



IRS Ruled Just in Pursuing Years of Underpayment and Fraud

By Alicea Castellanos, CPA

Long-term inadequate filing of Reports of Financial Bank and Financial Accounts (FBARs) just lets the IRS loose to pursue fraud—international lack of cooperation and even death notwithstanding, as a recent case shows.

In [*Estate of Clemons v. Comm’r of Internal Revenue*](#), the U.S. Tax Court has ruled that software entrepreneur Brett Clemons Sr., a holder of overseas accounts, underpaid his tax for several years and that his underpayments were due to fraud.

An American born in Florida, Clemons built a successful programming career and, in the mid-1980s, had started his own company and was soon working as an independent contractor for Hewlett-Packard U.S. By 2001, he was married with two children and opened an account with Union Bank of Switzerland (UBS).

He hid the account from his wife because he intended to get a divorce. The account had several features that helped Clemons (the account’s sole owner and signatory) hide it, and he paid UBS to hold his correspondence and to destroy any unclaimed mail after three years.

In fact, UBS eventually ran afoul of American authorities for hiding accounts. After the United States and Switzerland entered a tax treaty in 1996 to exchange taxpayer information, UBS entered into a similar agreement with the IRS. But investigation later showed that in 2001 or 2002, UBS began dividing American clients into two groups: those willing to report their accounts to the IRS, and those unwilling. UBS helped the “unwilling” group maintain anonymity and evade large amounts of tax. The U.S. Department of Justice later launched a well-publicized investigation.

Funneling Income for Years

During his first two years as an accountholder, Clemons deposited more than \$400,000 with UBS for investment in market funds, bonds, and private equity funds, among others. He also periodically traveled to Switzerland and withdrew funds in the form of checks. When he divorced in 2003, he did not disclose his UBS account to his wife or to the Florida court that oversaw the divorce.

From 2003 through 2009, he funneled income (sometimes more than \$250,000 annually, some from companies outside the United States) into foreign accounts. Clemons did not report much of it on his self-prepared U.S. tax returns, which were sometimes late. (He also

attempted to declare a NOL associated with a failed ranching business three times.) He did not report investment income earned in those foreign accounts, denied ever holding any foreign accounts and filed no FBARs. During those years, Clemons frequently visited Switzerland to make in-person withdrawals and later opened a German bank account after getting work in that country.

When in 2008 UBS informed him of new reporting requirements for U.S. citizens, Clemons closed that account (\$550,063) and opened another at Dresdner Bank (Switzerland). He aggressively used expenses to reduce his income reported and reported only interest from the German bank account on his 2008 returns, inconsistently reported overseas income for 2009, and filed no timely FBAR for either year.

After an IRS summons, UBS turned over records revealing Clemons's account. In 2011, after the examination began, Clemons filed delinquent FBARs for 2005 through 2009 that were false, incomplete and misleading. He also lied to revenue agents about the UBS account concerning the nature of the account and about deposits and withdrawals, among other details, and later answered incompletely when given information document requests (eventually his attorney answered when given a third-party summons).

At Issue

The IRS issued a notice of deficiency to Clemons for his 2003 through 2009 tax years, seeking to impose fraud penalties. The notice also determined that Clemons had omitted substantial amounts of gross income for those tax years.

In March 2021, after filing his petition and after trial, Clemons died; his estate was replaced as the true party in interest.

The key issues the Tax Court considered are whether the statute of limitations barred the IRS from assessing tax related to 2003 through 2009; whether Clemons is liable for enhanced fraud penalties for 2003 through 2009; and whether IRS determinations increasing his gross income and disallowing certain Schedule C deductions were correct.

The Court ruled that the statute of limitations did not protect Clemons because he filed fraudulent returns, that he was liable for fraud penalties for those years and that he offered insufficient evidence to rebut the IRS presumption when it issued its notice of deficiency.

This case clearly demonstrates that not filing FBARs and other information returns (or filing late or inaccurately) just gives the IRS more leverage when claiming that a taxpayer is trying to conceal foreign assets—and more power to level fraud penalties.

Alicea Castellanos, CPA, is the CEO and founder of Global Taxes LLC. Alicea provides personalized U.S. tax advisory and compliance services to high-net-worth families and their advisors. She specializes in U.S. tax planning and compliance for non-U.S. families. In 2021 and 2022, Alicea was the Gold and Silver Winner, respectively, of Citywealth's Powerwomen Awards in the category USA - Woman of the Year - Business Growth (Boutique).