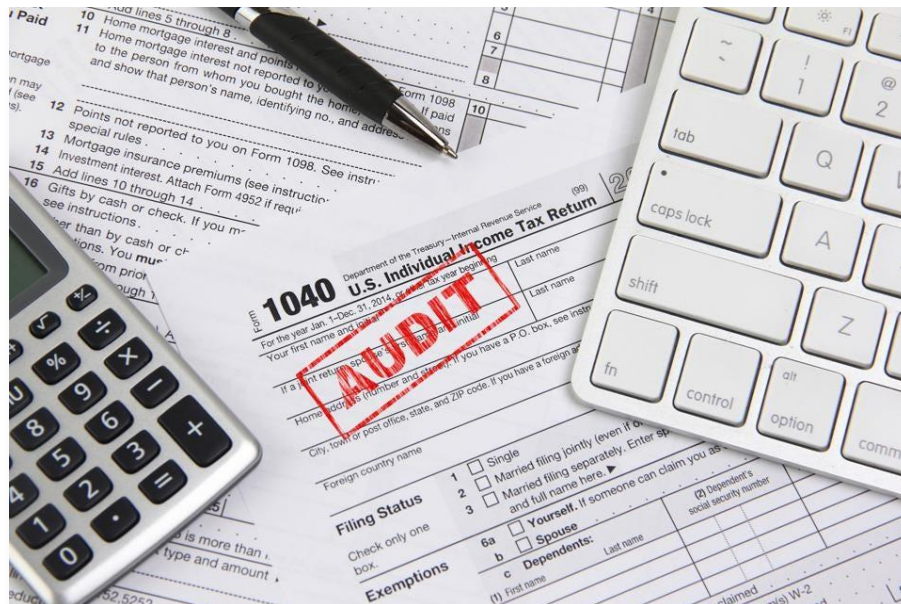




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\$50,000 Vs. \$2.72 Million: Supreme Court Weighs Steep IRS Penalties On Foreign Bank Accounts



The Supreme Court has some weighty cases to consider, but most Americans may not take notice of what seems like obscure IRS penalty provisions. The tax community has been watching IRS penalties for years — particularly how foreign bank account penalties are calculated.

The Supreme Court on November 2 heard [oral arguments in Bittner v. United States](#). Some observers of the justices' questions think the Court will rule for the government and its whopping penalties. But I'd say it's too soon to say.

Tax lawyers were abuzz when the Court [announced](#) it would hear the Bittner case. If you failed to report a foreign bank account but were not willful, which is a reasonable IRS penalty: \$50,000 or \$2.72 million?

Put differently, do non-willful foreign bank account reporting violations [apply per form or per account](#)? In 2021, [the Fifth Circuit held](#) in *United States v. Bittner* that a Romanian-born businessman and investor with foreign bank accounts was liable for penalties based on *each* of the dozens of accounts he failed to report each year rather than on the single [FBAR](#) form he failed to file each year (\$2.72 million in FBAR penalties for his five years of violations instead of \$50,000).

But a Ninth Circuit ruling, [United States v. Boyd](#), held that non-willful FBAR penalties apply per form. That means lower penalties. Supreme Court Justice Elena Kagan began by asking Bittner's attorney whether that was fair, a kind of one-size-fits-all penalty: "One might say that your version forces the government to treat equally someone who has a \$10,000 account and somebody like your client, who has extreme wealth and many many accounts and where he is depriving the government of much more information."

If you have dealt with the IRS, you may know that penalties can add up, and that how you calculate them can matter—a lot. This was no mere rounding error, but the IRS and the Justice Department have long had a focus on offshore accounts and disclosure. As an American citizen or green card holder (and in some other cases, such as persons filing U.S. tax returns based on a

substantial presence in the country), you must report your worldwide income, and that includes interest income from bank accounts overseas.

If you don't, there are taxes, interest and penalties. On top of these tax penalties, there are bigger and uglier penalties for failing to file foreign bank account reporting forms known as FBARs. Another name is FinCEN Form 114. The penalties for failing to file an FBAR are *worse* than tax penalties. Failing to file an FBAR can carry a civil penalty of \$10,000 for each non-willful violation. Non-willful means you didn't intend any harm, you were just ignorant. And that \$10,000 is each year, and the statute of limitations on FBAR violations is six years.

So that is \$60,000 per account. What if you have 10 accounts? That's \$600,000—even if you were *non-willful*. It can get worse. Actually, there's even inflation in penalties now. Because FinCEN adjusts FBAR penalties for inflation each year, for 2022 the [non-willful penalty is \\$14,489](#), not \$10,000.

If your violation is found to be *willful*, the penalty is the greater of \$100,000 or 50% of the amount in the account for each violation—and each year you didn't file is a separate violation. Criminal penalties for FBAR violations are even more frightening, including a fine of \$250,000 and five years of imprisonment.

If the FBAR violation occurs while violating another law (such as tax law, which it often will) the penalties are increased to \$500,000 in fines and/or 10 years of imprisonment. Many violent felonies are punished less harshly. The assessment of a civil penalty does not preclude criminal penalties or prosecution. Is it possible to argue your way out of a tax penalty?

If you've ever been in a dispute with the IRS, you know that you have the burden of proving you qualify for a deduction or shouldn't face a penalty. Penalty fights can be particularly brutal, and when penalties are on the table, you have usually lost some or all of your tax case already. And what is a reasonable penalty under the circumstances can be debated.

Taxpayers claim penalties are not warranted for many reasons, but one of the biggest is that their tax position was based on reasonable cause. Taxpayers bear the burden of substantiating that they acted with [reasonable cause](#). We all must exercise ordinary business care and prudence in reporting our proper tax liability. Remember, all tax returns are signed under penalties of perjury. The IRS applies a facts-and-circumstances test to determine whether a taxpayer had reasonable cause.

But with foreign account penalties—and many other ones, too—it can be particularly difficult to carry the day. On top of reasonable cause, certain penalty defenses involve other concepts, such as the absence of willful neglect. Isn't that proving a negative? Yes, and the taxpayer has to carry this burden, too.

Who wins in a tax penalty stalemate? This one should not surprise you: the IRS.

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