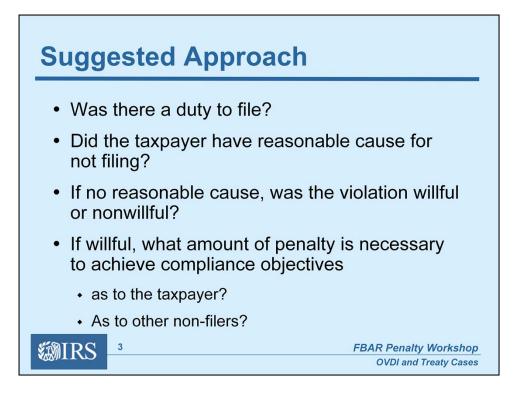
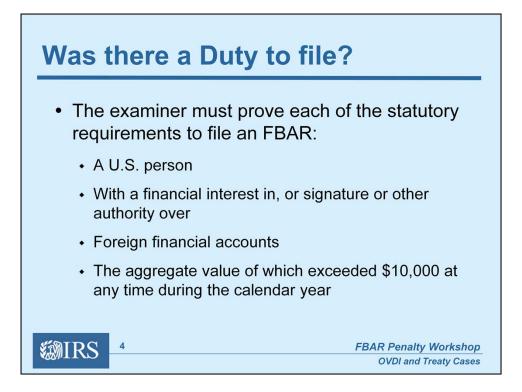


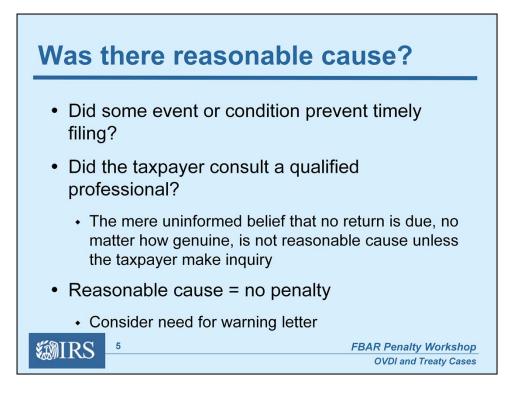
The goal of an FBAR penalty investigation is to gather evidence to arrive at a decision regarding the appropriate FBAR penalties. Examiners should try to avoid starting a penalty investigation with the intent of proving a that a specific penalty applies. At the start of the investigation you may have some evidence that tends to show willfulness, or that that tends to show non-willfulness, but until you gather additional information you really do not know with any degree of certainty the appropriate penalty, if any, to assert.

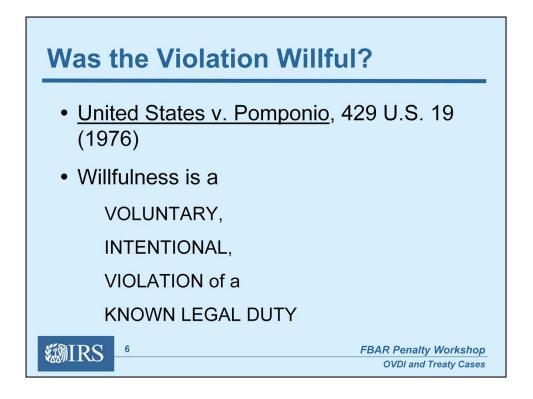
Many FBAR penalty investigations will result in non-willful penalties, not because the person did not act willfully, but because we cannot meet our burden to prove that the person acted willfully.

You need to allow the evidence to guide the investigation. If the evidence tends to show willful conduct by the person, then continue to gather evidence to prove willful FBAR violations; however, if the evidence tends to show non-willfulness, then at some point during the investigation you will shift the focus to evaluating whether the person has reasonable cause for the FBAR violations. At what point you have gathered enough information to make a decision about the direction of the investigation heavily depends upon the facts of the case.





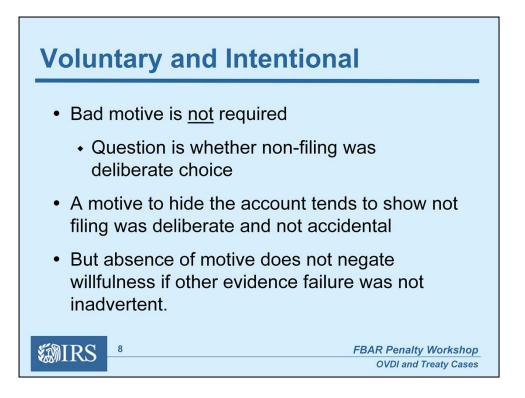


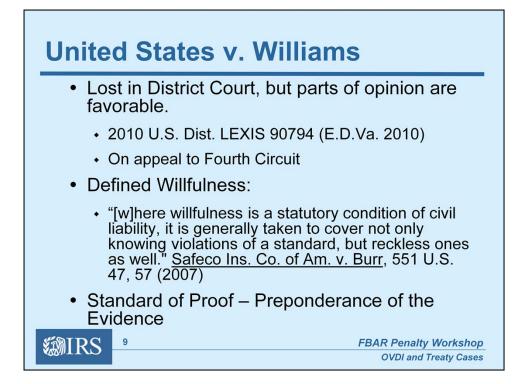


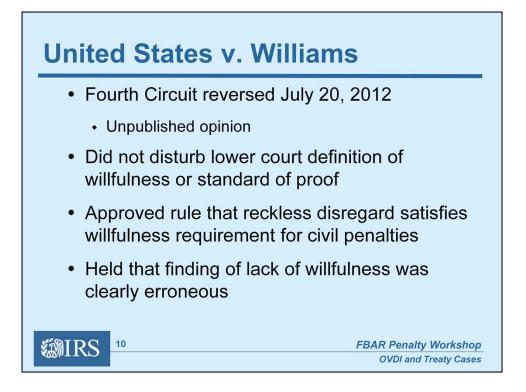


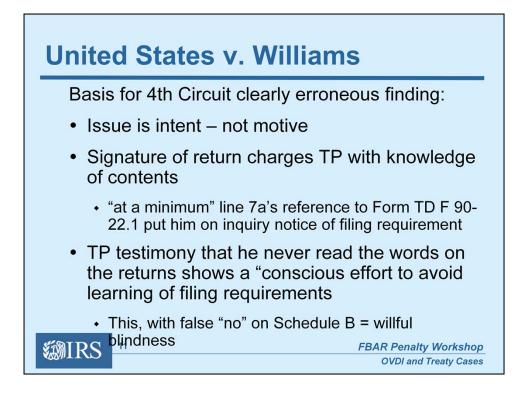
- Direct evidence:
  - Taxpayer filed a current incomplete FBAR or previously filed FBARs or received a warning letter
- Circumstantial evidence
  - Preparer asked about foreign accounts and taxpayer lied
  - · Taxpayer otherwise concealed account
  - · Failure continued for many years without inquiry

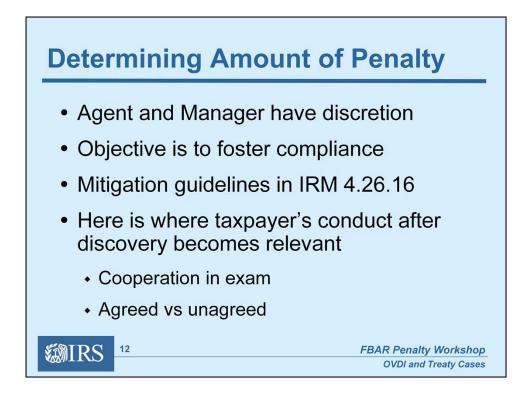




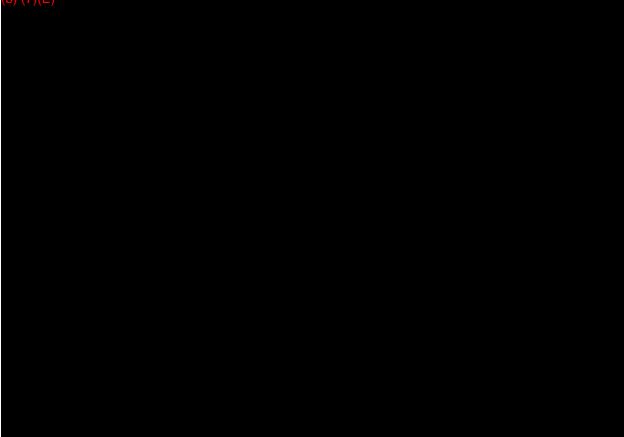


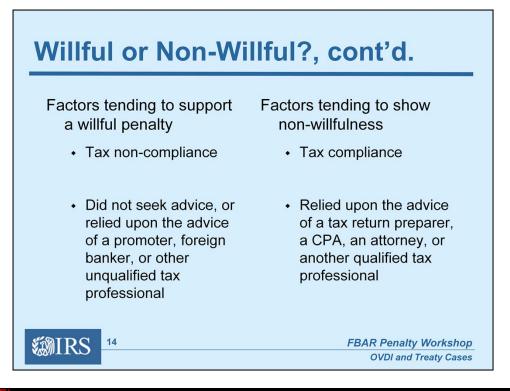


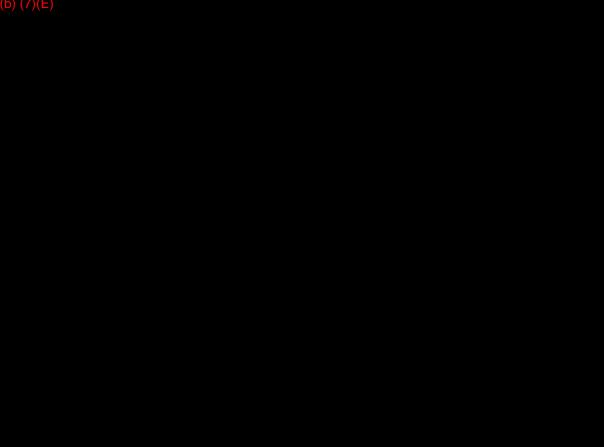


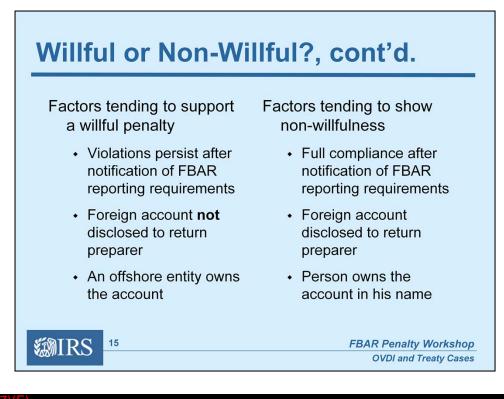


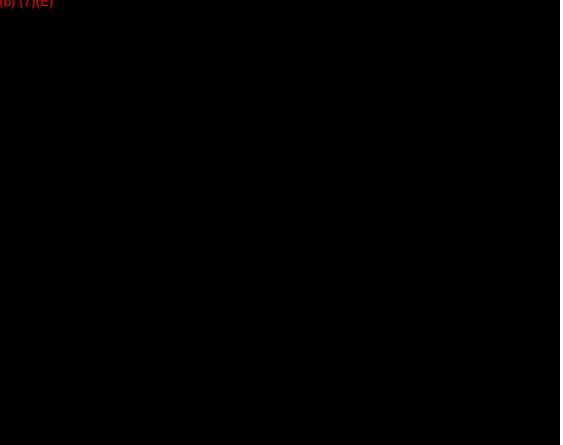








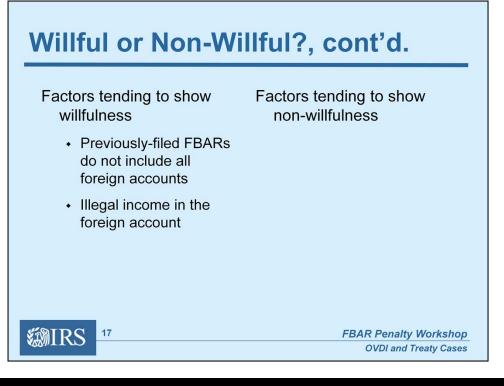


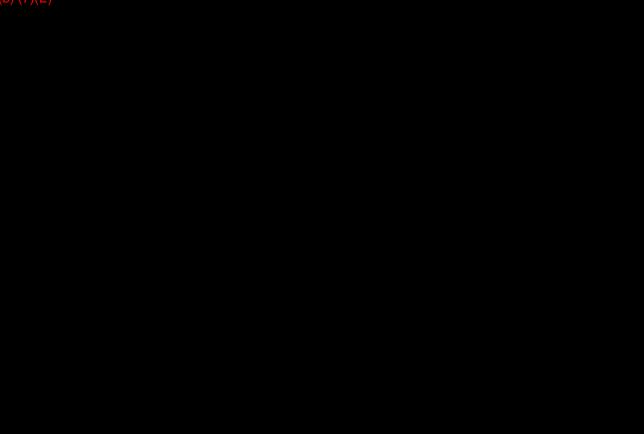


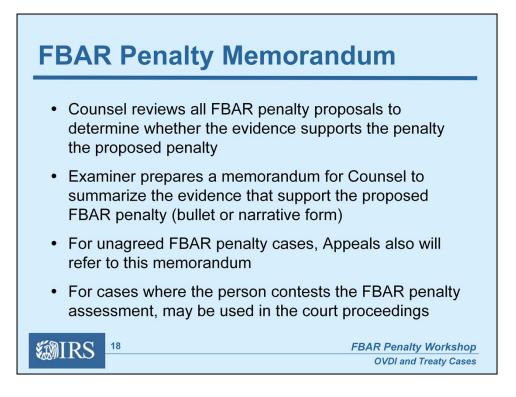
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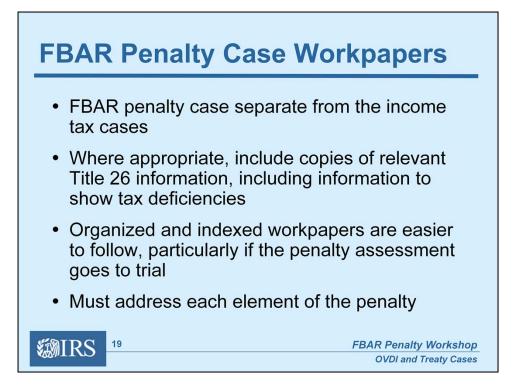


At the conclusion of all FBAR penalty investigations where the examiner proposes an FBAR penalty, either the willful penalty or the non-willful penalty, Counsel needs to review to the proposed FBAR penalties to determine whether the evidence gathered by the examiner is sufficient to sustain the proposed FBAR penalties.

To assist Counsel in this task, the examiner should prepare a memorandum to summarize the evidence that supports the penalty assessment. This memorandum can be in either bullet or narrative form, or a combination of the two forms. Often it is often better to summarize the evidence using bullets, and then use a narrative to explain how the evidence supports the proposed penalty assessments.

For unagreed FBAR cases where the person protests the penalties, the FBAR penalty memorandum will provide Appeals with a summary of the penalty case.

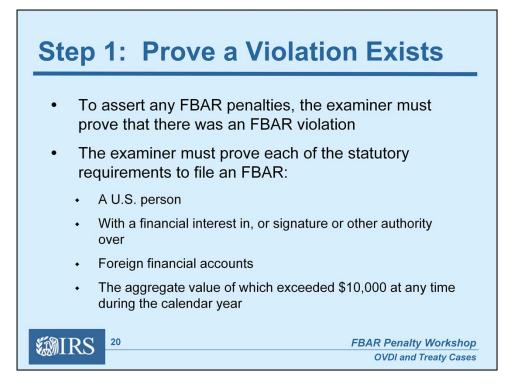
In the event the IRS assesses the FBAR penalties, and the person contests the assessments, the FBAR penalty memorandum will assist with preparing the case for the court.



The FBAR penalty case file is separate from the related income tax examinations or Title 26 penalty cases. The FBAR penalty case and the income tax cases may follow separate processing paths so it is important to include in the FBAR penalty case copies of all the relevant information from the Title 26 case files, including information to show the amounts of the tax deficiencies.

As with all cases, well organized and indexed workpapers are easier to follow. Also keep in mind that, if the FBAR penalty assessment goes to trial, the workpapers in the FBAR penalty case file will be an important part of the government's FBAR penalty case.

The workpapers must address each element of the FBAR reporting requirements. We will discuss these elements shortly. Examiners should consider organizing their workpapers according to these elements.



The FBAR penalty investigation is a two-step process. First, the examiner needs to prove that the person failed to file the report mandated by the statute. Second, the examiner must prove the appropriate penalty to assert.

To prove that a person failed to comply with the law, the examiner must prove that the person had a reporting requirement under the statute and that the person failed to comply with the statute.

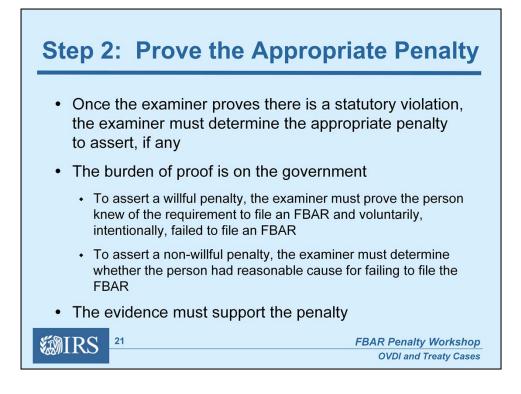
To prove that the person had filing requirement, the examiner must:

Prove the person is a U.S. Person.

Prove the person had a financial interest in, or signature or other authority over one or more accounts.

Prove that each account was a foreign financial account.

Prove the aggregate balance of the foreign financial accounts exceeded \$10,000 at any time during the calendar year.



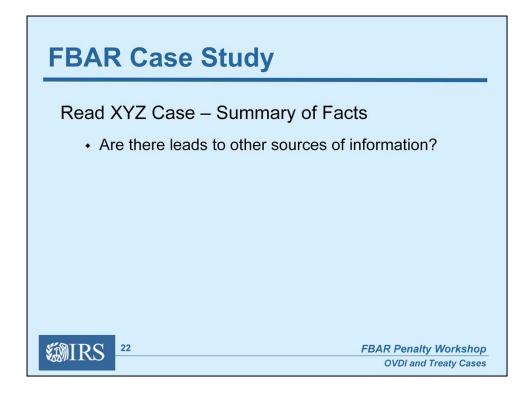
Once the examiner proves the person had a statutory reporting requirements and that the person failed to file the FBAR, the examiner must then determine the appropriate penalty to assert, if any.

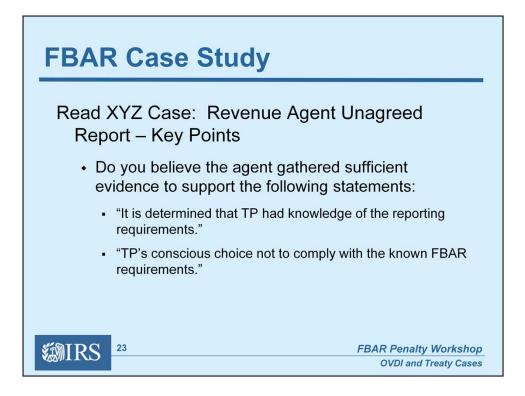
In all penalty cases, the burden of proof is on the government.

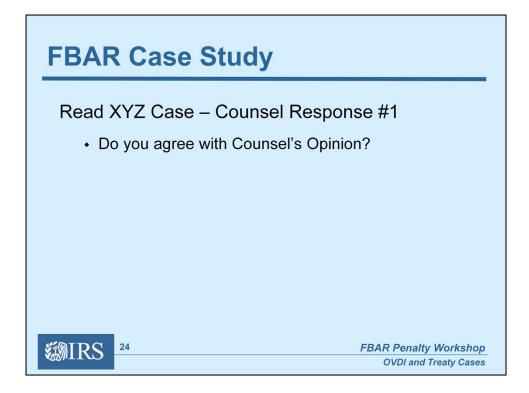
To assert a willful penalty, the examiner must prove the person knew of the requirement to file an FBAR and voluntarily, intentionally, failed to file an FBAR.

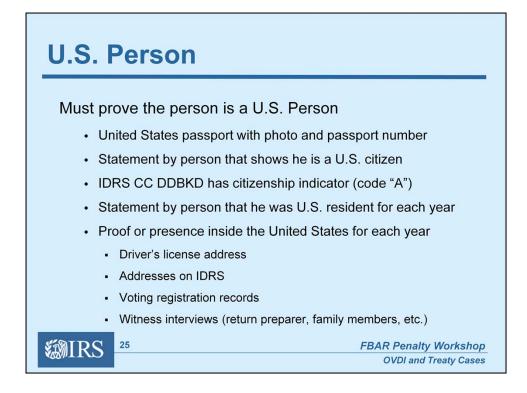
To assert a non-willful penalty, the examiner must determine whether the person had reasonable cause for failing to file the FBAR.

The evidence gathered by the examiner must support the proposed penalty assessment.









We need to prove that the person had a requirement to file an FBAR for a specific calendar year. Although this may seem obvious, you need to secure proof that the person was either a U.S. citizen or a resident of the United States during the calendar year. This should not be difficult to prove, but you need something in the case file to prove this simple fact.

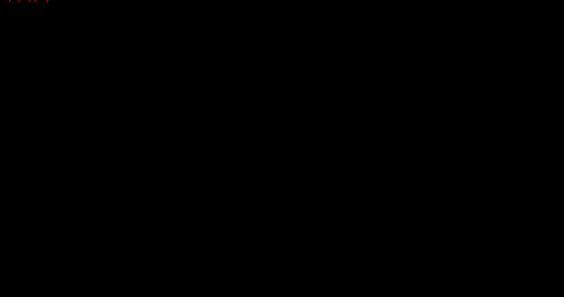
A copy of the person's United States passport, with a photograph of the person and the passport number, is good proof of citizenship. It is better if you made the copy of the passport, but a copy made by a third party may be sufficient.

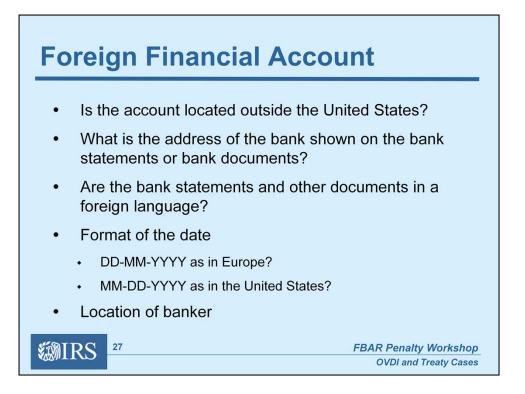
A statement by the person that shows he is a U.S. citizen, either an admission of citizenship, or a statement about the location of the person's birth, is acceptable.

IDRS command code DDBKD contains information from the Social Security Administration about the citizenship of the person associated with the Social Security Number; citizenship code "A" means the person is a U.S. citizen.

If the person is not a U.S. citizen, or we cannot prove the person is a U.S. citizen, then we need to prove that the person was a resident of the United States during each year for which there is an FBAR violation. A direct statement by the person about residency status is the best evidence, but other ways to show residency are addresses on a driver's license, IDRS addresses, voting registration records, and statements by other witnesses, such as the return preparer or family members, about their knowledge of the where the person lived during the relevant years.







Yes, this is a serious issue that you must address. UBS has a branches located throughout the United States. The fact that a person has a bank account with UBS is not proof that the bank account is a foreign bank account subject to reporting on an FBAR.

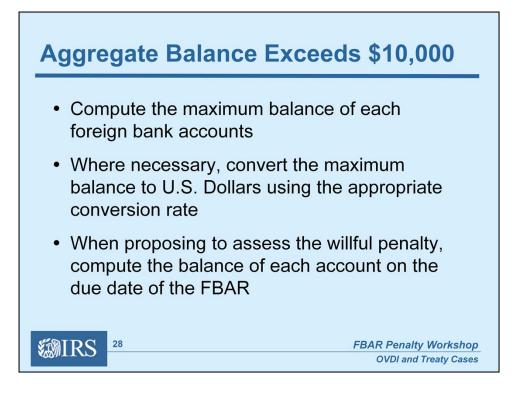
The easiest way to verify the location of the bank account is to inspect the UBS bank records. Is the bank address in bank records, or on the bank statements, located outside the United States?

Are the bank statements or bank documents in a language other than American English?

What is the format of the date? Is the format Day-Month-Year, as used in Europe, or Month-Day-Year as used in the United States?

If there are banker notes or other notes in the case file, can you determine the location of the parties who wrote the notes? Are the notes in American English? If the notes were written in a foreign language, or the person who wrote the notes is located outside the

United States, it is highly likely that the associated account is a foreign bank account.

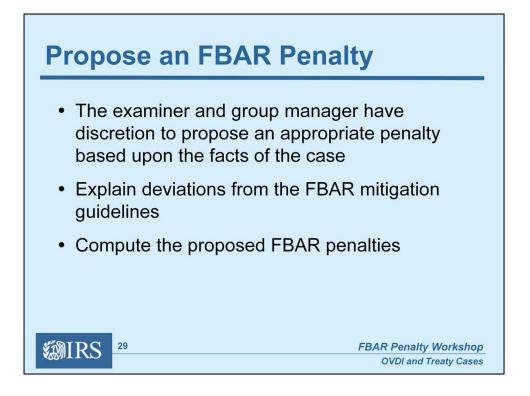


The final statutory requirement that you must prove is that the aggregate balance of the foreign accounts exceeded \$10,000 during the calendar year.

Based upon the bank statements you should be able compute the maximum balance of each foreign bank account in the currency of that account and, where necessary, the maximum balance of each account converted into U.S. Dollars.

Add together the maximum balances of all accounts to show that the aggregate balance of the foreign accounts exceeds \$10,000.

Also, for any account subject to FBAR reporting where you intend to assert the willful FBAR penalty, you need to show the balance of that account on June 30 of the year following the reporting year. Just to refresh your memory, the willful FBAR penalty is based upon the value in the account on the date of violation.

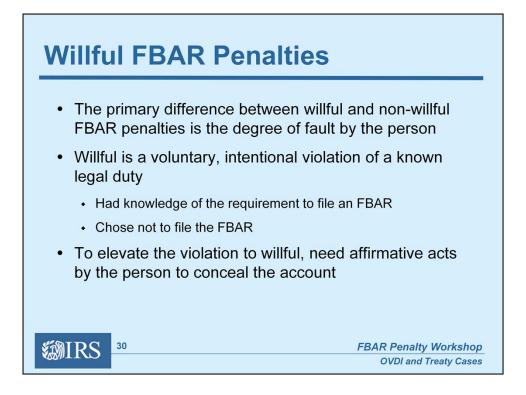


Once you have shown both that the person had a requirement to file an FBAR and that the person failed to file the FBAR, you need to determine the appropriate penalty. Under the FBAR penalty mitigation guidelines, the examiner and group manager have the discretion to propose an appropriate penalty based upon the specific facts of the case.

Where it is appropriate to deviate from the FBAR mitigation guidelines, the examiner and group manager need to explain the reasons for the deviations, regardless of whether the proposed penalty is an amount that is greater than, or less than, the amount penalty under the FBAR mitigation guidelines.

The examiner must also compute the amount of the proposed penalty.

The rest of this presentation discusses what type of evidence is necessary to sustain both willful and non-willful FBAR penalties.

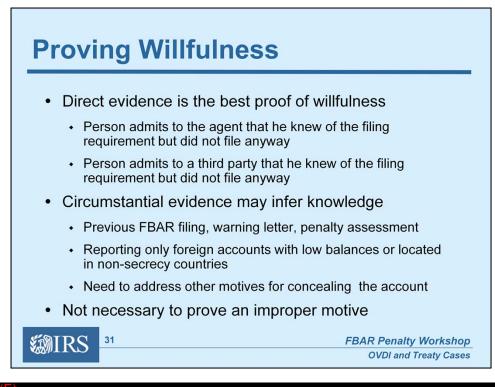


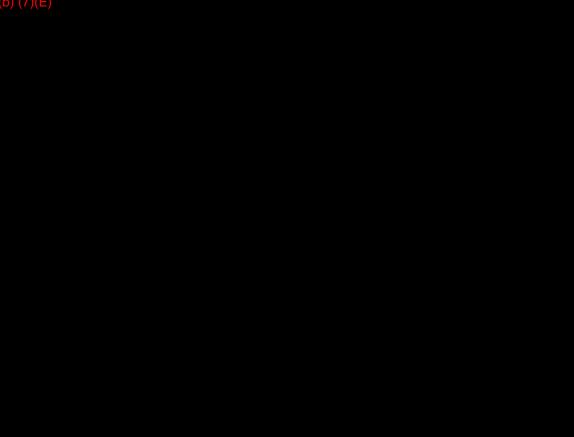
There are two FBAR penalties, one for willful violations and one for nonwillful violations. The primary difference between willful conduct and non-willful conduct is the degree of fault of the person who failed to file the FBAR.

The general definition for willful is the voluntary, intentional violation or disregard of a known legal duty. Notice that the two important concepts in the definition of willfulness are knowledge and intent.

With respect to FBAR filing requirements, a person acted willfully if he had knowledge of the requirements to file an FBAR and chose not to file the FBAR.

Absent direct proof that the person knew he had to file an FBAR, you will need to identify affirmative acts by the person to conceal the foreign account to elevate the FBAR penalty from non-willful to willful. There mere fact that a person failed to file an FBAR is, by itself, not an indication of willfulness.





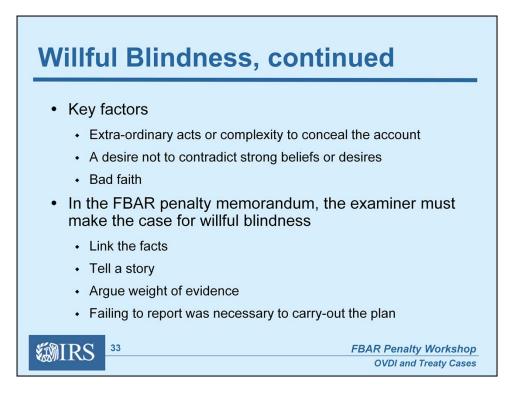
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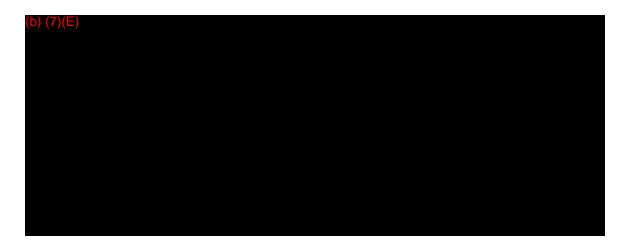
- Willful blindness is a voluntary, intentional, reckless failure to discover a legal duty (willful ignorance, intentional avoidance, blatant ignorance)
  - Rely upon circumstantial evidence
  - · Evidence subject to different interpretations
- Show the person was in a position to acquire knowledge
- Weakness: Person argues he did not know or have reason to know that he had to report the account







The success of a willful blindness case will depend upon three basic factors: first, did the person take extra-ordinary or complex actions to conceal his ownership of the foreign account; second, would disclosing the existence of the account either violate the person's stated reasons for having the account or conflict with strongly-held beliefs; third, taking into account all of the actions of the person, did the person act in bad faith with respect to the foreign account. We are going to discuss these factors in the next few slides. Keep in mind that not all these factors will apply in every case.

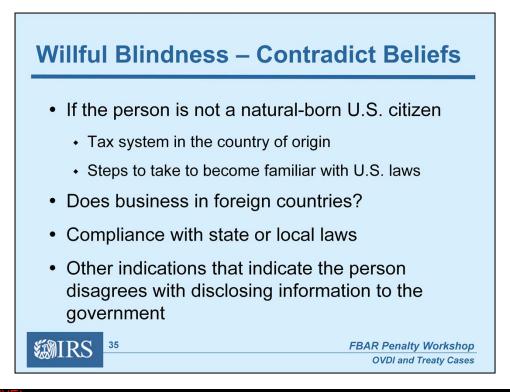


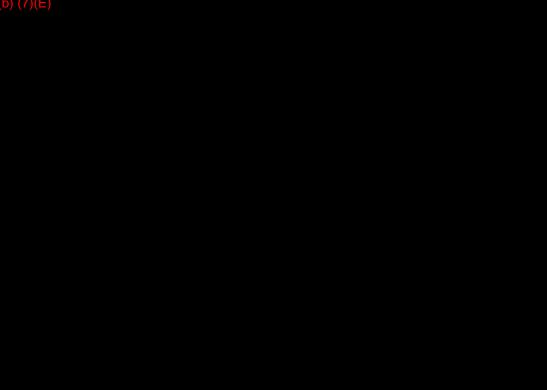
## Willful Blindness – Extraordinary Acts

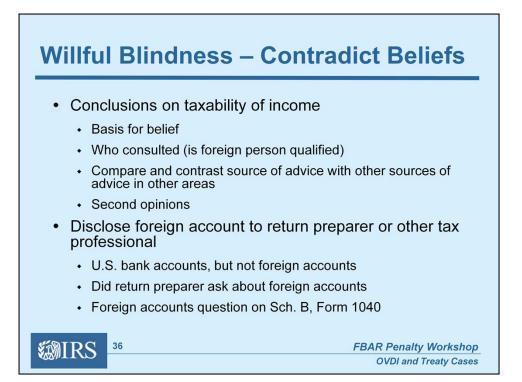
- Purpose of the account
  - · Why not a U.S bank account
  - · Equivalent of a cash hoard
- Probe any statements by the person about financial privacy
- Source of the funds on the account
- · Steps to conceal the account
  - · Create foreign entities (tiered entity structure); Why?
  - · Who provided the advice
  - · How did the person access the account (travel, wire transfers)
- · Passive beneficiaries have comparably less willfulness



FBAR Penalty Workshop OVDI and Treaty Cases

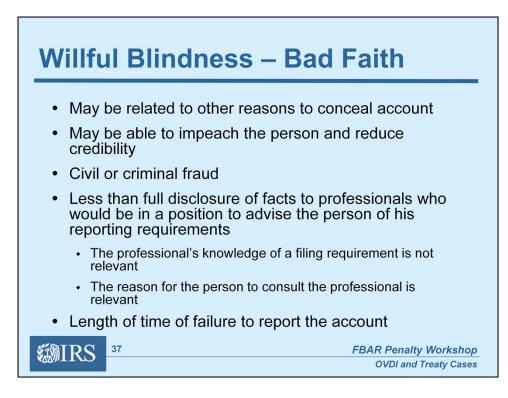


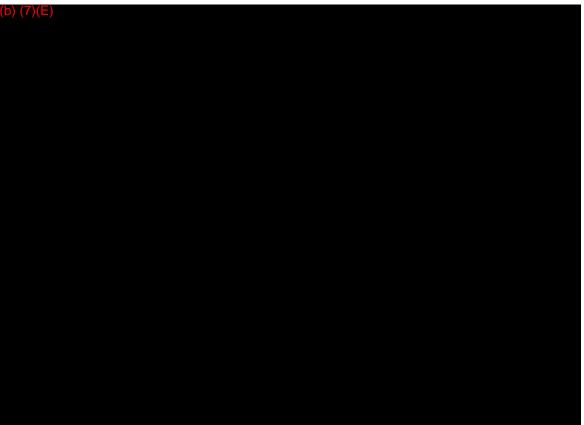


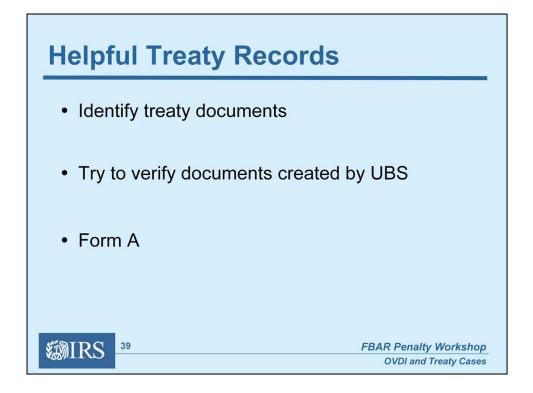


The slide deals with the basic relationship between the person and the tax return preparer, from the point of view of the person. Later in this presentation we are going to discuss importance of gathering evidence from the tax return preparer to explore the relationship from the point of view of the tax return preparer.





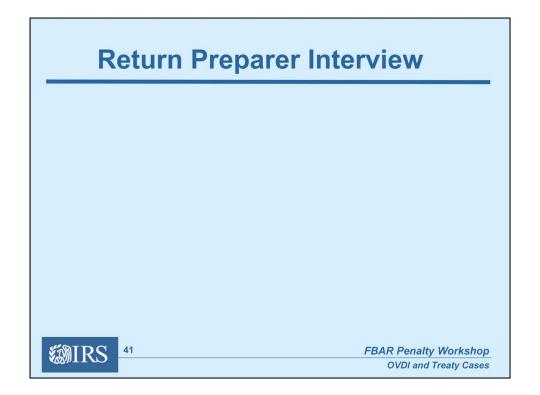


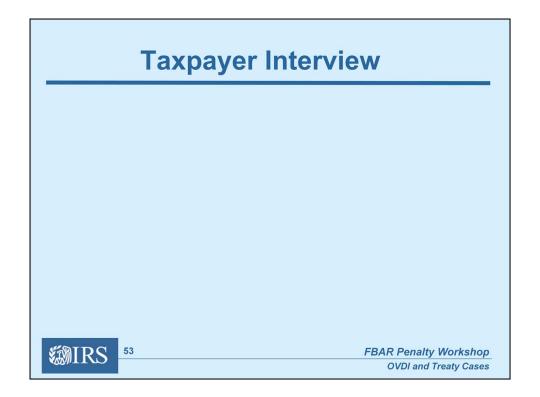


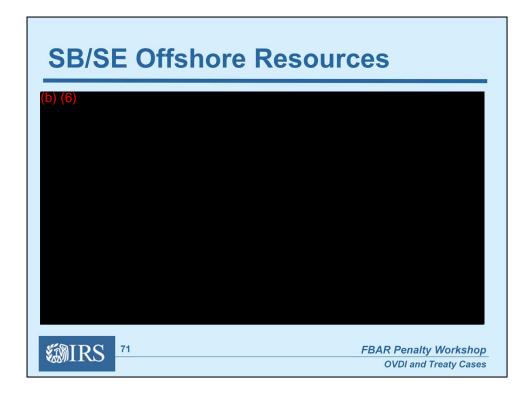
Where you have bank records secured under the tax treaty, it is important that you identify all treaty documents that you attach to the FBAR penalty memorandum that you send to Counsel. Although all of the documents have a stamp to identify them as treaty records, some do not have any other indication that they came from UBS. The penalty memorandum should identify the source of all documents attached to it.

If you are using documents created by UBS, for example the monthly balances summary, to support the FBAR penalty computation, you should try to verify the accuracy of the document. A bank statement is better evidence to show the balance in the account than a document created by UBS. Of course, if UBS did not provide all of the bank statements, then the UBS-created document becomes the best evidence available.

Form A, if present, is a very good document to show that the person added a layer of anonymity to an already secret arrangement.







SB/SE has three senior program analysts within the Abusive Transactions and Technical Issues function, ATTI for short, who specialize in offshore issues, including FBAR penalty investigations:

