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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* not more than $25,000 ($100,000 in the case of a corporation), 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."

*For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the misdemeanor offenses set forth in section 7203, the maximum permissible fine for offenses committed after December 31, 1984, is at least $100,000 in the case of individuals. As to corporations, the maximum permissible fine is at least $200,000. For felony offenses in section 7203 involving willful violations of section 6050I, the maximum permissible fine is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if 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.

10.02 *GENERALLY*

Section 7203 covers four different situations -- each of which constitutes a failure to perform in a timely fashion an obligation imposed by the Internal Revenue Code. The four categories set forth in section 7203 are: (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 section 6050I of the Internal Revenue Code, all of the offenses under section 7203 are misdemeanors. Therefore, except for the above-referenced 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 fair 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 of the Code. Willfulness is the same for both misdemeanor offenses and felony offenses under the Internal Revenue Code. The difference in the offenses is that failure to file or pay under section 7203 involves merely a failure to do something (an omission), whereas there must be an affirmative act or a "willful commission" to raise the offense to a section 7201 felony. ***Sansone v. United States***, 380 U.S. 343, 351 (1965). Note also that, 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).

Some cases have also been brought charging a failure to supply information and these are noted below. The charge of failing to "keep any records" is not commonly used and is not treated separately in this manual.

10.03 ***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* ***United States v. Stuart***, 689 F.2d 759, 763 (8th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (defendant who failed to file for three years guilty of three separate offenses rather than one continuing offense); ***United States v. Harris***, 726 F.2d 558, 560 (9th Cir. 1984) (same).

Any "person" who fails to perform an obligation imposed by the Internal Revenue Code and the applicable regulations may be liable for 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). Internal Revenue Code 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."

10.04 ***FAILURE TO FILE***

10.04[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. Defendant was a person required to file a return;
2. Defendant failed to file at the time required by law; and,
3. The failure to file was willful.

United States v. Foster, 789 F.2d 457, 460 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993); ***United States v. Buras***, 633 F.2d 1356, 1358 (9th Cir. 1980); ***United States v. Harting***, 879 F.2d 175, 766-67 (10th Cir. 1989); ***United States v. Williams***, 875 F.2d 846, 850 (11th Cir. 1989).

10.04[2] ***Required by Law to File***

Various provisions of the Internal Revenue Code (and regulations thereunder) specify the events which trigger the obligation to file a return. Section 6012 of the Internal Revenue Code lists the persons and entities required to make returns with respect to income taxes.

The receipt of a specified amount of gross income generally determines whether an income tax return must be filed. "Gross income" is broadly defined in section 61(a) of the Code to mean:

> [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;
>
> (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 which serves to trigger the filing requirement has changed over the years. 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. For taxable years beginning after December 31, 1984, 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. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); ***United States v. Bell***, 734 F.2d 1315, 1316 (8th Cir. 1984). 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.), *cert. denied*, 429 U.S. 822 (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.), *cert. denied*, 429 U.S. 918 (1976). *See* ***United States v. Goldstein***, 56 F.R.D. 52, 55 (D. Del. 1972). Nevertheless, gross receipts remaining, after appropriate adjustment, may properly reflect gross income. ***Clark v. United States***, 211 F.2d 100, 102 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955). *See also* ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); ***Ballard***, 535 F.2d at 405.

For manufacturing, merchandising, or mining enterprises, where the filing requirement is predicated upon gross income, gross income is determined, in part, by subtracting the cost of goods sold from gross receipts or total sales. Treas. Reg. § 1.61-3 (26 C.F.R.); ***Ballard***, 535 F.2d at 400, 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. ***Siravo v. United States***, 377 F.2d 469, 473 (1st Cir. 1967); ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir.), *cert. denied*, 446 U.S. 922 (1980). *See* ***United States v. Gillings***, 568 F.2d 1307, 1310 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978). The burden then shifts to the enterprise to come forward with evidence of offsetting expenses. ***Siravo***, 377 F.2d at 473-74; ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984); ***United States v. Bahr***, 580 F. Supp. 167, 170-71 (N.D. Iowa 1983). *See also* ***Garguilo***, 554 F.2d at 62; ***Gillings***, 568 F.2d at 1310.

Effective January 1, 1985, 26 U.S.C. § 6050I requires any person engaged in a trade or business who receives more than $10,000 in cash [2] in one transaction (or two or more related)

transaction(s) to file an information return (Form 8300). The return is due the 15th day after the cash is received.

Attorneys are not exempted from section 6050I's requirement that a Form 8300 must be filed each time a person engaged in a trade or business receives more than $10,000 in cash in the course of such trade or business. This requirement, as applied to attorneys, does not violate the Fourth, Fifth, or Sixth Amendments. ***United States v. Goldberger & Dubin, P.C.***, 935 F.2d 501 (2nd Cir. 1991). Nor does it violate the attorney-client privilege. ***United States v. Leventhal***, 961 F.2d 936 (11th Cir. 1992). Section 6050(I)(f)(1) and (2) criminalize the willful failure to file a Form 8300. Section 7203 criminalizes the failure to file. The government need not cite in the indictment or information the provision of the Code which requires the filing of the particular return involved. ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993). 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 671.

10.04[3] ***Return Not Filed at Time Required by Law***

10.04[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 a return of income be filed. For example, tax protestors 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.

"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." ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). The test is "whether the defendants' returns themselves furnished the required information for the I.R.S. to make the computation and assessment . . ." ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984). *See also* ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979) ("conglomeration of papers filed with almost blank 1040"); ***United States v. Edelson***, 604 F.2d 232, 234 (3d 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (where taxpayer included bottom line assertion of liability, but did not include information from which to derive that figure); ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984) (taxpayer must divulge "sufficient financial circumstances" to determine tax liability); ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 F.2d 954 (1986) (Form 1040 with word "object" written in all spaces requesting information is not a return); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075

(10th Cir. 1983); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979) ("unknown" or claimed "Fifth Amendment" responses on Forms 1040 are not returns). *See also* discussion at Section 40.02[2], *infra*.

The determination of what is an adequate return is a legal question, and the district court properly may decide the question. ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985) (if tax return does not contain any information relating to a taxpayer's income from which a tax may be computed, it cannot be classified as a return within the meaning of the Internal Revenue Code). Some courts, however, have cautioned that such a ruling may improperly invade the province of the jury. *See* Section 40.02[3], *infra*. Therefore, 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." ***United States v. Klee***, 494 F.2d 394, 397 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). *See also* ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (jury instructions regarding whether form filed constitutes return, and invocation of Fifth Amendment privilege).

Note, however, that the Ninth Circuit has held that a Form 1040 which contains only zeroes cannot form the basis for a section 7203 violation since the zeroes constitute information as to income from which a tax could be computed. ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). The ***Long*** court conclusion that a "return containing false or misleading figures is still a return" suggests that a more proper charge could be made pursuant to section 7206(1). ***Long***, 618 F.2d at 75-76. Other circuits which have considered the issue presented by ***Long*** have reject that court's reasoning. In rejecting ***Long***, the Seventh Circuit concluded that "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." ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). *See also* ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980) (returns which contained nothing but zeroes and constitutional objections plainly did not even purport to disclose the required information); ***Mosel***, 738 F.2d at 158 (we align ourselves with those circuits which have specifically considered and rejected the Ninth Circuit's decision in ***Long***); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980) (disagreement with the ***Long*** decision).

10.04[3][b] ***Return Not Filed at Time Required by Law***

The basis for a failure to file offense is that the government is entitled to have a required return filed on time. In the leading case of ***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.

In a number of instances the Internal Revenue Code sets forth the time when a given return must be filed. Thus, section 6072 of the Code prescribes the time for filing income tax returns. *See* Treas. Reg. §§ 1.6072-1, 1.6072-2 (26 C.F.R.).

Individuals on a calendar year basis are required to file 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). Sections 6075 and 6076 fix the time for filing other returns, such as estate and gift tax returns, and windfall profit tax returns. Forms 8300 are due the 15th day after the cash is received. *See* Treas. Reg. § 1.6050I-1(e) (26 C.F.R.).

When the last day for filing a return falls on a Saturday, Sunday, or a legal holiday, the return will be considered timely filed if it is filed on the next day which is not a Saturday, Sunday, or legal holiday. 26 U.S.C. § 7503. Thus, if a return is due on April 15th and April 15th falls on a Saturday or a Sunday, the return would not be due until the following Monday, unless the Monday is a legal holiday, in which event, a return would not be due until the next day -- Tuesday.

Where the Code does not fix a time for the filing of a return, the Secretary is directed to prescribe the time "by regulations" for filing any return, statement, or document required to be filed by the Code or by regulations. 26 U.S.C. § 6071.

Because the time required by law for filing a return is crucial to the offense, the government's failure in its charge to properly allege the date when the legal duty to file arose may jeopardize a prosecution. ***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 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 for a period of up to six months. In general, individuals may request an automatic extension (Form 4868) until August 15th. An additional extension, until October 15th, may also be requested. A corporation may have an automatic extension of six months for filing a return if it meets the conditions set forth in the Code and applicable regulations. 26 U.S.C. § 6081(b).

As a practical matter, this means that in any failure to file case a search must be undertaken of IRS records, so that a determination can be made as to whether the taxpayer has obtained an extension of time in which to file. An attempt should always be made 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 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).

There can be no crime of failing to file an individual return by April 15th if the taxpayer has obtained extensions of time in which to file. *See*, ***Goldstein***, 502 F.2d 526, reversing a conviction

where Goldstein was indicted for failing to file before April 15th, but at trial it developed that Goldstein had applied for an extension and, thus, had no duty to file until May 7th.

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 1987 1040EZ	$4,440	15th day of 4th month after close of tax year
		1988 $4,950	
		1989 $5,100	
		1990 $5,300	
		1991 $5,550	
		1992 $5,900	
		1993 $6,050	
Married Filing Jointly	1040, 1040A 1988	$8,900	Same
		1989 $9,200	
		1990 $9,550	
		1991 $10,000	
		1992 $10,600	
		1993 $10,900	
Corporation	1120	N/A	15th day of 3rd month after close of tax year
Sub S Corporation	1120S	N/A	Same
Partnership	1065	N/A	15th day of 4th month after close of tax year
Fiduciary (trust or estate income)	1041	$600 gross or any taxable income	15th day of 4th month after close of tax year
Person in Trade or Business	8300 (CTR)	receipt of more than $10,000 cash	15th day after cash received

Employer	941	collected with-holding tax (income and FICA)	Quarterly - last day of month following quarter**
Estate	706	Gross estate of $600,000 at time of death if after 1986	9 months after date of death

* Note that 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.

10.04[4] ***Proof of Failure to File***

The mechanics of establishing that there was a failure to file are simple. It can be done either with a witness or by a certification procedure. A combination of the two methods also may be employed.

Witness Procedure If a witness is to be used, a representative of the appropriate Service Center, *i.e.*, one from the Service Center having custody of returns for the required place of filing, is called to testify. The witness will testify that he or she is a representative of the Director of the Service Center, that he or she has custody of returns for a given area, that the defendant was required to file with his or her "office", that records are kept reflecting the returns filed, 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 addition, the witness should be interviewed ahead of time, and it should be brought out on the direct examination that the witness is not a tax expert. This is important, and a failure to do this can lead to confusion and a very uncomfortable witness. In some cases, particularly those involving tax protestors with experienced counsel, cross-examination concerning Service Center procedures and various codes on IRS account transcripts may be extensive. The questioning may also focus on the witness's knowledge that the Service Center has lost or misplaced returns or that the computerized taxpayer account system is faulty. Reference should be made to the discussion of tax protestor prosecutions in Section 40.00, *infra*.

For two cases where the witness procedure was used, *see* ***United States v. Greenlee***, 517 F.2d 899, 902-03 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975); ***United States v. Wellendorf***, 574 F.2d 1289, 1291 (5th Cir. 1978).

Certification Procedure A failure to file by a given taxpayer can be established without a witness by obtaining a certified transcript of account from the appropriate Service Center stating that the taxpayer has not filed a return for the year(s) in question. ***United States v. Spine***, 945 F.2d 143 (6th Cir. 1991); ***United States v. Ryan***, 969 F.2d 238 (7th Cir. 1992) (trial court's decision to admit IRS computer printouts will be reversed only for abuse of discretion); ***United States v. Farris***, 517 F.2d 226, 227-29 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (IRS certified computer records admissible as self-authenticating documents; Fed. R. Evid. 902(4)); ***United States v. Neff***, 615 F.2d 1235, 1241-42 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); *accord*, ***United States v. Yakobov***, 712 F.2d 20, 27 (2d Cir. 1983).

Proof of a negative is provided for by Rule 803(10) of the Federal Rules of Evidence, which states that the proof can be by way of testimony or in the form of a certification in accordance with Rule 902 of the Federal Rules of Evidence.

10.04[5] ***Willfulness***

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

Willfulness is the state of mind which must be proven to establish intent, and whether the charge is a felony (*e.g.*, 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).

Willfulness in criminal tax violations means a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973); ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982); ***United States v. Moon***, 718 F.2d 1210, 1222 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Edelson***, 604 F.2d 232, 235-36 (3d Cir. 1979); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Buckley***, 586 F.2d 498, 503-04 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); ***United States v. Grumka***, 728 F.2d 794, 796 (6th Cir. 1984); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir.), *cert. denied*, 479 U.S. 358 (1986); ***United States v. Verkuilen***, 690 F.2d 648, 655 (7th Cir. 1982); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Dahlstrom***, 713 F.2d 1423, 1427 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); ***United States v. Rothbart***, 723 F.2d 752, 754 (10th Cir. 1983). Particular reference should be made to the discussion of the subjective standard for willfulness in Sections 8.00 and 40.00, *supra.*

Thus, in a failure to file prosecution, the government is required to establish that the offender voluntarily and intentionally failed to file returns which he knew were required to be filed. ***United States v. Quimby***, 636 F.2d 86, 90 (5th Cir. 1981). The government need not, however, prove "evil motive or a bad purpose". ***United States v. Powell***, 955 F.2d 1206, 1211 (9th Cir. 1992). *See also* ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); ***Cooley v. United States***, 501 F.2d 1249, 1252-53 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). The only bad purpose necessary to meet the willfulness requirement of section 7203 is a deliberate intention not to file returns that the offender knew ought to be filed. ***United States v. Evanko***, 604 F.2d 21, 23 (6th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); ***United States v. Hawk***, 497 F.2d 365, 366-69 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974); ***United States v. Brown***, 600 F.2d 248, 258 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979).

Similarly, demonstration of 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. ***United States v. Dillon***, 566 F.2d 702, 703 (10th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978) (attempt to test constitutionality of income tax laws). In ***United States v. McCorkle***, 511 F.2d 482 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 826 (1975), the court flatly rejected the defendant's argument that to prove a willful failure to file the government had to establish an intent to defraud. The jury instruction upheld by the court is reprinted in a footnote to the opinion. *See* ***McCorkle***, 511 F.2d at 484 n.2. The ***McCorkle*** case furnishes a good example of evidence that is not admissible in defense of a failure to file, *e.g.*, contemplating suicide, no funds available to pay taxes, fear of IRS liens on property, involved in divorce, offering to pay civil liabilities, and not keeping accurate records. 511 F.2d at 486. *See also* ***United States v. Klee***, 494 F.2d 394, 395 n.1 (9th Cir.), *cert. denied*, 419 U.S. 835 (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); ***Cooley***, 501 F.2d at 1253 n.4. 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). *See* ***United States v. Wolters***, 656 F.2d 523, 525 (9th Cir. 1981) (jury instruction sufficiently defined willful so as to exclude "reckless disregard").

10.04[5][a] ***Proof of Willfulness***

Proof of willfulness may be, and usually is, shown by circumstantial evidence alone. ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979) (previously filed corporate and personal returns; reminder by accountant); ***United States v. Brown***, 548 F.2d 1194, 1199 (5th Cir. 1977) (letters from Service Center); ***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. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984) (section 7201) (list of acts from which willfulness can be inferred); ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963) (section 7201).

Willfulness is suggested by 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.), *cert. denied*, 423 U.S. 985 (1975). This may include years prior or subsequent to the prosecution period. ***United States v. Farris***, 517 F.2d 226, 229 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986).

Willfulness may also be shown by such acts as mailing tax protest materials to the IRS, disregarding IRS warning letters, and filing contradictory forms. ***United States v. Shivers***, 788 F.2d 1046, 1048 (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 protestor materials to IRS); ***United States v. Poschwatta***, 829 F.2d 1477, 1481-82 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (willfulness shown by past failure to file, application for extension of filing deadline, and knowledge of criminal penalties of failure to file).

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: the background of the defendant; the filing of returns in prior years, ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Birkenstock***, 823 F.2d 1026, 1028 (7th Cir. 1987); ***Poschwatta***, 829 F.2d at 1481; ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986); that the defendant was a college graduate with accounting knowledge; that the defendant was familiar with books and records and

operated a business, ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989); that the defendant earned a large gross income, ***Bohrer***, 807 F.2d at 161. *See also* ***United States v. Ostendorff***, 371 F.2d 729, 731 (4th Cir.), *cert. denied*, 386 U.S. 982 (1967); ***United States v. MacLeod***, 436 F.2d 947, 949 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971).

In a similar vein, where the defendant received a standard Form W-2, it has been held that:

> 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), *cert. denied*, 356 U.S. 949 (1958). The Form W-2 does not serve as a return, whether filed by the taxpayer or employer. ***Birkenstock***, 823 F.2d at 1030. *See also* Section 40.14[16], *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 he failed to file is relevant evidence and more than enough to establish willfulness. ***Garguilo***, 554 F.2d at 62.

10.04[5][b] ***Willful Blindness***

Because willfulness requires a voluntary and intentional violation of a known legal duty, it is a defense to a finding of willfulness that the defendant was ignorant of facts which made the conduct illegal. Such ignorance is not a defense, however, if the defendant purposefully sought to avoid knowledge. *See* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* ***McCreary v. United States***, 476 U.S. 1186 (1986) (mail and wire fraud). When a defendant claims ignorance as to facts necessary for a finding of willfulness, the defendant's knowledge may be inferred from conduct. Evidence that a defendant avoided knowledge of facts that would alert the defendant to a duty under the tax laws may prove knowledge circumstantially. The prosecution may argue that the jury should infer guilty knowledge from the charade of deliberate avoidance of knowledge. ***Ramsey***, 785 F.2d at 189. The use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) -- may be appropriate in circumstances where the defendant claims a lack of knowledge and the evidence supports a finding that the ignorance was intentional.

A number of courts have approved the use of such instructions under proper circumstances. *See, e.g.*, ***United States v. Picciandra***, 788 F.2d 39, 46 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986); ***United States v. Callahan***, 588 F.2d 1078 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Bussey***, 942 F.2d 1241, 1246 (8th Cir.), *cert. denied*, 112 S. Ct. 1936 (1991) (post-***Cheek*** decision); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several 9th Circuit cases).[3] Thus, it is advisable not to request such an

instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case. [1] Further, to avoid potential confusion with the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance." [2]

10.04[6] ***Tax Deficiency Not Necessary***

The crime of failing to file a return is complete if a return was required to be filed at 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), *cert. denied*, 440 U.S. 928 (1979). As a practical matter, evidence establishing a tax deficiency usually will be offered as a part of the government's evidence of willfulness but, as noted, 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). *See also* ***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).

10.04[7] ***Venue - Failure to File***

Reference should be made to the discussion of venue in Section 6.00, *supra*.
The general rule is that venue in a failure to file case is found in any judicial district in which the taxpayer is required to file, *i.e.*, the district in which the crime was committed. ***United States v. Rice***, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89 (5th Cir. 1981).

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 filing. 26 U.S.C. § 6091(a).

The general rule is that individual tax returns are to be filed either in the internal revenue district where the taxpayer resides or has his principal place of business, or at the Service Center serving the internal revenue district where the taxpayer resides or has his principal place of business. 26 U.S.C. § 6091(b); Treas. Reg. § 1-6091-2 (26 C.F.R.); ***United States v. Garman***, 748 F.2d 218, 219 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). "'Legal residence' means the

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1 Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

2 It is suggested that any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

permanent fixed place of the abode which one intends to be his residence and to return to it despite temporary residences elsewhere, or absences." ***United States v. Calhoun***, 566 F.2d 969, 973 (5th Cir. 1978). Note that, "(a)n individual employed (exclusively) on a salary or commission basis . . . does not have a 'principal place of business' within the meaning of this section." Treas. Reg. § 1.6091-2(a)(2) (26 C.F.R.).

One exception for individuals is that if the taxpayer's legal residence is outside the United States or if his return bears a foreign address, the return should be filed with the Director of International Operations, Internal Revenue Service, Washington, D.C., or the district director, or the director of Service Center, depending on the return form or in the instructions issued with the return. Treas. Reg. § 1.6091-3(b) (26 C.F.R.). Another exception is that if an individual, although continuously present in the United States, has no legal residence or principal place of business in any internal revenue district, the return should be filed with the District Director in Baltimore, Maryland. Treas. Reg. § 1-6091-2(a)(1) (26 C.F.R.).

For a corporation, the general rule is substantially the same as for individuals, except that the "principal office or agency of the corporation" is substituted for "legal residence." Treas. Reg. § 1.6091-2(b) (26 C.F.R.).

While no case exactly on point has been located, it would seem that the place of performance 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.

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, that an individual return "filed by hand-carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone, or local office constituting a permanent post of duty within the internal revenue district of such director) . . . ." Treas. Reg. § 1.6091-2(d)(1) (26 C.F.R.). The reference to the district director or local office refers back to the district "in which is located the legal residence or principal place of business" of the taxpayer. *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 where the appropriate Service Center is located, or in the district where the taxpayer resides or has his principal place of business. Note, however, that under the statute governing venue in continuing offenses, 18 U.S.C. § 3237, specific reference is made to cases brought pursuant to sections 7201, 7203, and 7206(1), (2), and (5). Section 3237(b) provides that where an offense is described in section 7203 or when venue for a prosecution of an offense described in section 7201 or section 7206(1), (2), or (5) is based solely on a mailing to the IRS 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 to the district in which he was residing at the time the offense was committed. *See also* Section 6.00, *supra*, on venue in this Manual.

10.04[8] ***Statute of Limitations***

Reference should be made to Section 7.00, *supra*, discussing the statute of limitations in

criminal tax cases.

The statute of limitations for a failure to file a return is six (6) 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 pursuant to section 6050I, the period of limitations is three (3) years, as is the period of limitations for failure to supply information or keep records.

The statute of limitations is computed from the due date of the return. *See* Section 10.04(3), *supra*. In the case of an individual, this will usually be April 15th, unless an extension of time in which to file is granted (26 U.S.C. § 6081), in which event the statute is computed from the extended compliance date. *See* ***United States v. Goldstein***, 502 F.2d 526 (3d Cir. 1974); ***United States v. Pandilidis***, 524 F.2d 644 (6th Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

The statute of limitations is tolled by the filing of the information or indictment. ***United States v. Saussy***, 802 F.2d 849, 851 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (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).

10.05 ***FAILURE TO PAY***

10.05[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.), *cert. denied*, 459 U.S. 1071 (1982). *See* ***Sansone v. United States***, 380 U.S. 343, 351 (1965). Prosecutions of a willful failure to pay "are rare". ***United States v. Tucker***, 686 F.2d at 233.

10.05[2] ***Required by Law to Pay***

This element should not pose any undue difficulty. If the taxpayer has not filed a return, the charge would be a failure to file. However, when a return has been filed reflecting a tax due and owing, 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. The charge would be under section 7203 if there was no affirmative attempt to evade the payment by, for example, the concealment of assets or the use of nominees, but, rather, simply a failure to pay a tax that was due and owing.

As to the time of payment, section 6151(a) of the Code sets forth the general rule as follows:

> Except as otherwise provided in this subchapter, 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 . . . .

See ***United States v. Drefke***, 707 F.2d 978, 981 (8th Cir.), *cert. denied*, 464 U.S. 359 (1983).

In the usual failure to pay case, the taxpayer will have filed a return and then failed to pay the tax. While most assessments are based on filed returns, it is not necessary that the Service assess the tax as due and owing, because a tax deficiency arises by operation of law on the date the return is due. 26 U.S.C. § 6151(a); ***United States v. Voorhies***, 658 F.2d 710, 714 (9th Cir. 1981) (an evasion of payment case but the principle is applicable here). 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); ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984).

10.05[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. A search of the Internal Revenue Service records should always include a search as to whether any extensions of time have been granted. While section 6151(a) of the Code provides that a tax is due at the time of filing "without regard to any extension of time," the reference to "any extension of time" merely fixes the date when the tax is due -- not when it necessarily must be paid. If an extension is granted, the tax would not have to be paid until the extended date. *See* ***Voorhies***, 658 F.2d at 713. *See also* the discussion in Section 10.04(4), Proof of Failure to File.

10.05[4] ***Willful Failure to Pay***

See the discussion of willfulness in Sections 8.06 and 10.04[4], *supra*.

In ***United States v. Andros***, 484 F.2d 531 (9th Cir. 1973), the court, in sustaining a conviction for willful failure to pay, took the position that to establish willfulness the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so. *Id.* at 531. But the court also stated that willfulness connotes bad faith or evil intent in view of all the financial circumstances of the taxpayer. This premise is no longer viable after ***United States v. Pomponio***, 429 U.S. 10 (1976).

In ***United States v. Tucker***, 686 F.2d 230 (5th Cir.), *cert. denied*, 459 U.S. 1071 (1982), the Fifth Circuit rejected the defendant's contention that the government had to prove the defendant was financially able to pay the tax when it became due, saying (686 F.2d at 233):

> Tucker's second argument is that, in order to show willfulness under Section 7203, the government must prove that the taxpayer was financially able to pay his tax debt when it came due. Tucker argues that he was unable to pay his taxes when due because his checking accounts had either very low or negative balances, and because he had no other assets available to satisfy the debt. He thus concludes that his failure to pay was not willful. This argument borders on the ridiculous. 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 Section 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.

The court declined to follow the Ninth Circuit in ***Andros***, 484 F.2d 531, taking the position that the language in ***Andros***, to the effect that it must be shown that a taxpayer has sufficient funds to pay the tax on or about the day the tax was due, was dicta. ***Tucker***, 686 F.2d at 233. Again, it would seem to be only common sense that a taxpayer who has dissipated his assets on luxury items should not be able to avoid criminal prosecution by showing that he had no funds to pay the taxes he owed. *See also* Section 9.03, *supra*.

10.05[5] ***Venue***

Reference should be made to the discussion of venue in Sections 6.00 and 10.04[7], *supra*.

Generally, a person required to pay a tax must pay the tax at the place fixed for filing the return. Venue would therefore normally be in the district where the return was filed. As previously noted, where there is no filing the charge normally would be a failure to file rather than a failure to pay a tax.

10.05[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.), *cert. denied*, 449 U.S. 868 (1980).

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. ***Andros***, 484 F.2d at 532-33. *See also* ***United States v. Pelose***, 538 F.2d 41, 44-45 (2d Cir. 1976); ***United States v. Sams***, 865 F.2d 713, 716 (6th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989) ("the limitation period begins to run when the taxpayer manifests some act of willful nonpayment").

10.06 ***SENTENCING***

Reference should be made to Section 5.00 *infra*, which discusses the application of the Federal Sentencing Guidelines to criminal tax cases.

10.07 ***DEFENSES***

There are a number of defenses that have been litigated and ruled on by the courts. A list of some of the common defenses raised in failure to file cases and their treatment by the courts follows.

10.07[1] ***Intent to Pay Taxes in Future***

The intent to report and pay taxes due 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).

10.07[2] ***Absence of a Tax Deficiency***

There is no requirement that the government establish a tax liability, 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), *cert. denied*, 440 U.S. 928 (1979).

10.07[3] ***Delinquent Filing***

The 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. Greenlee***, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd.*, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975); ***United States v. Ming***, 466 F.2d 1000, 1005 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972).

The First Circuit, in ***United States v. Bourque***, 541 F.2d 290, 294 (1st Cir. 1976), noted the principle that "subsequent conduct cannot relieve a taxpayer from criminal liability for failure to file tax returns on or before their due date." In this connection, the Seventh Circuit has upheld the exclusion of evidence 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), *cert. denied*, 445 U.S. 943 (1980).

10.07[4] ***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); ***United States v. Merrick***, 464 F.2d 1087, 1093 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).10.07[5] ***Inability to Pay***

The Seventh Circuit has stated that a defendant is not entitled to an instruction on inability to pay where no foundation was laid in the evidence that the defendant lacked the money to pay his taxes:

> Lewis had money to pay the other expenses of his business; he just assigned a lower priority to paying withholding taxes than to meeting his other expenses. This does not "show inability to pay" and the judge was not required to give an instruction that was premised on such inability.

United States v. Lewis, 671 F.2d 1025, 1028 (7th Cir. 1982). *See also*, ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir.), *cert. denied*, 459 U.S. 1071 (1982).

10.07[6] ***IRS Required to Prepare Returns***

Section 6020 of the Internal Revenue Code 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 or from such information as he can obtain." Courts have uniformly disapproved the use of this section as a defense in failure to file cases. *See*, *e.g.*, ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) ("[t]he Secretary of Treasury's execution of a return on behalf of a taxpayer does not relieve the taxpayer of his obligation to file a return."). *Accord*, ***United States v. Lacy***, 658 F.2d 396, 397 (5th Cir. 1981); ***Moore v. C.I.R.***, 722 F.2d 193, 196 (5th Cir. 1984).

A defendant in the Eastern District of New York claimed that the government was barred from prosecuting him for failure to file, because he had filed partnership returns, which triggered the IRS's duty to file individual returns for him under section 6020(b) of the Code. Rejecting this defense and holding that the government was not barred from prosecuting for a failure to file, the court stated that the defendant's interpretation of the statutes was "inherently implausible" and that section 6020(b) "cannot be interpreted as foreclosing civil or criminal sanctions for acts or omissions of the taxpayer." ***United States v. Harrison***, 30 A.F.T.R. 72-5367 (E.D.N.Y. 1972), *aff'd. without opinion*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

In ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980), the court held that there was "no merit to Millican'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."

In a similar vein, the Seventh Circuit upheld a jury instruction on section 6020(b) which stated that while the law permits the Secretary to prepare a return, "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. Verkuilen***, 690 F.2d 648, 656 (7th Cir. 1982).

10.07[7] ***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 (6th Cir.), *cert. denied*, 414 U.S. 825 (1973). *See also* ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).

10.07[8] ***Fear of Filing***

Saying it was "no defense," the Second Circuit upheld the refusal of the trial judge to instruct the jury that it must acquit if it found the defendant did not file his returns because of a fear of incriminating himself for prior violations. ***United States v. Egan***, 459 F.2d 997, 998 (2d Cir.), *cert. denied*, 429 U.S. 875 (1972).

10.07[9] ***Claim That Returns Were Mailed***

A jury could find that returns not received by the Internal Revenue Service were in fact mailed as claimed by a defendant. But a thorough explanation by a representative of the appropriate Service Center respecting the manner in which returns are received and processed, coupled with evidence that the Service Center never received the returns, is sufficient to support a conviction under section 7203. ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).

10.07[10] ***Complicated Records***

While characterizing the defense as "lame" and upholding the conviction on failure to file charges, the Sixth Circuit held that it was error not to permit the defendant to introduce in evidence some of his records to corroborate his claim that the records were so complicated he could not file accurate returns on time. ***United States v. Dark***, 597 F.2d 1097, 1099-1100 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979).

10.07[11] ***Paperwork Reduction Act***

The Paperwork Reduction Act, 44 U.S.C. § 3512 (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 protestors 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. ***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.), *cert. denied*, 113 U.S. 419 (1992). Also, it is not necessary that an expiration date 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* Section 40.14[20], *infra*.

10.07[12] ***Other Defenses***

In ***United States v. Dunkel***, 900 F.2d 105, 107-08 (7th Cir. 1990), *vacated and remanded on other grounds*, 111 S. Ct. 747 (1991), *rev'g on other grounds*, 927 F.2d 955 (7th Cir.), a tax protestor 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 Court 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.

10.08 *LESSER INCLUDED OFFENSE/RELATIONSHIP TO TAX EVASION*

In charging and sentencing determinations, the question sometimes arises whether section 7203 is a lesser included offense of section 7201, tax evasion. Reference should be made to the detailed discussion of this issue in Section 8.09, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing Nov. 1, 1986.

2. The term "cash" includes foreign currency and, to the extent provided in regulations prescribed by the Secretary of the Treasury, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000. 26 U.S.C. § 6050I(d)(1) & (2). Treas. Reg. § 1.6050I-1(c)(1) (26 C.F.R.). The term generally does not include a check drawn on the account of the writer.

3. *But see* ***United States v. Rodriguez***, 983 F.2d 455, 457 (2d Cir. 1993) (Second Circuit more willing than Ninth Circuit to authorize use of this type of instruction).