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THE TAX LAWYER

TAXES 1/08/2016

### To IRS, 'Willful' Means Penalties Or Jail

What is willful conduct and what is not? 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. However, the law is not so clear, and you can be *attributed* knowledge.

Many people think that even civil penalties cannot be imposed if you weren't actually trying to cheat anyone. Unfortunately, willfulness can be shown by your knowledge of reporting requirements and your conscious choice not to comply. "Gee, I didn't know," can get you off the hook in a variety of circumstances. Sometimes it can even work with the IRS. But it is hardly a Get Out of Jail Free card. Everyone has heard that ignorance of the law is no excuse.



On many key tax subjects, the IRS says that with hardly any effort, you could easily learn the IRS requirements. Some tax knowledge is attributed, and that's true with intent too. Your actions may spell the

difference between an innocent mistake and one that is willful and therefore far more serious.

Willfulness involves a voluntary, intentional violation of a known legal duty. In taxes, it applies for civil and criminal violations. This definition causes many people to think they are home free. If you didn't *know* you had a legal duty to report income or a foreign bank account, how can you be prosecuted? It's not that simple.

You may not have *meant* any harm, but that may not be enough. The failure to learn of filing requirements, coupled with efforts to conceal the facts, can spell willfulness. The tax law draws a line between non-willful and willful, and penalties or even prosecution can hang in the balance. A good example is offshore accounts. The IRS Streamlined amnesty program applies to non-willful activity. But IRS says if you were willful you should go into the IRS program called OVDP instead.

The difference is considerable. 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 banks, you pay 50%.

By comparison, Streamlined involves 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%. To participate in the Streamlined program, you have to certify you weren't willful. That's no big deal, right?

Maybe, but 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.

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.

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.

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—a conscious effort to *avoid* learning about reporting requirements—may be enough. 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](#). Ask yourself if your explanation passes the straight face test. Or get some advice about your facts from an experienced tax lawyer.

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