An Inquiry into the Factors Aiding Clemency for Foreign Corporations Requesting Protective Tax Return Filing Deadline Waivers

By Anthony Malik[1]

I. *INTRODUCTION*

Foreign corporations ("FCs") often have varying degrees of U.S. business activities which in turn subject them to varying degrees of U.S. tax exposure. Depending on a given FC's country of incorporation, size, business model, and activities it can be difficult—even for seasoned international tax specialists—to accurately assess the FC's U.S. tax position without diligently analyzing the facts and circumstances. Despite said difficulty, it is not uncommon for such FCs to receive advice regarding their U.S. tax positions from their foreign or U.S. generalist tax advisors. Unfortunately this often leads such FCs to have a false sense of their U.S. tax exposure thereby potentially putting them at severe risk of adverse action by the various U.S. tax authorities.

Given the fact-intensive nature of U.S. taxability determination, it is often in a FC's best interest to consider the advantages of filing protective tax returns.[2] In practice, however, many FCs are either unaware of the option, or are specifically advised not to, file protective tax returns. This may be, depending on the factual situations, perfectly harmless, less so, or flat-out unwise. The reason being that protective tax returns, as do virtually all (if not all) U.S. tax returns, have legally prescribed due dates[3] by which they must be filed with the Internal Revenue Service ("IRS" or "Service"). Much more importantly, apart from the open-ended statute of limitations under Internal Revenue Code ("IRC" or "Code") Section 6501 and the potentially applicable penalties under IRC Section 6651, that most U.S. tax practitioners are familiar with, the real peril for non-filing FCs is the potential disallowance of otherwise allowable deductions and credits[4] for purposes of computing their U.S. taxable incomes[5] if it is later determined that such FCs derived income that was effectively connected ("ECI")[6] with the conduct of a U.S. trade or business ("USTB").[7] Consequently FCs that do not file, when the prevailing facts and circumstances warrant the filing of, protective tax returns are at undue risk of being taxed on their gross incomes from U.S. sources.[8]

Fortunately for FCs in such predicaments, the IRS has established procedures[9] whereby they can request filing-deadline waivers for their prior years' unfiled protective tax returns pursuant to Treasury Regulation Section 1.882-4(a)(3)(ii).[10] A waiver then enables such FCs to file their prior years' protective tax returns and reclaim the ability to preserve all allowable deductions and credits. For this purpose, a given FC seeking a waiver must establish to the satisfaction of the Commissioner (and his or her delegates) that the FC, based on the facts and circumstances, acted reasonably and in good faith in not filing a prior year's protective tax return. The Commissioner will in turn consider the following factors to determine whether the FC acted reasonably and in good faith:

- Whether the FC did not become aware of its ability to file a protective tax return by the deadline for doing so;[11]
- Whether the FC had not previously filed a protective tax return;[12]
- Whether the FC voluntarily identifies itself to the IRS as having failed to file a protective tax return;[13]
- Whether there are other mitigating or exacerbating factors; and[14]
- Whether the FC failed to file a protective tax return due to intervening events beyond its control.[15]

In addition to these factors, the waiver is also preconditioned on the stipulation that:

- The FC cooperate in the process of determining its income tax liability for the taxable year for which the protective tax return was not filed.[16]

Despite the regulatory text's listing of the above factors, it should be noted that the requirement is not that one must satisfy each factor. Rather, the Commissioner's determination of a given FC's reasonable behavior and good faith is primarily based on the preponderant merit of its cumulative facts and circumstances. There is a conspicuous degree of overlap between some of the factors and different combinations of these factors will be more relevant in developing strong claims in different situations.[17]

In the ensuing sections, we will inquire into the aforementioned factors designed to aid clemency for FCs requesting protective tax return filing deadline waivers. Obviously, this paper cannot examine each factor by holding it up to the lens of every reasonably possible eventuality an international tax practitioner may encounter. Rather, what follows is a general discussion meant to help readers construe the factors more productively in developing compelling claims.

II. *UNAWARE OF ABILITY TO FILE A PROTECTIVE TAX RETURN BY THE DEADLINE*

Before moving forward, it should be briefly mentioned that an understanding of the longstanding authorities regarding what constitutes "reasonable cause," would be highly useful in construing these factors.[18] That said a FC's previous non-filing due to ignorance of the U.S. law is normally acceptable as an indicator of reasonable behavior and good faith. This is because unlike U.S. taxpayers, foreign taxpayers, let alone awareness with respect to technical U.S. tax return filing options, are not at all oriented to the U.S. tax system. As foreign taxpayers with limited U.S. business activities (and thus prospective protective tax return filers), it is understandable that FCs are often not—and cannot reasonably be expected to be—aware of the option to timely file protective tax returns.[19]

Some readers may no doubt ponder this seeming deviation from the general principle of *Boyle*[20] (i.e., ignorance of filing dates is not acceptable). However, apart from the fundamentally different fact patterns in cases involving foreign protective tax return filers, the touchstone of this factor is not unawareness of the filing due date but rather the abject unawareness of the option to file a protective tax return in the first instance. Perhaps the potency of such base-level unawareness lays in the fact that it would summarily withdraw, from even the most prudent taxpayer, all reason to explore filing deadlines or for that matter any other tax obligations related to, or springing from, the filing requirement itself.[21]

In practice, a situation that often occurs which allows making a strong claim with respect to this factor is when such a FC's foreign tax advisor, without any input from a U.S. international tax specialist, begins rendering U.S. tax advice. To such foreign tax advisors' credit, they are usually familiar with the international tax treaty concept of permanent establishment ("PE").[22] They consider a given FC's facts and circumstances, correctly determine that the FC does not have a U.S. PE,[23] and then incorrectly advise the FC that it need not concern itself with U.S. tax matters. Consequently, such a FC is led to an incorrect understanding of its U.S. tax exposure because PE is not the correct standard for initially determining U.S. taxability (and thus not the correct standard for determining U.S. tax compliance obligations). Rather, the correct standard to initially determine U.S. taxability is the lower USTB threshold. Generally foreign tax advisors are unfamiliar with this U.S. law concept unless they regularly collaborate with U.S. international tax advisors to serve international businesses with U.S. activities.

Another common scenario is when such FCs engage general U.S. tax practitioners (i.e., not U.S. international tax practitioners) to advise them regarding their U.S. tax positions. These generalists, unfamiliar with the finer points of U.S. international taxation, then hurriedly skim the international provisions of the Code. These generalists may succeed in learning about the option of filing protective tax returns to the point where they can excursively discuss them with the FCs. However, it is quite rare for these generalists to, in such a short amount of time, gain enough competence in this specialized area of practice to coherently advise the FCs regarding the benefits of filing, the possible consequences of non-filing, and even the deadlines of filing such forms. Moreover, such generalists, due to their inexperience in this area, are usually squeamish about the prospect of preparing tax forms for international businesses and thus have a tendency to implicitly advise non-filing. Consequently, many FCs walk away mistakenly feeling that exploring protective tax returns is not a useful or necessary endeavor.

The challenge of such a scenario is that it provides for attenuated (though not ineffectual) claims with respect to this factor. While the generalist may have made the FC aware of its ability to file a protective tax return, the generalist may not necessarily have made the FC "aware of its ability to file a protective return . . . by the deadline for filing a protective return."[24] Given the optional nature of protective tax returns and the framing of the advice, it is not inconceivable for a FC to think that such returns are not subject to filing deadlines. In fact, protective tax returns were previously not subject to filing deadlines under prior law.[25] The point being that FCs

do not necessarily forego learning about the relevant due dates willfully or negligently.

Nonetheless, given its weaker position, it is important to bolster such a claim with additional support. As an example, one could point towards the generalist's infractions of various provisions of Treasury Department Circular No. 230 ("Circ. 230")[26] and invoke reasonable cause due to reliance on a tax advisor.[27] As another example, one could point towards the lack of a meaningful incentive to not file to support their claim of unawareness of the necessity of filing by a deadline. Protective tax returns are tax-inconsequential, i.e., they essentially serve information reporting rather than income tax remittance purposes. Thus, FCs usually lack a motive to deliberately forego filing protective tax returns.

III. *NO PREVIOUSLY FILED PROTECTIVE TAX RETURNS*

The obvious function of this factor is to count against previously filing FCs that subsequently stopped filing. Holding such a corporate "stop-filer"[28] that previously filed protective tax returns to a higher standard than a FC that never filed in the first instance is understandable given such FC's previous demonstration of its knowledge regarding its U.S. tax return filing responsibilities followed by its decided non-filing. Further to this point, Example 6 in Treasury Regulation Section 1.882-4(a)(3)(iii) describes a corporate stop-filer as not having met the appropriate standard to receive a waiver. However, this by no means guarantees doom for stop-filing FCs. Rather, the likelihood of any waiver request's success is contingent upon the merits of the overall underlying facts and circumstances. Consider that the example given is one of a FC that:

- Earned ECI (i.e., it is probably a regular income tax return, not a protective tax return, filer);
- Stopped filing more than four years ago;
- Did not voluntarily identify itself to the IRS as having failed to previously file U.S. tax returns and did not make efforts to comply with U.S. tax laws until it was approached by an IRS examiner;
- Did not present evidence that intervening events beyond its control prevented it from filing U.S. tax returns; and
- Did not claim the presence of any mitigating factors in its defense.

Thus, it is not hard to see that this example could have articulated a contrary result had a couple of the foregoing factual points been taxpayer-friendly.

The filing logistics are also an important consideration in this factor. Consider the realistic situation where a FC, after years of conducting limited business activities in the U.S., reaches out to a U.S. international tax practitioner for advice on miscellaneous tax issues. During the conversation the practitioner recommends the FC to consider filing protective tax returns. This is the first time that the FC has learned of this option. The practitioner's advice makes sense but before committing to engage the practitioner to prepare a waiver request and handle all prior years' protective tax returns, the FC understandably decides to engage the practitioner to prepare only its current year's timely protective tax return. After the FC's current year protective tax return is filed, the FC becomes much more comfortable with the U.S. tax system. Also, by having gone through the process once, the FC better realizes the value of protective U.S. tax compliance. This newfound appreciation for protective tax returns then impels the FC to engage the practitioner to prepare its protective tax returns for all prior years during which the FC had any U.S. business connection. Does the previously filed timely current year's protective tax return preclude the FC from satisfying this factor's standard?

The short answer is that it most likely does not. Regarding this very factor the IRS's prior *Compliance Initiative for Nonresident Aliens and Foreign Corporations*[29] specified that taxpayers would remain eligible for clemency so long as they had not "previously filed a U.S. federal income tax return or a protective return for any taxable year prior to a taxable year for which a waiver [was] requested." It follows that the FC would be able to satisfy this factor's standard since it last engaged the practitioner to prepare only delinquent protective tax returns for taxable years preceding the current year.

Notwithstanding, it is vital to mention that the IRS's most current guidance is silent on this specific issue. On February 1, 2018 the Large Business and International Division ("LB&I") of the IRS issued a memorandum[30] to its employees with *Guidelines for Handling Delinquent Forms 1120-F and Requests for Waiver Pursuant to Treas. Reg. § 1.882-4(a)(3)(ii).*[31] An attachment to this memorandum provides LB&I employees a two-paged *Waiver Summary Analysis* document containing seven items to which employees are curiously asked to provide "detailed responses" in very limited spaces. Regarding previous filings, this document simply states, "Whether the corporation had not previously filed a U.S. income tax return"[32] and beneath this one-line statement provides a response space that is approximately 0.5 inches long and 5.0 inches wide. This points to a strong

possibility that LB&I employees, mechanically following this form, will (at least initially) count timely filed current year's protective tax returns against FCs. Thus, to avoid any unnecessary problems, it is advisable to recommend non-filing FCs to consider requesting a waiver pursuant to Treasury Regulation Section 1.882-4(a)(3)(ii) upfront and then filing all relevant protective tax returns in one fell swoop.

IV. *VOLUNTARILY IDENTIFYING ITSELF TO THE IRS AS NOT HAVING PREVIOUSLY FILED PROTECTIVE TAX RETURNS*

The importance of voluntary compliance in this area can be better understood by considering the IRS's history in inducing non-filers to comply with the U.S. tax law. As discussed earlier, protective tax returns did not initially have statutory filing deadlines. Consequently, FCs would forego filing U.S. tax returns until and unless they were pursued by the IRS. Understandably, the tax evasion opportunities available to FCs were troubling to the IRS. To curtail this behavior the IRS began denying filers of "delinquent"[33] tax returns the benefits of otherwise allowable deductions. The Courts[34] were in turn sympathetic to the IRS's position.

In *Taylor Securities, Inc. v. Commissioner*[35] the Board of Tax Appeals held that "it [was] inconceivable that Congress contemplated . . . that taxpayers could wait indefinitely to file returns and eventually when the [IRS] determined deficiencies against them they could then by filing returns obtain all the benefits to which they would have been entitled if their returns had been timely filed. Such a construction would put a premium on tax evasion, since a taxpayer would have nothing to lose by not filing a return as required by statute." Eventually in 1990, revised Treasury Regulation Section 1.882-4[36] handed deadlines to induce non-filers to voluntarily file timely protective tax returns otherwise they would lose their ability to claim any allowable deductions and credits in the event of a subsequent determination of U.S. taxability. Then most recently, on October 30, 2018, the IRS announced a new audit campaign targeting non-filing FCs.[37]

Given this special history and the IRS's modern enforcement efforts, no FC should unnecessarily delay filing its protective tax returns once it becomes aware of the option of doing so. The waiver request, with respect to the FC's voluntary compliance, should ideally lay out a timeline of the events and point out the FC's prompt action and responsible behavior in honoring its U.S. tax commitments. The waiver should also alert the adjudicator that the FC, depending on the facts, has never been requested to file U.S. tax returns, has never been requested to produce information that would suggest to the FC that it may be noncompliant in any regard, or that the FC is not currently under audit pursuant to the new campaign targeting non-filing FCs.

It is also undoubtedly helpful to point out the optional nature of protective tax returns. This can allow for a case to be made that the prior non-filing was not necessarily violative of U.S. revenue laws and that the subsequent voluntary filing was done in an effort to meet a higher standard of compliance. This claim is particularly likely to be influential when a given FC determines that it lacks a USTB[38] and also happens to not derive any non-ECI from U.S. sources.[39]

V. *OTHER MITIGATING FACTORS*

This is the most open category of factors and provides for an expanded opportunity to state a case. This category does not necessarily specifically pertain to extenuating circumstances in connection with the failure to file. These factors can be used to bolster the overall claim as to why a waiver would be appropriate in a given case. Below are some factors that may, depending on the situation, merit the approval of a waiver.

A. Prompt Action by Taxpayer

As previously mentioned, the waiver request should ideally lay out a timeline of the events and point out the FC's prompt action and responsible behavior in honoring its U.S. tax commitments. A FC's attempts to quickly file its delinquent protective tax returns within a reasonable amount of time after learning of its ability to do so demonstrates good faith to the IRS. A taxpayer's urgency and priority with respect to its tax matters is also a staple of the longstanding reasonable cause criteria.[40] The IRS is more willing to grant clemency in cases where FCs behaved diligently in filing their delinquent protective tax returns.

B. Intent of Taxpayer

A FC's cooperation, prompt action, and diligence, among other factors, can be discussed to provide the IRS a window into such a FC's mindset. The aim is to highlight evidence suggesting that the FC would have timely filed its prior years' protective tax returns had it been aware of the option to do so. It is also helpful to mention the FC's lack of meaningful motive to deliberately not file given the tax-inconsequential nature of protective tax returns. Good faith intentions of applicants surely receive favorable consideration by the IRS.[41]

C. Consistency with the Law's Objectives

The explicit regulatory standard currently required for consideration of a waiver is one of reasonable behavior and good faith.[42] This standard was conclusively prescribed for purposes of Treasury Regulation Section 1.882-4(a)(3)(ii) on March 7, 2003[43] after the revision of the stringent "good cause"[44] under "rare and unusual circumstances" standard

contained within the prior regulations.[45] The Department of the Treasury and the IRS had discovered that in practice the old standard was overly restrictive and as such failed to "balance the legislative intent to establish strong compliance measures with respect to required income tax return filing by foreign taxpayers with a means to grant relief from the filing deadlines in appropriate cases."[46] Resultantly "the [currently applicable] waiver standard provides that the filing deadlines may be waived by the commissioner or his or her delegate [so long as] the non-filer establishes that, based on the facts and circumstances, the non-filer acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return)."[47] Hence, a FC that has acted reasonably and in good faith can assert that the granting of a waiver would be wholly consistent with the law's stated objectives.

Separately, as protective tax returns do not reflect U.S. taxable income, a denial of a requested waiver would be tantamount to the imposition of the applicable penalties under IRC Section 6651 on taxpayers. If a FC is voluntarily filing its prior years' protective tax returns without regard to any potentially applicable penalties, the imposition of any such penalties effectively serve a purely punitive instead of a remedial purpose. The Courts have long recognized the concept of penalties being imposed as an inducement towards voluntary compliance rather than as an instrument for punishment.[48] Therefore, the granting of a waiver would also be consistent with judicial proclamations.

D. Consistency with the IRS's Policy Objectives

The IRS strives to promote voluntary compliance and to collect income tax returns in the most efficient manner possible.[49] In this regard, a FC's initiative to file its prior years' protective tax returns is in alignment with the IRS's various publicly stated policy objectives. As previously discussed, a denial of a requested waiver is tantamount to the imposition of the applicable penalties under IRC Section 6651 on a given FC. The imposition of such penalties would not only fail to meet the IRS's policy objectives but would likely undermine them.

Per the IRS, penalties are used to enhance voluntary compliance[50] by increasing the cost of noncompliance[51] and demonstrating the fairness of the tax system to compliant taxpayers.[52] As already discussed, the imposition of penalties on a voluntarily filing FC would serve a punitive instead of a remedial measure. Since protective tax returns are optional in nature, penalties would discourage—not enhance—voluntary compliance by other FCs with similar facts and circumstances. Regarding the IRS's objective of increasing the cost of noncompliance, the imposition of penalties in such cases would obviously only serve to increase the cost of voluntary compliance, not noncompliance. It would also violate the IRS's objective of demonstrating fairness of the tax system to compliant taxpayers.[53]

It is also the stated policy of the IRS that "in limited circumstances where doing so will promote sound and efficient tax administration, the Service may approve a reduction of otherwise applicable penalties or penalty waiver for a group or class of taxpayers as part of a Service-wide resolution strategy to encourage efficient and prompt resolution of cases."[54] As such, the waiver should stress the issuance of the previously discussed LB&I memorandum.[55] The guidelines within this memorandum are obviously designed to foster sound and efficient tax administration and such a FC is undoubtedly a candidate (out of an appropriate "group or class of taxpayers") for treatment under these guidelines. Therefore, a waiver request can rightfully assert that the granting of a waiver will meet several important policy objectives of the IRS.

E. No Prejudice to the Interests of the Government

Tax-inconsequential protective tax returns serve information reporting rather than income tax remittance purposes. Thus, the granting of relief cannot possibly result in a given FC enjoying lower tax liabilities for the tax years for which such a FC requests a waiver. Additionally, the granting of a waiver usually in no way affects (i.e., does not lower) the U.S. tax consequences of other taxpayers for those (or any other) years.

VI. *INTERVENING EVENTS BEYOND ITS CONTROL*

This factor is most suitably invoked in situations wherein a FC knew of its ability to file a protective tax return by the due date but nonetheless failed to do so. In assessing this claim, the IRS considers whether such a FC could have reasonably anticipated the event that caused the non-filing. Central to this factor is the idea that "The [FC's] obligation to meet the tax law requirements is ongoing. Ordinary business care and prudence requires that the [FC] continue to attempt to meet the requirements, even though late."[56] This factor cozily coincides with the longstanding reasonable cause standard.[57] Common events beyond a FC's control that can contribute to noncompliance include, but are not limited to:

- Death, serious illness, or unavoidable absence;[58]
- Fire, casualty, natural disaster, or other disturbances;[59] and
- Inability to obtain records.[60]

There is abundant tax literature available on these reasonable cause standards and thus we will not explore these in detail.

VII. *COOPERATION IN DETERMINING ITS U.S. INCOME TAX LIABILITY*

As tangentially discussed above, there is a strong likelihood that adjudicators will perform their waiver summary analyses by mechanically following the guidelines given to them. Hence, even though protective tax returns are tax-inconsequential, to avoid unnecessary problems the waiver request should unambiguously describe the FC's satisfaction of its requirement of "[cooperating] in the process of determining its income tax liability for the taxable year for which the return was not filed" in order to be granted a waiver.[61] On this score, the waiver request should emphasize that in the absence of a USTB and any non-ECI income, the FC is not subject to U.S. income taxation and has therefore correctly determined a nil (i.e., zero) U.S. income tax liability for the years for which it seeks a waiver. The narrative should ideally mention the FC's provision of complete, true, and accurate information regarding its business activities to an international tax specialist for making the appropriate determination.

VIII. *FINAL THOUGHTS*

FCs with U.S. business connections require special care and expertise. Depending on the situation, simply advising such FCs on their U.S. tax return filing obligations and options requires specialized knowledge. FCs with limited U.S. business activities that have never filed protective tax returns are often unknowingly in a precarious position vis-à-vis the IRS. This is particularly so now more than ever before considering the IRS's new audit campaign targeting non-filing FCs. Such FCs should consider promptly requesting a waiver pursuant to Treasury Regulation Section 1.882-4(a)(3)(ii) and filing their prior years' protective tax returns to safeguard their interests in the event of a dispute with the IRS.

ENDNOTES

1. Anthony ("Tony") Malik is Principal Consultant and owner of Point Square Consulting in Atlanta. He is an international tax specialist and non-attorney taxpayer advocate (Enrolled Agent). Tony represents clients in international tax controversies and amnesty procedures before the IRS and other tax authorities. He also provides a wide range of international tax compliance, planning, and research services. He is a member of the National Association of Enrolled Agents and the Georgia Society of CPAs. He can be reached at tony@pointsquaretax.com. Tony would like to thank Randall Brody of Tax Samaritan for sparking the idea to write this paper.

2. Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation*, filed pursuant to Treas. Reg. § 1.882-4(a)(3)(vi).

3. FCs' protective tax return filing deadlines depend on their degree of U.S. connection, whether the current taxable year is the first taxable year for which they will file a protective tax return, whether they filed a protective tax return for the immediately preceding taxable year, and whether they did not file a protective tax return for the immediately preceding taxable year and the current taxable year is not the first taxable year for which they will file a protective tax return. See IRC § 6072 and Treas. Reg. § 1.882-4(a)(3)(i).

4. See IRC § 882(c).

5. Treas. Reg. § 1.882-4(a)(3)(i).

6. Within the meaning of IRC § 882(a)(1) and Treas. Reg. § 1.882-1(b)(2).

7. This is the legal threshold by which FCs become subject to U.S. taxation under the Code. See IRC § 864(b) and the regulations thereunder.

8. See Treas. Reg. § 1.882-4(a)(3)(vi).

9. On February 1, 2018 the Large Business and International Division ("LB&I") of the IRS issued a memorandum to its employees with guidance on this matter. See LB&I-04-0218-007.

10. To keep the topic manageable, this paper will limit the discussion to a pure (as opposed to a partial) protective tax return by a FC, claiming the complete absence of both a USTB and any non-business U.S. source income, thereby reflecting a $0 U.S. income tax liability. Furthermore, to achieve the same end, it will also not delve into the modifications to the rules discussed herein due to the impact of treaty-based positions on protective tax returns.

11. Treas. Reg. § 1.882-4(a)(3)(ii)(B).

12. Treas. Reg. § 1.882-4(a)(3)(ii)(C).

13. Treas. Reg. § 1.882-4(a)(3)(ii)(A).

14. Treas. Reg. § 1.882-4(a)(3)(ii)(F).

15. Treas. Reg. § 1.882-4(a)(3)(ii)(E).

16. Treas. Reg. § 1.882-4(a)(3)(ii).

17. Consider that this paper foregoes specifically discussing the factor handed by Treas. Reg. § 1.882-4(a)(3)(ii)(D) due to its substantial overlap with the factor handed by Treas. Reg. § 1.882-4(a)(3)(ii)(B). Additionally, the factor handed by Treas. Reg. § 1.882-4(a)(3)(ii)(B) explicitly relates to protective tax returns while the factor handed by Treas. Reg. § 1.882-4(a)(3)(ii)(D), due

to its verbiage, seems more germane to FCs' regular income tax returns and protective tax returns required to disclose treaty-based return positions.

18. Technically, reasonable cause is not coterminous with the "acted reasonably and in good faith" standard of Treas. Reg. § 1.882-4(a)(3)(ii). Nonetheless there is documented support that reasonable cause is relevant to the standard of Treas. Reg. § 1.882-4(a)(3)(ii). Per CCA 200028030 (May 8, 2000), "While there is no legal precedent that sets forth the level of action required by a taxpayer in order to establish "good cause" under Treas. Reg. § 1.882-4(a)(3)(ii), certain penalty provisions of the Internal Revenue Code do include "reasonable cause" exceptions. It is our view that the precedent that has been developed with respect to these penalty provisions is relevant to the determination of whether a taxpayer satisfies the "good cause" requirement under Treas. Reg. § 1.882-4(a)(3)(ii). It should be noted, however, that the "good cause" threshold involves a higher standard of proof than that required to establish "reasonable cause."" We will discuss both "good cause" and the "acted reasonably and in good faith" standard of Treas. Reg. § 1.882-4(a)(3)(ii) in more detail further ahead in this paper.

19. See IRM, pt. 20.1.1.3.2.2.6(4)(B).

20. *United States v. Boyle*, 469 U.S. 241 (1985).

21. Consider *James v. USA*, No. 8:2011cv00271 (M.D. Fla. 2012), wherein the IRS requested summary judgment using in part *Boyle* (the IRS contended that James delegated the actual filing of Form 3520 to his tax preparer). James argued that his tax preparer's mistake was a failure to advise him of the requirement to file Form 3520, not his failure to file the return. In other words, James did not delegate the filing of Form 3520 to his tax preparer—he was abjectly unaware of the filing requirement in the first place. The judge referenced both IRM, pts. 20.1.1.3.2.2.6 (Ignorance of the Law) and 20.1.1.3.3.4.3 (Advice from a Tax Advisor) and denied the IRS's motion for summary judgment.

22. This is a facts and circumstances based threshold articulated in most bilateral income tax treaties by which nonresident corporations chartered in a treaty-contracting country, because of their level of cross-border economic activity in the other treaty-contracting country, become taxable there.

23. On this score too, the foreign tax advisors will most always fail in advising the FC regarding its duty to disclose its determination of the absence of its PE to the IRS on Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*. This is an infraction that carries with it a $10,000 penalty. See. Treas. Reg. §§ 301.6114-1 and 301.6712-1.

24. Treas. Reg. § 1.882-4(a)(3)(ii)(B).

25. See the pre-July 31, 1990 rendition of Treas. Reg. § 1.882-4(b)(1). Also see § 233 of the Revenue Act of 1928 and § 882(c) of the Internal Revenue Code of 1954.

26. For example Circ. 230 §§ 10.34(c)(1), 10.34(c)(2), 10.34(d), 10.35(a) and 10.37(a)(2)(ii)-(iii).

27. IRM, pt. 20.1.1.3.3.4.3.

28. Not to be confused with "non-filers." In the case of individual taxpayers, IRM, pt. 5.19.2.3 classifies persons who filed tax returns in previous years but not in subsequent ones as "stop-filers" (there is no precisely equivalent IRS classification for foreign corporations). The IRS has, now for years, been administering *The Individual Master File Return Delinquency Program* targeting stop-filers. See IRM, pt. 5.19.2. The point to absorb is that the IRS views stop-filers, whether individual or corporate, as an enforcement priority.

29. Notice 2003-38, 2003-27 IRB 9.

30. LB&I-04-0218-007.

31. The subject title of LB&I-04-0218-007.

32. Item C, Attachment A of LB&I-04-0218-007.

33. In the absence of statutory filing deadlines, prior to July 31, 1990, the Courts had held that there was a "terminal point" after which a FC could no longer claim the benefit of deductions by filing a return. See *Taylor Securities, Inc. v. Commissioner*, 40 B.T.A. 696, 703 (1939); *Blenheim Co., Ltd. v. Commissioner*, 125 F.2d 906 (4th Cir. 1942), affg. 42 B.T.A. 1248 (1940).

34. *Ibid*.

35. *Ibid*.

36. See T.D. 8322, 55 FR 50830 (December 11, 1990). The amendments were first published as proposed regulations. See § 1.882-4, Proposed Income Tax Regs., 54 FR 31547 (July 31, 1989).

37. See *1120-F Delinquent Returns Campaign* available online at https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-five-large-business-and-international-compliance-campaigns-1.

38. Treas. Reg. § 1.864-4.

39. IRC § 881.

40. See IRM, pt. 20.1.1.3.2(4)-(6).

41. Taxpayer intent is certainly an extant determinative in court cases. In administrative procedure there is at least one noteworthy instance where taxpayer intent was listed as one of the main good cause factors for purposes of requesting extensions of time for making elections or applications for relief. See prior Treas. Reg. § 1.9100-1 and Rev. Proc. 79-63, 1979-2 C.B. 578.

42. Treas. Reg. § 1.882-4(a)(3)(ii).

43. See T.D. 9043, 68 FR 11314 (March 7, 2003).

44. Taxpayers must typically demonstrate "reasonable cause" to avail of clemency mandated by the Code. On the other hand, they must often demonstrate "good cause" to avail of clemency not mandated by the Code. Good cause requires an extraordinary showing of reasonable cause.

45. See T.D. 8322, 55 FR 50830 (December 11, 1990).

46. Preamble, T.D. 8981, 67 FR 4173-4177 (January 29, 2002).

47. *Ibid*.

48. See *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L. Ed. 917 (1938); *Little v. Commissioner*, 106 F.3d. 1445 (9th Cir. 1997); *Gorra v. Commissioner*, 106 T.C.M. (CCH) 523, T.C. Memo. 2013-254 (November 12, 2013).

49. IRM, pt. 1.2.20.1.1(2).

50. IRM, pt. 1.2.20.1.1(1).

51. IRM, pt. 1.2.20.1.1(3)(b).

52. IRM, pt. 1.2.20.1.1(3)(a).

53. *Ibid*.

54. IRM, pt. 1.2.20.1.1(7).

55. LB&I-04-0218-007.

56. IRM, pt. 20.1.1.3.2.2(d).

57. *Ibid*.

58. IRM, pt. 20.1.1.3.2.2.1.

59. IRM, pt. 20.1.1.3.2.2.2.

60. IRM, pt. 20.1.1.3.2.2.3.

61. Treas. Reg. § 1.882-4(a)(3)(ii).