

6 N.Y. Prac., Criminal Law § 17:12 (4th ed.)

New York Practice Series - New York Criminal Law | October 2022 Update
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Chapter 17. Offenses Involving False Written Statements—Article 175

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§ 17:12. Offering a false instrument for filing—Tax
returns as “written instruments” under false filing statute

State tax returns are “written instruments” for purposes of the offering a false instrument for filing statute: “A tax return establishes duties of a taxpayer to the State and vice versa, to pay additional taxes or receive a refund,” and therefore is capable of being “used to the advantage or disadvantage of some person” within the meaning of the false filing statute.¹ State sales tax returns have also been found to be “written instruments” as defined by [N.Y. Penal Law § 175.00](#).²

The question whether the filing of a false state tax return is properly charged as a violation of [N.Y. Penal Law § 175.35](#) was once a hotly debated issue in New York. In *People v. Valenza*,³ the Court of Appeals held that, since there was an “integrated scheme” in the Tax Law to address the duties of vendors to collect, record and pay sales tax, and which imposed only civil penalties for the breach of those duties, the Legislature had manifested “an intent to exclude such conduct from criminal prosecution under either the Tax Law or the Penal Law.”⁴ Thus, the *Valenza* court held that violations of the state sales tax law could not be prosecuted as a larceny.

The Legislature responded to *Valenza* by amending the Tax Law to specifically provide that the penalties under the Tax Law did not preclude prosecution under the Penal Law for the willful failure to pay sales tax.⁵ Thereafter, in *People v. Walsh*,⁶ the Court cited the new legislation in upholding the People's power to prosecute the filing of false sales and use tax returns as offering a false instrument for filing in the first degree. Since *Walsh*, courts have routinely upheld indictments charging false filing offenses based on the filing of false state tax returns.⁷

In *Taub v. Altman*,⁸ the Court of Appeals decided a tax-related false filing issue with consequences as dramatic and far-reaching as those of *Valenza*, if not more so, although the full flavor of the drama may not be readily apparent or appreciated, particularly to the Bench and Bar outside New York City. In *Taub*, the Court of Appeals held that particular effect geographic jurisdiction under [N.Y. Crim. Proc. Law § 20.40\(2\)\(c\)](#) does not lie in New York County to prosecute a tax offense charged as offering a

false instrument for filing simply because New York County may be the “seat of government” for New York City and City tax revenues are processed in New York County:

We hold only that, under *N.Y. Crim. Proc. Law 20.40(2)(c)*, New York County may not assert jurisdiction over all crimes affecting the City on the sole basis that certain City agencies transact their business in offices located in Manhattan.⁹

Instead, the “particular effect” jurisdictional statute requires that the offense have a particular or special, and deleterious, effect on the governmental processes of New York County in particular, because felony prosecutions are brought by counties, and not simply on New York City as a whole.¹⁰

Taub reversed decades of case law, practice and tradition under which the New York County District Attorney has historically been permitted by the courts to prosecute the evasion of state taxes, an important prosecutorial tool in the kind of “white collar” investigations for which the Office of the New York County District Attorney is known. Unless or until the Legislature acts, which *Taub* invited,¹¹ the New York County District Attorney will no longer be permitted to prosecute tax offenses charged as offering a false instrument for filing, the most effective statutory vehicle for such prosecutions, unless of course an element of the offense, *e.g.*, the preparation or mailing of a false tax return, occurred in New York County.

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Footnotes

- 1 [People v. Mayer](#), 110 Misc. 2d 353, 442 N.Y.S.2d 50 (Sup 1981).
- 2 [People v. Walsh](#), 67 N.Y.2d 747, 500 N.Y.S.2d 96, 490 N.E.2d 1222 (1986) (rejecting contention that a sales tax return is merely a report of sales tax collected during a certain period and does not demand or require upon its filing that the state or any of its subdivisions take any action).
- 3 [People v. Valenza](#), 60 N.Y.2d 363, 469 N.Y.S.2d 642, 457 N.E.2d 748 (1983).
- 4 [People v. Valenza](#), 60 N.Y.2d 363, 371, 372, 469 N.Y.S.2d 642, 645, 646, 457 N.E.2d 748 (1983).
- 5 N.Y. Laws 1984, ch. 575 § 1.
- 6 [People v. Walsh](#), 67 N.Y.2d 747, 748, 500 N.Y.S.2d 96, 97, 490 N.E.2d 1222 (1986).
- 7 See, *e.g.*, [People v. Shurka](#), 191 A.D.2d 724, 596 N.Y.S.2d 428 (2d Dep’t 1993) (false filing prosecution under N.Y. Penal Law § 175.35 proper for underreporting amount of diesel fuel sold for the purpose of evading sales tax); [Sharpton v. Turner](#), 169 A.D.2d 947, 565 N.Y.S.2d 255 (3d Dep’t 1991) (upholding indictment charging offering false instrument for filing in the first degree and filing a false or fraudulent return in violation of N.Y. Tax Law §§ 1804(b) and 1801(a)); [People v. Diaz](#), 111 A.D.2d 765, 489 N.Y.S.2d 936 (2d Dep’t 1985).
- 8 [Taub v. Altman](#), 3 N.Y.3d 30, 781 N.Y.S.2d 492, 814 N.E.2d 799 (2004). See also § 17:10 for a discussion of a decision by the *nisi prius* court in *Taub* on another important issue raised by offering a false instrument for filing.
- 9 [Taub v. Altman](#), 3 N.Y.3d 30, 781 N.Y.S.2d 492, 814 N.E.2d 799 (2004).
- 10 [Taub v. Altman](#), 3 N.Y.3d 30, 781 N.Y.S.2d 492, 814 N.E.2d 799 (2004).

11

Taub v. Altman, 3 N.Y.3d 30, 781 N.Y.S.2d 492, 814 N.E.2d 799 (2004).

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