

U.S. Supreme Court Rules Against the IRS on Critical FBAR Issue

PROFESSIONALS

Neel Modha

PRACTICE AREAS

International Tax

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On Feb. 28, 2023, the U.S. Supreme Court in *United States v. Bittner* (“Bittner”) held, via a 5-4 majority decision, that the \$10,000 monetary penalty for a nonwillful failure to file FinCEN Forms 114 (Report of Foreign Bank and Financial Accounts) (“FBAR”) is computed on a per report, not per account, basis. This is a victory for FBAR filers since it clarifies that penalty exposure for nonwillful failure to file violations is computed differently than willful failure to file violations. Further, this resolves a dispute between the Department of Treasury (“government”) and FBAR filers in different circuit courts across the nation as to the scope of penalties and how much may be assessed by the Department of Treasury under law for nonwillful failure to file violations. The decision adds much needed clarification and mitigates what could otherwise be a patchwork of different penalty computation outcomes for FBAR filers with nonwillful failure to file penalties depending on which state they live in.

FBAR Background - Annual Reporting Requirement and Penalties

U.S. persons (including citizens, residents, corporations, partnerships, LLCs, trusts and estates) are required to file FBARs annually pursuant to the Bank Secrecy Act of 1970 (“BSA”), P.L. 91-508.

U.S. persons must report on an FBAR all financial interests in, or signature authority over, financial accounts located outside the United States (with certain exceptions) if the aggregate value of those financial accounts exceeds \$10,000 at any time during the calendar year.

The FBAR reports are designed to help the U.S. federal government trace funds that may be used for illicit purposes and identify unreported income that may be subject to taxation. Failure to comply with the annual filing obligation may result in penalties. The BSA prescribes the following penalties:

- Nonwillful violation - a civil penalty of up to \$10,000 for a nonwillful violation of any provision of the FBAR filing requirement unless due to reasonable

cause.

- Willful violation - a civil penalty up to the greater of \$100,000 or 50% of the balance of the account at issue.
- Criminal penalties also may be imposed.

Facts and Taxpayer's Violations in the *Bittner* case

Alexandru Bittner is a dual citizen of the United States and Romania. Bittner learned of his FBAR filing obligations after he returned to the U.S. from Romania in 2011, and he proceeded to submit FBARs for calendar years 2007 through 2011. The government deemed the late filed FBARs deficient because he did not report all foreign financial accounts as to which he had signature authority or financial interest. Bittner subsequently filed corrected FBARs – 61 accounts in 2007, 51 in 2008, 53 in 2009 and 2010, and 54 in 2011 – i.e., 272 accounts reported in total over five years.

The government claimed that Bittner's previous errors were not willful. The government determined that the five FBARs contained 272 accounts and computed nonwillful late filing penalties due at \$2.72M.

Bittner challenged the penalty arguing that the maximum penalty is \$10,000 per report, not \$10,000 per account.

US Supreme Court Ruling and Reasoning

In a 5-4 majority decision, the U.S. Supreme Court in *Bittner* ruled that the BSA's \$10,000 maximum penalty for a nonwillful failure to file applies on a per-report, not per-account, basis.

As a result, the taxpayer in *Bittner* should be assessed a \$50,000 penalty, not \$2.72M, for failure to file five years of FBARs (272 total accounts).

The majority decision pointed to the following as critical to their ruling that nonwillful penalties for FBAR purposes shall be computed on a per-report, and not per-account, basis:

1. ***Exclusio unius est exclusion alterius*** – this is a traditional rule of statutory interpretation. When Congress includes particular language in one portion of a status and omits it from another, the court interprets this to be purposeful omission.
 1. The BSA, in 31 USC sections 5314 and 5321, provides that the Secretary of the Treasury shall require persons to “keep records, file reports, or keep records and file reports”. The Supreme Court determined that the BSA in section 5314 does not speak of accounts or their number, but rather the legal duty to file reports, and determined that a taxpayer's violation of section 5314 reporting obligation is “binary”. And the BSA authorizes a \$10,000 civil penalty per section 5321 for “any violation” of section 5314.

2. Furthermore and specifically in contrast to the above, section 5321 specifically authorizes willful penalties of the maximum of \$100,000 or 50% of “the balance in the account.”
2. The government has “**repeatedly issued guidance to the public**” – via multiple warnings, fact sheets, and instructions – **that a nonwillful violation to file an FBAR is a single violation exposing the taxpayer to one \$10,000 penalty.**
3. **Legislative history** supports that the BSA in 1970 originally only included willful penalties. Congress, in 1986, authorized per-account penalties for willful violations. Then in 2004, Congress authorized penalties for nonwillful violations – The majority opinion of the Supreme Court in *Bittner* stated that “Congress could have, but did not, simply use language from its 1986 amendment to extend per-account violations for nonwillful violations.”
4. Congress declared that the BSA’s “purpose” is “to require” certain “reports” or “records” that may assist the government in various kinds of investigations. See BSA section 5311. The majority in the Supreme Court decision in *Bittner* stated, “**Absent is any indication that Congress sought to maximize penalties for every nonwillful mistake.**”
5. The BSA requires individuals with fewer than 25 accounts to provide details about each account while individuals (like *Bittner*) with 25 or more accounts do not need to list each account or provide account-specific details unless the Secretary requests more “detailed information.”
6. “**The government’s per-account penalty reading invites anomalies**—for example, subjecting willful violators to lower penalties than nonwillful violators—avoided by reading the nonwillful penalty to apply on a per-report basis.”

Conclusions for FBAR filers with nonwillful failure to file penalties

Two main conclusions may be drawn from the *Bittner* case:

1. *Victory for FBAR filers with nonwillful failure to file penalties*

Clearly, the outcome of *Bittner* is a win for FBAR filers since the U.S. Supreme Court’s ruling significantly reduces taxpayers’ potential financial exposure for nonwillful violations of the FBAR reporting requirements. It is important to note that the Supreme Court’s ruling in *Bittner* applies only to nonwillful failures to file. The penalties for violations that are knowing, intentional, reckless or due to willful blindness are not subject to the per report limit and may be assessed on a per account basis.

1. *The creation of certainty for FBAR filers with nonwillful failure to file penalties*

The U.S. Supreme Court in *Bittner* created certainty as to the monetary penalty computation for FBAR filers with nonwillful failure to file penalties. Using its discretionary authority to hear this case by granting a writ of certiorari, the U.S. Supreme Court called up the *Bittner* case for its review from the Fifth Circuit and noted its reasoning as to why it heard the case - “Because the Ninth Circuit read the law one way and the Fifth Circuit the other, [the U.S. Supreme Court] agreed to take this case.” This was

much needed because:

- - The Ninth Circuit Court of Appeals in *United States v. Boyd* ruled that penalties resulting from taxpayers' nonwillful failures to properly report should be applied on a per report, not per account, basis.
 - The Fifth Circuit Court of Appeals in *United States v. Bittner* ruled that penalties resulting from taxpayers' nonwillful failures to properly report should be applied on a per account basis.

In the absence of the U.S. Supreme Court decision in *Bittner*, nonwillful FBAR filers in the Fifth Circuit could presumably be penalized far worse than nonwillful FBAR filers in the Ninth Circuit. And such persons in states existing in other circuits would be left with a lack of clarity. With the Supreme Court ruling in *Bittner*, there should be no differences based on where FBAR filers reside, thereby creating uniformity for all U.S. persons with nonwillful FBAR failure to file penalties.