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Supreme Court To Rule On IRS Penalty For Non-Willful Failure To Report Foreign Accounts

If you failed to report a foreign bank account but were not willful, which is a reasonable IRS penalty, \$50,000 or \$2.72M? The Supreme Court has [announced](#) that it will decide, considering the non-willful FBAR violations in *Bittner v. United States*, No. 21-1195.

The Court is expected to clarify whether 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 the 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).

The Bittner decision is in direct conflict with a Ninth Circuit ruling which held that non-willful FBAR penalties apply per form. See [United States v. Boyd](#). 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 U.S.), 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 bank account reporting forms known as FBARs. Another name is FinCEN Form 114. These annual forms are not filed with the IRS, they are filed with the Financial Crimes Enforcement Network, part of the U.S. Treasury Department.

Make no mistake, the penalties for failing to file an FBAR are far *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. You have 10 accounts? That's \$600,000—even if you were *non-willful*. It can get worse. (Actually, 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 percent 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 ten 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? As a general proposition, taxpayers claim that penalties are not warranted for many reasons, but one of the biggest is the defense that a tax position was based on reasonable cause. How the IRS evaluates this depends on which penalty has been assessed. 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 does, of course.

Put differently, 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 on a case-by-case basis to determine whether a taxpayer meets the

reasonable-cause exception. But with foreign account penalties—and many other ones too—it can be particularly difficult to carry the day.

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