

Bank Secrecy Act - 31 USC 5321(b)(3)

No Administrative Setoff on Assessed Bank Secrecy Act Penalties

Proposed change:

31 USC 5321(b) is amended to add a new sub-section (b)(3) to read as follows:

(3) No Set-Off. – If no civil action shall be commenced by the Secretary within the time provided in section (2) hereof, any assessment of a civil penalty under this section shall be abated. Any assessment made under this section shall not be the subject of a set-off by the United States against any amount otherwise due.

Reason for change:

The Bank Secrecy Act requires that when the Government makes an assessment of a penalty, the Government has two years from the date of the assessment to bring an action to reduce the assessment to judgment. In a number of cases in which we have been involved to date, the Internal Revenue Service has made assessments of penalties against individuals under the Bank Secrecy Act without discussing a proposed assessment with the person assessed. In other words, the IRS agent decides to make a substantial penalty assessment and simply does it. The assessment cannot be challenged administratively. The assessment goes onto the government's computer system as a debt owed by the taxpayer to the government. Legal action by the Government to reduce such an assessment to judgment is the only opportunity that the assessed person has to contest the assessment where an independent judge can determine whether the assessment was valid and correct.

A Department of Justice spokesperson has stated publicly that the Government intends to make assessments of penalties for failure to timely file FBARs, but may not bring a civil action to reduce the assessment to judgment. Rather, the Government intends to administratively set off assessments against social security payments and other amounts due from the Government to individuals against whom assessments have been made. We have seen in similar circumstances where the Government has made tax assessment of penalties administratively that the Government is levying against the Social Security payments of taxpayers to collect the administratively determined debt created by the penalty assessment before the taxpayer has the opportunity to challenge the decision of the IRS agent.

This procedure raises substantial due process issues. The Government is making assessments against individuals without allowing them the opportunity to contest the assessment, and then using the administrative assessment to deprive citizens of rights to which they are clearly entitled. As we have seen in practice, an assessment may be made at the whim of an individual IRS agent without any opportunity for judicial review. The only remedy left to the assessed individual to for them to bring a

Federal lawsuit to enforce their clear rights after the Government has refused to make payment due to a set off based on the arbitrary assessment.

If the Government believes that a penalty against an individual is appropriate under the Bank Secrecy Act, the penalty should be assessed and an action brought to reduce it to judgment. If the Government does not wish to bring an action in court to reduce the assessment to judgment, then the assessment should be abated once the statute of limitations set by Congress has run. The Government should not be permitted to act arbitrarily and capriciously.