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Failure to File A Tax Return Penalty

The civil penalty applicable for failure to file timely returns is section 6651(a)(1). This penalty applies both inside and outside of the OVDP regime. The elements of this penalty are the same as the elements of the section 7203 failure-to-file offense. Indeed, the taxpayer must have a duty to file and must have failed to timely file.

In general, the section 6651(a)(1) penalty is 5 percent per month, plus an additional 5 percent for each month – or fraction thereof – during which the failure continues.[i] The penalty shall not exceed 25 percent.[ii]

What is the penalty base? Very simply, it is the tax required to be shown on the return. However, the base is reduced by the tax that has been paid by the due date of the return. For example, by withholding or estimated taxes.

An important point to remember is that "if the failure to file is fraudulent, the penalty rate becomes 15% per month, with a maximum of 75%"[iii] (i.e., see the discussion of the civil fraud penalty).

Can a taxpayer use the statute of limitations as a defense to the failure to file penalty? Unfortunately, such a defense is doomed to fail. In general, "the IRS must assess any tax, or issue a notice of deficiency, with respect to a tax year within three years of (1) when the return for the year was filed *or* (2) when the return was due to be filed, whichever is *later*."[iv] For example, if John filed his return on March 15, the statute of limitations would begin to run on April 15.

On the other hand, "if the return is filed *after* the original due date, the statute of limitations begins running the day the return was actually filed, regardless of whether an extension was granted."[v] For example, if John was granted an extension to July 1 to file his return, but actually filed it on June 1, the statute of limitations would begin to run on June 1.

Many events can extend or suspend the running of this limitations period.[vi] One such event is the failure to file a tax return. The statute of limitations for the IRS to assess and collect any outstanding balances does not begin until a return has been filed.[vii] In other words, the IRS can go back until time and memorial to assess and collect tax when no return has been filed.[viii]

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[i] Tax Crimes, Townsend, John, Campagna, Larry, Johnson, Steve, LexisNexis, 2008 at p. 381.
[ii] Id.
[iii] Id.
[iv] Id.

[v] Id.
[vi] Id.
[vii] Id.
[viii] Id.