

**5010 FAILURE TO FILE AN INDIVIDUAL¹ INCOME TAX RETURN —
§ 71.83(2)****Statutory Definition of the Crime**

Failure to file an income tax return, as defined by § 71.83(2) of the Wisconsin Statutes, is committed by a person who is required by law to file² a return and who willfully fails to file a return at the time required by law.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant was a person required by law to file a return of (his) (her) income for the taxable year ending _____.

A person is required to file a state income tax return for any calendar year in which the person has a gross income of _____.³

The term "gross income" means all income derived from any source and in any form, whether in money, property, or services. The term "gross income" includes compensation for services, including salaries, wages and fees, commissions, and similar items.⁴

A person is required to file a return whether or not a tax is due.

2. The defendant failed to file the return at the time required by law, which was on or before April 15, _____.⁵

Individual income tax returns are required to be filed on or before April 15 following the year of the earning of the gross income and must be filed [by mailing them to the Department of Revenue in Madison, Dane County, Wisconsin.] [in the manner specified by the Department of Revenue.⁶]

3. The defendant's failure to file the return was willful.

The failure to file a timely return is willful if the defendant knew (he) (she) was required to file and deliberately did not file a return.⁷

This does not require the State to prove that the defendant had a purpose to evade a tax or to defraud the State of Wisconsin.⁸

Deciding About Knowledge

You cannot look into a person's mind to find knowledge. Knowledge must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI-Criminal 5010 was originally published in 1983 and revised in 1991. This revision was approved by the Committee in October 2009 and involved adoption of a new format and nonsubstantive changes to the text.

This instruction is drafted for the misdemeanor offenses of willfully failing to file an income tax return as defined in § 71.83(2)(a)1. See the text of the statute in note 1, below.

Wis JI-Criminal 5012 is drafted for the felony offense of filing a false or fraudulent return under § 71.83(2)(b).

1. This instruction is drafted for the failure to file an individual return, which is prohibited by § 71.83(2)(a)1. The statute also covers returns other than individual returns:

(2) Criminal (a) Misdemeanor. 1. 'All persons.' If any person, including an officer of a corporation or a manager of a limited liability company required by law to make, render, sign or verify any return, willfully fails or refuses to make a return at the time required in § 71.03, 71.24, or 71.44, or willfully fails or refuses to make deposits or payments as required by § 71.65(3) or willfully renders a false or fraudulent statement required by § 71.65(1) and (2) or deposit report or withholding report required by § 71.65(3), such person shall be guilty of a misdemeanor and may be fined not more than \$10,000 or imprisoned for not to exceed 9 months or both, together with the cost of prosecution.

2. Section 71.83(2)(a)1 (see note 1, above) uses the phrase "make, render, sign, or verify" a return. The Committee concluded that simply using the word "file" throughout the instruction would be easier to understand and would be legally correct – it is the failure to file when required to do so that is the essence of this offense.

3. Here specify the requirement that applies in the case. Section 71.03(2) provides:

(2) PERSONS REQUIRED TO FILE; OTHER REQUIREMENTS. The following shall report in accordance with this section:

(a) Natural persons. Except as provided in sub. (6)(b):

1. Every individual domiciled in this state during the entire taxable year who has a gross income at or above a threshold amount which shall be determined annually by the department of revenue. The threshold amounts shall be determined for categories of individuals based on filing status and age, and shall include categories for single individuals; individuals who file as a head of household; married couples who file jointly; and married persons who file separately. . .

4. This definition is adapted from the lengthy one found in § 71.03(1).

5. The usual time limit for filing an individual return will be April 15 of the year following the earning of the income which is the subject of the return – § 71.03(6)(a). However, a different limit may occasionally apply, as where an extension of time has been granted. In those cases, the correct date should be included in the instruction.

6. See s. TAX 2.08(3), Wisconsin Administrative Code.

7. This definition of "willful" was approved as a correct statement of the law in State v. Olexa, 136 Wis.2d 475, 402 N.W.2d 733 (Ct. App. 1987). The definition was developed in part by relying on United States v. Pomponio, 429 U.S. 10 (1976), where the United States Supreme Court held that under the Internal Revenue Code, "willful" was to be defined as a "voluntary, intentional violation of a known legal duty." The Pomponio definition was reapproved in United States v. Cheek, 111 S.Ct. 604 (1990).

Both Olexa and Cheek reviewed the "willful" requirement in light of "tax protester" defenses. In Olexa, the court rejected the defendant's claims that she was not required to file tax returns because she was exempt from the filing requirements, that she was not a "person," and that federal reserve notes were not income. These claims were characterized as legal interpretations "not recognized by the mistake statute as valid defenses." 136 Wis.2d 475, 485.

In Cheek, the United States Supreme Court held that it was error for the trial court to instruct the jury that in order for a good-faith belief that one is not violating the law to negate willfulness, it must be objectively reasonable. Rather, it was for the jury to decide

. . . whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief.

Cheek rejected the claim that a good faith belief that the income tax is unconstitutional constitutes a defense. The court held that such claims are not inconsistent with the "willfulness" requirement:

Rather, they reveal full knowledge of the provisions at issue. . . .

We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness, need not be heard by the jury, and if they are, an instruction to disregard them would be proper.

In Olexa, the court held that "willful" was the equivalent of "intentionally" as defined in § 939.23(3). The court said that one of Olexa's defenses was essentially one of mistake: an honest error negating the state of mind essential to the crime. § 939.43(1). The mistake defense does not apply to mistaken legal interpretations, such as Olexa's claim that she was not a "person" under the tax statutes.

The results in Olexa and Cheek are very close to being inconsistent – at the heart of both cases is the defendant's claimed belief that he or she was not required to file returns under the tax statutes and therefore lacked the mental element required. To the extent that the decisions are inconsistent, the rule in Olexa governs in Wisconsin. Cheek was not based on constitutional grounds; it was only interpretation of a federal statute.

For a discussion of "willful" in the context of Department of Transportation rules, see Department of Transportation v. Transportation Comm'n, 111 Wis.2d 80, 330 N.W.2d 159 (1983).

8. Intent to defraud is not an element of this offense. It is the willful failure to file that is punished, thus intent to file and pay all taxes due at some future time is not a defense.