



Robert W. Wood

THE TAX LAWYER

TAXES 6/30/2014

What IRS Calls 'Willful' May Surprise You-- And Mean Penalties, Even Jail

What's willful and what's not? Most of us know that innocent, even *stupid* mistakes can be forgiven. Intentional wrongdoing? Much less so. Since taxes are complex, you might assume that just about *anything* can be called an innocent mistake. Don't.

The tax law draws a line between non-willful and willful, and huge penalties or even prosecution can hang in the balance. A good example is offshore accounts. A new IRS Streamlined amnesty program for offshore accounts applies to non-willful activity. But IRS says if you were willful you should go into the IRS program called OVDP instead.

What's the difference? A lot. The OVDP requires 8 amended tax returns and 8 FBARs. You pay taxes, interest and a 20% penalty on what you owe. To top it off, you pay a penalty of 27.5% of the 8 year high point in your offshore account. For some named 'bad' banks, you pay 50% [unless you beat August 4, 2014 deadline](#).

By comparison, Streamlined is a cakewalk. You file 3 tax returns, 6 FBARs, and pay taxes and interest but no penalties. Even better, instead of paying 27.5% of your offshore account, you pay 5% of that highest balance. If you live abroad, you don't even pay that 5%.

Is it any wonder that Americans are flocking to the Streamlined program? Maybe not, but the IRS is watching. And warning that 'willful' doesn't mean what you think it means. Willfulness is bad for tax return reporting and for FBARs too.

To participate in the Streamlined program, you have to certify you weren't willful. That's no big deal, right? Maybe. The IRS can inquire further, and its views about willfulness may not jibe with yours. It could mean big penalties or conceivably even prosecution. And the courts may side with the IRS.

According to the IRS, the test 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 violations. You may not have meant any harm or to cheat anyone, but that may not be enough. The failure to learn of filing requirements, coupled with efforts to conceal the existence of the accounts, may mean a violation was willful.

The mere fact you checked the wrong box, or no box, on a Schedule B shouldn't itself be sufficient to make an FBAR violation willful. The IRS says it needs to establish that you had knowledge of a duty to file FBARs. If you did, you knew it was illegal *not* to file one. But if you didn't know about FBARs, are you off the hook?

Not necessarily. Your conduct is relevant. Some courts say willfulness is a purpose to disobey the law, but one that can be inferred by conduct. Watch out for conduct meant to conceal. Setting up trusts or corporations? Filing some forms and not others? Using another passport? Telling your bank not to send statements? Using code words over the phone? Visits in person? Cash deposits and cash withdrawals?

All could suggest willfulness. So can moving money from one bank to another when the banks don't want undisclosed American accounts. It may be the banks putting you in this tough spot. It may be advisers telling you to follow these protocols, saying that everyone's doing it. But that may not absolve you.

Even if it can explain one failure, repeated failures to comply can morph conduct from inadvertent neglect into reckless or deliberate disregard. Even willful blindness may be enough, a kind of conscious effort to *avoid* learning about reporting requirements. And just remember, ask yourself if your explanation passes the straight face test. Or get some advice about your facts from an experienced tax lawyer.

"Gee, I didn't know," can work in some cases. But the IRS says that with hardly any diligence, taxpayers *could* learn of the requirements quite easily. IRS says any person with foreign accounts *should* read government tax forms and instructions. And failing to follow-up can provide evidence of willful blindness. See [Excerpt From Internal Revenue Manual, 4.26.16.4.5.3, Paragraph 6](#).

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.