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MARCH 14, 2023

U.S. Supreme Court rules against the IRS on critical FBAR issue

The U.S. Supreme Court recently weighed in on an issue regarding a provision of the Bank Secrecy Act (BSA) that has split two federal courts of appeal. Its 5-4 ruling in *Bittner v. U.S.* is welcome news for U.S. residents who "non-willfully" violate the law's requirements for the reporting of certain foreign bank and financial accounts on what's generally known as an FBAR. The full name of an FBAR is the Financial Crimes Enforcement Network (FinCEN) Form 114, *Report of Foreign Bank and Financial Accounts*.

Reporting requirement

The BSA requires "U.S. persons" to annually file an FBAR to report all financial interests in, or signature or other authority over, financial accounts located outside the country (with certain exceptions) if the aggregate value of the accounts exceeds $10,000 at any time during the calendar year. The term "U.S. person" includes a citizen, resident, corporation, partnership, limited liability company, trust or estate.

According to related regulations, individuals with fewer than 25 accounts in a given year must provide details about each. Filers with 25 or more accounts aren't required to list each or provide specific details; they need only provide the number of accounts and certain other basic information. FBARs generally are due on April 15, with an automatic extension to Oct. 15 if the April deadline isn't met.

Under the BSA, a willful violation of the requirement is subject to a civil penalty up to the greater of $100,000 or 50% of the balance of the account at issue. A provision prescribes a penalty of up to $10,000 for a non-willful violation of the filing requirement (with an exception for reasonable cause). Criminal penalties also may be imposed.

Violations at issue

The case before the Supreme Court was brought by Alexandru Bittner, a dual citizen of Romania and the United States. He testified that he learned of the reporting obligations after returning to the United States in 2011. Bittner subsequently submitted the required annual reports for 2007 through 2011.

The IRS deemed his FBARs deficient because they didn't include all of the relevant accounts. Bittner then filed corrected reports with information for each of his accounts. Although the IRS didn't contest the accuracy of the new filings or find that his previous errors were willful, it determined the penalty was $2.72 million — $10,000 for each of 272 accounts reported in five FBARs.

Bittner went to court to contest the penalty, arguing that it applies on a per-report basis, not per account — so he owed only $50,000 in penalties for his non-willful violations. The district court agreed, but the Fifth Circuit Court of Appeals reversed the ruling, siding with the IRS. By contrast, the Ninth Circuit, in *U.S. v. Boyd*, found in 2021 that the BSA authorized "only one non-willful penalty when an untimely, but accurate, FBAR is filed, no matter the number of accounts." That meant it was up to the Supreme Court to settle the issue.

High court's ruling

The Supreme Court agreed with Bittner's interpretation of the BSA's penalty provision for FBAR violations. It cited multiple sources that supported this conclusion.

For example, the Court noted that Congress had explicitly authorized per-account penalties for some willful violations. When Congress includes particular language in one section of a statute but omits that language from another, it explained, the Court normally understands the difference in language as conveying a difference in meaning. In other words, Congress obviously knew how to tie penalties to account-level information if that was its intent.

The Court also highlighted various public guidance from the IRS, including instructions for earlier versions of the FBAR and an IRS fact sheet. These references, the Court said, suggested to the public that the failure to file a report represents a single violation that exposes a non-willful violator to a single $10,000 penalty. (Note: The Supreme Court emphasized that such guidance wasn't "controlling" or decisive, but only informed its analysis.)

Implications for taxpayers

The Supreme Court's ruling significantly reduces taxpayers' potential financial exposure for non-willful violations of the FBAR reporting requirements. The reports typically list multiple accounts, meaning the IRS's interpretation could have led to tens of thousands of dollars in penalties for a single violation.

As the Court also pointed out, an individual with only three accounts who made non-willful errors when providing account-specific details would face a potential penalty of $30,000, regardless of how slight the errors or the value of the accounts. But a person with 300 bank accounts would shoulder far less risk because he or she is required to disclose only the correct number of accounts, with no details. Similarly, a person with a $10 million balance in a single account who fails to report the account would be subject to a penalty of $10,000 — while someone who fails to report a dozen accounts with an aggregate balance of $10,001 would be subject to a penalty of $120,000.

It's important to note that the Supreme Court's ruling applies only to non-willful failures to file. The penalties for violations that are knowing, intentional, reckless or due to willful blindness aren't subject to the per-report limit and may be assessed on a per-account basis, with costly ramifications.

Questions remain

The Supreme Court's ruling in *Bittner* should bring relief to taxpayers who've non-willfully violated the BSA's filing requirement, but it didn't clear all uncertainty around FBAR penalties. For example, the Court didn't address the *mens rea* (level of intent) on the part of the taxpayer that the IRS must establish to impose a non-willful penalty or whether penalties for violations of the BSA's recordkeeping requirements are determined on a per-account basis. We can help you avoid these thorny questions by ensuring you properly comply with your FBAR obligations. Contact us for more information.
