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United States v. Boyd: Ninth Circuit Sides With Taxpayer for Single Late Penalty on FBAR Reporting Multiple Foreign Accounts

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In *United States v. Boyd*, the Ninth Circuit Court of Appeals ruled that a taxpayer who fails to file FinCEN Report 114, Report of Foreign Bank and Financial Accounts (the ''FBAR''), is subject to a single penalty for the failure to file, instead of multiple penalties based upon the number accounts reported on the FBAR.[1] A majority of the three-judge panel overruled the district court, which had granted the government's motion for summary judgment that 31 U.S.C. §5321(a)(5)(A) authorizes imposition of multiple non-willful penalties of up to $10,000 for each foreign bank account required to be reported on the taxpayer's FBAR. The case is significant, as it is the first Court of Appeals decision on an issue over which district courts have divided.[2] There was a vigorous dissent.

Jane Boyd had a financial interest in 14 accounts with institutions in the United Kingdom. The aggregate balance in her foreign accounts exceeded the $10,000 threshold for reporting under 31 C.F.R. §1010.306(c). Between 2009 and 2011, the balance significantly increased after Ms. Boyd deposited funds received as an inheritance from her father. Although the accounts yielded interest and dividends, Ms. Boyd failed to report the income or disclose the accounts on her 2010 federal income tax return.

In 2012, Ms. Boyd entered the Internal Revenue Service's offshore voluntary disclosure program (the ''OVDP'') and submitted, in October 2012, an FBAR listing her 14 foreign accounts for 2010 and an amended 2010 income tax return which included the interest and dividends from those accounts.

In 2014, Ms. Boyd opted out of the OVDP. On subsequent examination of her 2010 return, the IRS determined the taxpayer committed an FBAR violation for each account she failed to timely report, but otherwise found the submitted FBAR to be complete and accurate. The IRS determined that the violations were non-willful and assessed a total penalty of $47,279.

Before the U.S. District Court for the Central District of California, Ms. Boyd argued that she had committed but one non-willful violation, for which the maximum penalty allowed by 31 U.S.C. §5321 was $10,000. The government contended that its regulations as supported by the statute authorized the IRS to assess one penalty for each non-reported account. The district court granted the government's motion for summary judgment.

The Ninth Circuit began its analysis in *Boyd* by recognizing that whether a late-filed FBAR reporting multiple accounts allows the government to assess a single non-willful penalty for the failure to file the form or multiple non-willful penalties based upon the number of accounts reported on the form presents an issue of first impression for that court. The opinion parses the language of two subsections of Title 31 of

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[1] *United States v. Boyd*, No. 19-55585, 2021 BL 105591 (9th Cir. Mar. 24, 2021).

[2] *Compare United States v. Boyd*, No. CV 18-803-MWF (JEMx), 2019 BL 144463 (C.D. Cal. Apr. 23, 2019) (holding statutory cap applies on per-account basis) *with United States v. Bittner*, 469 F. Supp. 3d 709 (E.D. Tex. 2020) (holding statutory cap applies on per-form basis), *appeal docketed*, No. 20-40597 (5th Cir. Sept. 11, 2020); *United States v. Kaufman*, No. 3:18-CV-00787, 2021 BL 8108 (D. Conn. Jan. 11, 2021) (per-form basis); and *United States v. Giraldeli*, No. 20-2830 (D.N.J. Mar. 16, 2021) (unpublished opinion) (per-form basis).

the U.S. Code: §5314(a), which requires U.S. citizens and residents to keep records and file reports regarding foreign financial accounts, and §5321(a), which imposes penalties for the failure to do so.[3] The path chosen by the court to resolve the issue was to determine the violation §5321(a)(5)(B) seeks to penalize. The court distilled §5314 to two ''separate and relevant'' provisions: filing the FBAR and including the information specified by Treasury regulations. The court considered itself compelled to consult Treasury regulations implementing §5314(a) to determine how the provisions of the statute could be violated, noting that ''if the Secretary were to do nothing, the Act itself would impose no penalties on anyone.''[4] It identified two relevant regulations. As described by the court, 31 C.F.R. §1010.350(a) specifies the information required to be reported by the FBAR, and 31 C.F.R. §1010.306(c) sets the deadline for filing the FBAR. Because her FBAR was accurate, she could not have violated 31 C.F.R. §1010.350(a). Instead, her only violation was of 31 C.F.R. 1010.306 because her FBAR was filed late. In the court's mind, this represented a single non-willful violation: the failure to timely file the FBAR.

The court next turned its attention to the government's arguments. It found the government's reliance on §1010.350(a) to be misplaced because Boyd did not violate that section. In fact, she provided the required information, albeit in a less than timely manner. The court dismissed the government's argument that the use of the word ''any'' before the word ''violation'' in 31 U.S.C. §5321(a)(5)(A) confirmed more than one violation may occur with respect to a single FBAR, asserting the reference in the statute merely referred to the regulations prescribing violations of §5314.

Looking beyond what the court found to be the ''clear language of §5321(a)(5)(B)(i),'' the government argued that the statutory scheme ''as a whole and legislative intent'' supported assessment of the $10,000 non-willful penalty on a per-account basis. Again the court was unpersuaded and quoted from its opinion in *United States v. McDuffy*, ''where Congress includes particular language in one section of a statute but omits it in another of the same act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.''[5] The presence of language in §5321(a)(1)(D) providing for penalty assessment on a per-account basis and the language in §5321(a)(1)(B)(ii) applying the reasonable cause exception to assertion of a non-willful penalty on a per-account basis was in contrast with the omission of any similar language in §5321(a)(5)(B)(i), which limits the civil penalty for violations of §5314 to $10,000. The presence of the word ''any'' in the clause ''the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000'' in §5321(a)(5)(B)(i) is not enough to support imposition of multiple penalties on a per-account basis as it is merely a reference to §5321(a)(5)(A) which authorizes the Secretary to ''impose a civil penalty on any person who violates, or causes any violation of, any provision of §5314.''

Although the majority found the statute and regulations to unambiguously support limiting non-willful violations of the FBAR filing obligation to $10,000 per form instead of per account, it proffered the Ninth Circuit's decision in *Bradley v. United States*[6] as further support for its ruling: ''But even if the statute were ambiguous in its treatment of non-willful penal-

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[3] The language of 31 U.S.C. §5321(a)(5) is instructive for understanding the court's analysis.

> (A) Penalty authorized.— The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.
>
> (B) Amount of penalty.—
>
> (i) In general.— Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.
>
> (ii) Reasonable cause exception.—No penalty shall be imposed under subparagraph (A) with respect to any violation if—
>
> (I) such violation was due to reasonable cause, and
>
> (II) the amount of the transaction or the balance in the account at the time of the transaction was properly reported.
>
> (C) Willful violations.—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), And
>
> (ii) subparagraph (B)(ii) shall not apply.
>
> (D) Amount.—The amount determined under this subparagraph is—
>
> (i) in the case of a violation involving a transaction, the amount of the transaction, or
>
> (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.

[4] *United States v. Boyd*, quoting *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 26 (1974).

[5] 890 F.3d 796, 800 (9th Cir. 2018), *quoting Dean v. United States*, 556 U.S. 568, 573 (2009), *cert. den.*, 139 S. Ct. 845 (2019).

[6] 817 F.2d 1400 (9th Cir. 1987).

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ties, we must strictly construe a 'tax provision which imposes a penalty. . .; [it] cannot be assessed unless the words of the provision clearly impose it.' "[7]

In dissent, Judge Sandra S. Ikuta engaged in the same statutory analysis as the majority but reached the opposite conclusion. The dissent found that 31 U.S.C. §5314(a) possesses both substantive and procedural elements. Substantively, the statute requires a taxpayer to "file reports" regarding the taxpayer's foreign accounts. Procedurally, the statute requires the reports to contain certain information. The regulations prescribed by the Secretary reflect this duality. The first clause of 31 C.F.R. §1010.350(a) requires reporting of each foreign account with respect to which the taxpayer has a financial interest or signature authority. The second clause of the regulation sets forth the procedural requirement that information regarding the foreign accounts be provided on the prescribed form. The distinction between the accounts to be reported and the form on which the reporting occurs is carried forward in 31 C.F.R. §1010.306 which also distinguishes between what is to be reported (information regarding the taxpayer's foreign accounts) and the means of reporting (the FBAR form). The dissent accuses the majority of conflating the report of the foreign account with the form by which the report is made. Recognizing the distinction requires assertion of the penalty on an account-by-account basis.

When the distinction is recognized, the violation which §5321(a)(5) penalizes becomes apparent: the failure to report each account with the required information. Section 5321(a)(5)(A) authorizes imposition of civil monetary penalties, while §5321(a)(5)(B), §5321(a)(5)(C), and §5321(a)(5)(D) provide different computations of the penalty amount depending upon whether the taxpayer's failure was willful or non-willful. The violation which is the subject of the penalty is the substantive failure to report the account, not the procedural failure to timely file the FBAR. The rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning"[8] requires that the word "violation" must have a consistent meaning throughout the subparagraphs of §5321. The violation committed by a non-willful taxpayer is the same as the violation committed by a willful taxpayer. Therefore, imposition of willful penalties on an account-by-account basis supports imposition of non-willful penalties on an account-by-account basis.

COMMENTARY

Wins are better than losses. The taxpayer's win before the Ninth Circuit Court of Appeals in *Boyd* is not to be lightly dismissed, as *Boyd* is the first case in which a Court of Appeals has ruled on the issue of whether $ 10,000 non-willful penalty for failure to file an FBAR is to be assessed on a per-account or per-form basis. Notwithstanding the dissent's characterization of the majority's statutory analysis as "strained and unpersuasive," reasonable minds may find the statutory analysis of the both the majority and the dissent persuasive. The government's brief in its appeal of the district court decision in *Bittner* relies heavily on the dissent in *Boyd*, devoting an entire portion of its brief to the arguments made by Judge Ikuta.

A win is a win. However, some wins mean less than others. Standing alone, Jane Boyd's victory will not be particularly helpful to most taxpayers. First, there is no reason to think the IRS intends to follow *Boyd* and concede the issue. Second, *Boyd* will help taxpayers willing to sue for a refund, but without IRS acquiescence, the decision means practically nothing for taxpayers unwilling to incur litigation expense.

In the area of foreign non-compliance, the government's strategy has been as clear as it has been successful.[9] It picks cases involving unsympathetic taxpayers. Jane Boyd is not the typical taxpayer in these cases. First, she is among a small minority of taxpayers who chose to opt out of the OVDP. Second, although her FBAR was filed late, it included all of her foreign financial accounts when it was filed. In fact, she reported 14 different accounts which the government reduced to 13 when it asserted penalties because the funds from one financial account flowed into two others. A far more typical taxpayer at the heart of the FBAR cases is Alexandru Bittner. The government's brief in support of its appeal of the district court decision in *Bittner v. United States*[10] describes the taxpayer as "a savvy businessman" earning millions of dollars. He maintained dozens of bank accounts in Romania, Switzerland, and Lichtenstein and purposefully used holding companies and numbered accounts to hide his identity.

Most significantly and characteristic of FBAR defendants, Mr. Bittner filed FBARs which did not include all of his foreign accounts. Not surprisingly, he was not successful in establishing reasonable cause for his failure to timely file his first FBAR. Inasmuch as he has appealed the district court's denial of his reasonable cause defense, his compliance history will be on full display before the Fifth Circuit Court of Appeals when the government presents its arguments for assertion of the $10,000 non-willful penalty on a per-account basis. While Bittner's first FBARs re-

[7] 817 F.2d 1400 at 1402-03.

[8] Dissent *quoting Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

[9] *See generally* Felhammer, Koodrich, Cohen, Kurzock, and Murray, *Civil FBAR Penalties: The Possible (Over) Breadth of Willfulness*, 170 Tax Notes Fed. 1537 (Mar. 8, 2021).

[10] Above n. 2.

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ported less than 25 accounts, his amended FBARs reported no less than 51 accounts for the years 2007-2011 with aggregate balances of as little as $3,053,884 and as much as $16,058,319. Justice may be blind, but it is not ignorant. To the extent a taxpayer's behavior influences judicial outcomes, *Bittner* is clearly a better case for the government to litigate than *Boyd*. On that basis alone, the government's chances for a win in *Bittner* before the Fifth Circuit are better than they were in *Boyd* even if the statutes at issue are the same.

Finally, it is naïve to take much solace from Jane Boyd's win. The IRS increasingly asserts willful FBAR penalties in lieu of non-willful penalties. Not only are the penalties greater for willful violations of 31 U.S.C. §5314, but those penalties also clearly apply on an account-by-account basis. Even if the government is unable to create a split in the opinions of the circuit courts, its discretion to determine whether a taxpayer's failure to disclose foreign accounts was willful or non-willful gives it recourse which any number of taxpayer victories limiting the amount of the non-willful penalty cannot nullify. Indeed, a loss in another circuit may further predispose the IRS to impose willful penalties.

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