

Practice

What Makes a Failure to File Your Tax Returns a Felony?

By Sandra R. Brown*

As Benjamin Franklin once wrote, “in this world nothing can be said to be certain, except death and taxes.”¹ For any U.S. citizen or resident with annual income in excess of a statutorily determined amount, the requirement to file a tax return is not only certain, but is a legal obligation.² Contrary to popular myth, the filing of a federal tax return is not “voluntary.”³ It is mandatory.⁴ Moreover, the intentional (willful) failure to file a required tax return is a crime. Because it is a crime, it is punishable by jail time. So, while the penalties and fines associated with the failure to file tax returns can be extremely costly even in the civil context, where the failure to file a required tax return is done willfully, it can also result in a loss of one’s liberty and freedom, *e.g.*, prison time. Case in point is a criminal tax case filed earlier this year by the United States against Daryl Brown.

Serial Non-Filer Pleads Guilty to Tax Evasion

From 2009 through 2016, Daryl Brown received taxable income. Nonetheless, Mr. Brown did not file his tax returns to report his income nor did he pay the taxes he owed on such taxable income. Mr. Brown did, however, take steps to evade his tax obligations, such as opening bank accounts and lines of credit in nominee names and using credit and debit cards from those accounts to pay for personal expenses. Additionally, he bought money orders with cash, directed others to buy money orders for him, and structured his purchase of money orders—sometimes from several locations on the same day—to avoid triggering reporting requirements that would have flagged his activity to the Internal Revenue Service (IRS).⁵ On March 13, 2020, Mr. Brown pled guilty to a charge of tax evasion and now faces a sentence of five years in prison.⁶

While both the DOJ and the IRS press releases in the above criminal tax case specifically referenced Mr. Brown’s failure to file his federal tax returns for multiple years, it is important to note that this case was not simply about

this taxpayer's lack of filing timely tax returns. Rather, this case was about the intentional "affirmative" steps which Mr. Brown took to conceal and misrepresent his financial dealings that resulted in his attempted evasion of his taxes. In simple terms, it was the affirmative acts, not Mr. Brown's serial non-filing of his tax returns, that resulted in the government investigating and charging him with tax evasion and which now has Mr. Brown facing five years in prison.⁷

So, while the penalties and fines associated with the failure to file tax returns can be extremely costly even in the civil context, where the failure to file a required tax return is done willfully, it can also result in a loss of one's liberty and freedom, e.g., prison time.

Does that mean the federal government can't prosecute someone based only on evidence of an intentional failure to comply with a legal duty to file a timely (and honest) tax return? The simple answer is—No. While the willful failure to file a tax return is a misdemeanor, the government will bring failure to file charges in appropriate circumstances which can result in incarceration for the non-filer. For example, actor Wesley Snipes was sentenced to three years in prison for his conviction for intentionally failing to file his tax returns⁸ with the IRS for the years 1999, 2000 and 2001,⁹ and singer and actress Lauryn Hill was sentenced to three months in prison and three months of home detention in connection with her guilty plea for intentional failure to file tax returns for the years 2005, 2006, 2007, 2008 and 2009.¹⁰

Increasing IRS Focus on Non-Filers

According to the most recent IRS Criminal Investigation Annual Report, in FY 2019 a total of 271 non-filer criminal tax investigations were opened and 114 non-filer tax cases were charged.¹¹ Interestingly, these numbers reflect an increase from both FY 2018, which reported 254 non-filer investigations and 110 prosecutions, and FY 2017, which

reported 206 non-filer investigations and 106 non-filer prosecutions by the IRS Criminal Investigation.¹²

Newly Created IRS Fraud Enforcement Office

On March 5, 2020, as part of the IRS's continuing focus on compliance issues which includes non-filers, the IRS announced that Damon Rowe, a veteran of IRS Criminal Investigation, was named to serve as the agency's director of the newly created Fraud Enforcement Office. Both Director Rowe and the Fraud Enforcement Office will reside in the IRS Small Business/Self Employed Division and work on agency-wide compliance issues in support of IRS efforts to detect and deter fraud while strengthening the National Fraud Program.¹³

In furtherance of the IRS's continuing focus on compliance, and a further signal of the IRS's commitment to the success of the new Fraud Enforcement Office, on May 25, 2020, the IRS announced that Carolyn Schenck, the current Assistant Division Counsel (International) in the Small Business/Self Employed (SB/SE) Division of the IRS Office of Chief Counsel, who also serves as counsel to the IRS Offshore Compliance Initiative, would also serve as the National Fraud Counsel serving the agency's new Fraud Enforcement Program and be assigned to work closely with Director Rowe.

The creation of the Fraud Enforcement Program and the appointments of two very senior IRS managers to focus on enhanced compliance could not have been more timely and perhaps is a further sign of the IRS's intent to take a deeper look at addressing non-compliance by non-filers.

TIGTA Report: Improvements Are Needed to the IRS's Non-Filer Program

On May 29, 2020, the Treasury Inspector General For Tax Administration ("TIGTA") issued a report that identified 879,415 high-income non-filers for tax years 2014 through 2016 with an estimated tax due of \$45.7 billion.¹⁴ The TIGTA report further noted that the top 100 high-income non-filers during that time period that the IRS did not address or resolve had estimated taxes due totaling \$9.9 billion. The overall breakdown of what TIGTA found is as follows (see Table 1).

TABLE 1. RANGES OF ESTIMATED TAX DUE OF HIGH-INCOME NONFILERS HAVING NO SATISFIED FILING REQUIREMENT FOR TYs 2014 THROUGH 2016¹

Range of Estimated Tax Due	Total for TYs 2014 - 2016			
	Number of Nonfilers	Percentage	Estimated Tax Due	Percentage
Above \$1,000,000	1,891	0.2%	\$13.5 Billion	29%
\$500,000.01 to \$1,000,000	3,272	0.4%	\$2.2 Billion	5%
\$100,000.01 to \$500,000	53,723	6%	\$9.8 Billion	22%
\$50,000.01 to \$100,000	114,924	13%	\$7.7 Billion	17%
\$10,000.01 to \$50,000	410,665	47%	\$11.1 Billion	24%
Total	879,415	100%	\$45.7 Billion	100%

Source: TIGTA ANALYSIS OF IMF CCNIP nonfiler data from the IRS's CDW and other tax account information obtained from the IMF as of the end of December 2018.

¹ *Spies*, S Ct, 43-1 ustr ¶9243, 317 US 492, 499, 63 S Ct 364.



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Following the TIGTA report, the IRS Commissioner announced a renewed focus on high income non-filers¹⁵ signally that now, more than ever, a willful failure to file will be vigorously pursued by the IRS, even if you are not a high profile taxpayer like Mr. Snipes or Ms. Hill.

Willful Non-Filers Versus Tax Evaders

For those who *intentionally* fail to file their tax returns in a timely fashion, particularly those “serial non-filers” like Mr. Brown who find themselves being prosecuted, there is often more going on. What is often going on is a series of intentional acts to defraud or conceal from the IRS information that would evidence an individual’s correct tax obligations. Such affirmative acts not only move a taxpayer into the realm of greater exposure for a criminal tax investigation and prosecution, but also increase the likelihood that such investigation will involve a charge of felony tax evasion.

Tax evasion, which is shorthand for a crime of willfully attempting to evade or defeat the assessment or payment of a tax, requires the government to prove that the individual engaged in some affirmative conduct for the purpose of misleading the IRS or concealing tax liability or assets.¹⁶ While a common method used to attempt to evade or defeat assessment of a tax is the filing of a false tax return that understates tax liability, either by omitting income, claiming deductions to which the taxpayer is not entitled, or both, the filing of a false tax return is not the only way in which a taxpayer can attempt to evade or defeat taxes or the payment thereof. Failing to file a return, coupled with an affirmative act of evasion and a tax due and owing, which is known as *Spies*¹⁷-evasion, qualifies as tax evasion. A mere failure to file a return, standing alone, cannot constitute an attempt to evade taxes.¹⁸

So what constitutes an “affirmative willful attempt” to evade? Here is a list of examples provided by the Supreme Court¹⁹: keeping a double set of books, making false entries

or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal*. That means, the acts, or attempts, by which defendants can attempt to evade are virtually unlimited.

Although the IRS reserves the right to investigate and prosecute those who intentionally don't file or pay taxes, the IRS is focused on tax compliance—its ultimate mission—and would rather work to encourage those individuals to come forward voluntarily or work out a payment plan instead of filing charges. In other words, if you cooperate and come in before the IRS finds you, you're less likely to be prosecuted. On the other hand, the more blatantly fraudulent a taxpayer's actions are, the more likely it is that the IRS will pursue prosecution.

Conclusion

With this in mind, for non-filers, whether frozen in place due to years of non-compliance or driven to stay out of sight by something more damaging than nonfeasance, it should be noted that the statute of limitations for a felony failure to file, *e.g.*, *Spies* tax evasion can last as long as *six years from the later of* the statutory due date of the tax return, including any extension granted, or the last act in furtherance thereof.²⁰ In the case of a civil investigation involving a failure to file a tax return, while the non-filer may not be facing a loss of liberty, the statute of limitations for the imposition of taxes, penalties and interest does not start in most cases until the taxpayer actually files the missing returns.²¹ Meaning, the IRS can follow a non-filer forever, or *what Benjamin Franklin said*.

ENDNOTES

* Prior to joining the firm, Ms. Brown served as the Acting United States Attorney, the First Assistant United States Attorney and the Chief of the Tax Division of the Office of the U.S. Attorney (C.D. Cal). Ms. Brown obtained her LL.M. in Taxation from the University of Denver.

¹ "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." Benjamin Franklin, in a letter to Jean-Baptiste Le Roy, 1789.

² Code Sec. 6012(a)(1)(A).

³ *K.M. Tedder*, CA-10, 86-1 USTC ¶9426, 787 F2d 540.

⁴ Code Secs. 6011(a), 6012(a), *et seq.*, and 6072(a). See also Reg. §1.6011-1(a).

⁵ See [www.irs.gov/compliance/criminal-investigation/serial-non-filer-pleads-guilty-to-](http://www.irs.gov/compliance/criminal-investigation/serial-non-filer-pleads-guilty-to-tax-evasion#:~:text=At%20sentencing%2C%20Brown%20faces%20a,restitution%20to%20the%20United%20States.)

[tax-evasion#:~:text=At%20sentencing%2C%20Brown%20faces%20a,restitution%20to%20the%20United%20States.](http://www.irs.gov/compliance/criminal-investigation/serial-non-filer-pleads-guilty-to-tax-evasion#:~:text=At%20sentencing%2C%20Brown%20faces%20a,restitution%20to%20the%20United%20States.)

⁶ See www.justice.gov/opa/pr/serial-non-filer-pleads-guilty-tax-evasion.

⁷ Code Sec. 7201.

⁸ Code Sec. 7203.

⁹ See www.justice.gov/archive/tax/usaopress/2008/txdv08_20080806_SnipesProsecutionCost.pdf.

¹⁰ See www.justice.gov/usao-nj/pr/singer-and-actress-lauryn-hill-sentenced-prison-failing-file-tax-returns-more-23-million.

¹¹ See www.irs.gov/pub/irs-utl/2019_irs_criminal_investigation_annual_report.pdf.

¹² *Id.*

¹³ IR-2020-49, March 5, 2020.

¹⁴ See www.treasury.gov/tigta/auditreports/2020reports/202030015_oa_highlights.html.

¹⁵ See www.irs.gov/newsroom/irs-increases-visits-to-high-income-taxpayers-who-havent-filed-tax-returns.

¹⁶ Code Sec. 7201.

¹⁷ *Spies*, SCT, 43-1 USTC ¶9243, 317 US 492, 499, 63 SCT 364.

¹⁸ *Id.*; *J. Hoskins*, CA-10, 2011-2 USTC ¶150,580, 654 F3d 1086, 1091; *W.E. Nelson*, CA-5, 86-1 USTC ¶9481, 791 F2d 336, 338.

¹⁹ *Spies*, 317 US at 499.

²⁰ Code Sec. 6531, *et seq.*

²¹ Code Sec. 6501(c).

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