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Supreme Court to Review Tax Penalties Imposed for Non-Willful FBAR Violations

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Recently, the U.S. Court of Appeals for the 5th Circuit ruled that the IRS could impose a penalty of \$2.72 million for a taxpayer's non-willful failure to report multiple foreign financial accounts on FBAR filings from 2007 to 2011 [*United States v. Bittner*, 128 AFTR 2d 2021-6760 (5th Cir. 2021)]. The [Supreme Court's decision to hear Bittner's appeal](#) of this 5th Circuit decision, while not as controversial as some recent cases, could significantly impact the IRS's authority to impose penalties for unintentionally inadequate FBAR filings.

The Report of Foreign Bank and Financial Accounts (the FBAR) was born out of the Bank Secrecy Act of 1970 (the BSA). Congress, concerned by taxpayer evasion of taxes with the use of foreign financial accounts, delegated the authority to the Secretary of Treasury to keep reports with respect to persons making transactions or having relationships with foreign financial agencies (31 U.S.C. § 5314). Under regulations to the BSA, the Secretary of the Treasury requires U.S. taxpayers to file a report on or before June 30th of each calendar year with respect to foreign financial accounts exceeding \$10,000.

The BSA authorized the Secretary to “impose a civil money penalty on any person who violates, or causes any violation of . . .” the FBAR rules (31 U.S.C. § 5321(a)(5)(A)). Initially, only willful violations of the FBAR reporting rules were subject to penalty. Congress added penalties for non-willful violations in 2004. See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418 (codified at 31 U.S.C. § 5321(a)(5)).

Different penalties attach to non-willful and willful violations. For a non-willful violation, “the amount of any civil penalty imposed . . . shall not exceed \$10,000” (31 U.S.C. § 5321(a)(5)(B)(i)). But no penalty attaches if the “violation was due to reasonable cause” and “the amount of the transaction or the balance in the account at the time of the transaction was properly reported.” *Id.* § 5321(a)(5)(B)(ii).

For a willful violation, the maximum penalty increases to the greater of \$100,000 or 50% of “the amount of the



transaction” (when a violation involves a transaction) or “the balance in the account at the time of the violation” (when a violation involves “a failure to report the existence of an account”). Id. § 5321(a)(5)(C)(i), (D). Willful violations are excluded from the reasonable-cause exception. Id. § 5321(a)(5)(C)(ii). Thus, a person with \$2,000,000 held in a foreign financial account, who fails to report this account in a willful violation of the FBAR rules, would be subject to a maximum penalty of \$1,000,000.

In *United States v. Bittner*, the taxpayer, born in Romania, had been a naturalized U.S. citizen but moved back to Romania in 1990. He was unaware that the FBAR rules applied to him while he was in Romania. Bittner returned to the United States in 2011. Upon learning of his FBAR reporting obligations, he hired a CPA, who in May of 2012 prepared and filed his outstanding FBARs. But those FBARs were deficient: they listed only his largest account and incorrectly stated he did not have an interest in 25 or more qualifying accounts. Bittner hired a new CPA, who in September of 2013 filed corrected FBARs for the years 2007 to 2011, since penalties for prior years were time-barred. See 31 U.S.C. § 5321(b)(1).

In June 2017, the IRS assessed \$2.72 million in penalties against Bittner for non-willful violations of section 5314—\$10,000 for each unreported account from 2007 to 2011, specifically 61 accounts in 2007, 51 in 2008, 53 in 2009, 53 in 2010, and 54 in 2011. The 5th Circuit saw no statutory prohibition against the IRS imposing penalties per account for non-willful violations. However, the court’s ruling contradicts the U.S. Court of Appeals for the 9th Circuit’s decision in a similar case. The 9th Circuit recently held that the IRS can only impose penalties of \$10,000 per FBAR filing, rather than per financial account, for non-willful violations (See *United States v. Boyd*, No. 19-55585 (9th Cir. March 24, 2021)).

While we await the Supreme Court’s decision on the imposition of FBAR penalties, U.S. residents and citizens with financial accounts overseas should talk with experienced tax advisors who understand the complex framework of these rules before filing their tax returns.