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7.00 STATUTE OF LIMITATIONS

7.01 GENERALLY

7.01[1] Statutory Provisions

This section gives a general overview of statute of limitations issues in criminal tax cases. For a more detailed discussion of a specific offense, reference should be made to the applicable chapter in this Manual.

Section 6531 of Title 26 controls the statute of limitations periods for most criminal tax offenses. This statute provides:

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years --

- (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
- (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
- (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document);
- (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
- (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);
- (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);
- (7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

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(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

Thus, under section 6531, the general rule is that a three-year statute of limitations exists for Title 26 offenses. However, a six-year period applies to certain excepted offenses. Section 6531 switches back and forth between enumerating the exception by specific Code reference and by a description of the offense. For example, 26 U.S.C. §§ 7206(1), 7202, 7212(a) and 7214(a), and 18 U.S.C. § 371 (conspiracy to evade taxes), are all specifically designated by code section as falling within the six-year exception. Failure to file an income tax return and failure to pay a tax, 26 U.S.C. § 7203, however, are designated by description rather than code section.

Generally, the statute of limitations begins to run when an offense is completed. *Toussie v. United States*, 397 U.S. 112, 115 (1970). Prosecutors should be aware that not all tax offenses are completed upon the filing of a tax return. For example, in a tax evasion case where the affirmative act of evasion is a subsequent false statement to IRS agents, the crime is completed at the time the false statement is made, not when the false return is filed. *United States v. Goodyear*, 649 F.2d 226 (4th Cir. 1981). Consequently, careful examination of the various elements is required to determine when a specific tax offense is completed.

7.01[2] *Limitations Periods for Common Tax Offenses*

<i>Description of Offense</i>	<i>Code Section</i>	<i>Statute of Limitations</i>	<i>Code Section</i>
Tax Evasion	26 U.S.C. § 7201	6 years	26 U.S.C. § 6531(2)
Failure to Collect, Account For or Pay Over	26 U.S.C. § 7202	6 years ¹	26 U.S.C. § 6531(4)
Failure to Pay Tax	26 U.S.C. § 7203	6 years	26 U.S.C. § 6531(4)
Failure to File a Return	26 U.S.C. § 7203	6 years ²	26 U.S.C. § 6531(4)
Failure to Keep Records	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Failure to Supply Information	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Supply False Withholding Exemption Certificate	26 U.S.C. § 7205	3 years	26 U.S.C. § 6531

¹ There is a difference of opinion as to the limitations period for section 7202 offenses. The Second and Tenth Circuits hold that a six-year statute of limitations period applies. *United States v. Musacchia*, 900 F.2d 493, 500 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991); *United States v. Porth*, 426 F.2d 519, 521-22 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). At least one district court has held that a three-year limitations period applies. *United States v. Block*, 497 F. Supp. 629, 630-32 (N.D. Ga.), *aff'd*, 660 F.2d 1086 (5th Cir. 1980). The Tax Division takes the position that the Second and Tenth circuits are correct, and that the six-year limitations period under 26 U.S.C. § 6531(4) applies to section 7202.

² A number of exceptions exist to the six-year rule. Section 6531(4) exempts returns which are required to be filed under part III of subchapter A of chapter 61. Part III refers to information returns required to be filed under 26 U.S.C. §§ 6031-6060, and includes, for example, partnership returns, returns of exempt organizations, subchapter S returns, estate returns and trust returns. Part III also includes returns relating to cash received in trade or business (Form 8300). Reference should be made to these specific Code provisions for a more detailed discussion of applicable limitations periods.

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File False Tax Return	26 U.S.C. § 7206(1)	6 years	26 U.S.C. § 6531(5)
Aid or Assist in Preparation of False Tax Return	26 U.S.C. § 7206(2)	6 years	26 U.S.C. § 6531(3)
Deliver or Disclose False Document	26 U.S.C. § 7207	6 years	26 U.S.C. § 6531(5)
Attempt to Interfere With Administration of Internal Revenue Laws	26 U.S.C. § 7212(a)	6 years 3	26 U.S.C. § 6531(6)
Conspiracy to Commit Tax Evasion	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(8)
Conspiracy to Defraud the Internal Revenue Service	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(1)
False Claim for Refund	18 U.S.C. § 286/287	5 years	18 U.S.C. § 3282
False Statement	18 U.S.C. § 1001	5 years	18 U.S.C. § 3282

3 Section 7212(a) refers to two types of offenses: (1) impeding employees of the United States acting in an official capacity; and (2) impeding the administration of the Internal Revenue laws. Section 6531(6) applies the six-year limitations period to the first prong of section 7212(a), not the second prong. Nonetheless, the Tax Division believes the six-year limitations period applies to offenses under the second prong of section 7212(a) pursuant to 26 U.S.C. § 6531(1). This section's broad description of "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner" encompasses the conduct prohibited under section 7212(a)'s second clause. Reference should be made to the discussion of this issue in the chapter dealing with Section 7212(a). *See* Chapter 17.00, *infra*.

7.02 *TRIGGERING OF STATUTE OF LIMITATIONS*7.02[1] *Filing a False Tax Return*7.02[1][a] *General Rule*

The general rule is that the statute of limitations for the filing of a false tax return starts on the day the return is filed. *United States v. Habig*, 390 U.S. 222, 223 (1968). See also *United States v. Kelly*, 864 F.2d 569, 574 (7th Cir.), cert. denied, 493 U.S. 811 (1989); *United States v. Marrinson*, 832 F.2d 1465, 1475-76 (7th Cir. 1987). However, if the return is filed early (*i.e.*, before the statutory due date), the statute of limitations does not start to run until the statutory due date. 26 U.S.C. § 6513(c)(1) (1988). See also *Habig*, 390 U.S. at 225. For example, if a tax return that is due to be filed on April 15, 1992, is filed early on January 26, 1992, the statute of limitations on the return would not begin to run until April 15, 1992.

Conversely, if a return is filed late (*i.e.*, after the statutory due date), the statute of limitations begins running the day the return was filed. *Habig*, 390 U.S. at 225. Thus, if a return that was due on April 15, 1992, was filed late on June 1, 1992, the statute of limitations commences on June 1, 1992.

In cases where an extension of time to file at a later date has been obtained, the statute of limitations begins to run from the date the return was filed, regardless of whether it was filed before or after the extension date. *Habig*, 390 U.S. at 225-27. Thus, where a return due on April 15, 1992, is granted an extension to August 15, 1992, and actually filed on August 1, 1992, the statute of limitations begins to run on August 1, 1992. Similarly, if the extension is to August 15, 1992, and the return is filed October 1, 1992, the statute of limitations begins to run on October 1, 1992.

The statutory due date for filing a return depends upon the type of tax and the return involved. Section 6072 of Title 26 sets out the statutory due dates for the filing of various tax returns. Individual income tax returns made on a calendar year basis are due on April 15th of the following year. 26 U.S.C. § 6072(a) (1988). Returns made on a fiscal basis are due on the fifteenth day of the fourth month of the following fiscal year. 26 U.S.C. § 6072(a) (1988). Corporate returns made on a calendar year basis are due on March 15th of the following year. 26 U.S.C. § 6072(b) (1988).

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Corporate returns made on a fiscal basis are due on the fifteenth day of the third month of the following fiscal year. 26 U.S.C. § 6072(b) (1988).

7.02[1][b] *Definition of Timely Filed*

A tax return is generally considered timely filed when it is received by the Internal Revenue Service on or before the due date of the return. Typically, when a return is received on or before the statutory due date, it is not date stamped. However, in cases where a return is filed after the statutory due date, the return is date stamped on the date received by the Service Center. This date then becomes the date of filing for statute of limitation purposes.

Prosecutors should be aware of the timely filed/timely mailed exception. Section 7502 of Title 26 allows the date of mailing by the taxpayer (as opposed to the date of receipt by the Internal Revenue Service) to be the date of filing where: (1) the return is sent by U.S. Mail and contains a U.S. postmark on or before the statutory due date; (2) the return is deposited in the mail addressed to the appropriate IRS office with postage prepaid; and (3) the return is delivered to the IRS after the date it was due. 26 U.S.C. § 7502 (1988).

In these circumstances, the return may be date stamped after the statutory due date and still deemed timely filed under section 7502.

7.02[2] *Failing to File a Tax Return*

Generally, the statute of limitations does not begin to run until the crime is complete. *Toussie v. United States*, 397 U.S. 112, 115 (1970). In cases where the defendant has failed to file a tax return, the statute of limitations begins to run when the return is due. *Phillips v. United States*, 843 F.2d 438, 443 (11th Cir. 1988). For example, if a tax return that is due to be filed on April 15, 1992, is not filed by the defendant, the statute of limitations on the return would not begin to run until April 15, 1992.

If a defendant has obtained an extension of time to file a tax return, there is no duty to file until the extension date. *Phillips*, 843 F.2d at 442-43. Thus, if a defendant obtains an extension to file from April 15, 1992, to August 15, 1992, and fails to file on

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the extension date, the statute of limitations would begin to run on August 15, 1992.

Section 6081 of Title 26 governs extensions. The IRS regulations for section 6081 detail the application procedures and extension times for filing various returns. Treas. Reg. § 1.6081-1, *et seq.* (26 C.,F.R.) Generally, the regulations provide for an automatic four-month extension of time for filing individual income tax returns. Treas. Reg. § 1.6081-4(a)(1). Prosecutors should be aware that taxpayers cannot extend their time to pay, only their time to file. Treas. Reg. § 1.6081-4(b). Thus, an extension request is valid only when accompanied with payment of the taxpayer's estimated tax liability. Treas. Reg. § 1.6081-4(a)(4).

7.02[3] *Tax Evasion*

In order to commit tax evasion, the defendant must commit some affirmative act to evade a tax. While this act most often is the filing of a false tax return, it may also be "any conduct the likely effect of which would be to mislead or conceal." *Spies v. United States*, 317 U.S. 492, 499 (1943).

The general rule is that the statute of limitations for tax evasion begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952); *United States v. DiPetto*, 936 F.2d 96, 97 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991); *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993).

Thus, in cases where the affirmative act of evasion is the filing of a false tax return, the statute of limitations begins to run on the date the return is filed or the statutory due date, whichever is later. *Beacon Brass Co.*, 344 U.S. at 46. Prosecutors should be aware of the applicable early filing, late filing and extension filing rules enumerated in section 7.02[1][a], *supra*.

Additionally, in cases where a false return is filed coupled with an affirmative act of evasion after the filing date, the statute of limitations commences on the date the last affirmative act took place or the statutory due date, whichever is later. *Beacon Brass Co.*, 344 U.S. at 46; *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987); *United States v. Trowsell*, 367 F.2d 815, 816 (7th Cir. 1966). For example, if a false 1991 tax return is timely filed on April 15, 1992, and the defendant engages in further affirmative acts of evasion (*e.g.*, lying to

agents of the IRS) on September 15, 1993, regarding his 1991 taxes, the statute of limitations would begin to run on September 15, 1993.

Further, in cases where no return is filed and some other act constitutes the affirmative act of evasion, the statute of limitations begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. *DiPetto*, 936 F.2d at 97; *United States v. Williams*, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); *Payne*, 978 F.2d at 1179; *United States v. Winfield*, 960 F.2d 970, 973-74 (11th Cir. 1992).

For example, if a 1991 tax return that is due to be filed on April 15, 1992, is not filed by the defendant, and the defendant had committed an act of evasion (*e.g.*, filing a false Form W-4 exemption certificate) on June 6, 1991, relating to his 1991 taxes, the statute of limitations would commence on April 15, 1992. Conversely, if a 1991 tax return that is due to be filed on April 15, 1992, is not filed by the defendant, and the defendant had committed an act of evasion (*e.g.*, lying to agents of the IRS) on December 1, 1993, relating to his 1991 taxes, the statute of limitations would commence on December 1, 1993.

7.02[4] *Conspiracy*

The statute of limitations for a conspiracy to evade taxes under the offense clause of section 371 is six years. Similarly, the statute of limitations for a *Klein* conspiracy under the defraud clause of section 371 is six years. Both of these offenses are controlled by 26 U.S.C. § 6531. Occasionally, defendants charged with a tax conspiracy under section 371 will argue that a five-year statute of limitations should apply to section 371, pursuant to 18 U.S.C. § 3282, which is the general limitations statute for Title 18 offenses. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. See *United States v. Aracri*, 968 F.2d 1512, 1517 (2d Cir. 1992); *United States v. Vogt*, 910 F.2d 1184, 1201 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United States v. Lowder*, 492 F.2d 953, 955-56 (4th Cir.), *cert. denied*, 419 U.S. 1092 (1974); *United States v. Fruehauf*, 577 F.2d 1038, 1070 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. White*, 671 F.2d 1126, 1133-34 (8th Cir. 1982); *United States v. Pinto*, 838 F.2d 426, 435 (10th Cir. 1988); *United States v. Brunetti*, 615 F.2d 899,

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901 (10th Cir. 1980); *United States v. Waldman*, 941 F.2d 1544, 1548 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 2938 (1992).

The statute of limitations in a conspiracy begins to run from the last overt act proved. *Grunewald v. United States*, 353 U.S. 391, 397 (1957). The government, however, is not required to prove that each member of a conspiracy committed an overt act within the statute of limitations. *Hyde v. United States*, 225 U.S. 347, 369-70 (1912). *See also United States v. Read*, 658 F.2d 1225, 1234 (7th Cir. 1981) (interpreting the *Hyde* decision). Once the government shows a member joined the conspiracy, their continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See, e.g., United States v. Juodakis*, 834 F.2d 1099, 1103 (1st Cir. 1987); *United States v. Barsanti*, 943 F.2d 428, 437 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); *United States v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980); *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987).

However, a showing of withdrawal before the limitations period (*i.e.*, more than 6 years prior to the indictment where the limitations period is 6 years) is a complete defense to conspiracy. *Read*, 658 F.2d at 1233. The defendant carries the burden of establishing this affirmative defense. *Juodakis*, 834 F.2d at 1102-03; *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir.), *cert. denied*, 112 S. Ct. 397 (1991); *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); *Krasn*, 614 F.2d at 1236; *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); *Finestone*, 816 F.2d at 589. *But see Read*, 658 F.2d at 1236 (burden of production on defendant, burden of persuasion remains on government to negate withdrawal defense); *United States v. Jannoti*, 729 F.2d 213, 221 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984) (initial burden on defense, then shifted to government); *United States v. West*, 877 F.2d 281, 289 (4th Cir.), *cert. denied*, 493 U.S. 860 (1989) (government retains burden of persuasion); *United States v. MMR Corp.*, 907 F.2d 489, 501 (5th Cir. 1990) (burden is two step process on defense and government); *Model Criminal Jury Instructions for the Ninth Circuit*, §8.05D (1992) (following *Read*).

The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See Juodakis*, 834 F.2d at 1102; *Lash*, 937 F.2d at 1083; *Krasn*, 614 F.2d at 1236; *United States v. Gonzalez*, 797 F.2d 915, 917 (10th Cir. 1986); *Finestone*, 816 F.2d at 589.

The government technically is not required to prove that each member of the conspiracy committed an overt act within the statute period. However, in practice, the prosecutor should critically review those conspirators whose membership predates the limitations period, and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

7.03 **TOLLING PROVISION: FUGITIVE OR OUTSIDE U.S.**

Section 6531 of Title 26 contains its own tolling provision. The statute provides:

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for commencement of such proceedings.

26 U.S.C. § 6531 (1988). Thus, the statute of limitations in Title 26 cases can be tolled if the defendant is outside the United States or is a fugitive.

"Outside the United States" and "fugitive from justice" are interpreted in the disjunctive. Mere absence from the United States without any intent to become a fugitive is sufficient to toll the statute of limitations. *United States v. Marchant*, 774 F.2d 888, 892 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

For example, in *Marchant*, 774 F.2d at 892, the Eighth Circuit held that defendant's eleven-day health and pleasure trip to Switzerland tolled the statute of limitations under 26 U.S.C. § 6531. According to the court, under section 6531 persons are "outside the United States" whenever they cannot be served with criminal process within the jurisdiction of the United States under Rule 4(d)(2) of the Federal Rules of Criminal Procedure. *Marchant*, 774 F.2d at 892.

The "fugitive of justice" clause in section 6531 refers to 18 U.S.C. § 3290. This statute provides: "No statute of limitations shall extend to any person fleeing from justice." 18 U.S.C.

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§ 3290 (1988). The circuits are split as to the intent required under this statute. The District of Columbia and Eighth Circuits have held that mere absence from the jurisdiction, regardless of intent, is sufficient to toll the statute of limitations. *In Re Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982); *McGowen v. United States*, 105 F.2d 791, 792 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939).

The First, Second, Fifth, Seventh and Ninth Circuits have held that intent to avoid arrest or prosecution must be proved before section 3290 applies. *Brouse v. United States*, 68 F.2d 294, 296 (1st Cir. 1933); *Jhirad v. Ferrandina*, 486 F.2d 442, 444-45 (2d Cir. 1973); *Donnell v. United States*, 229 F.2d 560, 563-65 (5th Cir. 1956); *United States v. Marshall*, 856 F.2d 896, 897-900 (7th Cir. 1988); *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976).

7.04 COMPLAINT TO EXTEND STATUTE OF LIMITATIONS

Section 6531 of Title 26 contains a mechanism for extension of the statute of limitations period. The statute provides:

Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

26 U.S.C. § 6531 (1988). Thus, the government may file a complaint within the limitations period and effectively extend the statute period nine months.

However, section 6531 was not designed to grant the government greater time in which to make a case. *Jaben v. United States*, 381 U.S. 214, 219 (1965). Rather, it was intended to be used in situations where the government has made its case within the limitations period but cannot obtain an indictment within the limitations period because of the grand jury schedule. *Jaben*, 381 U.S. at 219-20. *But see United States v. O'Neal*, 834 F.2d 862, 865 (9th Cir. 1987) (investigation and case preparation need not cease upon filing of complaint; whether government improperly invoked extension is tested by sufficiency of the complaint at the preliminary hearing).

In *Jaben*, the Supreme Court addressed the requirements for a valid complaint under section 6531. The Court held that a complaint must allege sufficient facts to support a probable cause finding that a tax crime has been committed by the defendant. *Jaben*, 381 U.S. at 220. Further, the

government must fully comply with the complaint process and afford the defendant a preliminary hearing. 381 U.S. at 220.

As a practical matter, a complaint should only be filed for the year in which the statute of limitations would otherwise expire. This procedure will not preclude development before the grand jury of counts for subsequent years in which the statute has not expired. Prosecutors should be aware, however, that the filing of a complaint may trigger the Speedy Trial Act as to the charge which is the subject of the complaint and, as a practical matter, may shorten the time within which the government can act on the remaining tax years under investigation. *See* 18 U.S.C. § 3161(b).

7.05 SUSPENSION OF STATUTE: SUMMONS ENFORCEMENT

Section 7609(e)(1) of Title 26 provides for the suspension of the statute of limitations in certain types of summons enforcement proceedings. This statute provides:

If any person takes any action as provided in subsection (b) [intervenes] and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations . . . under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

26 U.S.C. § 7609(e)(1) (1988).

It is beyond the scope of this Manual to treat in detail the nuances of summons enforcement proceedings. Any reliance on the suspension issue in this area requires a thorough analysis of section 7609, and particular care must be taken in measuring and documenting any period for which the statute of limitations is suspended.