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10.00 FAILURE TO FILE, SUPPLY INFORMATION OR PAY TAX

10.01 STATUTORY LANGUAGE: 26 U.S.C. § 7203

§7203. ***Willful failure to file return, supply information, or pay tax***

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined . . ., or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."[1]

10.02 TAX DIVISION POLICY

The misdemeanor offense of willful failure to file a tax return, pay tax, keep records or supply information should only be used when a defendant failed to comply with an affirmative requirement of the Internal Revenue Code or regulations and did not commit any act or omission as part of an attempt to evade taxes or obstruct the IRS. Cases involving individuals who fail to file tax returns or pay a tax but who also commit acts of evasion or obstruction should be charged as felonies under Section 7201 or Section 7212(a) to avoid inequitable treatment. As an example, a defendant who commits tax evasion, fails to file a tax return, and fails entirely to pay all taxes due should not be

[1] For the misdemeanor offenses set forth in section 7203, the maximum permissible fine is at least $100,000 for individuals and at least $200,000 for organizations. For felony offenses under section 7203 involving willful violations of section 6050I, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) & (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . ." 18 U.S.C. § 3571(d).

given more lenient treatment than a defendant who files a false tax return and fails to pay only a portion of taxes due.

10.03 GENERALLY

Section 7203 covers four different situations, each of which constitutes a failure to timely perform an obligation imposed by the Internal Revenue Code: (1) failure to pay an estimated tax or tax, (2) failure to make (file) a return, (3) failure to keep records, and (4) failure to supply information.

With the exception of cases involving willful violations of any provision of IRC § 6050I, all of the offenses under Section 7203 are misdemeanors. Therefore, except for Section 6050I felonies, Section 7203 prosecutions may be initiated either by information or indictment. Reference should be made to Section 25.00, *infra*, for additional discussion of violations of Section 6050I.

The charge most often brought under Section 7203 is the failure to make (file) a return. A number of cases are also brought under Section 7203 for failure to pay a tax. Note that the attempt to evade or defeat the payment of a tax is a felony under Section 7201. The difference in the offenses is that a failure to file or pay offense under Section 7203 involves a failure perform a specified act at the time required by law (an omission), whereas there must be an affirmative act or a "willful commission" to satisfy the requirements of a Section 7201 felony. ***Sansone v. United States***, 380 U.S. 343, 351-52 (1965). By its express terms, Section 7203 does not apply to a "failure to pay an estimated tax" if there is no "addition to tax" pursuant to the rules provided for in Section 6654 (Failure By Individuals To Pay Estimated Income Tax) and Section 6655 (Failure By Corporation To Pay Estimated Tax).

Few cases are brought charging a failure to supply information, possibly because of the three year statute of limitations. See Section 10.05[8], *infra*. The charge of failing to "keep any records" is also not commonly used. Consequently, these charges are not treated separately in this Manual.

10.04 PERSON LIABLE

Each of the categories set forth in Section 7203 specifies a distinct and separate obligation. Failure to perform an obligation in any one of the categories may constitute an

offense. *See* ***Sansone v. United States***, 380 U.S. 343, 351 (1965). An offender may be charged with failure to perform each obligation as often as the obligation arises. *See, e.g.*, ***United States v. Harris***, 726 F.2d 558, 560 (9th Cir. 1984) (defendant who failed to file for three years guilty of three separate offenses rather than one continuing offense); ***United States v. Stuart***, 689 F.2d 759, 763 (8th Cir. 1982) (same).

Any "person" who fails to perform an obligation imposed by the Internal Revenue Code and the applicable regulations may be subject to prosecution under Section 7203. The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Section 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." *See* ***United States v. Neal***, 93 F.3d 219, 223 (6th Cir. 1996) (corporate officers liable under Section 7203 for failure to file employer's quarterly tax return (Form 941)); ***Ryan v. United States***, 314 F.2d 306, 309 (10th Cir. 1963).

10.05 FAILURE TO FILE

10.05[1] Elements

To establish the offense of failure to make (file) a return, the government must prove three essential elements beyond a reasonable doubt:

1. The defendant was a person required to file a return;

2. The defendant failed to file at the time required by law; and

3. The failure to file was willful.

United States v. Hassebrock*, 663 F.3d 906, 919 (7th Cir. 2011); *United States v. McKee, 506 F.3d 225, 244 (3d Cir. 2007); ***United States v. Clayton***, 506 F.3d 405, 408 (5th Cir. 2007); ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992); ***United States v. Harting***, 879 F.2d 765, 766-67 (10th Cir. 1989); ***United States v. Williams***, 875 F.2d 846, 849 (11th Cir. 1989); ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986); ***United States v. Ostendorff***, 371 F.2d 729, 730 (4th Cir. 1967); *cf*. ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992) (in case in which there was no issue about

whether defendant was a person required to file a return, Fifth Circuit listed elements of misdemeanor failure to make return as willfulness and failure to make a return when due).

10.05[2] Required by Law to File

10.05[2][a] Income Tax Returns

Various provisions of the Internal Revenue Code (and regulations thereunder) specify the events that trigger an obligation to file a return. Section 6012 lists the persons and entities required to make returns with respect to income taxes, including, *inter alia*, "[e]very individual having for the taxable year gross income which equals or exceeds the exemption amount," with certain specified exceptions, and "every corporation subject to taxation under subtitle A." 26 U.S.C. § 6012(a)(1)(A).[2] The receipt of a specified amount of gross income generally determines whether an income tax return must be filed. *See* ***United States v. Middleton***, 246 F.3d 825, 841 (6th Cir. 2001) (stating that the assertion that the filing of an income tax return is "voluntary" is frivolous because 26 U.S.C. § 6012(a)(1)(A) requires that every individual who earns a threshold level of income must file a tax return); *see also* ***United States v. McKee***, 506 F.3d 225, 245 (3d Cir. 2007) (government must prove that an individual has a duty to file a tax return based on the receipt of income of a taxable nature, and bears burden of proving taxable character of funds). "Gross income" is broadly defined in section 61(a) of the Code to mean the following:

> [A]ll income from whatever source derived, including (but not limited to) the following items:
>
> > (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> >
> > (2) Gross income derived from business;
> >
> > (3) Gains derived from dealings in property;
> >
> > (4) Interest;
> >
> > (5) Rents;

[2] .Section 6012(a) also addresses filing requirements for estates, trusts, political organizations, homeowners associations, recipients of advanced payments of the earned income credit, and bankruptcy estates.

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

The amount of gross income that triggers the filing requirement has changed over the years. *See* ***United States v. Clayton***, 506 F.3d 405, 409 & nn.1 & 2 (5th Cir. 2007) (noting that filing requirement is tied to the "exemption amount," which is based, in part, on the Consumer Price Index). Consequently, care must be exercised to insure that the amount of gross income received by the defendant was sufficient to require the filing of a return in the particular year at issue. Attention should also be paid to the age (over or under the age of 65), marital status, and filing status of a spouse since these factors can change the threshold amount of income for a given year. Section 6012 provides a formula based on gross income to determine whether an individual must make a return.

To meet its burden, the government need prove only that a person's gross income equals or exceeds the statutory minimum. ***United States v. Bell***, 734 F.2d 1315, 1316 (8th Cir. 1984); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978). Where the government is unable to present direct evidence of gross income, its burden may be satisfied by means of an indirect method of proof. ***United States v. Bianco***, 534 F.2d 501, 503-06 (2d Cir. 1976) (evidence of expenditures in excess of the statutory minimum plus

evidence negating nontaxable sources); ***United States v. Shy***, 383 F. Supp. 673, 675 (D. Del. 1974) (net worth).

Gross income is different and distinguishable from gross receipts. "Gross receipts cannot be called gross income, insofar as they consist of borrowings of capital, return of capital, or any other items which the IRS Code has excluded from gross income." ***United States v. Ballard***, 535 F.2d 400, 404 (8th Cir. 1976). Nevertheless, after appropriate adjustments are made to the gross receipts total, the resulting amount may properly reflect gross income. *See* ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***Brown v. United States***, 434 F.2d 1065, 1067 (5th Cir. 1970); ***Clark v. United States***, 211 F.2d 100, 102 (8th Cir. 1954); ***Ballard***, 535 F.2d at 405. For example, for manufacturing, merchandising, or mining enterprises, the filing requirement is predicated upon gross income, which is determined, in part, by subtracting the cost of goods sold from gross receipts or total sales. 26 C.F.R. § 1.61-3 (1992); ***Ballard***, 535 F.2d at 404-05. To meet its burden, the government need prove only that gross receipts exceed the cost of goods sold by an amount sufficient to trigger the reporting requirement. ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir. 1980); ***Siravo v. United States***, 377 F.2d 469, 473 (1st Cir. 1967); *see also* ***United States v. Gillings***, 568 F.2d 1307, 1310 (9th Cir. 1978). The burden then shifts to the enterprise to come forward with evidence of offsetting expenses. ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984); ***Siravo***, 377 F.2d at 473-74; ***United States v. Bahr***, 580 F. Supp. 167, 170-71 (N.D. Iowa 1983); *see also* ***Gillings***, 568 F.2d at 1310; ***Garguilo***, 554 F.2d at 62.

The government need not cite in the indictment or information the provision of the Code that requires the filing of the particular return involved. ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992). It is enough that an indictment allege the elements of Section 7203 "with sufficient clarity to apprise [the defendant] of the charges against him and is drawn with sufficient specificity to foreclose further prosecution upon the same facts." ***Vroman***, 975 F.2d at 670-71.

10.05[2][b] Section 6050I (Forms 8300)

Section 6050I of the Internal Revenue Code requires any person engaged in a trade or business who receives more than $10,000 in cash in one transaction (or two or more related transactions) to file an information return (Form 8300). 26 U.S.C. 6050I(a); 26 C.F.R. §1.6050I-1(e)(2) (2001). The return is due the 15th day after the cash is

received. 26 C.F.R. §1.6050I-1(e)(1). Attorneys are not exempt from the requirements under Section 6050I. *See* ***Lefcourt v. United States***, 125 F.3d 79, 84-86 (2d Cir. 1997) (discussion of attorney's obligation to identify client on Form 8300 in civil context). This requirement, as applied to attorneys, does not violate the Fourth, Fifth, or Sixth Amendment. ***United States v. Goldberger & Dubin, P.C.***, 935 F.2d 501, 503-04 (2d Cir. 1991). It also does not impinge on the attorney-client privilege. ***United States v. Blackman***, 72 F.3d 1418, 1425 (9th Cir. 1995); ***United States v. Leventhal***, 961 F.2d 936, 940 (11th Cir. 1992). Section 7203 criminalizes the failure to file a Form 8300. *See, e.g.,* ***Bickham Lincoln-Mercury Inc. v. United States***, 168 F.3d 790, 793 (5th Cir. 1999).

10.05[3] Return Not Filed at Time Required by Law

10.05[3][a] What is a Return

The mere fact that an individual or entity files a tax form does not necessarily satisfy the requirement that an income tax return be filed. For example, tax defiers or individuals who receive illegal source income sometimes file the correct form but do not provide meaningful or complete information. Such filings may include assertions of various constitutional privileges.

Most courts take the approach that a form which does not contain sufficient financial information to allow the calculation of a tax liability is not a "return" within the meaning of 26 U.S.C. 7203. *See, e.g.,* ***United States v. Marston***, 517 F.3d 996, 1001 (8th Cir. 2008) ("A defendant can be guilty of failure to file a tax return even if he actually files a form with the I.R.S. if that form does not contain 'sufficient information [ ] from which the IRS can calculate tax liability'"); ***United States v. Kimball***, 925 F.2d 356, 357-38 (9th Cir. 1991) (*en banc*) (Forms 1040 filed by defendant, who "wrote only asterisks in the spaces provided on the income tax forms at issue and signed his name," did not constitute "returns" for purposes of 26 U.S.C. 7203); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (taxpayer included bottom line assertion of liability, but did not include information showing how that figure was derived); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986) (Form 1040 with word "object" written in all spaces requesting financial information is not a return); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Goetz***, 746 F.2d 705, 707 (11th Cir. 1984); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984) (per curiam); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984); ***United States v. Grabinski***, 727 F.2d 681, 686-87

(8th Cir. 1984); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir. 1979) (Forms 1040 containing responses of "unknown" or "Fifth Amendment" are not returns); ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970) ("A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner"). *See also* discussion at Section 40.03[5], *infra*.

Although it is well settled that a form containing only constitutional objections or asterisks does not constitute a tax return for purposes of 26 U.S.C. § 7203, the circuits disagree on whether a tax return form that contains all zeroes or minimal monetary information constitutes a tax return. The Ninth Circuit has taken the position that a Form 1040 with zeroes on all lines that require the reporting of financial information is a return because a tax liability, albeit an incorrect one, can be computed from zeroes. ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). (Note that under ***Long***, the filing of such a document could be charged under 26 U.S.C. 7206(1) as the filing of a false return. ***Long***, 618 F.2d at 75-76). Other courts have declined to follow ***Long***. *See, e.g.*, ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980); ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.1980). Those courts do not reject ***Long***'s premise that a tax liability can be computed from zeroes. Rather, they focus on the question whether the form submitted was intended to convey the sort of tax return information required to be submitted to the government. ***Moore***, 627 F.2d at 835 ("there must be an honest and reasonable intent to supply the information required by the tax code," and "when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); ***Smith***, 618 F.2d at 281 (returns that contained nothing but zeroes and constitutional objections plainly did not even purport to disclose the required information).

Some decisions suggest that the determination of what is an adequate return is a legal question, and the district court properly may decide the question. ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980); ***United States v. Klee***, 494 F.2d 394, 397 (9th Cir. 1974) (a return that

contained "absolutely no information" about the defendant's tax status but merely stated "all details available on proper demand" is not a return, and the "court was right in telling the jury so"). Other courts, however, have cautioned that such a ruling may improperly invade the province of the jury. *See* Section 40.03[5][c], *infra*. In view of the Supreme Court's reasoning in ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995), in which the Court held that materiality in a prosecution under 18 U.S.C. 1001 is an element of the offense and must be submitted to the jury, the safer practice would be to submit to the jury, with proper instructions, the question whether the form the defendant filed is a "return" within the meaning of 26 U.S.C. 7203. As a practical matter, the prosecutor may wish to consider bringing a charge under 26 U.S.C. § 7201, 26 U.S.C. § 7206(1), or 26 U.S.C. § 7206(2). Those statutes define felonies and are not limited to tax returns. *See* ***Marston***, 517 F.3d at 1001-02 (defendant who filed a Form 1040EZ listing zero income properly charged under 26 U.S.C. § 7206(1)).

10.05[3][b] Return Not Filed at Time Required by Law

Section 7203 applies to situations in which the taxpayer does not file a tax return on the required filing date. In ***Spies v. United States***, 317 U.S. 492, 496 (1943), the Supreme Court noted the importance given to timely filing:

> Punctuality is important to the fiscal system, and these are [criminal] sanctions to assure punctual as well as faithful performance of these duties.

Section 6072 of the Internal Revenue Code prescribes the time for filing income tax returns. Individuals who file on a calendar year basis are required to file a return on or before the 15th day of April following the close of the calendar year. 26 U.S.C. § 6072(a). Corporations are generally required to file on or before the fifteenth day of the third month following the close of the taxable year, *i.e.*, March 15th for a calendar year corporation. 26 U.S.C. § 6072(b). Section 6075 fixes the time for filing estate and gift tax returns. 26 U.S.C. §§ 6075(a) & (b). Forms 8300 are due the 15th day after the cash is received. *See* 26 C.F.R. § 1.6050I-1(e) (2001). In the event that the cash is received in multiple payments, the recipient must aggregate the initial payment and subsequent payments made within one year of the initial payment until the aggregate amount exceeds $10,000, and report with respect to the aggregate amount within 15 days after receiving the payment that causes the aggregate amount to exceed $10,000. 26 C.F.R. § 1.6050I-1(b)(2) (2001). When the last day for filing a return falls on a Saturday, Sunday, or a

legal holiday (including Emancipation Day, a legal holiday in the District of Columbia), the return will be considered timely filed if it is filed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. 26 U.S.C. § 7503. Section 7503 provides:

> When the last day prescribed under authority of the internal revenue laws for performing any act falls on a 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. For purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time; **the term "legal holiday" means a legal holiday in the District of Columbia**; and in the case of any return, statement, or other document required to be filed, or any other act required under authority of the internal revenue laws to be performed, at any office of the Secretary or at any other office of the United States or any agency thereof, located outside the district of Columbia but within an internal revenue district, the term "legal holiday" also means a Statewide legal holiday in the State where such office is located.

26 U.S.C. § 7503 (emphasis added). For example, if a return is due on April 15th and April 15th falls on a Saturday, the return would be considered timely if it was filed on the following Monday, unless the Monday is a legal holiday, in which event, the return would be considered timely if it was filed on the next day -- Tuesday.

If the Code does not fix a time for the filing of a return, the Secretary is directed to prescribe that time "by regulations." 26 U.S.C. § 6071(a).

Because one of the elements of a violation of 26 U.S.C. § 7203 is the defendant's failure to file a return at the time required by law, a prosecution might be jeopardized if an indictment did not properly allege the date when the legal duty to file arose. *See, e.g.*, ***United States v. Bourque***, 541 F.2d 290, 293-94 (1st Cir. 1976) (IRS regulations allow a new corporation to determine its own fiscal year and therefore date return is due); ***United States v. Goldstein***, 502 F.2d 526, 528 (3d Cir. 1974).

Pursuant to section 6081(a) of the Code, the Secretary is authorized to grant a "reasonable extension of time" for filing any return, declaration, statement, or other document required to be filed. Except for taxpayers who are abroad, the extension cannot be for a period longer than six months. 26 U.S.C. § 6081(a). A corporation may obtain an automatic extension of three months for filing a return, provided it meets the conditions set forth in the Code and applicable regulations. 26 U.S.C. § 6081(b). Section 6081(b) requires that, in order to be granted the extension, the corporation must "pay[], on or before the date prescribed for payment of the tax, the amount properly estimated as its tax."

Because there can be no crime of failing to file an individual return by April 15th if the taxpayer has obtained extensions of time within which to file, it is important in any failure to file case to search IRS records to determine whether any extensions have been obtained by the taxpayer. *See* ***Goldstein***, 502 F.2d at 528-29 (reversing conviction of defendant who was indicted for failing to file before April 15, but who had applied for an extension and had been given until May 7 to file return). Prosecutors should always attempt to obtain the filed extension form from the IRS. Many professional return preparers routinely keep in their files unsigned extensions on behalf of their clients, but an extension application signed by the taxpayer provides evidence that the taxpayer knew a return was due. Moreover, because the extension application bears a perjury jurat, a materially false signed extension application can form the basis for a felony prosecution under 26 U.S.C. § 7206(1).

The following chart summarizes some of the filing requirements for the most common taxpaying entities:

FILING REQUIREMENTS

TAXPAYER	***RETURN/FORM***	***GROSS INCOME***		***DATE DUE***
Individual (Single)*	1040, 1040A,	1994	$6,250	April 17, 1995
	1040EZ	1995	$6,400	April 15, 1996
(Under age 65)		1996	$6,550	April 15, 1997
		1997	$6,800	April 15, 1998
		1998	$6,950	April 15, 1999

	1999	$7,050	April 17, 2000
	2000	$7,200	April 16, 2001
	2001	$7,450	April 15, 2002
	2002	$7,700	April 15, 2003
	2003	$7,800	April 15, 2004
	2004	$7,950	April 15, 2005
	2005	$8,200	April 17, 2006
	2006	$8,450	April 17, 2007 (April 15, 2007, fell on a Sunday, and April 16th was Emancipation Day, a holiday in the District of Columbia. See IRS Questions and Answers - April 17 Deadline.)
	2007	$8,750	April 15, 2008
	2008	$8,950	April 15, 2009
	2009	$9,350	April 15, 2010
	2010	$9,350	April 18, 2011 (Because of Emancipation Day, a holiday in the District of Columbia)
	2011	$9,500	April 17, 2012
	2012	$9,750	April 15, 2013
			GENERAL: 15th day of 4th month after close of tax year

Married Filing Jointly (Both spouses under age 65)	1040, 1040A, 1040EZ	1994	$11,250	April 17, 1995
		1995	$11,550	April 15, 1996
		1996	$11,800	April 15, 1997
		1997	$12,200	April 15, 1998
		1998	$12,500	April 15, 1999
		1999	$12,700	April 17, 2000
		2000	$12,950	April 16, 2001
		2001	$13,400	April 15, 2002
		2002	$13,850	April 15, 2003
		2003	$15,600	April 15, 2004
		2004	$15,900	April 15, 2005
		2005	$16,400	April 17, 2006
		2006	$16,900	April 16, 2007
		2007	$17,500	April 15, 2008
		2008	$17,900	April 15, 2009
		2009	$18,700	April 15, 2010
		2010	$18,700	April 18, 2011
		2011	$19,000	April 17, 2012
		2012	$19,500	April 15, 2013
Corporation	1120	N/A		15th day of 3rd month after close of tax year
Subchapter S Corporation	1120S	N/A		Same
Partnership	1065	N/A		15th day of 4th month after close of tax year
Fiduciary (trust or estate	1041	$600 gross or any taxable income		15th day of 4th month after close of tax year

income)				
Person in Trade or	8300 (CTR)	receipt of more than $10,000 cash		15 days after cash received
Business				
Employer	941	collected withholding tax (income and FICA)		Quarterly - last day of month following quarter**
Estate	706	pre-1998	$600,000	9 months after death
		1998	$625,000	9 months after death
		1999	$650,000	9 months after death
		2000	$675,000	9 months after death
		2001	$675,000	9 months after death
		2002	$1,000,000	9 months after death
		2003	$1,000,000	9 months after death
		2004	$1,500,000	9 months after death
		2005	$1,500,000	9 months after death
		2006	$2,000,000	9 months after death
		2007	$2,000,000	9 months after death
		2008	$3,500,000	9 months after death
		2009	$3,500,000	9 months after death
		2010	$5,000,000	9 months after death
		2011	$5,000,000	9 months after death
		2012	$5,250,000	9 months after death

* The minimum amount for a married individual whose spouse filed separately is less.

** If the corporation has already deposited full amount, there is an additional 10 days in which to file.

10.05[4] Proof of Failure to File

Proof that a tax return was not filed must be established through the trial testimony of a representative of the IRS. Formerly, prosecutors could ask the IRS to conduct a search of its records and, if no record of a return was located, could introduce a certification of the non-existence of such record under Federal Rules of Evidence 803(10) and 902. However, such a procedure is no longer recommended after the Supreme Court's decisions in ***Crawford v. Washington***, 541 U.S. 36 (2004), and ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). Several circuit courts have held that certificates of the non-existence of a record violate the Confrontation Clause when introduced without the testimony of the preparer. *See* ***United States v. Orozco-Acosta***, 607 F.3d 1156 (9th Cir. 2010); ***United States v. Martinez-Rios***, 595 F.3d 581 (5th Cir. 2010); ***Gov't of Virgin Islands v. Gumbs***, No. 10-3342, 2011 WL 1667438 (3d Cir. May 4, 2011); ***United States v. Madarikan***, No. 08-5589, 2009 WL 4826912 (2d Cir. Dec. 16, 2009). Instead, prosecutors should introduce the certificate through the testimony of an IRS service center representative.

Effective December 1, 2013, Federal Rule of Evidence 803 will require that a prosecutor seeking to introduce evidence "that a diligent search failed to disclose a public record or statement" provide written notice of intent to introduce such a certification at least 14 days before trial. The defendant will then have seven days to object in writing.

It is preferable that a witness be a representative of the Service Center that has custody of returns for the required place of filing. The witness testifies that he or she is a representative of the Director of a particular Service Center, that the particular Service Center has custody of tax returns for a given geographical region, that any return that the defendant was required to file would have been filed with the particular Service Center whose director he or she represents, that the Service Center keeps records of the returns filed at the Service Center, and that a search of the records revealed that no return was filed by the defendant. If this procedure is followed, the witness should personally conduct or direct the search of the records. In the event that the Service Center representative from the Service Center where the return should have been filed is unavailable, a representative from another Service Center may be used. That representative can testify that he or she has access to records from all of Service Centers, that he or she personally conducted or directed the search of all the records, and that there was no record of the filing of the return at issue.

In addition, the witness should be interviewed in advance, and the questioner should establish during direct examination that the witness is not testifying as an expert witness. This clarification is important because failure to establish this fact can lead to confusion and a very uncomfortable witness. In some cases, particularly those involving tax defiers with experienced counsel, cross-examination concerning Service Center procedures and various codes on IRS account transcripts may be extensive. The questioning under cross-examination may also focus on the witness's knowledge regarding whether the Service Center has lost or misplaced returns or whether the computerized taxpayer account system is faulty. Reference should be made to the discussion of tax defier prosecutions in Section 40.00, *infra*.

10.05[5] Willfulness

Reference should be made to the discussion of willfulness in each chapter of this Manual involving crimes of willfulness, particularly Chapter 8, *supra*, ***Attempt to Evade or Defeat Tax***.

Willfulness is the state of mind that must be proven to establish intent. Whether the charge is a felony (*e.g.*, attempted evasion) or a misdemeanor (*e.g.*, failure to file), the willfulness or intent that must be established is the same. ***United States v. Bishop***, 412 U.S. 346, 361 (1973). Courts have defined willfulness in criminal tax violations as a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 199 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973); ***United States v. Murphy***, 469 F.3d 1130, 1137 (7th Cir. 2006); ***United States v. Abboud***, 438 F.3d 554, 581 (6th Cir. 2006); ***United States v. Boulerice***, 325 F.3d 75, 80 (1st Cir. 2002); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Rothbart***, 723 F.2d 752, 754 (10th Cir. 1983); ***United States v. Moon***, 718 F.2d 1210, 1222 (2d Cir. 1983); ***United States v. Dahlstrom***, 713 F.2d 1423, 1427 (9th Cir. 1983); ***United States v. Buckley***, 586 F.2d 498, 503-04 (5th Cir. 1978). Particular reference should be made to the discussion of the subjective standard for willfulness in Sections 8.00, *supra*, and 40.00, *infra.*

Thus, in a failure to file prosecution, the government must prove that the defendant acted voluntarily and intentionally, with the specific intent to do something that the law prohibited, that is to say, with intent to either disobey or disregard the law.

United States v. Abboud, 438 F.3d 554, 581 (6th Cir. 2006). Negligent conduct is not sufficient to constitute willfulness. *E.g.*, ***id***. at 581; ***United States v. Murphy***, 469 F.3d at 1137 (willfulness "requires proof of a specific intent to do something which the law forbids; more than a showing of careless disregard for the truth is required"); ***United States v. Quimby***, 636 F.2d 86, 90 (5th Cir. 1981) (Section 7203 "requires that the act be purposefully done with an awareness of the action and not just negligently or inadvertently"). However, the government is not required to prove that the defendant acted with "evil motive or a bad purpose." ***United States v. Blanchard,* 618 F.3d 562, 571 (6th Cir. 2010); *United States v. Easterday,* 564 F.3d 1004, 1008 (9th Cir. 2009); *United States v. Powell***, 955 F.2d 1206, 1211 (9th Cir. 1991); ***United States v. Asmus***, 774 F.2d 722, 726 (6th Cir. 1985) (taxpayer's good or evil motive is not relevant to determining whether the taxpayer's act was willful under § 7203); *see also* ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir. 1978). To establish the requisite level of willfulness, the government must prove that the defendant deliberately failed to file returns which he or she knew the law required to be filed. ***United States v. Evanko***, 604 F.2d 21, 23 (6th Cir. 1979); ***United States v. Brown***, 600 F.2d 248, 258 (10th Cir. 1979); ***United States v. Hawk***, 497 F.2d 365, 366-69 (9th Cir. 1974).

A "good purpose" is not a defense to a charge of willful failure to file. If it is shown that the taxpayer intentionally violated a known duty, the reason for doing so is irrelevant. *See* ***United States v. Dillon***, 566 F.2d 702, 703-04 (10th Cir. 1977) (rejecting argument that defendant should have been permitted to testify that his failure to file a return was an attempt to test constitutionality of income tax laws, because reason for violating known legal duty irrelevant). For example, after rejecting a defendant's argument that to prove a willful failure to file, the government had to establish an intent to defraud, the Seventh Circuit concluded that evidence the defendant sought to introduce to "explain" his failure to file -- including, *inter alia*, contemplation of suicide, lack of funds available to pay taxes, fear of IRS liens on property, pendency of divorce proceedings, an offer to pay civil liabilities, an offer to cooperate with the IRS, and a fear of prosecution for earlier years -- "was of no relevance to whether [defendant] intentionally failed to file returns knowing that he was legally obliged to do so." ***United States v. McCorkle***, 511 F.2d 482, 485-88 (7th Cir. 1975) (*en banc*); *see also* ***United States v. Klee***, 494 F.2d 394, 395 n.1 (9th Cir. 1974) ("no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes").

Willfulness is thus established when the government proves that the failure to file was "voluntary and purposeful and with the specific intent to fail to do that which he knew the law required." ***United States v. Wilson***, 550 F.2d 259, 260 (5th Cir. 1977). But willfulness is not established if the government proves only a "careless and reckless disregard" for the obligation to file. ***United States v. Eilertson***, 707 F.2d 108, 109-10 (4th Cir. 1983) (trial court improperly used pre-***Bishop*** "careless disregard" jury instruction).

10.05[5][a] Proof of Willfulness

Proof of willfulness in a willful failure to file case may be, and usually is, shown by circumstantial evidence alone. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Grumka***, 728 F.2d 794, 796-97 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979) (proof of willfulness included previously filed corporate and personal returns and reminder by accountant); *see also* ***United States v. Miller***, 520 F.3d 504, 509 (5th Cir. 2008) (attempted evasion case); ***United States v. Boulerice***, 325 F.3d 75, 80 (1st Cir. 2002) (in tax evasion case, "the government does not need to show direct evidence of tax motivation so long as jury has a sufficient circumstantial basis for inferring willfulness"); ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001) (listing range of conduct that can support a finding of willful attempt to evade taxation); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984) (listing acts from which willfulness can be inferred in evasion case); ***United States v. Brown***, 548 F.2d 1194, 1199 (5th Cir. 1977) (aiding and assisting in preparation and presentation of false tax returns case); ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962) (attempted evasion case).

A defendant's past taxpaying history is admissible to prove willfulness circumstantially. ***United States v. Daraio***, 445 F.3d 253, 264 (3d Cir. 2006); ***United States v. Bok***, 156 F.3d 157, 165 (2d Cir. 1998); ***Schiff***, 612 F.2d at 77-78; ***United States v. Magnus***, 365 F.2d 1007, 1011 (2d Cir. 1966) (prior taxpaying history, both federal and state, can be probative of a taxpayer's willfulness in failing to pay substantial amounts of federal taxes in the years at issue). Willfulness may be inferred from a pattern of failing to file for consecutive years in which returns should have been filed. ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir. 1975). This may include years prior or subsequent to the prosecution period. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986).

Willfulness may also be shown by such acts as mailing tax defier materials to the IRS, disregarding IRS warning letters, and filing contradictory forms. ***United States v. Shivers***, 788 F.2d 1046, 1047-48 (5th Cir. 1986) (defendant filed a W-4 claiming he was exempt from withholding only four days after filing a W-4 claiming three allowances); *see also* ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (defendant sent defier materials to IRS).

There is also an element of common sense in establishing willfulness in a failure to file case. Thus, willfulness can be shown by such factors as a defendant's background, ***United States v. McCaffrey***, 181 F.3d 854, 856 (7th Cir. 1999) (defendant was tax accountant); the filing of returns in prior years, ***United States v. Briscoe***, 65 F.3d 576, 588 (7th Cir. 1995) (evidence indicated that, except for one year, defendant failed to file or filed late in every year in which he owed taxes in excess of the amount withheld); ***United States v. Hauert***, 40 F.3d 197, 199 (7th Cir. 1994); ***United States v. Birkenstock***, 823 F.2d 1026, 1028 (7th Cir. 1987); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986) ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); a defendant's education and accounting knowledge, ***United States v. Ostendorff***, 371 F.2d 729, 731 (4th Cir. 1967)(college graduate with some special knowledge of accounting and insurance); a defendant's familiarity with books and records and experience operating a business, ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989); and the receipt of a large gross income, ***Bohrer***, 807 F.2d at 161.

Similarly, one appellate court found that, if the defendant received a standard Form W-2, "the jury was entitled to view the W-2 Forms as reminders of the duty to file received shortly before or during the period in which filing was required." ***United States v. Cirillo***, 251 F.2d 638, 639 (3d Cir. 1957). A Form W-2 does not serve as a return, whether filed by the taxpayer or employer. ***United States v. Birkenstock***, 823 F.2d at 1030. *See also* Section 40.05[11], *infra*. Also, evidence that a defendant had filed returns in other years when he claimed refunds, while there was a substantial tax due for the years for which he failed to file, is relevant evidence and more than enough to establish willfulness. ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); *accord* ***United States v. Briscoe***, 65 F.3d at 588. Additional examples of conduct found to constitute proof of willfulness in attempted evasion cases may be found in Section 8.08[3], *supra*.

10.05[5][b] Willful Blindness or Deliberate Ignorance

Because willfulness requires a voluntary and intentional violation of a known legal duty, a defendant's ignorance of the illegality of a failure to timely file a tax return is a defense to a finding that the defendant acted willfully. Such ignorance is not a defense, however, if the defendant purposefully sought to avoid knowledge by, for example, "consciously avoid[ing] any opportunity to learn what the tax consequences were. ***United States v. Williams***, 612 F.3d 500, 506-07 (6th Cir. 2010)" ***United States v. Bussey***, 942 F.2d 1241, 1248 (8th Cir. 1992); ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

When the evidence supports the conclusion that a defendant purposely contrived to avoid learning all the facts, the government may be entitled to an instruction on deliberate ignorance. ***United States v. Mapelli***, 971 F.2d at 286. The use of an "ostrich instruction" – also known as a deliberate ignorance, conscious avoidance, willful blindness, or ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir. 1976)) – may be appropriate in circumstances where "a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended." ***Jewell***, 532 F.2d at 700 n.7.

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means***. United States v. Pool***e, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." ***Id***. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge*." **Id.** citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***, *supra*.

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). *Accord* ***United States v. Miller*** 588 F.3d 897, 906 (5th Cir. 2009) ("The evidence demonstrates that [the defendant] was subjectively aware of a high probability of existence of illegal conduct.").

The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Poole***, 640 F.3d at 122; ***Stadtmauer***, at 255; ***Jewell,*** 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit[3] – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of

[3] *See* ***Alston-Graves***, *supra*.

> wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69. The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71.

Although ***Global-Tech Appliances*** has seemingly approved the use of the conscious avoidance instructions, it is important to note that circuit courts have approved their use only under proper circumstances. *See, e.g.*, ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988)***; United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Willis***, 277 F.3d 1026, 1031-32 (8th Cir. 2002); ***United States v. Dean***, 487 F.3d 840, 851 (11th Cir. 2007). Indeed, at least one court has said that the use of such an instruction is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991).

Accordingly, prosecutors should take care to ensure that a conscious avoidance instruction is given only when the facts warrant its use and that the court complies with the relevant rules of the circuit when giving such an instruction. *See, e.g.*, ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). A conscious avoidance instruction "is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because the courier knows full well that he is likely to find drugs there." ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

Furthermore, in a tax case, the language of any conscious avoidance instruction must not conflict with the government's obligation to prove the voluntary, intentional violation of a known legal duty. See § 8.08. Care must be taken to ensure that the conscious avoidance instruction applies only to the element of "knowledge," and does not extend to the government's obligation to prove a "voluntary, intentional violation." *See* ***United States v. Stadtmauer***, 620 F.3d 238, 258-259 (3d Cir. 2010) ("The Court's

instructions made clear that willful blindness applied only to the element of knowledge"). When a deliberate ignorance or conscious avoidance instruction is given, the jury should also be given a separate Good Faith instruction, which expressly directs the jury not to convict for negligence or mistake.

10.05[6] Tax Deficiency Not Necessary

The crime of failing to file a return is complete if a return was required to be filed on a given date and the taxpayer intentionally did not file a return. There is no requirement that the government prove a tax liability, as long as the proof establishes that the taxpayer had sufficient gross income to require the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978). As a practical matter, evidence establishing a tax deficiency may be offered as a part of the government's evidence of willfulness, but this is technically not necessary. *See* ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986) (evidence of tax liability relevant and not prejudicial in failure to file case); *cf*. ***United States v. Hairston***, 819 F.2d 971, 974 (10th Cir. 1987) (defendant not allowed to show that he would have received refund, to negate willfulness).

10.05[7] Venue – Failure to File

Reference should be made to the discussion of venue in Section 6.00, *supra*.

As a general rule, venue in a failure to file case is proper in any judicial district in which the taxpayer was required to file a return for the year at issue, *i.e.*, the district in which the crime was committed.[4] ***United States v. Clines***, 958 F.2d 578, 583 (4th Cir. 1992) (crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns); ***United States v. Hicks***, 947 F.2d 1356, 1361 (9th Cir. 1991) ("Failure to file a tax return is an offense either at the defendant's place of residence, or at the collection point where the return should have been filed"); ***United States v. Rice***, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89-90 (5th Cir. 1981).

[4] While no case exactly on point has been located, a reasonable interpretation of the law is that the place for the filing of tax returns is to be determined on the basis of the taxpayer's legal residence or principal place of business at the time the return was due, because 26 U.S.C. § 6091 is written in the present tense.

Section 6091 of the Code sets forth the places for filing returns. In those instances where the Code does not provide for the place of filing, the Secretary "shall by regulations prescribe the place for the filing." 26 U.S.C. § 6091(a).

Generally, individual tax returns are to be filed either in the internal revenue district in which the taxpayer resides or has his or her principal place of business, or at the Service Center serving the internal revenue district where the taxpayer resides or has his or her principal place of business. 26 U.S.C. § 6091(b)(1)(A). The corresponding regulation provides:

> Except as provided in § 1.6091-3 (relating to certain international income tax returns) and § 1.6091-4 (relating to exceptional cases):
>
> (a) *Individuals, estates, and trusts*. (1) Except as provided in paragraph (c) of this section, income tax returns of individuals, estates, and trusts shall be filed with any person assigned the responsibility to receive returns at the local Internal Revenue Service office that serves the legal residence or principal place of business of the person required to make the return.
>
> . . . .
>
> (c) *Returns filed with service centers*. Notwithstanding paragraphs (a) and (b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions.

26 C.F.R.. § 1-6091-2 (2008); ***United States v. Garman***, 748 F.2d 218, 219-21 (4th Cir. 1984). "'Legal residence' means the permanent fixed place of the abode which one intends to be his residence and to return to despite temporary residences elsewhere, or absences." ***United States v. Taylor***, 828 F.2d 630, 632-34 (10th Cir. 1987); ***United States v. Calhoun***, 566 F.2d 969, 973 (5th Cir. 1978). Note that "[a]n individual employed on a salary or commission basis who is not also engaged in conducting a commercial or professional enterprise for profit on his own account does not have a 'principal place of business' within the meaning of [26 U.S.C. § 6091(b)]." 26 C.F.R. § 1.6091-2(a)(2).

There are several exceptions to the general rule. 26 U.S.C. § 6091(b)(1)(B). If an individual citizen of the United States has a legal residence outside the United States or his or her return bears a foreign address, the taxpayer's principal place of abode is

considered to be outside the United States, and the taxpayer's return should be filed as directed in the applicable forms and instructions. 26 C.F.R. § 1.6091-3(b). Similarly, an individual citizen of a possession of the United States (whether or not a citizen of the United States) who has no legal residence or principal place of business in any internal revenue district in the United States should file a return as directed in the applicable forms and instructions. 26 C.F.R. § 1.6091-3(c).

The general rule for corporations is that "income tax returns of corporations shall be filed with any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves the principal place of business or principal office or agency of the corporation." 26 C.F.R. § 1.6091-2(b). However, "whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions." 26 C.F.R. § 1.6091-2(c).

Returns can also be filed by hand carrying to the appropriate Internal Revenue Service office. 26 U.S.C. § 6091(b)(4). The regulations provide, for example, "Returns of persons other than corporations which are filed by hand carrying shall be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office as provided in paragraph (a) of this section." 26 C.F.R. § 1.6091-2(d)(1). Section (a) refers to the Internal Revenue Service office in the district "that serves the legal residence or principal place of business of the person required to make the return." *Id*.

As a practical matter, all of this means that venue in the usual individual failure to file case can be placed in the district in which the appropriate Service Center is located or in the district in which the taxpayer resides or has his or her principal place of business. Note, however, that under 18 U.S.C. § 3237, the statute governing venue in continuing offenses, "where an offense is described in section 7203 of the Internal Revenue Code . . ., and prosecution is begun in a judicial district other than the judicial district in which the defendant resides," the case may be transferred upon motion by the defendant, "filed within twenty days after arraignment," to "the district in which he was residing at the time the alleged offense was committed." 18 U.S.C. § 3237(b). *See also* Section 6.00 of this Manual, *supra*, on venue.

10.05[8] Statute of Limitations

Reference should be made to Chapter 7 of this Manual, *supra*, discussing the statute of limitations in criminal tax cases.

The statute of limitations for a failure to file a return is six years, except for information returns required under Part III of subchapter A of Chapter 61 of the Internal Revenue Code. 26 U.S.C. § 6531(4). For information returns required by the Code, including returns (Forms 8300) required under section 6050I, the period of limitations is three years, as is the period of limitations for failure to supply information or keep records. 26 U.S.C. § 6531.

The statute of limitations is computed from the due date of the return. *See* Section 10.05[3][b], *supra*. In the case of an individual, this will usually be April 15th, unless an extension of time within which to file is granted (26 U.S.C. § 6081), in which case the limitations period is computed from the extended compliance date. *See generally* ***United States v. Phillips***, 843 F.2d 438 (11th Cir. 1988); ***United States v. Goldstein***, 502 F.2d 526, 529-530 (3d Cir. 1974). If April 15th fell on a Saturday, Sunday, or legal holiday, the due date was the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that taxpayers who file at the Andover Service Center receive an extra day to file in those years in which the filing date coincides with Patriots' Day in Massachusetts, which falls on the third Monday of April.

The statute of limitations is tolled by the filing of an information or indictment. ***United States v. Saussy***, 802 F.2d 849, 851 (6th Cir. 1986) (claim that information must be "verified" by affidavit or other prior determination of probable cause rejected). The statute is also tolled when the defendant is outside the United States or is a fugitive from justice, 26 U.S.C. § 6531, and during certain summons enforcement proceedings, 26 U.S.C. § 7609(e).

10.06 ***FAILURE TO PAY***

10.06[1] Elements

To establish the offense of failure to pay a tax, the government must prove beyond a reasonable doubt that

(1) the defendant had a duty to pay a tax,

(2) the tax was not paid at the time required by law, and

(3) the failure to pay was willful.

United States v. Tucker, 686 F.2d 230, 232 (5th Cir. 1982); *see* ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***In re Wray***, 433 F.3d 376, 378 (4th Cir. 2005); ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir. 1992) ("Willful failure to pay tax under § 7203 contains two elements: 1) failure to pay a tax when due, and 2) willfulness," with the "'failure to pay' a tax element" subsuming both "a duty to pay the tax" and "the tax was unpaid"); *see also* ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987) ("The elements of that misdemeanor as applied to this case are: (1) willfulness and (2) failure to pay the tax when due.")

10.06[2] Required by Law to Pay

In the usual failure to pay case, the taxpayer will have filed a return and then failed to pay the reported tax liability. (If the taxpayer did not file a return, the more likely charge would be failure to file the return.) When a return that shows a tax due and owing is filed and less than the full amount of tax is paid, there are at least two possible charges, depending on the facts -- an attempted evasion of payment, in violation of 26 U.S.C. § 7201, or a failure to pay a tax, in violation of 26 U.S.C. § 7203. If there is an affirmative attempt to evade payment of the tax, such as the concealment of assets or the use of nominees, the charge should be brought under Section 7201. When the conduct is simply a failure to pay a tax that was due and owing, the appropriate charge is a violation of Section 7203, failure to pay a tax. *See, e.g.*, ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***United States v. Mal***, 942 F.2d 682, 684 (9th Cir. 1991) ("What distinguishes [the felony offense of evasion] from the misdemeanor offense of willful failure to file a return, supply information, or pay taxes, which is set out in 26 U.S.C. § 7203, is the requirement of an affirmative act.").

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Although most assessments are based on filed returns, it is not necessary that the Service assess the tax as due and owing. Indeed, a tax deficiency arises by operation of law on the date the return is due: "when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return . . . ." 26 U.S.C. § 6151(a); *see* ***United States v. Drefke***, 707 F.2d 978, 981 (8th Cir. 1983); *see also* ***United States v. Ellett***, 527 F.3d 38, 40 (2d Cir. 2008) (evasion of assessment case); ***United States v. Silkman***, 220 F.3d 935, 937 (8th Cir. 2000) (evasion of assessment case); ***United States v. Voorhies***, 658 F.2d 710, 714 (9th Cir. 1981) (evasion of payment case). Otherwise stated, it is not necessary that there be an administrative assessment before a criminal prosecution may be instituted. ***Voorhies***, 658 F.2d at 714-15; *accord* ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992)(evasion case); ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984)(evasion case).

10.06[3] Failure to Pay

The Internal Revenue Service will provide a qualified witness and/or a certified transcript of account or a certificate of assessments and payments establishing the failure to pay the tax. Section 6151(a) of the Code provides that the tax must be paid at the time and place fixed for filing "determined without regard to any extension of time for filing the return."

10.06[4] Willful Failure to Pay

See the discussion of willfulness in Sections 8.08 and 10.05[5], *supra*.

10.06[4] Willful Failure to Pay

See the discussion of willfulness in Sections 8.08 and 10.05[5], *supra*.

Willfulness does not require the government to prove that the taxpayer had the financial ability to pay his or her taxes when they came due. ***United States v. Easterday***, 539 F.3d 1176, 1182 (9th Cir. 2008); ***United States v. Ausmus***, 774 F.2d 772, 725 (6th Cir. 1985); ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir. 1982); *but see* ***United States v. McGill***, 964 F.2d 222, 238 n.30 (3d Cir. 1992) (declining to resolve the then-

existing circuit split on whether the taxpayer's ability to pay was relevant to the willfulness of the failure to pay). As the Fifth Circuit stated:

> Every United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under § 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability.

Tucker, 686 F.2d at 233.

The Ninth Circuit at one time took the position that, to establish willfulness in a failure to pay prosecution, the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so. ***United States v. Andros***, 484 F.2d 531, 533-34 (9th Cir. 1973). However, following ***United States v. Pomponio***, 429 U.S. 10, 12 (1976), the Ninth Circuit overruled ***Andros***. ***United States v. Easterday***, 564 F.3d 1004, 1011 (9th Cir. 2009) (holding that in light of Supreme Court precedent, including ***Pomponio***, willfulness does not require the government to prove that a defendant had the ability to meet his tax obligations).

See also Section 9.04, *supra*.

10.06[5] Venue

Reference should be made to the discussion of venue in Sections 6.00 and 10.05[7], *supra*.

Proper venue for a criminal prosecution is a protected Constitutional right. ***United States v. Cabrales***, 524 U.S. 1, 6 (1998) ("The Constitution twice safeguards the defendant's venue right: Article III, § 2, cl. 3, instructs that 'Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed'; the Sixth Amendment calls for trial 'by an impartial jury of the State and district wherein the crime shall have been committed.'"). Rule 18 of the Federal Rules of Criminal Procedure requires that, "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed." Thus, a defendant in a criminal trial has the right to be tried in the district where the offense took

place. The "'locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" ***United States v. Cabrales***, 524 U.S. at 6-7 (*quoting* ***United States v. Anderson***, 328 U.S. 699, 703 (1946)).

Generally, a person required to pay a tax must pay the tax at the place fixed for filing the return. *See* 26 U.S.C. § 6151 ("Except as otherwise provided . . ., when a return of tax is required . . ., the person required to make such return shall . . . pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return."). Venue would therefore normally be in the district in which the return was filed. As previously noted, if no return has been filed, the charge normally would be a failure to file rather than a failure to pay a tax. It is unclear whether there is venue for a failure to pay prosecution in the jurisdiction in which the taxpayer resides if there is no filed return.

10.06[6] Statute of Limitations

The statute of limitations is six years "for the offense of willfully failing to pay any tax . . . at the time or times required by law or regulations." 26 U.S.C. § 6531(4). *See* ***United States v. Smith***, 618 F.2d 280, 281-82 (5th Cir. 1980). Generally, the statute of limitations begins to run when the crime is complete, i.e., when every element of the crime has been committed. *See* ***Toussie v. United States***, 397 U.S. 112, 115 (1970). In ***United States v. Sams***, 865 F.2d 713 (6th Cir 1988), the Sixth Circuit addressed the specific question of when the statute of limitations in a failure to pay case begins to run.

In ***Sams***, the defendant filed his 1979 tax return late and failed to pay the tax due and owing. 865 F.2d at 714. The defendant was convicted of, *inter alia*, willful failure to pay income tax for 1979. *Id*. At trial and on appeal, the defendant claimed that the statute of limitations had expired on the charge because the rules of Section 6513 govern the applicable period of limitations. 865 F.2d at 714-15. Section 6513 provides in part that "the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer." 26 U.S.C. § 6513(a). The ***Sams*** court observed, however, that in ***United States v. Habig***, 390 U.S. 222 (1968), "the Supreme Court held that section 6513(a) is applicable only in situations where 'a return is filed or a tax is paid before the statutory deadline.'" 865 F.2d at 715 (quoting ***Habig***, 390 U.S. at 225). Noting the ***Habig*** Court's statement that "[t]here is no reason to believe that

§ 6531, by reference to the 'rules of section 6513' expands the effect and operation of the latter beyond its own terms so as to make it applicable to situations other than those involving early filing or advance payment," ***Habig***, 390 U.S. at 225, the ***Sams*** court concluded that "section 6513 does not provide the applicable limitations period" when the defendant "neither paid his taxes in advance nor filed an early return." 865 F.2d at 715.

The ***Sams*** court then considered what constitutes the appropriate "starting date" for the statute of limitations under section 6531. Noting the general rule that a criminal statute of limitations begin to run when every element of the crime has been committed and pointing out that one element of the offense of failure to pay tax is willfulness, the Sixth Circuit "agree[d] with the Ninth Circuit that the statute of limitations 'begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax becomes wilful . . . .'" 865 F.2d at 715-16 (quoting ***United States v. Andros***, 484 F.2d 531, 532 (9th Cir. 1973) (citations omitted)). The court accordingly held that "the limitations period for willfully failing to pay income taxes cannot be determined by any general rule. Rather, the limitations period begins to run when the taxpayer manifests some act of willful nonpayment." ***United States v. Sams***, 865 F.2d at 716.

Accordingly, the six-year period of limitations begins to run when the failure to pay the tax becomes willful, not when the tax is assessed or when payment is demanded. ***United States v. Andros***, 484 F.2d at 532-33; ***United States v. Sams***, 865 F.2d at 716. Thus, it appears that there is some flexibility on the question of when the statute of limitation begins to run and when the six year statute of limitations expires. However, it is common in tax cases to use evidence of past filing or payment history to establish willfulness. Consequently, the government generally would proceed on the theory that the crime was complete on the date that the payment was due and the taxpayer failed to pay, i.e., April 15, unless there was evidence to establish that willfulness occurred after that date.

10.07 SENTENCING

Reference should be made to Section 43.00, *infra*, which discusses the application of the advisory Federal Sentencing Guidelines to criminal tax cases. Sentencing in a

Section 7203 case is governed by §2T1.1 of the Sentencing Guidelines. The commentary to §2T1.1(c)(1), which was amended in 2001, provides that:

> Tax loss does not include interest or penalties, **except** in willful evasion of payment cases under 26 U.S.C. § 7201 cases under 26 U.S.C. § 7203.

Id. Application note 1 (emphasis added). Accordingly, penalties and interest are not included in § 7203 failure to file case but **are** included in the tax loss calculation in § 7203 failure to pay cases. *See*, ***United States v. Josephberg***, 562 F.3d 478, 501-02 (2d Cir. 2009). Note, also, that costs of prosecution must be included in the punishment imposed for a violation of Section 7203. *See* ***United States v. May***, 67 F.3d 706, 707 (8th Cir. 1995).

10.08 ASSERTED DEFENSES

There are a number of defenses that have been litigated and decided by the courts. A list of some of the common defenses raised in failure to file and failure to pay cases, and how the courts have treated those defenses, follows.

10.08[1] Intent to Pay Taxes in Future

The intent to report and pay taxes due at some time in the future does not constitute a defense and "does not vitiate" the willfulness required for a failure to file or, for that matter, for an attempt to evade. ***Sansone v. United States***, 380 U.S. 343, 354 (1965).

10.08[2] Absence of a Tax Deficiency

There is no requirement that the government prove a tax liability in a failure to file case, as long as the taxpayer had a gross income that required the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978).

10.08[3] Delinquent Filing

The purported defense of filing late returns has been rejected in failure to file cases. In addition, evidence offered by the defendant of late filing and the late payment of

taxes has been excluded. ***United States v. Ming***, 466 F.2d 1000, 1005 (7th Cir. 1972); ***United States v. Greenlee***, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd.*, 517 F.2d 899, 903 (3d Cir. 1975). In this connection, the Seventh Circuit has upheld the exclusion of evidence offered by the defendant that he had eventually paid his taxes, even though the government was allowed to prove the amount of taxes the defendant owed for the years in issue. ***United States v. Sawyer***, 607 F.2d 1190 (7th Cir. 1979).

10.08[4] Negligence

Because failure to file and failure to pay are specific intent crimes, negligence is insufficient to establish willfulness. The government must prove that the defendant acted purposefully, as distinguished from inadvertently, negligently, or mistakenly. ***United States v. Collins***, 457 F.2d 781, 783 (6th Cir 1972); ***United States v. Matosky***, 421 F.2d 410, 413 (7th Cir. 1970).

10.08[5] Civil Remedy Not Relevant

The fact that the government could proceed civilly, instead of criminally, is "irrelevant to the issue of criminal liability and the defendant is not entitled to an instruction that the government could assess the taxes without filing criminal charges." ***United States v. Buras***, 633 F.2d 1356, 1360 (9th Cir. 1980); *accord* ***United States v. Merrick***, 464 F.2d 1087, 1093 (10th Cir. 1972).

10.08[6] Inability to Pay

See the detailed discussion of inability to pay as a defense to a willful failure to pay in Section 10.06[4], *supra*.

In general, a taxpayer's inability to pay his taxes is not a defense to a tax crime. ***United States v. Ausmus***, 774 F.2d 722, 724-25 (6th Cir. 1985); ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir. 1982). Although, the Ninth Circuit formerly suggested that, to establish willfulness in a failure to pay prosecution, the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so, ***United States v. Andros***, 484 F.2d 531, 533-34 (9th Cir. 1973), it held otherwise in ***United States v. Easterday***, 564 F.3d 1004 (9th Cir. 2009). *See also* ***United States v. Gilbert***, 266 F.3d 1180, 1185 (9th Cir. 2000) (rejecting argument that "failure to pay over the withholding tax was not willful because [the business owned by defendant] did not

have the funds to pay the taxes," because defendant's "act of paying wages to his employees instead of remitting withholding taxes to the IRS, shows that he voluntary and intentionally" committed a tax offense).

10.08[7] IRS Required to Prepare Returns

Code Section 6020(b) provides that if a person fails to file a return or makes a willfully false return, the Secretary "shall make such return from his own knowledge and from such information as he can obtain." 26 U.S.C. § 6020(b). Section 6020(b), however, does not require the Internal Revenue Service to prepare tax returns for individuals who fail to file, nor does it excuse the taxpayer from criminal liability for that failure. *See* ***United States v. Cheek***, 3 F.3d 1057, 1063 (7th Cir. 1993); ***In re Bergstrom***, 949 F.2d 341, 343 (10th Cir. 1991); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991); ***United States v. Schiff***, 919 F.2d 830, 832 (2d Cir. 1990); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982) ("the law does not require the Secretary to do so and the Secretary's discretion in this matter in no way reduces the obligation of the individual taxpayers to file their returns."); ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979) ("no merit to [the defendant's] claim of entitlement to an instruction that the Internal Revenue Service was under a duty pursuant to 26 U.S.C.A. section 6020(b)(1) to prepare his tax return."); ***United States v. Tarrant***, 798 F. Supp. 1292, 1302-03 (E.D. Mich. 1992).

When a defendant raises this argument during trial, the court may properly instruct the jury that while Section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." ***Powell***, 955 F.2d at 1213. It is advisable to request that an instruction on the meaning of Section 6020(b) be coupled with a reminder to the jury that the issue in a criminal tax case is not the validity of the defendant's interpretation of §6020(b), but whether the defendant had a good faith belief that his or her actions were in compliance with the tax laws. ***Powell***, 955 F.2d at 1213; *see also* ***Tarrant***, 798 F. Supp at 1302-03 (defendant allowed to testify as to an alleged good faith belief that he was relieved from the obligation of filing returns because Section 6020(b) states that the IRS will make out returns for individuals who fail to do so).

10.08[8] Marital and Financial Difficulties

The refusal of the trial judge to allow an attorney charged with a failure to file to introduce evidence of marital and financial difficulties has been upheld on the grounds that "evidence of financial and domestic problems are not relevant to the issue of willfulness" as used in Section 7203. ***Bernabei v. United States***, 473 F.2d 1385, 1385 (6th Cir. 1973).

10.08[9] Claim That Returns Were Mailed

A claim that a return was in fact mailed to the IRS may constitute a defense to a charge under 26 U.S.C. § 7203. In ***United States v. Greenlee***, 517 F.2d 899, 901-03 (3d Cir. 1975), the defendant testified that he had mailed his 1970 tax return to the IRS, although the IRS had no record of having received the return. During its case in chief, the prosecution offered a thorough explanation by a representative of the appropriate Service Center regarding the manner in which returns were received and processed, coupled with evidence that the Service Center had no record of receiving the return. *Id*. at 902. The defendant was convicted. *Id*. at 901. The court of appeals found that whether the return had been filed was a question of fact for the jury and that, while a jury could find that a return not received by the Internal Revenue Service had in fact been mailed, the jury could also reject such testimony. *Id*. at 903. Noting its limited function in reviewing the sufficiency of the evidence on appeal, the Third Circuit affirmed. *Id*.

10.08[10] Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. § 3512 (a)(1) (PRA), provides that no person shall be subject to any penalty for failing to provide information if an agency's request does not display an Office of Management and Budget (OMB) number. Tax returns are agency requests within the scope of the PRA and bear OMB numbers. However, return instruction booklets do not bear OMB numbers, and tax defiers have attempted to manufacture a defense on this basis. The absence of an OMB number from tax return instruction booklets does not excuse the duty to file the return. *See* ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992) (IRS instruction booklets merely assist taxpayers rather than independently request information); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir. 1992). It is also unnecessary for an expiration date to appear on a return. ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992) (year designation, *e.g.*, "1990" is sufficient); *see also* ***United States v. Patridge***, 507 F.3d 1092,

1094 (7th Cir. 2007) (Paperwork Reduction Act does not repeal section 7203 and there is no inconsistency between section 7203 and the Paperwork Reduction Act). *See also* Section 40.05[12], *infra*.

10.08[11] Other Claimed Defenses

In ***United States v. Dunkel***, 900 F.2d 105, 107-08 (7th Cir. 1990), *vacated and remanded on other grounds*, 498 U.S. 1043 (1991), *rev'g on other grounds*, 927 F.2d 955 (7th Cir. 1991), a defendant claimed that the requirement to "make a return" was unconstitutionally vague. The defendant posited different interpretations of the word "make," including to "construct a return out of raw materials." ***Dunkel***, 900 F.2d at 107. The Seventh Circuit had little sympathy for this frivolous argument and rejected it by stating that "statutes are not unconstitutional just because clever lawyers can invent multiple meanings." ***Dunkel***, 900 F.2d at 108.

10.09 LESSER INCLUDED OFFENSE/RELATIONSHIP TO TAX EVASION

In charging and sentencing determinations, the question sometimes arises whether 26 U.S.C. § 7203 is a lesser included offense of attempted evasion under 26 U.S.C. § 7201. Reference should be made to the detailed discussion of this issue in Section 8.11, *supra*.