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Are You Willful Or Ignorant About Taxes? (Hint, Ignorance Is Safer)

Tax time is just around the corner. It won't be long before all those annoying Forms 1099, W-2 and K-1 start to show up. Sometimes, the forms dribble in reporting income even after you've filed your return. There may be some surprises too, where you *think* you were paid \$1,000, but the 1099 says \$100,000!

If your income is all there in black and white, you may not have many choices. Yet even simple reporting problems can lead to [crippling mistakes that cost big](#). The more complex your affairs, the more you and your tax adviser must make judgment calls. But if you misstep, are you better off being honest and ignorant, or more clever and conniving?

Willfully evading federal income taxes is a felony. See [26 U.S.C. § 7203](#). "Willful" usually means voluntary or with intent. You are willful if you intentionally violate a legal duty of which you're aware. Yet [what IRS calls 'willful'](#) can be tough to predict. And even if you're ignorant, the IRS can say you are guilty of willful blindness—where you *intentionally* remain ignorant!



For example, there's lots of talk about how to soften the blow of disclosing foreign bank accounts or other tax problems. U.S. citizens and permanent residents must report worldwide income. They must also disclose foreign bank accounts on [FBARs](#). Penalties for failing to report income can be severe, and penalties for failing to file FBARs are even worse.

Some people may think they face worse treatment coming forward than by just clamming up and waiting to be contacted by the IRS. If they're lucky, they figure, that might never happen. But that is a very dangerous game of chicken, even if occasionally someone wins. Consider [United States v. J. Bryan Williams](#). Mr. Williams had checked the "no" box indicating (under penalties of perjury, mind you) that he did not have a foreign bank account. He also did not file FBARs.

Of course, it turned out he *did* have foreign accounts. Nevertheless, the court was not persuaded that Mr. Williams was trying to evade taxes. Some people manage to avoid the taint of willfulness in tax matters based on a genuine misunderstanding of the tax law. The misunderstanding can even be *unreasonable* as long as it's genuine. See [Cheek v. United States](#), 498 U.S. 192, 201 (1991).

Another way of not being willful: having a good-faith (even though unreasonable) belief that no tax was due. But often the "I didn't know any better" argument just doesn't work. Ignorance often really isn't bliss. In a criminal tax case in Illinois, [United States v. Kokenis](#), a jury found Chris Kokenis guilty of tax evasion. Asking for a new trial, Kokenis claimed the trial court had erred by excluding evidence of his good faith misunderstanding of the tax law.

The court denied his motion for a new trial, and in doing so, made a worrisome suggestion. The court suggested that this defense would require the defendant to take the stand to testify. Had Kokenis testified in his trial? No, not according to this [order](#).

You can't hold it against a criminal defendant who chooses not to testify in his own defense. For that reason, the court in [Kokenis](#) tiptoed around the issue of drawing negative inferences based a defendant's failure to testify. The court even noted in its [order](#) that it instructed the jury *not* to draw negative inferences from Kokenis' failure to take the stand in his own defense.

Still, said the court, how else could Mr. Kokenis have established his own good faith belief? The judge capped his you-have-to-take-the-stand-to-show-your-belief comments by quoting an old Orson Welles radio, *The Shadow*. Who knows what evil lurks in the hearts of men? Only *The Shadow knows*.

On appeal to the Seventh Circuit, Mr. Kokenis argued that the district court erred in ruling that he could not present evidence of good faith unless he waived his Fifth Amendment rights and testified. Nevertheless, the Seventh Circuit affirmed Mr. Kokenis' convictions and sentence. The appeals court did say that the district court applied the wrong standard in determining whether Mr. Kokenis could assert good faith. Nevertheless, the court ruled that the error was harmless given the overwhelming evidence of a lack of good faith. See *United States v. Kokenis*, 662 F.3d 919 (7th Cir. 2011).

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