



IRS Civil-Criminal Penalties *Willfulness*

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Gary S. Wolfe has over 34 years of experience, specializing in IRS Tax Audits and International Tax Matters including: International Tax Planning/Tax Compliance, and International Asset Protection.

As of July 2016, Gary Wolfe has internationally published 15 books and 28 articles. Gary has received 14 international tax awards from five different Global expert societies in LONDON/UK including being voted one of the 100 leading world's law firms with votes from over 150,000 voters in over 160 countries with the following award: Global 100 (2016) (KMH Media Group) - CA/US International Tax Planning Law Firm of the Year.

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IRS Civil/Criminal Penalties - Willfulness

Under the IRS rules, the willfulness element essential for a criminal tax evasion charge is defined as follows: (see IRS Criminal Tax Division/Office of Chief Counsel Tax Crimes Handbook)

"Willfulness is the voluntary, intentional violation of a known, legal duty: See: Cheek v. US 498 US 192, 200-201 (1991); US v. Pomponio 429 US 10,12 (1976); US v. Bishop 412 US 346, 360 (1973).

The subjective test is "A defendants' good faith belief that he is not violating the tax law, no matter how objectively unreasonable that belief may be, is a DEFENSE IN A TAX PROSECUTION. See Cheek, supra.

Mental impairment can be a defense subject to a medical evaluation which may include; loss of memory from drug/alcohol addition, brain impairment from personal injury (e.g.. car accident), or disease (Alzheimer's disease affected over 5m US people of all ages in 2015).

The key issue is whether there was a mental impairment at the time a tax crime was committed e.g. failure to declare an offshore account, failure to report income and other tax crimes.

For a U.S. taxpayer to avoid criminal prosecution, the tax rules are different than those tax rules for imposition of civil penalties. Tax crimes require ³intent²; i.e. the U.S. taxpayer deliberately and intentionally pursued a criminal course of conduct.

The U.S. taxpayer must demonstrate that he had ³a good faith belief² that he did not owe tax. If so, the U.S. taxpayer may be able to prevent a criminal conviction but not necessarily prevent being criminally prosecuted. The U.S. taxpayer must demonstrate that their ³tax theory² (however misguided) was in ³good faith² in order to negate the ³intent element² of the crime of tax evasion.

For example, in the case of Vernice Kuglin, she successfully convinced a jury that the IRS¹s failure to respond to her written inquiry regarding the need to file a tax return or pay tax on over \$900,000 in U.S. taxable income was a ³reasonable, good faith belief² and she was not convicted of tax evasion.

For example, in the 2007 case of Tom Cryer (an attorney in Louisiana) tax evasion charges were dropped and he was acquitted on charges of willfully failing to file a tax return. Cryer¹s defense was that the IRS refused to respond to his repeated demand that the government explain why his ³tax

theories² were not viable, instead they refused to respond to Cryer, stating his tax positions were ³frivolous².

At trial, Cryer convinced jurors that he genuinely believed he owed no tax for the years in question, and without proof of criminal intent, he was acquitted.

In the case of the actor Wesley Snipes, he provided the IRS with a 600-page explanation of why he was a ³non-taxpayer² which the IRS ignored as a ³tax protester² manifesto. He was not convicted of tax evasion (i.e. a felony) but was convicted for failure to file a tax return (misdemeanor) and was sentenced to three one-year consecutive prison terms.

For civil tax penalties, U.S. taxpayers must demonstrate the key element for a penalty defense; i.e. reasonable reliance on counsel. In criminal courts, reliance on counsel is essential but the courts give wide latitude with respect to a willfulness defense and the taxpayer¹s ³good faith belief².

In criminal cases, the prosecutor must prove beyond a reasonable doubt willfulness, or specific criminal intent, which means that the defendant:

1. Knew and understood the law; and
2. Intentionally set out to violate it; i.e. had the purpose of evading assessment or collection of taxes.

Regarding willfulness, the defendant may present a good faith defense, including good faith belief and reliance when reliance includes all that the defendant read and heard. According to the U.S. Supreme Court, good faith is a defense, no matter what the belief. However, the defendant is not allowed willful blindness; i.e. the defendant intentionally concealed the truth from himself.

Criminal penalties may be imposed for intentionally violating federal tax laws (i.e. willful violation). ³Ignorance of the law excuses no one² is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely because he or she is or was unaware of its content.

Under U.S. Model Penal Code Sec. 2.02(9), knowledge that an activity is unlawful is not an element of an offense unless the statute creating the offense specifically makes it one.

In *Cheek v. U.S.* (1991), 498 U.S. 192, willfulness is required for federal tax crimes. In *Cheek*, the U.S. Supreme court reversed his conviction for willful failure to file a tax return.

Cheek's tax theory² was that wages did not constitute income and he therefore failed to file a tax return. The U.S. Supreme Court held that Cheek was entitled to a good faith instruction to the jury; i.e. the jurors could acquit him if they found Cheek believed in good faith that he was not required to file. The prosecutor had to prove that Cheek did not rely in good faith on what he heard and read. Cheek was eventually convicted and served a year and a day.

In order to avoid criminal convictions, U.S. taxpayers must rely upon independent, competent counsel. In the case of *U.S. v. Lindsey Springer*, (Case No. 09 C.R. 043 JHP, Northern District of Oklahoma), the taxpayer and his attorney each received a 15 year sentence for conspiracy to defraud the U.S. and evasion of taxpayer's taxes by use of the attorney's trust account to funnel client funds and from which account client expenses were paid.

Although the good faith belief and reliance arguments may be usable as a defense in a criminal tax case, often these off-shore situations involve money laundering² (i.e. disguising the nature or origin of the funds), in which the government may criminally prosecute under the principal of intentional blindness² or ignoring what is reasonable² as a basis for conviction.

The best defense is a specific tax opinion letter from an independent, competent tax professional.

