

Justices' FBAR Ruling May Shift Feds' Enforcement Approach

By **Dylan Moroses**

Law360 (March 9, 2023, 6:11 PM EST) -- Following the U.S. Supreme Court's decision limiting the penalty for a nonwillful failure to report foreign bank accounts to \$10,000 per year, the government may become more aggressive in pursuing willful violations of the law, tax lawyers said.

The Internal Revenue Service likely will recalibrate its approach to the foreign account reporting penalty regime after the **justices' narrow ruling** against the agency last month, attorneys said. The court held 5-4 that the nonwillful failure to file an annual report of foreign bank and financial accounts, or FBAR, warrants a penalty of \$10,000 per year rather than \$10,000 for each account undisclosed.



The U.S. Supreme Court's ruling on the maximum penalty for a nonwillful FBAR violation may cause the government to rethink how it approaches FBAR disputes, especially if it wants to continue seeking large penalties. (AP Photo/Alex Brandon)

Following the decision, there's concern the government may choose to pursue greater penalties by making more claims of willful FBAR violations, for which the law allows for larger, account-specific penalties, said Kenneth E. Ahl of Archer & Greiner PC.

The government **has been successful** in litigating its enforcement of willful FBAR penalties, a trend some attorneys have considered an overreach of its responsibilities.

"I think there's going to be a shift in that direction," Ahl said.

The Shape of Cases to Come

Under federal law, U.S. citizens and legal residents with \$10,000 or more held abroad must file FBARs with the U.S. Department of the Treasury's Financial Crimes Enforcement Network. The IRS is authorized to assess penalties for the failure to file FBARs with Treasury under the law, and the U.S. Department of Justice frequently has filed suits to enforce those penalties.

The Supreme Court case involved Alexandru Bittner, a naturalized U.S. citizen from Romania, who initially filed federal tax returns but not FBARs for several years. The IRS imposed a \$10,000 penalty for each of Bittner's 272 undisclosed accounts from 2007 through 2011 — for a total \$2.72 million. The high court took the case to address a split between the Fifth **and Ninth** circuits on how the civil penalties should be assessed.

During **oral arguments**, Chief Justice John Roberts said the government's court filings suggested Bittner's case was one that could have been considered a willful violation. The government's attorney, Matthew Guarneri, acknowledged Justice Roberts' point and said the nature of Bittner's dispute led the IRS to seek the maximum \$10,000 nonwillful penalty per undisclosed account.

Mark J. Oberstaedt of Archer & Greiner said the dissent in Bittner, prepared by Justice Amy Coney Barrett, also signaled the government had been inclined to pursue the case as a willful FBAR violation.

The ruling almost certainly will encourage the government to reconsider how it approaches similar kinds of disputes, especially if it wants to continue seeking large FBAR penalties, Oberstaedt said.

Brett R. Cotler of Seward & Kissel LLP said the government could be more aggressive in arguing that certain FBAR violations were willful following the Bittner ruling.

As Oberstaedt put it: "If the intent of the service is going to be to continue to try to find ways to impose large penalties, it's the only way they can go now." U.S. citizens and their practitioners in disputes with the IRS over FBAR violations should be aware that examiners may be considering how to apply willful penalties, he warned.

A shift in the government's pursuit of FBAR penalties will come down to future internal IRS guidance issued following Bittner, according to Brian P. Ketcham of Ketcham PLLC.

"FBAR penalty enforcement has been a cash cow for the IRS for 10 years," he said, adding that he was skeptical the Supreme Court's ruling would slow down government enforcement efforts in this space on a broader level.

"It's too soon to tell if Bittner is going to send a signal to the IRS," Ketcham said.

Ahl said he would be watching in the near term for both public-facing and internal guidance from the IRS that solidifies the annual maximum \$10,000 penalty for nonwillful FBAR violations.

Cotler told Law360 that the high court's ruling could change the calculus for some wealthier taxpayers, who may choose to incur the limited fine rather than pay legal and accounting expenses to comply with an audit.

"You might get quicker resolutions to audits, because you have taxpayers that are just willing to pay it," Cotler said.

Retroactive Relief

For people who may have been in nonwillful FBAR litigation pending the result of Bittner, those cases should be resolved expeditiously, Oberstaedt said. U.S. citizens who have already paid more than a \$10,000 penalty for each year at issue in those cases should be able to obtain a refund on the difference, he added.

Although technically the Fifth Circuit still must amend its ruling to conform with the Supreme Court's opinion, that procedural move shouldn't delay other courts from resolving similar disputes after the justices' Bittner ruling, Oberstaedt said.

Two other subsets of taxpayers could be in a position to seek refunds following the result in Bittner, he said, while adding that the circumstances are more complicated.

U.S. citizens who voluntarily paid nonwillful FBAR penalties applied to them on a per-account basis may have a claim for a refund following Bittner, Oberstaedt said. If faced with statutes of limitations on those arguments, those people could argue that anyone who paid nonwillful FBAR penalties didn't have a claim for refund until the Supreme Court ruled in Bittner on Feb. 28, he said.

Other U.S. citizens may have entered into settlement agreements over the nonwillful FBAR penalties at issue, Oberstaedt said. The terms of those agreements may come into play and present more complicated legal questions that will have to be addressed in courts, he said.

Ketcham told Law360 that any disputes involving nonwillful FBAR penalties and settlement agreements will need to be considered on a case-by-case basis, with careful attention given to the closing language of those documents.

"They're all different; they look boilerplate, but a lot of times the language is tweaked by agents," Ketcham said. "A lot of times, you give up rights to refunds or to challenge it in [U.S.] Tax Court."

--Editing by Aaron Pelc and Roy LeBlanc.

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