Bloomberg Tax

Tax Management
International Journal™

Wonderland Redux: The Meaning of 'Willful'

By Robert E. Ward, J.D., LL.M.
WardChisholm, P.C.
Vancouver, British Columbia and Bethesda, Maryland

> *"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master — that's all."*
>
> Lewis Carroll (Charles L. Dodgson), *Through the Looking-Glass*, Chapter 6, p. 205 (1934) (originally published 1872)

In a recently published Program Manager Technical Advice (the "PMTA"),[1] a "Senior Technician Adviser" in the Internal Revenue Service Office of Chief Counsel provided guidance on the meaning of "willful" under 31 U.S.C. §5321(a)(5)(C) and the level of proof necessary to establish a civil violation of the FBAR requirements. It is always helpful to have the IRS set forth a position regarding the meaning of a term of art. But when it is apparent meaning changes with context, uncertainties persist. Welcome to Wonderland.

The first sentence of the PMTA's analysis may fairly be taken as a warning. " 'Willful' is a 'word of many meanings whose construction is often dependent on the context in which it appears.' "[2] The certain context of the PMTA is the willful FBAR penalty under 31 U.S.C. §5321(a)(5)(C). Whether the PMTA's definition of "willful" applies in other civil contexts is left patently uncertain. The first sentence cites authorities which distinguish the meaning of willful in criminal compared with civil contexts. The cases cited involve provisions of the Fair Credit Reporting Act,[3] the Firearm Owners Protection Act,[4] structuring in violation of the reporting requirements under 31 U.S.C. §5313(a),[5] failure to file a federal income tax return in violation of tax code §7203,[6] and patent infringement under 35 U.S.C. §271(b).[7] Based on those authorities, one might conclude that the expanded definition of willful set forth in the PMTA extends to all civil matters in which willfulness may be at issue.

The distinction the PMTA draws from the authorities it cites is that willfulness in the criminal context requires "criminal intent," "bad purpose," or a "specific intent to violate a known legal duty." In contrast, willfulness can be satisfied in a civil context not only by known or intentional violations of a standard of conduct, but also by "reckless" violations and a condition described as "[w]illful blindness to the obvious or known consequences of one's actions. . . ."[8] The analysis notes lesser authorities than the Supreme Court which have also concluded that recklessness and willful blindness are sufficient to establish willfulness in the context of imposition of civil FBAR penalties.[9]

---

[1] PMTA 2018-13 (May 23, 2018).

[2] PMTA, quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007).

[3] *Safeco Ins. Co. of Am.*, above n.2.

[4] *Brian v. United States*, 524 U.S. 184 (1998).

[5] *Ratzlaf v. United States*, 510 U.S. 135 (1994).

[6] *Cheek v. United States*, 498 U.S. 192 (1991).

[7] *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011).

[8] PMTA, citing *Safeco*, above n.3, at 59; *Global-Tech Appliances*, above n.7, at 769.

[9] PMTA, citing *United States v. Williams*, 489 F. App'x 655, 660 (4th Cir. 2012); *Bedrosian v. United States*, No. CV 15-5853, 2017 WL 4946433 (E.D. Pa. Sept. 20, 2017) (on appeal to the Third Circuit on other grounds); *United States v. McBride*, 908 F.

ISSN 0090-4600

In addition to defining the term ''willful'' and confirming that willful blindness and recklessness are within the scope of what it is to be willful, the PMTA also confirms the standard of proof necessary to establish a violation of the civil FBAR penalty. In CCA 200603026 the IRS asserted that clear and convincing evidence was necessary in order to establish that a taxpayer had willfully failed to file an FBAR. Noting that ''subsequent cases have not sustained this position,'' the IRS has determined that a mere preponderance of the evidence is sufficient to establish a willful FBAR filing violation, because of the absence of ''particularly important individual interests or rights.''[10] Asserting that ''the preponderance of the evidence standard applies where 'even severe civil sanctions that do not implicate such interests' are contemplated,'' the PMTA refers to the decisions of the District Courts in *Bohanec* and *Williams* in support of its conclusion.[11]

Given the case law, a broadened definition of willfulness in the context of the civil FBAR penalties should come as no surprise. However, it bears observing that the definition of willful as articulated in the PMTA is broader than the definition of willfulness appearing in the Internal Revenue Manual (although changes to the IRM may be forthcoming) and may be fairly considered an expansion of the scope and meaning of the term. Under the caption ''Defining Willfulness'' the IRM starts sufficiently narrow. ''The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty.''[12] The IRM goes on to provide that ''[w]illfulness is shown by the person's knowledge of the reporting requirements and the person's conscious choice not to comply with the requirements.''[13] Knowledge of a reporting requirement is necessary. The intentionality aspect is satisfied by the ''conscious choice not to file the FBAR.''[14] However, actual knowledge is not required when willful blindness is present. The IRM provides that ''[w]illfulness is attributed to a person who made a conscious effort to avoid learning about the FBAR reporting and recordkeeping requirements.''[15] ''Conscious effort'' also suggests intentionality.

The PMTA goes where the IRM does not: it extends the definition of willfulness to include not only willful blindness but also recklessness. Where is the intentionality in recklessness?

It may be that the concept of willful blindness includes the notion of recklessness or that recklessness includes the notion of willful blindness. The U.S. Supreme Court observed in *Safeco* that ''where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard but reckless ones as well . . . .''[16] However, in a subsequent case, *Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court drew a distinction between willful blindness and recklessness, noting that willful blindness surpasses recklessness and negligence. ''A reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing. . . and a negligent defendant is one who should have known of a similar risk but, in fact, did not . . . .''[17] The Supreme Court also illuminated the degree of knowledge required in order for a finding of willful blindness as one of near certainty.[18]

United States v. Williams also quotes the language of the Supreme Court in *Safeco*, which conflates willfulness with recklessness without referring to the distinction made by the Supreme Court in *Global-Tech Appliances, Inc.*[19] The PMTA cites *Bedrosian*, *McBride*, and *Garrity* as examples of cases in which the courts have concluded that willfulness for civil FBAR violations includes both recklessness and willful blindness. However, it goes to the trouble to define willful blindness and recklessness and then distinguish the two terms by the taxpayer's intent. In a footnote it cites the definition of willful blindness appearing in *Global-Tech Appliances, Inc.* without including or referring to the distinction made by the Supreme Court between willful blindness and recklessness.[20] The PMTA defines recklessness as a circumstance in

---

Supp. 2d 1186, 1210 (D. Utah 2012); *United States v. Bohanec*, 263 F. Supp. 3d 881, 889 (C.D. Cal. 2016); *United States v. Garrity*, 2018 WL 1611387 (D. Conn. Apr. 3, 2018).

[10] PMTA, quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385 (1983).

[11] PMTA, quoting *Herman & MacLean*, above n.10, at 389, and citing *Bohanec*, above n.9, at 889, and *Williams*, above n.9, at 659–60.

[12] IRM 4.26.16.6.5.1(1) (Nov. 6, 2015).

[13] IRM 4.26.16.6.5.1(4) (Nov. 6, 2015).

[14] *Id.*

[15] IRM 4.26.16.6.5.1(5) (Nov. 6, 2015). The language of the IRM comes from *Cheek v. United States*, 498 U.S. 192, 201 (1991).

[16] *Safeco*, 551 U.S. at 59, citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132–133 (1988), *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111, 125–126 (1985), *United States v. Ill. Cent. R. Co.*, 303 U.S. 239, 242–243 (1938), *United States v. Murdock*, 290 U.S. 389, 395 (1933).

[17] *Global-Tech Appliances Inc. v. SEB S.A.*, 131 S. Ct. 2060, #2071, referring to §2.02(2)(c) and (d) of the ALI Model Penal Code (1985).

[18] *Id.* (''A Court can properly find willful blindness only where it can almost be said that the defendant actually knew.''), quoting G. Williams Criminal Law §57, p. 159 (2d ed. 1961).

[19] *United States v. Williams*, above n.9, at 655, 660.

[20] *See* PMTA n.1. (''In the tax reporting context, the government can show willful blindness by evidence the taxpayer made 'a conscious effort to avoid learning about reporting requirements.' '' Citing *Williams*, 489 F. App'x at 659–60.) (''Additionally, the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of

ISSN 0090-4600

which ''the taxpayer (1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in position to find out for certain very easily.''[21] Where is the intentionality?

If the term ''willful'' can have a meaning that is different in a criminal context than in a civil context, perhaps it can also have a meaning which is different in an administrative context. Or not. This is unclear. The definition of *non*-willfulness under the streamlined filing compliance procedure (''SFCP'') includes conduct that is negligent or inadvertent.[22] However, broadening the definition of willfulness to include willful blindness and recklessness encroaches on negligence and inadvertence. What recklessness, negligence, and inadvertence have in common is the lack of an intentional element. As the PMTA defines willful blindness, the government must establish by a preponderance of the evidence that the taxpayer made a conscious effort to avoid learning about the FBAR reporting requirements or (in the case of U.S. citizens living abroad) the ongoing obligation to file a U.S. income tax return. Broadening the definition of ''willfulness'' to include recklessness moves that definition closer to negligence and inadvertence. A conscious effort to avoid learning about filing requirements is no longer necessary if the taxpayer simply neglected to learn about those requirements when the knowledge could have been acquired ''very easily.'' The definition of negligence as it appears in the Internal Revenue Manual blurs the distinction between recklessness and negligence by stating that if the taxpayer should have known about FBAR filing and recordkeeping requirements, the failure to exercise ''ordinary business care and prudence'' to learn and satisfy those requirements is negligent.[23] Perhaps one is left to conclude that ordinary business care and prudence is not very easy. Guidance as to where the line will be drawn between negligence that is non-willful for SFCP purposes, and recklessness that is sufficient to disqualify a taxpayer from eligibility, is found in the statement of the U.S. Supreme Court in *Global-Tech Appliances, Inc.*[24] Distinguishing between taxpayers who *knew* their failure to file U.S. income tax returns while living abroad or report the existence of foreign accounts created a substantial risk of violating U.S. law and those who *should have known* of such obligations but *did not* will be a challenge for both tax advisors and the IRS.

Returning again to the definition of willfulness appearing in the Internal Revenue Manual: a voluntary, intentional violation of a known legal duty. That definition suggests the requirement of an intentional element in order for a taxpayer's action to be willful. The line between willful and non-willful behavior is that non-willful behavior lacks the element of intentionality present in willful behavior. Hence, the requirement that blindness be willful. Broadening the definition of ''willful'' to include recklessness, as the PMTA has done, is supported by the Supreme Court's decision in *Safeco*. The line between willful and non-willful behavior has moved. Practitioners and taxpayers should be concerned that abandonment of an intentional aspect to willfulness facilitates further movement. The Supreme Court has parsed the distinction between recklessness and negligence. Perhaps one day it will further parse the distinction between gross and ordinary negligence to determine what is willful and what is not. ''When I use a word . . . it means just what I choose it to mean — neither more nor less.''

---

the accounts and the amounts involved, may lead to a conclusion that the violation was due to willful blindness.'' Citing IRM 4.26.16.6.5.1).

[21] *See* PMTA n.2, quoting *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989).

[22] ''Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.'' *Streamlined Filing Compliance Procedures*, IRS website (July 26, 2018).

[23] IRM 4.26.16.6.3.1 (Nov. 6, 2015).

[24] *Global-Tech Appliances Inc.*, 563 U.S. 754, n.14.

ISSN 0090-4600