

Non-Filer Presentation

Getting Our Clients Compliant

JEFFREY A. SCHNEIDER, EA, CTRS, NTPF FELLOW

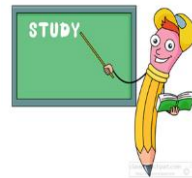
July 12th, 2019

Presented on behalf of the American Society of Tax Problem Solvers

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OBJECTIVES



What is a Non-Filer?

What are the IRS Processes and Remedies?

What can the Taxpayer Representative do to mitigate the issues facing a non-filer?

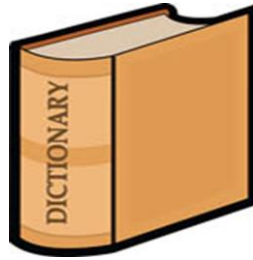
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PART I

WHAT IS A NON-FILER?



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IRS Definitions

Habitual

Just does not file for whatever reason

Skip Filers

Files one year then skip one or more years, then files and repeats this process (i.e., health reasons)

Stop Filers

Were compliant for a long time, then all of sudden stops filing, again for whatever reason

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Real World Definitions

Procrastinators

Know they should file but need assistance and/or prompting. They will typically respond and always indicate that they will cooperate when contacted by the IRS. However, information is usually provided in a piecemeal fashion

Uncooperative Non-Filers

They refuse to acknowledge and respond to correspondence (electronic or otherwise) and/or phone calls and if contacted by the IRS, they clearly state that they will not cooperate (**UNOPENED ENVELOPES**)

Tax Protestors

Advocate and/or use tax protestor's scheme (i.e., refusal to file due to some constitutional objection).

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PART II

IRS Processes and Programs

IRM 4.19.17, 4.19.17.1, 5.18.1 & 5.18.2

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What does the IRS want to find?

1. Occupation
2. Banking
3. Age

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What does the IRS want to find?

4. Address
5. Last return information (if applicable)
 1. When filed
 2. AGI
 3. Tax Liability
 4. How taxes were paid (W/H, Estimates)
 5. How many returns are delinquent

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To Ascertain Additional Sources of Income

- ✓ Search Public Records
 - ✓ Tax Assessor
 - ✓ World Wide Web
 - ✓ Business Licenses
 - ✓ Professional Associations
 - ✓ State Tax Information
 - ✓ Sales Tax Records
 - ✓ Income Tax Returns
 - ✓ **The easiest one they can look at is.....**

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WAGE AND INCOME TRANSCRIPT

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Substitute for Returns (SFRs)

Internal Revenue Code 6020(b)

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What Happens When an SFR is Prepared?? **It is a return for collections ONLY**

Three items that need to be considered:

- An SFR does not stop the Failure to File Penalty.
- An SFR does not stop the Failure to Pay Penalty.
- An SFR does start the 10-year collection statute of limitations ("CSED"). It does not started the assessment statute expiration date (ASED) The rationale is that the IRS can start collecting on the balance due if they have followed collection due process (outside of the scope of this narrative)). The IRS, in IRM 5.1.19.6.15, explicitly state that they cannot collect past this date.
- 6020(b)) is not mandatory, but permissive
 - *Stafford v Commissioner* 983 F 3d 25, 27 (5th Cir 1983) – cited by Roat

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A Practical Example

IRS Files an SFR for unfiled 2006 return, owing \$20,000 on
1/15/2009

Not considering extending the statute or file a return that adds tax,
what is the last date in which the IRS can collect tax?

1/15/2019

Look on transcript for Code and Description for Tax Written off and Lien Removed

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Sometimes Taxes Do Die



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Internal Revenue Service's SFR Program

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Purpose of the program is to assess the correct tax liability by:

- Securing a voluntary income tax return from the taxpayer

OR

- Computing tax, interest and penalties based on information gathered from outside sources

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NOW WHAT??

Sends out notices

Sends out notices

Sends out notices

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Automatic Substitute For Return Module

- the taxpayer is not self-employed;
- total income is less than \$100,000;
- the income shown on the IRS Information Reporting System totals more than 75% of adjusted gross income and total positive income on the taxpayer's last filed return;

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Automatic Substitute For Return Module

Per the IRS, due to financial constraints, this program
has been suspended

In light of TIGTA's recommendations to the contrary

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Automatic Substitute For Return Module

➤ the tax year is no older than six years prior to the current tax year; there is no current or pending "uncollectible status" on the account;

➤ the taxpayer's address has been verified.

➤ If these conditions do not exist, the matter will be sent to a Revenue Officer to review and obtain pertinent information prior to referral to the Examination Division for creation of an SFR for the taxpayer

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SFRs & SNOD

Kevin & Anne Marie McDuff – Docket 7851-17 (field 8/24/17)

- USTC Ruled that they did not have jurisdiction
- What does this have to do with Non-filers?
 - Parties agree that return for year at issue was not filed
 - Parties agree that SFR was never issued before SNOD was issued
- IRS wanted case kicked due to late filing of petition (by 65 days)
- The McDuffs wanted case tossed because SNOD was invalid (based on incorrect filing status). Also with no SFR, no SNOD.
- Chief Judge – L. Paige Marvel – **“No income tax return need to be filed in order for the commissioner to issued a valid notice of deficiency.”** (Road V Commissioner (9th Cir – 1988)).
- Since 6020(b) is permissive not mandatory, thus none is needed for SNOD

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Statute of Limitations

3 Years

this is the general statute for a timely filed return, the day after when the return is due, or if extended, when it was filed.

Timely Returns - §6072(a)

Early Returns - §6501(b)(1)

Late Returns - §6501(a)

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Statute of Limitations

3 Years

Assessments – SOL begins to run the day after a return is considered as filed (§6501)

Collections - SOL begins to run the day after the tax is assessed (§6502) *

***Request TX MODA (Not through E-services, but PPS or FOIA – which is SOL Specific**

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Statute of Limitations

6 years

When there is a material misstatement, which is the underreporting of income **GREATER** than 25%, the SOL is extended by another 3 years (§6501(e)(1)(A)).

PL Law 114-41 (6/2015) overrules USSCT ruling and now anyone that has an overstatement of uncovered cost basis is now considered when computing the 25% (§6501(e)(1)(B)(ii))

Considerations

Willful attempt to evade tax

Willful aiding or abetting the filing of false or fraudulent returns

Straight out Fraud

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Statute of Limitations

Unlimited

If a fraudulent return is filed with the intent to evade tax, the statute of limitations does not run even when a later, correct income tax return is filed.

§6501(c)

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Statute of Limitations

No Extension is filed

If return is filed on or before due date, the SOL is 3/6 years from the due date of the return, not when filed or when received.

Timely filed extension

If return is filed after the due date, the SOL is 3/6 years from when is received by the IRS, but not later than extended due date (§7502).

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Statute of Limitations

None

**There has to be a return filed for the
SOL to start.**

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Collection Statute of Limitations

10 Years

**Section 6502 currently provides that an assessed tax may be
collected by levy or by a proceeding in court if the levy is
made
or the proceeding began within 10 years after date of
assessment.
Sec. 6502(a)(1).**

As of 1990, prior was only 6 years

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Collection Statute of Limitations

Can be 20 Years or More

When a judgment is entered in a case where assessments were reduced to judgment, there is a 20 years SOL from the date the judgment was entered as the new CSED

IRM 5.1.19.3.2.1

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What is a Return?

**Robert D. Beard v Commissioner, 82
TC, 766 (1984),
affirmed curian 793 F2d 139 (6th Cir
1986)**

Update BRADLEY C. REIFLER AND NANCY REIFLER, Petitioners, v. COMMISSIONER OF
INTERNAL REVENUE, Respondent.
T.C. Memo. 2015-199

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What is a Return?

**Sufficient data to calculate a
tax liability**

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What is a Return?

**Document must purport to
be a return**

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What is a Return?

**Honest and reasonable
attempt to satisfy the
requirement of the tax law**

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What is a Return?

**Taxpayer must execute the return
under penalties of perjury (§6605)**

**Recently held in Tax Court Memo, 199
10/13/2015 (Bradley Reifler & Nancy
Reifler)**

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IRS Non-filer Program

Internal Revenue Manual

4.19.17

Who Pursues the Non-Filer

Tax Evasion or Fraud?

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What does the IRS do to Determine Fraud?

History of Non or late filing	Ability to pay
Repeated contact from the IRS	Not ignorant of the requirements (educated, profession in the field)
FBAR & FACTA Violations	Age and Health
Substantial Taxes Due, even with withholdings and estimates	Large Cash Transactions in number and dollars
Indications of large income per W&I Statements	No reasonable cause not to file
Prior history of Tax Criminal Violations	

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What if the IRS Feels Fraud Exists?

Will accept all returns, but will not solicit them

Will not discuss anything with the taxpayer:

- ❖ Advice as to what cause of action the IRS may take
- ❖ Penalties that can be assessed
- ❖ With their manager, discuss with Fraud Technical Manager

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Part III

How to Best Represent Your Client

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Circular 230

Circular 230

Circular 230

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Voluntary Compliance

Voluntarily informs the IRS of his failure to file for one or more years

Had income from only legal sources

Makes the disclosure prior to being informed that he is under criminal investigation

Files a correct tax return or cooperates with the IRS in ascertaining his correct tax liability

Makes full payment of the amount due, or if unable to do so, makes bona fide arrangements to pay

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STEP BY STEP REPRESENTATION

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INITIAL INTERVIEW

DOCUMENT REASONS FOR NOT FILING

FRAUD????

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8821 vs. 2848

**Why do we need a POA
when all we need is
information??**

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Engagement Letter

An Absolute Must

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Retainer

**Must accompany the
engagement letter and
before POA**

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Then POA if Needed

**Get Information that cannot
get via transcripts (TaxModA)**

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What Returns And How Many Returns to File?

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Privilege and the Enrolled Agent (FATPs¹)

IRC §7525

¹ Federally Authorized Tax Preparers

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Privilege and the Enrolled Agent

Both oral and written tax advice given by an FATP to a taxpayer-client can be protected.	The confidentiality privilege <u>does not</u> extend to criminal tax matters, which should be referred to a criminal tax attorney
Separate engagement letters, billing statements and files are essential to preserve the confidentiality privilege for tax advice communications, including tax advice documents	Engagement letters should address the confidentiality privilege but it is the client's responsibility to establish and assert the privilege.

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Privilege and the Enrolled Agent

If a FATP does not communicate a tax advice document to the taxpayer-client, but retains it in his or her file, <u>AND if the document is closely related in time and materiality to the tax discussion</u> , it may qualify for the confidentiality privilege	If the tax advice document is not communicated to the taxpayer-client, and is <u>remote in time and materiality</u> to the tax discussion, the document may still be protected under the work-product doctrine if prepared "in anticipation of litigation" or pursuant to employment by an attorney under an engagement letter.
The FATP's notes to the client file, mental impressions and thought processes may be protected under the confidentiality privilege.	The confidentiality privilege may be waived if a FATP communicates a tax advice document to the taxpayer-client and sends a copy, to the latter's banker or financial adviser.

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Additional Assessments

Penalties

Interest

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Additional Assessments

- **Late Filing (FTF)**
 - **5% per month or part**

- **Late Paying (FTP)**
 - **½% per month or part**

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Additional Assessments

- **Combined Penalties**
 - If there are both FTP and FTF, the FTF is reduced by the FTP
 - If return is over 60 days late, the minimum penalty can be **\$135 or 100% of the taxes due**

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Additional Assessments

- **Frivolous Tax Submissions – Tax Protestors**
 - **\$5000 penalty**
- A frivolous tax return is one that does not include enough information to figure the correct tax or that contains information clearly showing that the tax reported was substantially incorrect.

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Additional Assessments

- **20% Penalty**

- Shows negligence or intentional disregard of the rules or regulation

- Substantially understates their income

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Additional Assessments

- **Civil Fraud**

- Up to 75% Penalty

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Additional Assessments

- **Criminal Penalties**
 - **False Statements**
 - **Felony**
 - **75% Civil Penalty**
 - **Up to 3 years imprisonment**
 - **Up to \$250,000 fine**
 - **Tax Evasion**
 - **Felony**
 - **75% Civil Penalty**
 - **Up to 5 years imprisonment**
 - **Up to \$250,000 fine**

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Additional Assessments

- **Interest**
 - **Not actually a penalty, but is additional monies owed.**
 - **Charged on the outstanding balance**
 - **Changes quarterly**

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Discuss this With Your Clients

**IT MAY BE CHEAPER TO
BORROW THAN IT IS TO BE
SUBJECT TO MANY OF THE
PENALTIES AND INTEREST
CHARGES.**

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Non-Filing and Living Abroad

- **Form 14438**
 - Streamlined program – September 1st, 2012
 - Many non-filers of income tax returns and the FINCEN
 - Designed for “low compliance risk”
 - Expedited review
 - No penalties for follow-up actions
 - All back returns and monies due for the past 6 years are to be filed and any monies due (included interest) are to be paid.

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Non-Filing and Living Abroad

– Who is eligible for the Streamline Process

- Non-residents since 1/1/09
- Not file return from that point
- SSN for US citizens living abroad
- Valid ITIN if not eligible for an SSN
- Low risk have little or no tax due
- If filing an amended return, is considered high risk. Returns will be more carefully reviewed
- The more money owed, the higher the risk
- Must file form 14438 – provided in handouts
- High risk filers that owe <\$1500 for each year, will be deemed low risk

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Non-Filing and Living Abroad

The risk factor may rise if any of the following are present

- If any of the returns submitted through this program claim a refund;
- If there is material economic activity in the United States;
- If the taxpayer has not declared all of his/her income in his/her country of residence;
- If the taxpayer is under audit or investigation by the IRS;
- If FBAR has previously assessed penalties against the taxpayer or issued a FBAR warning letter;
- If the taxpayer has a financial interest or authority over a financial account(s) located outside his/her country of residence;
- If the taxpayer has a financial interest in an entity or entities located outside his/her country of residence;
- If there is U.S. source income; or
- If there are indications of sophisticated tax planning or avoidance.

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PART IV

OTHER CONSIDERATIONS

BANKRUPTCY & COLLEGE FUNDING

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BANKRUPTCY

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4 ITEMS TO CONSIDER

You must file all required tax returns for tax periods ending within four years of your bankruptcy filing.	During your bankruptcy you must continue to file, or get an extension of time to file, all required returns.
During your bankruptcy case you should pay all current taxes as they come due	During your bankruptcy case you should pay all current taxes as they come due

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An SFR does not constitute a return for bankruptcy purposes

The taxes assessed can not be discharged even if a “correct” return was filed

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Late Returns

1st, 5th & 10th Circuits

All have ruled that late returns, even “a moment late” can never be discharged due to the strict language of §523(a) of the Bankruptcy Code in 2005

Fahey, 779 F.3d 1 (1st Cir. 2015);
McCoy, 666 F.3d 924 (5th Cir. 2012);
Mallo, 774 F.3d 1313 (10th Cir. 2014).

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§523(a) of the Bankruptcy Code

- (a) A discharge under section [727](#), [1141](#), [1228\(a\)](#), [1228\(b\)](#), or [1328\(b\)](#) of this title does not discharge an individual debtor from any debt— (1) for a tax or a customs duty—
 - (A) of the kind and for the periods specified in section [507\(a\)\(3\)](#) or [507\(a\)\(8\)](#) of this title, whether or not a claim for such tax was filed or allowed;
 - (B) with respect to which a return, or equivalent report or notice, if required—
 - (i) **was not filed or given**; or
 - (ii) **was filed or given after the date on which such return, report, or notice was last due**, under applicable law or under any extension, **and** after two years before the date of the filing of the petition; or

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HOWEVER

The Bankruptcy Appellate Panel (Martin, No. EC-14-1180, B.A.P. 9th Cir. 12/17/15) - Ninth Circuit ruled that debtors who file income tax returns late—even after the IRS assesses taxes for the years in question—can still discharge those income tax liabilities in bankruptcy.

Contradicts holdings from the First, Fifth, and Tenth circuits that late-filed tax returns do not count as returns for determining whether such obligations can be discharged in bankruptcy.

The 9th Circuit ruled on the bankruptcy (allowed it though an SFR was filed, then returns were filed with the normal parameters), but did not address the one day late rule ([Smith v. United States \(In re Smith\), No. 14-15857, Pacer Docket Entry 51. \(9th Cir. 2016\)](#))

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HOWEVER #2

District Court of New Jersey – 3rd District

- Recent Davis case (INTERNAL REVENUE SERVICE, Appellant, v. MARK W.

DAVIS, Appellee. United States District Court, D. New Jersey. 06/28/16.

Entered an order certifying the issue to the 3rd Circuit from the bankruptcy court (CH 7 Filing, then CH 13).

Case is between the IRS and the debtor (vs ruling of the BC), the issue of the “one moment late” rulings of the 3 circuit courts will not necessarily be argued to the 3rd Circuit.

So we are still waiting on the one-day rule to be brought before the court in the 3rd Circuit

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COLLEGE FUNDING

**NO TAX RETURN
NO MONEY FOR COLLEGE**

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Additional Questions



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