

# Can IRS Collect Penalties Even Post-Death? You Bet

By Robert W. Wood

Does the IRS like to impose penalties? That seems like a safe bet since IRS penalties have a way of creeping into just about any kind of tax notice or adjustment. You might think that if you weren't trying to cheat on your taxes and just made a mistake, it would be OK. Hey, taxes are complex, and mistakes happen. Still, the burden is on you to show that you acted reasonably.

Relying on professional tax advice can be one way, but if you can't convince the IRS, you will probably end up with penalties. But how much? The size of penalties varies, but they often land around 25% of the taxes in question. Of course, it could get much worse than 25%. If the IRS believes you were trying to cheat, you could face a civil penalty of 75% or in extreme cases, even criminal prosecution.

And remember, most criminal tax cases start with civil audits. But there are plenty of special penalties, and some of them are of astounding size. A good example is penalties for failing to disclose the existence of a foreign bank account. As an American citizen or green card holder, you must report your worldwide income, and that includes interest income from bank accounts you have anywhere. If you don't, there are taxes, interest and penalties.

On top of these tax penalties, there are bigger and uglier penalties for failing to file bank account reporting forms known as FBARs, or foreign bank account reports. Another name is FinCEN Form 114. These are not even filed with the IRS, they are filed with the Financial Crimes Enforcement Network, part of the U.S. Treasury Department. The Financial Crimes Enforcement Network name alone is scary, and these foreign bank account forms were put into the law in 1970. They featured prominently in IRS and DOJ efforts to in going after offshore accounts and Swiss banks.

One big reason why those forms were key in that effort is that the penalties for failure to file an FBAR are far worse than tax penalties. Failing to file an FBAR can carry a civil penalty of \$10,000 for each non-willful violation. That's right, non-willful means you didn't intend any harm, you were just ignorant. And that \$10,000 is each year, and the statute of limitations on FBAR violations is six years. So that is \$60,000 per account. You have 10 accounts? That's \$600,000—even if you were *non-willful*. It gets worse too.

If your violation is found to be *willful*, the penalty is the greater of \$100,000 or 50 percent of the amount in the account for each violation—and each year you didn't file is a separate violation. Criminal penalties for FBAR violations are even more frightening, including a fine of \$250,000 and five years of imprisonment. If the FBAR violation occurs while violating another law (such as tax law, which it often will) the penalties are increased to \$500,000 in fines and/or ten years of imprisonment. Many violent felonies are punished less harshly.

The assessment of a civil penalty does not preclude criminal penalties or prosecution. How about dying? You might think that the IRS can't penalize you once you have passed away, but amazingly, the IRS has won a string of tax cases doing just that with FBAR penalties. Since the taxpayer who failed to report the foreign account is deceased, it's the estate that gets stuck with the bill for penalties.

You guessed it, that means the heirs who are hoping to inherit, might not, or might end up with less after the IRS is through with them. In *U.S. v. Gill*, No. 18-cv-04020 (S.D. Tex. 2021), the court denied the estate's motion to discuss, finding that even non-willful penalties survived the taxpayer's death. These were penalties—about \$800,000 worth—but the court said the purpose of the penalties was remedial. Go figure.

It's not just one judge either. In fact, there are a number of cases in which the IRS has made willful penalties stick, even after death. There too, the theory seems to be that even though these are purely penalties by statute—and big ones too—the purpose of these penalties was really mostly remedial. Does that seem strained?

The feds argue in the cases that by imposing these penalties—er I mean nudges to comply—the IRS and the feds just want people to comply with the rules. These “penalties” aren't to punish, they are to help people to comply. And that argument is winning in court. There is *U.S. v. Estate of Schoenfeld*, 344 F. Supp. 3rd, 1354 (M.D. Fla. 2018), *U.S. v. Wolin*, 489 F. Supp. 3d 21 (E.D.N.Y. 2020), *U.S. v. Park*, 389 F. Supp 3d 561 (N.D. Ill. 2019), and *U.S. v. Green*.

Is it possible to argue your way out of a tax penalty? Well, these estates have been trying. Of course, in virtually any circumstance, it is worth trying to push back. As a general proposition, taxpayers claim that penalties are not warranted for many reasons, but one of the biggest is the defense that a tax position was based on reasonable cause. How the IRS evaluates this defense depends on which penalty has been assessed, so you must first know that to determine whether you are, well, reasonable.

In addition, on top of reasonable cause, certain penalty defenses involve other concepts, such as an absence of willful neglect. Isn't that proving a negative? You bet. Who wins in a tax penalty stalemate? This one should not surprise you. The IRS does, of course. Put differently, taxpayers bear the burden of substantiating their reasonable cause.

We all must exercise ordinary business care and prudence in reporting our proper tax liability. Remember that all tax returns are signed under penalties of perjury. The IRS applies a facts-and-circumstances test on a case-by-case basis to determine whether a taxpayer meets the reasonable-cause exception. But with foreign account penalties—and many other ones too—it can be particularly difficult to carry the day.

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