

Client Alert

April 2023

U.S. Supreme Court in *Bittner* Limits FBAR Penalties for Non-Willful Violations

On February 28, 2023, the U.S. Supreme Court (“Supreme Court”) decided *Bittner v. United States*, 143 S. Ct. 713, and a challenge to the penalty provision in the Foreign Bank and Financial Accounts Report (“FBAR”) statute that applies to U.S. persons with bank accounts outside of the United States. In a 5-4 decision, the Supreme Court took a taxpayer-friendly position and held that the maximum penalty for non-willful violations of the Bank Secrecy Act’s (“BSA”) requirement to file an FBAR applies only on a per-form basis, and rejected the Internal Revenue Service (“IRS”) practice of assessing such fines on a per-account, rather than a per-form, basis.

The BSA and FBAR requirements

Section 5314 of the BSA requires U.S. persons who possess foreign accounts with an aggregate balance of more than \$10,000 to file an annual report on a form commonly referred to as the FBAR. Section 5321 of the BSA authorizes a maximum penalty of \$10,000 for non-willful violations of Section 5314. In *Bittner*, the Court addressed a circuit court split on whether a taxpayer committed a separate violation of Section 5314 for each account the taxpayer failed to report, or one violation per each deficient FBAR form.

The Circuit Split

Prior to *Bittner*, there was a split among the circuit courts, with the Ninth Circuit ruling in favor of the taxpayer in *United States v. Boyd*,¹ an earlier case discussed below. The petitioner, Alexandru Bittner, immigrated to the United States from Romania in 1982, became a naturalized U.S. citizen, and eventually moved back to Romania in 1990. As a dual citizen of the United States and Romania, Bittner maintained dozens of bank accounts in Romania, but failed to report them in his United States tax returns, claiming to be unaware of the requirement. Eventually, in 2011, Bittner

¹ *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021).

attorneys

Eduardo A. Cukier
ecukier@olshanlaw.com
212.451.2203

Kuang-Chu (K.C.) Chiang
kchiang@olshanlaw.com
212.451.2364

Robert M. Appleton
rappleton@olshanlaw.com
212.451.2288

Alexander G. Sánchez
Figueroa (Law Clerk)
asanchez-
figueroa@olshanlaw.com
212.451.2284

practices

International Law
Tax & Personal Planning
Litigation
Cross-Border and White
Collar Defense &
Investigations

returned to the United States and learned of his reporting obligations. He hired an accountant to help him prepare five late reports for years 2007 to 2011, which collectively involved 272 accounts. The U.S. Department of Treasury, taking the position that failure to report each of these accounts in a timely manner represented a non-willful violation, assessed the maximum penalty of \$10,000 for each account against Bittner, levying a total of \$2.72 million in fines. Bittner challenged the fines,² arguing that the BSA authorized a maximum penalty of \$10,000 for each late-filed report, as opposed to each account. Thus, he argued, the maximum fine he could be subject to was \$50,000. Bittner lost on both the district and circuit court levels with the Fifth Circuit affirming the government’s position and levying fines on a per account basis.³

The Ninth Circuit, however, had reached a different conclusion in a previous case, *United States v. Boyd*. In *Boyd*, the court rejected the IRS’s fine of \$130,000 which was calculated by assessing a \$10,000 fine for each one of Boyd’s thirteen accounts in the United Kingdom. Boyd challenged the penalty, and the Ninth Circuit held that the BSA authorizes “only one non-willful penalty when an untimely, but accurate, FBAR is filed, no matter the number of accounts.”

The Supreme Court’s Decision

In a 5-4 decision, the Supreme Court held that non-willful violations under the BSA accrue on a per-report, and not a per-account, basis.

Justice Gorsuch delivered the opinion for the majority. First, the majority focused on the statute, and found that the relevant statutory language for non-willful violations “does not speak of accounts or their number,” but rather of the duty to report. Thus, a violation of Section 5314 occurs when an individual fails to file a proper FBAR containing all required information, not for each account that the individual fails to include in the FBAR. Additionally, Section 5321 contains language assessing penalties for willful violations, which specifically addresses the failure to report “the existence of an account.” Thus, the Supreme Court concluded that because Congress explicitly authorized per-account penalties for some willful violations, but not for non-willful violations, Congress must not have intended for penalties for non-willful violations to accrue on a per-account basis. Second, even if not dispositive of the Supreme Court’s decision, the majority found support for its conclusion in the fact that the government had repeatedly issued guidance warning of per-report penalties for non-willful violations. Finally, the Supreme Court concluded that because “doubt persists at this point about the best reading of the BSA,” the rule of

attorneys

Eduardo A. Cukier
ecukier@olshanlaw.com
212.451.2203

Kuang-Chu (K.C.) Chiang
kchiang@olshanlaw.com
212.451.2364

Robert M. Appleton
rappleton@olshanlaw.com
212.451.2288

Alexander G. Sánchez
Figueroa (Law Clerk)
asanchez-
figueroa@olshanlaw.com
212.451.2284

practices

International Law
Tax & Personal Planning
Litigation
Cross-Border and White
Collar Defense &
Investigations

² *United States v. Bittner*, 469 F.Supp.3d 709, E.D.Tex. (June 29, 2020).

³ *United States v. Bittner*, 19 F.4th 734, 5th Cir.(Tex.) (Nov. 30, 2021).

lenity “requires us to favor a per-report approach that would restrain BSA penalties over a per-account theory that would greatly enhance them.”

Impact of the Supreme Court’s *Bittner* Decision

The *Bittner* decision is welcome news for U.S. persons who may have non-willfully failed to comply with their reporting requirements. Going forward, under *Bittner*, the IRS will only be able to apply penalties to a non-willful violation on a limited, per-form basis. This means that even if an account holder maintains more than one offshore account subject to FBAR, the penalty follows the reporting obligation, or the report that is required to be filed. Taxpayers that have been penalized on a “per account basis” may have a claim for reimbursement of their fine amounts and the costs associated with those fines.

Like the non-willful FBAR penalties, the willful FBAR penalties also have engendered much litigation. A critical question is how stringent a definition of “willfulness” should be applied. The IRS has applied, and certain courts have upheld, penalties for willful violations under an objectively reckless standard, by concluding that one that signs a tax return has a duty to review the return, and that an unintentional failure to comply with FBAR reporting can be a willful violation. The Supreme Court in *Bittner* was not faced with and chose not to answer the question of whether a subjective intent to violate the reporting obligations must be proven. This is the issue presented in *Bedrosian v. United States*, currently pending before the Supreme Court.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have any questions, including reimbursement for penalties assessed under FBAR on a “per account” basis.

attorneys

Eduardo A. Cukier
ecukier@olshanlaw.com
212.451.2203

Kuang-Chu (K.C.) Chiang
kchiang@olshanlaw.com
212.451.2364

Robert M. Appleton
rappleton@olshanlaw.com
212.451.2288

Alexander G. Sánchez
Figueroa (Law Clerk)
asanchez-
figueroa@olshanlaw.com
212.451.2284

practices

International Law
Tax & Personal Planning
Litigation
Cross-Border and White
Collar Defense &
Investigations

This publication is issued by Olshan Frome Wolosky LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising.

Copyright © 2023 Olshan Frome Wolosky LLP. All Rights Reserved.