

# The Future of FBAR After Bittner

## Dentons Federal Tax Controversy Insights

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On February 28<sup>th</sup>, the U.S. Supreme Court decided that the Bank Secrecy Act's (the "BSA") \$10,000 penalty for the nonwillful failure to file a Report of Foreign Bank and Financial Accounts (or "FBAR") applies on a per-report and not per-account basis.

The 5-4 decision made a \$2,670,000 difference to Alexandru Bittner, a naturalized U.S. citizen who had been living in Romania since the 1990s. From 2007 through 2011, Mr. Bittner at any one time held between 51 and 61 bank accounts spread across Romania, Switzerland, and Liechtenstein. As Mr. Bittner failed to file an FBAR report with the Financial Crimes Enforcement Network (or "FinCEN") for those five years, the IRS determined Mr. Bittner owed the \$10,000 penalty for each account he had failed to report—a total of 272 accounts. The Service therefore imposed a \$2.72 million total penalty on Mr. Bittner for tax years 2007–2011.

Justice Gorsuch, writing for the majority, followed the logic of the Ninth Circuit's 2021 Decision in *United States v. Boyd* in holding that "Best read, the BSA treats the failure to file a legally compliant report as one violation carrying a maximum penalty of \$10,000, not a cascade of such penalties calculated on a per-account basis. Because the Fifth Circuit thought otherwise, we reverse its judgment and remand the case for further proceedings consistent with this opinion."

The Court emphasized that the nonwillful nature of Mr. Bittner's failure to file better aligned with the statutory minimum penalty of \$10,000 per report. If the penalty applied per account, the Court reasoned, a

taxpayer who nonwilfully failed to file their FBARs could be penalized much more harshly than willful non-filers, for which there exists a separate statute allowing for greater penalties based on the value of the nondisclosed accounts.

The key takeaway for taxpayers holding foreign bank accounts or with signature authority over such accounts is to be aware of the FBAR requirement. The BSA requires taxpayers who possess foreign accounts with an aggregate balance over \$10,000 to file the FBAR every year. Following the Courts holding in *Bittner*, questions remain as to what remedies may be available to taxpayers who have already paid FBAR penalties on a per-account basis, and whether Congress will enact a safe harbor or grace period for formerly noncompliant filers who now wish to disclose foreign accounts. Post *Bittner*, the IRS could be anticipated to more aggressively argue that FBAR violations are willful so as to seek larger penalties.

The case is *Bittner v. United States*, No. 21-1195, in the U.S. Supreme Court.



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