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FOREIGN BANK AND FINANCIAL ACCOUNTS: FBAR REPORTING AND PENALTY DETERMINATION

Foreign asset reporting continues to be a high priority for the internal revenue service ("IRS") and the Justice Department. The Bank Secrecy Act of 1970, P.L. 91-508, as amended, requires taxpayers to submit a Report of Foreign Bank and Financial Accounts ("FBAR") each year. Although the FBAR form is issued by the Treasury's Financial Crimes Enforcement Network ("FinCEN"), it is filed electronically with the IRS and due every year on April 15 (or October 15 with an automatic extension) for the preceding calendar year.

FBAR Reporting

U.S. persons (i.e. U.S. citizens, green card holders, and resident aliens) must report on an FBAR all financial interests in, or signature or other authority over, financial accounts located outside the United States if the aggregate value of those financial accounts exceeded $10,000 at any time during the relevant calendar year. Foreign financial accounts include, but are not limited to, foreign bank accounts, securities accounts, mutual funds, life insurance or annuity contracts, and retirement accounts. A person has signature authority over a financial account if he or she has some degree of control over the disposition of the assets by way of direct communication with the institution where the account is held.

Non-willful and Willful Penalties

The penalty for failing to file an FBAR is $10,000 for each non-willful violation and the greater of $100,000 or 50% of the account value for each willful violation. In its upcoming term, the Supreme Court of the United States will address a circuit split between the Fifth and Ninth Circuit Courts of Appeals with respect to the maximum civil penalty that may be levied for a non-willful violation. Specifically, the Court will consider whether the applicable penalty for a non-willful violation is assessed per FBAR form (i.e. a single $10,000 penalty each year) or per account (i.e. a $10,000 penalty for each unreported foreign account), which the penalty statute in question (31 U.S.C. § 5321(a)(5)(B)) does not make clear.

Disputed FBAR Penalty Issue

In the Ninth Circuit case, the IRS penalized Jane Boyd for a non-willful failure to report thirteen accounts she had in the United Kingdom on an individual FBAR. After the district court granted the government's motion for summary judgment and held that the penalty applied per account, Boyd appealed to the Ninth Circuit, which reversed the district court's decision and concluded that the statute authorized a single $10,000 penalty for failure to file the FBAR.

Conversely, in the Fifth Circuit case, the IRS assessed FBAR penalties for 2007 through 2011 against Alexandru Bittner, a dual citizen of the United States and Romania, totaling $2.72 million (imposing a penalty for a total of 272 unreported foreign accounts). After the IRS assessment, the Justice Department sued Bittner to reduce the penalty to a civil judgment. The trial court determined that the penalty was unlawful under the penalty statute and that the proper penalty amount was $50,000 (i.e. $10,000 per form per year). On appeal, the Fifth Circuit reversed the trial court's ruling and held that each instance that Bittner failed to report a foreign bank account constituted a violation for purposes of the penalty statute and that the penalty, therefore, applied on a per account rather than per form basis.

By granting *certiorari* with respect to the Fifth Circuit's decision, the Supreme Court should settle the issue of whether the penalty imposed pursuant to an FBAR violation is assessed on a per FBAR form or per account basis.

JAH Can Help

Foreign asset reporting is complicated and can come with substantial penalties if you fail to comply. If you have any questions regarding FBAR reporting and penalty determination contact a member of our **Trusts and Estates Group** or fill out our **General Contact Form**.
