# The News from the FBAR Front Isn't All Bad, It Only Seems That Way Sometimes

By Robert S. Horwitz*

*Robert S. Horwitz examines recent FBAR cases.*



This year has seen several significant decisions in the FBAR penalty arena. While some taxpayers have been successful in defeating motions for summary judgment in FBAR willful cases, in those cases that have gone to trial the taxpayers have ultimately lost. In the non-willful FBAR area, however, the taxpayers this year were successful in convincing two district courts that the maximum non-willful penalty is $10,000 per annual form and not per account. This article will discuss some of the FBAR cases that were decided over the past year.

## The News on the FBAR Willful Penalty Is Not Great for Taxpayers

The Fourth Circuit was the first appeals court to address the willful FBAR penalty in *J.B. Williams*,[1] where the Court held that the defendant's failure to read the portion of Schedule B that checked the box "no" to whether he had any foreign accounts, constituted "willful blindness to the FBAR requirement," which made his conduct willful. Several trial courts have since cited *Williams* for the proposition that signing a return that has the box on Schedule B checked "no" constitutes willfulness for purposes of the FBAR penalty. *McBride*[2]; *Bohanec*[3]; and *Kimble*.[4]

The Fourth Circuit again addressed the FBAR willful penalty in *Horowitz*.[5] The taxpayers in *Horowitz* had worked several years in Saudi Arabia. They deposited a large part of their income into a local bank. Since that bank did not pay interest on deposits, they eventually transferred the funds to a Swiss bank account. The amount in the Swiss account eventually reached over $1.6 million and was their main financial asset. Eventually, they had the funds placed in a UBS account. When they returned to the United States, they did not give UBS their mailing address.

The taxpayers reported on their U.S. income tax returns the income they earned in Saudi Arabia and the interest earned on their U.S. bank accounts, so

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they knew that foreign income and interest income were both reported. They never told their CPA about the Swiss account or asked if interest on a foreign account was subject to U.S. income tax. They did, however, tell friends about the Swiss account.

In 2008 they were told by UBS that they had to close their account because UBS no longer was accepting U.S. citizens as customers. They moved the funds to another Swiss bank. The account opening forms directed the bank to hold mail and Dr. Horowitz initialed each page.

The taxpayers entered the Offshore Voluntary Compliance Initiative and paid the tax due on previously unreported foreign income, but in 2012 they opted out. In June 2014, the IRS assessed willful penalties against them. In 2016, the Government sued to collect the willful penalty. Relying on the *Williams* Court's discussion that a taxpayer's signing a return under penalty of perjury that falsely avers that he has no foreign accounts, the district court entered summary judgment in favor of the Government and the taxpayers appealed.

The taxpayers raised several arguments on appeal: First, they argued that under *W. Ratzlaf*,[6] willful for purposes of criminal penalties under the Bank Secrecy Act requires actual knowledge that one is violating the law and this definition should apply to "willful" for purposes of the FBAR willful penalty. Rejecting this argument, the Court noted that the Supreme Court remarked that "willful" is a term with many meanings and, in *Safeco Ins. Co. v. Burr*,[7] held that in the civil context "willful" includes "reckless disregard." The Court concluded that for purposes of the civil FBAR willful penalty, willful includes both actual knowledge and reckless disregard, which is determined under an objective standard: a person acts with reckless disregard if he acts or fails to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that I should be known." This differs from criminal recklessness and willful blindness, both of which include a subjective element. Nor is reckless disregard negligence, since it requires "a high risk of harm, objectively assessed." The Court agreed with the Third Circuit in *Bedrosian*,[8] that recklessness is established if the taxpayer "(1) clearly ought to have known that (2) there was a grave risk that an accurate FBAR was not being filed and if (3) he was in a position to find out for certain very easily."

While the Court cited *Williams* with approval, it did not use the "willful blindness" standard to determine whether the taxpayers acted willfully. Nor did it focus on their signing a return that falsely checked the Schedule B box no. Instead, the Court looked at all of the evidence as supporting a finding that the taxpayers acted with reckless disregard and, therefore, willfully.

The taxpayer's second argument was that the evidence did not support the district court's determination. The Fourth Circuit rejected this argument. The taxpayers knew a significant part of their savings were in the foreign accounts; that income they earned in Saudi Arabia was taxable by the United States and that interest on U.S. accounts was taxable by the United States. Nevertheless, they never asked their CPA if foreign interest was taxable by the United States and never informed the CPA about their foreign account. They did not give their U.S. mailing address to UBS and had their second Swiss bank hold the mail. Additionally, they failed to closely review their returns which reported they had no foreign accounts and signed the returns under penalties of perjury. The Fourth Circuit held that the evidence clearly established that the taxpayers "ought to have known" that they were failing to fulfill their obligation to disclose their Swiss accounts and could easily have found out that duty. They acted with reckless disregard and, therefore, willfully.

Third, the taxpayers argued that if they willfully failed to file FBAR returns, under the applicable regulations, the maximum penalty per year was limited to $100,000. Joining the Federal Circuit, the Fourth Circuit rejected this argument, finding that the 2004 amendments to the civil FBAR penalty voided the regulation and Treasury's failure to amend the regulation did not abrogate the statute.

Finally, the taxpayers argued that the assessment was time-barred. The statute of limitations was June 30, 2014 and the IRS had made the assessment on June 13, 2014. Subsequently, when a protest was filed with appeals, an IRS employee removed the assessment date without abating the assessment. The Court held that the June 13, 2014 assessment was never abated or reversed and removing the assessment date did not change the date of the assessment. Thus, the Court held that the assessment was timely.

Another interesting willful penalty decision to come down recently was the district court's decision on remand in *Bedrosian*.[9] Initially, the district court held that Bedrosian was not liable for the willful FBAR penalty. The Third Circuit reversed this holding, and directed the district court, on remand, to consider whether the plaintiff acted willfully under the "reckless standard" based on other Third Circuit cases in the "taxation realm." The result on remand was no surprise. Applying the following description of the reckless standard for willfulness, the district court held that Bedrosian acted willfully (quoting from the Third Circuit's opinion):

> A person commits a reckless violation of the FBAR statute by engaging in conduct that violates an objective standard: action entailing an unjustifiably high

risk of harm that is either known or so obvious that it should be known.

After considering several Third Circuit cases involving the trust fund recovery penalty, the district court held that based on the evidence, including the following, "Bedrosian's conduct was reckless and therefore willful":

- Bedrosian cooperated with the Government "only after he was exposed as having hidden foreign accounts."
- Bedrosian's FBAR only disclosed one of two Swiss accounts and he moved the funds in the undisclosed account to a different bank rather than repatriate them.
- Bedrosian admitted he saw a Wall Street Journal article about the federal government tracking mail coming to the United States from overseas and thus was aware of the possibility it would learn of his offshore accounts if mail was sent to him by the Swiss bank.
- Bedrosian knew his Swiss accounts were on "mail hold."
- His FBAR checked the box for having less than $1 million in the account when he knew the total in his accounts was over $1 million.

According to the district court, many of the circumstances cited by the Fourth Circuit in *Horowitz* were present in Bedrosian's case including knowledge of the FBAR reporting requirements and that world-wide income was taxed, the use of mail holds for correspondence from their Swiss bank, significant amounts in their offshore accounts, and siging returns under penalties of perjury.

The district court interpreted non-FBAR tax cases to "generally support that when a taxpayer is responsible for reviewing tax forms and signing checks, the taxpayer is responsible for errors that would have been apparent had they reviewed such forms and checks closely." Bedrosian knew there was more than $1 million in his Swiss accounts but the FBAR form he signed checked the box for under $1 million. He thus knew or should have known the form he signed was inaccurate and therefore acted willfully.

On January 29, 2021, the district court entered a Memorandum and Order on Penalty Amount in *Bedrosian*. Relying on a spreadsheet created by UBS showing monthly high balances, the district court determined that the IRS did not abuse its discretion "in imposing the maximum penalty against Bedrosian," which was 50% of the highest balance in the account. It entered judgment in favor of the United States for the balance due on the assessment, plus interest and the 6% annual non-payment penalty under 31 USC §3717, which will continue to accrue until the judgment is paid.

Based on the district court's decision, anyone who signs a return that contains an error that he or she would have caught had the return been read over carefully, has acted with "reckless disregard" and thus willfully signed a false return. I don't know if that is what Congress had in mind when it used the word "willfully" in the FBAR statute but the Government has used the taxpayer's signing such a return as the basis for summary judgment motions in a number of cases. The taxpayer's appeal in *Kimble*, where the Court of Federal Claims held as a matter of law that signing a return with a false answer on Schedule B is *per se* willful, was argued to the Federal Circuit last March.

A case where the IRS used an iron fist is *Jones*,[10] where an elderly widow who filed a streamlined disclosure ended up with penalties assessed against her of $751,685 for 2011 and of $770,255 for 2012 and against her late husband's estate for 2011 in the amount of $1,890,074. Mrs. Jones was born in Canada in 1928 and her late husband was born in New Zealand in 1919. After their marriage, they moved to the United States in 1954 and became U.S. citizens in 1969. Neither had attended college. They had separate and joint accounts overseas.

Their CPA knew Mr. and Mrs. Jones were both born overseas and lived in Canada before moving to the United States but he never asked them about foreign accounts and admitted he was unfamiliar with FBAR reporting requirements and that he never reviewed Schedule B with the Joneses. Their returns did not report foreign income and checked "No" to whether they had foreign accounts.

After her husband died, Mrs. Jones learned of his separate offshore accounts. In consulting with attorneys about his estate, she learned for the first time about the need to file FBARs and report foreign income. She filed a timely FBAR for 2012 and in 2014 filed amended returns for 2011 and 2012 reporting previously unreported foreign income. In 2015, she filed streamlined submissions and paid a miscellaneous penalty of $156,000 based on the highest total balance in her separate accounts and the joint accounts. The estate tax return filed for her late husband listed his foreign accounts.

Although there were no clear guidelines on filing a streamlined disclosure for a deceased spouse, the revenue agent assigned to review Mrs. Jones's streamlined filing asserted willful penalties on the ground that Mr. and Mrs. Jones both were "willfully blind." The parties filed cross-motions for summary judgment. The court granted in part and denied in part Mrs. Jones's motion and denied the Government's motion.

The district court acknowledged the cases that had embraced the "constructive knowledge" theory of willfulness but held that "constructive knowledge" can be rebutted. Because there was evidence that Mrs. Jones and her late husband did not know about the need to file FBARs, the Court held there were questions of material fact in dispute: "Ultimately, willfulness is a finding of fact and the fact that Mrs. Jones signed her return under penalty of perjury is *prima facie* evidence that she had constructive knowledge of the FBAR requirements. Such evidence creates a genuine dispute of material fact as to whether she engaged in a willful violation."

The Court then addressed Mrs. Jones' argument that the penalty amount was arbitrary and capricious and thus should be set aside. The Court stated that the penalty amount is reviewed for abuse of discretion under an arbitrary and capricious standard under the Administrative Procedure Act. Here, the penalty was based on inappropriate data (*i.e.*, the balance on June 30, 2012, to assess penalties for 2011 and 2012) that should not have been used and was therefore "arbitrary and capricious." The Court stated it would remand the matter to the IRS for a recalculation of the penalty if the jury found willfulness. The case was settled prior to trial.

A case where a taxpayer won a partial victory in an FBAR willful case is *Schwarzbaum*.[11] The first decision dealt with wilfulness; the second decision dealt with the amount of the penalty and whether it violated the excessive fines clause of the Eighth Amendment.

The taxpayer was born in Germany, had lived in several countries and spoke six languages. His father had built a successful textile business and had invested in real estate. The taxpayer became a U.S. citizen in 2000, spent part of each year from 1993 to 2010 in Costa Rica, Switzerland and the United States and lived in Switzerland full time from 2010–2016. Since 2016 he has lived in the United States. His father supported him until he was 45, at which time a Swiss account with $3 million was signed over to him. He invested the funds conservatively. His father died in 2009, leaving to him other offshore accounts. The taxpayer let the bankers invest the money for him.

Between 2006 and 2009, he transferred money from the United States to his account in Costa Rica. He filed FBARs for 2006 through 2009 that reported the Costa Rican account because it had a "U.S. connection." In 2009 he transferred funds from the United States to his largest Swiss account. He reported that account on his 2009 FBAR, but not any of his other Swiss accounts. He also reported a $5.05 million gift from his father in 2007 because the funds were wired to the United States.

The taxpayer participated in the OVDI but opted out. FBAR willful penalties totaling $13.729 million were assessed against him. This amount was the maximum penalty for the year with the highest balance spread out over 2006, 2007, 2008 and 2009.

Beginning its analysis, the district court stated that for purposes of a civil penalty, willfulness includes both knowing and reckless conduct and willful blindness but rejected the Government's argument that a taxpayer has constructive knowledge of the FBAR filing requirements based on signing a tax return. The district court also rejected the Government's arguments that the taxpayer was willfully blind because he opened Swiss accounts with instructions to "hold" mail and did not respond to the UBS letter, since he was directed to sign the "hold instructions" by Swiss bankers and didn't respond to the letter based on his Swiss attorney's advice.

Based on his FBAR filings for 2006–2009, the district court held that the taxpayer was willfully blind for 2007, 2008 and 2009 but not for 2006. While his English was limited in these years, he never asked anyone to translate the FBAR form or instructions for him. These instructions were unequivocal that a U.S. person must report all foreign financial accounts if the aggregate balance exceeded $10,000, regardless of whether there was a "U.S. connection." After reviewing the FBAR instructions for 2007, the Court found that Mr. Schwarzbaum should have been aware "of a high probability of tax liability with respect to his unreported accounts" and took no steps to learn about his filing and tax obligations. Thus, he met the willful blindness standard.

Because the IRS used the high account balance on the taxpayer's OVDI worksheet and not the balances as of June 30 of the year following the year for which the report was filed, the penalties were not assessed according to law. The court ordered supplemental briefing on the amount of the penalties and whether the Eighth Amendment prohibition against excessive fines applied.

In its second order, dated May 18, 2020, the district court fixed the total penalties for 2007, 2008 and 2009 at $12,907,952. The court rejected the taxpayer's arguments that (a) no penalty should apply since the IRS did not follow the law in determining the penalty amount; (b) that the case should be remanded to the IRS for further proceedings, with the IRS being time-barred from assessing penalties; (c) that the penalties were invalid; and (d) that the FBAR penalty should be capped at $100,000 per tax year. It also rejected the Government's argument that it should sustain the full amount of the proposed penalties, $13,729,591, since that amount was below the statutory maximum for 2007, 2008 and 2009. Based on the balance in each account the district court determined that the penalties were $4,498,486 for 2007, $4,212,871 for 2008 and $4,196,595 for 2009. In its analysis, the district court relied on charts prepared by the Government that listed the balance in each account as of June 30 of the year following the year for which the report was required and determined a penalty amount based on 50% of the balance in each account and, in some instances where the account balance was unknown or below $100,000 fixed the penalty at $100,000.

The court next addressed the taxpayer's Excessive Fines argument. The court held that FBAR penalties do not violate the Eight Amendment Excessive Fines provision because they did not serve primarily punitive, retributive or deterrent purposes but were primarily remedial. The court termed the FBAR penalty a "tax penalty" and noted that tax penalties have traditionally been considered remedial. The court also said that treating FBAR penalties as outside the purview of the Eight Amendment was consistent with the purpose of the FBAR, which "is to identify persons who may be using foreign financial accounts to circumvent United States laws and to identify and trace funds used for illicit purposes to identify unreported income maintained or generated abroad." Further, 31 USC §5321 is entitled "Civil penalties." The court concluded that FBAR civil penalties are not subject to the Eighth Amendment.

In my view, the court's evaluation of the Eight Amendment argument was based on an erroneous assumption: that FBAR penalties are "tax penalties." The purpose of the BSA was in large part aimed at detecting and deterring criminal conduct. The taxpayer has filed an appeal with the Eleventh Circuit.

## Taxpayers Win Partial Victories in Two Non-Willful Penalty Cases but the Government Wins One by Default

The IRS has taken the position that the non-willful penalty is assessed on an account-by-account basis. Thus, a person whose failure to file an FBAR form is non-willful and has five accounts totaling $70,000 could potentially be assessed the maximum $10,000 penalty for each account, for a total of $50,000 per year, while a person with one account with a balance of $500,000 would pay only one $10,000 penalty per year. This position met with success in the first case to address the issue, *Boyd*,[12] appeal pending (Ninth Circuit).

In two recent cases, district courts held that the $10,000 was assessed per form, not per account. *Bittner*,[13] involved non-willful FBAR assessments totaling $2.72 million against Bittner for 2007 through 2011. Bittner is a Romanian-born naturalized U.S. citizen who returned to Romania in 1990, where he became a very successful businessman and had an interest in or signatory authority over more than 50 foreign accounts. He returned to the United States in 2011. Because he had not filed timely FBARs for 2007 through 2011, the IRS assessed the non-willful FBAR penalties. The Government sued to collect the penalties. The Government moved for partial summary judgment as to the penalty assessed for those accounts Bittner admitted to having a financial interest in. The non-willful penalties assessed for those accounts were $1.77 million. Bittner filed a cross-motion for partial summary judgment, claiming that no more than one $10,000 non-willful penalty can be assessed per annual form.

The Court analyzed the text of the statute in the context of the statutory and regulatory framework. Since Code Sec. 5321(a)(5)(A) provides for a penalty "on any person who violates, or causes any violation of, any provision of §5314," the question became what is a "violation" of the statute. The parties agreed that, based on language in the regulations, the failure to file the annual FBAR is the violation that triggers the penalty. They disagreed whether, where there are multiple accounts, the failure to file the FBAR form constitutes a separate violation for each account or only one violation.

The Court looked to the language of the willful penalty, which bases the amount of the penalty "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." From this language, the Court concluded that Congress intended the willful penalty to be applied on an account-by-account basis.

The Court then looked at the language of the non-willful penalty and the reasonable cause exception. While the reasonable cause exception to the non-willful penalty was related to the "balance in the account," the non-willful penalty itself did not contain any reference to "account" or "balance in the account." The Court presumed that Congress acted intentionally when it drafted the non-willful penalty language without these references. Further, because the BSA aimed "to avoid burdening unreasonably a person making a transaction with a foreign financial agency," an individual required to file an FBAR form was only required to file one report for each year. As a result, "it stands to reason that a 'violation' of the statute would attach directly to the obligation that the statute creates—the filing of a single report—rather than attaching to each individual foreign financial account maintained." Additionally, no matter how many foreign accounts a person has, the requirement to file an FBAR is only triggered if the aggregate balance in the accounts is over $10,000. It thus made no sense "to impose per-account penalties for non-willful FBAR violations when the number of foreign financial accounts an individual maintains has no bearing whatsoever on that individual's obligation to file an FBAR in the first place."

The Court rejected the government's arguments that since the reasonable cause exception relates to the "balance in the account" the penalty must apply per account and that since the willful penalty applies on a per-account basis, so must the non-willful penalty. While Congress may have had good reason to assess the willful penalty on a per-account basis, looking to the balance in the account to determine the applicability of the reasonable cause exception did not support the conclusion that Congress meant for the non-willful penalty to apply for a per-account basis given the statutory language.

According to the Court, adopting its "per form" reading avoids the "absurd outcome that Congress could not have intended in drafting the statute." The Court used as an example of this "absurd outcome" two individuals with multiple offshore accounts with $1 million. One had two accounts and the other had 20. Even though both failures to file were non-willful, based on the government's reading, the individual with two accounts would face a maximum penalty of $20,000 while the individual with 20 accounts would face a maximum penalty of $200,000. As to the government's argument that investigation costs increase with the number of accounts, the Court found this insufficient to overcome the statutory language, especially since an individual with 25 or more accounts would not have to list any of the accounts on the FBAR.

The Court also rejected the government's reliance on *Boyd* since the court in *Boyd* did not explain why it found the government's interpretation more reasonable, the case was not binding precedent and the Court disagreed with it. The Court ended its discussion of the issue by noting "Congress knew how to make the non-willful FBAR penalty vary with the number of foreign financial accounts maintained, but it did not do so. That is the end of the road."

Finally, the Court determined that since Bittner did not file FBAR forms for the years in issue, the reasonable cause exception did not apply. Bittner has appealed to the Fifth Circuit, arguing that the district court erred in not providing the opportunity to present evidence on whether the reasonable cause exception applies. The Government filed a cross-appeal.

On January 11, 2021, the district court in *Kaufman*[14] held that the non-willful FBAR penalty is assessed per annual form, not per account. As in *Bittner*, the parties filed cross motions for summary judgment and presented the court with two issues: (a) whether the maximum $10,000 non-willful penalty was per account or per annual filing and (b) whether the defendant had "reasonable cause" for not filing an FBAR form. The result was the same as in Bittner: the defendant did not have reasonable cause, but the non-willful penalty was per annual form not per account.

The defendant is a U.S. citizen who has resided in Israel since 1979, where he had multiple financial accounts. His U.S. tax returns were prepared by an American accounting firm. Each year, the accountants would ask if he had any foreign accounts and would advise him that if he did, he may need to file FBAR forms. Each year he told his accountants he did not have any foreign accounts. When asked how he paid his bills, he claimed it was out of a U.S. brokerage account, so they checked the "no" box to the question on the return whether he had foreign accounts. Notwithstanding this evidence, Mr. Kaufman claimed he did not learn of the FBAR filing requirement until September 2011. He also claimed that he suffered a heart attack in late 2010 and was involved in an auto accident in 2011 and that these affected his cognitive abilities.

The first issue the Court addressed was the reasonable cause defense. To escape liability for the non-willful penalty a person must show "reasonable cause" and that the amount in the account was accurately reported. The Court focused on the "reasonable cause" prong. Since "reasonable cause" is not defined in the FBAR statute, the Court looked to the reasonable cause defense to penalties in Code Secs. 6651 and 6664, noting that under *R.W. Boyle*,[15] failure to timely file a return is not excused by reliance on an agent. Given the facts, including the taxpayer telling his CPAs that he did not have foreign accounts, the Court found there was no reasonable cause. Thus, he was liable for the non-willful penalty.

The Court turned to whether the maximum penalty was $10,000 per year, or whether the IRS could assess one non-willful penalty of up to $10,000 for each account. This was a question of statutory interpretation, the starting point for which is the "plain meaning" rule, *i.e.*, the language in a statute is given its plain meaning. The Government pointed to the language in the willful penalty provisions of the statute, which refer to "balance in the account" and "existence of an account" as requiring the non-willful penalty to apply on an account-by-account basis. Mr. Kaufman argued that this language "reveals exactly the opposite. The Court agrees with Kaufman."

Relying on *Bittner*, the Court reasoned that the language in the willful penalty provision shows that Congress knew how to make penalties account specific. From the exclusion of language in the non-willful provision which was in the willful provision of the statute, it drew a negative inference that Congress did not intend for the non-willful penalty to apply per account. To buttress its determination, the Court found it significant that the regulations provide as the threshold for filing the FBAR form an aggregate balance in all accounts of over $10,000 since it makes no sense to assess a non-willful penalty per account when the reporting obligation is based on the aggregate balance and not on the number of accounts.

Under both willful and non-willful penalties "the violation flows from the failure to file a timely and accurate FBAR. The only difference is that the manner for calculating the statutory cap for penalties for willful violations involves an analysis that includes consideration of the balance in the accounts, while no such analysis is required for non-willful violations." The Court reasoned that the Government's interpretation "could readily result in disparate outcomes among similarly situated people" based solely on the number of accounts and a person who had several accounts who was non-willful "could be exposed to a significantly higher penalty than a willful violator." The Court dismissed as conjecture the Government's argument that limiting the penalty for non-willful violations to $10,000 per year would decrease its deterrence value. The Court noted that for the first three decades of the statute's existence there was only a willful penalty and when Congress added the non-willful penalty it was aware that the willful penalty used the account balance as the basis for computing the penalty amount, something the Court found persuasive evidence that Congress did not want the non-willful penalty to be applied on a per account basis.

On January 25, 2021, the Government got a default judgment in *Stromme*,[16] where the court held that the non-willful penalty can be assessed on a per-account basis. The Government sued to collect non-willful penalties assessed against the defendant on an account-by-account basis. When the defendant failed to answer or otherwise respond, the Government moved for default judgment. In granting the motion, the district court, citing the *Boyd* decision, held that the IRS could assess a penalty of up to $10,000 for each unreported foreign account. The Government has submitted a copy of the order and judgment in *Stromme* to the Ninth Circuit under F. R. App. Pro. 28(j) to take into consideration in deciding *Boyd*.

## Conclusion

It has been almost 50 years since enactment of the FBAR willful penalty and 15 years since enactment of the non-willful penalty. While the courts are in general agreement that the Government can prove willfulness by establishing that the taxpayer acted with reckless disregard or willful blindness, it is still not settled whether signing a return under penalty of perjury that checks "no" to the Schedule B question about foreign accounts is, by itself, sufficient to establish willfulness, whether it raises a rebuttable presumption of willfulness or whether it is just evidence that supports a finding of willfulness. My opinion is that the definition of willfulness used in *Ratzlaf* should apply to FBAR civil penalty cases, but no court has come around to my way of thinking. The Federal Circuit may soon weigh in in the *Kimble* case on whether signing a return that checks the Schedule B box "no" is *per se* willful.

We also do not have any appellate decisions on whether the FBAR willful penalty can violate the Eighth Amendment prohibition against excessive fines. The Court of Federal Claims in *Norman*,[17] held that the taxpayer waived the argument by not timely raising it in the court below. The Eleventh Circuit may address the issue in *Schwarzbaum*, assuming the appeal is not dismissed.

While there was good news for taxpayers concerning the maximum non-willful FBAR penalty, the Ninth Circuit has as yet to issue its opinion in *Boyd*. Assuming the taxpayer wins that case, we can be assured that the Government will continue to pursue the issue in the *Bittner* appeal and to appeal any case in which the taxpayer convinces the district court that the non-willful penalty is per form not per account.

### ENDNOTES

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1 *J.B. Williams*, CA-4, 2012-2 USTC ¶50,475, 489 FedAppx 655.

2 *McBride*, 968 FSupp2d 1186 (Utah 2012).

3 *Bohanec*, 237 FSupp3d 881 (C.D. Cal. 2016).

4 *Kimble*, 141 FedCl 373 (2018).

5 *Horowitz*, 978 F3d 80 (2020), *aff'g* 978 FSupp3d 511 (MD 2019).

6 *W. Ratzlaf*, SCt, 94-1 USTC ¶50,015, 510 US 135, 114 SCt 655.

7 *Safeco Ins. Co. v. Burr*, 551 US 47 (2007).

8 *Bedrosian*, CA-3, 912 F3d 144 (2018).

9 *Bedrosian*, 2020 WL 7129303 (E.D. Pa. Dec. 4, 2020).

10 *Jones*, CV 19-04950 (CD CA May 11, 2020).

11 *Schwarzbaum*, 2020 WL 1316232 (SD FL Mar. 20, 2020), and 2020 WL 2526500 (May 18, 2020).

12 *Boyd*, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019).

13 *Bittner*, 469 FSupp3d 709 (E.D. Tex./2020).

14 *Kaufman*, 2021 WL 83478 (Conn. 2021).

15 *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 105 SCt 687.

16 *Stromme*, Case No. 1:20-cv-24800-UU (S.D. Fla. Jan. 25, 2021).

17 *Norman*, 942 F3d 1111 (2019).