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In this article, Dunn explores the recent Supreme Court oral arguments in *Bittner* regarding how penalties for the late filing of foreign bank account reports should be determined.

On November 2 the Supreme Court held oral arguments in *Bittner*,[1] on whether the failure to timely file a Financial Crimes Enforcement Network Form 114, "Report of Foreign Bank and Financial Accounts (FBAR)," constitutes one violation of the Bank Secrecy Act, or one violation for each account properly reportable on the delinquent FBAR. In 2020 a U.S. district court imposed a $10,000 penalty against Alexandru Bittner under 31 U.S.C. section 5321(a)(5)(A) for each of five FBARs not timely filed by him — for a total penalty of $50,000.[2] In 2021 the Fifth Circuit partially reversed, imposing a $10,000 penalty against Bittner for each of the 272 foreign financial accounts reportable on his untimely FBARs — a total penalty of $2.72 million.

Petitioner's Oral Argument

At oral argument, counsel for Bittner failed to mention that the case was not within the intendment of Congress in instituting the FBAR filing requirement. Congress instituted the FBAR filing requirement to deter Americans from evading U.S. income tax by transferring financial assets overseas, investing them there, and failing to report the income on a U.S. income tax return.[3] But that is not what Bittner did. A naturalized citizen of the United States, Bittner returned to his native Romania where he engaged in business and amassed a fortune before moving back to the United States. Bittner's Romanian accountants filed U.S. income tax returns for him, but apparently they were unaware of the FBAR filing requirement. In any event, Bittner did not transfer financial assets overseas. A fortiori, he did not do so for the purpose of evading U.S. income tax.

Justice Clarence Thomas asked what Bittner's position would be if Treasury required a report for each foreign financial account of a U.S. person.[4] Bittner's attorney could have responded with two points: (1) Treasury would never impose that reporting requirement because it would be administratively unfeasible; and (2) a single $10,000 penalty would nonetheless apply for failure to satisfy that reporting requirement.

Bittner's counsel made no such response.

31 U.S.C. section 5321(a)(5)(A) authorizes the Treasury secretary to "impose a civil money penalty on any person who violates . . . any provision of section 5314." 31 U.S.C. section 5321(a)(5)(B)(i) provides that the amount of that penalty "shall not exceed $10,000." 31 U.S.C. section 5314(a) provides that the Treasury secretary "shall require a resident or citizen of the United States . . . to keep records, file *reports*, or keep records and file *reports*, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign

[1] *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021), *cert. granted*, 142 S. Ct. 2833 (U.S. June 21, 2022) (No. 21-1195).

[2] *United States v. Bittner*, No. 4:19-cv-00415 (E.D. Texas 2020).

[3] *California Bankers Association v. Shultz*, 416 U.S. 21, 28 (1974), quoting H.R. Rep. No. 91-975, at 12-13 (1970) ("Congress was concerned about a serious and widespread use of foreign financial institutions" to evade U.S. income tax). *See Bittner*, 19 F.4th at 738.

[4] Transcript of Oral Argument at 3-4, *Bittner*, 19 F.4th 734 (Nov. 2, 2022) (No. 21-1195).

financial agency." (Emphasis added.) Thus, the failure to file reports required by 31 U.S.C. section 5314(a) — that is, FBARs — for a given year is subject to a single penalty not to exceed $10,000.

Bittner's attorney could have said the penalty asserted by the government — 272 accounts at $10,000 each for a total penalty of $2.72 million — is excessive and unreasonable. But that argument was not made.

Perhaps Bittner's best argument is a textual one. 31 U.S.C. section 5321(a)(5)(C) provides:

> In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314 —
>
> (i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of —
>
> (I) $100,000, or
>
> (II) 50 percent of the amount determined under subparagraph (D).

31 U.S.C. section 5321(a)(5)(D) provides:

> The amount determined under this subparagraph is . . .
>
> (ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account, the balance in the account at the time of the violation.

Poor drafting obviously besets 31 U.S.C. section 5321(a)(5)(C) and (D). Had Bittner been found to be willful, surely his penalty would not have been 272 accounts * $100,000 per account = $27.2 million. Clearly, in 31 U.S.C. section 5321(a)(5)(C), Congress intended to authorize one penalty against a willful taxpayer. The amount of the penalty will not exceed the greater of $100,000 or 50 percent of the aggregate of the taxpayer's high balances of foreign financial accounts for the year. I have handled hundreds of foreign accounts cases over the last 10 years, and this is how I have always interpreted 31 U.S.C. section 5321(a)(5)(C)(i); it is the only interpretation that makes any sense.

31 U.S.C. section 5321(a)(5)(C)(i) and 31 U.S.C. section 5321(a)(5)(A) and (B)(i) authorize the same penalty. It is the same, single penalty. For a willful violation, the penalty will not exceed the greater of $100,000 or 50 percent of the aggregate of the taxpayer's high balances of foreign financial accounts for the year. For a non-willful violation, the penalty will not exceed $10,000. Bittner's counsel made no such textual argument.

Justice Elena Kagan expressed concern about "a person who has hundreds of millions of dollars in many, many accounts, is constantly making transactions, is constantly opening and closing them, maybe doing it to evade taxes, maybe doing it to finance terrorism."[5] Kagan added, "And, you know, in that case, the equities go against you, and that suggests, well, let's just look at the statute, and the statute, as I said, is very account-specific."[6] There is no evidence that Bittner was seeking to evade U.S. income tax or to finance terrorism.

Justice Sonia Sotomayor said, "The whole purpose of this [Bank Secrecy] Act, was that wealthy people were squirreling away millions of dollars in foreign accounts all over the world and the government wanted to know where these accounts were."[7] But, as already noted, Congress's purpose in enacting the FBAR filing requirement in the Bank Secrecy Act was to deter Americans from evading U.S. income tax by transferring funds overseas, investing them there, and not reporting the resulting income on a U.S. income tax return.[8] That is not what Bittner did. He returned to his native Romania and engaged in business there, amassed a fortune, and then moved back to the United States. Throughout the time Bittner was in Romania, he filed U.S. income tax returns. There is no evidence that he transferred any financial assets out of the United States.

Respondent's Oral Argument

Assistant Solicitor General Matthew Guarnieri urged the assessment of an outrageous penalty to the Supreme Court — a penalty of $10,000 per account for each of 272 accounts —

[5] *Id.* at 29-30.

[6] *Id.* at 30.

[7] *Id.* at 35.

[8] *See Shultz*, 416 U.S. at 28; and *Bittner*, 19 F.4th at 738.

and made no effort to justify it. Indeed, it is unjustifiable.

Chief Justice John Roberts asked Guarnieri about "a longstanding canon of construction that if the words of a tax statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." Guarnieri answered, "This is not a tax case anyway."[9] This is just plain wrong. Congress imposed the FBAR filing requirement in the Bank Secrecy Act to deter U.S. taxpayers from evading U.S. income tax by transferring funds overseas and investing them there without reporting the resulting income on a U.S. income tax return. The Bank Secrecy Act thus supports the IRC. Indeed, in interpreting 31 U.S.C. section 5321(a)(5)(A) and (B)(i), Guarnieri cited the Internal Revenue Manual.[10] In interpreting the reasonable cause exception of 31 U.S.C. section 5321(a)(5)(B)(ii), he relied upon the definition of reasonable cause in reg. section 301.6651-1(c)(1) and IRM sections 20.1.1.3.2.1 and 20.1.1.3.2.1.1.[11]

Justice Samuel Alito asked if the government's position is that reasonable cause includes ignorance of the law. Guarnieri answered, "No. And we wouldn't accept that in this circumstance."[12] He then added:

> Now, if you can really demonstrate that you were wholly unaware of these obligations and also that if you had been acting prudently you wouldn't have discovered these obligations, I think that's a powerful case for reasonable cause.[13]

Later, Alito returned to this question:

> Could you return once again to your understanding of the relationship between the reasonable cause requirement and ignorance of the law? Your first answer, when I asked that, was ignorance of the law is not reasonable cause. But then you — you seemed to say, if someone isn't aware of — of the — of the reporting requirement, that makes a powerful case, a very powerful case, for reasonable cause. So what is the relationship exactly?[14]

Guarnieri did not answer Alito's question, other than to say that hiring and paying Romanian tax lawyers and accountants disqualified Bittner from having reasonable cause for his late compliance with the Bank Secrecy Act — an absurd proposition.[15]

The IRM answers Alito's question. Reasonable cause may be established if a taxpayer shows ignorance of the law in conjunction with other facts and circumstances, such as (1) the taxpayer's education; and (2) whether the taxpayer has been penalized before.[16]

A taxpayer may have reasonable cause for noncompliance because of ignorance of the law if he was unaware of the law and could not reasonably be expected to know of it.[17]

Finally, this exchange occurred between Justice Ketanji Brown Jackson and the assistant solicitor general:

> JUSTICE JACKSON: This applies to people who are living overseas and have more than $10,000 in a bank account, a foreign bank — it's a foreign bank account because they're living there, but —
>
> MR. GUARNIERI: Yes, I agree, with — with the slight amendment it's — it's U.S. citizens. It's a —
>
> JUSTICE JACKSON: Right. So any U.S. citizen —
>
> MR. GUARNIERI: — it's an obligation incumbent on U.S. citizens. That's right.
>
> JUSTICE JACKSON: — any U.S. citizen living abroad who has more than $10,000 in a bank account, wherever they're living, is subject to this?
>
> MR. GUARNIERI: That's correct.[18]

[9] Transcript of Oral Argument, *supra* note 4, at 54-55.
[10] *Id.* at 64-65.
[11] *Id.* at 72.
[12] *Id.* at 53-54.
[13] *Id.* at 54.
[14] *Id.* at 72.
[15] *Id.* at 74.
[16] IRM section 20.1.1.3.2.2.6.2.a and c.
[17] IRM section 20.1.1.3.2.2.6.4.b.
[18] Transcript of Oral Argument, *supra* note 4, at 75-76.

The representation that the FBAR filing obligation is limited to U.S. citizens living abroad is incorrect. The obligation applies to citizens or residents of the United States who have foreign financial accounts with an aggregate balance exceeding $10,000.[19] A resident of the United States for this purpose means a lawful permanent resident (green card holder), as well as an individual who satisfies the substantial presence test — essentially, someone who lives in the United States.[20] There are a great many foreign nationals residing in the United States who have foreign financial accounts exceeding the aggregate threshold and must file an FBAR.[21]

Reversal Likely

Based upon the justices' comments at the oral argument, I believe they will vote to reverse *Bittner*, with only Sotomayor and possibly Kagan voting to affirm. That certainly would be a just result. ■

[19] FinCEN FBAR Filing Instructions at 4.

[20] FinCEN FBAR Filing Instructions at 5. *See generally* IRC section 7701(b).

[21] *See, e.g.*, Stephen J. Dunn, "United States Income Taxation of Interests in United Kingdom-Based Pension Plans," Foreign Accounts Compliance Blog, Apr. 18, 2022.