

Fifth Circuit Holds that Non-willful FBAR Penalties Apply on Per-Account Basis

DECEMBER 3, 2021

On November 30, 2021, the Fifth Circuit Court of Appeals in *U.S. v. Bittner*, ___ F.4th ___ (5th Cir. Nov. 30, 2021), held that penalties for non-willful failures to report foreign bank accounts apply to *each unreported bank account* as opposed to *each report not filed*, as held by other courts.

The decision creates a split from the Ninth Circuit's March 2021 ruling, *see United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021), and other federal district court rulings applying non-willful FBAR penalties to each failure to file an annual FBAR. The decision presents a Circuit Court split that could potentially attract U.S. Supreme Court attention.

The *Bittner* decision revolves around a Romanian businessman's failure to report his interests in foreign bank accounts, as required by the Bank Secrecy Act. The U.S. District Court for the Eastern District of Texas assessed penalties in the amount of \$50,000 on a *per report* basis. The Fifth Circuit, however, concluded that the District Court wrongly applied 31 U.S.C. § 5314 and found that a violation is triggered for each failure to report an account—thereby resulting in the steeper penalty of \$2.72 million.

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