Willful Failure to File FBARs and the Sergeant Schultz Defense

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In this article, George Clarke, Andrew Wise, and Tom Zehnle* discuss how the U.S. government recently has intensified its pursuit of taxpayers who fail to pay taxes on money held in foreign bank accounts, leading to a massive increase in criminal investigations and prosecutions. An increasingly powerful tool in the hands of the Internal Revenue Service is Form TD 90-22.1 (Report of Foreign Bank and Financial Accounts), which a person must file with the Treasury Department if he or she has a financial interest in, or signatory authority over, financial accounts in a foreign country with an aggregate value exceeding $10,000 at any time during the tax year. Negligent failure to file the report, also known as the FBAR, can result in a civil monetary penalty not exceeding $10,000 unless the failure was due to reasonable cause and the income from the account was properly reported on the taxpayer's Form 1040. But a willful failure to file the report can result in a civil penalty that is the greater of $100,000 or 50 percent of the balance of the account at the time of the violation (it can also result in imprisonment). Not surprisingly, IRS used that heavy hammer and even the threat of its use to resolve numerous tax evasion cases on very favorable terms to the government. It was not simply the significant, and arguably draconian, penalty that made FBAR enforcement so attractive to IRS—it was also the relative ease with which IRS asserted an ability to prove willful violations. But two recent cases, *United States v. Williams* and *Global Tech Appliances Inc. v. SEB S.A.*, call the government's assumptions into significant question.

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