UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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December 08, 2022

Jose Angel Casal
Holland & Knight, LLP
701 BRICKELL AVE STE 3300
MIAMI, FL 33131

Andrea Darling de Cortes
Holland & Knight, LLP
100 N TAMPA ST STE 4100
TAMPA, FL 33602

Nicole M. Elliott
Holland & Knight, LLP
800 17TH ST NW STE 1100
WASHINGTON, DC 20006

William Morris Sharp
Holland & Knight, LLP
100 N TAMPA ST STE 4100
TAMPA, FL 33602

Daniel Ira Small
Holland & Knight, LLP
701 BRICKELL AVE STE 3300
MIAMI, FL 33131

Chad M. Vanderhoef
Holland & Knight, LLP
100 N TAMPA ST STE 4100
TAMPA, FL 33602

Appeal Number: 22-14058-CC
Case Style: USA v. Isac Schwarzbaum
District Court Docket No: 9:18-cv-81147-BB

Please use the appeal number for all filings in this court.

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Briefing
Pursuant to 11th Cir. R. 31-1, the appellant's brief is due on or before January 11, 2023. The appendix is due 7 days after the appellant's brief is filed. An incarcerated pro se party is not required to file an appendix.

The appellee's brief is due within 30 days after the service of the last appellant's brief. The appellant's reply brief, if any, is due within 21 days after the service of the last appellee's brief. This is the only notice you will receive regarding the due date for briefs and appendices.

Please see FRAP 32(a) and the corresponding circuit rules for information on the form of briefs and FRAP 32(b) and 11th Cir. Rules 30-1 and 30-2 for information on the form of appendices.

(In cross-appeals pursuant to Fed.R.App.P. 28.1(b), the party who first files a notice of appeal is the appellant unless the parties otherwise agree.)

Certificate of Interested Persons and Corporate Disclosure Statement ("CIP")
Every motion, petition, brief, answer, response, and reply must contain a CIP. See FRAP 26.1; 11th Cir. R. 26.1-1. In addition:

- Appellants/Petitioners must file a CIP within 14 days after this letter's date.
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The failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), no action taken on deficient documents, or other sanctions on counsel, the party, or both. See 11th Cir. R. 26.1-5(c).

Civil Appeal Statement
Appellants and Cross-Appellants must file a Civil Appeal Statement, which is available on the Court's website, within 14 days after this letter's date. See 11th Cir. R. 33-1(a).

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This appeal and all related matters will be considered for mediation by the Kinnard Mediation Center. The mediation services are free, and the mediation process is confidential. You may confidentially request mediation by calling the Kinnard Mediation Center at 404-335-6260 (Atlanta) or 305-714-1900 (Miami). See 11th Cir. R. 33-1.

Attorney Admissions
Attorneys who wish to participate in this appeal must be properly admitted either to the bar of this court or for this particular proceeding, See 11th Cir. R. 46-1; 46-3; 46-4. In addition, all attorneys (except court-appointed attorneys) who wish to participate in this appeal must file an appearance form within fourteen (14) days after this letter's date. The Application for Admission to the Bar and Appearance of Counsel Form are available on the Court's website. **The clerk generally may not process filings from an attorney until that attorney files an appearance form.** See 11th Cir. R. 46-6(b).

Attorneys must file briefs electronically using the ECF system. Use of ECF does not modify the requirements of the circuit rules that counsel must also provide four (4) paper copies of a brief to the court, nor does it modify the requirements of the circuit rules for the filing of appendices in a particular case.

Obligation to Notify Court of Change of Addresses
Each pro se party and attorney has a continuing obligation to notify this court of any changes to the party's or attorney's addresses during the pendency of the case in which the party or attorney is participating. See 11th Cir. R. 25-7.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis/sj, CC
Phone #: 404-335-6130

DKT-7CIV Civil Early Briefing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 9:18–CV–81147–BLOOM–REINHART

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISAC SCHWARZBAUM,

Defendant.

NOTICE OF APPEAL

Notice is given that defendant Isac Schwarzbaum hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Final Judgment after Remand entered in this action on November 1, 2022 (Doc. 162), and from the orders subsumed therein, including the Order on Motion to Retain Jurisdiction (Doc. 146).

HOLLAND & KNIGHT LLP

/s/ *Chad M. Vanderhoef*
CHAD M. VANDERHOEF
Florida Bar No. 109595
100 North Tampa Street, Suite 4100
Tampa, FL 33602
Telephone (813) 227-6388
Facsimile (813) 229-0134
Chad.Vanderhoef@hklaw.com

JOSE A. CASAL
Florida Bar No. 767522
701 Brickell Avenue, Suite 3300
Miami, FL 33131
Telephone (305) 789-7713
Facsimile (305) 789-7799
Jose.Casal@hklaw.com

NICOLE M. ELLIOTT
Admitted Pro Hac Vice
800 17th Street NW, Suite 1100
Washington, DC 20006
Telephone (202) 469-5144
Facsimile (202) 955-5564
Nicole.Elliott@hklaw.com

WILLIAM M. SHARP, SR.
Florida Bar No. 341452
ANDREA DARLING de CORTES
Admitted Pro Hac Vice
100 North Tampa Street, Suite 4100
Tampa, FL 33602
Telephone (813) 227-6387
Facsimile (813) 229-0134
William.Sharp@hklaw.com
Andrea.Cortes@hklaw.com

DANIEL I. SMALL
Florida Bar. No. 42579
701 Brickell Avenue, Suite 3300
Miami, FL 33131
Telephone (305) 789-7788
Facsimile (305) 789-7799
Dan.Small@hklaw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 2022, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record identified via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Chad M. Vanderhoef
Chad M. Vanderhoef

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-81147-BLOOM/Reinhart

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISAC SCHWARZBAUM,

Defendant.
_____/

ORDER ON MOTION TO RETAIN JURISDICTION

THIS CAUSE is before the Court upon Plaintiff United States of America's ("Government" or "Plaintiff") Motion to Retain Jurisdiction, ECF No. [136] ("Motion"). Defendant Isac Schwarzbaum ("Schwarzbaum" or "Defendant") filed a Response, ECF No. [141], to which the Government filed a Reply, ECF No. [144]. The Court has carefully considered the Motion, Defendant's Response and the Government's Reply, the record in this case, the applicable law, and is otherwise fully advised. For the reasons that follow, the Motion is granted.

The Court assumes the parties' familiarity with the facts in this case but provides a brief overview of recent procedural developments pertinent to the issues raised in the Motion.

Following trial, the Court determined that Schwarzbaum's FBAR violation for the year 2006 was non-willful, *see* ECF No. [92] at 18-20, but that his FBAR violations for the years 2007 through 2009 were willful, *see id.* at 20-22. However, the Court also found the IRS's method for calculating the applicable penalty amount was improper under 31 U.S.C. section 5321. *See id.* at 22-26. The Court therefore requested that the parties submit additional briefing regarding the

penalty amount, and ultimately entered an Amended Judgment based upon the recalculated amounts. ECF No. [105].

On appeal, the United States Court of Appeals for the Eleventh Circuit determined that this Court applied the correct legal standard in analyzing whether Schwarzbaum's FBAR violations were willful and did not disturb the Court's determinations regarding willfulness for the 2007, 2008, and 2009 tax years. *United States v. Schwarzbaum*, 24 F.4th 1355, 1358 (11th Cir. 2022). The Eleventh Circuit also held that this Court correctly found that the IRS's original penalties were not in accordance with law, but concluded that rather than recalculate the penalties itself, the Court should have remanded to the IRS to fix its mistake. *Id*. at 1365. As a result, the Eleventh Circuit vacated the Amended Judgment with instructions for this Court to remand to the IRS for a recalculation of Schwarzbaum's penalties. The Eleventh Circuit's mandate issued on March 21, 2022. ECF No. [139].

In the Motion, the Government requests that this Court retain jurisdiction during remand to the IRS so that the Court may enter a final judgment as to the amount of the recalculated penalties once the IRS completes the penalty recalculation. In response, Schwarzbaum argues that the Court cannot retain jurisdiction, that the Government's request is simply an attempt to avoid application of the statute of limitations, and that the Court must carry out the Eleventh Circuit's mandate, which does not state that this Court retains jurisdiction during the remand.

Upon review, the Court determines that it retains jurisdiction, notwithstanding remand to the IRS, because the remand does not divest the Court of jurisdiction. The Court finds two Eleventh Circuit cases to be particularly instructive —*Taylor v. Heckler*, 778 F.2d 674 (11th Cir. 1985) and *Druid Hills Civic Ass'n, Inc. v. Fed. Highway Admin.*, 833 F.2d 1545 (11th Cir. 1987). In *Taylor*, the issue before the court was whether the district court's remand in a social security case was a

final judgment within the meaning of the Equal Access to Justice Act ("EAJA") for purposes of awarding attorneys' fees. In concluding that it was not, the court observed that "[t]his circuit treats *all* remand orders to the Secretary as interlocutory orders, not as final judgments." 778 F.2d at 677 (emphasis in original). The court further held that "a claimant who has obtained a remand order from the district court cannot apply for a fee under the [EAJA] until the administrative process has come to an end and the district court has entered a final judgment." *Id*. at 677-78. While *Taylor* did not arise in the context of FBAR penalty assessments, the same logic applies in this case. If all remand orders are treated as interlocutory, and not final judgments, then the Court does not lose jurisdiction to enter a final judgment by simply remanding for a recalculation of penalties.

Druid Hills is further instructive. In *Druid Hills*, the government authorized funding for the construction of a 2.4 mile section of highway in Atlanta. 833 F.2d at 1547. Residents of the affected area and several civic associations challenged the project in the district court. *Id*. The district court dismissed, finding that the government had made adequate findings in its environmental impact statement ("EIS"). *Id*. On appeal, the Eleventh Circuit affirmed in part and reversed in part, and it remanded the case to the district court for it to remand to the Secretary of Transportation to make adequate findings regarding applicable impact requirements. *Id*. On remand from the Eleventh Circuit, the district court remanded the case to the Secretary. *Id*. at 1548. Following remand to the Secretary, the government made additional findings, concluding that the project satisfied applicable requirements, and then filed a motion for summary judgment in the district court based upon an administrative record developed entirely upon remand. *Id*. On appeal for the second time, the residents and civic associations argued in pertinent part that when the district court adopted the remand order of the Eleventh Circuit, that judgment constituted a final judgment that effectively terminated the litigation and the district court's jurisdiction. *Id*. Relying

on its decision in *Taylor*, the Eleventh Circuit noted first that "[h]ad the district court originally determined the Secretary's . . . findings inadequate and remanded the case to the Secretary, clearly, the district court would have retained jurisdiction of the case until the proceedings on remand were concluded." *Id.* The Eleventh Circuit then noted that

> [t]he only distinction between *Taylor* and this case is that the district court remanded the case to the Secretary of Transportation because the Eleventh Circuit ordered it to do so. This is a distinction without a difference. Hence, the district court retained jurisdiction.

Id. at 1549. Thus, applying the reasoning in *Taylor* and *Druid Hills,* remand to the IRS in this case does not divest the Court of jurisdiction. Concomitantly, the Eleventh Circuit's mandate did not have to specify that this Court retains jurisdiction during the remand.

While the Court appreciates Schwarzbaum's position on the statute of limitations, the Eleventh Circuit rejected his argument that remand was unnecessary, and that judgment should be entered in his favor instead, because the IRS would be time-barred on remand from recalculating the penalties. Specifically, the Eleventh Circuit stated that Schwarzbaum "cites no authority standing for the proposition that, on remand from judicial review under the APA, an agency could be time-barred from re-evaluating its original actions." 24 F.4th at 1367. Although Schwarzbaum now appears to contend that the Government should be time-barred from obtaining a judgment on the recalculated penalties, he cites no authority to support that proposition. The Eleventh Circuit observed further that "[t]here is no dispute that the IRS timely assessed Schwarzbaum's original FBAR penalties." *Id*. Notably, Schwarzbaum does not dispute the original timeliness now either. Finally, with respect to the remand ordered, the Eleventh Circuit specified that "[t]he remand we now direct is not for the IRS to issue new penalties, but for it to *recalculate the penalties is has already assessed*." *Id*. (emphasis added). As such, the Court finds no basis for the argument that a time-bar would apply following the penalty recalculation.

The Court certainly recognizes that it must carry out the Eleventh Circuit's mandate. *See Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) ("When an appellate court issues a specific mandate it is not subject to interpretation; the district court has an obligation to carry out the order."). But for the reasons already discussed, the Court disagrees that the Eleventh Circuit needed to express that this Court retains jurisdiction during the remand. In its mandate, the Eleventh Circuit specifically stated that "[w]e **VACATE** the district court's amended judgment and **REMAND** with instructions to remand to the IRS for recalculation of Schwarzbaum's FBAR penalties." ECF No. [139] at 26 (emphasis in original). Thus, in remanding to the IRS to recalculate Schwarzbaum's penalties, the Court is carrying out the Eleventh Circuit's order. In keeping with Eleventh Circuit case law, the remand for recalculation does not divest this Court of jurisdiction.

Accordingly, it is **ORDERED AND ADJUDGED** that the Motion, **ECF No. [136]**, is **GRANTED**. Following recalculation of the penalties, the Government may seek the entry of a second amended judgment. The Court will enter remand this case to the IRS for the recalculation by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, on May 16, 2022.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-81147-BLOOM/Reinhart

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISAC SCHWARZBAUM,

Defendant.
_____/

ORDER ON MOTION FOR RECONSIDERATION OF THE ORDER RETAINING JURISDICTION

THIS CAUSE is before the Court upon Defendant Isac Schwarzbaum's ("Defendant" or "Schwarzbaum") Motion for Reconsideration of the Order Retaining Jurisdiction, ECF No. [149] ("Motion"). Plaintiff the United States of America ("Plaintiff" or "Government") filed a Response, ECF No. [150], to which Schwarzbaum filed a Reply, ECF No. [151]. The Court has carefully considered the Motion, the Response, the Reply, the record in this case, the applicable law, and is otherwise fully advised. For the reasons that follow, the Motion is denied.

I. BACKGROUND

The Court assumes the parties' familiarity with the facts in this case. For purposes of the Motion, the Court recounts the relevant procedural background.

Following a five-day bench trial, the Court determined that Schwarzbaum's FBAR violation for the year 2006 was non-willful, *see* ECF No. [92] at 18-20, but that the Government properly assessed penalties for Schwarzbaum's willful FBAR violations for the years 2007 through 2009, *see id.* at 20-22. However, the Court determined that the IRS's method for calculating the applicable penalty amount was improper under 31 U.S.C. § 5321. *See id.* at 22-26. The Court

thereafter requested that the parties submit additional briefing regarding the penalty amount, and ultimately entered an Amended Judgment based upon the recalculated amounts. ECF No. [105]. Schwarzbaum filed a notice of appeal with respect to the Amended Judgment. *See* ECF No. [106].

On appeal, the United States Court of Appeals for the Eleventh Circuit determined that this Court applied the correct legal standard in analyzing whether Schwarzbaum's FBAR violations were willful and did not disturb the Court's determinations regarding willfulness for the 2007, 2008, and 2009 tax years. *United States v. Schwarzbaum*, 24 F.4th 1355, 1358 (11th Cir. 2022). The Eleventh Circuit also held that this Court correctly found that the IRS's calculation of the penalties was not in accordance with law and concluded that, rather than recalculate the penalties itself following briefing from the parties, the Court should have remanded to the IRS to fix its mistake. *Id*. at 1365. As a result, the Eleventh Circuit vacated the Amended Judgment with instructions for this Court to remand to the IRS for a recalculation of Schwarzbaum's penalties. *Id*. at 1367. The Eleventh Circuit's mandate issued on March 21, 2022. ECF No. [139].

The Government filed a motion requesting that this Court retain jurisdiction during remand to the IRS so that the Court could enter a final judgment as to the amount of the recalculated penalties once the IRS completed the penalty recalculation. ECF No. [136]. Schwarzbaum opposed the request, arguing that the Court could not retain jurisdiction, characterizing the Government's request as an attempt to avoid application of the statute of limitations, and pointing out that the Eleventh Circuit's mandate does not state that this Court retains jurisdiction during the remand. *See* ECF No. [141]. Upon review, the Court concluded that the remand did not divest the Court of jurisdiction. *See* ECF No. [146] ("Order") at 2-3. As such, the Court granted the Government's request. *Id*. at 4. The Court then remanded the case to the IRS for recalculation of Schwarzbaum's FBAR penalties in accordance with the Eleventh Circuit's mandate. ECF No. [147].

In the Motion, Schwarzbaum requests that the Court reconsider the Order pursuant to Rule 60. The Government opposes Schwarzbaum's request, arguing that reconsideration is improper, Schwarzbaum raises arguments previously unasserted or already rejected, and Schwarzbaum is simply disagreeing with the Eleventh Circuit's mandate.

II. LEGAL STANDARD

Pursuant to Rule 60, the Court may grant relief from a judgment or order upon several bases, including "mistake, inadvertence, surprise, or excusable neglect; . . . or any other reason that justifies relief." *See* Fed. R. Civ. P. 60(b)(1), (6). "By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'" *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir.1981)[1] (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 77 (5th Cir.1970)). Rule 60(b)(1) additionally "'encompasses mistakes in the application of the law,' including judicial mistakes." *United States v. One Million Four Hundred Forty-Nine Thousand Four Hundred Seventy-Three Dollars & Thirty-Two Cents ($1,449,473.32) in U.S. Currency*, 152 F. App'x 911, 912 (11th Cir. 2005) (quoting *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838, 840 (11th Cir. 1982)). Whether to grant relief pursuant to Rule 60(b) is ultimately a matter of discretion. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014) (citing *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (internal citation and quotations omitted)).

Furthermore, a motion for reconsideration is "an extraordinary remedy to be employed sparingly." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1370 (S.D. Fla. 2002). "The burden is upon the movant to establish the extraordinary circumstances supporting

[1] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent former Fifth Circuit decisions handed down prior to September 30, 1981.

reconsideration." *Saint Croix Club of Naples, Inc. v. QBE Ins. Corp.*, No. 2:07-cv-00468-JLQ, 2009 WL 10670066, at *1 (M.D. Fla. June 15, 2009) (citing *Taylor Woodrow Constr. Corp. v. Sarasota/Manatee Airport Auth.*, 814 F. Supp. 1072, 1073 (M.D. Fla. 1993)).

> A motion for reconsideration must do two things. First, it must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice.

Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294, 295 (M.D. Fla. 1993) (citations omitted).

Because court opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure," a motion for reconsideration must clearly "set forth facts or law of a strongly convincing nature to demonstrate to the Court the reason to reverse its prior decision." *Am. Ass'n of People With Disabilities v. Hood*, 278 F. Supp. 2d 1337, 1339, 1340 (M.D. Fla. 2003) (citations omitted). As such, a court will not reconsider its prior ruling without a showing of "clear and obvious error where the 'interests of justice' demand correction." *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, No. 6:11-cv-1637-Orl-31, 2013 WL 425827, at *1 (M.D. Fla. Feb. 4, 2013) (quoting *Am. Home Assurance Co. v. Glenn Estess & Assoc.*, 763 F.2d 1237, 1239 (11th Cir. 1985)). "When issues have been carefully considered and decisions rendered, the only reason which should commend reconsideration of that decision is a change in the factual or legal underpinning upon which the decision was based." *Taylor Woodrow Constr. Corp.*, 814 F. Supp. at 1072-73; *see also Longcrier v. HL-A Co.*, 595 F. Supp. 2d 1218, 1247 n.2 (S.D. Ala. 2008) (noting that reconsideration motions are to be used sparingly, and stating, "imagine how a district court's workload would multiply if it was obliged to rule twice on the same arguments by the same party upon request"). A motion for reconsideration "is not an opportunity for the moving

party . . . to instruct the court on how the court 'could have done it better' the first time." *Hood v. Perdue*, 300 F. App'x 699, 700 (11th Cir. 2008) (citation omitted).

Thus, a motion to reconsider is "appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Kapila v. Grant Thornton, LLP*, No. 14-61194-CIV, 2017 WL 3638199, at *1 (S.D. Fla. Aug. 23, 2017) (quoting *Z.K. Marine Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (internal quotation marks omitted). "Such problems rarely arise and the motion to reconsider should be equally rare." *Burger King Corp.*, 181 F. Supp. 2d at 1369. Ultimately, reconsideration is a decision that is "left 'to the sound discretion' of the reviewing judge." *Arch Specialty Ins. Co. v. BP Inv. Partners, LLC*, No. 6:18-cv-1149-Orl-78DCI, 2020 WL 5534280, at *2 (M.D. Fla. Apr. 1, 2020) (quoting *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir. 1993)).

Through this lens, the Court considers the Motion.

III. DISCUSSION

Schwarzbaum urges the Court to reconsider the Order, arguing that retaining jurisdiction amounts to a remand without vacatur, the statute of limitations on FBAR penalty assessments has expired, and treating remand as interlocutory violates the Eleventh Circuit's mandate in this case. But upon review, other than disagreeing with the Court's interpretation of the applicable case law and the Order, Schwarzbaum has pointed to no legal or factual error that would warrant the extraordinary relief of reconsideration. "[W]hen there is mere disagreement with a prior order, reconsideration is a waste of judicial time and resources and should not be granted." *Roggio v. United States*, No. 11-22847-CIV, 2013 WL 11320226, at *1 (S.D. Fla. July 30, 2013) (internal citation and quotation marks omitted); *see also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327,

1344 (11th Cir. 2010) (recognizing no basis for reconsideration where motion did nothing but ask the court to reexamine unfavorable ruling, absent a manifest error of law or fact). "It is an improper use of the motion to reconsider to ask the Court to rethink what the Court already thought through—rightly or wrongly." *Z.K. Marine Inc.*, 808 F. Supp. at 1563 (citation and alterations omitted).

Indeed, Schwarzbaum's Motion is premised upon a new, and incorrect, position regarding the effect of the Eleventh Circuit's opinion and resulting mandate, which the Court addresses. As the Court notes above, the Eleventh Circuit determined that this Court applied the correct legal standard in analyzing whether Schwarzbaum's FBAR violations were willful and did not disturb the Court's determinations regarding willfulness. *Schwarzbaum*, 24 F.4th at 1358. The Eleventh Circuit also held that this Court correctly found that the amount of the penalties was not correctly calculated but concluded that the Court should not have recalculated them itself. *Id*. at 1365. The Eleventh Circuit therefore directed this Court to remand to the IRS for recalculation of the penalties. *Id*.

In the Motion, Schwarzbaum now draws a distinction between the *imposition* of a penalty and the *assessment* of a penalty, arguing that the two concepts are different and not interchangeable. Schwarzbaum argues that following the Eleventh Circuit's vacating the Amended Judgment, "no valid assessment exists in connection with Mr. Schwarzbaum's FBAR reporting errors[,]" contending further that "[b]ecause the assessment includes the calculation of the FBAR penalty, there can be no assessment absent a calculation." ECF No. [149] at 8. However, as the Government correctly points out, the Eleventh Circuit vacated the Amended Judgment, but did not vacate the assessment in this case.

In its opinion, the Eleventh Circuit made it clear that it was *not* vacating the assessment, as Schwarzbaum now argues—"[t]he remand we now direct is not for the IRS to issue *new* penalties, but for it to recalculate the penalties it has *already assessed*." *Id*. (emphasis added). As the Court noted in its Order, the Eleventh Circuit specifically rejected Schwarzbaum's argument regarding the statute of limitations and stated that "he cites no authority standing for the proposition that, on remand from judicial review under the APA, an agency would be time-barred from re-evaluating its original actions." *Schwarzbaum*, 24 F.4th at 1367.

IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED**, that the Motion, **ECF No. [149]**, is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, on October 25, 2022.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-81147-BLOOM/Reinhart

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISAC SCHWARZBAUM,

Defendant.
_____/

ORDER ON MOTION FOR ENTRY OF A SECOND AMENDED JUDGMENT

THIS CAUSE is before the Court upon the United States of America's ("Plaintiff" or "Government") Motion for Entry of a Second Amended Judgment, ECF No. [152] ("Motion"). Defendant Isa Schwarzbaum ("Defendant" or "Schwarzbaum") filed a Response, ECF No. [155], to which the Government filed a Reply, ECF No. [158]. The Court has carefully considered the Motion, the Response, the Reply, the record in this case, the applicable law, and is otherwise fully advised. For the reasons that follow, the Motion is granted.

In the Motion, the Government requests that the Court enter a second amended judgment, following the IRS's recalculation of the FBAR penalty amounts in this case. In response, Schwarzbaum renews many of the arguments the Court already rejected with respect to his motion for reconsideration, *see* ECF No. [159], and contends that the penalty amounts again violate 31 U.S.C § 5321(a)(5) and the Court's previous Order Assessing Penalties, ECF No. [98] ("Order"). Specifically, Schwarzbaum argues that the Court previously "firmly" rejected the Government's argument that it should be able to use taxpayer-prepared documents to determine the proper account balances. *See* ECF No. [155] at 3. However, Schwarzbaum misinterprets the Court's

Order. In its Findings of Fact and Conclusions of Law, the Court determined that the penalty amounts did not conform to the statute because the Government used the incorrect base amounts to calculate the FBAR penalties. *See* ECF No. [92] at 25.

Schwarzbaum also relies on a statement in the Court's Order, "that the USA did not obtain the account balances on the relevant date of violation does not permit the USA to substitute estimated account balances in its proposed recalculations, even if those estimates were provided by Schwarzbaum." *Id*. (quoting Order, ECF No. [98] at 8). Importantly, the Court's statement arose in the context of its own recalculation of the penalty amounts, which the Eleventh Circuit determined the Court lacked the power to do. *See United States v. Schwarzbaum*, 24 F.4th 1355, 1365 (11th Cir. 2022) ("The district court lacked the power to recalculate Schwarzbaum's FBAR penalties."). As such, Schwarzbaum's reliance upon the statement is misplaced.

Schwarzbaum's additional argument regarding the Government's lack of entitlement to interest is based upon the assertion, which the Court has already rejected, that the Eleventh Circuit vacated the assessments in this case. *See* ECF No. [159] at 6-7. As the Court previously pointed out, the Eleventh Circuit vacated the Amended Judgment based upon the Court's improper calculation of penalties and *not* the Court's finding of willfulness or the proper assessment of FBAR penalties. The Eleventh Circuit directed the Court to remand this case to the IRS for a *recalculation* of the penalties but left intact the Court's findings of willfulness. *Id*. at 1367. The Court remanded this case to the IRS on May 16, 2022, *see* ECF No. [147], and the IRS has now recalculated the applicable penalties. Thus, the Government is entitled to the entry of the second amended judgment.

Accordingly, it is **ORDERED AND ADJUDGED**, that the Motion, **ECF No. [152]**, is **GRANTED**. The Government shall file an updated proposed Second Amended Judgment,

updating the amounts accrued for late-payment penalties and prejudgment interest, **no later than October 31, 2022**, and the Court will enter the Second Amended Judgment by separate order.

DONE AND ORDERED in Chambers at Miami, Florida, on October 27, 2022.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-81147-BLOOM/Reinhart

UNITED STATES OF AMERICA,

Plaintiff,

v.

ISAC SCHWARZBAUM,

Defendant.
_____/

FINAL JUDGMENT AFTER REMAND

THIS CAUSE is before the Court following the entry of its Order on the United States of America's Motion for Entry of a Second Amended Judgment, ECF No. [160] ("Order"). Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Judgment is entered in favor of Plaintiff, the United States of America as to Counts 2, 3, and 4 of the Complaint, ECF No. [1]. Judgment is entered in favor of Defendant, Isac Schwarzbaum as to Count 1 of the Complaint.
2. Defendant shall pay to the United States of America penalties of **$12,555,813.00**, for willful violations of the FBAR reporting requirements for tax years 2007, 2008, and 2009 as follows:
    a. $4,185,271.00 as an assessed willful FBAR penalty for the year 2007;
    b. $4,185,271.00 as an assessed willful FBAR penalty for the year 2008;
    c. $4,185,271.00 as an assessed willful FBAR penalty for the year 2009.
3. Defendant is liable to the United States of America for accrued late-payment penalties on the FBAR penalties for tax years 2007 through 2009 as provided by 31 U.S.C.

§ 3717(e)(2) in a total amount of **$4,606,204.18** as of November 1, 2022. Late payment penalties shall continue to accrue pursuant to 31 U.S.C. § 3717(e)(2) and 31 C.F.R. §§ 5.5(a), 901.9 until the principal amount of the penalty is paid.

4. Defendant is liable to the United States of America for accrued prejudgment interest on the FBAR penalties for tax years 2007 through 2009 as provided by 31 U.S.C. § 3717(a)(1) in the total amount of **$767,700.70** as of November 1, 2022.
5. Post-judgment interest shall accrue on this Judgment pursuant to 28 U.S.C. § 1961.
6. The Court reserves jurisdiction to award attorneys' fees and costs.
7. This case shall remain **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, on November 1, 2022.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record