

Criminal Tax Manual

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## **7.00 STATUTE OF LIMITATIONS**

### ***7.01 GENERALLY***

#### ***7.01[1] Statutory Provisions***

This section gives a general overview of statute of limitations issues in criminal tax cases. For a more detailed discussion of a specific offense, reference should be made to the applicable chapter in this Manual.

Section 6531 of Title 26 controls the statute of limitations periods for most criminal tax offenses. This statute provides:

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years –

- (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
- (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
- (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);
- (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
- (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531.

Thus, under Section 6531, the general rule is that a three-year statute of limitations exists for Title 26 offenses. However, a six-year period applies to certain excepted offenses. Section 6531 switches back and forth between enumerating the exception by specific Code reference and by a description of the offense. For example, 26 U.S.C. §§ 7206(1), 7207, 7212(a) and 7214(a) and 18 U.S.C. § 371 (conspiracy to evade taxes) are all specifically designated by Section 6531 as falling within the six-year exception. By contrast, willful failure to file an income tax return and willful failure to pay a tax, criminalized by 26 U.S.C. § 7203, are each designated as subject to the six-year exception solely by description of the offense.

Generally, the statute of limitations begins to run when an offense is completed. *Toussie v. United States*, 397 U.S. 112, 115 (1970). Prosecutors should be aware that not all tax offenses are completed upon the filing of a tax return. For example, in a multiple-year tax evasion case where the affirmative acts of evasion include the subsequent filing of a single false amended return intended to evade all years' taxes, each crime is completed at the time the amended return was filed, not when the tax liabilities arose at the time each of the false original returns was filed. *United States v. Thompson*, 518 F.3d 832, 856-57 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 487 (2008); *see also United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981) (in evasion case in which the affirmative act of evasion is a subsequent false statement to IRS agents, crime is complete at time of false statement, not when false return is filed). Consequently, careful examination of the various elements is required to determine when a specific tax offense is completed.

**7.01[2] Limitations Periods for Common Tax Offenses**

<b><i>Description of Offense</i></b>	<b><i>Code Section</i></b>	<b><i>Statute of Limitations</i></b>	<b><i>Code Section</i></b>
Tax Evasion	26 U.S.C. § 7201	6 years	26 U.S.C. § 6531(2)
Failure to Collect, Account For or Pay Over	26 U.S.C. § 7202	6 years <sup>1</sup>	26 U.S.C. § 6531(4)
Failure to Pay Tax	26 U.S.C. § 7203	6 years	26 U.S.C. § 6531(4)
Failure to File a Return	26 U.S.C. § 7203	6 years <sup>2</sup>	26 U.S.C. § 6531(4)
Failure to Keep Records	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Failure to Supply Information	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Supplying False Withholding Exemption Certificate	26 U.S.C. § 7205	3 years	26 U.S.C. § 6531
Filing a False Tax Return	26 U.S.C. § 7206(1)	6 years	26 U.S.C. § 6531(5)

<sup>1</sup> The limitations period for Section 7202 offenses has been the subject of recent litigation. It is the view of the Tax Division that the six-year statute of limitations provided for in Section 6531(4) is applicable to prosecutions under Section 7202. Reference should be made to the discussion of this issue in the chapter dealing with Section 7202. See Chapter 9.00, *infra*.

<sup>2</sup>As provided by Section 6531(4), the six-year rule for failure to file a return does not apply to returns that are required to be filed under part III of subchapter A of chapter 61. Part III covers information returns required to be filed under 26 U.S.C. §§ 6031-6060, and includes, for example, partnership returns, returns of exempt organizations, subchapter S returns, and returns relating to cash received in a trade or business (Form 8300). The rules in this area are rather complicated, as there is a further exception that makes the applicable limitations period for failure to file a subchapter S return six years, rather than the three-year period generally applicable for failures to file information returns. See 26 U.S.C. § 6037(a). Reference should be made to these specific Code provisions for a more detailed discussion of applicable limitations periods.

Aid or Assist in Preparation or Presentation of False Tax Return	26 U.S.C. § 7206(2)	6 years	26 U.S.C. § 6531(3)
Deliver or Disclose False Document	26 U.S.C. § 7207	6 years	26 U.S.C. § 6531(5)
Attempt to Interfere With Administration of Internal Revenue Laws	26 U.S.C. § 7212(a)	6 years <sup>3</sup>	26 U.S.C. § 6531(6)
Conspiracy to Commit Tax Evasion	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(8)
Conspiracy to Defraud the Internal Revenue Service	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(1)
False Claim for Refund	18 U.S.C. § 286/287	6 years <sup>4</sup>	26 U.S.C. § 6531(1)
False Statement	18 U.S.C. § 1001	5 years	18 U.S.C. § 3282

<sup>3</sup> Section 7212(a) refers to two types of offenses: (1) impeding employees of the United States acting in an official capacity; and (2) impeding the administration of the Internal Revenue laws. The Tax Division takes the position that a six-year limitations period applies to offenses under both prongs of Section 7212(a), pursuant to 26 U.S.C. § 6531(6). Reference should be made to the discussion of this issue in the chapter dealing with Section 7212(a). *See Chapter 17.00, infra.*

<sup>4</sup> The Tax Division is not aware of any cases in which the statute of limitations applicable to false claim for refund cases arising under the internal revenue laws has been litigated. The Tax Division takes the position that a six-year limitations period applies to such offenses under 18 U.S.C. §§ 286, 287 pursuant to 26 U.S.C. § 6531(1). Reference should be made to the discussion of this issue in the chapter dealing with 18 U.S.C. §§ 286, 287. *See Chapter 22.00, infra*

## 7.02 TRIGGERING OF STATUTE OF LIMITATIONS

### 7.02[1] Filing a False Tax Return

#### 7.02[1][a] General Rule

The general rule is that the statute of limitations for the filing of a false tax return starts on the day the return is filed. *United States v. Habig*, 390 U.S. 222, 223 (1968); *United States v. Kelly*, 864 F.2d 569, 574 (7th Cir. 1989). However, if the return is filed early (*i.e.*, before the statutory due date), the statute of limitations does not start to run until the statutory due date. 26 U.S.C. § 6513(a); *Habig*, 390 U.S. at 225; *United States v. Marrinson*, 832 F.2d 1465, 1475-76 (7th Cir. 1987). For example, if a tax return that is due to be filed on April 15, 2009, is filed early on February 26, 2009, the statute of limitations on the return would not begin to run until April 15, 2009.

Conversely, if a return is filed late (*i.e.*, after the statutory due date), the statute of limitations begins running the day the return is filed. *Habig*, 390 U.S. at 223-25; *United States v. Hills*, 618 F.3d 619, 634-35 (7th Cir. 2010); *United States v. Anderson*, 319 F.3d 1218, 1220-21 (10th Cir. 2003). Thus, if a return that was due on April 15, 2008, was filed late on June 1, 2008, the statute of limitations began to run on June 1, 2008.

In cases where an extension of time to file at a later date has been obtained, the statute of limitations begins to run from the date the return is filed, regardless of whether it was filed before or after the extension date. *Habig*, 390 U.S. at 225-27. Thus, where a return was initially due on April 16, 2007, and the taxpayer was granted an extension to October 16, 2007, and actually filed on October 1, 2007, the statute of limitations started to run on October 1, 2007. Similarly, if the extension was to October 16, 2007, and the return was filed November 1, 2007, the statute of limitations began to run on November 1, 2007.

The statutory due date for filing a return depends upon the type of tax and the return involved. Section 6072 of Title 26 sets out the statutory due dates for the filing of various tax returns. Individual income tax returns made on a calendar year basis are due on April 15th of the following year. 26 U.S.C. § 6072(a). Individual returns made on a fiscal year basis are due on the fifteenth day of the fourth month of the following fiscal year. 26 U.S.C. § 6072(a). Corporate returns made on a calendar year basis are due on

March 15th of the following year. 26 U.S.C. § 6072(b). Corporate returns made on a fiscal basis are due on the fifteenth day of the third month of the following fiscal year. 26 U.S.C. § 6072(b). Other types of returns may have unusual rules applicable only to the particular type of return.

The statutory due date for a return remains the same even if the due date falls on a Saturday, Sunday, or a legal holiday. Section 7503 of Title 26 provides that “[w]hen the last day prescribed under the authority of the internal revenue laws for performing any act” – such as filing a return – “falls on Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday.” Section 7503 provides only that a return “shall be considered timely” if due on a Saturday, Sunday, or legal holiday and filed on the next business day – it does not alter the “last day prescribed for the filing” of a return within the meaning of Section 6513(a). *See Hannahs v. United States*, 1995 WL 230461 (W.D. Tenn. Jan. 30, 1995) (holding that Saturday, April 15, 1989 was “the last day prescribed for filing a return for purposes of § 6513,” notwithstanding § 7503); *Kabotyanski v. IRS*, 2007 WL 526603 (E.D.N.Y. Feb. 13, 2007); *Weisbart v. IRS*, 2004 WL 528442 (E.D.N.Y. Mar. 15, 2004); Rev. Rul. 2003-41. Section 7503 does not delay commencement of the statute of limitations provided for in Section 6531 when a return is filed early and the limitations period does not commence until the statutory due date of the return. *See* 26 U.S.C. § 6531 (providing that “[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable”).<sup>5</sup>

*Example:* April 15, 2007, was a Sunday, and Monday, April 16, 2007, was a legal holiday in Washington, DC (Emancipation Day).<sup>6</sup> Accordingly, a return filed on Tuesday, April 17, 2007, would be deemed timely filed. But if a taxpayer filed her return on Friday, April 13, 2007, her return would be deemed filed on Sunday, April 15, 2007.

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<sup>5</sup> The IRS takes the same position in the Internal Revenue Manual. *See* I.R.M. § 9.1.3.6.3 (even if return filed on next business day would be considered timely per § 7503, “the statutory due date remains unchanged,” so “the calculation of the statute of limitations in investigations involving early filed returns or failures to file should use the statutory due date regardless of the day of the week on which that date falls”).

<sup>6</sup> Section 7503 defines “legal holiday” as “a legal holiday in the District of Columbia.”

As such, the six year limitations period for charging 26 U.S.C. § 7206(1) would begin on April 16, 2007, and expire on Monday, April 15, 2013. An indictment returned after that date would be time-barred.

### ***7.02[1][b] Definition of Timely Filed***

A tax return is generally considered timely filed if it is received by the IRS on or before the due date of the return. Typically, when a return is received on or before the statutory due date, it is not date stamped by the IRS upon receipt. However, in cases in which a return is filed after the statutory due date, the return is date stamped on the date it is received by the Service Center. This date then becomes the date of filing for statute of limitation purposes.

Prosecutors should be aware of the timely mailed/timely filed exception to the general rule. Section 7502 of Title 26 deems the date of mailing by the taxpayer (as opposed to the date of receipt by the IRS) to be the date of filing if (1) the return is sent by U.S. Mail and contains a U.S. postmark that is dated on or before the statutory due date, (2) the return is deposited in the mail addressed to the appropriate IRS office with postage prepaid, and (3) the return is delivered to the IRS after the date it was due. 26 U.S.C. § 7502(a).<sup>7</sup>

In these circumstances, the return may be date stamped after the statutory due date and still be deemed timely filed under Section 7502. Typically, the IRS will retain the envelope in which the return was mailed only if the return was filed after the due date.

### ***7.02[2] Failing to File a Tax Return***

Generally, the statute of limitations does not begin to run until the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115 (1970). In cases in which the defendant has failed to file a tax return, the statute of limitations begins to run when the return is due. *United States v. Phillips*, 843 F.2d 438, 443 (11th Cir. 1988). For example, if a defendant did not file a tax return that was due to be filed on April 15, 2008, the statute of limitations on the return began to run on that date.

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<sup>7</sup> Returns sent by designated private delivery services are treated as having been sent by U.S. mail for purposes of the timely mailed/timely filed exception to the general rule. 26 U.S.C. § 7502(f)(1). “Designated delivery service” is defined under Section 7502(f)(2).

If a defendant has obtained a valid extension of time to file a tax return, there is no duty to file until the extension date. *Phillips*, 843 F.2d at 442-43. Thus, if a defendant obtained an extension to file from April 16, 2007, to October 16, 2007, and failed to file on or before the extended due date, the statute of limitations began to run on October 16, 2007. The extension date applies only if the extension is valid. An invalid, untimely application for automatic extension does not extend the statute of limitations beyond the statutory due date. See *Phillips*, 843 F.2d at 443.

Section 6081 of Title 26 governs extensions. The regulations promulgated under Section 6081 detail the application procedures and lengths of extensions for various types of returns. Treas. Reg. (26 C.F.R.) § 1.6081-1, *et seq.* The regulations provide for an automatic extension of time for filing individual income tax returns that varies in length depending upon the tax year involved. For individual returns filed before January 1, 2006, the regulations provided for a four-month automatic extension. Treas. Reg. § 1.6081-4(a)(1) (1983), *superseded by* Temp. Treas. Reg. § 1.6081-4T(a) (2005). For individual returns filed on or after January 1, 2006, the regulations provide for a six-month automatic extension for the filing of personal income tax returns. Temp. Treas. Reg. § 1.6081-4T(a) (2005), *superseded by* Treas. Reg. § 1.6081-4(a) (2008).

Prosecutors should be aware that an automatic extension of time to file a return does not operate to extend the time for the payment of any tax due on the return. See Treas. Reg. § 1.6081-4(b) ("[A]ny automatic extension of time for filing an individual income tax return ... shall not operate to extend the time for payment of any tax due on such return.") To qualify for an automatic extension of time to file, a taxpayer must properly estimate his tax liability using the information available, enter his tax liability on a Form 4868, and file the Form 4868 by the due date of the return. Instructions for Form 4868; see also Treas. Reg. § 1.6081-4(a)(4) ("Such application for extension must show the full amount properly estimated as tax for such taxpayer for such taxable year ...."). Although an extension of time to file a return does not extend the due date for paying tax, a taxpayer may obtain a valid, automatic extension of the return filing date without paying the tax; the taxpayer will, however, be liable for interest and penalties. See *Deaton v. Commissioner*, 440 F.3d 223, 224-225 (5th Cir. 2006); Instructions for Form 4868.

### **7.02[3] Tax Evasion**

In order to commit tax evasion, the defendant must commit some affirmative act to evade a tax. While this act most often is the filing of a false tax return, it may also be “any conduct, the likely effect of which would be to mislead or conceal.” *Spies v. United States*, 317 U.S. 492, 499 (1943).

The general rule is that the statute of limitations for tax evasion begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. *United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000); *United States v. Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999); *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. Dandy*, 998 F.2d 1344, 1356 (6th Cir. 1993); *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992); *United States v. DiPetto*, 936 F.2d 96, 98 (2d Cir. 1991). Thus, in a case in which the affirmative act of evasion is the filing of a false tax return, the statute of limitations begins to run on the date the return is filed or the statutory due date, whichever is later. In a case where a false return is filed and there is an affirmative act of evasion occurring after the filing date, the statute of limitations starts to run on the date the last affirmative act took place or the statutory due date, whichever is later. *United States v. Thompson*, 518 F.3d 832, 856-57 & n.13 (10th Cir. 2008); *United States v. Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999); *United States v. Dandy*, 998 F.2d at 1355; *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986); *United States v. Trowsell*, 367 F.2d 815, 816 (7th Cir. 1966). For example, if a false 2000 tax return was timely filed on April 16, 2001, and, on September 15, 2002, the defendant engaged in further affirmative acts of evasion (*e.g.*, lying to IRS agents) regarding his 2000 taxes, the statute of limitations began to run on September 15, 2002.

Further, in cases in which no return is filed and some other act constitutes the affirmative act of evasion, the statute of limitations begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. *See Carlson*, 235 F.3d at 470; *Payne*, 978 F.2d at 1179 & n.2; *United States v. Winfield*, 960 F.2d 970, 973-74 (11th Cir. 1992); *DiPetto*, 936 F.2d at 98. For example, if a 2000 tax return that was due to be filed on April 16, 2001, was not filed by the defendant, and, on June 6, 2000, the defendant had committed an act of evasion (*e.g.*, filing a false Form W-4 exemption certificate) relating to his 2000 taxes, the statute of limitations started to run on April 16, 2001. Conversely, if a 2000 tax return that was due to be filed on April

16, 2001, was not filed by the defendant and, on December 1, 2003, the defendant committed an act of evasion (*e.g.*, lying to agents of the IRS) relating to her 2000 taxes, the statute of limitations started to run on December 1, 2003.

#### **7.02[4] Conspiracy**

The statute of limitations for a conspiracy to evade taxes, under the offense clause of Section 371, is six years. Similarly, the statute of limitations for a *Klein* conspiracy, under the defraud clause of Section 371, is six years. Both of these offenses are controlled by 26 U.S.C. § 6531. Occasionally, a defendant charged with a tax conspiracy under Section 371 will argue that the five-year statute of limitations generally applicable to Title 18 offenses<sup>8</sup> should apply to Section 371. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See United States v. Aracri*, 968 F.2d 1512, 1517 (2d Cir. 1992); *United States v. Waldman*, 941 F.2d 1544, 1548 (11th Cir. 1991); *United States v. Pinto*, 838 F.2d 426, 435 (10th Cir. 1988); *United States v. White*, 671 F.2d 1126, 1133-34 (8th Cir. 1982); *United States v. Brunetti*, 615 F.2d 899, 901-02 (10th Cir. 1980); *United States v. Fruehauf Corp.*, 577 F.2d 1038, 1070 (6th Cir. 1978); *United States v. Lowder*, 492 F.2d 953, 955-56 (4th Cir. 1974).

The statute of limitations in a conspiracy begins to run from the date of the last overt act proved. *Grunewald v. United States*, 353 U.S. 391, 397 (1957). The government is not required to prove, however, that each member of a conspiracy committed an overt act within the statute of limitations. *Hyde v. United States*, 225 U.S. 347, 369-70 (1912); *see also United States v. Read*, 658 F.2d 1225, 1234 (7th Cir. 1981) (interpreting the *Hyde* decision). Once the government shows that a member joined the conspiracy, his continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See, e.g., United States v. Schorovsky*, 202 F.3d 727, 729 (5th Cir. 2000); *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991); *United States v. Juodakis*, 834 F.2d 1099, 1103-04 (1st Cir.1987); *United States v. Finestone*,

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<sup>8</sup> *See* 18 U.S.C. § 3282(a): “Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”

816 F.2d 583, 589 (11th Cir. 1987); *United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980); *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976).<sup>9</sup>

However, a showing of withdrawal before the limitations period (*i.e.*, more than 6 years prior to the indictment, where the limitations period is 6 years) is a complete defense to conspiracy. *Read*, 658 F.2d at 1233. The defendant carries the burden of going forward to establish this affirmative defense. *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991); *Juodakis*, 834 F.2d at 1102-03; *Finestone*, 816 F.2d at 589; *Krasn*, 614 F.2d at 1236; *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978); *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964). The government, however, retains the burden of persuasion. *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989) (government retains burden of persuasion); *United States v. Jannoti*, 729 F.2d 213, 221 (3d Cir. 1984) (initial burden on defense, then shifted to government); *Read*, 658 F.2d at 1236 (burden of production on defendant; burden of persuasion remains on government to negate withdrawal defense); *Manual of Model Criminal Jury Instructions for the Ninth Circuit*, Instruction No. 8.19 (2003) (following *Read*).

The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See, e.g., Lash*, 937 F.2d at 1083; *Juodakis*, 834 F.2d at 1102; *Finestone*, 816 F.2d at 589; *United States v. Gonzalez*, 797 F.2d 915, 917 (10th Cir. 1986); *Krasn*, 614 F.2d at 1236.

### **7.02[5] Employment Taxes**

If a return with respect to social security taxes and income tax withholding (Form 941) for any period ending with or within a calendar year is filed before April 15th of the succeeding calendar year, the return is considered filed on April 15th of that following

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<sup>9</sup> Although the government technically is not required to prove that each member of the conspiracy committed an overt act within the statute period, in practice, the prosecutor should critically review each conspirator whose membership in the conspiracy predates the limitations period and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

calendar year. 26 U.S.C. 6513(c)(1).<sup>10</sup> Thus, the limitations period as to a Form 941 filed for a reporting period during a calendar year runs from April 15th of the following year.

By its terms, § 6513(c)(1) applies only where a return was filed. Thus, in a case involving a failure to file a Form 941, the statute of limitations runs from the due date of the return, rather than the later date under § 6513(c)(1). *See Toussie v. United States*, 397 U.S. 112, 115 (1970) (statute of limitations does not begin to run until an offense is complete); *United States v. Phillips*, 843 F.2d 438, 443 (11th Cir. 1988) (failure to file a return typically is complete on the due date of the return). The Form 941 is generally due quarterly, one month after the conclusion of each quarter.<sup>11</sup> 26 U.S.C. 6011(a); 6151; 26 C.F.R. §§ 31.6011(a)-1; 6011(a)-4; 31.6071(a)-1(a)(1), (4).

### **7.03 TOLLING PROVISION: FUGITIVE OR OUTSIDE U.S.**

Section 6531 of Title 26 contains its own tolling provision. The statute provides:

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings.

26 U.S.C. § 6531. Thus, the statute of limitations in Title 26 cases can be tolled if the defendant is outside the United States or is a fugitive.

"Outside the United States" and "fugitive from justice" are interpreted in the disjunctive. Mere absence from the United States without any intent to become a fugitive is sufficient to toll the statute of limitations. *See United States v. Marchant*, 774 F.2d 888, 892 (8th Cir. 1985). In *Marchant*, for example, the Eighth Circuit held that defendant's eleven-day health and pleasure trip to Switzerland tolled the statute of limitations under 26 U.S.C. § 6531. According to the court, persons are "outside the

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<sup>10</sup> Similarly, Section 6513(c)(2) provides, "If a tax with respect to remuneration or other amount paid during any period ending with or within a calendar year is paid before April 15 of the succeeding calendar year, such tax shall be considered paid on April 15 of such succeeding calendar year."

<sup>11</sup> Persons who fail to collect the tax, pay over the tax, or file quarterly Forms 941 can be required to file and pay more often. *See, e.g.*, 26 C.F.R. § 31.6011(a)-5(a)(1) (monthly).

United States,” as that term is used in Section 6531, whenever they cannot be served with criminal process within the jurisdiction of the United States under Rule 4(d)(2) of the Federal Rules of Criminal Procedure. *Marchant*, 774 F.2d at 892.

The “fugitive from justice” clause in Section 6531 refers to 18 U.S.C. § 3290, which provides: “No statute of limitations shall extend to any person fleeing from justice.” The circuits are split as to the intent required under this statute. The majority rule, as adopted by the First, Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits is that intent to avoid arrest or prosecution must be proved before section 3290 applies. *Brouse v. United States*, 68 F.2d 294, 296 (1st Cir. 1933); *Jhirad v. Ferrandina*, 486 F.2d 442, 444-45 (2d Cir. 1973); *Donnell v. United States*, 229 F.2d 560, 563-65 (5th Cir. 1956); *United States v. Greever*, 134 F.3d 777, 780-81 (6th Cir. 1998); *United States v. Marshall*, 856 F.2d 896, 897-900 (7th Cir. 1988); *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976); *Ross v. United States Marshal*, 168 F.3d 1190, 1194 (10th Cir. 1999). By contrast, two circuits, the District of Columbia Circuit and the Eighth Circuit, have held that mere absence from the jurisdiction, regardless of intent, is sufficient to toll the statute of limitations. *See McGowen v. United States*, 105 F.2d 791, 792 (D.C. Cir. 1939); *In Re Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982).

#### **7.04 COMPLAINT TO EXTEND STATUTE OF LIMITATIONS**

Section 6531 of Title 26 also contains a mechanism for extending the statute of limitations period. The statute provides:

Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

26 U.S.C. § 6531. Thus, the government may file a complaint within the limitations period and effectively extend the statute period nine months.

However, Section 6531 “was not meant to grant the Government greater time in which to make its case.” *Jaben v. United States*, 381 U.S. 214, 219 (1965). Rather, Section 6531 “was intended to deal with the situation in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule.” *Jaben*, 381 U.S. at 219-20; *cf. United States v. O’Neal*,

834 F.2d 862, 865 (9th Cir. 1987) (investigation and case preparation need not cease upon filing of complaint; whether government improperly invoked extension is tested by sufficiency of the complaint at the preliminary hearing). For there to be a valid complaint triggering the extension of the limitations period under Section 6531, the complaint must allege sufficient facts to support a probable cause finding that a tax crime has been committed by the defendant. *Jaben*, 381 U.S. at 220. Further, to take advantage of the extension under Section 6531, the government must fully comply with the complaint process and afford the defendant a preliminary hearing. *Jaben*, 381 U.S. at 220.

As a practical matter, a complaint should only be filed for the year in which the statute of limitations would otherwise expire. This procedure will not preclude development before the grand jury of counts for subsequent years as to which the statute has not expired. Prosecutors should be aware, however, that the filing of a complaint may trigger the Speedy Trial Act as to the charge that is the subject of the complaint and, as a practical matter, may shorten the time within which the government may act on the remaining tax years under investigation. *See* 18 U.S.C. § 3161(b).

#### ***7.05 SUSPENSION OF STATUTE: SUMMONS ENFORCEMENT***

Section 7609(e)(1) of Title 26 provides for the suspension of the statute of limitations in certain types of summons enforcement proceedings. This statute provides:

If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations . . . under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.[<sup>12</sup>]

26 U.S.C. § 7609(e)(1).

It is beyond the scope of this Manual to treat in detail the nuances of summons enforcement proceedings. Any reliance on the suspension issue in this area requires a

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<sup>12</sup>Subsection (b) of 26 U.S.C. § 7609 permits certain persons to intervene in proceedings with respect to enforcement of summonses and to initiate proceedings to quash summonses.

thorough analysis of Section 7609, and particular care must be taken in measuring and documenting any period for which the statute of limitations is suspended.

***7.06 SUSPENSION OF STATUTE:  
OFFICIAL REQUEST FOR FOREIGN EVIDENCE***

Criminal tax prosecutions increasingly involve the use of evidence obtained from foreign sources. Section 3292 of Title 18 provides for the suspension of the statute of limitations to permit the United States to obtain foreign evidence. This statute provides:

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

. . . .

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense —

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

18 U.S.C. § 3292.

Letters rogatory, requests under a treaty or convention, or any other request made by a court or law enforcement authority of the United States will qualify as an “official request.” 18 U.S.C. § 3292(d). The statute does not require that the “request expressly list by citation the alleged statutory violations in order for a foreign evidence request to pass

muster under 18 U.S.C. § 3292.” *United States v. Neill*, 952 F. Supp. 831, 832 (D.D.C. 1996).

The Eleventh Circuit has held that, in an application for an order suspending the running of the statute of limitations, the government “must provide something with evidentiary value – that is, testimony, documents, proffers, and other submissions bearing some indicia of reliability – tending to prove it is reasonably likely that evidence” of an offense is in the foreign country. *United States v. Trainor*, 376 F.3d 1325, 1332-33 (11th Cir. 2004). In *Trainor*, the court held that the government’s submission of only its application and a request, by the Criminal Division Office of International Affairs, for foreign evidence, which were not sworn or verified, was inadequate to satisfy the government’s burden of showing by a preponderance of the evidence that “it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.” *Id.* at 1333. The court stated that the government may satisfy that burden by including a sworn or verified application containing the necessary factual information, testimony by government officials, affidavits, declarations, exhibits, or other materials of evidentiary value, including even hearsay testimony. *Id.* at 1333.

While the maximum period for which the statute of limitations may be suspended for an offense is three years, the period begins to run when the government requests evidence from a foreign government. “[T]he starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted.” *United States v. Bischel*, 61 F.3d 1429, 1434 (9th Cir. 1995).

Likewise, the period ends when the foreign court or authority takes final action on the request. “[F]inal action’ for purposes of § 3292 means a dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records.” *United States v. Bischel*, 61 F.3d at 1434. The prosecutor’s satisfaction with the evidence provided is not determinative of whether there has been a final action. “However, when the foreign government believes it has completed its engagement and communicates that belief to our government, that foreign government has taken a ‘final action’ for the purposes of § 3292(b).” *United States v. Meador*, 138 F.3d 986, 992 (5th Cir. 1998). Such a communication from a foreign government does not preclude further inquiry by the United States. “If dissatisfied with a dispositive response from a foreign authority, the prosecutor need only file another request and seek a further suspension of

the limitations period, subject to the ultimate three-year limitation on the suspension period.” *United States v. Meador*, 138 F.3d at 993 (footnote omitted).

All requests for foreign evidence in criminal tax investigations should be coordinated with the Criminal Appeals & Tax Enforcement Policy Section, Tax Division, and the Office of International Affairs, Criminal Division. For further information on foreign evidence gathering in criminal tax cases, see Chapter 41.00 of this Manual.