

**REPEATED FAILURE TO FILE PERSONAL INCOME AND
EARNINGS
Tax Law § 1808
(Committed on or after August 11, 2010)**

The (specify) count is Repeated Failure to File Personal Income and Earnings Taxes.

Under our law, a person is guilty of Repeated Failure to File Personal Income and Earnings Taxes when that person, with intent to evade payment of ¹ (specify applicable tax) fails to file a return for three consecutive taxable years [provided that such person had an unpaid tax liability with respect to each of the three consecutive taxable years].

Note: Tax Law § 1808(b) states that: “In any prosecution for a violation of subdivision (a) of this section, it shall be a defense that the defendant had no unpaid tax liability for any of the three consecutive taxable years.” That provision, along with the understanding that such knowledge of no unpaid tax liability should be “uniquely within a defendant’s knowledge,” [People v Davis, 13 NY3d 17, 32 (2009)] appears to express a legislative intent that the defendant must place the proviso in the definition in issue before the People are required to prove the proviso beyond a reasonable doubt. Davis at 31 (“The main goal of the interpretative rules governing exceptions and provisos is to discover the intention of the enacting”).

The following terms used in that definition have a special meaning:

Note: “RETURN” is defined by Tax Law § 1808(c) to “mean a return required under section six hundred

¹ At this point the statute continues: “any tax imposed under article twenty-two of this chapter or any related income or earnings tax statute.” In lieu of that language, the court should specify the applicable statutory language of the tax in issue.

fifty-one of this chapter, section 11-1751 of the administrative code of the city of New York or section 92-85 or 92-105 of the codes and ordinances of the city of Yonkers.” The court may therefore define return as follows:

RETURN means a return required by the [Administrative Code of the City of New York, or, as the case may be, the Codes and Ordinances of the City of Yonkers]. The Administrative Code (or, as the case may be, the Codes and Ordinance of the City of Yonkers) requires (specify).²

INTENT means conscious objective or purpose. Thus, a person acts with intent to with intent to evade payment of a tax when that person's conscious objective or purpose is to do so.

Note: If applicable:

It is a defense that the defendant had no unpaid tax liability for any of the three consecutive taxable years.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following (two/three) three elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name) failed to file a return for the payment of (specify applicable tax) for three consecutive taxable years;
2. That the defendant did so with intent to evade payment of that tax; [and]

² Tax Law 1808 (c) further specifies: “It [return] shall not include any information return referred to in subsection (i) of section six hundred fifty-one of this chapter, or subdivision (i) of section 11-1751 of such code, or subdivision (g) of section 92-105 of such codes and ordinances, or section six hundred fifty-eight of this chapter or section 11-1758 of such code or section 92-111 of such codes and ordinances, or any employer's return required by section six hundred seventy-four of this chapter or section 11-1774 of such code.”

Add if proviso / defense in issue:

3. That the defendant had an unpaid tax liability with respect to each of the three consecutive taxable years.

If you find the People have proven (both / each) of those elements beyond a reasonable doubt, you must find the defendant guilty of this crime.

If you find the People have not proven (either one or both / any one or more) of those elements beyond a reasonable doubt, you must find the defendant not guilty of this crime.