



## SUPREME COURT RULES THAT NON-WILLFUL FOREIGN BANK ACCOUNT REPORTING PENALTY APPLIES ON A PER REPORT BASIS

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The Bank Secrecy Act requires every U.S. person with a financial interest in, or signature or other authority over, a financial account located outside the U.S. to report the account to the U.S. Treasury Department annually, if the total value of the foreign financial accounts exceeds \$10,000 at any time during the year. The reporting is made on FinCen Form 114, Report of Foreign Bank Account and Financial Accounts (FBAR). A civil penalty of \$10,000 is imposed for a non-willful violation of the FBAR reporting requirements.

Taxpayers and the IRS have consistently disagreed about whether the non-willful FBAR penalty should be applied on a per-account or per-report basis. For a taxpayer with deposited funds in multiple foreign bank accounts or subaccounts, the difference in the amount of the non-willful penalty for failing to report the accounts is substantial depending on whether the penalty applies separately to each account or once for failing to file the FBAR itself. A split between the Fifth and Ninth Circuit Court of Appeals regarding the correct application of the non-willful FBAR penalty recently provided the U.S. Supreme Court the opportunity to finally resolve this longstanding dispute in *Bittner v. U.S.*

In *Bittner*, the IRS imposed a \$2.72 million penalty on Alexandru Bittner for his non-willful violation of the FBAR reporting requirements for 272 foreign financial accounts over a 5-year period (272 accounts x \$10,000). Bittner argued that the FBAR penalty applied on a per-report basis and that the penalty should total \$50,000 (\$10,000 per year). In a 5-4 decision issued on February 28, 2023, the U.S. Supreme Court concluded that “the [Bank Secrecy Act] treats the failure to file a legally compliant report as one violation carrying a maximum penalty of \$10,000, not a cascade of penalties calculated on a per-account basis.”

The *Bittner* decision has provided a significant win for taxpayers. Based on *Bittner*, taxpayers who non-willfully fail to satisfy the FBAR reporting requirements can be assured that only a single \$10,000 per-report penalty may be imposed. For taxpayers who previously paid the non-willful penalty on a per-account basis, *Bittner* may provide an opportunity to claim a refund for the overpayment of the penalty. Unfortunately, the mechanism for claiming a refund remains unclear and questions regarding the timeframe for filing a refund claim and whether there are any equitable doctrines available to provide taxpayers with relief remain unanswered. Moreover, the IRS may now be more inclined to characterize FBAR violations as willful because the non-willful penalty is now significantly less than the willful penalty - the greater of \$100,000 per account or 50% of the maximum account balance during the year of the violation.

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Taxpayers who previously paid penalties on a per-account basis for non-willful FBAR reporting violations should consult their tax advisors to discuss available options. Most importantly, taxpayers who are currently evaluating non-willful FBAR violations should calculate the penalty based on the Bittner decision.

If you have any questions regarding this alert, please contact your Cummings & Lockwood private clients attorney.