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U.S. Supreme Court Rules that FBAR Penalties Are Per-FBAR Form, Rejecting IRS's Per-Account Position

By Susan Combs*

In this article, the author discusses a decision by the U.S. Supreme Court regarding the maximum penalty that may be imposed under the Bank Secrecy Act for failure to file a timely and accurate FBAR report.

The U.S. Supreme Court has issued a 5-4 decision in *Bittner v. United States*, ruling that the Bank Secrecy Act's $10,000 maximum penalty for a nonwillful failure to file a timely and accurate Report of Foreign Bank and Financial Accounts (FBAR) on Financial Crimes Enforcement Network (FinCEN) Form 114 accrues on a per-FBAR report, not a per-account, basis.

As a result, the penalty at issue in the case is capped at $50,000 for failure to timely file FBAR forms for five years. The taxpayer avoided a $2.7 million penalty tied to 272 separate foreign accounts.

BACKGROUND

Like many tax cases, this case required the Court to decide how best to read a statute. The Justices' differing interpretations led them into a split decision. In an unusual line-up, Justice Gorsuch led a majority that included Justices Jackson, Alito, Kavanaugh and Roberts. Justice Barrett wrote a dissenting opinion, joined by Justices Thomas, Sotomayor and Kagan. The case once again highlights that the rules of statutory construction are not merely academic. Astute taxpayers, tax advisors, and tax litigators will apply insights from this latest opinion – reviewed in this article – in providing tax advice and developing advocacy strategies.

THE WORDING OF THE STATUTE IS PARAMOUNT

Not surprisingly, the Court's analysis began with the terms of the statute itself. The statute at issue, the Bank Secrecy Act,[1] directs the Secretary of the Treasury to require U.S. citizens "to keep records, file reports, or keep records and file reports, when the . . . person makes a transaction or maintains a relation for any person with a foreign financial agency." For "any violation" of this reporting duty, Section 5321 authorizes a civil penalty up to $10,000.

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[1] 31 U.S.C. § 5314.

Justice Gorsuch, writing for the majority, observed, "Immediately, one thing becomes clear. Section 5314 does not speak of accounts or their number but rather the legal duty to file reports" that include information about a person's foreign "transaction[s] or relationship[s]."[2] Thus, the statute establishes a binary duty – either one files a compliant report, or one does not. Because the duty is to file reports, the penalty accrues per-FBAR report.

The majority rejected the government's theory that because the statute authorizes per-account penalties for some willful violations, and has an account-specific reasonable cause exception, the Court should infer Congress meant nonwillful violations to be account-specific too. Justice Gorsuch leaned on the canon that, "When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[3] In other words, if Congress wanted to tie penalties to account-level information, it knew how to do so, but did not.

The dissent, instead, favored the canon that "identical words used in different parts of the same statute are generally presumed to have the same meaning."[4] The statute's pattern of account-specific language meant the nonwillful penalty must also operate on a per-account basis, Justice Barrett wrote. Pointing to the regulations, the dissent also identified that the FBAR form is not the "report" but simply the procedural tool used to implement the reporting duty. Because the obligation is to report the account, according to the dissent, the government may impose a per-account penalty.

CONTEXTUAL CLUES IDENTIFIED BY THE MAJORITY TO SUPPORT ITS READING

Going beyond the text, the majority turned to "contextual clues" against the government's theory, including inconsistent prior administrative guidance, statutory purpose, and potential absurd results. Of note, no IRS regulation required a penalty on a per-account basis, which bypassed the regulation invalidity issues and agency deference issues that are a common feature of many tax cases in the current environment.

Prior Administrative Guidance

The majority gave less weight to the per-account theory because the government's prior guidance to the public did not warn of its current view

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[2] Slip op. p.5.

[3] Slip op. p.7.

[4] Slip op. dissent, p.4.

advocated in court. "Doubtless, the government's guidance documents do not control our analysis. But this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court."[5]

The dissent dismissed the prior guidance as adding little because the traditional tools of construction supplied the answer in this case.

Purpose of the Statute

The majority also noted that the statute's preamble clause said nothing about a desire by Congress to maximize penalties for every nonwillful mistake, which supported a per-FBAR report view.

The dissent, on the other hand, believed a per-account penalty better promotes the purpose of cracking down on criminals and terrorists, a point the majority disputed.

Potential Absurd Results

Also concerning to the majority was the incongruity invited by a per-account approach. Justice Gorsuch used an example to illustrate the point:

> Consider someone who has a $10 million balance in a single account who nonwillfully fails to report that account. Everyone agrees he is subject to a single penalty of $10,000. Yet under the government's theory, another person engaging in the same nonwillful conduct with respect to a dozen foreign accounts with an aggregate balance of $10,001 would be subject to a penalty of $120,000.[6]

The dissent countered that, naturally, a person who violates the law many times might pay a steeper price than one who violates the law just once.

RULE OF LENITY

Finally, Justice Gorsuch wrote that the rule of lenity – the principle that courts strictly construe statutes imposing penalties against government – requires favoring a per-report approach. Only Justice Jackson joined that part of the opinion, so the section does not reflect the majority view.

CONCLUSION

In addition to a big taxpayer win, the *Bittner* decision gives another important data point from which to interpret how the Justices, and other courts, might use the various rules of statutory construction in future tax cases.

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[5] Slip op. p.10 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140).

[6] Slip op. p.14-15.