taxnotes federal

Volume 164, Number 3 ■ July 15, 2019

The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny

by Michael D. Kummer and Saul Mezei

Reprinted from *Tax Notes Federal*, July 15, 2019, p. 365

The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny

by Michael D. Kummer and Saul Mezei

Michael D. Kummer is a partner-elect and Saul Mezei is a tax partner at Morgan, Lewis & Bockius LLP in Washington.

In this article, Kummer and Mezei examine *Boyd*, in which a district court concluded that the penalty for a non-willful violation of the foreign bank account report statute applies to each unreported account rather than each annual report.

Under 31 U.S.C. section 5314 and its implementing regulations, U.S. citizens or residents must file a report if they have a financial interest in, or signature authority over, foreign financial accounts containing more than $10,000 in the aggregate at any time during a calendar year. Individuals comply with this reporting obligation by filing Financial Crimes Enforcement Network Form 114, also known as a foreign bank account report.

Subparagraph A of 31 U.S.C. section 5321(a)(5) allows the Treasury secretary to impose civil penalties on any person who violates, or causes any violation of, section 5314. Section 5321(a)(5)(B)(i) limits the penalty as follows: "the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000." Section 5321(a)(5)(C) provides an exception to this limitation by providing for "increased" penalties for willful violations of section 5314. Courts have recently grappled with an important question of statutory construction regarding the non-willful variant of the penalty: whether the $10,000 limitation applies to each account or to each FBAR. Stated differently, the issue is whether a violation relates to the FBAR as a whole (in which case the penalty is capped at $10,000 per year) or to each foreign account (in which case the individual can be subject to multiple $10,000 penalties in a given year).

Because 31 U.S.C. section 5314 is broad, this issue potentially affects many individuals, some of whom might not even know they have a reporting obligation.[1] The rules apply to any U.S. resident, regardless of whether they might otherwise be obligated to file a tax return. The types of accounts subject to reporting include items such as an insurance or annuity policy with a cash value. And the penalties can be draconian — in one ongoing case, the IRS assessed separate $10,000 penalties for accounts that had balances of just $30, $50, $64, $84, and $816 during the year at issue.[2]

This article briefly examines the only judicial opinion to have directly addressed the per-account-versus-per-form issue in detail.[3] In *Boyd*,[4] decided in April, the U.S. District Court for the Central District of California adopted the per-

[1] As the Treasury secretary noted in a 2002 report, "There appear to be a number of taxpayers who fail to file because of lack of knowledge or confusion about the filing requirements." Treasury, "A Report to Congress in Accordance With Section 361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)," at 11 (Apr. 26, 2002).

[2] *United States v. Patel*, No. 19-cv-792 (C.D. Cal. 2019). Perhaps recognizing the potential inequity of that position, the government later explained that it would not, in that particular case, "seek to reduce to judgment or collect penalties [the IRS] assessed on accounts with a balance of less than $10,000." *See* United States' Opposition to Plaintiff's Motion for Summary Judgment, *Patel*, No. 19-cv-792, at 5 n.3 (C.D. Cal. June 7, 2019). But the government left open the possibility that it might do so in other cases.

[3] A handful of other cases have also involved the per-account-versus-per-form issue, but those cases were either not decided on the merits or did not otherwise directly address the issue. *See, e.g.*, Order Granting United States' Motion for Default Judgment, *United States v. Gardner*, No. 18-cv-3536, at 4 (C.D. Cal. Apr. 22, 2019); Order Denying Defendant's Motion for Judgment on the Pleadings, *United States v. Cohen*, No. 17-cv-1652, at 4 (C.D. Cal. Oct. 23, 2018); and Order Granting United States' Motion for Default Judgment, *United States v. VanKatwyk*, No. 17-cv-3314, at 4 (C.D. Cal. Oct. 23, 2017).

[4] *United States v. Boyd*, No. 18-cv-803 (C.D. Cal. 2019).

account construction in a short and conclusory opinion. The nature of the opinion is not surprising after a review of the oral argument transcript. Noting that the question was one of first impression, the district court appeared to resign itself to the fact that the Ninth Circuit would ultimately decide the issue.

Consistent with the district court's expectation, the losing party (Jane Boyd) has appealed to the Ninth Circuit.[5] Regardless of the outcome, the issue (which is also pending in at least one other case[6]) deserves a more careful and thoughtful analysis.

Statutory Construction Issue Given Short Shrift

Boyd was a U.S. citizen. The IRS concluded that she committed non-willful FBAR violations by failing to timely report an interest in 13 bank accounts in the United Kingdom during 2010. In assessing penalties, the IRS treated each unreported account as a separate non-willful FBAR violation. The court adopted the government's view that the statutory maximum penalty of $10,000 applies to each unreported foreign financial account.

The court began its interpretive analysis in an odd place. Rather than starting by parsing the language of the statute that imposes the penalty,[7] the court began by discussing language in the statutory reasonable-cause exception to the penalty.[8] The court next discussed the provision governing penalties for willful FBAR violations, which both parties agreed did not apply.

The court then considered the language of the penalty provision at issue — 31 U.S.C. section 5321(a)(5)(B)(i). Citing a treatise on tax controversies,[9] the court determined that the statute is "somewhat unclear as to whether the $10,000 negligence penalty applies per year or per account."[10] But instead of engaging in a careful analysis of what created the ambiguity and how to best resolve it, the court summarily concluded that the government's interpretation was more reasonable based on the phrase "balance in the account" in the reasonable-cause exception and in the inapplicable penalty provision for willful FBAR violations.

Under 31 U.S.C. section 5321(a)(5)(B)(ii), a reasonable-cause defense requires the taxpayer to properly report the "balance in the account." Under 31 U.S.C. section 5321(a)(5)(D), penalties for willful FBAR violations are calculated based on the "balance in the account" at the time of the violation. In adopting the per-account construction, the court agreed with the government that Congress's use of the singular — "balance in the account" — indicated that violations relate to each account.

In reaching that summary conclusion, the court failed to consider the basic canon of construction, codified at 1 U.S.C. section 1, that "in determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things." In other words, the singular includes the plural. If that canon is applied to the "balance in the account" language in the reasonable-cause exemption, the balance in each of an individual's accounts would need to be accurately reported to qualify for the defense. At a minimum, this construction is reasonable and casts serious doubt on the district court's heavy reliance on the use of the singular term. It also supports the taxpayer's per-form construction.

In focusing on the same "balance in the account" language in the penalty provision for willful FBAR violations, the court ignored the fact that that provision specifically applies to willful failures to report "an account" or information about "an account." In contrast, Congress omitted the phrase "an account" from the penalty provision for non-willful FBAR violations. On this

[5] *United States v. Boyd*, No. 19-55585 (9th Cir. 2019) (appeal docketed May 23).

[6] *See, e.g.*, *Patel*, No. 19-cv-792 (discussed later in the text).

[7] *See, e.g.*, *United States v. Ron Pair Enterprises Inc.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself.").

[8] In doing so, the district court incorrectly cited the statute it was using to support its interpretation, citing 31 U.S.C. section 5321(a)(5)(B)(ii) as "31 U.S.C. section 5321(a)(B)(ii)."

[9] Robert S. Fink, *Tax Controversies — Audits, Investigations, Trials*, vol. 1, section 17.03 (2018) ("Section 5321 is unclear as to whether the $10,000 negligence penalty applies per year or per account.").

[10] *Boyd*, No. 18-cv-803, at 7. The court appears to have used the term "negligence penalty" as shorthand for the penalty for non-willful violations. Neither the statute nor the applicable regulations use the term "negligence" (or require a showing of negligence for the penalty to apply).

front, the court overlooked another basic canon of construction[11]: "A negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."[12] And Congress might have had good reason to differentiate between non-willful and willful conduct by punishing willful FBAR violations far more heavily than non-willful FBAR violations — which is exactly what these two different provisions do.[13] In short, Congress's use of "an account" for penalties for willful violations but not for non-willful violations supports a per-form construction.

Moreover, although both the language and purpose of 31 U.S.C. section 5321 target violations of 31 U.S.C. section 5314, the court never even bothered to analyze section 5314 in interpreting section 5321.[14] This is concerning because section 5314 arguably focuses on reports, not accounts. As the court briefly noted while merely reciting the statutory background, section 5314 requires individuals to "keep records, file reports, or keep records and file reports." The court noted that corresponding regulations require individuals to "report on an annual basis" an interest in a foreign bank account and that the "required form" is the FBAR. In other words, the statutory language could suggest that the harm the regime is designed to penalize is the failure to timely file an accurate report and not, as the district court concluded, the existence of each interest in a foreign account.

Nor did the court address that the IRS has long interpreted the reporting requirement as kicking in only if the aggregate amount in an individual's foreign accounts exceeds $10,000 in a given year.[15] In other words, the IRS does not permit a per-account construction to allow an individual to avoid filing an FBAR. The fact that the reporting obligation itself is tied not to any one account but instead to the total balance in all accounts in which an individual has an interest also arguably supports a per-form construction.

It is also troubling that the court failed to analyze the legislative history after finding the statute "somewhat unclear" on its face.[16] The purpose of the reporting requirements, which were enacted as part of the Bank Secrecy Act of 1970 (title 31), was to require individuals to maintain records and file reports to resolve the "huge gap in law enforcement" created by foreign bank secrecy laws that inhibit knowledge and investigation by U.S. agencies.[17] Once reports are filed, they are "available to FinCEN analysts, law enforcement, and appropriate regulatory authorities for use,"[18] including by following up with investigation. The legislative purpose is arguably satisfied — or at least furthered — when an individual files a report, regardless of whether

[11] The court also failed to discuss how the penalty regime might apply in the event of a willful violation with respect to one account but a non-willful violation with respect to another account. It arguably could support a per-account construction if, in the same year, the failure to accurately report one account could attract a penalty for a willful violation but the failure to accurately report another account could attract a penalty for a non-willful violation. But a per-form construction for non-willful violations could still work harmoniously with a per-account construction for willful violations. For instance, the willful failure to accurately report any accounts could attract a separate penalty for each account, while the non-willful failure to accurately report any other accounts could attract one penalty capped at $10,000 for the year.

[12] *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006); *Cf. Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely.").

[13] *Cf.* H.R. Rep. No. 1008-755, at 615 (2004) ("The maximum civil penalty for a non-willful act is up to $10,000. In addition, the Senate amendment increases the present-law penalty for willful behavior to the greater of $100,000 or 50 percent of the amount of the transaction or account.").

[14] Under 31 U.S.C. section 5321(a)(5)(B)(i), "the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000," and under subparagraph (A), the Treasury secretary "may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314."

[15] *See* Internal Revenue Manual section 4.26.16.3.6(1).

[16] *United States v. Great Northern Railway Co.*, 287 U.S. 144, 154-155 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.").

[17] H.R. Rep. No. 91-975, at 12-13 (1970). According to the Senate report on the Bank Secrecy Act of 1970, "the United States can legitimately require its own citizens or financial institutions to *keep records and file reports* on transactions with foreign financial institutions and that is the approach taken by the bill." S. Rep. No. 91-1139, at 3 (1970) (emphasis added).

[18] Treasury, *supra* note 1, at 4.

the individual has one or a dozen foreign financial accounts. This would also seem to support a per-form construction.[19]

Nor did the court consider other instances in which a failure to comply with reporting requirements carries civil penalties. For example, some taxpayers must file Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," to report their interest in particular foreign corporations. Unlike the FBAR, on which individuals can list multiple foreign accounts, a separate Form 5471 must be filed for each applicable foreign corporation. Failure to accurately file Form 5471 carries a civil penalty of $10,000, which expressly applies to each noncompliant form.[20] Although the Form 5471 regime arises under title 26 and the FBAR regime arises under title 31, the Form 5471 regime (and others) could provide useful interpretive guidance in the per-form-versus-per-account debate.

The IRS Normally Takes a Per-Form Approach

The *Boyd* court indicated that a rule of lenity could apply — the notion that a "tax provision which imposes a penalty is to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it."[21] But the court went on to conclude that a rule of lenity "only dictates that the Court should choose the more lenient of two reasonable interpretations."[22] In adopting the government's construction, the court appears to have implicitly held that Boyd's interpretation was unreasonable.

This is surprising given that the IRS itself instructs examiners to, in "most cases," recommend "one penalty per open year, regardless of the number of unreported foreign accounts."[23] Moreover, the IRS requires examiners to consult with an Operating Division FBAR coordinator and obtain group managerial approval to *depart* from the per-form construction.[24] If a per-form construction was unreasonable, the IRS would presumably not instruct its examiners to adopt it in most cases or force them to seek approval for departures. The court ignored this entirely.

Setting aside whether a rule of lenity applies as a technical matter, there is good reason to at least consider a lenient construction of a penalty statute that the district court concluded is "somewhat unclear" on whether the penalty applies per year or per account. Congress can clearly impose a more stringent rule if it desires, as it appears to have done for penalties for willful FBAR violations.

Odd Dictum Regarding Deference to the Agency

Finally, at the end of its opinion, the *Boyd* court noted that the government "did not rely on any deference under *Chevron* or *Skidmore*" but that "any sort of deference to the agency would bolster" its position.[25] This dictum is perplexing given the IRS's requirement that examiners use a per-form construction in most cases. And it is unclear to what the court would have deferred — the court cited the applicable regulation (31 C.F.R. section 1010.350) but did not analyze it. In any event, like 31 U.S.C. sections 5314 and 5321, the regulation does not clearly prescribe a per-account construction.

Moreover, as the Supreme Court recently explained, courts must resort to "all the standard tools of interpretation" before deferring to an agency's interpretation of its own regulation.[26] The district court failed to do this, even for the applicable statutes. Ultimately, the court's passing reference to agency deference, like other aspects of its opinion, is confusingly succinct.

---

[19] Conversely, Congress noted that the IRS had "already decided to include a question on the 1971 income tax returns asking whether a taxpayer has a foreign bank account" and that the Bank Secrecy Act "would follow up on this approach" by authorizing "recordkeeping requirements on the part of those who acknowledge that they have a foreign bank account." *See* S. Rep. No. 91-1139, at 8-9 (1970). Thus, Congress might have believed that mere notice to the IRS that an individual had an interest in a foreign bank account was insufficient — *i.e.*, that the IRS (and other agencies) also needed more detailed information on an account-by-account basis. This would seem to support the per-account construction advanced by the Justice Department.

[20] *See*, *e.g.*, sections 6038(b) and 6679.

[21] *Bradley v. United States*, 817 F.2d 1400, 1402-1403 (9th Cir. 1987) (citing *Commissioner v. Acker*, 361 U.S. 87, 91 (1959)).

[22] *Boyd*, No. 18-cv-803, at 8.

[23] IRM section 4.26.16.6.4.1(1).

[24] IRM section 4.26.16.6.4.1(3).

[25] *Boyd*, No. 18-cv-803, at 9.

[26] *Kisor v. Wilkie*, No. 18-15 (U.S. 2019) (slip op. at 11).

This Issue Deserves a Closer Look

As noted, *Boyd* is on appeal to the Ninth Circuit, and the same issue is pending in at least one other case. That case, *Patel*,[27] is awaiting a decision on summary judgment in the same district court that decided *Boyd*, but it is before a different judge. On July 8, that judge ordered a stay pending the Ninth Circuit's determination in *Boyd*, and it is conceivable that the Patels' attorney (or others) will seek to file an amicus brief in the *Boyd* appeal.

A thorough and careful analysis of the per-account-versus-per-form issue would be a welcome benefit for individuals, practitioners, the IRS, and courts. We are optimistic that the Ninth Circuit in *Boyd* will take the opportunity to provide one. ■

[27] *Patel*, No. 19-cv-792.