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Will Hillary's 'Careless Not Criminal' Excuse Work With IRS?

The FBI Director has concluded that [Hillary Clinton's](#) use of a private e-mail server to handle work-related communications while she was Secretary of State was “extremely careless.” Significantly, though, he said that it did *not* cross the line into criminal behavior. The FBI Director’s [remarks](#) will be debated for months, but “careless, not criminal” may become a new tag line. The email issue has nothing to do with taxes, of course, but more than a few American taxpayers may try to connect the dots to their own behavior.

A prime source of interaction with the government for many Americans is the IRS, so ask yourself: Would “careless, not criminal” get you out of a civil or criminal jam with the IRS? American taxpayers not infrequently say, “I didn’t know” or “that was an innocent mistake.” The IRS may say that even if you didn’t know, you *should have* known. In fact, conduct can be considered *criminal* even if you didn’t know or didn’t have a bad intent. We’ll come back to the concept of willful blindness.



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)

According to the FBI Director's [prepared remarks](#), there is a difference between carelessness and willful misconduct. [Section 793\(f\) of the Espionage Act](#) imposes criminal penalties for “gross negligence” in allowing classified information to be “removed from its proper place of custody” or delivered to anyone not entitled to possess it. Gross negligence, among other things, means recklessly disregarding the danger to others. What about American taxpayers? What is willful and what's not?

Since taxes are complex, 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. A good example involves 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 more expensive IRS program called OVDP.

To participate in the Streamlined program, you must certify (under penalties of perjury) that you were not willful. It is nothing to take lightly. 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.

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. 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. (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. It might include filing some forms and not others. Using another passport, telling your bank not to send statements, and using code words over the phone could all look suspect. Same with visits in person, cash deposits and cash withdrawals. Any of that conduct could suggest willfulness. So can moving money from one bank to another when the banks don't want undisclosed American accounts.

Advisers may tell you that everyone's doing it, but that may not absolve you. Even if it can explain one failure, repeated failures to comply 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. It is true that, "I didn't know," can still work in some cases.

But with hardly any diligence, the IRS says that taxpayers *could* learn of these requirements quite easily. IRS says that you *should* read government tax forms and instructions. According to this [excerpt from the Internal Revenue Manual](#), failing to observe the rules can be evidence of willful blindness. 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.