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FBAR Penalties Just Got Even Worse

The Fourth Circuit Court of Appeals has handed the IRS a victory in its war on offshore accounts and income. In *United States v. Williams*, the appeals court reversed the district court's holding that Mr. Williams didn't act willfully when he failed to file FBARs.

(Photo credit: bradipo)

Until it was reversed on appeal, *United States v. Williams* was a ray of hope for those considering FBARs as obscure forms the IRS must prove you ***knew*** about. See IRS May Find "Innocent" FBAR Violation Willful. Williams had checked the "no" box on his tax return for no foreign account and failed to file FBARs. While Williams admitted he was a tax cheat, the district court was not persuaded that he was willful when he didn't file FBARs.

The district court suggested the IRS would have a hard time proving willfulness when a taxpayer didn't know about FBARs. That may have caused some with foreign accounts not to step forward. Some tax cases imply that you might not be willful if you have a genuine misunderstanding of the tax law even if it's unreasonable. See *Cheek v. United States*.

But the FBAR landscape is touchy and the reversal of *Williams* suggests treading carefully. Williams pled guilty to tax evasion and the sole question was whether the FBAR violation ***itself*** was willful. Although the

district court said the government didn't separately prove willfulness, the appeals court was willing to connect the dots.

Williams testified that he didn't report the accounts and admitted willfully evading taxes. To the appeals court, that meant FBARs too. It wasn't clear that Williams knew anything about FBARs.

Still, the appeals court said that Williams made a ***conscious effort to avoid learning*** about FBARs. That itself was willful, it suggested. However, one judge dissented, noting that:

1. The court should limit itself to whether there was clear error by the trial court. Here, there wasn't.
2. True, there was ***some*** evidence of willfulness, but there was ***other*** evidence Williams was not. Trial courts—not appellate courts—should decide such issues.
3. There was no question Williams was willful about the ***tax evasion***, but that wasn't the question here. Williams never indicated he knew anything about FBARs.
4. Williams ***wasn't*** trying to hide anything in his guilty plea and allocution; in fact had every incentive to come clean.
5. The district court cogently and correctly noted that with the mix of evidence before it, the government hadn't shown willful FBAR violations, period.

Post-*Williams* FBARs? How much will the *Williams* case impact future FBAR penalties and prosecutions? The majority suggests you can be willful ***without*** a specific bad intent: willful blindness. But the dissent is persuasive. Plus, the unusual facts and Williams' admission of tax fraud taint the case enormously. Better facts might achieve a better result.

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