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I. Introduction

The General Accounting Office has estimated that about five million individuals and couples with tax liabilities of about two billion dollars did not file the required income tax returns for the tax year 1972.[1] With the onslaught of tax protester movements in recent years and the escalating rate of inflation and rising incomes that pushes more taxpayers above the minimum income filing requirements, it is reasonable to assume that this statistic has remained at least relatively constant through the succeeding years.[2] What many of these nonfilers may not fully appreciate is that "[a]ny person . . . required by (Title 26 of the United States Code) . . . to make a return . . . , who *willfully* fails . . . to make such return . . . at the time or times required by law or regulations, shall, . . . be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both, together with the costs of prosecution."[3]

A large percentage of the American citizenry, whether they are

* B.A. Muhlenberg College; J.D. Dickinson School of Law. This article is being published under a pen name at the request of the author.

1. Gen. Acct. Office, *Report to the Congress, Who's Not Filing Income Tax Returns* (July 11, 1979) [hereinafter cited as Report to Congress]. Tax year 1972 data was used because it provided the most current and best available data at the time of the report.

2. Sixty-three million individual income tax returns were filed in 1972. Accordingly, eight percent of those required to file did not do so. This number increased to 87 million in 1978. *Id.* at 1, 5. If the eight percent figure remained constant, 7 million individuals failed to file in 1979.

3. 26 U.S.C. § 7203 (1980) (emphasis added). This article will be concerned primarily with the nonfiling of individual income tax returns which are required pursuant to 26 U.S.C. § 6012 (1976). The threshold gross income that will trigger the filing requirement for 1979, whether or not a tax is due is as follows:

Single under 65	$3300
Single over 65	4300
Married filing jointly:	
both under 65	5400
both over 65	7400
Married filing separately	1000

aware of it or not,[4] may be committing a federal crime. With increased computer sophistication and pressure from Congress and the General Accounting Office to utilize additional manpower to catch nonfilers, the Criminal Investigation Division of the Internal Revenue Service will continue to pursue prosecutions under 26 U.S.C. § 7203 with great frequency.[5] Accordingly, it will be the rare tax practitioner who tiptoes through his career without having to advise a client who has failed to file a tax return. This article will examine defenses to the charge of willful failure to file and procedures for the practitioner to employ in presenting these defenses before the Internal Revenue Service and the Department of Justice.[6] As noted by other commentators, it is difficult to predict from a simple perusal of case law what considerations will influence the Government to decline a criminal prosecution.[7] Therefore this article will occasionally rely on common sense and experience in criminal tax matters to suggest worthwhile lines of defense.

II. The Government's Burden

The Seventh Circuit has provided the most popular definition of the prima facie failure to file case in *United States v. Matosky*:[8]

> [T]he Government has proven its case when it has established beyond a reasonable doubt: that the defendant was required to file a return; that he knew he was so required; and that he willfully or purposefully, as distinguished from inadvertently, negligently, or mistakenly, failed to file such a return.[9]

Since willfulness is rarely subject to direct proof, it may be proved

4. United States v. Rosenfield, 469 F.2d 598, 600 (3d Cir. 1972) (it is no defense that taxpayer did not know that nonfiling is a crime).

5. In 1978, the efforts of the Criminal Investigation Division resulted in 717 recommended prosecutions and 356 convictions. Report to Congress, *supra* note 1, at 3. Although hundreds of decisions under 26 U.S.C. § 7203 (1976) have been reported, the case law is not fully developed, particularly with respect to "returns" filed by tax protesters. *See* note 84 and accompanying text *infra*.

6. The taxpayer will have four opportunities to present criminal defenses in the administrative criminal tax procedure:

(1) Before the Criminal Investigation Division if requested, *See* Treas. Reg. § 601.107(b)(2) (1968);

(2) Before District Counsel of the Internal Revenue Service (a conference is usually offered by letter);

(3) Before the Department of Justice if requested; and

(4) Before the Assistant United States Attorney.

Each agency or division may be receptive to different defenses. In 1977, Internal Revenue Service statistics indicate that the District Counsel declined 264 criminal recommendations from its own Criminal Investigation Division, the Department of Justice declined 222 cases recommended by the District Counsel, and the United States Attorneys declined 274 cases referred by the Department of Justice. *Chief Counsel Annual Report FY 1977,* Department of Treasury, Publication 1076 (1978).

7. *See, e.g.,* J. Boughner, *How Practitioners Should Handle Willful Failure to File Cases,* 32 J. OF TAX. 46 (1970).

8. 421 F.2d 410 (7th Cir.), *cert. denied,* 283 U.S. 904 (1970).

9. *Id.* at 413.

totally by circumstantial evidence.[10] Willfulness, therefore, becomes a matter for the jury to decide under proper instructions.[11]

The Government's case may consist merely of evidence of the nonfiling,[12] the gross income of the taxpayer for the year,[13] and perhaps evidence of a prior filing history to establish the taxpayer's knowledge of the return requirement.[14] Additionally, the Government may introduce Forms W-2 and 1099 that were issued to the taxpayer to show that he was reminded of his income and duty to file.[15]

The defense could argue that the Government has failed to meet its burden of proof. It is unlikely, however, that a passive defense will prove successful. As previously noted, the Government's prima facie case is easily proved. Moreover, the Government's conviction rate in criminal tax cases is extremely high, which indicates that it is highly selective in accepting cases for prosecution. The Government today will rarely bring a criminal prosecution where the tax deficiency is de minimis or the gross income, which triggers the filing requirement, is barely above the threshold amount.[16] This author found no reported cases in which the Government failed to prove that the gross income was above the threshold filing requirement.

An examination of cases indicates that the Government will rarely prosecute a case in which the taxpayer has failed to file only one time. Therefore, the Government's case is significantly bolstered by the defendant's failure to file a return in successive years, which is itself suggestive of willfulness.[17]

Minimal evidence is actually needed to obtain a section 7203 conviction for willful failure to file a tax return. Accordingly, the principle methods of successfully defending a failure to file case are

10. Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), *cert. denied,* 340 U.S. 917 (1951).

11. United States v. Murdock, 290 U.S. 389 (1933).

12. Self-authenticated, officially-certified I.R.S. computer printouts that show unfiled tax returns are accepted as proof of nonfiled tax returns. United States v. Farris, 517 F.2d 227 (7th Cir. 1975).

13. *See* United States v. Rosenfield, 469 F.2d 598 (3d Cir. 1972); Shy v. United States, 383 F. Supp. 673 (D. Del. 1975) (the Government can use the net worth method of proof to show that the taxpayer was required to file a return).

14. The case law has placed taxpayer in a "catch-22" dilemma with respect to his prior filing history. The taxpayer's filing of timely returns in prior years is evidence that permits the inference that he knew the law required him to file returns and that he willfully failed to do so. United States v. McCabe, 416 F.2d 957 (7th Cir. 1969), *cert. denied,* 396 U.S. 1058 (1970). Evidence that the taxpayer failed to file returns in other years, however, also suggests willfulness and a course of conduct in ignoring the obligation. *See* United States v. Ostendorff, 371 F.2d 729 (4th Cir.), *cert. denied,* 386 U.S. 982 (1967); United States v. Litman, 246 F.2d 206 (3d Cir.), *cert. denied,* 355 U.S. 869 (1957).

15. United States v. Cirillo, 251 F.2d 638, 639, n.9 (3d Cir. 1957), *cert. denied,* 356 U.S. 949 (1958).

16. *See* INT. REV. MAN. 9132 suggesting that criminal tax cases involving nominal tax deficiencies should be avoided.

17. United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir.), *cert. denied,* 386 U.S. 982 (1967); United States v. Litman, 246 F.2d 206, 208 (3d Cir.), *cert. denied,* 355 U.S. 869 (1957).

(1) attack a procedural defect in the Service's handling of the criminal investigation; (2) argue that Service policy will not be served by criminally prosecuting this particular taxpayer or that equitable reasons exist for not prosecuting this taxpayer; and (3) produce some affirmative evidence that the crime was not committed. The latter defense involves principally proof that the nonfiling was not willful.

III. Procedural Defenses

A. Government's Failure to Follow its Own Procedures

The tax practitioner or criminal tax attorney will often be retained by a taxpayer after the taxpayer has been interviewed by special agents of the Criminal Investigation Division and/or after the taxpayer has had delinquent returns prepared and filed with the agents. It may appear that defense of the case is now hopeless because the taxpayer has confessed to virtually everything but murder in the first degree.

At this stage, however, the attorney should question the taxpayer carefully with respect to the agents' prior conduct. It may be possible to have the damning testimony suppressed if one can demonstrate an indiscretion committed by the Service during its investigation.

Instances of failure to give Miranda warnings in initial interviews with taxpayers suspected of tax fraud may be rare. Authority exists, however, for suppressing evidence obtained in warningless interviews even though such warnings are not mandated by constitutional decisional law.[18]

On October 3, 1967, the Service issued a News Release which, in essence, stated that special agents would give Miranda type warnings in interviews with the taxpayer during a criminal investigation.[19] An interview conducted in violation of this published procedure lead to the decision of *United States v. Leahey.*[20] The court in *Leahey* examined the purpose of this procedure, which was admittedly to safeguard the constitutional rights of persons suspected of tax fraud. The issue in *Leahey* was framed as follows:

> whether we must exclude this evidence so that agencies will be compelled to adhere to the standards of behavior that they have formally and purposefully adopted in the light of the requirements of the Constitution, even though these standards may go somewhat farther than the Constitution requires.[21]

18. United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969). *Miranda* warnings are not required to be given to taxpayers in a noncustodial situation. *See* Beckwith v. United States, 425 U.S. 341 (1976).

19. I.R.S. News Release No. 897, October 3, 1967.

20. 434 F.2d 7 (1st Cir. 1970).

21. *Id.* at 10.

The court concluded that due process required the I.R.S. to follow the published procedure and that the evidence obtained in violation of such procedures must be excluded.

Similarly, in *United States v. Toussaint,*[22] the court ruled that continuation of an I.R.S. investigation without informing the taxpayer of the possibility of criminal prosecution, in contravention of rules in the I.R.S. "Audit Technique Handbook for Internal Revenue Agents," breached the Service's implied contracts with the public that it will follow its own rules.[23] In *Toussaint* as in *Leahey,* the court was concerned with the purpose of the internal regulation. In this instance, the Service itself recognized that taxpayers were more inclined to cooperate with revenue agents than with special agents. By continuing an investigation past the permissible point, that at which there were firm indications of fraud, the revenue agent was found to have obtained information through fraud and deceit. The further interrogation of the taxpayer prior to referral of the case to a special agent violated the taxpayer's fourth and fourteenth amendment rights.

The Supreme Court has shrouded the above cases with a degree of uncertainty in *United States v. Caceres,*[24] by ruling that the Internal Revenue Service is not required to follow all their procedural rules to the letter where compliance is not mandated by the Constitution or by statute. In *Caceres* the Internal Revenue Service conducted a "consensual" electronic surveillance without getting the final prior approval from Justice Department officials as required by the Internal Revenue Manual, a public document. The Court particularly noted that the taxpayer could not reasonably contend: (1) that he relied on the regulations; (2) that their breach had any effect on his conduct; or (3) that his rights were in any way impaired. The taxpayer's conduct did not depend upon the approval or disapproval of a Justice Department official.

Caceres may be a decision of very limited import. It may not overrule the decisions discussed above where the taxpayers could certainly argue that the failure to follow Internal Revenue Service procedures mislead them with regards to the nature and seriousness of the investigation.

The Supreme Court's rationale in *Caceres* may be summarized as follows:

(1) It is incumbent upon agencies to follow their own proce-

22. 456 F. Supp. 1069 (S.D. Tex. 1978). The court found that the taxpayer's fourth and fourteenth amendment rights had been violated.

23. INT. REV. MAN. 9322.1 provides that if an examiner discovers firm indications of fraud, he will suspend his activities at the earliest practicable opportunity and forward a report to the Chief of the Criminal Investigation Division.

24. 440 U.S. 741 (1979). *See* Note, 85 DICK. L. REV. 183 (1980).

dures where the rights of individuals are affected.[25]

(2) A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.[26]

(3) There may be instances when the Court should enforce the procedure even though there is no constitutional or statutory violations.[27]

(4) The circumstances in *Caceres* presented no reasons why a court should exercise what discretion it may have to exclude evidence obtained in violation of the procedure.[28]

Clearly the door has been left wide open for further attacks on the Service's failure to follow its procedures and regulations. Notwithstanding *Caceres,* the factual situations of *Leahey* and *Toussaint* may be decided today exactly as they were previously, since in those two instances the courts found compelling and constitutional reasons to enforce the internal procedures.

A manual provision that has not been judicially tested but which has specific importance in the failure to file domain is I.R.M. 5(12)22, "Guidelines for Initial Taxpayer Contact, Return Compliance Programs." This provision states, in part, that "before soliciting a delinquent return, revenue officers should determine whether or not a referral [to the Criminal Investigation Division] is justified based upon the fraud indicators in I.R.M. 5(12)23.1:(1)."[29] The manual further provides that "[c]ollection activity personnel will suspend activities as soon as possible after indications of fraud are uncovered."[30] A revenue officer is often the first I.R.S. employee to investigate an instance of nonfiling. He is required to make an initial determination of whether the case has criminal implications which warrant a referral to the Criminal Investigation Division. If a referral to the Criminal Investigation Division is justified, delinquent returns are not to be solicited. If the revenue officer solicits a delinquent return, he is inferring to the taxpayer that no criminal investigation will be pursued if the information is supplied. The so-

25. *Id.* at 751 n.14.
26. *Id.* at 749.
27. *Id.* at 755, 756.
28. *Id.* at 756.
29. INT. REV. MAN. 5(12)22(f)(5). These fraud indicators, if not present, can provide arguments for the taxpayer that a criminal case does not exist. The fraud indicators identified in the Manual include:

(a) a substantial tax liability involving at least two taxable years;
(b) a sophisticated taxpayer;
(c) inability or refusal to explain nonfiling;
(d) misleading statements;
(e) history of nonfiling coupled with ability to pay;
(f) concealment of assets;
(g) unusual payment of business expenses with cash or cashing of business receipts; and
(h) attempts to interfere in the investigation.

30. INT. REV. MAN. 5(12)23.2(1).

licitation is in the nature of a civil compromise.[31] Furthermore, for reasons discussed in *Toussaint,* further information gathering by the revenue officer, after observing firm indications of fraud, may violate the taxpayer's fourth amendment rights and at least provide grounds for suppression of testimony given to the Service.

When a decision has been made to file a delinquent return, a decision to be discussed below, the taxpayer may even plant the seed of solicitation by asking the revenue officer for advice as to his future conduct. Often the advice will be to file delinquent returns. Once this course has been determined,[32] it is to the taxpayer's advantage to submit the returns prior to the appearance of any special agent. The purpose of this strategy is twofold. It may convince the revenue officer to treat the case as a simple late filing, rather than a potential fraud referral. Should the case be referred to the criminal division, it may influence that division to decline to prosecute in light of the solicitation issue. If the filing in response to a solicitation or semi-solicitation does nothing more than present counsel with an equitable argument in the administrative conferences, it is at least an edge which may affect someone's judgment in the chain of command. Conversely, in flagrant instances of nonfiling, the delinquent returns may be given no mitigating consideration.

In conclusion, any procedural defect in the criminal investigation should be brought to the attention of the Government.[33] Its effect cannot be predicted, but it may be assumed that the Government does not wish to constantly place its mistakes before the courts and test the seriousness of them, particularly when they tend to mislead or prejudice the taxpayer. Naturally, when the Government's error is harmless, as in *Caceres,* one can assume that the case will be prosecuted.

B. The Fatal Indictment

A rare defense to a failure to file charge, but one that should not be overlooked, is an attack on the indictment for failing to accurately state the proper due date for the filing of an income tax return. In *Goldstein v. United States,*[34] the indictment was actually dismissed

31. In United States v. Collins, 457 F.2d 781 (6th Cir. 1972), the Sixth Circuit ruled that the taxpayer was entitled to a jury instruction to the effect that if the taxpayer, who had once been visited by revenue agents who helped him prepare returns for three years past, believed that another revenue agent would come around to collect any taxes owed in future years, he could be acquitted for the section 7203 charge.

32. *See* notes 48 through 64 and accompanying text *infra* for discussion of the filing of delinquent returns.

33. Internal Revenue Manual provisions will not always be admissible. *See* Cooley v. United States, 501 F.2d 1249 (9th Cir.), *cert. denied,* 419 U.S. 1123 (1974) (the manual provisions did not support the defense that the taxpayer believed he was not required to file a return).

34. 502 F.2d 526 (3d Cir. 1974). *Cf.* United States v. Pandilidis, 524 F.2d 644 (6th Cir.

when it failed to note that the due date for the return had been extended past April 15.[35] The court reasoned that the grand jury had weighed the defendant's state of mind on the wrong day and in the wrong circumstances. Although most failure to file charges will now be brought by information, which is amendable, *Goldstein,* if carried to its extreme, may hold that if an indictment read "April 15" as the due date for the return and April 15 were a weekend day, the indictment would be subject to challenge.[36] One must recognize though, that this slight variation is of a completely different nature than the error in *Goldstein,* where a request for an extension of time had been filed.

IV. Equitable Arguments to be made Before the Internal Revenue Service, the Department of Justice and the Jury

A. A De Minimis Tax Deficiency

Should a case arise in which the taxpayer is able to show that his deductions or losses are such that no tax was due, every effort should be made to impress upon the Government that the case lacks jury appeal. Although the criminal statute does not require a tax liability,[37] nor must the Government prove an intent to defraud,[38] the actual amount of the tax liability will be extremely relevant where the defense is based upon an honest belief by the taxpayer that he did not have to file a return if no tax was owed.[39] Further, if the taxpayer actually owed no tax for the year in question, then although he may be guilty of a technical violation, it would not normally be a case of sufficient magnitude to justify criminal prosecution in the eyes of the Government.[40]

1975), *cert. denied,* 424 U.S. 933 (1976) (court ruled that trial court's permission to amend indictment by bill of particulars to take into account extensions was harmless error and not of constitutional dimensions).

As to when the offense of failure to file is committed, see Tilzer, *Where Does the Taxpayer Commit the Offense of Willfully Failing to File His Return,* 45 J. OF TAX. 54 (1977).

35. When an extension of time for filing is granted and no return is ever filed, the statute of limitations runs from the end of the extension period. United States v. Habig, 390 U.S. 222 (1969); United States v. Twining, [1975-2] U.S. Tax Cas. (CCH) ¶ 9768 (N.D. Cal. 1975).

36. *See* 26 U.S.C. § 7503 (1980); Treas. Reg. § 1.6072-1(d) (1968).

37. Spies v. United States, 317 U.S. 492 (1943).

38. United States v. Klee, 494 F.2d 394 (9th Cir. 1974); United States v. Fahey, 411 F.2d 1213 (9th Cir. 1969), *cert. denied,* 396 U.S. 957 (1970) (willfulness need not entail a purpose to evade tax or to defraud).

39. *See* United States v. Walker, 479 F.2d 407 (9th Cir. 1973), in which a conviction was reversed because the trial court admitted prejudicial evidence about an increase in net worth to prove willfulness after the Government had already established a duty to file. If the taxpayer presented evidence that he had no tax liability and therefore believed that he was not required to file, the Government could introduce evidence to prove the tax liability of the taxpayer.

40. Boughner, *supra* note 7, at 46.

B. *Cooperation: Filing Delinquent Returns and the Payment of Liabilities*

If a client approaches counsel prior to any investigation by the Service with the revelation that he has not filed a tax return, delinquent returns should be filed immediately[41] or at the very least, the tax liabilities should be paid anonymously.[42] Although the Service no longer assures nonprosecution in a truly voluntary, conscience motivated disclosure, it will rarely prosecute in the face of such a disclosure.[43] To advise otherwise increases the risk of a criminal prosecution at a later date if the taxpayer is discovered.

More commonly, the nonfiling client will come to counsel after he has been discovered by the Internal Revenue Service. Assuming the client has retained counsel prior to confessing to special agents, the attorney must fully review the case and make a decision as to whether the taxpayer should cooperate with the Service, open his books and records, and/or file delinquent returns. Cooperation in the investigation has been a favorite subject of commentators for many years.[44] The general consensus is that only under the rarest circumstances should counsel cooperate with investigators or subject his client to an interview.

Two conceivable situations in which one might agree to an interview are (1) when your client insists on an interview and is so obviously innocent and convincing that an interview will guarantee the withdrawal of special agents from the case[45] and (2) when your client is so pathetic, uneducated, and/or infirm that not even the Internal Revenue Service would seek prosecution. The latter situation is known as the "poor slob" defense. Although it will occasionally lead to withdrawal of the special agents, the dangers of extracting a full confession in an interview are so great that the defense is best presented only by counsel. A tact which may alleviate pressure from the special agents and portray at least an aura of cooperation is to submit the client to an interview solely with regard to biographical information. A general rule of thumb, however, is that when in doubt, do not cooperate with special agents.[46]

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41. The Treasury Department on January 10, 1952, formally abandoned its long-standing "voluntary disclosure policy." Treas. Dep't Info. Release No. S-2930. I.R.S. News Release IR-432 (December 13, 1961) notes, however, that the Service will carefully consider a voluntary disclosure in deciding whether to prosecute.

42. *See* United States v. Boughner, 350 F.2d 663 (7th Cir. 1965) (attorney need not disclose name of taxpayer making anonymous payment).

43. This view is generally shared by the tax bar. *See* Boughner, *supra* note 7, at 46.

44. A most thorough discussion of the pros and cons of cooperation can be found in J. BALTER, TAX FRAUD AND EVASION, Chapter 6 (3d ed. 1976).

45. *See* Tilzer, *Protecting the Client's Rights During the Tax Fraud Investigation Process,* 41 J. OF TAX. 356 (1974).

46. Barnett, *Procedures in Tax Fraud Investigations,* 47 TAXES 807, 814 (1969). *See also* Bacon, *IRS and the Criminal Lawyer,* 7 TRIAL 33-4 (1971). Ross, *What Every Lawyer Should*

Contrary to the opinion of many commentators who weigh non-cooperation as a negative to the extent that it will alienate the special agent and propel him to vehemently investigate the case,[47] it is now so commonplace for attorneys to resist disclosures and interviews that this should no longer be a factor.

The most difficult decision to make and the most critical in any failure to file case is whether to file a delinquent return subsequent to the entry of I.R.S. agents into the case. The dangers of filing a delinquent return are several.

First, a delinquent return provides the jury or the court with a full confession[48] of the taxpayer's duty to file. As noted previously however, the duty to file is rarely in question, at least as far as threshold dollar amounts are concerned. It is difficult to predict the effect a return "confession" will have on the jury. One likely response is that if the taxpayer could file soon after contact by the Service, why could he not have filed on time. Furthermore, admissions greatly simplify the Government's presentation at trial. In sophisticated criminal tax cases, it is often to the benefit of the defense to make the case as difficult and complex as possible for the jurors so that they will be less inclined to convict.

Second, the filing of a delinquent return, if fraudulent, can turn what would have been a misdemeanor into a felony.[49] *Spies v. United States,*[50] teaches that if the taxpayer does nothing more than totally disregard the filing obligation, he is subject only to the sanctions of a misdemeanor for failing to file a return. Furthermore, a fraudulent delinquent return can subject the client to a civil fraud penalty under 26 U.S.C. § 6653(b), which may not otherwise be applicable if there is merely a failure to file.[51] Accordingly, if the tax-

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Know About Tax Evasion and Fraud Cases, 54 A.B.A.J. 1102 (1968); FREEMAN AND FREEMAN, THE TAX PRACTICE HANDBOOK, § 10-5 (1973).

47. Research Institute of America, 25 FED. TAX COORDINATOR 2d V-3406 (1980) describes the following consequences of failing to cooperate:

(1) the suspicions of agents are increased;

(2) it will leave a bad impression on the jury; and

(3) it may lead to an increased sentence.

The following are listed as advantages of cooperation:

(1) it allays the suspicions of the agents;

(2) it is evidence of good faith if the case goes to the jury; and

(3) it tends to decrease the sentence if convicted.

48. *See* United States v. Calderon, 348 U.S. 160 (1954) (conviction sustained primarily on admissions); Benes v. Canary, 224 F.2d 470 (6th Cir. 1955); Vloutis v. United States, 219 F.2d 782 (5th Cir. 1955).

49. A false return could subject the taxpayer to a charge of attempted tax evasion under 26 U.S.C. § 7201 (1980) or filing a false and fraudulent income tax return under 26 U.S.C. § 7206(1) (1980).

50. 317 U.S. 492 (1943) (section 7201 involves some willful commission in addition to a willful omission). *Cf.* United States v. Kafes, 214 F.2d 887 (3d Cir.), *cert. denied,* 348 U.S. 887 (1954) (failure to file plus "attempt" to evade equals evasion).

51. *See* Bolden v. Commissioner, 37 T.C.M. (CCH) 1232 (1978) (fraud penalty approved for fraudulent delinquent returns). Although there is no need to prove an "attempt" to evade

payer has substantial income which he refuses to report under any circumstances and/or if the taxpayer wishes to file a return which is not totally accurate, he should be advised not to file a delinquent return, and to assert the privilege against self-incrimination. Nevertheless, the taxpayer could make an advance payment on his tax liability without the danger of filing an amended return. Although the advance payment will not satisfy the continuing obligation to file a return, it may produce the same subtle mitigating effect upon the Government.

Third, the filing of a delinquent return should never include an admission to the fraud penalties.[52] Such conduct is practically an admission of willfulness. Furthermore, even payment of all the civil liabilities and penalties will not preclude a criminal prosecution.[53]

Fourth, if the taxpayer's defense to the section 7203 charge is based on an alleged good faith belief that he was not required to file an income tax return, the filing of a delinquent return may destroy the effectiveness of that position. For example, if the taxpayer claims that he did not believe a filing was required because no tax was owed and a delinquent return shows a substantial tax liability, the defense is practically worthless. Similarly, if the defense is that the income tax laws are unconstitutional or that the taxpayer was exercising his fifth amendment privilege against self-incrimination and a delinquent return is filed, the jury will question the taxpayer's good faith at the time of the nonfiling.

The obvious intention in filing a delinquent return is to convince the Government and later the judge or jury that: (1) the failure to file, now corrected, was perhaps negligent but certainly not criminal; (2) the taxpayer is repentent; (3) the taxpayer never truly intended to evade his taxes;[54] and (4) the overall circumstances of this nonfiling suggest that the case is better handled civilly than criminally. One can see that the dangers in filing an amended return are concrete and possibly severe, while the advantages are speculative at

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tax to sustain the civil fraud penalty under 26 U.S.C. § 6653(b), the Government must still prove a specific intent to evade tax. *Compare* Jones v. Commissioner, 259 F.2d 300 (5th Cir. 1958) (failure to file insufficient to sustain fraud penalty) *with* Blackwell v. Commissioner, 24 T.C.M. (CCH) 1367 (1965) (fraud penalty sustained in failure to file case). In examining the case law, one could conclude that it is actually easier to obtain a criminal conviction for willful failure to file than it is to sustain the civil fraud penalty.

52. *See generally, Interest of Tax Practitioners in Fraud Cases on Increase,* 2 J. OF TAX 41 (1955).

53. It is no defense to a criminal charge that the taxpayer paid the civil penalties. Slick v. United States, 1 F.2d 897 (7th Cir. 1925). *See also* United States v. Ming, 466 F.2d 1000 (7th Cir. 1972), *cert. denied*, 409 U.S. 915 (1973) (late filing and late payment are immaterial to willfulness). In the same vein, United States v. Sansone, 380 U.S. 343 (1965) held that "the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by section 7203." *Id.* at 354.

54. *See* notes 24 and 53 and accompanying text *supra.* Procrastination, however, is no defense to a section 7203 suit. Hull v. United States, [1976-1] U.S. Tax Cas. (CCH) ¶ 9181 (10th Cir. 1975); United States v. Browney, 421 F.2d 48 (4th Cir. 1970).

best. Equitable arguments may persuade the agency not to prosecute, but if this strategy fails, the same arguments may prove inadmissible before the jury because the defenses presented may not be considered legal in nature.

There is one further potential strategic advantage to be gained by filing a delinquent return. The filing of a non-fraudulent delinquent return will start the running of the three year civil statute of limitations on assessment even if the failure to file was deliberate and fraudulent with the intent to evade tax.[55] Normally, the civil statute remains open during a criminal investigation because of fraud or the nonfiling.[56]

There is an expressed Service policy not to issue statutory notices of deficiency[57] in open criminal tax investigations.[58] The reasons for this policy are twofold. First, the Government does not wish to disclose its entire criminal case to the taxpayer in a civil proceeding in which the rules of discovery are broad.[59] Second, the Government may lose the civil case and be faced with a collateral estoppel argument in the criminal trial.[60]

Notwithstanding usual I.R.S. practice of not issuing statutory notices in open criminal cases in which non-fraudulent delinquent returns are concerned, the I.R.S. may feel that protection of revenue demands that a notice be issued. If a statutory notice is not issued, any additional civil liabilities not shown on the delinquent return, including the civil fraud penalty, are beyond assessment.

It is very possible that three years will pass from the date of filing the delinquent return to the criminal trial for willful failure to file. If this happens, the Government will solicit consent to extend the statute of limitations.[61] Counsel will have to decide whether to pressure the Service into issuing a statutory notice of deficiency. If the notice is issued, the taxpayer will be facing civil and criminal litigation at the same time. This may or may not be to the taxpayer's advantage.[62] The remote possibility exists that the Government will

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55. 26 U.S.C. § 6501(c) (1980). Bennett v. Commissioner, 30 T.C. 114 (1958) held that:
> once a non-fraudulent return is filed putting the Commissioner on notice of a taxpayer's receipts and deductions, there can be no policy in favor of permitting assessment thereafter at any time without limitation. We think the statute of limitations begins to run with the filing of such return.

Id. at 123-24. The Service has adopted this position in Rev. Rul. 79-178, 1979-1 C.B. 435.

56. 26 U.S.C. § 6501(c) (1980).

57. 26 U.S.C. § 6212 (1980).

58. INT. REV. MAN. 9325.2.

59. INT. REV. MAN. 9325.2(4)(b)2 and (d).

60. In United States v. Abatti, 463 F. Supp. 596 (S.D. Calif. 1979), the court held that a Tax Court decision in favor of taxpayer precluded the Government, by operation of collateral estoppel, from prosecuting for tax evasion and making false returns.

61. The taxpayer may consent to an extension of the statute of limitations, 26 U.S.C. § 6501(c)(4) (1980) (civil statute).

62. The disadvantages of dual trials include substantially increased costs and legal fees

decide not to issue the notice or that the notice once issued so prejudices the criminal case that criminal prosecution should be avoided.

Filing a delinquent return can prove quite hazardous and many are of the opinion that it serves no useful purpose.[63] It is, however, one affirmative act that the taxpayer can take in an effort to prevent a criminal prosecution. At least two courts have noted that cooperation with I.R.S. agents may be an indication of an absence of fraudulent intent.[64] Similarly, cooperation with revenue agents supports the taxpayer's contention that the nonfiling was merely negligent or inadvertent.

V. Substantive Defenses

A. Did the Taxpayer File a Return?

On occasion a taxpayer will maintain that tax returns were filed and that the I.R.S. computer records indicating he or she has not are in error. In an excellent article on the subject of willful failure to file,[65] Jackson L. Boughner suggests that if counsel pressures the taxpayer to produce proof of payment of his tax liabilities and copies of his returns, the dishonest taxpayer will usually admit none were filed. If, however, your client is steadfast in his contention, *Liebert v. United States*[66] provides guidance. Mr. Liebert was an attorney who clung to the defense that he had filed returns, despite I.R.S. records indicating that none had been received. Liebert's counsel made a discovery motion under Federal Rule of Criminal Procedure 16(b) for access to the Internal Revenue Service Center computer equipment and a computer generated list of nonfilers. This motion was granted by the trial court. Mr. Liebert intended to contact other individuals on the nonfilers list to determine whether they had in fact filed returns. With this information in hand, Liebert could show that the Government records were unreliable. Liebert also wanted his computer expert to run tests on the I.R.S. computer systems. On appeal, the Government argued that they would agree to provide other information and data and access to the computers, but the list of nonfilers should be protected. The Third Circuit agreed. Nevertheless, when it came time to permit access to the highly sophisticated I.R.S. computer system, and other data as required by the court or-

and subjecting the taxpayer to the broad discovery in the civil case, which might be used in the criminal trial.

63. *See, e.g.,* BALTER, *supra* note 44, at ¶ 6.02(7).

64. *See* Toledano v. Commissioner, 362 F.2d 243 (5th Cir. 1966); Melinder v. United States, 281 F. Supp. 451 (W.D. Okla. 1968) (amended returns filed one and one-half months after revenue agents appeared).

65. Boughner, *supra* note 7, at 48.

66. 519 F.2d 542 (3d Cir. 1975), *cert. denied,* 423 U.S. 485 (1976).

der, the Government failed to comply and the information was dismissed. The Government chose to disobey the discovery order and risk dismissal of its case rather than disclose certain information that it felt was important to protect. Before all the nonfilers of the world ease a sigh of relief, it is reasonable to assume that a trial court may not grant such a discovery motion unless (1) the taxpayer has maintained from the onset that he filed returns and (2) the taxpayer has some proof that a return was filed, such as proof of payment of liabilities or a copy of the return.[67]

B. Was the Nonfiling Willful?

The Supreme Court laid to rest a longstanding dispute as to the definition of willfulness in *United States v. Pomponio.*[68] The Court declared that the only necessary motive to establish willfulness is the intentional violation of a known legal duty. It further held that evil motive or bad purposes were not necessary elements of willfulness.[69] The taxpayer's motive for not filing is, however, relevant when it affects one of the elements of the offense as defined in *Matosky.*[70] In *Matosky,* the taxpayer claimed that he did not file returns in order to avoid detection and apprehension for other crimes he may have committed. The court ruled that the taxpayer need not have a tax related motive to be convicted for nonfiling. The court further stated that the taxpayer's reasons for not filing are irrelevant *as long as* the elements of the offense are proved.[71] The taxpayer will often wish to present evidence of his motive to rebut the Government's usual circumstantial proof of willfulness. Accordingly, the taxpayer's motive will often prove relevant to the issue of willfulness as further discussed below.

1. Unsuccessful Defense Against Willfulness.—In addition to those unsuccessful lines of defense previously discussed,[72] the following defenses have proven unsuccessful in mitigating willfulness or otherwise precluding prosecution: (1) chronic alcoholism prevented the taxpayer from forming the requisite criminal intent;[73] (2)

67. Although the court opinions in *Liebert* give no indication whether these factors were considered, it appears that Liebert offered no proof that he filed a return.

68. 429 U.S. 10 (1976).

69. The Court previously held in United States v. Bishop, 412 U.S. 346 (1973) that willfulness has the same meaning in misdemeanor and felony sections of the Internal Revenue Code.

70. United States v. Matosky, 421 F.2d 410 (7th Cir.), *cert. denied,* 288 U.S. 904 (1970). *See* United States v. Martin, 507 F.2d 428 (7th Cir. 1974) (trial court reversed for instructing that motive was irrelevant).

71. *See* notes 8, 9 and accompanying text, *supra. Cf.* Oliver v. United States, 54 F.2d 48 (7th Cir.), *cert. denied,* 285 U.S. 543 (1931) (fear of reporting income from questionable sources was indicative of willfulness).

72. *See* notes 4, 37, 38, 53, 54 and 70 *supra.*

73. United States v. Jalbert, 504 F.2d 892 (1st Cir. 1974).

Section 7203 is unconstitutional due to vagueness;[74] (3) the taxpayer is confined to a hospital and gravely ill;[75] (4) professional and domestic pressures negated intent;[76] (5) the taxpayer had no funds to pay the tax;[77] (6) the Government was aware of taxpayer's liability because a partnership return was filed;[78] (7) Federal Reserve Notes are not legal tender;[79] (8) the taxpayer was a victim of selective prosecution because of his protester activities;[80] and (9) the taxpayer feared that filing a return would disclose previous nonfilings.[81]

A defense that can be successful is to shift the blame to an accountant or other representative who either (1) gave incorrect advice after being told all the facts[82] or (2) failed to file a return for the taxpayer as promised.[83]

2. Two Common Defenses To Willfulness

a. Lack of funds plus belief that returns cannot be filed without remittance.—A bona fide misunderstanding about one's duty to file a return is a defense to section 7203.[84] The most popular claim is that the taxpayer lacked funds with which to pay the tax on or about April 15 and had no idea that a return could be filed without remittance. Although very few people actually know that a tax return can be filed without remittance, when the defense is raised and offered, the jury often rejects it.[85] The defense may seem like an afterthought or convenient excuse to the jurors. The taxpayer must almost convince a jury that he believed that he was relieved of the filing obligation because of lack of funds. This is one defense that the Government can easily rebut by showing that the taxpayer had access to funds on or about the due date of the return.[86]

74. United States v. Ming, 466 F.2d 1000 (7th Cir. 1972), *cert. denied,* 409 U.S. 915 (1973).

75. *See In re* Goldberg v. Hoffman, 225 F.2d 463 (7th Cir. 1955) (U.S. Attorney has discretion whether to prosecute); Treas. Dep't Info. Release No. S-2910 (Dec. 11, 1951).

76. Bernabei v. United States, 473 F.2d 1385 (6th Cir. 1973); United States v. Haseltine, 419 F.2d 579 (9th Cir. 1970); United States v. Eustis, 409 F.2d 228 (9th Cir. 1969). Haskell v. United States, 241 F.2d 790 (10th Cir.), *cert. denied,* 354 U.S. 921 (1957).

77. Ripperberger v. United States, 248 F.2d 944, 955 (4th Cir. 1957), *cert. denied,* 355 U.S. 940 (1958); Yarborough v. United States, 230 F.2d 56 (4th Cir.), *cert. denied,* 351 U.S. 969 (1956).

78. United States v. Harrison, [1972-2] U.S. Tax Cas. (CCH) ¶ 9573 (E.D.N.Y. 1972), *aff'd,* [1973-1] U.S. Tax Cas. (CCH) ¶ 9295 (2d Cir.), *cert. denied,* 411 U.S. 965 (1973). *See also* United States v. Hayes, [1960-2] U.S. Tax Cas. (CCH) ¶ 9783 (E.D. Wis. 1960).

79. United States v. Gardiner, 531 F.2d 953 (9th Cir. 1976).

80. *Id.*

81. United States v. Egan, 459 F.2d 997 (2d Cir.), *cert. denied,* 409 U.S. 875 (1972).

82. Kuhn v. United States, 42 F.2d 210 (3d Cir. 1930).

83. United States v. Platt, 435 F.2d 789 (2d Cir. 1970).

84. Murdock v. United States, 290 U.S. 389 (1933).

85. *See, e.g.,* United States v. Lemlich, 418 F.2d 212 (5th Cir. 1969), *cert. denied,* 397 U.S. 913 (1970).

86. *See* United States v. Haller, 543 F.2d 62 (9th Cir. 1976) in which evidence of net worth and expenditures were used to rebut a defense of lack of funds. The taxpayer did not file a return when he later acquired funds, which cast doubt on his defense.

b. The tax protester.—An increasing number of taxpayers in recent years have filed "returns" with only their name, social security number and an assertion of the fifth amendment.[87] This situation raises two questions: (1) has a return been filed and (2) if not, is the failure to file willful?

The answer to the first question is relatively clear. The document filed will not be considered a return unless it provides sufficient information from which the Commissioner can compute a liability.[88] One defense is to argue that the "return" filed contained sufficient data for the Government to compute a liability albeit an incorrect one.[89] In most protester cases the courts find that no return has been filed.

Taxpayer arguments that all financial and business information required by a return is protected from disclosure by the fifth amendment have similarly been dismissed.[90] The Supreme Court touched on this issue in *United States v. Sullivan,*[91] in which it stated

> If the form of return provided called for answers that the defendant was privileged from making, he could have raised that objection in the return, but could not on that account refuse to make any return at all. It would be an extreme if not an extravagent application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made a crime.

Although taxpayers can find some solace in the first sentence of the above quote, the Court in *Sullivan* made a rather definitive statement that the fifth amendment does not protect one from filing a

87. A recent variation of this protest is the filing of a Form 1040 that contains zeros in the spaces provided for supplying financial information. Interestingly enough, the Ninth Circuit has held that one cannot be convicted for failing to file a return when such a form is filed. United States v. Long, [1980-2] U.S. Tax Cas. (CCH) ¶ 9480 (9th Cir. 1980). The court in *Long,* however, suggested that the taxpayer may be subject to the criminal charge of filing a false return under 26 U.S.C. § 7206(1) (1980). *See* United States v. Smith, [1980-2] U.S. Tax Cas. (CCH) ¶ 9480 (5th Cir. 1980) (forms containing zeros and constitutional objections did not constitute a return).

Forms that fail to provide amounts, even zeros, will not be considered returns. United States v. Schiff, 612 F.2d 73, 77 (2d Cir. 1977); United States v. Klee, 494 F.2d 394 (9th Cir.), *cert. denied,* 419 U.S. 835 (1974). *Cf.* United States v. Irwin, 561 F.2d 198 (105h Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978) (no return when only entry indicated that taxpayer was due a refund).

88. Florsheim Bros. Dry Goods Co. v. United States, 280 U.S. 453 (1930); United States v. Johnson, 577 F.2d 1304 (5th Cir. 1978); United States v. Daly, 481 F.2d 28 (8th Cir. 1973) (fifth amendment privilege does not extend to the failure to file a tax return); United States v. Porth, 426 F.2d 519 (10th Cir.), *cert. denied,* 400 U.S. 824 (1970). *See* discussion in note 87 *supra.*

89. *See* note 87 *supra.* Counsel, however, may be subjecting the client to a false return charge by presenting this argument.

To constitute a return the "return" must be vverified by the taxpayer. *See generally* United States v. Moore, [1980-2] U.S. Tax Cas. (CCH) ¶ 9627 (7th Cir. 1980).

90. United States v. Karsky, 610 F.2d 548 (8th Cir. 1980); United States v. Edelson, 604 F.2d 232 (3d Cir. 1979) (fifth amendment privilege is no defense to the charge of failing to file a tax return).

91. 274 U.S. 259, 263-64 (1927).

return and that a form "return" without financial data will be no return at all.

The tax protester, however, should get to the jury with the issue of whether he misunderstood the legal right to assert the fifth amendment and, therefore, lacked the requisite willfulness. In protester cases the Government will often introduce testimony about the taxpayer's prior involvement in the tax protest movement.[92] This testimony is evidence that the taxpayer's activities were merely a form of protesting the income tax laws and were not the result of a misunderstanding or misinterpretation. To support its argument the Government has been able to obtain the following jury instruction: "A good faith misunderstanding of the law may negate willfulness [but] a good faith disagreement with the law does not."[93] Similarly, the courts have admitted evidence of prior filings by the taxpayer to demonstrate the lack of any good faith misunderstanding of the law's filing requirements.[94]

As might be suspected the great majority of recent decisions with respect to tax protesters have resulted in affirmance of convictions.[95]

VI. Conclusion

A defense to willful failure to file is often difficult but not insurmountable. The explanations for nonfiling are limitless.

The practitioner should raise all possible procedural, equitable and substantive defenses as he can to Government representatives at all stages of administration.[96] If trial is necessary a key ingredient to acquittal is the sincerity of the taxpayer. With over five million nonfilers every year, the taxpayer may be lucky enough to find a person on the jury who is one of those five million and who is every bit as sincere as the taxpayer.

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92. *See, e.g.,* United States v. Francisco, [1980-1] U.S. Tax Cas. (CCH) ¶ 9196 (8th Cir. 1980) (I.R.S. had attempted to explain law to the taxpayer subsequent to prior nonfilings).

93. United States v. Karsky, 610 F.2d 548, 550 (8th Cir. 1980). In *Karsky,* taxpayer claimed to have good faith but mistaken belief that the Internal Revenue Code is unconstitutional and that the fifth amendment permits refusal to answer questions on the return).

94. United States v. Karsky, 610 F.2d 548 (8th Cir. 1980); United States v. Wade, 585 F.2d 573 (5th Cir. 1979).

95. *See, e.g.,* United States v. Francisco, [1980-1] U.S. Tax Cas. (CCH) ¶ 9196 (8th Cir. 1980); United States v. Edelson, 604 F.2d 232 (3d Cir. 1979); United States v. Evanko, [1979-2] U.S. Tax Cas. (CCH) ¶ 9544 (5th Cir. 1979); United States v. Wade, 585 F.2d 573 (5th Cir. 1979) (amount of income not privileged although source of income may be).

96. A criminal defendant is entitled to have instructions presented relating to any theory of defense for which any foundation in the evidence exists, no matter how weak or incredible that evidence may be. United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956).