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Supreme Court Ruled for the Taxpayer

Holding that Non-willful Failure to File FBAR Should be Penalized on a Per-Report Basis, instead of Per-Account.

On February 28, 2023, the Supreme Court of the United States (SCOTUS) ruled that the $10,000 maximum for non-willful failure to file a Foreign Bank and Financial Accounts (FBAR) is calculated on a per-report instead of a per-account basis in Bittner v. United States.

Justice Gorsuch delivered the Majority opinion. The Court first examined the statutory language of 31 U.S.C. §5314 and §5321. §5314 stipulates that the Secretary of the Treasury shall require certain person to report and maintain records of their "relation" with foreign financial agency and file an annual report known as an "FBAR" – the Report of Foreign Bank and Financial Accounts. §5314 does not mention accounts or number but simply a legal obligation to file such reports. Thus, violation §5314 is binary, meaning either one satisfies such obligation by filing the report to the extent and by the way as prescribed, or one does not. §5321 imposes a penalty of up to $10,000 for non-willful violation of §5314. §5314 does not speak of accounts or number. The legislative history indicates that Congress intentionally left such language out. The Court reasoned that "when Congress includes particular language in one section of a statute but omits it from" a neighboring one, the difference in language is meant to convey a difference in meaning (expressio unius est exclusio alterius). Clearly, when Congress wishes to impose a penalty on a per-account basis, it knows how to do so. The lack of such particular language in §5321 for non-willful violation shows that the penalty for non-willful violation shall not be assessed on a per-account basis.

In addition, many U.S. taxpayers and tax professionals seek guidance from the government and often refer to documents and instructions issued by the I.R.S. In I.R.S., Letter 3709, p. 1 (Mar. 2011), the government specifically stated that a person, who is required to file an FBAR but fails to do so, may be subject to a civil penalty, and such penalty cannot exceed $10,000. Instructions included with the FBAR form also contain a caution stating that "[a] person who is required to file an FBAR and fails to properly file it may be subject to civil penalty not to exceed $10,000." [1] The I.R.S. changed its position during the litigation. Although I.R.S. instructions and interpretations of the statutes are not law and do not control the Court's independent analysis, the lack of consistency in its view was considered by the Court in assessing the persuasiveness of its arguments.

As Justice Gorsuch pointed out, the answer to the issue, in this case, makes a difference for immigrants who hold accounts and assets overseas and Americans who live abroad. It is worth noting that the per-report penalty assessment method applies only to non-willful violations. The penalty for a willful violation is 50 percent of the maximum account balance during the year or $100,000.00 [adjusted for inflation], whichever is greater. When willfulness is at issue, the government has the burden to establish it. Sometimes, they may use the fact that the taxpayer has previously filed Schedule B to demonstrate prior knowledge and willfulness. As the Court mentioned, the I.R.S. instructions and guidance are non-controlling when it comes to legal analysis. However, if the I.R.S. takes an inconsistent stance, such an inconsistent stance will be considered when assessing their argument's persuasiveness.

[1] I.R.S., Form T.D. F 90-22.1, p.8 (March. 2011).