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Zhanna Ziering Speaks to Tax Notes on *Bedrosian* and *DeMauro*

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Almost two years after a circuit court curtailed one of the few taxpayer wins on foreign bank account reporting willfulness, practitioners are wondering why the district court has yet to issue a decision following remand.

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Practitioners previously said that the Third Circuit holding could be viewed as a trespass on the district court's role as fact finder. The lower court had ruled that Bedrosian was at most negligent, emphasizing his cooperation with an IRS investigation and that he checked the box on his return indicating a possession of a foreign account.

"It allowed [practitioners] to take a deep breath when the district court decision came out because we felt that finally a court was coming back to the reality of the situation and starting to look at the motive . . . instead of doing this cold application of the recklessness standard," Zhanna Ziering of Caplin & Drysdale said on a September 24 webinar sponsored by Strafford.

Whatever deep breath practitioners may have taken before, the remand may now be causing hyperventilating.

"[The] remand back to the district court . . . pretty much [had] an instruction to the judge to find recklessness. I don't think . . . [it] could have been any clearer," Ziering said.

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Ziering pointed to another recent case, *United States v. DeMauro*, No. 17-cv-640 (D.N.H., 2020), as further highlighting the problem with the applied willfulness standard. In that August 28 decision, the court held that a defendant had willfully failed to file her FBARs because she acted recklessly by failing to get professional advice on her foreign accounts even though she had relied on professionals in the past. The court also found that she did not have fraudulent intent to evade taxes.

The facts were sympathetic to the taxpayer, Ziering said, noting that Annette DeMauro set the foreign account up while she was going through a bitter divorce and that she informed her accountant about the foreign account, though he did not initially know about the FBAR requirements.

"It's really kind of a stretch, in particular because in that case in the year at issue, there was no filing that had Schedule B . . . and the last return that was filed in 2001 did not have a Schedule B," Ziering said. "The court looks at exactly the same set of facts, and willfulness is found by the preponderance of the evidence, but tax fraud is not by clear and convincing evidence, even though, as the government argued, there was sufficient indicia."

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In a footnote, the court said it was inclined to believe that Bedrosian's initial claim was within the scope of 28 U.S.C. section 1346(a)(1) and thus didn't supply the district court with jurisdiction at all because Bedrosian didn't pay the full penalty before filing suit, as required by the *Flora* rule established by the U.S. Supreme Court. But the court ultimately concluded that the district court had authority to act by virtue of the government's counterclaim.

Although this aspect of the decision is interesting, Ziering said that practically speaking, she cannot envision a taxpayer paying a small penalty amount to go to court and the government not taking that opportunity to counterclaim. Dawson agreed.

For the full article, please visit *Tax Notes'* website (subscription required).

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