

District court: FBAR non-willful penalty applies per report, not per account

A U.S. District Court recently concluded that the penalty for a non-willful violation of the rules relating to FinCEN Report 114, “Report of Foreign Bank and Financial Accounts” — commonly referred to as an FBAR — applies to each report rather than to each foreign financial account maintained but not timely or properly reported. Let’s take a closer look at the details.

FBAR fundamentals

Under the Internal Revenue Code, every U.S. person who has a financial interest in or signature or other authority over a financial account or accounts in a foreign country must report the account(s) to the IRS annually using an FBAR if the aggregate value of the foreign financial account(s) exceeds \$10,000 at any time during the calendar year. One FBAR is used to report multiple accounts.

The U.S. Secretary of the Treasury may impose a civil money penalty on any person who violates or causes a violation of the FBAR filing requirements. The maximum amount of the penalty depends on whether the violation was non-willful or willful.

The maximum penalty for a non-willful violation is \$10,000. In the case of any person willfully violating, or willfully causing a violation, the maximum penalty is the greater of \$100,000 or 50% of an amount determined under specific tax rules.

Note that for penalties that are assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the \$10,000 and \$100,000 amounts are adjusted for inflation.

The case at hand

In *U.S. vs. Bittner*, the plaintiff non-willfully failed to file an FBAR for 2007. He had 51 foreign accounts that year, with more than \$10,000 in each. The IRS assessed a penalty of \$510,000 — in other words, a \$10,000 penalty for each account. The plaintiff filed suit in district court, arguing that the penalty for a non-willful FBAR violation should be \$10,000 per report, not per account.

The district court concluded that the penalty for a non-willful FBAR violation relates to each FBAR form not timely or properly filed rather than to each foreign financial account maintained but not timely or properly reported. Thus, the penalty for the plaintiff was \$10,000.

The court looked to the language of the willful penalty and found that the tax code mentions “account” three times. The court said, “Congress clearly knew how to make FBAR penalties account specific.”

Because “account” isn’t mentioned in the specific section of the tax code pertinent to this matter, the court stated the non-willful penalty applies only to the violation of the FBAR rules — and those rules refer only to filing a report. Thus, the non-willful penalty applies to only the report, not to the number of accounts omitted from that report.

Notably, in 2019, another district court had held in *U.S. v. Boyd* that the penalty for a non-willful FBAR violation relates to each account required to be shown on the FBAR. That court concluded that the IRS could impose the statutory maximum penalty of \$10,000 for each of a taxpayer’s 13 accounts that should have been reported on one FBAR.

The district court in *U.S. vs. Bittner* recognized that *Boyd* came to an opposite conclusion but found that the *Boyd* court’s analysis failed to provide adequate guidance as to how it reached its conclusion. The *Bittner* court also said that *Boyd* was heard in a different district and in a different circuit.

Critical to comply

If you have a financial interest in, or signature or other authority over, a financial account in a foreign country, it's critical to comply with FBAR filing requirements. Contact your tax advisor for assistance. •