

Statute of Limitations Primer: Tax and Related Title 18 Prosecutions

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Introduction

All tax and related Title 18 criminal offenses investigated by IRS special agents have a statute of limitations.¹ However, the determination of the applicable limitations period is not usually just a straightforward counting of days, months, or years.

General Considerations

The statute of limitations is an affirmative defense. It is waived if not timely asserted.² A conviction will be affirmed when a defendant knowingly waives a viable statute of limitations defense.³

The principal issues that arise when a statute of limitations defense is raised are: what is the applicable statute of limitations period; when did the limitations period begin to run; and has there been a tolling event or an extension provision affecting the normal expiration of the applicable limitations period.

The usual federal criminal statute of limitations for noncapital offenses is five years.⁴ The statute of limitations for an offense prosecuted under most code offense provisions and related conspiracies is determined under section 6531. That provision sets forth the general rule of a three-year limitations period. However, as discussed in more detail below, the general rule is consumed by a list of exceptions that lengthen the limitations periods to six years for most tax crimes.

It is hornbook law that the statute of limitations on a criminal prosecution begins to run only on occurrence of all of the essential elements of the offense -- that is, when the crime is said to be "complete."⁵ In determining whether the statute of limitations has expired, the day of the commission of the offense is normally excluded; the day of the return of the indictment or filing of an information is included.

¹ Special agents routinely determine and note in their investigative files the expiration date(s) of each offense being considered. Although the application of the Sentencing Guidelines makes it immaterial to a sentence whether one or more charges become time-barred, consideration of the statute of limitations and resolution of any issues are part of the case review processes of both IRS Criminal Investigation (CI) division and the Tax Division of the Department of Justice.

² See *United States v. Arky*, 938 F.2d 579 (5th Cir. 1991); *United States v. Karlin*, 785 F.2d 90 (3d Cir. 1986).

³ In *United States v. Akmakjian*, 647 F.2d 12 (9th Cir. 1981), the defendant was not allowed to withdraw a guilty plea to an admittedly time-barred count, because he expressly waived a statute of limitations defense motion that was pending at the time of his guilty plea.

⁴ 18 U.S.C. section 3282(a).

⁵ See *United States v. Irvine*, 98 U.S. 450 (1879); *Toussie v. United States*, 397 U.S. 112 (1970).

A tax return filed early is deemed filed on the initial statutory due date prescribed by the code.⁶ A return that is filed beyond the due date generally triggers the statute of limitations period on the date the return is filed,⁷ that is, the date the IRS receives the return. That date is usually fixed by the official receipt date stamped on the return.⁸ A return that has an extended due date triggers the limitations period whenever filed after the original statutory due date, regardless of whether it was filed before or after the extended due date.⁹

A crime that is said to be "continuing" might have an indefinite limitations period. With the exception of conspiracy, the notion that a crime is a continuing offense is disfavored.¹⁰ Nevertheless, under certain circumstances, ordinary tax violations have been held to assume continuing offense status. In one case, a course of evasion of payment of assessed taxes continuing over many years was charged in a single count. The district court rejected a statute of limitations argument and determined the indictment properly charged a continuing course of conduct that included the evasion of payment for taxes more than six years old.¹¹ In another case, the government argued that the limitations period for an evasion prosecution was extended annually by the defendant's failure to correct documents that contained a false Social Security number, resulting in a tax deficiency in later years. Although the opinion upheld the indictment as timely, the court did not rule on the continuing offense issue.¹²

Tolling and Extension

The statute of limitations is tolled upon the timely filing of an information or indictment.¹³ Section 6531 tolls the running of the

⁶ United States v. Habig, 390 U.S. 222 (1968); section 6513(a).

⁷ Habig, 390 U.S. 222.

⁸ See United States v. Robinson, 811 F.Supp. 1174 (S.D. Miss. 1993); United States v. Stella, 745 F.Supp. 195 (S.D.N.Y. 1990).

⁹ Habig, 390 U.S. 222.

¹⁰ Toussie, 397 U.S. 112; Irvine, 98 U.S. 450. See also, e.g., United States v. Knoll, 16 F.3d 1313 (2d Cir. 1994).

¹¹ Shorter v. United States, 608 F.Supp. 871 (D.D.C. 1985), aff'd, 809 F.2d 54 (D.C. Cir. 1987).

¹² United States v. Payne, 978 F.2d 1177 (10th Cir. 1992).

¹³ See, e.g., United States v. Schmick, 904 F.2d 936 (5th Cir. 1990); United States v. Saussy, 802 F.2d 849 (6th Cir. 1986). When a timely indictment or information is dismissed after the limitations period has expired for a reason other than one that bars a later prosecution, a new indictment or information may be brought within six calendar months. 18 U.S.C. section 3288. Similarly, if a timely brought indictment or information is dismissed when the limitations period will expire within six calendar months, a new indictment or information can be brought within six calendar months. 18 U.S.C. section 3289. See, e.g., United States v. Serubo, 502 F.Supp. 299 (E.D. Pa. 1980). A time-barred indictment dismissed under a plea agreement can be

statute of limitations while the defendant is "outside the United States" or a "fugitive from justice".¹⁴ Mere absence from the United States invokes the code tolling provision, because neither the intention for the absence from the United States nor its duration are pertinent.¹⁵ No criminal statute of limitations runs on a Title 18 offense while one is "fleeing from justice."¹⁶

Another code provision, section 7609(e), suspends the limitations period for criminal prosecution when a "third-party recordkeeper" summons is not complied with or when there is a related summons proceeding instituted.¹⁷

A district judge may enter an order suspending the statute of limitations in certain situations when a formal request for foreign evidence is outstanding.¹⁸

Tax Misdemeanors

Except for certain information returns, the statute of limitations to prosecute the willful failure to timely file a return under section 7203 is six years.¹⁹ The general three-year period applies to misdemeanor failure to file any information return required under sections 6031-6060. Included are the information returns required to be filed by partnerships, exempt organizations, certain trusts, certain foreign corporations, trade or business payers (Form W-2 and Form 1099 series),

reinstated if a guilty plea is vacated. See 18 U.S.C. section 3296.

¹⁴ A fugitive from justice is defined under 18 U.S.C. section 3290.

¹⁵ See *United States v. Marchant*, 774 F.2d 888 (8th Cir. 1985) (while on an 11-day vacation to Switzerland, the defendant could not be served criminal process); *United States v. Myerson*, 368 F.2d 393 (2d Cir. 1966) (115 days total absence during the statute of limitations period for various purposes without indicia of flight).

¹⁶ 18 U.S.C. section 3290. It remains unresolved whether mere absence from the jurisdiction is sufficient to invoke that tolling provision, or whether intended flight in the face of pending charges is required.

¹⁷ See, e.g., *United States v. Orłowski*, 808 F.2d 1283 (8th Cir. 1986).

¹⁸ 18 U.S.C. section 3292. See, e.g., *United States v. Torres*, 318 F.3d 1058 (11th Cir. 2003).

¹⁹ Section 6531(4) refers to a failure to "make a return at the time or times required by law or regulation." The failure to file a foreign financial account form, TDF 90.22-1, a felony, is not technically a tax offense. See 31 U.S.C. section 5322(a). The offense has a five-year statute of limitations under 18 U.S.C. section 3282(a).

pension plans, and for mortgage foreclosures. Also included is Form 8300, which is required for certain cash receipts.²⁰

A failure-to-file offense is complete -- and the statute begins to run -- when the failure becomes willful. Ordinarily, that would be the day after the due date of a tax return, but it can be later if there is sufficient proof the failure did not become willful until later.²¹ The determination of the date when a failure-to-file offense became willful is factual, and is therefore a question to be determined by the jury.²² When a valid extension of time to file has been obtained,²³ failure to file does not become willful until the day after the extended due date.²⁴

The offense of willful failure to pay charged under section 7203 has a six-year limitations period.²⁵ In those cases, the concepts are similar; the running of the limitations period commences the day after the failure to pay becomes willful.²⁶

²⁰ The offense is, however, a felony, because the potential term of imprisonment is five years, not one year. See section 7203 (last sentence).

²¹ The government's evidentiary burden to prove willfulness other than immediately on passage of the due date will likely be difficult. See *United States v. Goldstein*, 502 F.2d 526 (3d Cir. 1974).

²² *United States v. Hook*, 781 F.2d 1166 (6th Cir. 1986).

²³ See section 6081. Extensions are invalid or can be invalidated retroactively when they are filed untimely, not accompanied by proper payment of estimated liability when required, or in the case of an extension that is not automatic and subject to discretion, when the reason provided for requesting the extension is false. See, e.g., *Phillips v. United States*, 843 F.2d 438 (11th Cir. 1988); *Crocker v. Comm'r*, 92 TC 899 (1989); Rev. Rul. 79-113, 1979-1 C.B. 389.

²⁴ *Phillips*, 843 F.2d 438. See also *United States v. Pandilidis*, 524 F.2d 644 (6th Cir. 1975). Compare *United States v. Calhoun*, 566 F.2d 969 (5th Cir. 1978) (nonfiling after claimed application of automatic extension for residing or traveling outside the United States results in lookback to April 15), and *Galuska v. Comm'r*, 98 T.C. 661 (1992) (filing extensions have no effect on the civil refund limitations period).

²⁵ Section 6531(4).

²⁶ *United States v. Sams*, 865 F.2d 713 (6th Cir. 1988) (jury could have inferred from the defendant's attachment to the return indicating a willingness to make payment arrangements that willfulness was lacking until that date or later); *United States v. Andros*, 484 F.2d 531 (9th Cir. 1973) (limitations period can commence at a date later than when taxes are assessed or payment demanded).

Lesser known misdemeanors of omission enumerated by section 7203 (the failure to keep records and the failure to supply information) are not subject to an exception contained in section 6531. Those offenses are subject to a three-year statute of limitations. The misdemeanor offenses set forth in sections 7204 and 7205, which regard withholding statements, are also subject to a three-year limitations period.

Section 7207, which provides for the misdemeanor punishment of a false or fraudulent document, is subject to a six-year limitations period.²⁷ That limitations period will ordinarily begin to run on the date the document is presented. For example, if a taxpayer submitted a false or fraudulent document during an examination in 2004 to support a deduction claimed on his timely filed 2001 tax return, although the statute of limitations on prosecution of the false tax return or evasion offense expires in the year 2008, the limitations period on the section 7207 false presentment offense does not expire until 2010.

Tax Felonies

Tax felonies normally implicate a six-year limitations period. That includes tax evasion (section 7201); filing a false return or other document (section 7206(1)); the aiding and assisting thereof (section 7206(2)); and the intangible misconduct provision (section 7212(a)), which is somewhat analogous to an obstruction offense. The statute of limitations to prosecute both the evasion of assessment and evasion of payment under section 7201 is six years.²⁸

When the sole affirmative act of tax evasion charged is the filing of a false return, the general filing date rules apply to compute the limitations period. However, in other cases, the limitations period for an evasion offense runs on the commission of the last affirmative act of evasion, so evasion cases can be brought long after six years from the anniversary date of the filing of the offending tax return.²⁹ Therefore, if any affirmative act is committed after a return is filed, the six-year period may run from the time of the commission of the affirmative act.³⁰ In a failure-to-file case in which affirmative acts result in a

²⁷ Section 6531(5).

²⁸ Section 6531(2).

²⁹ See, e.g., *United States v. Beacon Brass Co.*, 344 U.S. 43 (1952) (post-filing false statements to officials); *United States v. Goodyear*, 649 F.2d 226 (4th Cir. 1981) (false statements made after filing of false return).

³⁰ That date can be much later than the return due date or actual filing date. See, e.g., *United States v. Dandy*, 998 F.2d 1344 (6th Cir. 1993) (December 1990 indictment for 1982 and 1983 evasion was timely more than six years from delinquent return filings when evasive acts occurred through November 1985); *United States v. Winfeld*, 906 F.2d 970 (11th Cir. 1992) (indictment in 1988 was timely on January 31, 1979, for fiscal year-end false return filed December 5, 1980, when false statement was made to agents in 1984); *United States v. DeTar*, 832 F.2d 1110 (9th Cir. 1987) (timely indictment in October 1985 charging evasion of payment of 1977 and 1978 taxes); *United States v. Ferris*, 807 F.2d 269 (1st Cir. 1986) (1985 indictment for evasion in 1976 and 1977 held timely when 1979 and 1985

Spies evasion charge, the limitations period commences to run from the due date of the return or the last affirmative act of evasion, whichever is later.³¹

The statute of limitations to prosecute the filing of false tax returns, statements, affidavits, or other documents is six years.³² For an original return, the statute of limitations commences on the later of the due date or date of filing, whichever is earlier. For a delinquent return or an amended return filed after the due date, the limitations period commences when the return is filed with the IRS.³³

Under section 7206(2), the statute of limitations to prosecute one who assists in the preparation or presentation of a false return or other document is six years.³⁴ There is no case that provides a clear-cut answer to the question of when the statute of limitations commences to run under section 7206(2). Because a violation of that provision can be charged in different ways, all of the possible issues have not received critical examination. In one case, a section 7206(2) violation was held to occur every time a taxpayer relied on the advice of the defendant, a tax shelter promoter, to file false returns, even though more than six years had elapsed since he provided the initial advice to claim false deductions.³⁵ Depending on how an indictment charges an aiding and assisting offense and what view is followed (whether or not the actual filing of a return or other document is an element of the offense³⁶), the statute of limitations may not commence until a false return or other document is actually filed. If filing is not deemed an element of a particular section 7206(2) offense -- for example, when an indictment only charges counseling or advising the preparation of a false return or document, or when the false return or document is provided to an intermediary who is required by law to file it -- the crime would appear to be complete when the defendant provided the prohibited aid or assistance, and the six-year period would run from that date, regardless of filing or the due date.³⁷ If a defendant is charged with the actual preparation of a false tax return, it might be argued that the statute of limitations runs from the last date prescribed for filing the return,

statements to agents were made to conceal prior evasion); United States v. Trowsell, 367 F.2d 815 (7th Cir. 1966) (1964 indictment charging 1961 affirmative act made to conceal evasion of 1946-1953 taxes held timely). Accord, United States v. Payne, 978 F.2d 1177 (10th Cir. 1992) (discussing cases and focusing on the date a tax deficiency is incurred when affirmative acts occur earlier).

³¹ See, e.g., United States v. DiPetto, 936 F.2d 96 (2d Cir. 1991) (when earlier filing and maintaining of false withholding document, Form W-4, is the affirmative act charged, limitations period runs from later due date of unfiled income tax return).

³² Section 6531(5).

³³ United States v. Samara, 643 F.2d 701 (10th Cir. 1981).

³⁴ Section 6531(3).

³⁵ United States v. Kelley, 864 F.2d 569 (7th Cir. 1989).

³⁶ See United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983).

³⁷ See United States Cutler, 948 F.2d 691 (10th Cir. 1991). A similar argument was rejected in Imholte v. United States, 226 F.2d 585 (8th Cir. 1955).

regardless of when the preparation occurred and whether or not the return was ever filed.³⁸

Offenses under section 7202 regarding employment tax withholding have been held to be subject to the six-year limitations period.³⁹ The offenses described in section 7212(a), including the omnibus obstruction-type clause regarding the due administration of the IRS, is subject to a six-year limitations period.⁴⁰ The limitations period commences upon the occurrence of the last corrupt act.⁴¹

Tax-Related Title 18 Offenses

The principal nontax offenses⁴² investigated by IRS special agents (other than conspiracy and money-laundering), including false statements (18 U.S.C. section 1001), false claims (18 U.S.C. section 287), and aiding and abetting (18 U.S.C. section 2), are subject to the customary five-year statute of limitations.⁴³

The limitations period to prosecute a false statement under 18 U.S.C. section 1001 ordinarily begins to run when the false oral or written statement is made. One decision holds that a false statement that is mailed begins the limitations period when mailed, not when received, based on the rationale that neither the receipt nor reliance by the agency are elements of the offense.⁴⁴ Generally, each false statement is a separate crime against which a separate limitations period is applied.⁴⁵ An indictment charging a false oral statement made

³⁸ See *Hull v. United States*, 356 F.2d 919 (5th Cir. 1966). In *United States v. Bursten*, 395 F.2d 976 (5th Cir. 1968), the Fifth Circuit stated it deemed *Hull* overruled by *Habig*.

³⁹ *United States v. Mussachia*, 900 F.2d 493 (2d. Cir. 1990); *United States v. Porth*, 426 F.2d 519 (10th Cir. 1970).

⁴⁰ Section 6531(6). See *United States v. Kassouf*, 144 F.3d 952, Doc 98-16265, 98 TNT 100-81 (6th Cir. 1998); *United States v. Kelly*, 147 F.3d 172 (2d. Cir. 1998); *United States v. Wilson*, 118 F.3d 328, Doc 97-20500, 97 TNT 135-14 (4th Cir. 1997).

⁴¹ See *United States v. Workerger*, 90 F.3d 1409, Doc 96-21347, 96 TNT 147-64 (9th Cir. 1996).

⁴² For a listing including others, see IRM Part 9, Exhibit 9.1.3-2 (Aug. 11, 2003).

⁴³ 18 U.S.C. section 3282(a). The government may argue that under section 6531(1), the limitations period for an 18 U.S.C. section 287 offense is six years. That argument would appear to be correct for 18 U.S.C. section 286, which criminalizes conspiracies relating to fraudulent claims, but not section 287, because neither the intent to defraud nor an attempt to evade are elements of a section 287 offense.

⁴⁴ *United States v. Smith*, 740 F.2d 734 (9th Cir. 1984).

⁴⁵ See, e.g., *United States v. Jordan*, 890 F.2d 247 (10th Cir. 1989); *United States v. Warnick*, 815 F.2d 1341 (10th Cir. 1987). Repeated false statements given in response to identical questions can result in a defendant being

within the limitations period that serves to confirm a similar false written statement made outside the limitations period is not subject to a statute of limitations defense.⁴⁶

The period of limitations to prosecute a false claim under 18 U.S.C. section 287 normally begins to run when the false claim is presented. For income tax returns and other documents that claim a false refund from the IRS, that will ordinarily be when the return or other document is filed.⁴⁷

The ordinary statute of limitations for prosecution of criminal conspiracies under 18 U.S.C. section 371 is five years.⁴⁸ The statute of limitations period on a conspiracy commences from the date of the last overt act undertaken in furtherance of the main criminal objectives.⁴⁹

A conspiracy under the offense clause of 18 U.S.C. section 371 is not necessarily subject to the same limitations period as the underlying offense. Conspiracy is not the commission of the crime which it contemplates, nor does a conspiracy violate or arise under the statute whose violation is the object of the conspiracy.⁵⁰ Thus, a conspiracy to commit a substantive tax offense ordinarily has a five-year limitations period regardless of whether the underlying offense carries a three- or six-year statute of limitations. Under section 6531, however, there is a six-year limitations period applicable when a conspiracy charges "the defrauding or attempting to defraud the United States or any agency thereof" or attempts "in any manner to evade or defeat any tax or the payment thereof."⁵¹ It is unclear whether a five- or six-year statute applies to a conspiracy to violate section 7206(2).⁵²

The exact language used in an indictment to express the objects of a conspiracy must be carefully scrutinized to determine the applicable limitations period. When a single-count conspiracy charges conduct

convicted for only one such false statement. *United States v. Olsow*, 836 F.2d 439 (9th Cir. 1987). When those multiple false statements are made, the government need only indict and prove one false statement made within the five-year limitations period.

⁴⁶ *United States v. Roshko*, 969 F.2d 9 (2d Cir. 1992).

⁴⁷ It is unclear whether the code filing provisions (for example, section 6513(a)) are applicable to a Title 18 false claim prosecution.

⁴⁸ 18 U.S.C. section 3282(a).

⁴⁹ *Grunewald v. United States*, 353 U.S. 391 (1957). See also *United States v. Fletcher*, 928 F.2d 495 (2d Cir. 1991).

⁵⁰ See *Braverman v. United States*, 317 U.S. 49 (1942).

⁵¹ Sections 6531(1), 6531(8). See, e.g., *United States v. Aracri*, 968 F.2d 1512 (2d Cir. 1992); *United States v. Vogt*, 910 F.2d 1184 (4th Cir. 1990); *United States v. Brunetti*, 615 F.2d 899 (10th Cir. 1980); *United States v. Waldman*, 941 F.2d 1544 (11th Cir. 1991), *United States v. Lowder*, 492 F.2d 953 (4th Cir. 1974); *United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983).

⁵² *United States v. Fruehauf*, 577 F.2d 1038 (6th Cir. 1978).

subject to both five- and six-year periods of limitations, dual jury instructions and special verdict forms are appropriate.⁵³

Title 18 Obstruction and Perjury Offenses

IRS special agents encounter obstruction and perjury offenses during both administrative and grand jury investigations. They have authority to investigate and recommend prosecution in those cases when there are tax-related offenses that can or are to be charged. Obstruction and perjury offenses have a five-year limitations period. The principal obstruction offenses are 18 U.S.C. sections 1503 (typically misconduct during a grand jury investigation or trial), 1505 (agency proceeding obstruction), 1510 (obstruction of a criminal investigation), and 1512 (witness tampering and related offenses). In due course, IRS special agents will have cases involving Sarbanes-Oxley offenses (18 U.S.C. section 1519), punishing the destruction and alteration of records. Perjury prosecution is recommended by IRS special agents under 18 U.S.C. sections 1621 and 1623, and usually relates to testimony before a grand jury or in a tax trial.

Obstruction and perjury offenses rarely raise limitations questions. They are not historical crimes being investigated years after completion and are ordinarily prosecuted rather quickly after occurrence and discovery, usually during an investigation of principal tax and related offenses.

Conclusion

The statute of limitations on criminal prosecution can provide a complete and perfect defense, albeit technical. Tax and related charges are often involved and complex. Determination of the applicable limitations period is often not merely counting elapsed time.

⁵³ See *United States v. The Southland Corporation*, 760 F.2d 1366 (2d Cir. 1985) (18 U.S.C. section 371 count with dual objects: to violate the Travel Act and to defraud the United States by impeding the function of the Service).