PERSPECTIVE

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Up Next: The 'Careless, Not Criminal' Defense

By Robert W. Wood

After former Treasury Secretary Timothy Geitner made history with his Turbo-Tax defense, there was spate of tax cases about whether "the software made me do it" qualified taxpayers for relief from IRS penalties. It does not appear that anyone tried the Turbo-Tax defense in a criminal tax case, but it was probably debated. And in the current political cycle, more than a few lawyers are now probably wondering about using the "Hillary Defense."

FBI Director James B. Comey said Hillary was just careless with her emails. Well, *extremely* careless. Since then, the bounds of the Hillary Defense are surely being discussed. Ordinary citizens may soon be invoking it, from traffic tickets to taxes. Who understands taxes anyhow?

The FBI director said Clinton's use of a private email server was "extremely careless" but did not cross the line into criminal behavior. His remarks could make "careless, not criminal" a well-worn line. But will "careless, not criminal" get you out of a jam with the IRS? You can certainly tell the IRS, "I didn't know," or "that was an innocent mistake." In fact, it isn't a foolish argument to make, though the IRS may respond that you *should have* known. And that "should have known" standard isn't just in civil audits. In the tax realm, some conduct can be considered *criminal* even if you were ignorant of the law and did not have a bad intent.

Taxes have their own lingo and their own rules. Taxes are complex, so 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.

The test for willfulness 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 tax violations. You may not have *meant* to cheat anyone, but that may not be enough. The failure to learn of IRS filing requirements, coupled with efforts to conceal what you did, may be willful. Some courts say willfulness is a purpose to disobey the law, but one that can be inferred by conduct.

So, watch out for conduct that is meant to conceal, or that can be interpreted that way. In the tax world, conduct meant to conceal might include setting up trusts or corporations, dealing in cash, splitting cash into multiple deposits or withdrawals, or keeping two sets of books. Even swapping goods or services to avoid income can be enough. Willful or evasive conduct might be inferred if you were to file some forms and not others, or making cash deposits and cash withdrawals.

Another big non-no is mixing personal and business funds, failing to keep records, and under-reporting your receipts. All could look bad and could suggest willfulness. Watch for patterns, too.

Repeated failures can turn inadvertent neglect into reckless or deliberate disregard. There is a phrase in the tax law called "willful blindness" — a kind of conscious effort to *avoid* learning about your reporting requirements. And willful blindness can be enough for criminal charges.

It is still true that "I didn't know," can get you out of civil penalties with the IRS in some cases. Even in criminal tax cases, on the right facts, "I didn't know" can be pivotal too. But the IRS hears this kind of claim frequently, and they may not be forgiving. Often, the IRS responds that ignorance is no excuse, and that you *could* have learned about the pertinent tax rules easily, with hardly any diligence. IRS says that you *should* read government tax forms and instructions.

The burden of proof can be a big problem too. 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. If you are trying out a "didn't-know, meant no harm" kind of excuse with the IRS, first ask yourself if your explanation passes the straight face test. Even better, get some advice about your facts from an experienced tax lawyer. And speaking of tax lawyers, relying on advisers is another big area.

You might rely on a tax lawyer, CPA or enrolled agent. Sometimes, it can be more effective to say that you didn't know, *and* that your accountant or tax lawyer didn't tell you. But before you go down that path, be sure you'll get the support you need from your tax professional in advance.

No one wants to be thrown under the bus. And if you are saying that your tax professional made the mistake, be prepared to show that you fully disclosed the facts to your tax professional. Finally, if you are interacting with the IRS, make certain you keep your eyes on the big picture.

Some taxpayers have managed to make conflicting explanations and excuses that end up turning a civil tax case into a criminal one. A majority of criminal tax cases today come from regular old civil tax audits where the IRS feels it is seeing deceptive practices. If you are being audited, the last thing you want to do is lie, create false documents, or otherwise try to deceive the government.

Robert W. Wood *is a tax lawyer with www.WoodLLP.com, and the author of "Taxation of Damage Awards & Settlement Payments" (www.TaxInstitute.com). This is not legal advice.*