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ANALYSIS

Tax Attorneys Welcome SCOTUS Ruling on Foreign Investment Reporting Rules With Cautious Optimism

“I think they’ll take a harder look at the willful vs. non-willful in order to get those penalty numbers back up to what they otherwise would have done,” warned one tax attorney.

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Brad Kutner

Tax attorneys are already taking the U.S. Supreme Court up on their new interpretation of penalties associated with taxes on foreign income, a ruling that spells good and bad news for those with money overseas.

“We’re not talking about \$100 claims here, this is something worthwhile claiming in court,” said Kenneth Ahl, a tax attorney with Archer & Greiner, who said he’s already acting on behalf of clients in the wake of *Bittner v. U.S.*, a case decided last week which altered the penalty structure for those who fail to report income from other countries.

“[The tax code] provides that a violation occurs when an individual fails to file a report consistent with the statute’s commands. Multiple deficient reports may yield multiple \$10,000 penalties, and even a seemingly simple deficiency in a single report may expose an individual to a \$10,000 penalty,” wrote Justice Neil Gorsuch for the 5-4 majority. “But penalties for non-willful violations accrue on a per-report, not a per-account, basis.”

The court was asked whether a violation under the Bank Secrecy Act is the failure to file a single annual report, no matter the number of foreign accounts, or whether there is a separate violation for each account that is not properly reported.

The act’s regulations require those with foreign bank accounts to file an annual form, commonly called an “FBAR,” listing their accounts with an aggregate balance over \$10,000. Penalties can be very stiff, especially for willful violations.

The ruling is expected to make big impacts in not only future tax disputes, but also many currently running and possibly even already decided tax penalties cases according to Ahl and his Archer co-counsel, Mark Oberstaedt.

“I think there’s a fair argument that there was no cause of action to pursue a claim for refund until now and that issue will be litigated for sure,” Oberstaedt, Archer’s Ass. Chair of Business Litigation, said. He said even people who entered into settlement agreements related to penalties could see their funds returned.

“It’ll be case-by-case, looking at the settlement agreements,” he said, noting a dispute’s procedural steps will play a role in opening that door.

Reuben Muller, a tax attorney with Cole Schotz, was similarly optimistic for those seeking a refund.

“Any ongoing litigation against other taxpayers to enforce assessed penalties should resolve themselves when this issue is the only issue that remains,” he said, pointing to one of his own ongoing failure to report disputes. “We’re not asking for all of the claim to be refunded, it’s just the excess based on where *Bittner* came out,” he said.

But Ahl and Oberstaedt also warned the reduction in IRS penalty availability could see the agency take a more aggressive posture in cases where the willfulness of the violation could be debated.

“I think they’ll take a harder look at the willful vs. non-willful in order to get those penalty numbers back up to what they otherwise would have done,” Oberstaedt warned.

There’s also the short term effort to claw back the funds. While current cases may have avenues in existing dockets, those long-since-settled cases may need guidance from IRS before they can continue, or lawyers like Ahl will ask the court’s to step in sooner.

“We’ll have to see if IRS issues any guidance,” Ahl, himself a former IRS employee who took part in issuing technical opinions, said. But he also offered to aid his clients as needed. “We’ll be very happy to begin the process, but others will as well.”

Muller, meanwhile, also pointed to a portion of the majority opinion, endorsed only by Justice Ketanji Brown Jackson, which touched on the rule of lenity which allows the court to construe an ambiguous law in favor of the defendant. Noting the possible \$68 million fine and 1,360 years Bittner was facing in the case, rather than a \$1.25 million fine and 25 years in prison available under the new interpretation, the opinion says “in these circumstances, the rule of lenity, not to mention a dose of common sense, favors a strict construction.”

“There’s real due process, cruel and unusual punishment problems, and it gives some oxygen to that argument and we might see more of it in the future,” Muller said.

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