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GMS Flash Alert

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United States – U.S. Supreme Court Rules on FBAR Penalty Issue

On February 28, 2023, the U.S. Supreme Court announced its decision in *Bittner v. United States*,[1] holding that the penalty for violating the rules to report foreign financial accounts on FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (the "FBAR"),[2] applies on a per-report basis, rather than on a per-account basis.

WHY THIS MATTERS

U.S. citizens and residents are required to report certain foreign financial accounts annually on the FBAR. The report is not part of the U.S. tax return, but is filed separately online with the U.S. Treasury Department. Many taxpayers are unaware that the requirement applies to them, and penalties for failure to comply with this requirement can be substantial. The recent Supreme Court decision is favorable to taxpayers in that it decided that the most frequently assessed penalty applies just once to each FBAR, as opposed to applying to each account that was not listed on an FBAR.[3]

More Details

The penalty for "non-willful" failure to comply with FBAR requirements is $10,000 per violation. Broadly, "non-willful" refers to a failure that was not intentional on the part of the taxpayer, e.g., because he was not aware of the requirement. Willful violations of the FBAR filing requirement by an individual can be as much as 50 percent of the maximum value of the account during the year for which the violation occurs, and may also result in criminal prosecution.[4]

In the case of the $10,000 penalty for non-willful violation, the enabling legislation leaves room for interpretation as to whether the penalty applies once per FBAR, or can apply to each foreign account that was not reported in an FBAR. If, for example, 30 foreign accounts were not reported in an FBAR, the difference could be whether the penalty should be $10,000 or $300,000. The U.S. Fifth and Ninth Circuit (i.e., regional) Courts had made conflicting decisions on the issue,

and in 2022 the U.S. Supreme Court took up the *Bittner* case, in which $2.72 million in civil penalties (for failure to report 272 accounts over a period of 5 years) had been assessed, to resolve the conflict.

KPMG INSIGHTS

Many assignees are surprised to learn that they are subject to these international information reporting requirements, and may have difficulty collecting the information necessary to file a complete and timely report, or may not understand the scope of requirements. The threshold for reporting is relatively low: a U.S. citizen or resident must file an FBAR if the total value of all his foreign financial accounts exceeds $10,000 on any given day of the year, and if that is the case, *all* foreign financial accounts must be reported. Those who prepare their own tax returns may miss the requirement to separately file the FBAR. In many cases inbound assignees to the United States may receive employer-provided tax return preparation assistance that does not include FBAR preparation.

The decision in the *Bittner* base provides welcome clarity regarding the application of FBAR penalties, and will result in lower penalties for many who inadvertently run afoul of the regulations.

FOOTNOTES:

1 *Bittner v. United States*.

2 FinCEN Form 114 filing information can be found on the U.S. Government Financial Crimes Enforcement Network website, and on this U.S. Internal Revenue Service website.

3 For some insight on the case as it came to the Supreme Court and the potential impacts of a decision on filers of FBARS, see Y. Sohn, "Non-Willful FBAR Violation and Compliance Through Various IRS Programs," published in *Mobility Matters*, a publication of the KPMG International member firm in the United States.

4 Penalties related to noncompliance with FBAR filing requirements are discussed in U.S. Internal Revenue Publication 5569.

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