



Robert W. Wood

THE TAX LAWYER

Oct. 29 2010 – 9:09 am

Are You Willful Or Ignorant About Taxes?

No, this isn't a trick question. Following up on [Becoming Tax Mr. Clean](#), there's lots of talk now about voluntary disclosure to the IRS. There's also lots of talk about whether and how one might try to soften the blow of disclosing foreign bank accounts (or other tax problems) along with their myriad penalties. See [Six Questions About Secret Foreign Bank Accounts](#).

Of course, U.S. citizens and permanent residents must report their worldwide income on U.S. tax returns. They must also disclose foreign bank accounts on an [FBAR](#). The penalties for failing to report worldwide income can be severe, but the penalties for failing to file FBARs are even worse. See [Ten Things To Know About Offshore Bank Accounts](#).

Given the costs and penalties, some people may be thinking that they face worse treatment by coming forward than by just clamming up and waiting to be contacted by the IRS. If they're lucky, that might never happen, they figure. Such thoughts are dangerous, as it is safest to come forward. Still, if you're evaluating your options, considering so-called quiet disclosures, pre-clearances, and other creative ideas is not all bad. See [Six Questions About Secret Foreign Bank Accounts](#).

Another question is how much the IRS can prove if you (usually against your counsel's advice) decide not to come forward. Yet one recent case, [United States v. J. Bryan Williams](#), suggests the IRS may have a hard time proving "willfulness" when a U.S. taxpayer with a foreign bank account didn't know he had to report it. Williams had checked the "no"

box indicating (under penalties of perjury, mind you) that he did not have a foreign bank account. He also did not file FBARs.

Nevertheless, the court was not persuaded that he was trying to evade taxes. Willfully evading federal income taxes is a felony. See [26 U.S.C. § 7203](#). You may think your child or pet is willful, but “willful” in this context usually means voluntary or with intent. You are willful if you intentionally violate a legal duty of which you’re aware.

Interestingly, though, some people have managed to avoid the taint of willfulness in tax matters based on a genuine misunderstanding of the tax law. The misunderstanding can even be unreasonable as long as it’s genuine. See [Cheek v. United States](#), 498 U.S. 192, 201 (1991). Another way of not being willful: having a good-faith (even though unreasonable) belief that no tax was due.

Is Ignorance Bliss? Despite the popular aphorism, ignorance isn’t usually bliss. But perhaps sometimes it can be better to be ignorant. In a recent criminal tax case in Illinois, [United States v. Kokenis](#), a jury found Chris Kokenis guilty of tax evasion.

Asking for a new trial, Kokenis claimed the trial court had erred by excluding evidence of his good faith misunderstanding of the tax law. The court denied his motion for a new trial, and in doing so, made a worrisome suggestion. The court suggested that such a defense would require the defendant to take the stand to testify. Had Kokenis testified in his trial? Nope. See [order](#).

The court seemed careful to tiptoe around the issue of drawing negative inferences based a defendant’s failure to testify. The court even notes in its [order](#) that it instructed the jury that it could **not** draw negative inferences from the fact that Kokenis did not take the stand in his own defense. Still, said the court, how else could he have established what his own good faith belief was?

My favorite cutesy (but still downright weird) part of the court’s comments, though, was a paean to the old radio shows that (despite our iPod, iPhone era) I still love. The Judge capped his you-have-to-take-the-stand-to-show-your-belief harrumph with a footnote suggesting that

otherwise, who knows (what evil lurks in the hearts of men)? Quoting Orson Welles, the Judge said “only ***The Shadow knows.***”

Well, it sounded better when Orson Welles said it.

For more about foreign bank accounts see:

[Ten Facts About Tax Expatriation](#)

[Ten Ways To Audit Proof Your Tax Return](#)

[Six Questions About Secret Foreign Bank Accounts](#)

[Ten Things To Know About Offshore Bank Accounts](#)

[IRS FAQs Regarding FBAR – Filing Requirements](#)

[IRS FAQs Regarding FBAR – Financial Accounts](#)

*Robert W. Wood practices law with [Wood & Porter](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009, [Tax Institute](#)), he can be reached at wood@woodporter.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*