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Dear IRS, I'll Take The Hillary Defense

Can we all use the Hillary Defense? The FBI Director said Hillary was just careless—well, *extremely* careless. Since then, more than a few [lawyers now point](#) to the “Hillary Defense.” Surely, ordinary citizens should be able to invoke it too, from traffic tickets to taxes. Who understands taxes anyhow? Hillary Clinton’s use of a private e-mail server for work-related communications while Secretary of State was “extremely careless” but did not cross the line into criminal behavior, said the FBI Director.

His [remarks](#) could make “careless, not criminal” a well-worn line. But will “careless, not criminal” get you out of a jam with the IRS? A prime source of interaction with the government for many Americans is the IRS. Can you tell the IRS, “I didn’t know,” or “that was an innocent mistake?” Yes, but the IRS may respond that you *should have* known. And this isn’t just in civil audits. In fact, in the tax realm, some conduct can be considered *criminal* even if you didn’t know or didn’t have a bad intent.



Before Hillary Clinton can formally accept her party's nomination, she still has one major concern: her email scandal. (AP Photo/Kevin Lamarque, Pool, File)

[In his remarks](#) about carelessness vs. willful misconduct, the FBI Director seemed to ignore the criminal penalties for gross negligence related to classified information. Of course, taxes have their own lingo and their own rules. Without question, taxes are complex, so you might assume that just about *anything* can be called an innocent mistake. Actually, the tax law draws a line between non-willful and willful. Big penalties or even prosecution can hang in the balance.

The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty. Willfulness is shown by your knowledge of reporting requirements, and your conscious choice not to comply. Willfulness means you acted with knowledge that your conduct was unlawful—a voluntary, intentional, violation of a known legal duty.

It applies for civil and criminal tax violations. You may not have *meant* to cheat anyone, but that may not be enough. The failure to learn of IRS filing requirements, coupled with efforts to conceal what you did, may be willful. Some courts say willfulness is a purpose to disobey the law, but one that can be inferred by conduct. So, watch out for conduct meant to conceal.

We are talking about taxes here, but consider whether any of Mrs. Clinton's conduct was meant to conceal.

In the tax world, conduct meant to conceal might include setting up trusts or corporations, dealing in cash, keeping two sets of books, and even swapping goods or services to avoid income. It might include filing some forms and not others, or cash deposits and cash withdrawals. Mixing personal and business funds, failing to keep records, and under-reporting your receipts all look bad. Any of that conduct could suggest willfulness.

Watch for patterns, too. Repeated failures can turn inadvertent neglect into reckless or deliberate disregard. Willful blindness—a kind of conscious effort to *avoid* learning about reporting requirements—can be enough for criminal charges. Yes, “I didn't know,” can still work in some cases. But the IRS says that taxpayers *could* learn of these requirements easily, with hardly any diligence. IRS says that you *should* read government tax forms and instructions.

You may have the burden of proving that your mistakes were innocent. The IRS can say you were willful in circumstances that you might think are innocent. Examples of willfulness might include reporting \$100 when you actually received \$200, failing to declare an offshore account, deducting your family vacation, and many more. The concept applies for civil and criminal violations. You may not have meant any harm or to cheat anyone, but that may not be enough. So if your excuse is that you were just trying to use one device for your emails? The IRS might be expected to say, that's tough.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.