



Robert W. Wood  
THE TAX LAWYER

## Which IRS Violations Are Evasion Or Willful Depends On The Facts

Taxes 5/01/2017

The tax law distinguishes between non-willful and willful conduct. Willfulness involves a voluntary, intentional violation of a known legal duty. In taxes, it applies to both civil and criminal violations. Big penalties and even prosecution can hang in the balance. Innocent mistakes can be forgiven, but conduct that appears to be *intentional* can be a different story. Many people think that even civil penalties cannot be imposed if you were not actually *trying* to cheat anyone. However, intent can sometimes be inferred from conduct.

The definition of willfulness causes many people to think that their conduct is not likely to be examined, and that their own knowledge is entirely subjective. If you didn't *know* you had a legal duty to report income or a foreign bank account, you might reason, how can you be treated as willful? Unfortunately, it is not that simple. Take the recent case of *Arthur Bedrosian v. U.S.* reported [here](#).



In the early 1970s, he opened two Swiss bank accounts. An accountant prepared his tax returns, and Bedrosian did not inform the accountant about the Swiss accounts. In the 1990s, he finally mentioned them to the accountant, who said that he had been breaking the law for years by failing to report. Even so, the accountant said that he should do nothing. He said it would be resolved on Bedrosian's death when the assets in the Swiss accounts would be repatriated as part of his estate. Taxes could be paid on them then, the accountant suggested.

Again, Bedrosian did nothing. But in 2007, his accountant died and Bedrosian hired a new accountant. The new accountant included the much smaller of the two accounts on Bedrosian's tax return—omitting the larger one. He also prepared and filed an FBAR for Bedrosian. Even then, Bedrosian's reporting was incomplete, omitting all of the income from the Swiss accounts. Finally, a letter from the Swiss bank warned that it was reporting the accounts to the IRS. As a result, in 2010, Bedrosian amended his 2007 return to report correctly.

The amended tax return picked up hundreds of thousands of dollars of unreported income. The IRS investigated and Bedrosian supplied documents and cooperated. The IRS was apparently ready to treat him as non-willful, imposing the \$10,000 per account per year penalty for non-willful FBAR violations. But before the case was finalized, it was transwferred to another IRS agent, who wrote the violations up as willful.

On July 18, 2013, the IRS sent Bedrosian a letter stating that it was imposing a penalty for willful failure to file an FBAR for 2007. The proposed penalty was \$975,789, 50% of the maximum value of the account. Bedrosian filed suit in the district court claiming that the penalty was unwarranted. Both the IRS and Bedrosian moved the court for summary judgment. The district court in Pennsylvania denied summary judgment to the IRS and to the taxpayer. The IRS had slapped on the high 50% penalty for willfully failing to file an FBAR.

The court concluded that whether the taxpayer willfully failed to submit an accurate FBAR was an inherently factual question. The court said there were still genuine disputes about what Bedrosian knew about his reporting requirements, and when he knew it. In general anyone with non-U.S. bank accounts having an aggregate value over \$10,000 at any time during the year must report all of the accounts. One must report even if one has a signature interest only, without beneficial ownership. And the penalties are quite high.

Civil penalties for a non-willful violation can range up to \$10,000 *per account per year*. With a six year statute of limitations, even non-willful violations can be expensive, especially with multiple accounts. Three accounts times six years could mean \$180,000 in penalties, and that is for *non-willful* violations. If the IRS says that your violation was *willful*, it is much worse. Civil penalties for a willful violation can range up to the greater of \$100,000 or 50% of the amount in the account. With up to a six year statute of limitations, that could total 300% of the account value. Fortunately, the IRS says that administratively it generally will only take 100%! And then there are potential *criminal* penalties too. Criminal FBAR violations can draw very serious penalties, including a \$500,000 fine, 10 years imprisonment, or both.

*For alerts to future tax articles, email me at [Wood@WoodLLP.com](mailto:Wood@WoodLLP.com). This discussion is not legal advice.*