

# Stakes Rising in Litigation of Non-Willful FBAR Violations

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By Andrew Velarde

Whether the IRS can impose maximum penalties for non-willful violations of foreign bank account reporting by year or by account is again the subject of litigation, and this case involves a much higher potential penalty.

In June the Justice Department filed [a complaint](#) against Alexandru Bittner, a Romanian-born and naturalized U.S. citizen, alleging that he had non-willfully failed to file FBARs from 2007 to 2011. During that time, Bittner had signature authority or control of between 51 and 61 accounts that he failed to disclose, according to the complaint. Most of the accounts were in Romania, but he also had one in Liechtenstein and one in Switzerland.

The crux of the litigation turns on how to count violations. The government is seeking nearly \$3 million in penalties and accruals for the FBAR violations, assessing \$10,000 per account per violation under 31 U.S.C. 5321(a)(5).

Bittner filed [his answer](#) July 30 in a case before the U.S. District Court for the Eastern District of Texas, asserting several defenses, including reasonable cause.

Until late 2011, Bittner lived in Romania, where he had no knowledge of the existence of FBAR forms, according to the answer. After he discovered the requirement, he hired a CPA to get into compliance, but the CPA made errors in the preparation because of gross negligence, which was unknown to Bittner, the answer states.

Bittner also asserts that the penalties “far exceed” what is authorized by statute. The maximum penalty allowed under 31 U.S.C. 5321(a)(5) is \$10,000 per FBAR form, totaling \$50,000 in Bittner’s case, the answer argues.

“The applicable FBAR forms and accompanying instructions state that persons who have financial interests in 25 or more bank accounts are to file a single FBAR form stating that fact and stating the number of accounts, but are specifically not to complete Parts II or III of the form,” the answer states. “Bittner thus was required only to file one FBAR annually with limited information, and his innocent failure to timely file that annual FBAR constitutes only a single violation of the statute, punishable at most by \$10,000.”

Bittner also asserts that the government acted arbitrarily and capriciously in penalizing him, arguing that he was “for reasons unknown . . . singled out for excessively harsh treatment far greater than similarly situated persons.”

As evidence of arbitrary and capricious treatment, the answer cites the IRS streamlined filing compliance procedures for nonresidents, under which non-willful failures only result in the filing of three years of delinquent returns, six years of FBARs, and the payment of any tax and

interest due in lieu of other penalties. Bittner had requested streamlined treatment in 2014 but was denied, according to the complaint.

## Absurd Is the Word

Although willful FBAR violations and the heftier 50 percent of account value penalty that accompany them have been a more publicized subject of litigation, the dispute over how to interpret non-willful violations has garnered attention recently.

In *United States v. Boyd*, [No. 2:18-cv-00803-MWF-JEM](#) (2019), the U.S. District Court for the Central District of California held that a taxpayer [owed non-willful FBAR penalties for each of her 13 undisclosed accounts](#), rather than for each year her alleged violations occurred. While the court held that section 5321 was unclear on the issue of non-willful penalties, it found persuasive the government's argument citing the reasonable cause exception in 31 U.S.C. 5321(a)(B)(ii) to support its contention that each violation relates to each account as evidenced by the use of the singular "account" and "balance" in the statutory text.

Unlike *Bittner*, however, *Boyd* involved a relatively paltry total penalty of \$47,000, with the IRS assessing penalties ranging from less than \$200 to \$5,000 per account. The brief nine-page order is now on appeal in the Ninth Circuit.

According to Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP, the *Bittner* complaint demonstrates the "absurd result of [the] logic" behind the *Boyd* decision. He said practitioners are hopeful that other courts, like the court in *Bittner*, will rule that the penalty applies per filing, thus limiting the penalty to \$10,000 per year, regardless of the number of accounts.

"If that hope is realized, the *Boyd* decision will eventually become a single outlier in non-willful FBAR penalty jurisprudence," Ungerman said.

In his answer, Bittner also asserts that the penalties constitute an excessive fine in violation of the Eighth Amendment. That argument over FBAR penalty unconstitutionality, which does not have a strong track record for taxpayers, is seen far more often in the [willful violation context](#).

But Bittner argues that the "astronomical penalties of nearly \$3 million . . . is far in excess of any appropriate punishment." Bittner owed only \$625 in tax for the years at issue, the answer asserts. He also argues that the amount rises to the level of a criminal sanction and constitutes an unconscionable punishment.

"The sheer comparison of the penalties . . . to the income that had to be picked up, it's absurd," said Zhanna Ziering of Caplin & Drysdale Chtd.

"There is no mechanism built into either the statute or the [Internal Revenue Manual] which would settle up the duplication of accounts. . . . When you're dealing with a non-willful penalty, you might be penalizing the failure to report the same exact money as it travels from account to account," Ziering said, adding that this goes beyond the intent of the statute.

Under IRM 4.26.16.6.4.1, in most cases examiners will recommend one penalty per year for non-

willful violations, though facts and circumstances may dictate otherwise. It also states that in no case will non-willful penalties exceed 50 percent of the highest aggregate balance of all unreported accounts. This penalty cap, first instituted in a May 2015 memo, has largely been viewed as the IRS's attempt to address concerns that FBAR penalties might otherwise [run afoul of the Eighth Amendment](#).

“The IRM guidance suggests one penalty per FBAR, and only in special circumstances [assert otherwise]. And in a case where somebody only has [\$625 in taxes] **and seems to have a plausible explanation, it is not clear on the face of the complaint what were the special circumstances,**” Ziering said.

The case is *United States v. Bittner*, No. 19-cv-00415 (ED TX). Bittner is represented by Farley P. Katz, Rachael Rubenstein, and Theodore Joshua Wu of Clark Hill PLC. Bittner has demanded a trial by jury.