



## Robert W. Wood

THE TAX LAWYER

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# How IRS Can Tax ‘Gifts’ and Impose Big Penalties

Are gifts income the IRS can tax? Fortunately, no, but the line between what is income and what is a gift is sometimes fuzzy. Let’s say you do major favors for your employer and get a gift of \$20,000, is that really a gift? You might try to document it that way, but it’s not likely the IRS would agree. The IRS would say it is a bonus, even if it is not run through usual payroll. What of more usual family gifts, where your uncle or grandmother sends you money? That is safer and is probably made with what the IRS calls detached and disinterested generosity. Ideally you don’t just want money to show up in your bank account, since the IRS could someday call it income if you cannot explain that it is not. Having a contemporaneous instrument of gift or at least a letter from your relative saying it is a gift is a good idea. But assuming that it’s a gift, any gift tax or gift tax return is the problem of the person who gave it to you, right?

Not so fast. It’s true that in the U.S., gift tax falls on the giver not the recipient. But these days with a \$12.6M lifetime exemption, most people don’t have to pay gift tax (though they still may need to file gift tax returns reporting the gift). But as a recipient, before of *foreign* gifts. With the sharp eyes of the IRS abroad and looming FATCA compliance, foreign bank accounts are less secret

than they used to be. [Income from abroad is taxable](#) and you must report your foreign bank accounts. It's harder to claim ignorance of these rules than in the past. But what about foreign gifts and inheritances? These rules aren't as well publicized but the stakes are huge. If you receive a gift or inheritance, it isn't income so you might think there's nothing to report. Besides, if there is a gift or estate tax, the person giving you the money or property pays it, not the recipient.



However, if you're concerned about **proving** that something was a gift or inheritance instead of income, you'd better file [IRS Form 3520](#). Ditto if you are concerned about avoiding penalties. The IRS instructions are [here](#). File a Form 3520 if you receive:

1. More than \$100,000 from a nonresident alien individual or a foreign estate (including foreign persons related to that nonresident alien individual or foreign estate) that you treated as gifts or bequests; or

2. More than \$14,375 from foreign corporations or foreign partnerships (including foreign persons related to such foreign corporations or foreign partnerships) that you treated as gifts.

You are required to report bequests on Form 3520 when you actually or [constructively receive](#) them. Thus, report a gift in the year you actually receive it or in the year you *could have* acquired it, whichever is first. The penalty for reporting a gift late is 5 percent of its value for each month the gift is not reported (capped at 25 percent). However, no penalty applies if the IRS is convinced the failure to report was due to reasonable cause and not willful neglect.

**Form 3520.** If you receive a gift from abroad or distribution from a foreign trust, you may need to file [Form 3520](#), Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts. See [How To Report Foreign Gifts And Bequests To IRS](#). Penalties are severe, the *greater* of \$10,000 or 35% of the gross reportable amount. For returns reporting gifts, the penalty is 5% of the gift per month, up to a maximum penalty of 25% of the gift.

**Form 3520-A.** Another nettlesome form is the [Form 3520-A](#), Information Return of Foreign Trust With a U.S. Owner. Taxpayers must report ownership interests in foreign trusts. The penalty for failing to file or filing inaccurately is the *greater of* \$10,000 or 5% of the gross value of trust assets determined to be owned by the U.S. person.

As with foreign accounts and foreign assets, these rules are being looked at more closely. And in recent years, the IRS has gone on a real penalty notice spree regarding these forms. Not filing can mean a penalty. Plus, if you file

late, the IRS may penalize you, making you wonder if you should have filed at all.

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