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## ARTICLES

# Constitutional Implications Triggered by the Imposition of Criminal Sanctions Under Section 268(b) of the Tax Reform Code of Pennsylvania (72 P.S. § 7268(b))

Roseann B. Termini\*  
JoAnn C. Petroziello\*\*

### I. Historical Overview and Introduction

The first permanent sales and use tax legislation instituted in Pennsylvania was enacted under the Selective Sales and Use Tax Act.<sup>1</sup> Subsequently, in 1963, the Legislature amended the Selective Sales and Use Tax Act and renamed it the Tax Act of 1963 for Education.<sup>2</sup> In 1971, the Tax Act of 1963 for Education was repealed and the current sales and use tax law, the Tax for Education

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1. Act of Mar. 6, 1956, Pub. L. 1228, No. 381 (1956) (arts. I-VI).

2. PA. STAT. ANN. tit. 72, § 3403-1 (1964). PA. STAT. ANN. tit. 72, § 3403-1 to § 3403-605 (1964) was repealed in 1971. See Herman C. McCloud, *Sales Tax and Use Tax Historical Developments and Differing Features*, 22 DUQ. L. REV. 823 (1984).

Act, was adopted as part of the Tax Reform Code of 1971.<sup>3</sup>

Article II of the Tax Reform Code of 1971 [hereinafter Tax Reform Code]<sup>4</sup> imposes a tax upon each separate retail sale of tangible personal property or services within Pennsylvania.<sup>5</sup> The current tax is six percent of the purchase price.<sup>6</sup> The Tax Reform Code mandates that the vendor collect this tax from the purchaser and pay this tax to the Pennsylvania Department of Revenue [hereinafter Department of Revenue].<sup>7</sup> The statute also dictates that every person required to collect and remit sales taxes file returns containing information regarding the imposed tax.<sup>8</sup> Furthermore, the Tax Reform Code specifically details that the person obligated to file the return must remit the tax to the Department of Revenue at the time of filing the return.<sup>9</sup>

This Article places primary emphasis on one section of the Tax Reform Code—section 7268(b),<sup>10</sup> which authorizes criminal sanc-

3. PA. STAT. ANN. tit. 72, §§ 7201-82 (1990 & Supp. 1991).

4. *Id.* §§ 7101-10004.

5. *Id.* § 7202.

6. *Id.* § 7203(h).

7. *Id.* §§ 7202, 7237.

8. PA. STAT. ANN. tit. 72, §§ 7215, 7271 (1990 & Supp. 1991).

9. *Id.* §§ 7221, 7222.

10. Section 7268(b) specifically provides:

[A]ny person maintaining a place of business in this Commonwealth, who advertises or holds out or states to the public or to any purchaser or user, directly or indirectly, that the tax or any part thereof imposed by this article will be absorbed by such person, or that it will not be added to the purchase price of the tangible personal property or services described in subclauses (2), (3) and (4) of clause (k) of section 201 of this article sold or, if added, that the tax or any part thereof will be refunded, other than when such person refunds the purchase price because of such property being returned to the vendor, and any person maintaining a place of business in this Commonwealth and selling or leasing tangible personal property or said services the sale or use of which by the purchase is subject to tax hereunder, who shall wilfully [sic] fail or refuse to collect the tax from the purchaser and remit the same to the department, and any person who shall wilfully [sic] fail, neglect or refuse to file any return or report required by this article or any taxpayer who shall refuse to pay any tax, penalty or interest imposed or provided for by this article, or who shall wilfully [sic] fail to preserve his books, papers and records as directed by the department, or any person who shall refuse to permit the department or any of its authorized agents to examine his books, records or papers, or who shall knowingly make any incomplete, false or fraudulent return or report, or who shall do, or attempt to do, anything whatever to prevent the full disclosure of the amount or character of taxable sales purchases or use made by himself or any other person, or shall provide any person with a false statement as to the payment of tax with respect to particular tangible personal property or said services, or shall make, utter or issue a false or fraudulent exemption certificate, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1000) and costs of prosecution, or undergo imprisonment not exceeding one year, or both: Provided, however, [t]hat any person maintaining a place of business outside this Commonwealth may absorb the tax with respect to taxable sales made in the normal course of business to customers present at such place

tions when sales tax returns are not filed and sales tax monies are not remitted to the Department of Revenue. The discussion is based, in part, on the constitutional implications pertaining to the requisite notice when criminal sanctions are possible. The imposition of criminal liability for a violation of the Tax Reform Code raises questions germane to both the United States and Pennsylvania Constitutions. This Article focuses on due process issues, specifically emphasizing statutory vagueness and notice requirements.

Pennsylvania case law is instructive and serves as a guide in differentiating terms such as "willful" and "tardy." The distinction between these terms is critical because Pennsylvania courts have determined that the imposition of criminal liability for failure to file sales tax returns hinges on whether the behavior is deemed "willful" or "tardy."<sup>11</sup> The goal of this Article is to impart understanding and insight into this complex area of criminal sales tax liability by highlighting recent developments in this area of the law.

## II. Due Process

What is the meaning of due process as applied to state sales taxes? Under the Due Process Clause of the United States Constitution, a tax may be unconstitutional if it is "so arbitrary and capricious as to amount to confiscation."<sup>12</sup> The terms "tyranny" and "despotism" have also been employed to describe taxes that were found to violate the Due Process Clause of the United States Constitution.<sup>13</sup> In essence, the Due Process Clause is violated in tax matters when such "taxation" does not amount to a tax at all, but constitutes a confiscation of property.

A statute that encompasses criminal liability must adequately notify the accused of the conduct the statute proscribes in order to comply with the Due Process Clause of the Fourteenth Amendment.<sup>14</sup> Legislation may contravene the Due Process Clause if it does

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of business without being subject to the above penalty and fines. The penalties imposed by this section shall be in addition to any other penalties imposed by any provision of this article.

PA. STAT. ANN. tit. 72, § 7268(b) (1990) (footnote omitted).

11. See *infra* notes 103-40 and accompanying text.

12. *Nichols v. Coolidge*, 274 U.S. 531, 532 (1927). See also *Heiner v. Donnan*, 285 U.S. 312 (1932).

13. Stanley S. Surrey, Comment, *Assignments of Income and Related Devices: Choice of the Taxable Person*, 33 COLUM. L. REV. 791, 824 n.131 (1933).

14. *Commonwealth v. Heinbaugh*, 354 A.2d 244, 246 (Pa. 1976). As the United States Supreme Court stated in *Connally v. General Constr. Co.*, 269 U.S. 385 (1926):

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will

not provide sufficient direction "to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."<sup>15</sup> Acts designated as criminal "must be defined with appropriate definiteness."<sup>16</sup> This necessary requisite provides citizens with "a reasonable opportunity to know what [acts are] prohibited."<sup>17</sup> Otherwise, enforcement of the law becomes arbitrary and capricious, thereby causing possible unfairness to criminal defendants.

Statutes enacted by the legislature carry a presumption of constitutionality because of the assumption that the legislature did not intend to violate the Constitution.<sup>18</sup> This concept has particular application with regard to taxation matters. As held in *Commonwealth v. Life Assurance Co.*,<sup>19</sup> tax legislation will not be declared unconstitutional unless it "*clearly, palpably, and plainly* violates the Constitution."<sup>20</sup> Due process, however, "is flexible<sup>21</sup> and calls for procedural protections as the particular situation demands."<sup>22</sup> In determining the amount of protection afforded a defendant in a

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render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

*Id.* at 391.

15. *Musser v. Utah*, 333 U.S. 95, 97 (1948). *See also* *Cole v. Arkansas*, 338 U.S. 345, 354 (1949).

16. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

17. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

18. *See, e.g.*, 1 PA. CONS. STAT. § 1922(3) (Supp. 1990); *Commonwealth v. Blystone*, 549 A.2d 81 (Pa. 1988), *aff'd*, 494 U.S. 299 (1990); *Hughes v. Commonwealth Dep't of Transp.*, 523 A.2d 747 (Pa. 1987).

19. 214 A.2d 209 (Pa. 1965), *appeal dismissed*, 384 U.S. 268 (1966).

20. *Id.* at 214 (emphasis in original).

21. States, as well as the federal government, are afforded broad power to adopt any measures reasonably calculated to prevent tax evasion or avoidance. As stated in *Helvering v. City Bank Farmers Trust Co.*:

A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed.

296 U.S. 85, 90 (1935) *reh'g denied*, 296 U.S. 664 (1935). *See* *Leonard v. Thornburgh*, 489 A.2d 1349 (Pa. 1985) (legislature possesses wide discretion in matters of taxation).

22. *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850.00) in United States Currency*, 461 U.S. 555, 564 (1983) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Due process questions in this regard, therefore, are answered with constitutional flexibility in mind. *See* *DuPont v. Commissioner*, 289 U.S. 685, 688 (1933) (requiring that constitutional questions which arise in taxation cases mandate a determination in favor of the government).

criminal proceeding for failure to file sales tax returns, the intent of the legislature in enacting the statute must be considered.<sup>23</sup> When seeking to condone legislative intent, the court must examine the occasion and necessity for the enactment, the circumstances under which the statute was enacted, the mischief to be remedied, and the object to be obtained.<sup>24</sup>

The due process guarantees afforded under the Pennsylvania Constitution are no greater than those provided by the Federal Constitution.<sup>25</sup> Section 7268(b) comports with due process requirements as it contains reasonable standards to guide the prohibited conduct.<sup>26</sup>

Ignorance that criminal liability is a consequence of one's nonfeasance is not excusable or justifiable.<sup>27</sup> Section 7268(b) clearly states that one is criminally liable for failing to pay taxes and/or file sales tax returns.<sup>28</sup> As will be discussed more thoroughly below, *Commonwealth v. Boyle*<sup>29</sup> demonstrates this principle.<sup>30</sup> The defendant in *Boyle* served as president of the restaurant that generated the sales causing the sales tax to be due the Commonwealth.<sup>31</sup> Mr. Boyle recognized the tax implications of restaurant sales and also his obligation under the law to file the returns and pay the taxes collected.<sup>32</sup> Mr. Boyle previously received and filed sales tax returns and was therefore aware of the responsibility to file such returns and remit the tax monies due the Commonwealth.<sup>33</sup>

Even though a defendant facing criminal liability under section 7268 of the Tax Reform Code may assert numerous constitutional challenges, the authority of the Commonwealth to tax is a "sovereign" and "inherent" power granted by the Pennsylvania Constitution.<sup>34</sup> The Pennsylvania Constitution does not specifically authorize

23. *Township of Moon v. Police Officers of the Township of Moon*, 498 A.2d 1305, 1309 (Pa. 1985).

24. *Id.*

25. *Commonwealth v. Lindenmuth*, 554 A.2d 62, 64 (Pa. Super. Ct. 1989), *appeal denied*, 564 A.2d 916 (Pa. 1989); *Coades v. Pennsylvania Bd. of Probation & Parole*, 480 A.2d 1298, 1305 (Pa. Commw. Ct. 1984). *See also Commonwealth v. Heck*, 491 A.2d 212, 219 (Pa. Super. Ct. 1985), *aff'd*, 535 A.2d 575 (Pa. 1987); *Eiffert v. Pennsylvania Cent. Brewing Co.*, 15 A.2d 723, 726 (Pa. Super. Ct. 1940).

26. *See United States v. Powell*, 423 U.S. 87, 94 (1975).

27. *See, e.g., Barlow v. United States*, 32 U.S. (7 Peters) 404, 411 (1833); *United States v. Smith*, 18 U.S. (5 Wheaton) 153, 182 (1820); *Commonwealth v. Fine*, 70 A.2d 677, 679 (Pa. Super. Ct. 1950); *Commonwealth v. Mittelman*, 36 A.2d 860, 863 (Pa. Super. Ct. 1944).

28. *See supra* note 10.

29. 576 A.2d 967 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

30. *See infra* text accompanying notes 86-99.

31. *Boyle*, 576 A.2d at 970, 976.

32. *Id.* at 970.

33. *Id.*

34. PENNSYLVANIA CONSTITUTIONAL CONVENTION: TAXATION & STATE FINANCE —

the imposition of a sales and use tax.<sup>35</sup> However, the Legislature has plenary power to raise revenue through the process of taxation.<sup>36</sup> Imposition of a sales tax falls within the parameters of the Pennsylvania Legislature's residual taxing authority. The uniformity clause of the Pennsylvania Constitution provides that all taxes shall be uniform upon the same class of subjects and levied and collected under general laws.<sup>37</sup>

Moreover, because the "power to tax is an inherent power of the State vested absolutely in the Legislature," it is "exercisable even in the absence of specific authorization in the Pennsylvania Constitution."<sup>38</sup> A state's power to tax is limited only by the Federal Constitution and the laws of the United States.<sup>39</sup> As stated by Justice Paxson in *Fox's Appeal*:<sup>40</sup>

The taxing power of the state is great and searching. Within the limits of the constitution, it is bounded only by the necessities of the state and the will of the people. This must be so, or the state might be without the means to sustain itself, to repel aggression from without, or to suppress disorder within. So long as it lays its burden upon all alike, there is hardly a limit to this power. It may take from the people what its necessities demand.<sup>41</sup>

Because the Commonwealth's taxing power is sovereign and inherently provided for in the Pennsylvania Constitution, sales taxes authorized by legislative enactment cannot be negated by a skillful evasive scheme based upon meritless constitutional challenges.

#### A. *Vagueness*

Defendants facing criminal liability under section 7268(b) of the Tax Reform Code allege that the statute is inherently and unconstitutionally vague because of its failure to give taxpayers clear notice of the point in time that a failure to file sales tax returns or make payments may result in criminal liability rather than civil lia-

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REF. MANUAL NO. 7, at 5 (1967-1968) [hereinafter PENNSYLVANIA CONSTITUTIONAL CONVENTION].

35. See PA. CONST. art. 8, § 1.

36. *Leahey v. Farrell*, 66 A.2d 577 (Pa. 1949); *Commonwealth v. Perkins*, 21 A.2d 45 (Pa. 1941), *aff'd*, 314 U.S. 586 (1942); *Commonwealth v. Dauphin County*, 6 A.2d 870 (Pa. 1939); *Clouser v. City of Reading*, 113 A. 188 (Pa. 1921).

37. See PA. CONST. art. 8, § 1.

38. PENNSYLVANIA CONSTITUTIONAL CONVENTION, *supra* note 34, at 5.

39. *Curtis' Estate*, 6 A.2d 283 (Pa. 1939).

40. 4 A. 149 (Pa. 1886).

41. *Id.* at 153-54. See *Commonwealth v. Perkins*, 21 A.2d 45 (Pa. 1942), *aff'd*, 314 U.S. 586 (1941).

bility.<sup>42</sup> In a sales tax context, the constitutionality argument of vagueness<sup>43</sup> focuses on the claim that section 7268(b) is silent as to *when* an omission to file a return and/or collect and remit taxes exposes a taxpayer to criminal prosecution. However, section 7268(b) is not silent with regard to when criminal liability attaches. To the contrary, section 7268(b) furnishes requisite notice to those taxpayers required to file sales tax returns and/or collect and remit taxes.

Under the Tax Reform Code, criminal liability attaches when any "person," as defined under section 7201(e),<sup>44</sup> willfully fails, neglects, or refuses to file any return or report required or when any such person willfully fails or refuses to collect and remit taxes due the Commonwealth.<sup>45</sup> Specifically, the offense of a willful failure to remit sales tax is set forth in section 7268(b) of the Tax Reform Code, which states in pertinent part:

[A]ny person maintaining a place of business in this Commonwealth and selling or leasing tangible personal property[,] . . . the sale or use of which by the purchaser is subject to tax hereunder, who shall wilfully [sic] fail or refuse to collect the tax from the purchaser and remit the same to the [D]epartment [of Revenue] . . . shall be guilty of a misdemeanor . . . .<sup>46</sup>

The basis of criminal liability of section 7268(b) of the Tax Reform Code is non-compliance with the tax administration system.

The offense of a willful failure to file sales tax returns is set forth in the same section of the statute: "[A]ny person who shall wil[l]fully fail, neglect, or refuse to file any return or report required by this article . . . shall be guilty of a misdemeanor . . . ."<sup>47</sup>

An examination of Pennsylvania case law illustrates Pennsylvania courts' interpretation of section 7268(b) of the Tax Reform Code and the attachment of criminal liability. In *Commonwealth v. Turrell*,<sup>48</sup> a case involving a charge of theft by failure to make the required disposition of funds received, the Supreme Court of Pennsyl-

42. A defendant asserting unconstitutionality, however, must show "not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

43. For a discussion of the "void for vagueness" doctrine and compliance with due process requirements, see Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948) [hereinafter Note, *Due Process*]; Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

44. See *infra* text accompanying note 72.

45. PA. STAT. ANN. tit. 72, § 7268(b) (1990).

46. *Id.*

47. *Id.*

48. 584 A.2d 882 (Pa. 1990).



vania determined when criminal liability attaches.<sup>49</sup> The court held:

[C]riminal liability attaches as soon as the failure to make a required disposition of funds occurs . . . . [L]iability can[not] be negated through a return of the misappropriated funds. The crime is complete when all of its elements have been fulfilled, and once completed, it cannot be undone. Certainly, where an offender has made restitution, and particularly where restitution has been made before the filing of criminal charges, this can be considered by a sentencing court as a significant factor in mitigation of the punishment to be imposed. Restitution does not, however, negate the fact that a crime has been committed.<sup>50</sup>

Similarly, criminal liability attaches under section 7268(b) of the Tax Reform Code when a person *willfully* fails to act within the boundaries established by the statute.<sup>51</sup> As long as an ascertainable standard exists in a statute, the person whose conduct falls within the parameters of that standard lacks standing to challenge the statute on vagueness principles.<sup>52</sup> Section 7268 of the Tax Reform Code provides the requisite definiteness to defeat any vagueness challenge.

The distinction must be drawn, however, between a failure to remit sales taxes prior to the institution of criminal proceedings and a failure to remit subsequent to the commencement of charges. The cases of *Commonwealth v. Sacco*<sup>53</sup> and *Commonwealth v. Boyle*<sup>54</sup> illustrate this concept.

The defendant in *Sacco* remitted the required taxes approximately two years prior to the institution of the criminal action.<sup>55</sup> The *Sacco* court stated that section 7268(b) denotes a "carefully defined *crime*."<sup>56</sup> The court determined that the imposition of monetary sanctions by the Legislature in the form of interest under section 7265 of title 72 of Purdon's Pennsylvania Statutes and in the form of penalties under section 7267 of that same title was designed for tardy taxpayers.<sup>57</sup> More specifically, the court articulated that the criminal sanctions of section 7268(b) were intended for "taxpayers who do not pay their taxes, remit taxes withheld, or file returns."<sup>58</sup>

49. 18 PA. CONS. STAT. § 3927(a) (1983).

50. *Turrell*, 584 A.2d at 886.

51. See PA. STAT. ANN. tit. 72, § 7268(b) (1990).

52. *Commonwealth v. Grundy*, 561 A.2d 39, 41 (Pa. Super. Ct. 1989).

53. 531 A.2d 1 (Pa. Super. Ct. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988).

54. 576 A.2d 967 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

55. *Sacco*, 531 A.2d at 1.

56. *Id.* at 2 (emphasis in original).

57. *Id.*

58. *Commonwealth v. Sacco*, 531 A.2d 1, 2 (Pa. Super. Ct. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988).

## CRIMINAL SANCTIONS UNDER 268(b)

Unlike the defendant in *Sacco*, the defendant in *Boyle* failed to file sales tax returns and failed to remit sales taxes due *prior* to the institution of the criminal action.<sup>59</sup> Therefore, the defendant failed to satisfy the requirements under section 7268(b).<sup>60</sup>

The court in *Boyle* distinguished *Sacco* by determining that *Boyle* was simply not a case of tardy filing; therefore, *Boyle* was dissimilar to the situation presented in *Sacco*.<sup>61</sup> The Superior Court of Pennsylvania in *Boyle* specifically noted: "As we explained in *Sacco*, penal statutes should be reasonably construed according to the fair import of their terms . . . . [W]e cannot agree, that [s]ection 268(b) does not prohibit a failure to remit returns until long after they are due, and then only after criminal proceedings are initiated."<sup>62</sup> Thus, the court ascertained that the nonfeasance was not merely a pattern of tardiness.

The case of *Commonwealth v. Perlman*<sup>63</sup> also distinguished *Sacco*. In *Perlman*, unlike *Sacco*, compliance occurred subsequent to notification of the pending criminal charges.<sup>64</sup> The court in *Perlman* affirmed the defendant's conviction and stated:

The key distinction between this case and *Sacco* is that, here, evidence was introduced that indicated that appellant's conduct resulted not from mere "tardiness" but from a willful refusal to file the returns and taxes . . . . From this evidence a fact finder could conclude that appellant did not merely act in a *dilatory* fashion but instead filed only in response to the investigation, in an attempt to ward off the impending criminal prosecution.<sup>65</sup>

In so distinguishing *Sacco*, the *Perlman* court held that criminal liability is the proper penalty where a defendant *willfully* fails to file sales tax returns and remit taxes due the Department of Revenue.<sup>66</sup> However, where a person's failure to fulfill his or her responsibilities with regard to sales tax collection and remittance is merely negligent

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59. *Commonwealth v. Boyle*, 576 A.2d 967, 970 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990). See *supra* notes 31-33 and accompanying text.

60. *Boyle*, 576 A.2d at 970. The defendant was charged with the failure to file sales tax returns for seven time periods in 1983 and with the failure to remit sales taxes for fourteen months in 1982 and 1983. *Id.* at 969 n.2. The defendant in *Boyle* only filed returns for the dates set forth in Counts I through VII after he was charged and the original information was filed. *Id.* at 969.

61. *Id.* at 971.

62. *Id.*

63. 572 A.2d 2 (Pa. Super. Ct. 1990), *appeal denied*, 557 A.2d 343 (Pa. 1989).

64. *Id.* at 5.

65. *Id.* at 6.

66. *Id.*

and not willful, only civil sanctions are appropriate.<sup>67</sup>

The mere allegation that the drafting of the Tax Reform Code is more than imprecise imports no justification for striking a statute on vagueness grounds. "The fact that [the legislature] might, without difficulty, have chosen clearer or more precise language equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague."<sup>68</sup> Rather, due process requirements are fulfilled if the statute in question contains reasonable standards to guide the prospective conduct.<sup>69</sup>

The test applicable in deciding vagueness challenges in criminal matters is whether the prohibited conduct is so utterly vague that a person of common intelligence would need to guess at its meaning and differ as to its application.<sup>70</sup> The test is clearly met because the language of section 7268(b) of the Tax Reform Code is explicit. Therefore, a defendant should not complain that he or she did not have notice of the ramifications for a failure to file sale tax returns and pay sales taxes due the Department of Revenue.

The language of the Tax Reform Code negates the claim that section 7268(b) is inherently ambiguous for not adequately identifying the persons responsible for filing the sales tax returns. Section 7268(b) of the Tax Reform Code applies to "*any person* maintaining a place of business in the Commonwealth."<sup>71</sup> Under section 7201 of the Tax Reform Code the word "person" is defined as follows:

Any natural person, association, fiduciary, partnership, corporation or other entity, including the Commonwealth of Pennsylvania, its political subdivisions and instrumentalities and public authorities. Whenever used in any clause prescribing and imposing a penalty or imposing a fine or imprisonment, or both, the term "person," as applied to an association, shall include the members thereof *and, as applied to a corporation, the officers thereof.*<sup>72</sup>

This definition demonstrates a legislative intent to pierce artificial business entities in order to impose criminal liability on natural

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67. *Id.* See *Commonwealth v. Boyle*, 576 A.2d 967, 971 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

68. *Commonwealth v. Nelson*, 523 A.2d 728 (Pa. 1987), *cert. denied*, 484 U.S. 928 (1987).

69. *United States v. Powell*, 423 U.S. 87, 94 (1975).

70. *Id.* at 92. For a discussion of due process requirements in this area, see Note, *Due Process*, *supra* note 43.

71. PA. STAT. ANN. tit. 72, § 7268(b) (1990).

72. *Id.* § 7201(e) (emphasis added).

rather than fictional persons. This is consistent with the legislative intent to create a fiduciary responsibility with respect to the collection of sales taxes.<sup>73</sup>

Additional authority imposing criminal responsibility is based on section 307(e)(1) of the Crimes Code which provides that “[a] person is legally accountable for any conduct he performs or causes to be performed in the name of a corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.”<sup>74</sup> This provision applies to non-Crimes Code offenses, such as the offense of failure to file and failure to remit sales tax.<sup>75</sup>

It therefore appears that no cognizable basis exists in the contention that the Tax Reform Code is vague and fails to identify “the person” responsible for the filing of sales tax returns. This conclusion comports with the statutory language of section 7201(e). Section 7268(b) of the Tax Reform Code specifically defines when the failure to file tax returns and the failure to remit taxes exposes one to criminal liability. Furthermore, the Tax Reform Code explicitly details the applicability of section 7268 in its definition of the word “person.” Nothing is so uncertain or indefinite in section 7268(b) that would prevent a person of common intelligence from comprehending its meaning. As section 7268 is written, and as it is applied, the statute is not unconstitutionally vague. Permitting this type of constitutional challenge would allow every person charged with a crime to claim lack of notice by arguing that he or she was not put on notice that the conduct was unlawful until a conviction was returned. “Under this theory, such lack of notice would nullify every criminal conviction and serve to make our criminal justice system an empty shell.”<sup>76</sup>

### B. Notice

Related to the due process concern of definiteness in criminal statutes is the amount of requisite notice one must have that a statute prohibits certain acts or imposes criminal sanctions based upon a

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73. A “person,” as defined under the Tax Reform Code, has the fiduciary duty, as trustee for the Commonwealth, to pay the tax over to the Department of Revenue. *See Commonwealth v. Morris*, 48 Pa. D. & C.3d 563, 566 (1988). In *Morris*, the court determined that a *de facto* owner of a business may be held personally liable and hence legally prosecuted for failure to file sales tax returns or remit sales taxes due the Commonwealth. *Id.*

74. 18 PA. CONS. STAT. § 307(e)(1) (1983).

75. *Id.* § 107(a).

76. *Commonwealth v. Baggs*, 392 A.2d 720, 722-23 (Pa. Super. Ct. 1978).

failure to fulfill certain responsibilities. In Pennsylvania, the Tax Reform Code provides that prior to the commencement of business, every person who maintains a place of business that sells or leases taxable services or tangible personal property must apply for a sales tax license with the Department of Revenue.<sup>77</sup> The Tax Reform Code further states that a vendor must *both* collect the sales tax from the purchasers at retail establishments and remit the sales tax to the Department of Revenue.<sup>78</sup> Therefore, a vendor cannot complain about lack of notice before sanctions for nonpayment of sales tax are imposed since prior to the commencement of business, a duty exists to obtain a sales tax license. Further, subsequent to the commencement of business, a vendor's obligation includes the collecting and remitting of sales tax to the Department of Revenue.<sup>79</sup> In essence, the vendor merely serves as an intermediary or trustee for the taxing authority, with the vendor retaining full responsibility for the collection, reporting, and remission of Pennsylvania sales taxes.

It is well-recognized that criminal liability arises only if the perpetrator had prior notice that the transaction or lack thereof was illegal.<sup>80</sup> This applies in the context of criminal liability based upon a failure to file returns and/or pay sales tax. Derivation of this principle emanates from the notice requirement of the Fifth Amendment of the United States Constitution in accordance with due process of law.<sup>81</sup> The Due Process Clause mandates that a person be given fair notice as to what constitutes illegal activity so that a person's behavior may conform to the requirements of the law.<sup>82</sup>

What is fair notice that criminal sanctions may be imposed? Does ignorance that criminal liability is a consequence of one's nonfeasance excuse or justify the noncompliance? As a general rule, ig-

77. PA. STAT. ANN. tit. 72, § 7208 (1990).

78. *Id.* § 7202(a).

79. *Id.*

80. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 77 (1976); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); United States v. Harris, 347 U.S. 612, 617 (1954); Commonwealth v. Heinbaugh, 345 A.2d 244, 245 (Pa. 1976).

81. The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the [m]ilitia, when in actual service in time of [w]ar or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

82. *See id.* amend. IV.

norance of the law or a mistake of law is no defense to criminal prosecution.<sup>83</sup> However, due to the complexity of the tax code, the United States Supreme Court has held, with regard to the federal tax statutes, that criminal liability will result only from a “willful” noncompliance with the law.<sup>84</sup>

The express language of section 7268(b) of the Tax Reform Code imposes criminal liability for failing to file tax returns.<sup>85</sup> *Commonwealth v. Boyle*<sup>86</sup> provides an excellent illustration of this principle. In *Boyle*, the defendant filed the roles of president and sole officer of a food company that conducted business as a restaurant in Pennsylvania.<sup>87</sup> A restaurant manager collected applicable state sales taxes and deposited them in a corporate bank account over which the defendant retained exclusive control.<sup>88</sup> The manager did not prepare sales tax returns for the business.<sup>89</sup> Instead, the manager forwarded the paperwork to the defendant for the filing of the sales tax returns and remittance of the tax payments.<sup>90</sup> However, the sales taxes collected were not remitted to the Department of Revenue, nor were the necessary returns filed.<sup>91</sup>

An auditor for the Department of Revenue then contacted the defendant.<sup>92</sup> The auditor’s determination that the defendant was the taxpayer was based on the fact that he was listed as the owner on the sales tax license.<sup>93</sup> The defendant acknowledged his delinquency in tax return filings and tax payments.<sup>94</sup> When the auditor met with the defendant at a later date, the defendant revealed several boxes that contained delinquent returns.<sup>95</sup>

Subsequently, a criminal tax investigator for the Department of

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83. See, e.g., *Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); *Lambert v. California*, 355 U.S. 225, 228 (1957), *reh’g denied*, 355 U.S. 937 (1958); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 182 (1820). The above cases state the common-law presumption.

84. See *Cheek v. United States*, 111 S. Ct. 604 (1991).

85. See PA. STAT. ANN. tit. 72, § 7268(b) (1990).

86. 576 A.2d 967 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

87. *Id.* at 970.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Commonwealth v. Boyle*, 576 A.2d 967, 970 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990). Sales taxes were collected between June 1982 and September 1983, but the money was not remitted to the Commonwealth. *Id.* Sales tax returns for the period of March 1983 and September 1983 were not filed. *Id.*

92. *Id.* The Department of Revenue auditor met with the defendant in February 1983. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

Revenue interviewed the defendant regarding the nonpayment of the taxes.<sup>96</sup> The defendant acknowledged that he was the owner of the restaurant, the corporate president, and the sole officer.<sup>97</sup> The responsibility for preparing and filing the returns and paying the taxes due was recognized as well.<sup>98</sup> Based on the facts of this case, the defendant was cognizant that the restaurant was subject to taxation on its sales and of the duty under the law to file the returns and pay the taxes collected. Furthermore, the defendant, as president of the restaurant, received tax returns during the time period for which he was charged and had also previously filed tax returns.<sup>99</sup>

The Pennsylvania Supreme Court has held that “[o]ne who has a warning of a law’s proscription is not entitled to attack the language of the act on the basis that it would not give similar warning to another, whose conduct might fall within its literal ambit.”<sup>100</sup> Reasonable notice of the prohibitive conduct is all that is required.<sup>101</sup> Furthermore, statutes are not “to be tested against paradigms of draftsmanship. . . . Rather, the requirements of due process are satisfied if the statute in question contains *reasonable* standards to guide the prospective conduct.”<sup>102</sup> Therefore, the assertion that the Tax Reform Code fails to provide requisite notice of the proscribed conduct is negated.

### III. Terminology Defined and Distinguished: “Willful” and “Tardy”

#### A. *Willful Defined*

The term “willful” is not defined under the Pennsylvania Tax Reform Code. Pennsylvania courts, therefore, must resort to section 302(g) of the Crimes Code for its definition.<sup>103</sup> Section 302(g) de-

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96. *Commonwealth v. Boyle*, 576 A.2d 967, 970 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

97. *Id.* The criminal tax investigator met with the defendant in September 1983. *Id.*

98. *Id.*

99. *Id.* During the course of the investigation, the defendant provided the investigator with bank records pertaining to the period June 1982 through September 1983. *Id.* During 1982, the average monthly balance amounted to about \$78,000, and in 1983, the ending monthly balance was approximately \$33,000. *Id.* The defendant provided no reason to the investigator for failing to timely file the returns and pay the taxes except that he believed he was being audited at the time during which the returns were to be filed. *Id.*

100. *Fabio v. Civil Serv. Comm’n*, 414 A.2d 82, 88 (Pa. 1980).

101. *Commonwealth v. Heinbaugh*, 354 A.2d 244, 246 (Pa. 1976).

102. *Id.* (emphasis in original).

103. Section 107(a) of the Pennsylvania Crimes Code provides in pertinent part that “[t]he provisions of Part I of this title [ §§ 101-1106 ] (relating to preliminary provisions) are applicable to offenses defined by this title or by any other statute.” 18 PA. CONS. STAT. ANN. § 107(a) (1983).

finer the term “willfully” as follows: “A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”<sup>104</sup> Further, section 302(b)(2) of the Crimes Code provides:

A person acts knowingly with respect to a material element of an offense when:

- (i) [I]f the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.<sup>105</sup>

Under the definition of the term “willfully,” good faith is neither a defense to, nor an element of, the offense of a willful failure or refusal to file returns and/or pay sales taxes.

For example, in *Commonwealth v. Kimble*,<sup>106</sup> the defendant’s conviction resulted from a willful failure to file sales tax returns and to remit sales tax monies collected as required by section 7268 of the Tax Reform Code.<sup>107</sup> The defendant alleged that his failure to remit amounts due for sales taxes which he collected was involuntary because the money was in a bank account that had been frozen by the actions of his creditors.<sup>108</sup> The defendant further claimed that the trial court’s jury instruction that an act may be willful despite good faith equates to the creation of a strict liability crime.<sup>109</sup> However, the Pennsylvania Superior Court held that section 7268(b) of the Tax Reform Code contains no good faith defense to criminal charges.<sup>110</sup> The court specifically stated:

[Section] 7268 *does* provide for a limited good faith defense in a limited *civil* context, coupled with the fact that the preceding criminal section presently subject to our scrutiny ([s]ection 7268) is totally barren of such ameliorative language, are reflective of a conscious election by our legislature to limit the application of good faith defense to civil tax litigation. Section 7268

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104. 18 PA. CONS. STAT. ANN. § 302(g) (1990).

105. *Id.* § 302(b)(2).

106. 470 A.2d 1369 (Pa. Super. Ct. 1984).

107. *Id.* at 1371.

108. *Id.* at 1375.

109. *Id.* at 1375-76.

110. *Id.* at 1376.



requires that a violation of its provisions be "willful." Insofar as the lower court correctly charged the jury concerning the necessity of a willful failure to remit tax monies as grounds for appellant's conviction, we reject appellant's contention that the court below usurped the function of the jury by removing from its consideration the possible good faith of appellant as it may have impacted upon the willfulness and voluntariness of appellant's behavior.<sup>111</sup>

*Kipps v. Commonwealth*<sup>112</sup> exemplifies an analogous illustration. In *Kipps*, the court concluded that under the definition of the term "willfully," a financial ability to pay is neither a defense to, nor an element of, the offense of willful failure or refusal to pay overdue taxes.<sup>113</sup> Similarly, the Pennsylvania Superior Court in *Boyle* stated: "In essence, [the defendant] was contending that his failure to file tax returns was an act of good faith. Good faith is no defense to a violation of [s]ection 268."<sup>114</sup>

Other courts grappling with the issue of a "willful" failure to file taxes have reached similar conclusions. In *Commonwealth v. Klinger*,<sup>115</sup> the defendant was charged with the willful failure or refusal to timely pay the fuel use and oil company franchise taxes that were collected from customers and owed to the Commonwealth.<sup>116</sup> The statutes under which the defendant was charged required that a criminal violation be committed "willfully" as defined in section 302 of the Crimes Code.<sup>117</sup> At trial, the defendant asserted a good faith defense by presenting evidence that the tax payments lapsed on account of previously incurred substantial financial obligations, including taxes owed prior to the period in question.<sup>118</sup> On appeal, the defendant argued that the trial court erred in precluding evidence of a good faith defense.<sup>119</sup> The Superior Court concluded, however, that since the statute did not afford such a defense, the trial court did not err in excluding evidence of the alleged good faith.<sup>120</sup> The court fur-

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111. *Commonwealth v. Kimble*, 470 A.2d 1369, 1376 (Pa. Super. Ct. 1984) (footnote omitted).

112. 586 A.2d 1003 (Pa. Commw. Ct. 1991).

113. *Id.* at 1007.

114. *Commonwealth v. Boyle*, 576 A.2d 967, 977 n.3 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990).

115. 535 A.2d 1060 (Pa. Super. Ct. 1987), *appeal denied*, 549 A.2d 915 (Pa. 1988), *appeal denied*, 551 A.2d 214 (Pa. 1988).

116. *Id.* at 1061.

117. *Id.* at 1065.

118. *Id.*

119. *Id.*

120. *Commonwealth v. Klinger*, 535 A.2d 1060 (Pa. Super. Ct. 1987), *appeal denied*, 549 A.2d 915 (Pa. 1988), *appeal denied*, 551 A.2d 214 (Pa. 1988).

ther held that the trial court correctly relied upon the definition of the term “willfully” provided under section 302(g) of the Crimes Code.<sup>121</sup>

The holdings of *Klinger* and *Kimble* are dispositive of the issues raised in the tax context. As the criminal tax liability statutes under consideration in *Klinger* and *Kimble* exemplify, the language of the Tax Reform Code offers no good faith defense, nor does it include a financial inability defense. Requiring the Commonwealth to prove the defendant’s financial ability contravenes statutory principles of construction.<sup>122</sup> Such a requirement would result in supplying omitted statutory language and not giving the term “willfully” its “fair meaning” as specified in the Crimes Code.

Under the definition of the term “willfully” in the Pennsylvania Crimes Code, the Commonwealth has to prove beyond a reasonable doubt only that one was aware that he or she had to pay the sales taxes and nonetheless failed to do so.<sup>123</sup> Section 7268(b) is analogous to section 7202 of the Internal Revenue Code.<sup>124</sup> Section 7202 pertains to the willful failure to collect or pay taxes and specifically details:

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.<sup>125</sup>

Section 7202 of the Internal Revenue Code resembles section 7268(b) of the Tax Reform Code both in language and in context. Similar to section 7268(b) of the Tax Reform Code, section 7202 of the Internal Revenue Code imposes criminal liability when a person fails to act as required by the specific language of the statute and also provides no specific reference to the exact time when criminal liability attaches.

A defendant facing criminal liability might possibly assert that *United States v. Poll*<sup>126</sup> controls this area. *Poll* involved a prosecu-

121. *Id.* at 1065-66.

122. *See* Commonwealth v. Pope, 317 A.2d 887, 889 (Pa. 1974).

123. 18 PA. CONS. STAT. ANN. §§ 302(b)(2), (g) (1983).

124. 26 U.S.C. § 7202 (1988).

125. *Id.*

126. 521 F.2d 329 (9th Cir. 1975), *cert. denied*, 429 U.S. 977 (1976).

tion for willful failure to pay income tax.<sup>127</sup> In *Poll*, the court held that evidence of the taxpayer's financial difficulties was admissible as a defense.<sup>128</sup> The *Poll* holding, however, was later rejected by the Fifth Circuit in *United States v. Tucker*<sup>129</sup> and by the Sixth Circuit in *United States v. Ausmus*.<sup>130</sup> The court in *Ausmus* held that as a general rule, financial ability to pay a tax when it comes due is not a prerequisite to criminal liability.<sup>131</sup> As the court enunciated, "[O]therwise, a recalcitrant taxpayer could spend his money as fast as he earns it and evade criminal liability while not paying taxes as long as his bank balance is zero when the taxpayer's taxes are due."<sup>132</sup> The conclusion that the Commonwealth is not required to prove the defendant's financial ability to pay his or her taxes during the period in question negates such a defense raised by defendants facing criminal penalties in this area of the law.<sup>133</sup> The United States Supreme Court, in *Cheek v. United States*,<sup>134</sup> reaffirmed that the "conclusively establish[ed]" standard of tax crimes is the "voluntary, intentional violation of a known legal duty."<sup>135</sup>

### B. "Tardy" and "Willful" Differentiated

An important distinction exists between "tardiness" and a "willful" failure to comply with the Tax Reform Code. Criminal sanctions under section 7268(b) are appropriate only when a "person," as defined in the Tax Reform Code,<sup>136</sup> "willfully" fails, refuses or neglects to perform a required act.<sup>137</sup>

127. *Id.* at 330.

128. *Id.* at 332.

129. 686 F.2d 230 (5th Cir. 1982), *reh'g denied*, 690 F.2d 905 (5th Cir. 1982), and *cert. denied*, 459 U.S. 1071 (1982).

130. 774 F.2d 722 (6th Cir. 1985).

131. *Id.* at 725.

132. *Id.*

133. Some federal courts have held that "willfulness" requires that the court find some element of evil motive or bad purpose. *See, e.g., Spies v. United States*, 317 U.S. 492, 498 (1943); *Spurr v. United States*, 174 U.S. 728, 734 (1899); *Felton v. United States*, 96 U.S. 699, 702 (1878).

134. 111 S. Ct. 604 (1991). In *Cheek*, the defendant was an airplane pilot who stopped paying taxes in 1980 after attending an anti-tax seminar. *Id.* at 607. As a defense to the Internal Revenue Service's assertion that *Cheek's* actions were "willful," the defendant claimed that he honestly believed the seminar leaders who contended that because wages only compensate employees for work performed and are not truly "income," the federal tax system was unconstitutional. *Id.* at 607-08.

135. *Id.* at 605 (quoting *United States v. Pomponio*, 429 U.S. 10, 12 (1976), *reh'g denied*, 429 U.S. 987 (1976)). *See also United States v. Bishop*, 412 U.S. 346, 360 (1973).

136. *See supra* text accompanying note 72.

137. PA. STAT. ANN. tit. 72, § 7268(b) (1990). For a discussion of when a person acts "willfully," see *Cheek v. United States*, 111 S. Ct. 604 (1991), and *Commonwealth v. Kimble*, 470 A.2d 1369 (Pa. Super. Ct. 1984).

The requirement that the noncompliance be willful should assuage any concerns that a person might be criminally convicted for "mere tardiness" in complying with the requirements of the Tax Reform Code. Noncompliance with the Tax Reform Code is "willful" only if it is voluntary, purposeful, deliberate, and intentional.<sup>138</sup> This is distinct from accidental, inadvertent, or negligent noncompliance or noncompliance that is the result of a mistake of fact or a good faith misunderstanding of the requirements of the law.<sup>139</sup> Under this approach, "tardiness," negligence, inadvertence, or confusion as to the filing requirements, would not result in criminal liability. In the absence of willfulness, only civil penalties attach.<sup>140</sup>

#### IV. Policy Considerations Entailed in the Imposition of Criminal Sanctions

Do acts of omission concerning nonpayment of sales taxes rise to the level of criminal activity? Should a person, as defined under section 7201(e) of the Tax Reform Code, be prosecuted for nonpayment of tax monies? For business entities, criminal sanctions and the substantial public disrepute that attaches to criminal violations are powerful incentives for compliance. The deterrent effect of criminal sanctions in sales tax statutes is enhanced when individuals who participate in illegal activities can be personally subjected to the possibility of substantial fines and/or imprisonment. Courts have recognized the role of criminal sanctions in tax enforcement and have meted out sentences that include incarceration.<sup>141</sup>

Is subjecting a person to criminal liability instead of civil liability for a violation of the Tax Reform Code too harsh a penalty? Perhaps one might contend that these individuals are not criminals in the "true" sense of the word because, for example, they pose no societal threat. And, if they are found guilty, they are guilty of nothing more than creatively attempting to avoid paying taxes on income received through corporate transactions.

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138. See 18 PA. CONS. STAT. ANN. § 302(g) (1983). While the word "willful" is not specifically defined by the Tax Reform Code, the general definition under title 18 states: "[A] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material element of the offense, unless a purpose to impose further requirements appears. *Id.* See also *Kimble*, 470 A.2d at 1376 n.15.

139. See *Cheek*, 111 S. Ct. at 609-10.

140. Compare PA. STAT. ANN. tit. 72, §§ 7265 and 7267 (1990).

141. See, e.g., *Commonwealth v. Boyle*, 576 A.2d 967 (Pa. Super. Ct. 1990), *appeal granted*, 584 A.2d 311 (Pa. 1990); *Commonwealth v. Perlman*, 572 A.2d 2 (Pa. Super. Ct. 1990); *Commonwealth v. Kimble*, 470 A.2d 1369 (Pa. Super. Ct. 1984). The defendant in *Kimble* was sentenced to two years probation.

In actuality, the basic argument against criminal sanctions is that failure to pay taxes amounts to nothing more than white collar crime. Does this then imply that the Internal Revenue Service, the Pennsylvania Department of Revenue, and society as a whole, should condone this type of misconduct? Does this type of white collar activity provide justification for leaving this area of the law unregulated and hence unenforced?

The argument can be entertained that Pennsylvania, as well as other states, have more critical problems to address and remedy. Our society is one where the drug problem appears, at times, uncontrollable, where heinous crimes such as murder and rape have increasingly proliferated at an alarming rate, where sexual abuse of children has risen, where domestic violence has increased, where the homeless population is too numerous to count, and where bigotry, discrimination, and hatred are still apparent even as the next century approaches. Society labels these "conventional crimes" as morally reprehensible, which necessitates punishment in the form of either a civil or a criminal penalty. Criminal sanctions achieve society's goals of prevention, restraint, rehabilitation, education, retribution, and deterrence.<sup>142</sup>

When considering the above plights that permeate society, does avoidance of state sales tax seem all that evil? In today's society, should law enforcement officers utilize and allocate resources to enforce tax laws? Perhaps some would respond "no." However, it is highly improbable that the aforementioned social dilemmas can be alleviated without federal and state expenditures of monies. Public funds are crucial to conquer these social ills and to ensure that defendants criminally charged receive the full import of the protections enumerated in the United States Constitution. Without the collection of both federal and state taxes, the aforementioned problems are magnified and hence not mitigated.

The residents of Pennsylvania have the responsibility to remit all taxes due the federal government and the Commonwealth of Pennsylvania. However, even in light of all of the aforementioned problems, individuals and business entities still attempt to manipulate and evade the payment of taxes that the government clearly has the right to levy. So, while at first glance the evasion of Pennsylvania sales tax might not appear as a criminal act that justifies criminal sanctions in light of all the other above-referenced grave offenses, the

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142. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.5, at 31-36 (1986).

failure to remit tax monies due the Commonwealth is, in actuality, one of the most severe of all crimes. It is this crime that deprives the residents of Pennsylvania of the social services so necessary in today's society.

This position is in accordance with the policy behind the federal Internal Revenue Code and Pennsylvania's Tax Reform Act. That is, the taxing of individuals and entities producing income ensures the availability of money to facilitate state and federal entitlement programs. Section 7268(b) of the Tax Reform Act comports with due process requirements. Therefore, the imposition of criminal as well as civil liability is not a harsh penalty at all, but is instead necessary if the tax system of the United States and the Commonwealth of Pennsylvania is to mean anything. Subjecting a defendant who willfully fails to file returns and remit taxes to mere civil liability only encourages individuals and entities to attempt to circumvent or elude the tax system. Civil enforcement sanctions are sometimes viewed as a "cost of doing business." However, criminal sanctions invoke a greater possibility of personal liability because as section 7268 details, the act must be willful. Moreover, the costs of defending such an action would not be covered by insurance policies or indemnification agreements.<sup>143</sup>

When audits occur, the penalty merely consists of a monetary sum; therefore, the temptation potentially exists for individuals and entities to avoid taxation. In order for our federal and state funded programs to fulfill society's social necessities, taxes must be remitted to the appropriate federal and state authorities. One may not discharge responsibilities to other members of society by evasion of taxation through "frivolous" constitutional arguments.

Criminal prosecution for violations of the Tax Reform Code should result in increased compliance because criminal penalties entail a societal stigma. Finally, resorting to criminal sanctions is, at times, the only method of attaining adequate deterrence.

## V. Conclusion

The imposition of criminal sanctions, in addition to civil liability, for a "willful" failure to file sales tax returns and remit monies due the Commonwealth of Pennsylvania comports with due process and is not a harsh penalty. The imposition of Pennsylvania sales and use taxes is within the Legislature's plenary power to raise revenue

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143. *Atlas Assurance Co. v. McCombs Corp.*, 194 Cal. Rptr. 66, 71 (Cal. Ct. App. 1983) (guilty plea exonerates insurance company from liability to defend).

through taxation. In the absence of the collection of such revenue, the Commonwealth cannot carry out essential programs that curtail the plights presently faced by many residents of Pennsylvania. This Article should dissuade individuals and business entities from endeavoring to evade the obligation to pay sales tax monies to the Commonwealth. The Pennsylvania decisions detailed demonstrate the commitment by the Commonwealth to enforce and uphold the Tax Reform Code.<sup>144</sup> Evolving case law illustrates the willingness by the judiciary to impose criminal sanctions when sales tax returns are not filed and monies are not properly remitted. This is further evidenced in the distinction between "tardy" versus a "willful" omission. That is, criminal liability is triggered not for mere inadvertence, but when one intentionally violates a known legal duty. The "frivolous" constitutional arguments raised and decided in terms of due process concerns of notice and vagueness should negate any arguments against imposition of criminal sanctions.

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144. PA. STAT. ANN. tit. 72, § 7268(b) (1990).