

Circuits Split Over Issuing Non-Willful FBAR Penalties Per Form or Per Account

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On November 30, 2021, in *U.S. v. Bittner*, the Fifth Circuit reversed the District Court's taxpayer-friendly decision and ruled that non-willful FBAR penalties may be assessed per account rather than per form. The ruling came as a surprise to many, especially considering that the \$10,000 "per-form cap" had been gaining momentum in various District Courts around the country—indeed, the Ninth Circuit had established the per-form cap in *U.S. v. Boyd*. Now, non-willful taxpayers in the Fifth Circuit face the harsher, per account penalty analysis, which in the *Bittner* case means the difference between the IRS's original \$2.72 million per-account penalty assessment versus the trial court's \$50,000 per-form penalty. While we wait to see if/when this new circuit split will attract the Supreme Court's attention, taxpayers outside of the Ninth Circuit are left with much uncertainty when negotiating with the IRS over non-willful FBAR penalties.

Bittner Facts

Taxpayer was born in Romania but became a naturalized U.S. citizen in the 1980's. While living in the U.S., he worked as a dishwasher and plumber—eventually earning a master plumber certificate in California. Shortly thereafter, Taxpayer returned to Romania and lived there until 2011 as a successful businessman and investor—maintaining signature authority or control over "dozens" of foreign accounts having an aggregate high balance exceeding \$10,000.

While in Romania, Taxpayer was unaware that, as a U.S. citizen, he was required to report interests in foreign accounts. Thus, Taxpayer failed to file annual FBAR forms, per the Bank Secrecy Act (BSA). In 2011, Taxpayer returned to the United States, learned of his reporting obligations, and took measures to file corrected FBARS for 2007 through 2011. The IRS assessed a \$2.72 million

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penalty. The amount was calculated using the per account analysis—\$10,000 per unreported account for each tax year from 2007 through 2011.

The United States District Court for the Eastern District of Texas found the Taxpayer liable, denied Taxpayer’s reasonable cause defense, but reduced the assessment to \$50,000 based on the per-form approach. Under this method, only each annual failure to file an FBAR incurred a maximum penalty of \$10,000.

Subsequently, the Fifth Circuit affirmed the denial of the reasonable-cause defense, reversed the District Court’s ruling with respect to the proper application of the \$10,000 penalty, and remanded the matter back to the District Court for proceedings consistent with the Fifth Circuit’s ruling.

The Fifth Circuit’s Decision and Analysis

Acknowledging that “[o]n this point, we part ways with a recent Ninth Circuit panel, which split on this issue,” the Fifth Circuit ruled that:

each failure to report a qualifying foreign account constitutes a separate reporting violation subject to penalty. The penalty therefore applies on a per-account, not a per-form, basis.

In reaching this conclusion, the Court first noted that the primary reason for enacting the BSA was to “curb the ‘serious and widespread use’ of foreign financial accounts to evade taxes.” The Court stated that per 31 U.S.C. §5321(a)(5)(A), the Secretary “may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.” However, the

Court explained that determining the proper penalty assessment depended on the interpretation of “violation” as used in 31 U.S.C. §5314, rather than a violation of a regulation prescribed under that code section. In other words, does “violation,” as used in 31 U.S.C. §5314, mean “failure to file an FBAR” or “failure to report an account”?

Unpersuaded by the District Court’s reliance on the reasoning in a case predating (by 30 years) the amendment to 31 U.S.C. §5314 which added the penalties for non-willful violations, the Fifth Circuit instead engaged in a review of the overall text, structure, history, and purpose of the statute and regulations. In its analysis, the Court indicated that 31 U.S.C. §5314 is comprised of both a substantive element (filing to disclose each account) and a procedural element (requirement that reports include information as required by the Secretary). And the regulations, stated the Court, distinguish the substantive filing/disclosing obligation from the procedural requirement to file the appropriate form.

Significantly, in the Court’s opinion, when the language of the statute and regulations are viewed together, a statutory requirement exists to report each “qualifying transaction or relation with a foreign financial agency,” while the regulations impose a requirement to timely file the FBAR reports. As such, the Court indicated that:

By authorizing a penalty for “any violation of[] any provision of section 5314,” as opposed to the regulations prescribed under section 5314, section 5321(a)(5)(A) most naturally reads as referring to the statutory requirement to report each account—not the regulatory requirement to file FBARs in a particular manner.

Therefore, clarified the Court, 31 U.S.C. §5314 provides the Secretary with discretion to direct how to satisfy the overall requirement to report qualifying accounts, but it does not create the obligation to file “a single report.”

Conclusion

Taxpayers prevailing in FBAR cases are becoming an increasingly endangered species. And while many, including the taxpayer in Bittner, see an “absurdity” with the Fifth Circuit’s line of reasoning since it can result in non-willful violators incurring much, much larger penalties than willful violators, the Fifth Circuit was clear that:

Congress’s central goal in enacting the BSA was to crack down on the use of foreign financial accounts to evade taxes. It is not absurd—it is instead quite reasonable—to suppose that Congress would penalize each failure to report each foreign account.

If you have questions regarding FBAR penalties, please contact our tax team for a free initial consultation at (410) 862-3957 or fill out [OUR ONLINE FORM](#).

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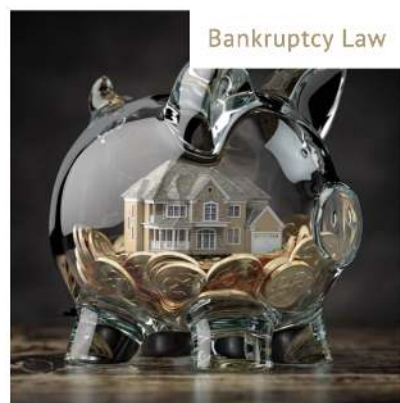


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