



# Brager Tax Law Group

April 2013

## Tax Filers Beware: "Super FBAR" Form Due with Tax Return

Greetings,

Beware of a little known tax form required if the tax filer has a **foreign bank account** or foreign financial assets. Many people who have foreign bank accounts and assets are unaware of this new tax form that is in its second year of use by the IRS, which continues to pursue uncovering offshore assets to collect additional taxes. It sometimes is referred to as a 'Super FBAR' because it requires reporting assets, which don't necessarily need to be listed on the regular Foreign Bank Account Report (FBAR), TDF 90-22.1 that is due June 30<sup>th</sup>.


U.S. taxpayers may have to file IRS Form 8938 if they have foreign financial assets with a total value exceeding \$50,000 on the last day of the year. Different filing thresholds apply based upon a variety of factors. The Form must be attached to the annual income tax return and filed by the due date, which, for most people, is Monday, April 15<sup>th</sup>, or later if on extension.

The failure to file Form 8938 could result in hefty fines. Those who willfully fail to file are subject to a penalty of \$10,000 and continued failure to file within 90 days after IRS notification entails an additional \$10,000 for each 30 day period. Furthermore, if the tax filer underpays tax due to fraud, the filer must pay a penalty of 75 percent of the underpayment.



**Dennis N. Brager, Esq.**

Former IRS Senior Trial Attorney  
Nationally Recognized California  
State Bar Certified Tax Specialist

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### Upcoming Events

**Dennis will be speaking at the following upcoming conferences.**

#### **Innocent Spouse Webinar**

9 AM PT  
May 21st, 2013

#### **State Bar Small & Solo Firm Summit**

"Innocent Spouse"  
Long Beach, CA  
June 20-22, 2013

#### **California State Bar Tax Section Annual Meeting**

"State and Federal Responsible Person Penalties"  
3:20 PM- 4:20 PM PT

The Form 8938, Statement of Specified Foreign Financial Assets must be filed by a person who is a U.S citizen (including those living abroad), a resident alien or a nonresident alien who makes an election to be treated as a resident alien.

The valuation of the foreign financial assets is also important, since a major error which causes the non-filing of the Form 8938 could trigger a penalty. Financial assets include foreign bank accounts, stocks, securities, interest in a foreign entity such as a trust or estate, notes, currency and many others as specified in the IRS instructions for Form 8938.

The rules surrounding the filing of the Form 8938 can be very confusing. Anyone who has failed to file a Form 8938 last year and now believes that was an error, he or she may wish to consult with a **tax attorney** to figure out the best way to solve the problem.

Sincerely,  
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## **Prominent Tax Attorney Found Liable for Civil Tax Fraud Penalties Due to Finding of "Willful Blindness" to Underreporting of Income**

After being convicted of **criminal tax fraud** and serving 18 months in federal prison, a prominent former **California tax attorney** recently found himself again the subject of an IRS investigation into his alleged tax fraud. After a criminal tax case that culminated in Owen G. Fiore's guilty plea to tax evasion for the 1999 tax year, the IRS began to seek civil tax fraud penalties against Mr. Fiore for 1996 through 1999. Although Mr. Fiore conceded the **tax disputes** and the tax fraud charges for 1998 and 1999, he disputed

San Jose  
November 8, 2013

### **2013 American Bar Association 30th Annual Institute on Criminal Tax Fraud and 3rd National Institute on Tax Controversy**

Las Vegas  
December 11-13, 2013

#### **Previous Events**

##### **KFWB Radio 980 AM**

"Money 101 with Bob McCormick"  
9:05 AM - 11 AM PT  
Los Angeles  
March 11, 2013 & March 29, 2013

#### **Previous Speeches**

##### **Los Angeles County Bar Association's 2013 Tax Night**

"International Tax Enforcement Update"  
Los Angeles  
February 12, 2013

##### **2012 American Bar Association nth Annual Institute on Criminal Tax Fraud and 2nd National Institute on Tax Controversy**

"Tax Strategies, Administrative Tax Strategies and Techniques in a Recessionary Economy"  
Las Vegas  
December 6-7, 2012

#### **Articles Quoting Dennis Brager**

##### **"Bel Air Payroll Firm Sued for Allegedly Keeping Clients' Tax Payments"**

*The Baltimore Sun*  
March 1, 2013

##### **"Indictment of Swiss Bank Employees Signals Ongoing Crackdown on Evasion, Lawyers Say"**

his fraud liability for 1996 and 1997. While the Tax Court felt that it was unclear whether some of Mr. Fiore's actions weighed in favor of a finding of tax fraud, the court took a novel approach and ultimately held that Mr. Fiore had been "willfully blind" to his unreported income, and consequently found him liable for tax fraud for the 1996 and 1997 tax years.

Borrowing heavily from criminal law principles and discussing relevant appellate jurisprudence on the issue, the Tax Court applied the infrequently-used (at least in the area of civil tax fraud) willful blindness concept to Mr. Fiore's actions in the years in question. Specifically, the court stated that if the IRS could prove by clear and convincing evidence that Mr. Fiore was "aware of a high probability of unreported income or improper deductions" and "deliberately avoided steps to confirm this awareness," the standard for civil tax fraud would be met.

Ultimately, the Tax Court found that Mr. Fiore met both prongs of the test for willful blindness. Discussing Mr. Fiore's extensive work experience and education, the court found that such experience ensured that he was aware of the risk of underreporting his income through generally neglecting firm administration. Furthermore, the court discussed Mr. Fiore's significant use of funds during the period in question, and inferred from this that he consciously chose to not pay taxes in order to have more funds on hand. As to the second prong of the test, the court found that since Fiore had access to bank statements, bills and deposit slips for each taxable year, yet failed to check them when preparing his tax returns, this constituted "deliberate" avoidance of steps to confirm the underreporting of his income.

After this discussion of Mr. Fiore's **tax return problems**, the Tax Court concluded that the finding of willful blindness not only weighed in favor of tax fraud, but deserved "particular weight" in determining whether Mr. Fiore had committed tax fraud. When added to other factors such as Mr. Fiore's repeated failure to

*The Bureau of National Affairs*  
January 4, 2013

**"New 'Streamlined' IRS Procedures Effective for Non-Resident U.S. Citizens"**

*The Wall Street Journal Online*,  
September 12, 2012

**Articles Written by  
Dennis Brager**

**"Third-Party Federal Tax Liens and Levies and How to Fight Them"**

*Journal of Tax Practice & Procedure*  
December 2012/January 2013

**"New 'Streamlined' FBAR Filing"**

*Los Angeles Daily Journal*  
November 1, 2012

**"Case Finds CFOs Liable for Payroll Taxes"**

*CFO.com*  
October 4, 2012

**Recent Blog Posts**

**"Tax Preparers Beware! 6th Circuit Court of Appeals Affirms Dismissal of Tax Refund Suit Due to Inability to Prove Timely Filing of Amended Return"**

April 11, 2013

**"Prominent Tax Attorney Found Liable for Civil Tax Fraud Penalties Due to Finding of 'Willful Blindness' to Underreporting of Income"**

March 20, 2013

**"Streamlined Foreign Bank Account Report (FBAR) Filing Compliance Procedure FAQs Issued by IRS for Non-Resident Taxpayers"**

March 6, 2013

cooperate in his **IRS tax audits** , consistent underreporting of income, and haphazard recordkeeping (none of which conclusively weighed in favor of a finding of tax fraud on their own), the court found that the IRS had met the burden of proof to show that Mr. Fiore committed tax fraud in 1996 and 1997.

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## **Tax Preparers Beware! 6th Circuit Court of Appeals Affirms Dismissal of Tax Refund Suit Due to Inability to Prove Timely Filing of Amended Return**

The 6th Circuit recently taught an expensive lesson to a Michigan couple about carefully following procedure when dealing with IRS Tax Problems. In **Stocker v. United States (6th Cir. 2013)**, the 6th Circuit affirmed the dismissal of Robert and Laurel Stocker's suit against the IRS challenging the IRS' denial of a \$64,000 tax refund, holding that because the Stockers could not prove the timely filing of their amended federal tax return under the methods established in Internal Revenue Code (IRC) Section 7502, the District Court for the Western District of Michigan was correct in dismissing the case.

The Stockers' **tax problems** and subsequent loss of their \$64,000 refund occurred because of a seeming minor error. Following an IRS tax audit of a business in which the Stockers had invested and lost money, Mr. Stocker's CPA prepared amended 2003 federal tax returns for the Stockers that entitled them to a \$64,000 refund. Mr. Stocker's CPA advised him that the returns had to be mailed by October 15, 2007 to comply with the tax law. Unfortunately, though Mr. Stocker testified that he mailed the returns on that day, he neglected to bring copies of the certified mail receipts to the post office, therefore failing to obtain date-stamped receipts. Apparently this was because although the CPA's office manager prepared postage prepaid, certified mail return receipted

**"San Diego Used Car Dealer Sentenced in Tax Fraud Case"**  
January 28, 2013

### **Our Services**

- **Tax Litigation**
- **Tax Controversy**
- **Criminal Tax Defense**
- **IRS Payroll Tax Problems**
- **California Payroll Tax Problems**
- **Tax Fraud**
- **Tax Preparer Penalties**
- **Office of Professional Responsibility (OPR) Defense**
- **California Sales Tax Problems**
- **Tax Audits**
- **Tax Appeals**
- **Innocent Spouse Defenses**
- **Offers in Compromise**
- **Installment Payment Agreements**

The **Brager Tax Law Group** is a tax litigation and tax controversy law firm, which represents clients with tax problems and tax disputes with the IRS, the California Franchise Tax Board (FTB), the State Board of Equalization (SBE) and the Employment Development Department (EDD). **All of the firm's tax lawyers** were former trial attorneys with the IRS.



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requested envelopes for the Stockers she mistakenly retained the customer copies of the certified mail receipts for the 2003 amended returns, rather than giving these copies to Mr. Stocker so that he could present them at the post office as he mailed the returns.

This left the Stockers at a disadvantage when their tax dispute began, as the IRS' records stated that the envelope containing the Stockers' amended 2003 return was postmarked four days late. Compounding the Stockers' tax problems, the IRS failed to retain the postmarked envelope in question. Seeking help in their tax dispute the Stockers brought suit, but the District Court granted the IRS' motion to dismiss for lack of jurisdiction due to the suit being barred as past the three-year period for filing a claim for a tax refund. On appeal, the 6th Circuit affirmed.

The 6th Circuit was unmoved by the Stockers' attempts to prove the mailing date of their return through means other than those set forth in IRC Section 7502. As the IRS' records indicated that the returns were postmarked four days late, the Stockers could not prove timely delivery under IRC Sec. 7502(a)(1), which states that the postmark of the returns establishes the date of mailing. Additionally, Mr. Stocker's failure to obtain the certified mail receipt precluded the use of IRC section 7502(c)(1), which states that the "date of registration shall be deemed the postmark date". The court rebuffed the Stockers' attempts to prove timely delivery through circumstantial evidence; rather, the Court stated that its own precedent prevented any other method of proof. Finally, the court held that the District Court had not abused its discretion in refusing to draw the inference that the Stockers had timely filed their returns because of the IRS' failure to retain the postmarked envelope in violation of internal policy.

Despite the seemingly minor nature of the Stockers' mistakes, the 6th Circuit was highly unsympathetic to their plight. Ultimately, the court reiterated that only certain procedures

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are available to prove timely filing, and the Stockers' own mistakes precluded them from receiving relief, despite their innocent nature. While calling it "unfortunate" that the Stockers could not prove the timeliness of their return, the court sent a strong message to taxpayers that it was unwilling to make exceptions for even the most innocent of mistakes. If you have a tax problem you may wish to contact a **tax litigation attorney** for assistance..

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