RECENT DEVELOPMENTS IN FEDERAL INCOME TAXATION

We apologize to our readers. If we had more time, this outline would be much shorter.

By

Bruce A. McGovern
Professor of Law and Director, Tax Clinic
South Texas College of Law Houston
Houston, Texas 77002
Tele: 713-646-2920
e-mail: bmcgovern@stcl.edu

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Note: This outline was prepared jointly with Cassady V. ("Cass") Brewer, Associate Dean and Professor of Law, Georgia State University College of Law, Atlanta, GA, and James M. Delaney, Centennial Distinguished Professor of Law at the University of Wyoming College of Law, Laramie, WY.

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A. Interest, Penalties, and Prosecutions

1. Tax Court has discretion to allow taxpayer to withdraw petition to abate interest. Mainstay Business Solutions v. Commissioner, 156 T.C. 98 (3/4/21). In this case, the taxpayer, Mainstay Business Solutions, sought to withdraw its petition requesting review of the IRS's failure to abate interest. Mainstay filed Form 843, Claim for Refund and Request for Abatement, for numerous quarterly tax periods ending in 2009, 2010, and 2011. Mainstay then petitioned the court pursuant to § 6404(h) to review the IRS's failure to abate interest. After filing its petition in the Tax Court, Mainstay moved to withdraw the petition and dismiss the action. In general, the Tax Court has jurisdiction pursuant to § 6404(h)(1) to determine whether the IRS's failure to abate interest was an abuse of discretion. In an ordinary deficiency case, § 7459(d) provides that the Tax Court's decision to dismiss a proceeding is a binding decision that the deficiency is the amount determined by the IRS. In a deficiency case, a taxpayer may not withdraw a petition in order to avoid a decision by the Tax Court. However, in a sequence of non-deficiency cases since the enactment of § 6404 in 1996, the Tax Court has concluded that a taxpayer may withdraw its petition in cases seeking review of collection actions, determinations of innocent spouse relief, and whistleblower award determinations. See *Wagner v. Commissioner*, 118 T.C. 330 (2002), *Davidson v. Commissioner*, 144 T.C. 273 (2015), *Jacobson v. Commissioner*, 148 T.C. 68 (2017). Because there is no specific Tax Court Rule that controls whether a taxpayer can withdraw the petition in these types of non-deficiency actions, the Tax Court looks to the Federal Rules of Civil Procedure (FRCP) for guidance. Under the FRCP, a civil action may be dismissed voluntarily without a court order under two circumstances. First, an action can be dismissed if the plaintiff files a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Second, an action can be dismissed if the plaintiff files a stipulation of dismissal signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1)(A). In all other circumstances a plaintiff is allowed to dismiss a civil action voluntarily only through a court order. Fed. R. Civ. P. 41(a)(2). Following these rules and the court's precedents in *Wagner*, *Davidson*, and *Jacobson*, Judge Kerrigan held that the Tax Court has authority to allow a petition to be withdrawn voluntarily in a case reviewing the Secretary's failure to abate interest. The Court concluded that the IRS would not be prejudiced if the court were to treat Mainstay's proceeding as if it had never been commenced. Thus, in the absence of any objection by the IRS, Judge Kerrigan granted Mainstay's motion to withdraw its petition and dismiss the case.

2. Tax Court also has discretion to grant taxpayer's motion to dismiss its petition for an award of administrative costs. Stein v. Commissioner, 156 T.C. 167 (6/17/21). Following the Tax Court's decision in *Mainstay Business Solutions v. Commissioner*, 156 T.C. 98 (3/4/21), discussed above, Judge Gale allowed the petitioners, a married couple (the Steins), to withdraw their petition requesting review of the IRS's denial of their application for an award of reasonable administrative costs. Section 7430(a)(1) provides that a taxpayer who prevails in an administrative proceeding before the IRS regarding "the determination, collection, or refund of any tax, interest, or penalty" may be entitled to an award of reasonable costs incurred in connection with the proceeding. A taxpayer requests such an award by filing a written application with the IRS. Pursuant to § 7430(f)(2), the Tax Court has jurisdiction to review the IRS's denial of a taxpayer's timely filed application for an award of costs. After the IRS denied the Steins' application for an award of administrative costs, they filed a petition in the Tax Court seeking review of the IRS's decision. After the IRS filed an answer and without any objection from the IRS, the Steins moved to voluntarily dismiss the case. The narrow issue to be decided was whether the Tax Court had authority to grant a taxpayer's motion to dismiss such a proceeding without entering a decision. Applying Judge Kerrigan's analysis in *Mainstay Business Solutions v. Commissioner*, Judge Gale concluded that the Steins' original petition did not invoke the Tax Court's deficiency jurisdiction. Judge Gale reasoned that if a taxpayer may withdraw its petition seeking review of the IRS' failure to abate interest, collection actions, determinations of innocent spouse relief, and whistleblower award determinations without implicating the Court's deficiency jurisdiction, the Steins could similarly withdraw their petition in this administrative costs case. See *Mainstay Business Solutions v. Commissioner*, 156 T.C. 98 (3/4/21), *Wagner v. Commissioner*, 118 T.C. 330 (2002), *Davidson v. Commissioner*, 144 T.C. 273 (2015), *Jacobson v. Commissioner*, 148 T.C. 68 (2017). Because there is no specific Tax Court Rule that controls whether a taxpayer can withdraw the petition in these types of non-deficiency actions, the Tax Court looks to the Federal Rules of Civil Procedure (FRCP) for guidance. Under the FRCP, a civil action may be dismissed voluntarily without a court order under two circumstances. First, an action can be dismissed if the plaintiff files a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Second, an action can be dismissed if the plaintiff files a stipulation of dismissal signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1)(A). In all other circumstances a plaintiff is allowed to dismiss a civil action voluntarily only through a court order. Fed. R. Civ. P. 41(a)(2). Consistent with the FRCP and the Tax Court's prior precedents, Judge Gale held that the IRS would not prejudiced if the court were to treat this action as if it had never been commenced. Thus, in the absence of any objection by the IRS, the court granted the Steins' motion to withdraw their petition and dismiss this case.

B. Discovery: Summonses and FOIA

C. Litigation Costs

D. Statutory Notice of Deficiency

E. Statute of Limitations

F. Liens and Collections

1. If a taxpayer responds to a notice of intent to levy by timely filing Form 12153 to request a hearing, the taxpayer has requested a collection due process hearing, not an equivalent hearing, even if the taxpayer checks the box indicating they are requesting an equivalent hearing. Ruhaak v. Commissioner, 157 T.C. No. 9 (11/16/21). The IRS issued a final notice of intent to levy with respect to the taxpayer's 2013 and 2014 taxable years. In response, the taxpayer filing Form 12153, which is the form used to request a collection due process (CDP) hearing before an IRS Appeals Officer. The taxpayer submitted Form 12153 within the 30-day period required by § 6330(a)(2), (a)(3), and (b)(1) to request a CDP hearing. On Form 12153, the taxpayer checked the box on the line labeled "Equivalent Hearing" that states "I would like an Equivalent Hearing - I would like a hearing equivalent to a CDP Hearing if my request for a CDP hearing does not meet the requirements for a timely CDP Hearing." Although a CDP hearing and an equivalent hearing are conducted in the same manner, there are two principal differences: (1) a request for a CDP hearing suspends the running of the limitations period for the IRS to collect tax but a request for an equivalent hearing does not, and (2) when the IRS issues a notice of determination that reflects its decision following a CDP hearing, the taxpayer has the right to seek review in the Tax Court pursuant to § 6330(d)(1), but the taxpayer has no right of judicial review following an equivalent hearing. The taxpayer in this case explained

> that he had requested an equivalent hearing so that he could present to Appeals his views on the morality of paying Federal income tax but without the possibility of subsequent Tax Court litigation or a fine.

The Tax Court (Judge Gale) observed that one reason the taxpayer may have requested an equivalent hearing was to avoid the $5,000 penalty of § 6702(b) for making a "specified frivolous submission." The IRS's position, as reflected in the Internal Revenue Manual, is that, although the penalty can apply to a timely requested CDP hearing, the IRS will not impose the penalty when the taxpayer has requested an equivalent hearing. When the taxpayer failed to submit information requested by the IRS Appeals Officer assigned to conduct the hearing, the IRS issued a notice of determination upholding the collection action. The taxpayer then sought review of the notice of determination in the Tax Court. The taxpayer argued that he had requested an equivalent hearing because he had complied with Reg. § 301.6330-1(i)(1), (2), Q&A-I7, Q&A-I9, which provides that a taxpayer who fails to timely request a CDP hearing may instead request a similar administrative hearing, called an "equivalent hearing," within the one-year period following the mailing date of the written levy notice. In other words, the taxpayer argued that a request submitted within the 30-day period for requesting a CDP hearing is necessarily submitted within the one-year period following the mailing date of the written levy notice, and that he had indicated on Form 12153 that he was requesting an equivalent hearing. The Tax Court rejected this argument and held that the taxpayer's timely request on Form 12153 was a request for a CDP hearing, and not a request for an equivalent hearing, despite the taxpayer's indication on Form 12153 that he was requesting an equivalent hearing in the event his request did not meet the requirements for a timely CDP hearing. The court interpreted Reg. § 301.6330-1(i)(1) to mean that

> only those taxpayers who fail to timely request a CDP hearing are eligible to request an equivalent hearing. Logically, a taxpayer cannot yet have failed to make a timely request for a CDP hearing before the 30-day period for requesting a CDP hearing has expired.

After concluding that the taxpayer had requested a CDP hearing, the court reviewed the IRS's determination that the levy against the taxpayer should be upheld. The court upheld the IRS's position. The court also considered whether to impose penalties under § 6673, which authorizes the Tax Court to impose a penalty of up to $25,000 against a taxpayer who advances a frivolous or groundless position in proceedings before the court or who institutes such proceedings primarily for delay. The court observed that this was the third CDP case that the taxpayer had filed in the Tax Court and that the court had imposed penalties under § 6673 in the taxpayer's most recent case. The court determined, however, that the taxpayer's position in this case that he had requested an equivalent hearing was not frivolous. At the same time, the court made clear to the taxpayer that "advancing frivolous arguments relating to his conscientious objection to the payment of Federal taxes is likely to result in the imposition of a significant section 6673 penalty against him."

G. <u>Innocent Spouse</u>

1. The Tax Court loses jurisdiction over a taxpayer's petition seeking innocent spouse relief if a refund action is filed for the years in question. Coggin v. Commissioner, 157 T.C. No. 12 (12/8/21). Prior to his death, the taxpayer's late husband filed joint federal income tax returns late for the years 2001 through 2009 and made late full or partial payments for those years but did not pay any interest or penalties. Following her husband's death, the taxpayer learned for the first time of the joint returns and the tax liabilities arising from them. She filed returns for all years in question with the filing status of married filing separately. The court's opinion is not clear whether these returns were original returns or amended returns. The returns filed by the taxpayer claimed refunds for the years 2001 through 2007. The IRS issued a notice of disallowance as to three of the years for which the taxpayer sought refunds and, in response, the taxpayer filed a complaint in a federal district court seeking refunds for 2001 through 2007. Her complaint asserted that the joint returns filed by her late husband had been filed without her knowledge or consent and therefore were invalid and that she was entitled to refunds based on the separate returns she had filed. In its answer in federal district court, the government asserted counterclaims seeking to reduce the taxpayer's liabilities for 2002 through 2009 to judgment. The federal district court granted the government's motion for summary judgment and dismissed the taxpayer's refund claims on the basis that the returns filed by the taxpayer's late husband were valid joint returns. The court also ordered that the government's counterclaims proceed to trial. However, the federal district court did not enter a final appealable order or judgment as to the taxpayer's refund claims. The taxpayer then filed an administrative claim for innocent spouse relief for 2001 through 2009 on Form 8857 pursuant to § 6015. The federal district court granted the taxpayer's motion for a stay of proceedings pending the outcome of the taxpayer's request for innocent spouse relief. The IRS did not issue a notice of determination denying the taxpayer's request for innocent spouse relief; instead, the U.S. Justice Department Tax Division sent a letter to the taxpayer's attorney denying her request for innocent spouse relief. In response, the taxpayer filed a petition in the Tax Court asking the court to determine that she is entitled to innocent spouse relief for 2001 through 2009. The Tax Court (Judge Weiler) granted the IRS's motion to dismiss for lack of jurisdiction. Section 6015(e)(1) provides that the Tax Court has jurisdiction to determine whether a taxpayer is entitled to innocent spouse relief if the taxpayer files a petition within specified time periods. However, § 6015(e)(3) provides that, if either individual who filed the joint return in question files a suit for refund in a federal district court or the United States Court of Federal Claims, then the Tax Court loses jurisdiction over the taxpayer's petition seeking innocent spouse relief to the extent the court in which the refund action was filed acquires jurisdiction over the years that are the subject of the refund suit. In this case, the Tax Court concluded, the federal district court in which the taxpayer had filed her refund action acquired jurisdiction over her refund claims for the years 2001 through 2007 and retained jurisdiction because that court had not entered judgment as to her refund claims. Although the taxpayer had not asserted her entitlement to innocent spouse protection in the federal district court action, the Tax Court also observed that the federal district court had not ruled on the taxpayer's request for innocent spouse relief. As to the years 2008 and 2009, however, the Tax Court observed that the federal district court did not have or claim to have jurisdiction over refund claims of the taxpayer for 2008 and 2009. Accordingly, the Tax Court retained jurisdiction over the taxpayer's petition seeking innocent spouse protection for these years.

H. Miscellaneous

1. You say "FBAR." We say "FUBAR." Although Treasury has failed to update relevant FBAR regulations, the penalty for willful violations is not capped at $100,000 per account, says the Federal Circuit. Norman v. United States, 942 F.3d 1111 (Fed. Cir. 11/8/19), *aff'g* 138 Fed. Cl. 189 (7/31/18). The issue in this case is whether substantial foreign bank account reporting ("FBAR") penalties assessed by the Service were reduced. Under 31 U.S.C. § 5321(a)(5)(A), the Secretary of the Treasury "may impose" a penalty for FBAR violations, and pursuant to administrative orders, the authority to impose FBAR penalties has been delegated by the Secretary to the Service. Further, under the *current* version of 31 U.S.C. § 5321(a)(5)(B)(i), the normal penalty for an FBAR violation is $10,000 per offending account; however, the penalty for a *willful* FBAR violation "shall be increased to the greater of" $100,000 or 50 percent of the balance in the offending account at the time of the violation. *See* 31 U.S.C. § 5321(a)(5)(C). These minimum and maximum penalties for willful FBAR violations were changed by the American Jobs Creation Act of 2004 ("AJCA"), Pub. L. No. 108-357, § 821, 118 Stat. 1418 (2004). The prior version of 31 U.S.C. § 5321(a)(5) provided that the penalty for *willful* FBAR violations was the greater of $25,000 or the balance of the unreported account up to $100,000. Treasury regulations issued under the pre-AJCA version of 31 U.S.C. § 5321(a)(5), reflecting the law at the time, capped the penalty for willful FBAR violations to $100,000 per account. *See* 31 C.F.R. § 1010.820(g). In this case, the government assessed a penalty of $803,500 for failure to file an FBAR in 2007 with respect to a Swiss Bank account. The taxpayer argued that the "may impose" language of the relevant statute, 31 U.S.C. § 5321(a)(5), provides the Secretary of the Treasury with discretion to determine the amount of assessable FBAR penalties and that, because the outdated Treasury regulations had not been amended to reflect the AJCA's increase in the minimum and maximum FBAR penalties, the Service's authority was limited to the amount prescribed by the existing regulations. The court reasoned that the amended statute, which provides that the amount of penalties for willful FBAR violations *shall be* increased to the greater of $100,000 or 50 percent of the account value, is mandatory and removed Treasury's discretion to provide for a smaller penalty by regulation. According to the court, the statute gives Treasury discretion *whether* to impose a penalty in particular cases, but not discretion to set a cap on the penalty that is different than the cap set forth in the statute.

- *Recklessness as willfulness*. The relevant statute provides an enhanced penalty for a person who "willfully" fails to comply with the requirement to file an FBAR. The court considered whether a taxpayer who *recklessly* fails to comply with the requirement to file an FBAR can be treated as having committed a *willful* violation. The taxpayer argued "that willfulness in this context require[d] a showing of actual knowledge of the obligation to file an FBAR." The court disagreed. The court relied on the U.S. Supreme Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007), in which the Court had observed that, when willfulness is a statutory condition of civil (as opposed to criminal) liability, the Court had "generally taken it to cover not only knowing violations of a standard, but reckless ones as well." Accordingly, in this case, the court held, "willfulness in the context of [31 U.S.C.] § 5321(a)(5) includes recklessness." The court observed that its interpretation of the statute was consistent with prior decisions of the U.S. Courts of Appeals for the Third and Fourth Circuits. See *Bedrosian v. United States*, 912 F.3d 144 (3d Cir. 2018); *United States v. Williams*, 489 F. Appx. 655 (4th Cir. 2012). The court examined the taxpayer's conduct, which included false statements to the IRS about her foreign account, and concluded that the U.S. Court of Federal Claims had not clearly erred in determining that she had willfully violated the requirement to file an FBAR. Specifically, the court rejected the taxpayer's argument that her failure could not be willful because she had not read her federal income tax return before signing it.

- *Other courts have concluded that the penalty for willful violations is not capped at $100,000*. Several federal district courts have considered whether the outdated Treasury regulation limits the penalty for a willful FBAR violation to $100,000 per account and reached different conclusions. For cases holding that the outdated FBAR regulations limit the penalty for willful FBAR violations to $100,000 per account, see *United States v. Wadhan*, 325 F. Supp. 3d 1136 (D. Colo. 7/18/18); *United States v. Colliot*, 121 A.F.T.R.2d 2018-1834 (W.D. Tex. 5/16/18). For cases holding that the outdated FBAR regulations do *not* limit the penalty for willful FBAR violations, see *United States v. Schoenfeld*, 396 F. Supp. 3d 1064 (M.D. Fla. 6/25/19); *United States v. Park*, 389 F. Supp. 3d 561 (N.D. Ill. 5/24/19); *United States v. Garrity*, 123 A.F.T.R.2d 2019-941 (D. Conn. 2/28/19); *Kimble v. United States*, 141 Fed. Cl. 373 (12/27/18).

a. The Fourth Circuit agrees that recklessness is sufficient to establish a willful FBAR violation and that the penalty for a willful FBAR violation is not capped at $100,000. United States v. Horowitz, 978 F.3d 80 (4th Cir. 10/10/20). In an opinion by Judge Niemeyer, the U.S. Court of Appeals for the Fourth Circuit held that (1) recklessness is sufficient to establish a willful FBAR violation, and (2) the penalty for a willful FBAR violation is not capped at $100,000. With respect to the first issue, the court adopted the same line of reasoning as the U.S. Court of Appeals for the Federal Circuit in *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 11/8/19), i.e., the court relied on the U.S. Supreme Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007), in which the Court had observed that, when willfulness is a statutory condition of civil (as opposed to criminal) liability, the Court had "generally taken it to cover not only knowing violations of a standard, but reckless ones as well." The court provided further guidance on the meaning of the term "recklessness":

> In the civil context, "recklessness" encompasses an objective standard—specifically, "[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994); *see also Safeco*, 551 U.S. at 68 (same). In this respect, civil recklessness contrasts with criminal recklessness and willful blindness, as both of those concepts incorporate a subjective standard.

In this case, the court concluded, the taxpayers, who were aware that their Swiss bank account was earning interest and that interest was taxable income and who failed to disclose the foreign account to the accountant preparing their tax return, had been reckless and therefore willful in failing to file an FBAR.

The court also rejected the taxpayer's argument that, because the "may impose" language of 31 U.S.C. § 5321(a)(5)(A) leaves the amount of assessable FBAR penalties to the discretion of the Secretary of the Treasury and the (albeit outdated) Treasury regulations had not been amended to reflect the AJCA's increase in the minimum and maximum FBAR penalties, the IRS's authority was limited to the amount prescribed by the existing regulations. The existing regulations limit the FBAR penalty for willful violations to $100,000 per unreported account. The court reasoned that the relevant statute did not authorize the Secretary of the Treasury to impose a lower maximum penalty for willful FBAR operations. According to the court, "the 1987 regulation on which the Horowitzes rely was abrogated by Congress's 2004 amendment to the statute and therefore is no longer valid."

b. The Eleventh Circuit agrees: recklessness is sufficient to establish a willful FBAR violation and the penalty for a willful FBAR violation is not limited to $100,000. United States v. Rum, 995 F.3d 882 (11th Cir. 4/23/21). In a per curiam opinion, the U.S. Court of Appeals for the Eleventh Circuit has held that (1) recklessness is sufficient to establish a willful FBAR violation, and (2) the penalty for a willful FBAR violation is not capped at $100,000. With respect to the first issue, the court adopted the same line of reasoning as the U.S. Courts of Appeals for the Federal and Fourth Circuits in *Norman v. United States*, 942 F.3d 1111 (Fed. Cir. 11/8/19), and *United States v. Horowitz*, 978 F.3d 80 (4th Cir. 10/10/20), i.e., the court relied on the U.S. Supreme Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007), in which the Court had observed that, when willfulness is a statutory condition of civil (as opposed to criminal) liability, the Court had "generally taken it to cover not only knowing violations of a standard, but reckless ones as well." For purposes of determining whether a reckless (and therefore willful) FBAR had violation occurred, the Eleventh Circuit adopted the meaning of recklessness set forth in *Safeco*:

> The Safeco Court stated that "[w]hile the term recklessness is not self-defining, the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." 551 U.S. at 68, 127 S. Ct. at 2215 (internal quotations and citations omitted).

In this case, the taxpayer had filed tax returns for many years on which he indicated that he had no interest in a foreign financial account despite the fact that he had a Swiss bank account at UBS. He also reported the account for some purposes, such as to demonstrate his financial strength when obtaining a mortgage, but not for others, such as applying for financial aid for his children's college costs. According to the Eleventh Circuit, the District Court had not erred in granting summary judgment to the government on the issue of whether the taxpayer had acted recklessly and therefore willfully in failing to file FBARs.

The court also rejected the taxpayer's argument that, because the "may impose" language of 31 U.S.C. § 5321(a)(5)(A) leaves the amount of assessable FBAR penalties to the discretion of the Secretary of the Treasury and the (albeit outdated) Treasury regulations had not been amended to reflect the AJCA's increase in the minimum and maximum FBAR penalties, the IRS's authority was limited to the amount prescribed by the existing regulations:

> The plain text of § 5321(a)(5)(C) makes it clear that a willful penalty may exceed $100,000 because it states that the maximum penalty "shall be . . . the greater of (I) $100,000, or (II) 50 percent of the amount determined under subparagraph (D)," which is the balance of the account.

c. The Second Circuit also holds that the penalty for a willful FBAR violation is not capped at $100,000. United States v. Kahn, 5 F.4th 167 (2d Cir. 7/13/21). In an opinion by Judge Kearse, the U.S. Court of Appeals for the Second Circuit has agreed with the other federal courts of appeal that have considered the issue and held that the penalty for willful FBAR violations is not capped at $100,000 per account. The court concluded that the 2004 amendments to 31 U.S.C. § 5321(a)(5)(C) rendered invalid the 1987 Treasury regulation that limits the penalty for willful FBAR violations to $100,000 per account.

- *Dissenting opinion by Judge Menashi*. In a dissenting opinion, Judge Menashi argued that the regulation does not conflict with the statute and that the Treasury Department was bound by its own regulation:

> The Treasury Department's current regulations provide that the penalty for Harold Kahn's willful failure to file a Report of Foreign Bank and Financial Accounts ("FBAR") may not exceed $100,000. *See* 31 C.F.R. § 1010.820(g)(2). This penalty falls within the statutorily authorized range. *See* 31 U.S.C. § 5321(a)(5). While the governing statute also authorizes penalties greater than $100,000, it nowhere mandates that the Secretary impose a higher fine. *See id.* In fact, the statute gives the Secretary discretion to impose no fine at all. *See id.* § 5321(a)(5)(A). The current regulation therefore does not conflict with the governing statute and the Secretary must adhere to that regulation as long as it remains in effect.

2. Tax Court lacks jurisdiction in a whistleblower case finding a preliminary award recommendation does not constitute a "determination." McCrory v. Commissioner, 156 T.C. 90 (3/2/21). The petitioner, Ms. McCrory, filed numerous Forms 211, Application for Award for Original Information, with the IRS's Whistleblower Office (WBO). These forms asserted that various taxpayers had underreported their tax obligations. The WBO initially sent a letter to Ms. McCrory, which contained a preliminary award recommendation of $962.92. The letter also included a Summary Report form. The Summary Report form presented Ms. McCrory with two options. If she agreed with the award, she should check a box indicating her agreement, sign, and return the form to the WBO. Alternatively, if Ms. McCrory disagreed with the award, she should check the other box, sign, date, and return. Rather than check one of the two boxes, Ms. McCrory created a third box on the Summary Report form, checked it, and indicated in an accompanying letter that she neither agreed nor disagreed and that she needed more facts to decide. She also indicated that she would like to review the administrative file. The WBO declined to allow Ms. McCrory to review the administrative file. In response, Ms. McCrory filed a petition with the Tax Court requesting disclosure of information explaining the IRS decision-making process regarding the preliminary award recommendation. The WBO then suspended further consideration of the petitioner's claim. In the Tax Court, the IRS moved to dismiss Ms. McCrory' petition on the basis that the Tax Court lacked jurisdiction. The issue presented to the Tax Court was whether the preliminary award recommendation issued to Ms. McCrory constituted a "determination" within the meaning of § 7623(b)(4). Section 7623(b)(4) provides that any determination regarding awards to whistleblowers may, within 30 days of such determination, be appealed to the Tax Court, which has jurisdiction. Thus, in general, the Tax Court's jurisdiction in whistleblower cases is established when the Commissioner of the IRS issues a written notice containing a determination. *Cooper v. Commissioner*, 135 T.C. 70, 75 (2010). In *Whistleblower 4496-15W*, 148 T.C. 425, 430 (2017), the Tax Court concluded that neither the WBO's issuance of the preliminary award recommendation nor the acceptance of the award by a whistleblower constituted a determination. The court reasoned in *Whistleblower 4496-15W* that there cannot be a "determination" and, therefore, no jurisdiction, where the amount of the award remained subject to conditions that might result in future reductions in the award. Consistent with the reasoning in *Whistleblower 4469-15W*, the IRS argued that the Tax Court lacked jurisdiction in this case because the preliminary award recommendation received by Ms. McCrory did not constitute a determination. The Tax Court (Judge Nega) agreed with the IRS and held that the preliminary award recommendation issued by the IRS to Ms. McCrory did not qualify as a "determination" within the meaning of § 7623(b)(4) because it was not a final administrative decision regarding Ms. McCrory's whistleblower claims. The letter received by Ms. McCrory specifically indicated that the preliminary award recommendation was preliminary because the determination of the tax was not final at that time. Thus, because the amount of the award recommended in the letter was not final and because the amount of the award remained subject to change, there could not have been a final determination of the award. Because no determination was issued to Ms. McCrory, the Tax Court lacked jurisdiction over the matter.

3. The Tax Court lacks jurisdiction to review the IRS Whistleblower Office's threshold rejection of an application for a whistleblower award for failure to meet minimum threshold criteria for such claims. Li v. Commissioner, 22 F.4th 1014 (D.C. Cir. 1/11/22). The petitioner, Ms. Li, filed Form 211, Application for Award for Original Information, with the IRS's Whistleblower Office (WBO) asserting four tax violations by a third party. The WBO concluded that Ms. Li's allegations were "speculative and/or did not provide specific or credible information regarding tax underpayments or violations of internal revenue laws," and that she therefore was not eligible for an award. Therefore, the WBO did not forward her form to an IRS examiner for any potential action against the target taxpayer. The IRS informed her of this in a letter that stated that she could appeal the decision to the U.S. Tax Court. Ms. Li filed a petition in the Tax Court, which held that the IRS did not abuse its discretion in rejecting her application for an award. On appeal, the U.S. Court of Appeals for the D.C. Circuit (Judge Sentelle) dismissed the appeal for lack of jurisdiction and remanded to the Tax Court with a direction for the Tax Court to do the same. For the Tax Court to have jurisdiction in a whistleblower case, the court reasoned, § 7623(b)(4) requires that there be a "determination" regarding an award. In this case, the court held, the IRS WBO's rejection of a claim for failure to meet the minimum threshold criteria for a claim is not a determination and therefore the Tax Court has no jurisdiction. In reaching this conclusion, the court rejected and characterized as "wrongly decided" the Tax Court's decisions in *Cooper v. Commissioner*, 135 T.C. 70 (2010), and *Lacey v. Commissioner*, 153 T.C. 146 (2019).

XI. WITHHOLDING AND EXCISE TAXES

XII. TAX LEGISLATION

A. Enacted