

The Supreme Court Issues Pro-Taxpayer Opinion in FBAR Penalty Case

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Listen to Melinda Summarize the Case:

Now this is a headline I was pleased to concoct as I have not seen a lot of taxpayer-favorable rulings in my years of practice in the FBAR space.

In *Bittner v. United States* (No. 21-1195), a 5-4 decision last month, the Court held that the \$10,000 maximum penalty for the non-willful failure to file a Report of Foreign Bank and Financial Accounts (the "FBAR" or the FinCEN114 report) accrues on a per report basis and not per account.

By way of background, United States persons must file an annual report, an FBAR, to the extent they have financial interests in or signature authority over financial accounts located outside the United States when the aggregate value of these accounts exceeds \$10,000 during the applicable calendar year. Section 5321 of the Internal Revenue Code of 1986, as amended, (the "Code" and references are "Section") authorizes the imposition of civil penalties of up to \$10,000 for a violation of this requirement, which are imposed by Section 5314 of the Code.

Now the interesting part here, and the crux of this case, is that neither Section 5314 nor Section 5321 specify whether non-willful penalties are to be imposed per account or per some other measure. They speak in terms of an individual's obligation to file the report itself.

In the case at bar, the petitioner failed to file his FBAR reports when due and then submitted them after returning to the United States and learning of his reporting obligations. Petitioner owned between 54 and 61 accounts in the years at issue. The government never suggested his errors were willful. They took the position that the penalty should be applied to his non-willful filings on a per account basis, essentially because the statute regarding willful violations imposed penalties on a per account basis. Non-willful is generally defined as conduct due to negligence or mistake or a good-faith misunderstanding of the law. Willful is generally defined as a knowing and intentional violation of a legal duty. Two very different states of mind.

Petitioner argued his penalty should be imposed per form as the Code itself does not specify otherwise for a non-willful violation such as his case

The Supreme Court ruled in favor of the Petitioner holding the non-willful penalty violation shall be treated as one violation carrying a maximum penalty of \$10,000 per report and not per account.

This is an exciting holding also in that it resolves a former split on the issue between the 5th and 9th Circuits.

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