Taxpayers received unwelcome news in April 2019, when the U.S. District Court for the Central District of California ordered that a taxpayer owed non-willful FBAR penalties for each of her 14 unreported foreign accounts rather than for the single failure to timely file an FBAR.

An Analysis of *Boyd*

Non-Willful FBAR Penalty

Does the 10K Apply Per-Account or Per-Report?

NICHOLAS R. PETERSON

Taxpayers are required to file annual foreign bank account reports, colloquially called FBARs[1], to report their foreign accounts.[2] In general, FBAR reporting is required if the maximum aggregate value of the taxpayer's foreign accounts exceeded $10,000 at any time during the calendar year.[3] Civil penalties may be imposed for both willful and non-willful violations of the reporting requirements.[4]

The non-willful penalty provision was added in 2004.[5] Since then, taxpayers have found themselves at loggerheads with the Internal Revenue Service ("IRS") over how penalties should be applied. The IRS's position is that non-willful penalties are determined per-account. This means that if a taxpayer failed to file an FBAR that should have reported three accounts, then a non-willful FBAR penalty of $10,000[6] may be imposed for each unreported account.

Practitioners have argued for an alternative approach, insisting that a non-willful penalty should be applied on a per-FBAR basis. Because only one FBAR must be filed per year, the assertion of penalties per account conflicts with the statute's notion of a maximum penalty cap. Practitioners contend that the per-account construction disregards the plain language of the penalty provisions, mischaracterizes the statutory scheme, and ignores congressional intent.[7]

Taxpayers received unwelcome news in April 2019, when the U.S. District Court for the Central District of California ordered that a taxpayer owed non-willful FBAR penalties for each of her 14 unreported foreign accounts rather than for the single failure to timely file an FBAR.8 In Boyd, the district court noted that the statutory and regulatory language is "somewhat unclear," but found the per-account construction to be a reasonable interpretation.[9] The taxpayer appealed to the Ninth Circuit.[10]

Boyd has drawn the attention of the broader tax community because it presents an important issue of first impression at the appellate level.[11] A thorough and careful analysis by the Ninth Circuit would be a welcome benefit for practitioners and their clients.

Overview of the Case

During 2010, Jane Boyd, a U.S. citizen, held a reportable interest in 14 financial accounts in the United Kingdom.[12] The U.K. accounts consisted of bank and investments accounts, held across eight different financial institutions with an aggregate balance of $1,020,414.[13] Jane Boyd inherited the funds from family members in the United Kingdom.[14] The U.K. accounts generated dividends and interest, which Jane Boyd did not report on her U.S. income tax return.[15] She also failed to disclose the existence of the U.K. accounts on either Schedule B (Form 1040) or an FBAR.[16]

In 2012, Jane Boyd filed an application to resolve matters through the Offshore Voluntary Disclosure Program ("OVDP"), an initiative designed to encourage non-compliant taxpayers with foreign accounts, assets and income to become compliant with their U.S. tax and reporting obligations.[17] Jane Boyd was accepted into the OVDP and submitted an amended U.S. income tax return reporting all U.K. income, along with an FBAR reporting all U.K. accounts for 2010.[18] Jane Boyd also filed amended U.S. income tax returns and FBARs for other years not at issue in the case.[19]

In 2014, Jane Boyd exercised her right to opt out of the OVDP to seek penalty waiver or reduction.[20] By opting out of the OVDP, Jane Boyd agreed that the IRS could audit her amended U.S. income tax returns and FBARs, and assert penalties if warranted.[21] At the end of the audit, the IRS concluded that Jane Boyd had committed 13 violations but that she had not violated her reporting requirements willfully.[22] For purposes of computing the non-willful penalty, the IRS determined that Jane Boyd qualified for a reduced penalty based on the IRS's internal mitigation guidelines.[23]

Using these guidelines, the IRS computed the total penalty as follows. For each of Jane Boyd's seven U.K. accounts which contained at least $50,000 during 2010, the IRS included $5,000 in the total penalty, *i.e.*, 7 accounts multiplied by $5,000, for a subtotal of $35,000.[24] For

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1 Since 2013, the formal title of an FBAR has been FinCEN Form 114.

2 31 U.S.C. § 5314; 31 C.F.R. § 1010.350.

3 31 C.F.R. § 1010.306(c).

4 31 U.S.C. § 5321(a)(5).

5 *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418, 1586.

6 The maximum penalty for a violation under 31 U.S.C. § 5321(a)(5) is adjusted for inflation annually.

7 *See, e.g.*, Brief of American College of Tax Counsel as *Amicus Curiae* in Support of Defendant-Appellant, *Boyd v. United States*, No. 19-55585 (9th Cir. May 23, 2019); Brief of *Amici Curiae* Laxman, Jashu, Hiten, and Anita Patel in Support of Defendant, *Boyd*, No. 19-55585.

8 Order Re: Motion for Summary Judgment [31]; Motion for Summary Judgment [32], *Boyd v. United States*, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019), *appeal docketed*, No. 19-55585 (9th Cir. May 23, 2019).

9 Order Re: Motion for Summary Judgment [31]; Motion for Summary Judgment [32], *Boyd,* 2019 WL 1976472 at 7.

10 Notice of Appeal from a Judgment or Order of a United States District Court, *Boyd,* 2019 WL 1976472.

each of Jane Boyd's six U.K. accounts which contained less than $50,000 during 2010, the IRS included 10 percent of the high account balance in each account in the total penalty, for a subtotal of $12,279.[25] In computing the penalty, the IRS treated each account that was not listed on a timely filed FBAR as a separate non-willful violation.[26] This resulted in a total penalty of $47,279.[27] Jane Boyd contested the penalty, resulting in the current litigation.

During the proceedings in the district court, the parties filed cross-motions for summary judgment.[28] The district court issued an order granting the government's motion, concluding that the government advanced the more reasonable interpretation of the statutory and regulatory language.[29] In a short opinion, the district court adopted the per-account construction.[30] The nature of the opinion is not surprising after a review of the oral argument transcript.[31] 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.[32]

Plain Language of the Statute

There are two types of civil penalties that may be imposed on a taxpayer who fails to file a timely, complete, and accurate FBAR: (i) a civil penalty for a non-willful failure,[33] and (ii) a civil penalty for a willful failure.[34] Taxpayers who have non-willfully violated the FBAR rules are relieved of all civil liability if the violation was due to reasonable cause.[35]

The Reasonable Cause Exception and Willful Penalty Provisions. The district court started its interpretive analysis with the reasonable cause exception and willful penalty provisions.[36] In each instance, the district court noted that Congress used the same "balance in the account" language.[37] The district court explained that Congress's use of the terms "account" and "balance" in the singular form in the statutory scheme "contemplates that the relationship with each foreign financial account constitutes the non-willful FBAR violation."[38] Without providing further analysis, the district court held that the IRS may impose the penalty for non-willful violations on a per-account basis.[39]

The district court first discussed the reasonable cause exception, which provides:[40]

11 *See*, *e.g.*, Brief of American College of Tax Counsel as *Amicus Curiae* in Support of Defendant-Appellant, *Boyd*, No. 19-55585; Brief of *Amici Curiae* Laxman, Jashu, Hiten, and Anita Patel in Support of Defendant, *Boyd*, No. 19-55585.

12 [Proposed] Statement of Uncontroverted Facts and Conclusions of Law at No. 5, *Boyd*, 2019 WL 1976472.

13 *Id*.

14 Appellant's Opening Brief at 6, *Boyd*, No. 19-55585.

15 [Proposed] Statement of Uncontroverted Facts and Conclusions of Law at No. 7, *Boyd*, 2019 WL 1976472.

16 *Id*. at No. 8-9.

17 *Id*. at No. 10.

18 *Id*. at No. 11-12.

19 *Id*.

20 *Id*. at No. 13.

21 *Id*. at No. 15-16.

22 *Id*. at No. 17.

23 *Id*. at No. 18.

24 *Id*. at No. 20-22.

25 *Id*. at No. 20-21.

26 *Id*. at No. 18.

27 *Id*. at No. 20.

28 *See* Notice of Motion for Summary Judgment, *Boyd*, 2019 WL 1976472; Defendant's Notice of Motion and Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56, *Boyd*, 2019 WL 1976472.

29 *Boyd*, 2019 WL 1976472.

30 *Id*.

31 *See* Reporter's Transcript of Hearing, *Boyd*, 2019 WL 1976472.

32 *Id*. at 3.

33 31 U.S.C. § 5321(a)(5)(A); 31 U.S.C. § 5321(a)(5)(B).

34 31 U.S.C. § 5321(a)(5)(C); 31 U.S.C. § 5321(a)(5)(D).

35 31 U.S.C. § 5321(a)(5)(B)(ii).

36 Order Re: Motion for Summary Judgment [31]; Motion for Summary Judgment [32], *Boyd*, 2019 WL 1976472 at 7.

37 *Id*.

38 *Id*. at 8.

39 *Id*. at 7.

40 31 U.S.C. § 5321(a)(5)(B)(ii) (emphasis added).

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.

The district court next discussed the willful penalty provisions, which provide:[41]

(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).

(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.

Setting aside whether the per-account construction should apply to either the reasonable cause exception or willful penalty provisions, the district court simply looked in the wrong place for the relevant statutory language. The analysis ignores the plain language of non-willful penalty provisions.

Non-Willful Penalty Provisions. The language of the non-willful penalty provisions makes no mention of the word "account" or "balance."[42] The non-willful penalty provisions provide:[43]

(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) [which applies to willful violations], the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000.

The citation to Section 5314 refers back to the requirement to "keep records, file reports, or keep records and file reports."[44] Subsection (a) of this statute provides:[45]

Considering the need… to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person… maintains a relation… with a foreign financial agency.

In other words, the plain language of the statute indicates that the non-willful penalty provisions penalize the failure to timely file an accurate FBAR and not, as the district court concluded, the existence of each interest in a foreign account.

Consistency of the Statutory Scheme. In its order, the district court provided little rationale for why the reasonable cause exception and willful penalty provisions should inform its interpretation of the non-willful penalty provisions. In its appellee brief however, the government vigorously defends the district court's reference to other provisions within the statutory scheme. Noting that courts are to start with the premise that the words of a statute must be read in their context with the goal of understanding the statute as a symmetrical and coherent regulatory scheme,[46] the government asserts that the per-FBAR construction makes the statutory scheme incoherent.[47]

Consistency with Reasonable Cause Exception. To demonstrate that the per-FBAR construction cannot be applied to the reasonable cause exception, the government

asks the Ninth Circuit to consider the following hypothetical:[48]

> [S]uppose a U.S. person files a timely FBAR reporting one foreign account accurately, but non-willfully omitting three foreign accounts. For the omitted accounts, suppose that the person did not know that she was a co-owner of the first account, that her accountant advised her she did not have to report the second account, and that she did not tell her accountant about the third account because it generated no income and she mistakenly believed that such accounts did not have to be reported.

The government explains that the U.S. person should be required to prove reasonable cause separately with respect to each of the three omitted accounts, because satisfying reasonable cause for one of the omitted accounts does not satisfy reasonable cause with respect to the other two omitted accounts.[49] The government concludes that the per-FBAR construction could not logically be applied to the reasonable cause exception, because as the hypothetical demonstrates, the reason for the violation is different for each account.[50]

The government extrapolates that if the per-account construction applies to the reasonable cause exception, then it necessarily follows that the per-account construction also must apply to the non-willful penalty provisions.[51] The assumption is that applying different approaches to different provisions creates inconsistency. However, there is nothing inconsistent with applying the per-account construction to the reasonable cause exception, and the per-FBAR construction to the non-willful penalty provisions. When the courts refer to consistency, they generally mean that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[52] The courts do not mean that the same per-account construction must be applied to separate provisions.

The logic of applying the per-account construction to the reasonable cause exception and the per-FBAR construction to the non-willful penalty provision is demonstrated in the government's own hypothetical. The U.S. person would be subject to a statutory maximum penalty of $10,000 for the delinquent FBAR, unless the U.S. person could prove reasonable cause separately with respect to each of the three omitted accounts. Nothing in this interpretation makes the statutory scheme incoherent. The government simply misinterprets the rationale behind the rule of consistency.

Consistency with Willful Penalty Provisions. The government next argues that the per-FBAR construction does not provide a resolution when an FBAR presents compliance with some accounts but noncompliance with other accounts.[53] The government asks the Ninth Circuit to consider the following hypothetical: "[A] U.S. person files a timely FBAR accurately reporting one account, non-willfully omitting one account for which she was not able to show reasonable cause, and willfully omitting a third account she wanted to

[41] 31 U.S.C. § 5321(a)(5)(C); 31 U.S.C. § 5321(a)(5)(D) (emphasis added).
[42] 31 U.S.C. § 5321(a)(5)(A); 31 U.S.C. § 5321(a)(5)(B).
[43] *Id*.
[44] 31 U.S.C. § 5314(a).
[45] *Id*.
[46] Brief for the Appellee at 32, *Boyd*, No. 19-55585.
[47] *Id.* at 16.
[48] *Id*. at 42.
[49] *Id*.
[50] *Id*.
[51] *Id*. at 14-15 ("Section 5314 and the relevant regulations create a reporting requirement that extends to each foreign account. It necessarily follows that a violation of § 5314 and the regulations relates to a single account and not to the FBAR form on which accounts are reported.").
[52] *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). *See also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *ASARCO, LLC. v. Celanese Chemical Co.*, 792 F.3d 1203, 2010 (9th Cir. 2015); *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1244 (9th Cir. 2012).
[53] Brief for the Appellee at 45, *Boyd*, No. 19-55585.

conceal."[54] The government notes that by applying the per-FBAR construction to the penalty provisions, that taxpayers may be penalized for properly reported accounts.[55] The government concludes that "[s]urely Congress did not intend to penalize the proper reporting of a foreign account on an FBAR because a different account on the form was improperly reported."[56]

The question of whether the per-FBAR interpretation applies to the willful penalty provisions is not at issue in this case. However, the government's point remains valid—taxpayers could be unfairly penalized for properly reported accounts under the per-FBAR construction. Fortunately, the plain language of the statute provides a solution. The FBAR penalty provisions establish only maximum penalty amounts, leaving the IRS to determine the appropriate FBAR penalty amount based on the facts and circumstances.[57] Currently, the IRS uses mitigation guidelines to ensure that penalties are asserted in a fair and consistent manner.[58] In the government's hypothetical, IRS examiners would use their best judgment in asserting penalties, and could reduce the amount of the penalties depending on the extent of the reporting violations.

If the government's concern is the assertion of excessive penalties, then the proposed solution of applying penalties per account is odd. While the government correctly notes that taxpayers could be penalized for properly reported accounts under the per-FBAR construction, this result is mitigated by the statute imposing only maximum penalties. More importantly, the per-FBAR construction caps the penalty at $10,000 per year, while the per-account construction allows the IRS to impose penalties with seemingly no limits.

Legislative History. It is troubling that the district court failed to analyze the legislative history after finding the statute "somewhat unclear" on its face. The legislative history indicates that Congress intended to impose a modest non-willful penalty to increase compliance with the FBAR filing requirements. There is no indication that Congress intended to give the IRS the authority to impose massive penalties for a single delinquent FBAR.

The impetus for broadening the FBAR statutory and regulatory scheme was the terrorist attacks of September 11, 2001. In October 2001, the President signed into law the Patriot Act,[59] which (i) broadened the scope of Bank Secrecy Act[60] to focus on terrorist financing as well as money laundering, (ii) gave the Financial Crimes Enforcement Network additional responsibilities and authority, and (iii) instructed the U.S. Department of the Treasury ("Treasury") to study methods for improving FBAR compliance. Section 361(b) of the Patriot Act provides:[61]

> The Secretary of the Treasury shall study methods for improving compliance with the reporting requirements established in Section 5314 of Title 31, United States Code, and shall submit a report on such study to Congress by the end of the 6-month period beginning on the date of the enactment of this Act and each 1-year period thereafter. The initial report shall include historical data on compliance with such reporting requirements.

The Treasury reported that the compliance rate with the FBAR reporting requirement could be as low as 20 percent, meaning that as many as 800,000 individuals each year failed to comply with the requirement.[62] In response, the Treasury provided Congress various reviews and recommendations to enhance compliance with the FBAR reporting requirement.[63]

54 *Id.*
55 *Id.*
56 *Id.*
57 *See* 31 U.S.C. § 5321(a)(5).
58 Internal Revenue Manual § 4.26.16.6.6 (Nov. 6, 2015).
59 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.
60 Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114.
61 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. at § 361(b).
62 *See* Secretary of the 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*

Against this backdrop, Congress enacted the American Jobs Creation Act, amending the FBAR statute to extend civil penalties to non-willful violations.[64] In doing so, Congress understood that the problem of tax evasion through the use of foreign accounts had "grown significantly in recent years" and therefore believed that improving compliance with the reporting requirement was "vitally important to sound tax administration, to combating terrorism, and to preventing the use of abusive tax schemes and scams."[65] It further believed that "[a]dding a new civil penalty that applies without regard to willfulness will improve compliance with this reporting requirement."[66]

When Congress added the non-willful penalty provisions, rather than simply using the willful penalty provisions as a starting point, it enacted distinct language which does not make any reference to "account" or "balance."[67] Generally, Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.[68] Therefore, Congress is presumed to have intentionally omitted any reference to "account" or "balance" in the non-willful penalty provisions. The distinct language suggests that Congress intended to differentiate between non-willful and willful conduct and punish willful violations far more heavily than non-willful violations.[69] There is no indication that Congress intended to give the IRS the authority to impose a penalty of $10,000 per account, and impose hundreds of thousands of dollars (or more) in penalties for a single delinquent FBAR.

In its appellee brief, the government argues that massive non-willful penalties are justified "because [Congress] believed that the reporting of foreign accounts was 'vitally important to sound tax administration' and believed that the non-willful penalty would improve compliance with reporting requirements."[70] However, the distinct language of the non-willful penalty provisions indicates that Congress viewed non-willful violations rules as relatively minor infractions and that imposing a modest penalty of $10,000 per year was sufficient to increase compliance. The plain language of the statute and congressional intent should not be ignored to now impose non-willful penalties on a per-account basis.

Conclusion

Practitioners and their clients are deeply concerned that the district court's order supporting the per-account construction permits the IRS "to assess massive non-willful FBAR penalties based on a single failure to timely file [an] FBAR."[71] The Ninth Circuit should take this opportunity resolve ambiguity in the statute and provide a thorough and careful analysis of the penalty provisions, the statutory scheme, and congressional intent. ●

Act of 2001 (Apr. 26, 2002) at 6, *available at* https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf.

63 *See, e.g.*, Secretary of the 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* (Apr. 24, 2003), *available at* http://www.fincen.gov/news_room/rp/files/fbar3613.pdf; Secretary of the 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* (Apr. 26, 2002) at 6, *available at* https://www.treasury.gov/press-center/press-releases/Documents/fbar.pdf.

64 American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418.

65 S. Rep. No. 108-192, at 108 (2003).

66 *Id*.

67 *See* 31 U.S.C. § 5321(a)(5).

68 *Fortney v. United States*, 59 F.3d 117, 120 (9th Cir. 1995) (applying this presumption to the Internal Revenue Code). *See also Republic of Sudan v. Harrison*, __ U.S. __, 139 S.Ct. 1048, 1058 (2019) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

69 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.").

70 Brief for the Appellee at 45, *Boyd*, No. 19-55585.

71 Appellant's Opening Brief at 27, *Boyd*, No. 19-55585. *See also* Brief of American College of Tax Counsel as *Amicus Curiae* in Support of Defendant-Appellant, *Boyd v. United States*, No. 19-55585 (9th Cir. May 23, 2019); Brief of *Amici Curiae* Laxman, Jashu, Hiten, and Anita Patel in Support of Defendant, *Boyd*, No. 19-55585.