Extended Assessment Periods and International Tax Enforcement: M. Rafizadeh, *Unreported Foreign Assets, and Use of FATCA Weapons*

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Hale E. Sheppard analyzes the pertinent aspects of FATCA, special issues related to Form 8938 (Statement of Specified Foreign Financial Assets), *and IRS pronouncements and court precedents.*

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I. Introduction

When Congress wants to reduce what it considers offshore tax cheating, it can do many things, including enacting laws forcing U.S. persons to report the existence of foreign assets, severely penalizing information-reporting violations, and giving the IRS more time to find the offenders by extending assessment-periods. For its part, the IRS can devote significant resources to international enforcement and take aggressive positions in applying the laws passed by Congress. A good example of this is a recent Tax Court case, *M. Rafizadeh*. It centers on several provisions created by the Foreign Account Tax Compliance Act ("FACTA") and the IRS's quest to seek taxes and penalties from earlier years by using an expansive interpretation of assessment-periods.[1] This article analyzes the pertinent aspects of FATCA, special issues related to Form 8938 (*Statement of Specified Foreign Financial Assets*), and IRS pronouncements and court precedent demonstrating how the IRS employs FATCA tools to attack multiple returns over multiple years in situations involving unfiled Forms 8938 and other international information returns.

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II. International Tax Enforcement Tools Introduced by FATCA

Getting serious about international tax enforcement in 2010, Congress created as part of FATCA a long list of tools and placed them at the IRS's disposal. One

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must understand three such tools in order to grasp the significance of *M. Rafizadeh*.

A. Tool #1—Duty to File Form 8938

FATCA created the Form 8938 filing requirement by adding Code Sec. 6038D.[2] The general rule is the following:

> Any individual who, during any taxable year, holds an interest in a specified foreign financial asset [SFFA] shall attach to such person's return of tax [a Form 8938] if the aggregate value of all [SFFAs] exceeds $50,000 (or such higher dollar amount as the Secretary may prescribe.[3]

Thanks to a series of regulations, the scope of the Form 8938 filing duty has expanded considerably since inception. As of 2016, it applies to certain U.S. individuals and domestic entities, which are collectively referred to as specified persons ("SPs").[4] In its current form, the general rule can be broken down in the following manner: (i) any SP (ii) who/that holds an interest; (iii) in an SFFA; (iv) during any portion of a taxable year; (v) must attach to his/her/its timely tax return; (vi) a complete and accurate Form 8938; (vii) if the total value of all SFFAs; and (viii) exceeds the applicable filing threshold.[5]

When Congress wants to reduce what it considers offshore tax cheating, it can do many things, including enacting laws forcing U.S. persons to report the existence of foreign assets, severely penalizing information-reporting violations, and giving the IRS more time to find the offenders by extending assessment-periods.

Holding an interest in an asset means different things in different contexts. When it comes to Form 8938, an SP generally holds an interest in an SFFA if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the SFFA are (or should be) reported, included, or otherwise reflected on the SP's annual tax return.[6] The regulations clarify that an SP has an interest in the SFFA *even if* no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the SFFA for the year in question.[7] The regulations also indicate that an SP must file a Form 8938, despite the fact that none of the SFFAs that must be reported affect the U.S. tax liability of the SP for the year.[8]

For purposes of Form 8938, the term SFFA includes two major categories: foreign financial accounts[9] and other foreign financial assets held for investment purposes.[10] A brief overview of each category is provided below.

The concept of "financial account" for purposes of Form 8938 is complicated for several reasons, one of which is that the definition is not found in the applicable statute, Code Sec. 6038D, or the corresponding regulations. Instead, it is located elsewhere in the Internal Revenue Code, in the international tax withholding provision, Code Sec. 1471, and its ultra-dense regulations.[11] Below is a summary of the items that are considered "foreign accounts."

- Depository accounts are considered "financial accounts" for purposes of Form 8938. In this context, the term "depository accounts" generally encompasses (i) commercial accounts, (ii) savings accounts, (iii) time-deposit accounts, (iv) thrift accounts, (v) accounts evidenced by a certificate of deposit, thrift certificate, investment certificate, passbook, certificate of indebtedness, or any other instrument for placing money in the custody of an entity engaged in a banking or similar business for which the entity is obligated to give credit, regardless of whether such instrument is interest-bearing or non-interest-bearing, and (vi) any amount held by an insurance company under a guaranteed investment contract or similar agreement to pay or credit interest.[12]
- Custodial accounts are deemed to be "financial accounts" for purposes of Form 8938. Here, the term "custodial accounts" ordinarily means an arrangement for holding for the benefit of another person a financial instrument, contract, or investment, such as shares of corporate stock, promissory notes, bonds, debentures, other evidences of debt, currency or commodity transactions, credit default swaps, swaps based on a non-financial index, notional principal contracts, insurance policies, annuity contracts, and any options or other derivative instruments.[13]
- Equity or debt interests in a foreign financial institution, other than interests regularly traded on established securities markets, generally are categorized as "financial accounts."[14]
- The term "financial account" also includes "cash value

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insurance contracts" and certain types of annuity contracts issued or maintained by an insurance company, a holding company for an insurance company, or certain foreign financial institutions.[15]

- Tax-favored foreign retirement accounts, foreign pension accounts, and foreign non-retirement savings accounts meeting certain criteria are treated as "financial accounts" for purposes of Form 8938.[16] Moreover, even if these items have been excluded from the definition of "financial account" pursuant to an intergovernmental agreement ("IGA") between the United States and a foreign country to implement FATCA, they will still be considered "financial accounts" for purposes of Form 8938. In other words, while certain foreign governments and financial institutions are not required to provide data to the IRS pursuant to FATCA about certain retirement-type accounts, SPs holding an interest in such accounts will not benefit from such an accommodation.[17]

In addition to the "financial accounts" described above, SFFAs include items falling under the catch-all provision, *i.e.*, other foreign financial assets. Among these assets are (i) stock issued by a foreign corporation, (ii) a capital interest or profits interest in a foreign partnership, (iii) an interest in a foreign trust, (iv) a note, bond, debenture, or other form of debt issued by a foreign person, (v) an interest swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement with a foreign counterparty, (vi) any option or other derivative instrument with respect to any of the items listed as examples or with respect to any currency or commodity that is entered into with a foreign counterparty or issuer, (vii) securities issued by a non-U.S.-person, and (viii) financial instruments or contracts held for investment purposes whose issuer or counterparty is a non-U.S.-person.[18]

Congress understands that a tax-related duty ordinarily has no effect unless it can be enforced, which is why it supplied a penalty. If an SP fails to file a timely Form 8938, the IRS can assert a standard penalty of $10,000.[19] The penalty can increase to a maximum of $50,000 per year if a taxpayer refuses to file Forms 8938 within 90 days after receiving notice from the IRS identifying the problem.[20] An SP who unintentionally fails to file a timely, accurate Form 8938 can avoid penalties if the SP can demonstrate that the violation was due to reasonable cause and not due to willful neglect.[21]

With respect to the effective date of Code Sec. 6038D and the Form 8938 filing duty, FATCA and the corresponding legislative history state the following:

> The amendments made by this section shall apply to all taxable years beginning after the date of the enactment of this [HIRE] Act.[22]

The legislative history describes the effective date more clearly, stating that Code Sec. 6038D "is effective for taxable years beginning after the date of enactment" of the HIRE Act, which was March 18, 2010.[23] Because most individuals are calendar-year taxpayers, and because Code Sec. 6038D applied only to individuals (and not entities) until 2016, the first time that individuals were required to enclose a Form 8938 was with their annual Form 1040 was 2011.

B. Tool #2—Extension of Assessment-Period in Case of Unfiled Forms 8938

Congress, through FATCA, modified assessment-periods in two ways. The first change derives from adding Form 8938 to the list of international information returns whose absence keeps the assessment-period open indefinitely under Code Sec. 6501(c)(8).

1. Code Sec. 6501(c)(8) Before and After FATCA

The general rule is that the IRS has three years from the time a taxpayer files a tax return to audit such return and propose adjustments, such as tax increases, penalties, and interest charges.[24] There are various exceptions to the normal three-year rule. One exception, found in Code Sec. 6501(c)(8), applies to situations where a taxpayer fails to file an information return regarding foreign entities, transfers, or assets.[25]

Code Sec. 6501(c)(8), *before* the enactment of FATCA in 2010, stated the following:

> In the case of any information which is required to be reported to the Secretary [under various international tax provisions, *but not Section 6038D*], the time for assessment of any tax imposed by [the Internal Revenue Code] *with respect to any event or period to which such information relates* shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported…

Congress made two changes to Code Sec. 6501(c)(8) through FATCA. It added Code Sec. 6038D as one of the relevant international tax provisions. Moreover, Congress added the phrase "tax return" before "event or period," such that the IRS now has additional time to

make assessments with respect to any "tax return, event, or period" to which the omitted information relates. Thus, if an SP neglects to file a Form 8938, then the assessment-period essentially stays open forever with respect to the *entire tax return* with which the Form 8938 should have been enclosed.

The international enforcement tools created by FATCA are powerful on their face, and they acquire additional strength when the IRS broadly interprets and applies them.

Below is the version of Code Sec. 6501(c)(8), *after* incorporating the FATCA changes:

> In the case of any information which is required to be reported to the Secretary [under various international tax provisions, *including Section 6038D*], the time for assessment of any tax imposed by this title *with respect to any tax return, event, or period to which such information relates* shall not expire before the date which is 3 years after the date on which the Secretary is furnished the information required to be reported under such section.[26]

2. Concept of "Related" Tax Return, Event, or Period

Congress and the IRS have adopted from the outset a broad interpretation of a "related" tax return, event, or period, though this seems to have gone unnoticed by many taxpayers and tax professionals. For instance, the legislative history indicates that the taxes and penalties asserted by the IRS during the extended assessment-period under Code Sec. 6501(c)(8) are not limited to items related to the information that should have been reported on an international information return, like Form 8938. Two excerpts from relevant legislative history are set forth below:

> Section 6501(c)(8) provides an exception to the three-year period of limitations due to failures to provide information about cross-border transactions or foreign assets. Under this exception, as amended by the Hiring Incentives to Restore Employment Act, the limitation period for assessment of tax does not expire any earlier than three years after the required information about certain cross-border transactions or foreign assets is actually provided to the Secretary by the person required to file the return. In general, such information reporting is due with the taxpayer's return; thus, the three-year limitation period commences when a timely and complete return (including all information reporting) is filed. Without the inclusion of the information reporting with the return, the limitation period does not commence until such time as the information reports are subsequently provided to the Secretary, even though the return has been filed. *The taxes that may be assessed during this suspended or extended period are not limited to those attributable to adjustments to items related to the information required to be reported by one of the enumerated sections*.[27]

> [T]he limitations period for assessing taxes with respect to a tax return filed on March 31, 2011 ordinarily expires on March 31, 2014. In order to assess tax with respect to any issue on the return after March 31, 2014, the IRS must be able to establish that one of the exceptions applies. If the taxpayer fails to attach to that return one of multiple information returns required [including Form 8938], the limitations period does not begin to run unless and until that missing information return is supplied. Assuming that the missing report is supplied to the IRS on January 1, 2013, the limitations period for the entire return begins, and elapses no earlier than three years later, on January 1, 2016. *All items are subject to adjustment during that time, unless the taxpayer can prove that reasonable cause for the failure to file existed.* If the taxpayer establishes reasonable cause, the only adjustments to tax permitted after March 31, 2014 are those related to the failure to file the information return. *For this purpose, related items include (1) adjustments made to the tax consequences claimed on the return with respect to the transaction that was the subject of the information return, (2) adjustments to any item to the extent the item is affected by the transaction even if it is otherwise unrelated to the transaction, and (3) interest and penalties that are related to the transaction or the adjustments made to the tax consequences*.[28]

C. Tool #3—Six-Year Assessment Period for Income Omissions from SFFAs

As indicated above, FATCA altered the assessment-periods to favor the IRS in two ways. The second alteration was giving the IRS three extra years to pursue a taxpayer in situations where the taxpayer has a duty to file Form 8938 to report SFFAs, he fails to file Form 8938, and the unreported SFFAs generate more than

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$5,000 in income that never appears on the corresponding U.S. tax returns.

Code Sec. 6501(e)(1)(A) read as follows *before* FATCA:

> If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, [then] the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed…

Congress amended Code Sec. 6501(e)(1)(A) by expanding its coverage. The provision stated the following *after* FATCA. The new language has been marked for ease of review:

> If the taxpayer omits from gross income an amount properly includible therein and (i) such amount is in excess of 25 percent of the amount of gross income stated in the return, *or (ii) such amount (I) is attributable to one or more assets with respect to which information is required to be reported under Section 6038D (or would be so required if such Section were applied without regard to the dollar threshold specified in subsection (a) thereof and without regard to any exceptions provided pursuant to subsection (h)(1) thereof), and (II) is in excess of $5,000*, [then] the tax may be assessed, or a proceeding in court for collection of such tax, may be begun without assessment at any time within 6 years after the return was filed.[29]

In plainer English, amended Code Sec. 6501(e)(1)(A) states that, if (i) a taxpayer omits income from a tax return that should have been included, *and either* (ii) such omitted income exceeds 25 percent of the gross income actually reported on the tax return, *or* (iii) such omitted income is more than $5,000 *and* is attributable to one or more SFFAs that generally are required to be disclosed on Form 8938, then the IRS can assess the related income taxes within six years of the time that the taxpayer files the relevant tax return.[30] The primary consequence of amended Code Sec. 6501(e)(1)(A) is that relatively minor amounts of omitted income can keep the assessment-period open a full six years, instead of the normal three. In today's world, it takes little to reach the new, lower trigger of $5,000.

The effective date of amended Code Sec. 6501(e)(1)(A) differs from that for new Code Sec. 6038D, which introduced the Form 8938 filing duty. The law states the following about when the new six-year assessment-period under Code Sec. 6501(e)(1)(A) entered into force:

> The amendments made by this section shall apply to (1) returns filed after the date of the enactment of this [HIRE] Act [*i.e.*, March 18, 2010]; and (2) returns filed on or before [March 18, 2010], if the period specified in Section 6501 of the Internal Revenue Code of 1986 (determined without regard to such amendments) for assessment of such taxes has not expired as of [March 18, 2010].[31]

III. The IRS Attempts to Clarify Assessment-Period Extensions

Admittedly, the preceding segments in this article about Tool #2 and Tool #3 are dense. If it makes readers feel better, IRS personnel were confused, too. Therefore, the IRS decided to issue guidance about how to apply amended Code Sec. 6501(c)(8) and amended Code Sec. 6501(e)(1)(A), by issuing IRSIG SBSE-25-0312-022 ("Memo").[32]

A. Explanation About Amended Code Sec. 6501(c)(8)

The Memo, in a portion called "HIRE Act Examples and Clarifying Information," indicates that amended Code Sec. 6501(c)(8) applies to all international information returns listed, including Form 8938, and it covers all tax returns, provided that the assessment-period had not expired by March 18, 2010, the date on which the HIRE Act took effect. The Memo then provided the following example:

> The taxpayer filed the [Form 1120 for 2005] on March 15, 2006. During the taxable year 2005, the taxpayer acquired more than 10% of the outstanding stock of a foreign corporation, but failed to file a Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations, as required to be filed to report the stock acquisition as prescribed by IRC § 6046. Normally, the period of time for assessment would have expired on March 15, 2009 [*i.e.*, three years after the time that the Form 1120 for 2005 was filed]. Since the taxpayer failed to report the information required to be reported by IRC § 6046, the period of time for assessment would not expire on March 15, 2009, but [rather] would expire three years after the required information is actually reported by the taxpayer. *The clarifying amendment to IRC § 6501 (c)(8) makes it clear that the open assessment*

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statute applies to the entire return and not only to the tax deficiency attributable to the information which was not reported, unless the failure to provide the required information is due to reasonable cause and not willful neglect. If it is determined that reasonable cause for failing to report the information exists, the period of time for assessment is only open for the deficiency attributable to the information not reported under IRC § 6046, in this example.

B. Explanation About Amended Code Sec. 6501(e)(1)(A)

The Memo also provides guidance about amended Code Sec. 6501(e)(1)(A). It gives the following information (or perhaps misinformation) about the effective date, which, as will become evident later in this article, forms the basis of the litigation position by the IRS in *M. Rafizadeh*:

> The amendment to § 6501(e) applies to all returns as long as the period of time (determined without regard to the § 6501(e) amendments referenced above) for assessment of taxes has not expired as of March 18, 2010. Therefore, if the income tax return was filed after March 18, 2010, *or the assessment statute was otherwise still open as of [March 18, 2010], and more than $5,000 was omitted from gross income that is attributable to specified foreign financial assets*, the statute remains open under § 6501(e) for a total of six years from the date the return was filed.

The Memo also features a series of examples about amended Code Sec. 6501(e)(1)(A), directing readers to assume that the taxpayer omitted $6,000 of income from a foreign bank account considered an SFFA.

> **Example 1.** Taxpayer filed his 2006 federal income tax return on or before April 15, 2007. Since the three-year statute of limitations on assessment had not expired on March 18, 2010, it will not expire before April 15, 2013.
>
> **Example 2.** Taxpayer timely filed his 2005 federal income tax return on or before April 15, 2006. Unless the statute of limitations remains open on March 18, 2010, under some other exception to the three-year statute of limitations on assessment, Code Sec. §6501(e)(1)(A)(ii) does not apply since the statute of limitations will have expired prior to March 18, 2010.
>
> **Example 3.** Taxpayer filed his 2005 federal income tax return on or before April 15, 2006. On December 31, 2008, the taxpayer consents to extend the statute of limitations on assessment to April 15, 2010. Since the extended statute of limitations on assessment had not expired on March 18, 2010, it will not expire before April 15, 2012.
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> **Example 4.** Taxpayer late-filed his 2005 federal income tax return on December 1, 2007. Since the three-year statute of limitations on assessment had not expired on March 18, 2010, it will not expire before December 1, 2013.
>
> **Example 5.** Taxpayer late-filed his 2005 federal income tax return on December 1, 2006. Since the three-year statute of limitations on assessment expired before March 18, 2010, the six-year statute of limitations does not apply, unless some other exception to the normal three-year statute of limitations keeps the statute open until March 18, 2010.
>
> **Example 6.** Taxpayer filed his 2005 federal income tax return on or before April 15, 2006. The return contains a more-than-25-percent omission of income, including an omission of more than $5,000 of income attributable to a foreign financial asset. Because the statute of limitations is six years from the filing date of the return for both the "more-than-25-percent omission of income" and the "omission of more than $5,000 of income attributable to a foreign financial asset," the statute of limitations will not expire before April 15, 2012, and will not be extended even though the statute remained open on March 18, 2010.

IV. Using Code Sec. 6501(c)(8) to Attack Multiple Tax Returns

The IRS issued a document in 2015, Program Manager Technical Advice ("PMTA") 2014-018, addressing extension of assessment-periods under Code Sec. 6501(c)(8) in a situation where the executor of an estate failed to file Forms 8938 for the deceased.

The main facts in PMTA 2014-018 are as follows. The taxpayer, a U.S. person, held an interest in various SFFAs, the value of which exceeded the relevant filing threshold for Form 8938. The taxpayer died in Year 1, leaving behind gross assets large enough to require the filing of a Form 706 (*U.S. Estate and Generation-Skipping Transfer Tax Return*). Generally, the executor or administrator of an estate has three main filing duties:

(i) File a Form 1040 for the decedent for the short-year, running from January 1 through the date of death; (ii) File a Form 1041 (*U.S. Income Tax Return for Estates and Trusts*) for the estate for the short year, running from the date of death until December 31, as well as all subsequent years until the estate is closed; and (iii) File a Form 706 for the estate, if necessary. In PMTA 2014-018, the executor (i) filed the Form 1040 for the taxpayer, but omitted income from the SFFAs and failed to attach Form 8938, (ii) filed Form 1041 for the estate, but omitted income from the SFFAs, and (iii) filed Form 706, but omitted the SFFAs from the gross estate. By the time that PMTA 2014-018 was issued, the general three-year assessment-period for Form 1040, Form 1041, and Form 706 had expired.

The IRS's analysis began with a reminder that Congress created several "disincentives" to hiding SFFAs, including the $10,000 penalty for not filing a Form 8938 and the extended assessment-periods under Code Sec. 6501(c)(8). The IRS then focused on the third "disincentive," emphasizing the "operative language" in the current version of Code Sec. 6501(c)(8): If a taxpayer fails to file a Form 8938 or any of the other international information returns specifically listed, then the assessment-period is extended for "any tax imposed by this title with respect to any tax return, event, or period to which [the information on Form 8938] relates." The IRS emphasized that, from its perspective, *all* aspects of this language should be broadly construed. In particular, the IRS indicated that (i) the phrase "any tax imposed by this title" includes any income tax, estate tax, gift tax, or excise tax, along with related penalties and interest, (ii) the phrase "any tax return" encompasses, "at the very least," any return that the IRS requires a taxpayer to file under Chapter 61 of the Internal Revenue Code, (iii) the phrase "any event or period" should be construed to include taxes resulting from a particular transaction or event, as well as any taxes arising with respect to a specific taxable period, and (iv) the modifying phrase, "to which such information relates," should be interpreted liberally.

A considerable portion of PMTA 2014-018 focused on this last aspect; that is, determining whether information that should have been provided to the IRS on Form 8938 (or any other relevant international information return) "relates" to a tax return, event, or period. The IRS stated the following in this regard:

> Whether information "relates" to a specific "return, event, or period" will generally require a case-specific inquiry. *However, in many cases, the failure of an executor to report a foreign financial asset [on Form 8938], which is required to be reported under Section 6038D (or any of the other listed provisions), will hold open the period of limitations on assessment of any tax required to be shown on the individual's Form 1040 or the estate's Form 1041 or Form 706*, to the extent that the unfurnished information "relates" to such return.

The existence of these two assessment-period extensions, along with the IRS's willingness to brandish them even when their applicability is questionable, will have a serious impact on decisions by taxpayers about participating in a voluntary disclosure program to rectify past non-compliance, the best strategies for defending themselves during an IRS attack, and more.

The IRS then applied its interpretation of Code Sec. 6501(c)(8) to the facts in PMTA 2014-018. The violations by the executor consisted of omitting income from the SFFAs on the Form 1040 and not attaching Form 8938 to Form 1040, omitting income from the SFFAs on Form 1041, and omitting the SFFAs from the gross estate on Form 706. The IRS provided the following explanation as to why the unfiled Form 8938 triggers an indefinite assessment-period for all three tax returns, even though Form 8938 was only required to be filed with one return (*i.e.*, the final Form 1040), and even though there was no discussion, and likely no evidence, that the executor intentionally or willfully did anything wrong:

> The information required to be reported under Section 6038D would have helped the [IRS] to identify each of these omitted items. At the very least, the information would have identified a likely source of income, during the relevant time period, and assets held at or near the time of death. *On these facts, it seems clear that the unfurnished information [that should have been reported to the IRS on Form 8938] would relate to each of these three returns because it identified a source of income reportable on the Form 1040 and the Form 1041 and an item which should have been included in the gross estate on the Form 706.*

In case the breadth of the IRS's position on this point somehow escaped a reader, PMTA 2014-018 stated it again, in a slightly different manner. The official conclusion is as follows:

> In the event of a failure to furnish information required under Section 6038D, Section 6501(c)(8) operates to suspend the period of limitations on assessment of any tax with respect to any return, event, or period, to which the undisclosed information relates. *This would suspend the period of limitations for assessment for any tax reportable on an individual's final Form 1040 or an estate's Forms 1041 or 706 anytime there is a failure to furnish information, required under Section 6038D, which relates to that return*. Whether or not undisclosed information "relates" to a specific return will be a case specific inquiry.

V. Using Code Sec. 6501(e)(1)(A) to Attack Multiple Years

In *M. Rafizadeh*, the IRS took an aggressive position, attempting to use amended Code Sec. 6501(e)(1)(A) to reach tax liabilities stemming from unreported foreign accounts during years before FATCA took effect, years which would otherwise be closed under the normal assessment-periods.[33]

A. The Basic Facts

The taxpayer filed timely Forms 1040 for 2006, 2007, 2008, and 2009, by April 15 of the relevant years. There was one big problem, at least as far as the IRS was concerned: The taxpayer failed to report on such Forms 1040 the passive income (*i.e.*, dividends, interest, and capital gains) earned by his account at UBS in Switzerland. The IRS served a John Doe Summons on UBS on July 21, 2008, and the taxpayer was one of the individuals with respect to whose tax liability the Summons was issued. UBS did not comply with the Summons initially, but this matter was finally resolved on November 16, 2010.

Just over four years later, on December 8, 2014, the IRS issued a Notice of Deficiency to the taxpayer with respect to 2006, 2007, 2008, and 2009, alleging tax liabilities and accuracy-related penalties.[34] The numbers here, particularly for a case reaching the Tax Court, were small: a proposed tax liability of $9,045 for 2006, $10,934 for 2007, $4,117 for 2008, and $1,619 for 2009. This minor amount of money at play, combined with the focus on a procedural issue involving assessment periods, are the likely culprits for why few tax practitioners have noticed *M. Rafizadeh*, despite its importance.

The taxpayer disputed the Notice of Deficiency by filing a Petition with the Tax Court. His primary contention was that the proposed tax liabilities are groundless because the relevant assessment-periods had expired before the IRS issued the Notice of Deficiency. If no tax liabilities exist, then the proposed penalties disappear, too, the taxpayer argued in his Petition. The IRS filed an Answer with the Tax Court rejecting these contentions, the taxpayer countered with a Reply, and, ultimately, the taxpayer filed a Motion for Summary Judgment.

B. Key Statutes and Effective Dates

The dispute in *M. Rafizadeh* centered on the following provisions of the Internal Revenue Code, along with their corresponding effective dates.

1. New Code Sec. 6038D

Any individual who, during any taxable year, holds an interest in [an SFFA] shall attach to such person's return of tax [a Form 8938] if the aggregate value of all [SFFAs] exceeds $50,000 (or such higher dollar amount as the [IRS] may prescribe).[35]

2. Effective Date of New Code Sec. 6038D

The amendments made by this section shall apply to all taxable years beginning after the date of the enactment of this [HIRE] Act [*i.e.*, March 18, 2010].[36]

3. Amended Code Sec. 6501(e)(1)(A)

If the taxpayer omits from gross income an amount properly includible therein and (i) such amount is in excess of 25 percent of the amount of gross income stated in the return, or (ii) such amount (I) is attributable to one or more assets with respect to which information is required to be reported under Code Sec. 6038D (or would be so required if [Code Sec. 6038D] were applied without regard to the dollar threshold specified in [Code Sec. 6038D(a)] and without regard to any exceptions provided pursuant to [Code Sec. 6038D(h)(1)]) and (II) is in excess of $5,000, [then] the tax may be assessed, or a proceeding in court for collection of such tax, may be begun without assessment at any time within six years after the return was filed.[37]

4. Effective Date of Amended Code Sec. 6501(e)(1)(A)

The amendments made by this section shall apply to (1) returns filed after the date of the enactment of this [HIRE] Act [*i.e.*, March 18, 2010] and (2) returns filed on or before [March 18, 2010], if the period specified in Code Sec. 6501 of the Internal Revenue Code of 1986 (determined

without regard to such amendments) for assessment of such taxes has not expired as [March 18, 2010].[38]

C. Summary of the Main Positions of the Parties

As one would expect, there was a substantial amount of arguing, criticizing, analogizing, emphasizing, distorting, and urging in various documents filed by the parties with the Tax Court. Wading through all the materials reveals the following positions by the parties.

The taxpayer advanced a number of arguments, some of which are summarized below.[39]

- Amended Code Sec. 6501(e)(1)(A) expressly states that the six-year assessment-period applies where the omitted income is attributable to one or more SFFAs with respect to which information generally must be reported under Code Sec. 6038D "and" must exceed $5,000. Accordingly, the IRS has the burden of proving that both elements exist.
- The IRS should concede the proposed 2009 tax liability because amended Code Sec. 6501(e)(1)(A) requires, among other things, that the omitted income from the SFFAs exceed $5,000, and this did not occur in the taxpayer's case for 2009.
- Amended Code Sec. 6501(e)(1)(A) specifically provides that the omitted income exceeding $5,000 "is attributable to one or more assets with respect to which information is required to be reported under Section 6038D [on Form 8938]." The provision does not say that the omitted income "is attributable to assets that meet the definition of SFFA." The HIRE Act, Notice 2011-55, legislative history, and the regulations all indicate that the Form 8938 filing duty mandated by Code Sec. 6038D took effect for tax years beginning *after* March 18, 2010, individuals ordinarily are calendar-year taxpayers, and Code Sec. 6038D applied only to individuals (and not to entities) until 2016; therefore, the first time that individuals were required to enclose a Form 8938 was with their 2011 Form 1040.
- The language of amended Code Sec. 6501(e)(1)(A) is unambiguous, so the general rules of statutory construction dictate that it is not necessary to search further for meaning.
- Congress knows how to create exceptions to the Form 8938 filing requirement, as evidenced by the language of amended Code Sec. 6501(e)(1)(A)(ii). It states that the omitted income is attributable to one or more SFFAs with respect to which information is required to be reported under Code Sec. 6038D, even if the total value were below the $50,000 reporting threshold, and even if the SFFA were normally exempt because of the special rules designed to avoid duplicative reporting on multiple international information returns. Thus, if Congress had wanted the six-year assessment-period under Code Sec. 6501(e)(1)(A) to apply to years before a Form 8938 filing duty was in effect, it knew how to say so.

The main positions of the IRS can be reduced to the following:

- The HIRE Act took effect on March 18, 2010, at which time the general three-year assessment-period under Code Sec. 6501 was still open with respect to the taxpayer's 2006 Form 1040, 2007 Form 1040, and 2008 Form 1040.
- Because the assessment-periods for 2006, 2007, and 2008 were still open, the six-year assessment-period under amended Code Sec. 6501(e)(1)(A) applies, regardless of the fact that the taxpayer did not have a duty to file a Form 8938 until 2011.
- Using the six-year assessment-period, coupled with the suspension of the running of the assessment-periods for 664 days as a result of the issuance of the John Doe Summons to UBS, the assessment-periods for 2006, 2007, and 2008 were still open at the time that the IRS issued the Notice of Deficiency on December 8, 2014.

D. Decision by the Tax Court

The Tax Court described the pivotal question in the following manner: "[W]hether Section 6501(e)(1)(A)(ii) can apply for tax years for which the reporting requirement of Section 6038D did not apply." It then noted that the confusion derives from the fact that (i) new Code Sec. 6038D, creating the duty to file Form 8938, and amended Code Sec. 6501(e)(1)(A), expanding the situations to which the six-year assessment-period applies, were given different effective dates in the HIRE Act, and (ii) Code Sec. 6501(e)(1)(A) specifically cross-references Code Sec. 6038D.

Next, the Tax Court did a statutory construction analysis, citing precedent for the idea that (i) words in a statute must be given their ordinary meaning, (ii) a statute must be interpreted as a whole, such that no clause, sentence, or word is superfluous, void, or insignificant, and (iii) assessment periods, which serve to bar the rights of the government, should be strictly construed in favor of the government. With those concepts in mind, the Tax Court held for the taxpayer, granting his Motion for Summary Judgment, and thus determining that the Notice of Deficiency for 2006, 2007, and 2008 was issued too late. Below is a portion of the Tax Court's reasoning:

We conclude that the wording of the effective date for Section 6501(e)(1)(A)(ii) limits its application to years for which the reporting requirement of Section 6038D also is effective … We must give effect to all the words in the key phrase before us—"assets with respect to which information is required to be reported under Section 6038D" … [W]e conclude that the most natural reading of this phrase is that the six-year statute of limitations applies only when there is a Section 6038D reporting requirement (or would be barring an exception that is to be disregarded). Section 6501(e)(1)(A)(ii) does not simply incorporate the definition of [SFFAs] in Section 6038D; it also specifies that the [SFFAs] are subject to the reporting requirement (or would be but for an exception that is disregarded). We agree with [the taxpayer] that had Congress intended simply to incorporate the definition in Section 6038D of the assets to be covered, Congress should have used other more straightforward wording, such as the defined term itself.[40]

VI. Conclusion

The international enforcement tools created by FATCA are powerful on their face, and they acquire additional strength when the IRS broadly interprets and applies them. PMTA 2014-018 demonstrates that the IRS intends to use Code Sec. 6501(c)(8) to pursue multiple returns in cases where a taxpayer fails to file at least one of a long list of international information returns. In that same vein, *M. Rafizadeh* shows that the IRS plans to rely on the six-year assessment-period in Code Sec. 6501(e)(1)(A) when a taxpayer neglects to file a Form 8938 and omits more than $5,000 in income from assets that should have been disclosed there. The existence of these two assessment-period extensions, along with the IRS's willingness to brandish them even when their applicability is questionable, will have a serious impact on decisions by taxpayers about participating in a voluntary disclosure program to rectify past non-compliance, the best strategies for defending themselves during an IRS attack, and more.

ENDNOTES

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1. Foreign Account Tax Compliance Act (P.L. 111-147) (March 18, 2010), Title V (Offset Provisions), Subtitle A, Parts I through V. FATCA is a part of the Hiring Incentives to Restore Employment ("HIRE") Act.
2. Act Sec. 511(a) of Foreign Account Tax Compliance Act (P.L. 111-147) (March 18, 2010), Title V (Offset Provisions), Subtitle A, Parts I through V.
3. Code Sec. 6038D(a).
4. The following categories are considered "specified individuals:" (i) U.S. citizens, (ii) individuals who are U.S. residents for any portion of the relevant year, (iii) nonresident aliens who affirmatively elect under Code Sec. 6013(g) or Code Sec. 6013(h) to be treated as U.S. residents for federal tax purposes, (iv) nonresident aliens who are *bona fide* residents of Puerto Rico, and (v) nonresident aliens who are *bona fide* residents of a so-called "Section 931 Possession," which, at this point, means American Samoa. *See* Reg. §1.6038D-1(a)(1) and (2). For its part, the term "specified domestic entity" means (i) a domestic corporation, a domestic partnership, or a domestic trust; (ii) that was "formed or availed of" for purposes of holding, either directly or indirectly; and (iii) SFFAs. *See* Reg. §1.6038D-6(a).
5. Code Sec. 6038D(a). For a more comprehensive analysis for Form 8938 and its evolution, *see* Hale E. Sheppard, *The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance*, 38(3) INT'L TAX J. 11 (2012); Hale E. Sheppard, *Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules After IRS Issues Final Regulations*, 41(2) INT'L. TAX J. 25 (2015); Hale E. Sheppard, *Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting*, 42(3) INT'L TAX J. 5 (2016); Hale E. Sheppard, *Children with Foreign Accounts: Unexpected Income, Schedule B, Form 8938, and FBAR Issues*, 124(3) J. INT'L TAXATION 134 (2016) and 124(3) J. TAXATION 134 (2016); Hale E. Sheppard, *Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns* 95(5) TAXES 31 (2017).
6. Reg. §1.6038D-2(b)(1).
7. Reg. §1.6038D-2(b)(1).
8. Reg. §1.6038D-2(a)(8).
9. Code Sec. 6038D(b)(1); Reg. §1.6038D-3(a)(1).
10. Code Sec. 6038D(b)(2); Reg. §1.6038D-3(b)(1).
11. Reg. §1.6038D-1(a)(7).
12. Reg. §1.1471-5(b)(1)(i); Reg. §1.1471-5(b)(3)(i).
13. Reg. §1.1471-5(b)(1)(ii); Reg. §1.1471-5(b)(3)(ii).
14. Reg. §1.1471-5(b)(1)(iii); Reg. §1.1471-5(b)(3)(iii)(iv).
15. Reg. §1.1471-5(b)(1)(iv); Reg. §1.1471-5(b)(3)(vii); Reg. §1.1471-5(b)(2)(v).
16. Reg. §1.1471-5(b)(2)(i)(A), (B) and (D); *See also* Reg. §1.6038D-3(a)(7).
17. *See* Reg. §1.1471-5(b)(2)(vi); Reg. §1.6038D-1(a)(7); Preamble, 76 FR 73819-73820 (Dec. 12, 2014); Instructions to Form 8938 (Oct. 2015) at 5.
18. Code Sec. 6038D(b)(2); Reg. §1.6038D-3(b)(1); Reg. §1.6038D-3(d).
19. Code Sec. 6038D(d)(1); Reg. §1.6038D-8(a).
20. Code Sec. 6038D(d)(2); Reg. §1.6038D-8(c).
21. Code Sec. 6038D(g); Reg. §1.6038D-8(e)(1).
22. Act Sec. 511(c) of Hiring Incentives to Restore Employment Act (P.L. 111-147) (March 18, 2010), Title V, Subtitle A, Parts I through V.
23. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act." JCX-4-10 (Feb. 23, 2010) at 62.
24. Code Sec. 6501(a).
25. Code Sec. 6501(c)(8).
26. Act Sec. 511(b) of Foreign Account Tax Compliance Act (P.L. 111-147) (March 18, 2010), Title V, Subtitle A, Parts I through V.
27. U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment to the House Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010. JCX-46-10 (Aug. 10, 2010) at 36 (emphasis added); *See also* U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act." JCX-4-10 (Feb. 23, 2010) at 66 (emphasis added).
28. U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment to the House Amendment to H.R. 1586, Scheduled for Consideration by the House of Representatives on August 10, 2010. JCX-46-10 (Aug. 10, 2010) at 37. *See also* Chief Counsel Advisory 201147030 (Nov. 25, 2011).
29. Code Sec. 6501(e)(1)(A); Act Sec. 513(a) of Hiring

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Incentives to Restore Employment Act (P.L. 111-147), March 18, 2010.

[30] Code Sec. 6501(e)(1)(A); U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, The "Hiring Incentives to Restore Employment Act," under Construction by the Senate. JCX-4-10 (Feb. 23, 2010) at 64–66; Act Sec. 513(d) of Hiring Incentives to Restore Employment Act (P.L. 111-147), March 18, 2010.

[31] Act Sec. 513(c) of Hiring Incentives to Restore Employment Act (P.L. 111-147), March 18, 2010. *See also* U.S. Joint Committee on Taxation. Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act." JCX-4-10 (Feb. 23, 2010) at 66.

[32] IRSIG SBSE-25-0312-022 (March 09, 2012).

[33] The author derived information about the case from various documents filed with or by the Tax Court, including the Answer filed April 8, 2015, Redacted Petition filed April 13, 2015, Reply to Answer filed June 12, 2015, Petitioner's Motion for Summary Judgment filed July 13, 2015, Respondent's Response to Petitioner's Motion for Summary Judgment filed September 7, 2015, Petitioner's Response to Respondent's Response to Petitioner's Motion for Summary Judgment filed September 30, 2015, and *M. Rafizadeh*, 150 TC No. 1, Dec. 61,101 (Jan. 2, 2018).

[34] The Notice of Deficiency specifically states that the IRS granted full "innocent spouse" relief under Code Sec. 6015(c) to the wife, Nancy K. Rafizadeh, from the joint and several liability in the Notice of Deficiency.

[35] Code Sec. 6038D(a).

[36] Act Sec. 511(c) of Hiring Incentives to Restore Employment (P.L. 111-147) (March 18, 2010), Title V, Subtitle A, Parts I through V.

[37] Code Sec. 6501(e)(1)(A); Act Sec. 513(a) of Hiring Incentives to Restore Employment Act (P.L. 111-147), March 18, 2010.

[38] Act Sec. 513(c) of Hiring Incentives to Restore Employment Act (P.L. 111-147), March 18, 2010.

[39] The taxpayer did not cite supporting data from the Internal Revenue Manual in his pleadings with the Tax Court or his Motion for Summary Judgment, but portions of this administrative guidance buttresses his positions. For example, one segment states the following: "The tax may be assessed within six years after the original return was filed (IRC Section 6501(e)), if the taxpayer omits … More than $5,000 in income attributable to foreign financial assets *required to be reported on Form 8938* (disregarding the dollar reporting threshold), regardless of whether or not the specified foreign financial assets are reported on Form 8938 or another IRS form per Code Sec. 6501(e)(1)(A)(ii) (*the Form 8938, Statement of Foreign Financial Assets reporting requirement applies only to tax years beginning after March 18, 2010*)." IRM §25.6.1.9.5.3 (Sept. 20, 2016).

[40] *M. Rafizadeh*, 150 TC No. 1, Dec. 61,101 (Jan. 2, 2018) at 7–8.

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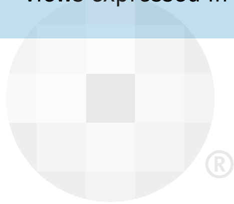
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