FOREWORD

This Seventh Edition of the *Criminal Tax Manual* constitutes a major revision of the Manual. This edition includes revisions of every previous chapter and new sections on topics such as tax money laundering, sentencing guidelines and policies, foreign evidence, Tax Division directives, and a criminal tax trial outline. This comprehensive guide for federal law enforcement officials is the result of the efforts of numerous former and current members of the Criminal Enforcement Sections. The team members and contributors for this Seventh Edition, who are listed on the following page, were awarded the first annual Barrister's Award by Assistant Attorney General Loretta C. Argrett in recognition of their efforts and this outstanding product.

The onerous day-to-day responsibility for coordinating the revision of this Manual fell to Michael Karam, a 16-year member of the Tax Division, currently serving in the Criminal Appeals and Tax Enforcement Policy Section (CATEPS). He was supervised in this effort by Robert Lindsay, chief of CATEPS, who established the overall direction of this revision and who worked innumerable late hours and weekends on this project. The Tax Division also owes special thanks to the computer expertise of Tony Whitledge and Alan Hechtkopf and to the diligent efforts of Sharon L. Sammons, Joyce A. Sanderlin, Sherri L. Spencer, Anita Davis, Stacey Wentela, Flora Brown, and Lorna Hall, who made the final and timely production of these volumes possible.

The Tax Division hopes that all who consult this Manual will find it useful as you continue the great traditions of those law enforcement officials who have sought to enhance voluntary compliance through the resolute and fair enforcement of the criminal tax laws. [1]

July, 1994

Mark E. Matthews

Deputy Assistant Attorney General
Tax Division

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1 The contents of this Manual provide an internal guide to federal law enforcement officials. Nothing in it is intended to create any substantive or procedural rights, privileges or benefits enforceable in any administrative, civil or criminal matter by any prospective or actual witnesses or parties. *See* ***United States v. Caceres***, 440 U.S. 741 (1979).

UNITED STATES DEPARTMENT OF JUSTICE
TAX DIVISION
CRIMINAL TAX MANUAL - 1994 Ed.

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1.00 *ORGANIZATION AND AUTHORITY*

1.01 *TAX DIVISION AUTHORITY*

The functions assigned to, and conducted, handled, or supervised by, the Assistant Attorney General, Tax Division, are set forth in Department of Justice Regulations on the Tax Division, Sections 0.70 and 0.71 (28 C.F.R.)[1] which, for convenience of reference, are reproduced below.

Title 28 -- ***Judicial Administration***

PART 0 (Zero) -- ***ORGANIZATION OF THE DEPARTMENT OF JUSTICE***

Subpart N -- Tax Division

§ 0.70 ***General functions***.

The following functions are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division:

(a) Prosecution and defense in all courts, other than the Tax Court, of civil suits, and the handling of other matters, arising under the internal revenue laws, and litigation resulting from the taxing provisions of other Federal statutes (except civil forfeiture and civil penalty matters arising under laws relating to liquor, narcotics, gambling, and firearms assigned to the Criminal Division by Section 0.55(d)).

(b) Criminal proceedings arising under the internal revenue laws, except the following: Proceedings pertaining to misconduct of Internal Revenue Service personnel, to taxes on liquor, narcotics, firearms, coin-operated gambling and amusement machines, and to wagering, forcible rescue of seized property (26 U.S.C. 7212(b)), corrupt or forcible interference with an officer or employee acting under the Internal Revenue laws (26 U.S.C. 7212(a)), unauthorized disclosure of information (26 U.S.C. 7213), and counterfeiting, mutilation, removal, or reuse of stamps (26 U.S.C. 7208).

(c)(1) Enforcement of tax liens, and mandamus, injunctions, and other special actions or general matters arising in connection with internal revenue matters.

(2) Defense of actions arising under section 2410 of Title 28 of the United States Code whenever the United States is named as a party to an action as the result of the existence of a Federal tax lien, including the defense of other actions arising under section 2410, if any, involving the same property whenever a tax-lien action is pending under that section.

(d) Appellate proceedings in connection with civil and criminal cases enumerated in paragraphs (a) through (c) of this section and in Section 0.71, including petitions to review decisions of the Tax Court of the United States.

[Order No. 423-69, 34 FR 20388, Dec. 31, 1969, as amended by Order No. 445-70, 35 FR 19397, Dec. 23, 1970; Order No. 699-77, 42 FR 15315, Mar. 21, 1977; Order No. 960-81, 46 FR 52346, Oct. 27,1981] [1]

§ 0.71 ***Delegation respecting immunity matters***.

The Assistant Attorney General in charge of the Tax Division is authorized to handle matters involving the immunity of the Federal Government from State or local taxation (except actions to set aside ad valorem taxes, assessments, special assessments, and tax sales of Federal real property, and matters involving payments in lieu of taxes), as well as State or local taxation involving contractors performing contracts for or on behalf of the United States.

Prosecutions for obstruction of justice (18 U.S.C., Secs. 1501-1511), perjury (18 U.S.C., Secs. 1621, 1622), false declarations before a grand jury or court (18 U.S.C., Sec. 1623), fraud and false statements in matters within the jurisdiction of a government agency (18 U.S.C., Sec. 1001), and conspiracy to defraud the United States (18 U.S.C., Sec. 371) come under Sec. 0.179 (28 C.F.R.). Section 0.179a provides, with respect to those offenses, as follows:

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1 The contents of the Federal Register are required to be judicially noticed. 44 U.S.C. § 1507.

§ 0.179a ***Enforcement responsibilities.***

> (a) Matters involving charges of obstruction of justice, perjury, fraud or false statement, as described in Section 0.179, shall be under the supervisory jurisdiction of the Division having responsibility for the case or matter in which the alleged obstruction occurred. The Assistant Attorney General in charge of each Division shall have full authority to conduct prosecution of such charges, including authority to appoint special attorneys to present evidence to grand juries. However, such enforcement shall be preceded by consultation with the Assistant Attorney General in charge of the Criminal Division, to determine the appropriate supervisory jurisdiction. (See 38 CFR 0.55(p).)
>
> (b) In the event the Assistant Attorney General in charge of the Division having responsibility for the case or matter does not wish to assume supervisory jurisdiction he shall refer the matter to the Assistant Attorney General in charge of the Criminal Division for handling by that Division.
> [Order No. 630-75, 40 FR 53390, Nov. 18, 1975].

For prosecutions involving the charging of tax crimes as mail fraud, wire fraud, or bank fraud (18 U.S.C. Secs. 1341, 1343, 1344) or as predicates to a RICO charge or as the specified unlawful activity of a money laundering offense, cross reference should be made to Tax Division Directive No. 99 (Mar. 30, 1993), which is contained in Chapter 3.00, *infra*.

1.02 *CRIMINAL ENFORCEMENT SECTIONS ORGANIZATION CHART*

I. Assistant Attorney General

II. Deputy Assistant Attorney General (Criminal Tax)

III. Director, Criminal Enforcement Sections

Stanley F. Krysa -- (202) 514-2973
(202) 514-8455 (FAX)

IV. Chiefs, Four Criminal Enforcement Sections

A. ***Criminal Appeals & Tax Enforcement Policy Section***

(202) 514-5396
(202) 514-8455 (FAX)

Robert E. Lindsay, Chief
Alan Hechtkopf, Assistant Chief

B. ***Northern Criminal Enforcement Section***

(202) 514-5150
(202) 514-8455 (FAX)

Edwin R. Pierce, Chief
Jerrold Kluger, Assistant Chief
Curtis Nash, Assistant Chief

States and Territories:

Connecticut	Massachusetts	Ohio
Delaware	Michigan	Pennsylvania
Kentucky	New Hampshire	Rhode Island
Maine	New Jersey	Vermont
Maryland	New York	District of Columbia

Drug Task Force Liaison Attorneys for:
Boston, Baltimore, New York, and Detroit

C. ***Southern Criminal Enforcement Section***

(202) 514-5145
(202) 514-9623 (FAX)

J. Randolph Maney, Chief
Ralph E. Belter, Assistant Chief
Rosemary E. Paguni, Assistant Chief

States and Territories:

Alabama	Missouri	Virginia
Arkansas	New Mexico	West Virginia
Florida	North Carolina	Canal Zone
Georgia	South Carolina	Puerto Rico
Louisiana	Tennessee	Virgin Islands
Mississippi	Texas	

Drug Task Force Liaison Attorneys for:
Atlanta, Houston, St.Louis and Miami

D. ***Western Criminal Enforcement Section***

(202) 514-5247
(202) 514-9623 (FAX)

Ronald A. Cimino, Chief
Mark R. Friend, Assistant Chief
David A. Brown, Assistant Chief

States and Territories:

Alaska	Iowa	Oregon
Arizona	Kansas	South Dakota
California	Minnesota	Utah
Colorado	Montana	Washington
Hawaii	Nebraska	Wisconsin
Idaho	Nevada	Wyoming
Illinois	North Dakota	American Samoa
Indiana	Oklahoma	Guam

Drug Task Force Liaison Attorneys for:
Chicago, Denver, Los Angeles, San Diego and San Francisco.

1.03 *CRIMINAL ENFORCEMENT SECTIONS -- DELEGATION OF AUTHORITY*

The delegation of authority in criminal tax cases by the Assistant Attorney General, Tax Division, to the Deputy Assistant Attorney General (Criminal Tax), Tax Division, and to officials of the Criminal Enforcement Sections, Tax Division, is set forth in Tax Division Directive No. 71. For convenience of reference, Directive No. 71 is reproduced in Chapter 3.00, *infra*.

1. The Code of Federal Regulations is prima facie evidence of the text of the original documents. 44 U.S.C. § 1510.

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2.00 *CRIMINAL TAX PRACTICE AND PROCEDURES (UNITED STATES ATTORNEYS' MANUAL)*

N.B. The section references in this table of contents correspond to the references in the *United States Attorneys' Manual* (Title 6) dealing with the Tax Division.

2.00 CRIMINAL TAX PRACTICE AND PROCEDURES
(UNITED STATES ATTORNEYS' MANUAL)

Title 6 of the ***United States Attorneys' Manual*** (USAM) describes the jurisdiction of the Tax Division and the authority and procedures of the component parts of the Division.

For convenience of reference, the pertinent parts of Title 6 of the ***United States Attorneys' Manual***, pertaining to criminal tax cases, are set forth in the pages which follow.

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6-1.000 *POLICY*

6-1.100 *DEPARTMENT OF JUSTICE POLICY AND RESPONSIBILITIES*

The Assistant Attorney General in charge of the Tax Division, subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General, is responsible for conducting, handling, or supervising tax matters, as more particularly described in 28 C.F.R. §0.70.

The Tax Division, under the direction of the Assistant Attorney General, supports and coordinates tax litigation. The closest possible cooperation between the offices of the U.S. Attorneys and the Tax Division is highly desirable to ensure that tax litigation for the United States is handled in an expeditious and professional manner. The information in this manual is designed to describe the kinds of litigation that the Tax Division has encountered over the years and to explain in some detail the interrelationship of the U.S. Attorneys' offices and the Division in particular kinds of cases.

The Department of Justice, including the U.S. Attorneys, is responsible for the conduct of all phases of federal tax litigation in the federal and state courts, including the prosecution of criminal tax cases, the collection of tax claims in bankruptcy, probate and insolvency proceedings, the defense of mortgage foreclosure suits involving tax liens, the initiation of collection suits against delinquent taxpayers, the defense of refund litigation, and the handling of administrative summonses cases. All federal tax litigation in which the United States is a party must be handled by attorneys who are either employed by the Department of Justice or are authorized by it to represent the United States.

The Tax Division generally has the responsibility of authorizing prosecution in criminal tax cases. Once prosecution is authorized, U.S. Attorneys usually have the initial responsibility for the trial of criminal tax cases. However, the Tax Division has a staff of highly qualified trial attorneys who will render assistance in criminal tax cases upon request. The litigation assistance may be in the form of a senior Tax Division attorney who, either individually or with another Division attorney, may handle the grand jury investigative and/or trial aspects of a criminal tax case or even may assume responsibility for a period of time of a district's criminal tax docket. In other instances, the assistance may be provided by a Tax Division attorney acting as co-counsel with an Assistant U.S. Attorney in one or more cases or investigations. Tax Division attorneys also are available for consultation and assistance on criminal tax policy and litigation matters, including foreign evidence gathering problems.

In civil tax ligation, the primary responsibility for handling most of the cases rests with Tax

Division attorneys. The function of the U.S. Attorney in civil tax cases varies depending on the nature of the case. In virtually all tax cases, other than in the Claims Court, the U.S. Attorney and his/her designated Assistant are counsel of record.

On occasion, special circumstances may make it desirable for the government to be represented in a particular civil tax case by the U.S. Attorney, and not by an attorney from one of the Civil Trial Sections. The Chief of the appropriate Civil Trial Section or one of his/her Assistants is authorized to make the determination. An individual trial attorney has no authority to allow a U.S. Attorney to represent the government in any civil tax case. When, however, the U.S. Attorney is authorized to handle a civil tax case, a trial attorney will also be assigned to the case.

Some types of civil tax cases are assigned directly to the U.S. Attorneys, including certain types of bankruptcy proceedings, actions under 28 U.S.C. §2410 (other than interpleader), and some types of summons litigations. When U.S. Attorneys are unable because of personnel shortages or for other uncontrollable circumstances to staff civil tax cases for which their offices have litigation responsibilities, the Tax Division should be contacted and assistance requested. In the event that the Tax Division is unable to provide such assistance, it will undertake to aid the U.S. Attorney in preparing the paperwork necessary to have an IRS attorney appointed as a Special Assistant U.S. Attorney as an interim measure until the crisis is over.

In a district in which an IRS District Counsel office is located, special arrangements can be made with the concurrence of the Tax Division, the U.S. Attorney, and the District Counsel to have one or more District Counsel attorneys appointed as Special Assistant U.S. Attorneys to handle certain bankruptcy matter.

6-1.110 *Other Relevant Manuals for U.S. Attorneys*

U.S. Attorneys have been furnished with the Tax Division's Criminal Tax Manual (1985), the Manual for Collection of Tax Judgments, and a manual concerning the award of attorneys's fees and related expenses under 26 U.S.C. §7430 entitled "Guidelines-Awards Under Section 7430 of the Internal Revenue Code." The Criminal Tax Manual is a comprehensive procedural and substantive guide to the handling of criminal tax case and includes jury instructions and other forms. It is available by a request directed to the Chief of the Criminal Section. These publications should be of assistance to U.S. Attorneys and their staffs in the conduct of tax litigation. However, this Title of the USAM will prevail in any instance where any other manual is in derogation or conflict.

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6-4.000 *CRIMINAL TAX CASE PROCEDURES*

6-4.010 *The Federal Tax Enforcement Program*

The Federal Tax Enforcement Program is designed to protect the public interest in preserving the integrity of this nation's self-assessment tax system through vigorous enforcement of the internal revenue laws. The purpose of a criminal tax prosecution is to expose the wrongdoer, thereby deterring other potential tax violators. Obviously, the most effective deterrent to would-be violators is successful prosecution coupled with a sentence commensurate with the gravity of the offense.

The government's objective in criminal tax prosecutions is to get the maximum deterrent value from the cases prosecuted. The achieve this objective, the government's tax enforcement activities must reflect uniform enforcement of the tax laws. Uniformity is particularly necessary because prosecution standards in the tax area potentially affect more individuals than any other area of the law. Accordingly, the Federal Tax Enforcement Program is designed to have the broadest possible impact on compliance attitudes by emphasizing balanced enforcement, not only with respect to the types of violations prosecuted but also the geographic location and economic and vocational status of the violators.

In view of the importance of the uniform prosecution program, the Tax Division has been delegated the responsibility of authorizing or declining investigation and prosecution in criminal tax matters. *See* USAM 6-4.211, *infra*. However, the tax enforcement program can only work effectively if the IRS, Department of Justice, and U.S. Attorneys work in harmony. The following guidelines are intended to harmonize this effort.

6-4.020 *Criminal Tax Manual and Other Tax Division Publications*

The Tax Division's ***Criminal Tax Manual*** (1985 ed.) and its "Institute on Criminal Tax Trials" contain exhaustive treatments of statutes, methods of proof, policies and procedures, indictment/information forms, jury instructions, and various specialized areas involved in criminal tax prosecutions. All prosecutors involved in federal criminal tax cases should cross-reference such works during their handling of criminal tax cases.

6-4.030 *Criminal Tax Materials on JURIS*

The Tax Division, in conjunction with the Justice Management Division, has created several criminal tax data base files on JURIS in its tax file group. The available criminal tax files in the tax file group are: (1) CRTAXMAN: Tax Divisions's Criminal Tax Manual; (2) FORMS: Tax

Division's Indictment/Information Forms; (3) JURYINST: Tax Division's Model Criminal Tax Jury Instructions; (4) PROTEST: Tax Division's Criminal Tax Protestor Case Lists; and (5) CRTAXNEW: Recent Criminal Tax and other cases from Criminal Section Newsletter.

In addition, TAXBRIEF, a criminal tax appellate brief bank, is available in JURIS' brief file group to facilitate reference and research in criminal tax.

6-4.100 *INVESTIGATIVE AUTHORITY AND PROCEDURE*

6-4.110 *IRS Administrative Investigations*

The IRS' Criminal Investigation Division (CID) is responsible for investigating the violations of the criminal provisions of the internal revenue laws. CID's jurisdiction includes the investigation of all alleged criminal violations arising under 26 U.S.C. (Internal Revenue Code) (except those relating to alcohol, tobacco, and firearms taxes, and certain of the violations punishable under 26 U.S.C. §§ 7212(a), 7213(a), and 7214(a)) and related violations of the criminal provisions of 18 U.S.C.

CID special agents are responsible for conducting administrative investigations of alleged criminal violations arising under the internal revenue laws. To enable special agents to fulfill this responsibility, they are authorized to administer oaths under 26 U.S.C. §7622 and to take testimony of witnesses and examine books and records under 26 U.S.C. §7602. Special agents are also authorized to serve summonses and subpoenas, and to execute search and arrest warrants. *See* 26 U.S.C. §7608.

6-4.111 *Origin of IRS Administrative Investigations*

CID investigations are generally initiated as a result of one of the following:

A. Fraud referrals from other divisions within IRS;

B. Information provided by other government agencies;

C. Information provided by private parties;

D. Matters or projects developed within CID.

Matters found to have criminal fraud prosecution potential, or deemed to warrant further inquiry, are approved for investigation and pursued by special agents to the extent available

resources permit.

6-4.112 ***IRS Joint Administrative Investigations***

Joint investigations are conducted by special agents in cooperation with representatives of other IRS divisions. Matters are usually investigated jointly with revenue agents (Examination Division) when false returns are filed or when a willful failure to file occurs. Joint investigations with revenue officers (Collection Division) usually evolve from a willful failure to pay tax.

6-4.113 ***IRS Review of Administrative Investigations***

Upon concluding an administrative investigation, a special agent recommending prosecution must prepare a special agent's report (SAR) that details the investigation, its results, and the agent's recommendations. After review within CID, the SAR, together with the exhibits, is reviewed by District Counsel. When prosecution is deemed warranted, District Counsel prepares a criminal reference letter (CRL), that discusses the nature of the crime(s) for which prosecution is recommended, the evidence relied upon to prove it, technical aspects and anticipated difficulties of prosecution, and the prosecution recommendations themselves.

6-4.114 ***IRS Referral of Reports and Exhibits from Administrative Investigations***

Affirmative recommendations for prosecution or prosecution-related action in matters under the investigative jurisdiction of CID are referred to the Department of Justice, Tax Division, or, where the Tax Division has authorized, directly to U. S. Attorneys for the jurisdiction where venue most appropriately lies. *See* 26 U.S.C. § 6103(h). Such referrals generally include a CRL, SAR, and sufficient relevant exhibits to permit analysis of the matters to evaluate prosecutive merit. Where matters are referred to the Tax Division, a copy of the CRL will be forwarded simultaneously to the appropriate U.S. Attorney. Likewise, where matters are directly referred to the U.S. Attorney, a copy of the CRL will be forwarded simultaneously to the Tax Division.

6-4.115 ***Effect of IRS Referral on Administrative Investigations***

Referral of a matter to the Tax Division terminates IRS authority to use administrative process to further investigate the matter referred. *See* 26 U.S.C. § 7602(c).

6-4.116 ***Effect of Declination on Administrative Investigations***

Declination of a matter referred for prosecution to the Tax Division permits IRS to take whatever administrative action it feels is appropriate under the circumstances including further

investigation by CID. *See* IRM 9652. Administrative process is available to the special agent conducting such further investigation. 26 U.S.C. § 7602(c). The IRS may, if warranted, resubmit the matter to the Tax Division as a new referral.

6-4.117 ***General Enforcement Plea Program***

The IRS and the Tax Division have implemented a nationwide guilty plea program in administratively investigated General Enforcement Program cases. Under this plea program, administratively investigated criminal tax cases may be referred directly and simultaneously from the IRS to U.S. Attorneys' Offices and the Tax Division in Washington, D.C., where only legitimate source income is involved (e.g., no narcotics or organized crime) and where taxpayer's ***counsel*** indicates during such early stage in the investigation taxpayer's wish to enter a guilty plea consistent with the Tax Division's major count policy. Following IRS consideration to ensure legal sufficiency, abbreviated written referrals from the CID and District Counsel to both the U.S. Attorney and Tax Division will permit an accelerated means for cases to be disposed of where the target of the investigation does not contest criminal liability. All authority to conduct plea negotiations rests with the U.S. Attorney and the Tax Division and not the IRS. Tax Division and U.S. Attorney liaison attorneys for such program will ensure compliance with the Tax Division's major count policy. *See* Memorandum to all U.S. Attorneys from Acting Assistant Attorney General, Tax Division, regarding Program for Entering into Plea Negotiations on Title 26 Offenses Prior to Formal Review by District Counsel's Office and Tax Division (Feb. 25, 1986). *See* also IRM 9620.

6-4.120 ***Grand Jury Investigations***

Although a federal grand jury is empowered to investigate both tax and nontax violations of federal criminal tax laws, use of the grand jury to investigate in general solely criminal tax violations must first be approved and authorized by the Tax Division. *See* 28 C.F.R. § 0.70; 26 U.S.C. §6103(h).

Authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. § 287 (other than violations committed by a professional tax return preparer), has been delegated to all United States Attorneys by the Tax Division (see Tax Division Directive No. 96, dated December 31, 1991). This delegation of authority is subject to the following limitations:

(1) The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

(2) Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or n the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

In all cases, a copy of the request for grand jury investigation letter, together with a copy of the Form 9131 and a copy of all exhibits, must be sent the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the copy of the request for grand jury investigation letter (together with the copy of the Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the request for grand jury investigation letter has not been forwarded to the Tax Division by overnight courier or by telefax by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of the delegation of authority. In no such case may the United States Attorneys's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the United States Attorney's authority to authorize prosecution of such cases (*see* USAM, 6-4.243, *infra*). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. Due to the unique problems posed by electronically filed false claims for refunds, Tax Division authorization is required if prosecution is deemed appropriate in an electronic filing case.

6-4.121 *IRS Requests to Initiate Grand Jury Investigations*

CID generally relies upon the administrative process to secure evidence during an investigation. However, where CID is unable to complete its administrative investigation or

otherwise determines that the use of administrative process is not feasible, it may request a grand jury investigation.

Procedurally, the request must include a completed IRS Form 9131, a Request for Grand Jury Investigation signed by Regional or District Counsel, and whatever exhibits are available to support the request. *See* IRM 9267.2 ***et seq***. Because this request is a referral of the matter to the Department of Justice, CID may no longer use administrative process. *See* USAM 6-4.115, *supra*.

6-4.122 ***U.S. Attorney Initiated Grand Jury Investigations***

A. IRS Direct Referrals

Although the U.S. Attorney is authorized to conduct a Title 26 grand jury investigation in direct referral matters, the instances where such referrals require grand jury investigation will be rare. *See* USAM 6-4.243, *infra*.

B. Tax Division Referrals for Prosecution

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for prosecution by the Tax Division to the extent necessary to perfect the tax charges authorized for prosecution.

C. Tax Division Referrals for Grand Jury Investigation

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for that purpose by the Tax Division, whether upon IRS (*see* USAM 6-4.121, *supra*) or Tax Division (*see* USAM 6-4.126, *infra*) request, to the extent necessary to either perfect the tax charges authorized for investigation or determine that prosecution is inappropriate (*see* USAM 6-4.242, *infra*).

D. Joint Tax-Nontax Investigations with IRS Participation: Delegation of Authority with Respect to Approving Request Seeking to Expand a Nontax Grand Jury Investigation to Include Inquiry into Possible Federal Criminal Tax Violations

Effective October 1, 1986, Tax Division Directive No. 86-59 was issued to confer a delegation of authority with respect to approving requests seeding to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations on the following individuals:

1. Any U.S. Attorney appointed under 28 U.S.C. §541 or §546.

2. Any attorney-in-charge of a Criminal Division Organized Crime Strike Force established pursuant to 28 U.S.C. §510.

3. Any independent counsel appointed under 28 U.S.C. §593.

The authority conferred allows the designated official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding which is being conducted within the sole jurisdiction of the designated official's office. (26 C.F.R. §301.6103(h)(2)-1(a)(2)(ii).) Provided, that the delegated official determines that:

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with Rule 6(e)(3)(A)(ii), Fed.R. of Cr.P., to seek the assistance of government personnel assigned to the IRS to assist said attorney in his/her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multijurisdictional investigation, nor are the target individuals considered to have national prominence-such as local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

4. A written request seeking the assistance of IRS personnel and containing pertinent information relating to the alleged federal tax offenses has ben forwarded by the designated official's office to the appropriate IRS official (e.g., Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential tax violations, and the Tax Division interposes no objection to the request.

6. The IRS has made a referral pursuant to the provisions of 26 U.S.C. §6103(h)(3) in writing stating that it:

a. Has determined, based upon the information provided by the attorney for the government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed;

b. Agrees to furnish the personnel needed to assist the government attorney in his/her duty to enforce federal criminal law; and

c. Has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by an attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceeding to be evaluated by the IRS and the Tax Division before undertaking to initiate criminal proceedings.

The authority delegated includes the authority to designate: the targets (subjects) and the scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, provided, that prior written notification is given to both the IRS and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. §7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Enforcement Task Force Investigations (Drug Task Force), individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the U.S. Attorney, independent counsel, or attorney-in-charge of strike force with an SAR and exhibits through Regional Counsel (IRS) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of the grand jury investigations conducted by a Drug Task Force shall be forwarded directly to the Tax Division by the U.S. Attorney with an SAR and exhibits.

The authority delegated is limited to matters which seek either to:

1. Expand nontax grand jury proceedings to include inquiry

into possible federal criminal tax violations;

2. Designate the targets (subjects) and the scope of such inquiry; or

3. Terminate such proceedings.

In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the IRS, remains vested in the Assistant Attorney General in charge of the Tax Division as provided in 28 C.F.R. §0.70. In addition, authority to alter any actions taken pursuant to the delegations contained herein, is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. §0.70.

See USAM 6-4.125, *infra*, for Drug Task Force procedures.

6-4.123 **Joint U.S. *Attorney-IRS Request to Expand Tax Grand Jury Investigations***

The U.S. Attorney must secure Tax Division approval before expanding a Title 26 grand jury investigation to include targets not authorized by the Tax Division. A written request for expanded authorization must be submitted prior to initiating that phase of the grand jury investigation. The request must establish the basis for the Tax Division's authorization to expand the investigation. *See* USAM 6-4.213(A)(2), *supra*.

6-4.124 ***Strike Force Requests***

See USAM 6-4.122, *supra*.

6-4.125 ***Drug Task Force Requests***

Matters for grand jury investigation involving tax which fall within the jurisdiction of an Organized Crime Drug Task Force (Drug Task Force) are distinguished from similar matters for grand jury investigation handled by a U.S. Attorney only in that processing within IRS is streamlined. Regional Counsel (Criminal Tax) does not become involved in its Drug Task Force referrals or recommendations. Drug Task Force requests for joint tax-nontax investigation with IRS participation need to be approved by the District Director, who then makes a referral. Likewise, once the investigation has been concluded, recommendations for or against prosecution are submitted directly to the Tax Division by the District Director. *See* USAM 6-4.127, *infra*. In all other respects, tax matters within the jurisdiction of a Drug Task Force are procedurally

indistinguishable from other tax matters.

6-4.126 ***Tax Division Requests***

Grand jury authorization may originate within the Tax Division during evaluation of IRS referrals for prosecution.

6-4.127 ***IRS Transmittal of Reports and Exhibits from Grand Jury Investigations***

Recommendations for prosecution of Title 26 violations resulting form grand jury investigations must be submitted to the Tax Division for authorization. *See* USAM 6-4.211, *infra*. When an investigation has produced sufficient evidence to merit indictment, the U.S. Attorney should have the special agent assigned to the matter prepare an SAR, attach the relevant exhibits, and, except in Drug Task Force situations, send it to Regional Counsel (Criminal Tax) for review and Counsel's recommendation to the Tax Division. Regional Counsel has requested that it be allowed thirty (30) days to review the matter prior to making any recommendation; Tax Division should be allowed sixty (60) days to review the proposed prosecution recommendation. The U.S. Attorney's views also should be forwarded to the Tax Division. *See* USAM 6-4.242, *infra*.

The IRS must also transmit recommendations against prosecution (or matters without IRS recommendation) resulting from such grand jury investigations to the Tax Division for evaluation. See IRM 9267.5; *see also*, USAM 6-4.242, *infra*.

See USAM 6-4.125, *supra*, for Drug Task Force procedures.

6-4.128 ***IRS Access to Grand Jury Material***

All IRS personnel to whom grand jury material has been disclosed must be named in a list provided by the U.S. Attorney to the district court which empaneled the grand jury whose material has been so disclosed. Fed. R. Crim. P. 6(e)(3)(B). Grand jury material is disclosed to IRS personnel under the following conditions:

A. Grand jury material remains under the aegis of the U.S. Attorney and/or Tax Division;

B. Disclosure of grand jury material may be made only to IRS personnel assisting the government attorney in the criminal investigation and only for the purpose of enforcing federal criminal law;

C. All grand jury material, and any copies made thereof, must be returned to the U.S. Attorney or Tax Division at the conclusion of the grand jury investigation.

6-4.129 ***Effect of DOJ Termination of Grand Jury Investigation and IRS Access to Grand Jury Material***

See USAM 6-4.116, *infra*. IRS access to grand jury material may be accomplished for use in an administrative investigation only in accordance with Rule 6(e)(3)(C)(i), Federal Rules of Criminal Procedure. ***United States v. Baggot***, 463 U.S. 476 (1983).

6-4.130 ***Search Warrants***

By Tax Division No. 52 (Jan. 2, 1986), which superseded Tax Division Directive No. 49 (Oct. 1, 1984), the authority of the Assistant Attorney General, Tax Division, generally to approve search warrants in Title 26 and Title 18 tax investigations was delegated to U.S. Attorneys and other specified officials in U.S. Attorneys' offices where such warrant is directed at offices, structures, premises, etc., of targets or subjects of the investigation. The authority to seek and execute search warrants is otherwise retained by the Assistant Attorney General, Tax Division, and is specifically retained where the target or subject is:

A. An accountant;

B. A lawyer;

C. A physician;

D. A public official/political candidate;

E. A member of the clergy;

F. A news media representative;

G. A labor union official; or

H. An official of a tax exempt organization under 26 U.S.C. §501(c)(3).

In such instances where Tax Division authority is not delegated, specific prior written approval of the Tax Division must be obtained. The delegated official has discretion to seek Tax Division advice or approval in all instances. Within ten (10) working days of the execution of the

warrant, the U.S. Attorney shall notify the Tax Division, in writing, of results of the search and transmit copies of the warrant (and attachments and exhibits), inventory, and any other relevant papers.

6-4.200 *PROSECUTORIAL AUTHORITY AND PROCEDURES*

6-4.210 *Tax Division Responsibility*

6-4.211 *Tax Division Jurisdiction*

The Assistant Attorney General, Tax Division, has responsibility for all criminal proceedings arising under the internal revenue laws except the following: proceedings pertaining to misconduct of IRS personnel; taxes on liquor, narcotics, firearms, coin-operated gambling and amusement machines, and to wagering; forcible rescue of seized property (26 U.S.C. §7212(b)); corrupt or forcible interference with an officer or employee acting under the internal revenue laws (26 U.S.C. §7212(a)); unauthorized disclosure of information (26 U.S.C. §7213); and counterfeiting mutilation, removal or reuse of stamps (26 U.S.C. §7208). *See* 28 C.F.R. §0.70.

6-4.211(1) *Filing False Tax Returns: Mail Fraud Charges or Mail Fraud Predicates for RICO*

The authorization of the Tax Division is required before charging mail fraud counts either independently or as predicate acts to a RICO charge: (1) when the only mailing charged is a tax return or other internal revenue form or document; or (2) when the mailing charged is a mailing used to promote or facilitate a scheme which is essentially only a tax fraud scheme (e.g., a tax shelter).[1] Such authorization will be granted only in exceptional circumstances as explained below.

The filing of a false tax return, which almost invariably involves a mailing, is a tax crime chargeable under 26 U.S.C. 7206(1) (if the violator is the taxpayer) or 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or tax shelter promoter). It is the position of the Tax Division that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violation motives are involved, even though other crimes may technically have been committed. *See*, ***United States v. Henderson***, 386 F.Supp. 1048, 1052-53(S.D.N.Y. 1971).[1]

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1 The Ninth Circuit in ***United States v. Miller***, 545 F.2d 1204, 1216 (9th Cir. 1976) *cert denied*, 430 U.S. 930 (1977) in footnote 17 stated a contrary position, but did not analyze the issue as it was not squarely presented. The case involved corporate diversion and possible fraud on creditors as well as tax evasion.

Under certain narrowly defined circumstances, however, a mail fraud prosecution predicated on a mailing of an internal revenue form or document, or where the scheme involved is essentially a tax fraud scheme, might be appropriate in addition to, but never in lieu of, applicable substantive tax charges. *See* ***United States v. Mangan***, 575 F.2d 32, 48-49 (2d Cir. 1978) (where the defendant filed false refund claims on behalf of others, thereby acting more like a thief in the traditional sense). Such a situation could arise in a tax shelter or other tax fraud case, when individuals, through no deliberate fault of their own, were demonstrably victimized as result of a defendant's fraudulent scheme and use of a mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims. The fact that a defendant committed conduct which independently victimized individuals is to be reflected in the mail fraud allegations in the indictment. Mail fraud charges could also be used in a tax fraud case when the government was also victimized in a non-revenue collecting capacity. *See*, *e.g.*, ***United States v. Busher***, 817 F.2d 1409, 1412 (9th Cir. 1987) (case involving primarily false contract claims). However, to the extent victimization of third parties constitutes an exception to the general rule, the evidence must demonstrate direct, substantial victimization as opposed to a general or theoretical harm to a general class of victims.

Normally, in a tax shelter case, the mere imposition of interest and penalties on the investors will not constitute sufficient victimization to warrant the use of mail fraud charges in addition to tax charges. However, each individual case will be reviewed on its merits to determine whether the degree of culpability of the individual investors is such as to treat them more as victims than participants in the particular scheme. Among the factors to consider are the existence of bona fide pending civil suits against the promoters by the investors, the nature and degree of misrepresentations made to the investors, and the degree of independent losses beyond the tax liability.

A similar policy will be followed with respect to the filing of RICO charges predicated on mail fraud charges which in turn involve essentially only a tax fraud scheme. Tax offenses are not predicates for RICO offenses-a deliberate Congressional decision-and charging a tax offense as a mail fraud charge could be viewed as circumventing Congressional intent unless unique circumstances justifying the use of a mail fraud charge are present.

However, once a decision has been made by the Tax Division to authorize mail fraud charges, the decision whether to authorize a RICO charge in turn based on these mail fraud charges is one for the Criminal Division to make.

For a determination as to whether a mail fraud charge predicated on the mailing of internal revenue forms or documents is appropriate, the Tax Division should be consulted early in the

investigation rather than waiting until a last minute decision is needed.

6-4.212 ***Delegation of Authority Within the Criminal Section***

See DOJ Tax Division Directive No. 53 (Mar. 1, 1986).

6-4.213 ***Review***

A. ***Standards for Review***

1. ***Prosecution***

The standards underlying review of criminal tax matters for authorization of prosecution require evidence supporting a prima facie case and a reasonable probability of conviction. Other considerations influencing authorization for prosecution are in accord with the dictates of the Federal Tax Enforcement Program. *See* generally USAM 6-4.010, *supra*.

2. ***Grand Jury Investigation***

The standards underlying review of criminal tax matters for authorizing grand jury investigations require articulable facts supporting a reasonable belief that a tax crime is being or has been committed.

B. ***Categories of Matters Reviewed***

1. ***IRS Referrals***

The Tax Division utilizes a complex/noncomplex case designation procedure to expedite the review of criminal tax matters referred from IRS while maintaining uniformity of prosecution standards. *See* USAM 6-4.114, *supra* and 6-4.121, *supra*.

a. ***Complex Matters***

Complex matters are those IRS referrals which utilize an indirect method of proof, are factually or legally complex, contain technical and/or sensitive tax issues, or involve a policy issue. Complex matters are reviewed by Criminal Section docket attorneys. Docket attorneys prepare prosecution memoranda analyzing the evidence, highlighting procedural and/or substantive problems and discussing recommendations for further action. The matters are further reviewed by one or more Criminal Section senior attorneys whereupon a final decision to

prosecute or decline prosecution is made. *See* USAM 6-4.212, *supra* and 6-4.241, *infra*.

b. ***Noncomplex Matters***

Noncomplex matters are those IRS referrals in which the specific items method of proof is used. Noncomplex matters are screened by senior Criminal Section attorneys to ensure that no issues requiring in-depth review are present. Should the screening procedure reveal such issues, the matters are referred to docket attorneys for in-depth review. Otherwise, the matters are transmitted within two weeks to the appropriate U.S. Attorney for consideration within ninety (90) days. *See* USAM 6-4.244, *infra*.

2. ***U.S. Attorney Request for Grand Jury Authorization***

See USAM 6-4.122, *supra* and 6-4.123, *supra*.

Where Tax Division authorization is required, requests for Title 26 grand jury authorizations are approved or denied by Criminal Section personnel.

C. ***Review of Direct Referrals***

To ensure national uniformity of prosecution standards, the Tax Division monitors all matters directly referred to U.S. Attorneys. *See* USAM 6-4.243, *infra*. Should such review reveal that a matter was improperly referred, the Tax Division will so notify the U.S. Attorney.

6-4.214 ***Conferences***

Conferences are not a matter of right but, if requested, are generally granted.

A conference is designed to provide the putative defendant an opportunity to present any explanations or evidence which he/she desires the Tax Division to consider in reaching a decision regarding prosecution. A conference is not an opportunity to explore the government's evidence. The Division's practice regarding "discovery" is to advise conferees of the proposed charges, method of proof, and income and tax figures recommended by IRS. The putative defendant is also advised that the charges, method of proof, and computations are subject to change. Statements made by a proposed defendant will be used not only to evaluate the matter but also in any court proceeding, criminal or civil. Fed.R.Evid. 801(d)(2). However, since May 30, 1986, statements made by attorneys for taxpayers (i.e., vicarious admissions) at conferences will *not* be utilized in general in court proceedings. Investigative leads provided at the conference may, however, of course be developed. In administratively investigated cases, plea negotiations are permitted

consistent with the Tax Division's major count policy and appropriate U.S. Attorney's Office policy. *See* DOJ Tax Division Directive No. 86-58 (May 14, 1986).

Normally, if time and circumstances permit, a conference in Washington, D.C., is granted upon a written request to the Tax Division from the taxpayer or the taxpayer's authorized representative. However, if the matter has been forwarded to the U.S. Attorney before the request is received, the request will be denied with the suggestion that the taxpayer seek a conference with the U.S. Attorney. Such conference is granted at the discretion of the U.S. Attorney. In unusual circumstances, the Tax Division may request that a conference be held and that the U.S. Attorney submit a report regarding any recommended changes in the authorization.

6-4.215 ***Expedited Review***

An expedited review is one which the Tax Division will render a final decision regarding prosecution within thirty (30) days of receipt from IRS of the CRL, SAR, and relevant exhibits. In exceptional circumstances when the U.S. Attorney finds that a given matter cannot be processed within the Division's stated guidelines, the U.S. Attorney personally must submit a written request to the Chief, Criminal Section, requesting an expedited review. The request must outline whatever difficulties exist requiring such expedited review. An expedited review will be granted only when such difficulties are shown to be exceptional circumstances.

6-4.216 ***Priority Review***

A priority review is one wherein the Tax Division will render a final decision regarding prosecution within sixty (60) days of receipt from IRS of the CRL, SAR, and relevant exhibits. A request for a priority review must be made in writing by an Assistant U.S. Attorney to the Chief, Criminal Section and will be granted on a showing of exceptional circumstances.

6-4.217 ***On-Site Review***

Criminal Section personnel will perform on-site reviews of Drug Task Force and other matters in appropriate circumstances. On-site reviews, either of grand jury investigations or prosecution recommendations, are only granted in exceptional circumstances and through written request procedure outlined in USAM 6-4.215, *supra*.

6-4.218 ***Authorizations and Declinations***

The final authority for the prosecution of all criminal tax matters rests with the Assistant

Attorney General, Tax Division, 28 C.F.R. §0.70. *See* USAM 6-4.212, *supra*.

6-4.219 ***Assistance of Criminal Section Personnel***

The Tax Division will consider requests by the U.S. Attorney for litigation assistance. Reasons for requests for trial assistance include those instances when the U.S. Attorney:

A. Recuses himself/herself and his/her office;

B. Lacks sufficient resources or personnel; or

C. Declines to prosecute a matter. (*See* USAM 6-4.245, *infra*.)

The U.S. Attorney is generally expected to handle those matters accepted for prosecution under the non-complex procedures. *See* USAM 6-4.244, *infra*.

6-4.240 ***U.S. Attorney's Responsibilities***

The U.S. Attorney is normally responsible for investigation and prosecution of criminal tax matters after authorization by the Tax Division. *See* USAM 6-2.212, *supra*.

6-4.241 ***Review of CRLs***

The U.S. Attorney will receive a copy of CRLs in any matters under the investigative jurisdiction of CID and referred to the Tax Division for prosecution or prosecution-related actions when venue for charges recommended in the referral falls within the U.S. Attorney's district. The U.S. Attorney may desire to review the matter and communicate his/her views to the Tax Division within twenty-one (21) days of receipt of the CRL, or within such shorter period as may be necessitated by an impending expiration of the statute of limitations or other exigent circumstances. When no comments are received within three (3) weeks, the Tax Division will assume that U.S. Attorney did not wish to express his/her views regarding the prosecution potential of the matter.

6-4.242 ***Recommendation of Grand Jury Investigation***

At the conclusion of a grand jury investigation authorized by or on behalf of the Tax Division, the U.S. Attorney conducting the investigation should submit an analysis of the investigation to the Tax Division and recommend either that charges be brought or prosecution be declined. If nontax charges are recommended, the analysis must explain how these nontax charges relate to the tax charges. A copy of the proposed indictment or information should accompany the

analysis. In addition to the U.S. Attorney's analysis, all relevant exhibits generated during the course of the grand jury investigation, the transcript of the proceedings, and the CRL and SAR must be submitted. *See* USAM 6-4.127, *supra*.

The Tax Division must receive this material at least sixty (60) days prior to the expiration of the statute of limitations unless the Tax Division already has agreed to handle the matter in accordance with USAM 6-4.215, *supra*.

6-4.243 ***Review of Direct Referral Matters***

The direct referral program is designed to promote the rapid prosecution of matters that constitute an imminent drain on the U.S. Treasury. Because immediate action is often required, IRS is authorized to refer the following categories of matters directly to the U.S. Attorney for prosecution:

A. Excise taxes-all 26 U.S.C. and 18 U.S.C. offenses involving taxes imposed by Subtitles C, D and E, except Chapter 24;

B. Multiple filings of false and fictitious returns claiming refunds (18 U.S.C. §§286 and 287)- all offenses wherein taxpayer files two or more returns for a single tax year claiming false refunds, excluding return preparers who falsify returns to claim funds and cases involving false or fictitious claims for refund which are submitted to the Internal Revenue Service through the Electronic Filing (ELF) program.

C. Trust Fund matters (26 U.S.C. §§7215 and 7512)-offenses involving alleged violations of the trust fund laws;

D. "Ten percenter" matters (26 U.S.C. §7206(2))-when arrest occurs contemporaneously with the offense;

E. Returns (IRS Form 8300) relating to cash received in a trade or business pursuant to 26 U.S.C. § 6050I (26 U.S.C. §§ 7203 and 7206 only). *See* DOJ Tax Division Directive No. 87-61 (Feb. 27, 1987).

The U.S. Attorney may initiate or decline prosecution of direct referrals without prior approval from the Tax Division (whereas in all other instances the U.S. Attorney can initiate proceedings only with specific Tax Division authorization). However, once prosecution has been initiated, the indictment, information, or complaint may not be dismissed without the prior approval

of the Tax Division. *See* USAM 6-4.246, *infra*.

6-4.244 ***Review of Noncomplex Matters***

Within three months of receipt of a designated non-complex matter, the U.S. Attorney is to review the matter and initiate proceedings, request that the matter be declined (*see* USAM 6-4.245, *infra*), or request that the Tax Division handle the matter (*see* USAM 6-4.219, *supra*).

6-4.245 ***Request to Decline Prosecution***

A. Request by U.S. Attorney

Whenever the U.S. Attorney feels that a particular tax matter should not be prosecuted, those views are to be forwarded to the Tax Division. The Assistant Attorney General will then consider the matter and determine whether the matter should be prosecuted or declined. If it is determined that the matter should be prosecuted, the U.S. Attorney will be requested to proceed. If the U.S. Attorney declines to proceed, the matter will be handled by Criminal Section personnel. Notice that the U.S. Attorney desires not to proceed must be received sufficiently in advance of the expiration of the statute of limitations or any other deadlines to allow adequate consideration by the Tax Division and adequate time for preparation by Division personnel.

B. Grand Jury No Bill

Once a grand jury returns a no bill or otherwise acts on the merits n declining to return an indictment, the same matter (i.e., same transaction or event and the same putative defendant) must not be presented to another grand jury or represented to the same grand jury without first securing the approval of the Assistant Attorney General, Tax Division. Ordinarily such approval will not be given in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice.

6-4.246 ***Request to Dismiss Prosecution***

Indictments, informations, and complaints may not be dismissed without prior approval of the Tax Division except when a superseding indictment has been returned or the defendant has died. Requests to dismiss prosecutions are the personal responsibility of the U.S. Attorney and all requests relating thereto must accordingly be signed. Form USA-900 may be used for this purpose.

6-4.247 ***U.S. Attorney Protest of Declination***

If in disagreement with the Tax Division's decision to decline prosecution of a matter arising out of a grand jury investigation, the U.S. Attorney may request reconsideration of that determination. Such request must be in writing and set forth the U.S. Attorney's reasons for desiring to proceed with prosecution.

The Tax Division will not entertain protests by the U.S. Attorney of matters which were administratively investigated by the IRS. *See* USAM 6-4.241, *supra*.

6-4.248 ***Status Reports***

After criminal tax cases have been referred to a U.S. Attorney, it is essential that the Tax Division be kept advised of all developments. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

A. A copy of the indictment returned (or no billed), or the information filed, which reflect the date of the return (or no bill) or filing;

B. Date of arraignment and kind of plea;

C. Date of trial;

D. Verdict and date verdict returned;

E. Date and terms of sentence; and

F. Date of appeal and appellate decision.

It is important that information regarding developments in pending cases be provided to the Tax Division in a timely manner in order that the Department's files reflect the true case status and so that, upon completion of the criminal case, the case can be timely closed and returned to the IRS for the collection of any revenue due through civil disposition.

6-4.249 *Return of Reports and Exhibits*

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the U.S. Attorney should return to witnesses their exhibits. Grand jury materials should be retained by the U.S. Attorney under secure conditions, in accordance with the requirements of maintaining the secrecy of grand jury material. *See* Fed.R.Cr.P. 6(e). All non-grand jury reports, exhibits, and other materials furnished by the IRS for use in the investigation or trial should be returned by certified mail, return receipt requested, to the appropriate District Director, IRS, Attention: Chief, CID, as directed in the Tax Division's letter authorizing prosecution or as directed by Regional Counsel in cases directly referred to the U.S. Attorney.

6-4.270 *Criminal Division Responsibility*

The Criminal Division has limited responsibility for the prosecution of offenses investigated by the IRS. Those offenses are: excise violations involving liquor tax, narcotics, stamp tax, firearms, wagering, and coin-operated gambling and amusement machines; malfeasance offenses committed by IRS personnel; forcible rescue of seized property; corrupt or forcible interference with an officer or employee acting under the internal revenue laws; and unauthorized mutilation, removal or misuse of stamps. *See* 28 C.F.R. §0.70.

6-4.300 *TAX DIVISION POLICIES REGARDING CASE DISPOSITION AND SENTENCING*

6-4.310 *Major Count(s) Policy/Plea Agreements*

The overwhelming percentage of all criminal tax cases are disposed of by entry of a plea of guilty. In most cases, the transmittal letter forwarding the case from the Tax Division to the U.S. Attorney will identify the major count(s) that have been authorized for prosecution. The U.S. Attorney's Office, without prior approval of the Tax Division, is authorized to accept a plea of guilty to the major count(s) of the indictment or information.

The U.S. Attorney also is authorized to seek a plea to more than the major count(s) if it is considered warranted. As part of the major count policy, the timeliness of a plea offer should also be considered in assessing the value of the plea solely to the major count(s). This comports with standard DOJ policy regarding prompt disposition of cases. *See* ***Principles of Federal Prosecution*** on JURIS.

The designation of the major count is generally premised on the following considerations:

A. Felony counts take priority over misdemeanor counts.

B. Tax evasion counts (26 U.S.C. §7201) take priority over all other substantive tax counts.

C. The count charged in the indictment or information which carries the longest prison sentence will be considered a major count.

D. As between counts under the same statute, the count involving the greatest financial detriment to the United States (i.e., the greatest additional tax due and owing) will be considered the major count.

E. Where there is little difference in financial detriment between counts, the determining factor will be the relevant flagrancy of the offense.

F. Where the determination of the major count(s) is complicated by considerations not covered by the above rule, the U.S. Attorney is encouraged to consult the Tax Division.

When the major count of a tax indictment charges a felony offense, U.S. Attorneys will not accept a plea to a lesser-included offense nor substitute misdemeanor offenses for the felony offense charged. The Tax Division will not, absent unusual circumstances, consent to reduce a charge from a felony to a misdemeanor merely to secure a plea.

After a defendant's guilty plea to one or more major counts has been accepted by the court and the sentence has been imposed, the remaining counts of the indictment or information may be dismissed.

A defendant sometimes indicates in advance of the indictment or information that he intends to enter a guilty plea to the major count(s). If this occurs, the full extent of the defendant's tax offenses must be included in the court records by charging the defendant with all of the authorized offenses even though, after plea and sentence, the residual counts may be dismissed. In presenting the factual basis for the prosecution in compliance with Rule 11, Fed.R. of Cr.P., the government prosecutor should include the full extent of the violation on residual counts in order to demonstrate the actual criminal intent on the part of the defendant. A plea of guilty by a corporation will not result in the dismissal of charges against an individual unless special circumstances exist for justifying such dismissal. *See* USAM 9-2.146.[2]

6-4.320 ***Nolo Contendere Pleas***

It is the policy of both the Department of Justice and the Tax Division not to consent to a plea of nolo contendere in tax cases. When a defendant enters a plea of guilty to, or is found guilty of, income tax evasion (26 U.S.C. §7201) the plea and conviction collaterally stops the taxpayer from contesting the civil fraud penalty in subsequent civil tax proceedings. A plea of nolo contendere does not entitle the government to utilize the doctrine of collateral estoppel.

When a plea of nolo contendere is offered over the government's objection, the attorney for the government will state for the record why acceptance of the plea would not be in the public interest. Fed.R.Cr.P. 11(b). In addition to a factual recitation, the government attorney will bring to the court's attention whatever arguments exist for rejecting the plea. The government attorney also will oppose dismissal of any charges to which the defendant does not plead nolo contendere. As in the case with guilty pleas, the attorney for the government will urge the court to require the defendant to admit publicly the facts underlying the criminal charges, to minimize the effectiveness of any attempt by the defendant to portray him or herself as technically liable, but not seriously culpable.

Thus, attorneys for the government must oppose acceptance of nolo contendere pleas. A government attorney cannot consent to the acceptance of a nolo contendere plea in criminal tax cases unless the Assistant Attorney General, Tax Division, has expressly concluded that the circumstances of a particular case are so unusual that acceptance of such a plea would be in the public interest. *See* ***Principles of Federal Prosecution***.

6-4.330 ***Alford Pleas***

In the landmark case of ***North Carolina v. Alford***, 400 U.S. 25 (1970), the Supreme Court upheld the validity of accepting a plea of guilty over the defendant's claims of innocence. The court stated that the standard by which the validity of the plea is to be judged is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id*. at 31. The record must reflect the voluntary nature of the plea and the factual foundations supporting it.

An attorney for the government will not, absent prior approval of the Assistant Attorney General, Tax Division, enter into an ***Alford*** plea agreement if the defendant maintains his innocence with respect to the charge or charges to which he offers to plead guilty. Involvement by government attorneys in the inducement of guilty pleas by defendants who protest their innocence may create the appearance of prosecutorial overreaching.

Apart from refusing to enter into ***Alford*** plea agreements, however, the degree to which government attorneys can express their opposition to such pleas is limited. Government prosecutors should discourage ***Alford*** pleas by refusing to agree to terminate prosecutions where such a plea is proffered to fewer than all of the charges pending. If an ***Alford*** plea to fewer than all charges is tendered and accepted over the government's objection, the government attorney will proceed to trial on all of the remaining counts not barred on double jeopardy grounds unless the Assistant Attorney General, Tax Division, approves dismissal of the charges.

In ***Alford*** plea cases, the attorney for the government will attempt to establish as strong a factual basis as possible for the plea, not only to satisfy the requirements of Rule 11(f), Fed.R. of Cr.P., but also to thwart the defendant's efforts to project a public image of innocence. *See* ***Principles of Federal Prosecution***.

6-4.340 ***Sentencing***

Rule 32(a), Federal Rules of Criminal Procedure, permits government counsel to make a statement to the court at the time of sentencing. Counsel for the government will be prepared to make a full statement of facts, including if applicable, the amount of tax evaded in all the years for which a defendant was indicated; the means utilized to perpetrate and conceal any fraud; the past criminal record of the taxpayer; and all other information which the court may consider important in imposing an appropriate sentence.

Under no circumstances, either following a trial conviction or plea of guilty, will the government recommend that there be no period of incarceration. In some instances the attorney for the government may agree not to make any recommendation for sentence. Still, the court should be advised that the government's standing silent should not be construed as a recommendation for leniency.

Whenever recommendations are made to the court on sentencing the Tax Division's policy is to request the imposition of a jail sentence in addition to the fine, together with the costs of prosecution. In the Tax Division's view, payment of the civil tax liability, plus a fine, costs, and suspended sentence does not constitute a satisfactory disposition of a criminal tax case.

6-4.350 ***Costs of Prosecution***

The principal substantive criminal tax offenses (i.e., 26 U.S.C. §§ 7201, 7203, 7206(1) and (2)), provide for the imposition of costs of prosecution upon conviction. Courts increasingly are recognizing that the imposition of costs in such criminal tax cases is ***mandatory*** and constitutional. *See, e.g.,* ***United States v. Saussy***, 802 F.2d 849 (6th Cir. 1986); ***United States v. Wyman***, 724

F.2d 684 (8th Cir. 1984); ***United States v. Chavez***, 627 F.2d 953 (9th Cir. 1980); ***United States v. Fowler***, 794 F.2d 1446 (9th Cir. 1986); and ***United States v. Palmer***, 809 F.2d 1504 (11th Cir. 1987). The Tax Division strongly recommends that attorneys for the government seek costs of prosecution in criminal tax cases.

6-4.360 ***Compromise of Criminal Liability/Civil Settlement***

While statutory authority under 26 U.S.C. §7122(a) does exist for both the Secretary of the Treasury and the Attorney General to enter into agreements to compromise criminal tax cases without prosecution, as a matter of longstanding policy, such authority is very rarely exercised. If it is concluded that there is a reasonable probability of conviction and that prosecution would advance the administration of the internal revenue laws, any decision to forego prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States, would be susceptible to the attack that the taxpayer was given preferential treatment because of his ability to pay whatever amount of money the government demanded. Such action could also implicate adversely the "traditional aversion to imprisonment for debt." *See* ***Spies v. United States***, 317 U.S. 492, 498 (1943).

Consequently, proposed criminal tax case are reviewed without any consideration being given to the matter of civil liability or the collection of taxes, penalties, and interests. In short, proposed criminal tax cases are examined with the view to determining whether a violation has occurred to the exclusion of any consideration of civil liability.

Absent extraordinary circumstances, such as permanent loss of tax revenues unless immediate protective action is taken, settlement of the civil liability is postponed until after sentence has been imposed in the criminal case, except when the court chooses to defer sentencing pending the outcome of such settlement. In this event, the IRS should be notified so that it can begin civil negotiations with the defendant.

DECEMBER 17, 1990

TO: Holders of United States Attorneys' Manual Title 6

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Shirley D. Peterson
Assistant Attorney General
Tax Division

RE: ***Application of Major Count Policy in Sentencing Guideline Cases***

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 6.
3. Insert in front of affected section.

AFFECTS: USAM 6-4.310

PURPOSE: This bluesheet sets forth minor modifications to the Tax Division's "Major Count Policy" to conform to the implementation of the Sentencing Guidelines and Department policies adopted pursuant thereto. Except as specifically modified herein, the "Major Count Policy" (USAM 6-3.410) remains the same.

The following modifies 6-4.310, ***Major Count(s) Policy/Plea Agreements***, with a new subsection 6-4.311, ***Application of Major Count Policy in Sentencing Guidelines Cases***.

Indictments are now beginning to be returned and informations filed in tax cases involving years for which the Sentencing Guidelines are in effect (offenses committed after November 1, 1987). The Department has adopted policies dealing with pleas and sentencing under the

Guidelines. The Guidelines and the Department's policies pursuant thereto necessitate minor conforming changes to the Tax Division's Major Count Policy (USAM 6-4.310). Under that policy, the Tax Division designates one of the counts approved for prosecution as the major count and the United States Attorney's office may accept a plea to that count without consulting the Tax Division. If the United States Attorney's office desires to accept a plea to any count other than the designated major count, it may do so only after seeking and obtaining the approval of the Tax Division. Except as specifically modified herein, the Major Count Policy (USAM 6-4.310) otherwise remains the same.

The Department's plea policy for Sentencing Guideline cases is set forth in the Attorney General's Memorandum to Federal Prosecutors, dated March 13, 1989. Under that policy, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Thereafter, charges are not to be bargained away or dropped unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. However, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain.

Under the Sentencing Guidelines, sentences in criminal tax cases are primarily determined by the amount of "tax loss." The relevant "tax loss" includes the tax loss caused by the offense or offenses of conviction (see, e.g., United States Sentencing Guidelines (U.S.S.G.) §2T1.1(a)), plus the tax loss from any other year which is part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." (U.S.S.G. §1B1.3(a)(2); U.S.S.G. §2T1.1, comment (n.3)). The Guidelines provide that "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." (U.S.S.G. §2T1.1, comment (n.3).) The Guidelines also include a list of examples, not intended to be inclusive, of conduct that is part of the same course of conduct or common scheme or plan. (*Id*.)

1. ***Tax Offenses Which Are All Part of the Same Course of Conduct or Common Scheme or Plan***. Normally, no change in the application of the Major Count Policy will be required by virtue of the Guidelines and the Department's plea policy for Guideline cases. in most cases, all of the tax charges in an indictment are related. Consequently, even if the defendant pleads to a single count and the remaining counts are dismissed, the tax loss from all of the years should be taken into account in determining the tax loss for the offense to which a defendant pleads. Thus, in the usual case, the Tax Division will continue to designate a single count as the major count according to the principles previously utilized in designating the major count. (See USAM 6-4.310.) This will be the case even where one or more of the counts relates to a pre-Guideline year, so long as the counts are related. In that case, the count designated as the major count by the Tax

Division will be a Guideline year count in order to meet the Department's goal of bringing all sentencing under the Guidelines as rapidly as possible.

2. ***Tax Offenses Which Are Not All Part of the Same Course of Conduct or Common Scheme or Plan***. Where all of the tax charges are not part of the same course of conduct or common scheme or plan, however, the Departments' plea policy for Guideline cases may require the Tax Division either to designate as major counts one count from each group of unrelated counts or to designate one count from one of the groups of unrelated counts as the major count and have the prosecutor obtain a stipulation from the defendant establishing the commission of the offenses in the other group (see U.S.S.G. §1B1.2(c)). This will be the case where the offense level of the group with the highest offense level must be increased under §3D1.4. Only in this way will prosecutors in tax cases be able to comply with the Attorney General's directive that readily provable charges may be dismissed only when the applicable guideline range from which a sentence may imposed would be unaffected by the dismissal of charges. In selecting the major count or counts, the usual rules for selecting major counts will apply. Again, Guideline year counts will take precedence over pre-Guideline year counts in the selection process.

3. ***Designation More Than One Count as a Major Count***.
Designating more than a single year as a major count may also be required where the computed guideline sentencing range exceeds the maximum sentence which can be imposed under a single count. For example, the situation may arise in a prosecution for a number of Section 7206(1) violations that the guideline sentence range is computed to be 37 to 46 months, although the statutory maximum sentence impossible under the major count is only 36 months. Although it is likely that such a situation will rarely arise, the possibility does exist. No hard and fast rules can be set out to deal with these kinds of situations. A number of variables must be taken into account, such as the willingness of the defendant to agree with the government's calculation of the guideline range, the defendant's willingness to plead to more than a single count, the effect of any acceptance of responsibility reduction, and so on. Therefore, the most that can be said is that each case will be carefully examined by the Tax Division (and, reconsidered when necessary) to determine whether more than a single count must be designated as a major count.

4. ***Selection of a Pre-Guideline Offense as a Major Count***.
Where there are both pre-Guideline year counts and Guideline year counts, pre-Guideline year counts will be selected by the Tax Division as major counts, in addition to one or more Guideline year counts, only if they are not part of the same course of conduct or common scheme or plan as one of the Guideline year counts and there is some significant reason for taking a plea to that count or counts. For example, designation of a pre-Guideline year count as a major count, in addition to one ore more Guideline year counts, may be appropriate where the amount involved in the pre-Guideline year is substantially greater than the amounts in any of the Guideline year counts.

5. ***Tax Charges and Non-Tax Charges***. In cases in which there are both tax counts and non-tax charges, the selection of which tax count to designate as the major count may not have any effect on the applicable guideline range because the offense level of the group or groups of non-tax offenses is 9 or more levels higher than the offense level of the group containing the tax charges (see U.S.S.G. §§3D1.2, 3D1.4). In such cases, the Tax Division will normally continue to designate the major count by application of the usual rules for selecting the major count. However, the Tax Division may designate a less serious tax offense in the group as the major count if it is supplied with sufficient information establishing that such a selection will not affect the applicable guideline range and with adequate justification for a deviation from the Major Count Policy.

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1. A scheme does not fall in the latter category if it is designed to defraud individuals or to defraud the government in a non-revenue collecting capacity.

2. By a bluesheet to the ***United States Attorney's Manual***, dated December 17, 1990, the Tax Division made modifications to its major count policy in Sentencing Guideline cases. A copy of the December 17, 1990, bluesheet appears at the end of this chapter.

TABLE OF CONTENTS

3.00 TAX DIVISION POLICY DIRECTIVES AND MEMORANDA

3.00 *TAX DIVISION POLICY DIRECTIVES AND MEMORANDA*

The Tax Division's policies and procedures are contained in a series of Tax Division Directives and Memoranda, which are set forth in the pages that follow for ease of reference.

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DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 52

January 2, 1986

The Authority to Execute Title 26 or
Tax-related Title 18 Search Warrants

Pursuant to the authority vested in me by Part 0, Sub-Part N of Title 28 of the Code of Federal Regulations, Section 0.70, delegation of authority with respect to approving the execution of Title 26, U.S.C., or tax-related Title 18, U.S.C., search warrants directed at offices, structures, premises, etc., owned, controlled or under the dominion of the subject or target of a criminal investigation, is hereby conferred upon:

1. Any United States Attorney appointed under Section 541 of Title 28, U.S.C.,

2. Any United States Attorney appointed under Section 546 of Title 28 U.S.C.,

3. Any permanently appointed representative within the United States Attorney's office assigned as First Assistant United States Attorney,

4. Or to any permanently appointed representative within the United States Attorney's office assigned as chief of criminal functions.

This delegation of authority is expressly restricted to these, and no other, individuals.

This delegation of authority does not affect the statutory authority and procedural guidelines relating to the use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. Sec. 59.1, *et seq.*

The Tax Division shall have exclusive authority to seek and execute a search warrant that is directed at the offices, structures or premises owned, controlled, or under the dominion of a subject

or target of an investigation who is:

1. An accountant;

2. A lawyer;

3. A physician;

4. A local, state, federal, or foreign public official or political candidate;

5. A member of the clergy;

6. A representative of the electronic or printed news media;

7. An official of a labor union;

8. An official of an organization deemed to be exempt under Section 501(c)(3) of the Internal Revenue Code.

Any application for a warrant to search for evidence of a criminal tax offense not specifically delegated herein must be specifically approved in advance by the Tax Division pursuant to Section 6-2.330 of the United States Attorneys' Manual.

Notwithstanding this delegation, the United States Attorney or his delegate has the discretion to seek Tax Division approval of any search warrant or to request the advice of the Tax Division regarding any search warrant.

The United States Attorney shall notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and shall transmit to the Tax Division copies of the search warrant (and attachments and exhibits), inventory, and any other relevant papers.

The United States Attorneys' Manual is hereby modified effective January 2, 1986.

ROGER M. OLSEN
Acting Assistant Attorney General
Tax Division

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ATTACHMENT

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Subject:	Authority to Execute Title 26 Tax-Related Title 18 Search Warrants	Date:	AUG. 7, 1984 GLA:ljp
To:	All United States Attorneys	From:	Glenn L. Archer, Jr. Asst. Attorney General Tax Division

By Tax Division Directive No. 49 (copy attached), I have authorized delegation to United States Attorney's offices the authority to approve the execution of certain limited Title 26 or tax-related Title 18 search warrants. At the request of the Internal Revenue Service, the effective date of this delegation is October 1, 1984. In recent years, the case law concerning search and seizure has developed to the point where it is clear that, upon a showing of probable cause, the Government may conduct reasonable searches for the purpose of obtaining documentary evidence establishing the commission of a crime. The developing case law has led, in part, to the decision to delegate the authority to approve requests for search warrants in tax cases on a limited basis.

The procedure will now permit a direct request from District Counsel's office to you. The delegation order permits consultation or referral of the matter to the Tax Division, as you choose. The delegation extends to the United States Attorney and the Chief of your Criminal Division. It cannot be delegated to anyone else in your office. There is a ten-day notification requirement which will permit the Tax Division to collect the relevant data necessary to evaluate the use of search warrants by the Internal Revenue Service and Department of Justice nationally.

If you have any questions whatsoever, please contact Roger M. Olsen, Deputy Assistant Attorney General, Tax Division, telephone: 633-2915, or Stanley F. Krysa, Chief, Criminal Section, Tax Division, telephone: 633-2973.

I would appreciate having the name and telephone number of the Assistant United States Attorney in each office who, in addition to the United States Attorney, is authorized to approve these warrants. A list of those names will be forwarded to the IRS and, of course, retained for the Tax Division's files.

Also attached is a brief, technical memorandum on the law of search warrants for documentary evidence.

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BRIEF MEMORANDUM OF LAW CONCERNING SEARCH WARRANTS

Ever since ***Warden v. Hayden***, 378 U.S. 294 (1967), established that the Government could seize "mere evidence" pursuant to a search warrant, the use of search warrants for items, such as personal papers and business records, became a viable legal possibility. In ***Warden v. Hayden***, although the items of clothing seized were evidentiary, their seizure did not violate the Fifth Amendment privilege, since the items were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself ..." supra, 302-303. Rule 41(b) of the Federal Rules of Criminal Procedure echoes this holding and provides that: "A warrant may be issued ... to search for and seize any ... property that constitutes evidence of the commission of a criminal offense ...".

In 1976, the possibility that a search and seizure of business records might violate the Fifth Amendment privilege against self-incrimination was foreclosed in ***Andresen v. Maryland***, 427 U.S. 463 (1976). The Supreme Court upheld the search of the defendant's law office and of the office of the real estate firm which he also controlled, although incriminating business records were found at both locations. The Court based its opinion on the finding that the individual against whom the search was directed was not required to aid in the discovery, production, or authentication of incriminating evidence; thus, the seizure of the business records was not a violation of the Fifth Amendment. *Cf.* ***United States v. Doe***, 52 U.S.L.W. 4296 (Feb. 28, 1984).

The Supreme Court's approval of a law office search in Andresen lends some support to similar searches in the future. However, the issue of attorney/client privilege or work-product doctrine was not specifically addressed in Andresen and is, therefore, still a matter of controversy and sensitivity. In addition, the search's legality may depend on whether the status in the investigation of the individual whose property is searched is that of a disinterested third party or whether he is believed to have engaged in criminal conduct. *See* ***Zurcher v. Stanford Daily***, 436 U.S. 547 (1978); ***United States v. Bithoney***, 631 F. 2d l (lst Cir. 1980), cert. denied, 449 U.S. 1083 (1981).

Because the questions of privilege and status in the investigation remain sensitive legal issues, the Tax Division has decided to delegate the authority to approve search warrants in tax cases only in those limited instances where the search warrant is directed at offices, structures, or premises owned, controlled, or under the dominion of the subject or target of a criminal investigation. The subject, or target, moreover, must not fall into the exempted categories listed in the delegation order, which categories we deem to be of such a sensitive nature, from the perspective of tax law enforcement, that prior approval of the Tax Division is still required before a search warrant is obtained.

Aside from questions of strict legality, search warrants in tax investigations involve potential problems and issues intrinsic to tax cases. The concept of seizing personal or business books and records as the evidence or instrumentality of a crime is not as direct or simple a problem as is the seizure of a contraband. These documents usually contain much personal and confidential information and these very same documents, which, by their own nature, are not unusual, illegal or dangerous, will be the evidence of or the instrumentality of the crime to be charged. In addition to the controversial nature of such a seizure of documents, the requirement that the items to be seized must be named with specificity is more difficult to meet. In tax cases, the warrant must be specific, not only regarding the items to be seized and the place searched, but a specific time frame must also be stated.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE

NO. 86 - 58

May 14, 1986

Introduction. While it is the function of the Tax Division to carefully review the facts, circumstances, and law of each criminal tax case as expeditiously as possible, the taxpayer should be given a reasonable opportunity to present his/her case at a conference before the Tax Division. Where the rules governing conferences are so rigid and inflexible that such an opportunity is effectively denied a taxpayer, the interests of justice are not served. The following guidelines will assist the Tax Division attorneys in reviewing such cases.

(1) ***Vicarious Admissions***. Effective immediately, the vicarious admissions rule for statements by lawyers attending conferences before the Criminal Section shall no longer be used by the Tax Division, except where the lawyer authenticates a written instrument, *i.e.*, document, memorandum, record, etc.

(2) ***Administrative Investigations***. Effective July 1, 1986, plea negotiations may be entertained at the conference in non-grand jury matters, consistent with the policies of the appropriate United States Attorney's office. Written plea agreements should be prepared and entered into by the United States Attorney's office unless there is a written understanding between the Tax Division and the United States Attorney's office to the contrary. Where the prospective defendant indicates a willingness to enter into a plea of guilty to the major counts(s) and to satisfy the United States Attorney's office policy, the matter should be referred to the United States Attorney's office for plea disposition.

(3) ***Number of Conferences***. There is no fixed number of conferences which may be granted in any one particular case. Ordinarily, one conference is sufficient. However, in some cases it may be that more than one conference is appropriate. The test is not in the number of conferences, for there is no right to a conference, but whether, under the facts and circumstances of the case, sufficient progress is or will be made in either the development of material facts or the clarification of the applicable law, without causing prejudice to the United States. Tax Division attorneys should be mindful that justice delayed is justice denied and, therefore, sound, professional judgment should be used at all times in such matters.

(4) ***Witness at Conferences***. On occasion, the taxpayer or a witness may attend the conference. In rare situations, the taxpayer or a witness may attempt to make oral reprensentations or statements at the conference. There are no restrictions on the use of such statements by the Government. However, such attempts should be discouraged, since the Tax Division is conducting a review of an investigation and is not conducting either a hearing or an investigation. Under no circumstances may evidence be presented at the conference based upon any understanding that it is in lieu of any person testifying before a grand jury.

(5) ***Grand Jury Investigations and Coordination with United States Attorney's Office***. Effective immediatley, in every grand jury investigation where a conference is requested, the Tax Division trial attorney shall initially contact the United States Attorney's office and discuss the case with the appropriate Assistant United States Attorney, and ascertain whether disclosure of any facts of the case is likely to expose any person, including witnesses, to the risk of intimidation or danger. If there is such a risk, the trial attorney shall then advise the appropriate assistant chief of the Criminal Section, who shall decide the appropriate course of action. The Tax Division trial attorney shall advise the Assistant United States Attorney that he/she may attend the conference if they so desire.

ROGER M. OLSEN
Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 86-59

AUTHORITY TO APPROVE GRAND JURY EXPANSION

REQUESTS TO INCLUDE FEDERAL CRIMINAL

TAX VIOLATIONS

AGENCY: Department of Justice

ACTION: Notice

SUMMARY: This Directive delegates the authority to approve requests seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations from the Assistant Attorney General, Tax Division, to any United States Attorney, Attorney-In-Charge of a Criminal Division Organization Strike Force or Independent Counsel. The Directive also sets forth the scope of the delegated authority and the procedures to be followed by designated field personnel in implementing the delegated authority.

EFFECTIVE DATE: October 1, 1986

FOR FURTHER INFORMATION CONTACT: Edward M. Vellines, Senior Assistant Chief, Office of Policy & Tax Enforcement Analysis, Tax Division, Criminal Section (202-633-3011). This is not a toll fee number.

SUPPLEMENTARY INFORMATION: This order concerns internal Department management and is being published for the information of the general public.

TAX DIVISION DIRECTIVE NO. 86-59

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, delegation of authority with respect to approving requests seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations is hereby conferred on the following individuals:

1. Any United States Attorney appointed under Section 541 or 546 of Title 28, United States Code.

2. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, United States Code.

3. Any Independent Counsel appointed under Section 593 of Title 28, United States Code.

The authority hereby conferred allows the designated official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding which is being conducted within the sole jurisdiction of the designated official's office. (Section 301.6103(h)(2)-1(a)(2)(ii) (26 C.F.R.)). *Provided*, that the delegated official determines that--

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the Government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with F.R.Cr.P. 6(e)(A)(ii) to seek the assistance of Government personnel assigned to the Internal Revenue Service to assist said attorney in his/her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multijurisdictional investigation, nor are the targets individuals considered to have national prominence--such as local, state, federal, or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

4. A written request seeking the assistance of Internal Revenue Service personnel and containing pertinent information relating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate Internal Revenue Service official

(e.g., Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential tax violations, and the Tax Division interposes no objection to the request.

6. The Internal Revenue Service has made a referral pursuant to the provisions of 26 U.S.C. Section 6103(h)(3) in writing stating that it: (1) has determined, based upon the information provided by the attorney for the Government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed; (2) agrees to furnish the personnel needed to assist the Government attorney in his/her duty to enforce federal criminal law; and (3) has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the Internal Revenue Service and the Tax Division before undertaking to initiate criminal proceedings.

The authority hereby delegated includes the authority to designate: the targets (subjects) and the scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, *provided*, that prior written notification is given to both the Internal Revenue Service and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. Section 7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Task Force Investigations, individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the United States Attorney, Independent Counsel or Attorney-in-Charge of a Strike Force with a special agent's report and exhibits through Regional Counsel, (Internal Revenue Service) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of grand jury investigations conducted by an Organized Crime Drug Task

Force shall be forwarded directly to the Tax Division by the United States Attorney with a special agent's report and exhibits.

The authority hereby delegated is limited to matters which seek either to: (1) expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations; (2) designate the targets (subjects) and the scope of such inquiry; or (3) terminate such proceedings. In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the Internal Revenue Service, remains vested in the Assistant Attorney General in charge of the Tax Division as provided in 28 C.F.R. 0.70. In addition, authority to alter any actions taken pursuant to the delegations contained herein is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. 0.70.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *October 1, 1986*

DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 87 - 61

DELEGATION OF AUTHORITY FOR TAX PROSECUTIONS
INVOLVING RETURNS UNDER 26 U.S.C. SECTION 6050I

By virtue of the authority vested in me by Part 0, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, delegation of authority with respect to authorizing tax prosecutions, under Title 26, United States Code (U.S.C.), Sections 7203 and 7206 with respect to Returns (IRS Form 8300) Relating to Cash Received in a Trade or Business as prescribed in 26 U.S.C. Section 6050I, is hereby conferred on the following individuals:

1. The Assistant Attorney General, Deputy Assistant Attorneys General, and Section Chiefs of the Criminal Division.

2. Any United States Attorney appointed under Section 541 or 546 of Title 28, U.S.C.

3. Any permanently appointed representative within the United States Attorney's Office assigned either as First Assistant United States Attorney or Chief of criminal functions.

4. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, U.S.C.

5. Any Independent Counsel appointed under Section 593 of Title 28, U.S.C.

This delegation of authority is expressly restricted to the aforementioned individuals and may not be redelegated.

The authority hereby conferred allows the designated official to authorize, on behalf of the Assistant Attorney General, Tax Division, tax prosecutions under 26 U.S.C. Sections 7203 and 7206 with respect to returns (IRS Form 8300) prescribed in 26 U.S.C. Section 6050I relating to cash received in a trade or business; Provided, that:

1. The prosecution of such tax offenses (e.g. Sections 7203 and 7206) involves solely cash received in a trade or business as required by 26 U.S.C. Section 6050I.

2. The matter does not involve the prosecution of accountants, physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly-held corporations and/or their officers.

3. The Tax Division of the Department of Justice will be furnished by certified mail a copy of the referral from the Internal Revenue Service to the designated field office personnel regarding the potential tax violations.

Except as expressly set forth herein, this delegation of authority does not include the authority to file an information or return an indictment on tax matters. The authority hereby delegated is limited solely to the authorization of tax prosecutions involving the filing or non-filing of returns (IRS Form 8300) pursuant to 26 U.S.C. Section 6050I. The authority to alter any actions taken pursuant to the delegation contained herein is retained by the Assistant Attorney General, Tax Division, in accordance with the authority contained in 28 C.F.R. 0.70.

Notwithstanding this delegation, the designated official has the discretion to seek Tax Division authorization of any proposed tax prosecution within the scope of this delegation or to request the advice of the Tax Division with respect thereto.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *February 27, 1987*.

DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 70 [1]

October 3, 1988

Re: Reorganization of the Criminal Section
of the Tax Division

The reorganization of the Criminal Section of the Tax Division has been approved by Attorney General Dick Thornburgh. It became effective October 3, 1988.

I hereby appoint the following persons to the designated positions under the approved organization plan:

1. Director, Criminal Enforcement Sections - Stanley F. Krysa

2. Northern Criminal Enforcement Section -
Chief, George T. Kelley
Assistant Chief, E. Ralph Pierce
Assistant Chief, Jerrold Kluger

3. Southern Criminal Enforcement Section -
Chief, J. Randolph Maney, Jr.
Assistant Chief, Ralph E. Belter
Assistant Chief, Rosemary E. Paguni

4. Western Criminal Enforcement Section -
   Chief, Ronald A. Cimino
   Assistant Chief, Mark E. Friend
   Assistant Chief, (Vacant)

5. Criminal Appeals and Tax Enforcement Policy Section -
   Chief, Robert E. Lindsay

WILLIAM S. ROSE, JR.
Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 71

October 3, 1988

Re: Delegation of Authority Relating to
Criminal Tax Cases
(Including Authority to Approve and Decline
Prosecution and Related Matters)

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, delegation of authority, with respect to criminal tax cases within the cognizance of the Tax Division, is hereby conferred as follows:

1. Authority to Approve Criminal Proceedings.

(a) ***Unanimous Recommendation for Prosecution***. Except as hereinafter indicated, criminal tax cases referred to the Tax Division by the Internal Revenue Service and within the cognizance of the Tax Division may be approved for criminal proceedings by any Chief of a regional Criminal Enforcement Section provided that the recommendations within the assigned Criminal Enforcement Section, including the recommendation by the docket attorney, unanimously propose criminal action, and the case is not considered by the approving official to warrant higher level consideration within the Tax Division.

(b) In addition to the authority conferred in paragraph 1(a), the Chief is authorized to:

(1) Approve tax prosecutions, in accord with the authority and limitations contained in paragraphs 1(a), (c) and (d) in cases where the Criminal Enforcement Section's recommendations are other than unanimous, provided that an Assistant Chief has recommended prosecution;

(2) Authorize dismissal in direct referral cases as described in U.S.A.M. 6-2.230, provided notification is received from the appropriate United States Attorney in accord with the procedures described in U.S.A.M. 6-2.420, indicating why

proceeding with prosecution is not believed advisable and the Assistant Chief who acts on the matter does not recommend continuing the prosecution with attorneys from the Tax Division; and

(3) Pass prosecution of the first year recommended for prosecution by the Internal Revenue Service in all cases received with less than seven (7) calendar months remaining before the expiration of the statute of limitations.

(c) ***Criminal Proceedings Covered by this Delegation***. Except for such offenses described in the U.S.A.M., Title 6-2.220, as being under the general responsibility of the Criminal Division and U.S.A.M., Title 6-2.230, concerning direct referral cases, the criminal proceedings encompassed by this delegation concern the initiation of prosecution for tax and/or tax-related violations, including charges described in 28 C.F.R. 0.179, offenses defined in the Internal Revenue Code (Title 26, United States Code), and such offenses defined in Title 18 and Title 31, United States Code, as may be investigated by special agents of the Internal Revenue Service's Criminal Investigation Division in connection with enforcement of federal revenue laws, including 26 U.S.C. 7201-7207, 7210, 7215; 18 U.S.C. 286, 287, 1501-1511, 1621-1623; 31 U.S.C. 1058, 1059; and conspiracies to commit such offenses, including conspiracies in violation of 18 U.S.C. 371 to defraud the Government by impeding, impairing, obstructing, and defeating the lawful function of the U.S. Department of Treasury, Internal Revenue Service, in the ascertainment, computation, assessment, and collection of the revenue. Charges under 18 U.S.C. 1001 or 1341 involving only the mailing of tax forms and charges involving the use of the omnibus clause in 26 U.S.C. 7212 require the approval of the Director of the Criminal Enforcement Sections.

(d) ***Selection of Charges and Matters Related to the Handling of Criminal Tax Cases***. The authority hereby delegated includes the authority to approve tax prosecutions based on the charges recommended by the Internal Revenue Service, or Criminal Enforcement Section attorneys, or whatever tax and/or tax-related charges are deemed appropriate by the approving official. In addition, the authority to approve criminal proceedings, as herein described, includes the authority to designate, in accord with Tax Division policy and practice, potential defendants and to select charges, approve plea agreements, and make determinations as to the Tax Division's position concerning (1) whether dual prosecution consideration may be applicable in a criminal tax case in which the Internal Revenue Service requests advice, and (2) whether civil action proposed by the Internal Revenue Service should be undertaken during the pendency of a criminal tax case. In addition, this delegation includes the authority to execute correspondence transmitting cases to the appropriate United States Attorney's office requesting that prosecution be

initiated in accord with such approval. Authority to execute correspondence in the name of a Chief of a regional Criminal Enforcement Section is also delegated to Assistant Chiefs in The Criminal Enforcement Section. The authority to execute correspondence specifically relating to ministerial matters in the processing and handling of cases including, when appropriate, the scheduling and confirmation of conferences, requesting of status reports, and the processing of closing letters, in cases in which pleas or convictions have been obtained, is hereby delegated to Criminal Enforcement Section attorneys in all cases assigned to them.

2. ***Authority Concerning Grand Jury Matters***.

(a) ***Recommendation for Grand Jury Investigation Originating in Criminal Enforcement Sections***. Except in cases they consider to warrant higher level consideration within the Tax Division, any Chief of a regional Criminal Enforcement Section may approve the initiation of a grand jury investigation concerning potential tax and/or tax-related violations in cases referred from the Internal Revenue Service with a prosecution recommendation, if such official believes that grand jury inquiry is warranted prior to a decision being made on the prosecutorial merits of such case.

(b) ***Joinder of Tax Aspects with Ongoing Nontax Grand Jury Investigation***. The authority to approve requests seeking to initiate a grand jury investigation into matters concerning tax and/or tax-related violations, as part of an already ongoing nontax grand jury investigation, made or initiated by or on behalf of offices within the Department of Justice, is hereby delegated to any Chief in charge of a regional Criminal Enforcement Section, provided the request is not considered to warrant higher level consideration within the Tax Division.

(c) ***I.R.S. Generated Requests for Grand Jury Investigation***. The authority to approve or disapprove initiation of a grand jury investigation concerning potential tax and/or tax-related violations in cases referred to the Tax Division from the Internal Revenue Service without a prosecution recommendation or with a recommendation for initiation of a grand jury investigation, in which the Internal Revenue Service has generated such referral, is hereby delegated to any Chief of a regional Criminal Enforcement Section in the Tax Division.

(d) ***Scope of Grand Jury Investigation Concerning Tax Matters***. The delegation in paragraphs 2(a), (b), and (c) regarding the approval of grand jury investigations concerning potential tax and/or tax-related violations includes the authority to designate the subjects and scope of such grand jury inquiry and the tax years considered to warrant investigation.

3. ***Authority Delegated to the Director, Criminal Enforcement Sections***.

In addition to the authorities conferred on regional Section Chiefs in paragraphs 1 and 2, the Director of the Criminal Enforcement Sections is authorized to:

(a) Approve tax prosecutions in accord with the authority and limitations contained in paragraphs 1(a), (c), and (d) in cases where the assigned regional Criminal Enforcement Section's recommendations are other than unanimous.

(b) Decline prosecution in all cases involving conflicting recommendations relative to prosecution, *provided* the case is not considered to warrant higher level consideration within the Tax Division.

(c) Approve or disapprove requests to apply for search warrants relating to searches for evidence that a tax offense has been committed in accord with the procedures described in U.S.A.M. 6-2.330, *provided* the request does not require higher level consideration within the Department of Justice pursuant to the provisions of 28 C.F.R. 59.

(d) Decline prosecution or approve prosecution (reversing the earlier decision to decline prosecution), *provided* that the case was not acted on at a higher level within the Tax Division when previously considered, in which event, such higher official shall have this authority.

(e) Approve or disapprove recommendations made in cases in accord with the procedures described in paragraph 1(b)(2) concerning whether prosecution should continue in a direct referral case notwithstanding notification from the appropriate United States Attorney indicating why proceeding with prosecution is not believed advisable.

(f) Approve or disapprove recommendations to pass prosecution of the first year in cases received from the Internal Revenue Service with less than seven (7) calendar months remaining before the expiration of the statute of limitations, when warranted under the procedures set forth in paragraph 1(d).

4. ***Authority Delegated to the Deputy Assistant Attorney General (Criminal Tax)***.

The Deputy Assistant Attorney General (Criminal Tax) is authorized to exercise all the

authorities conferred in paragraphs 1, 2, and 3.

The Deputy Assistant Attorney General may, notwithstanding the foregoing paragraphs, prescribe additional matters which require his or her approval or the approval of officials higher than those authorized to act in a particular situation by this delegation.

5. ***Scope and Effect of this Delegation***.

(a) This delegation supersedes Tax Division Directives No. 44 and 53 and all other delegations of authority to approve criminal proceedings or decline prosecutions for tax purposes previously issued.

(b) Notwithstanding the above, in cases involving the prosecution of an attorney for conduct committed in his professional, as opposed to individual, capacity the decision on referral, prosecution or declination, shall be made by the Deputy Assistant Attorney General.

(c) Except as authorized by this delegation, authority to (1) approve or disapprove the initiation of criminal proceedings for tax and/or tax-related violations; or (2) take any action, the effect of which would be to preclude prosecution for such violations, including but not limited to entering into agreements not to prosecute and approving requests to apply for court orders compelling the testimony of witnesses under 18 U.S.C. 6003(b), 6004, and 28 C.F.R. 0.175(b) and (c); or (3) execute a written request for a tax return or return information to be obtained from the Internal Revenue Service for tax administration purposes in accord with 26 U.S.C. 6103(h)(2) and (3)(B), remains vested in the Assistant Attorney General in charge of the Tax Division, subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General as provided in 28 C.F.R. 0.70. In addition, authority to alter any action taken pursuant to the delegations contained in paragraphs 1 through 4, inclusive, is retained by the Assistant Attorney General in charge of the Tax Division in accord with the authority contained in 28 C.F.R. 0.70.

(d) In the event a Tax Division official designated herein other than the Assistant Attorney General, Tax Division, or Deputy Assistant Attorney General (Criminal Tax) is recused from acting on a particular case, and there is no other official of similar rank available to act in a particular case, then the next higher ranking official shall be the appropriate official to act on such case. When either, or both, the Assistant Attorney General, Tax Division, or Deputy Assistant Attorney General (Criminal Tax) is recused in a particular case, a ranking Tax Division official will be designated to act as either the Assistant Attorney General or Deputy Assistant Attorney General (Criminal Tax) as the

need arises for purposes of that particular case in accord with the authority contained in 28 C.F.R. 0.132(e).

(e) In situations in which the Assistant Attorney General, Tax Division, designates an individual to be "Acting" in the capacity of an official specified herein, the individual designated as "Acting" shall have the same authority as herein delegated to that official, provided, the "Acting" official has not previously acted on the matter then being considered in a subordinate capacity. 28 C.F.R. 0.132(d) and (e).

WILLIAM S. ROSE, JR.
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: *October 3, 1988*

DEPARMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 75

March 21, 1989

MODIFICATION OF POLICY RE USE OF 26 UNITED STATES CODE SECTION 7207 IN FALSE RETURN FILING CIRCUMSTANCES

INTRODUCTION

The Tax Division recognizes that United States Attorneys frequently investigate financial crimes through joint tax and nontax grand jury investigations. In such matters, it is appropriate that the culpable parties be prosecuted for felony violations, that immunity be used sparingly, and that cooperating participants in the corrupt activity be required to plead guilty to the commission of some significant aspect of the original conduct.

We also recognize there are instances when a minor target seeks to cooperate, and his or her culpability is such that neither immunity nor a plea to a felony is appropriate. In short, the criminal conduct is more suited to a misdemeanor charge, when there is an agreement to cooperate in the ongoing investigation of the principal target(s).

In some situations, described above, the only misdemeanor charges that may be available to the prosecution are tax misdemeanors, i.e., sections 7203 or 7207 of Title 26 U.S.C. Where a tax return has not been filed, a section 7203 violation (failure to file) may exist. However, if a tax return has been filed and the false aspect of that return is minor, e.g., the corrupt person may have accepted bribes of relatively minor amounts that were not reported or the payor may have falsely deducted the bribe payment as a business expense, then the conduct would constitute the filing of a false return, punishable either as a felony under 26 U.S.C. Section 7206(1) or a misdemeanor under 26 U.S.C. Section 7207.

In the past, the Tax Division would not approve either a prosecution or guilty plea pursuant to section 7207, when the false document was a tax return, because it has been our long-standing policy that prosecution of materially false returns should be for felony charges. We believe that the use of section 7207 should generally be restricted to circumstances where taxpayers submitted false or altered *documents* to the IRS in support of information submitted on a tax return.

We recognize that this policy has created problems because an individual, who desires to cooperate, may be willing to plead to a misdemeanor but not to a felony. To address this problem,

the Tax Division is modifying its policy to provide United States Attorneys with a means of dealing with the limited situation described above.

Accordingly, the Tax Division will now entertain requests for the approval of guilty pleas to a violation(s) of 26 U.S.C. section 7207 in appropriate circumstances where the taxpayer is involved in the corrupt activity under investigation and *agrees to cooperate in the ongoing investigation against the principal target(s).* The guidelines for the limited use of 26 U.S.C. section 7207 are set forth below.

The relaxation of the Tax Division policy relative to section 7207 prosecutions will be limited to the circumstances described in the guidelines. Defendants providing assistance to the Government should otherwise be rewarded by receiving leniency in the imposition of sentence, as provided by the new Sentencing Guidelines, rather than by being permitted to plead to reduced charges.

The procedures outlined will be utilized throughout the remainder of fiscal years 1989 and 1990. The Tax Division will assess the effect of this change on the National Tax Compliance Program before making this policy change permanent.

GUIDELINES

The Department of Justice, Tax Division, agrees to consider approving plea agreements with charges brought under 26 U.S.C. section 7207 for witnesses cooperating in Title 18 and Title 26 grand jury investigations and in no other circumstances under the following conditions.

1. Approval for section 7207 charges will not be given in any case in which the Tax Division has previously authorized charges against the subject under section 7206(1), section 7201, or a tax (***Klein***) conspiracy.

2. The Tax Division must be provided with a prosecution statement or letter describing the outlines of the Title 26 and/or Title 18 investigation, the involvement of the cooperating witness who will plead, and the anticipated cooperation that the witness is expected to provide in the investigation.

3. The subject must have agreed to be a cooperating witness in a Title 18 or Title 26 investigation to which the witness' proposed income tax violation is related.

4. In addition to his cooperation in the ongoing criminal investigation and prosecution, the subject must agree to cooperate fully and truthfully with the Internal Revenue Service in any civil

audit or adjustment of the tax liability arising out of the circumstances of the criminal case.

5. The subject must be informed that any plea agreement to tax misdemeanors under 26 U.S.C. Section 7207 is subject to the approval of the Tax Division, Department of Justice. No such plea agreement is to be executed until authorized by the Tax Division or, if executed, unless it contains a provision that the plea agreement is subject to the approval of the Tax Division.

6. Approval for use of section 7207 will not be given, hence should not be requested, if the underpayment of taxes resulting from the false statements in the return exceeds $2500 in any of the years. In such cases the plea must be to a tax felony charge.

7. The IRS must make a referral pursuant to 26 U.S.C. Section 6103(h)(3)(A). The United States Attorney must have obtained tax disclosure confirming the filing of the return(s). The Tax Division should be provided with an abbreviated SAR, a computation of the taxes due, the tax return(s) involved, and a copy of the plea agreement or a statement of its terms. Section 7207 approval will not be given if the tax disclosure material suggests that a tax misdemeanor would be an inappropriate disposition of the case.

8. The subject must sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved in all the years under investigation.

JAMES I. K. KNAPP
Acting Assistant Attorney General
Tax Division

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DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 77

July 7, 1989

Section 7212(a) Policy Statement

The Tax Division occasionally receives for review recommendations for prosecution involving the "omnibus" clause of 26 U.S.C. Sec. 7212(a) which prohibits corrupt endeavors to obstruct or impede the due administration of the Internal Revenue Code. To promote uniform enforcement of the internal revenue laws, the Tax Division issues this internal directive setting forth criteria for use of this clause.

In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed -- typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. Section 371 charges are unavailable due to insufficient evidence of a conspiracy. However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties. Continually assisting taxpayers in the filing of false returns or engaging in other conduct designed to make audits difficult; and other numerous, large-scale violations of 26 U.S.C. Section 7206(2) or 18 U.S.C. Section 287 (as it pertains to refund claims for other or fictitious taxpayers), are examples of situations when Section 7212(a) charges might be appropriate. Such an application of the "omnibus" clause is consistent with what we believe to be the overall purpose of Section 7212(a), which is to penalize conduct aimed directly at IRS personnel in the performance of their duties, and at general IRS administration of the federal tax enforcement program, but not to penalize tax evasion as such.

The omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense. Section 7212(a) pleadings might be utilized to set forth allegations concerning attempted conspiracies with undercover agents to impede or impair the functions of the IRS, but no Section 7212(a) count should be predicated on such conduct alone, as that conduct by itself would rarely be sufficient to impede or impair the due administration of the Internal Revenue Code.

Use of the omnibus clause in an indictment must be approved by the Director of the Criminal Enforcement Sections or higher.

SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

MEMORANDUM

DATE: September 14, 1989

TO: All United States Attorneys

FROM: Shirley D. Peterson
Assistant Attorney General
Tax Division

RE: ***Tax information about prospective jurors: impact of the Hashimoto decision on criminal tax prosecutions***

In ***United States v. Hashimoto***, 878 F.2d 1126 (1989), the Ninth Circuit reversed a conviction in a criminal tax case on the ground that the defendant was improperly denied access to information about prior audits of prospective jurors. At this writing, our petition for rehearing with a suggestion for rehearing en banc is pending.

This decision has potentially adverse consequences for the prosecution of criminal tax cases. It provides defense counsel with arguable bases for seeking to delay trial and for creating a possible ground for reversal of a conviction.

Background

Hashimoto is the first decision interpreting 26 U.S.C., Section 6103(h)(5), a provision that authorizes the IRS, upon request, to disclose to the defense or prosecution in a tax case whether the prospective jurors have been the subject of an IRS audit or investigation. Such requests must be made in writing. The applicable procedures and the information to be supplied along with the request are set out in the Internal Revenue Manual Disclosure of Official Information Handbook Section 1272(22) 70 *et seq.* (attached). The IRS must limit its response to an affirmative or negative reply to the inquiry.

The defendant in ***Hashimoto*** filed a motion for early release of the jury list in order to submit to the IRS a request for audit information about the prospective jurors. The motion was denied. The local rules provided that the jury list would not be made available earlier than seven days prior to trial, unless the court ordered otherwise in the interests of justice. After denial of the motion, the defendant did not submit a request to the IRS, move for a continuance, or propose voir

dire questions asking whether any of the jurors had been audited or investigated by the IRS.

On appeal, the Ninth Circuit, with one dissent, reversed the conviction, finding that the district court committed error in denying the motion for early release of the jury list. The court held that the defendant had an absolute right to the information about audits or investigations of prospective jurors, that Section 6103(h)(5) contemplated sufficiently early release of the jury list to enable the defendant to file the request and receive the information, and that the seven days afforded under the local rules was not an adequate time. The defendant's failure to request the information from the IRS upon receiving the jury list, failure to seek the information on voir dire, and failure to move for a continuance were found to be of no consequence. The panel held that denial of the motion deprived the defendant of information about jurors and created a presumption of a significant risk of prejudice, which was not overcome by the questions posed during voir dire.

Discussion

As a result of ***Hashimoto***, we anticipate that, as a matter of routine, defense counsel in criminal tax cases will file motions for early release of jury lists and motions for continuance of trial, on the ground that additional time is needed to file requests with, and obtain responses from, the IRS under Section 6103(h)(5). In several cases, courts have already granted continuances based on ***Hashimoto***.

The assumption that additional time is needed to secure juror information from the IRS is not well founded. The ***Hashimoto*** majority speculated that a request under Section 6103(h)(5) must be submitted to the IRS in Washington, but the IRS Handbook is to the contrary. The Handbook provides that a request may be sent to the director the Internal Revenue Service Center which services the prospective jurors' place of residence and that, if time is limited (as, for example, where the jury will be empaneled in a few days), requests may be submitted to the IRS district disclosure officer. The Handbook notes that the jury list is generally released shortly before the jury is empaneled, sometimes less than twenty-four hours in advance, and consequently provides that the disclosure officer must ensure that requests are given priority and that the involved functions know of the limited time available. In addition, the Handbook provides that an oral response may be given when there is insufficient time for a written response to reach the requestor.

Moreover, the legislative history of Section 6103(h)(5) does not support the reasoning of the panel majority. In enacting this provision in 1976, the Congress merely codified the prior IRS practice of disclosing information about prospective jurors to government attorneys and extended an equal right to representatives of taxpayers. The legislative history gives no indication of an intention on the part of the Congress to create a new basis for reversible error, either for denial of the information in its entirety or for denial of a motion for early release of a jury list. The panel

decision was similarly off the mark in presuming prejudice and failing to apply the harmless error doctrine.

While we strongly believe that ***Hashimoto*** was wrongly decided, it is evident that defense counsel will routinely raise this issue even if we are successful in getting the decision reversed. In order to pursue a uniform litigation strategy in cases raising this issue, prosecutors should be guided by the following:

Motions for early release of juror list. Prosecutors should oppose requests for early release of jury lists. The statute confers no right to early disclosure. It merely provides that a request can be made at such time as a defendant or prosecutor gets the jury list. The procedures set out in the IRS Handbook recognize that the time for responding will usually be limited and the IRS procedures should permit a timely response. In any event, the interests of the defendant can be fully protected by having the court ask the prospective jurors during voir dire whether any of them have been the subject of an IRS audit or investigation. If a request is submitted to the IRS, but the information is not available until after voir dire, the defendant can still establish that a juror has not truthfully responded to the court's questions, and the court can take appropriate action. A defendant who seeks early release of the jury list, but fails to submit a request to the IRS should be presumed satisfied with the jurors' responses and be considered to have waived any claim of error based on denial of the motion. In opposing a motion for early release of the jury list, prosecutors should be request that the court put the defendant on notice that any claim of error will be waived in the event the defendant fails to seek the information from the IRS.

Motions for continuance of trial. Prosecutors should likewise oppose motions for continuance of trial, even when the defendant has made a request to the IRS, but seeks a continuance to allow additional time for IRS to respond. The defendant's rights can be adequately protected by questions to the jurors on voir dire, and the court can take appropriate action if information ultimately supplied by IRS indicates that a juror did not respond truthfully.

Voir dire. In any case where the defense indicates that a request under Section 6103(h)(5) has been or might be made the prosecutor should propose voir dire questions seeking to determine whether any of the prospective jurors have been the subject of an IRS audit or investigation.

Conclusion

In the event that you have any questions about the ***Hashimoto*** decision or about the procedures set out in this memorandum, you are encouraged to contact the Criminal Enforcement Section Chief [2] for your region:

George T. Kelley, Northern Region (514-0003)

J. Randolph Maney, Jr., Southern Region (514-4334)

Ronald A. Cimino, Western Region (514-5247)

Copies of the Government's Petition for Rehearing with Suggestion for Rehearing En Banc in ***Hashimoto*** can be obtained from Robert E. Lindsay, Chief, Criminal Appeals and Tax Enforcement Policy Section (514-3011).

DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 96

Re: Delegation of Authority to Authorize
Grand Jury Investigations of False
and Fictitious Claims for Tax Refunds

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287, is hereby conferred on all United States Attorneys.

This delegation of authority is subject to the following limitations:

1. The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

2. Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself /herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

In all cases, the request for grand jury investigation letter, together with the Form 9131 and a copy of all exhibits, must be sent to the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the request for grand jury investigation letter (together with the completed Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the referral letter has not been forwarded to the Tax Division, Department of Justice (by overnight courier), by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This delegation of authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the delegation of authority to authorize prosecution of such cases (see United States Attorneys' Manual, Title 6, 4.243). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. Due to the unique problems posed by electronically filed false and fictitious claims for refunds, Tax Division authorization is required if prosecution is deemed appropriate in an electronic filing case.

SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: December 31, 1991

January 15, 1993

Honorable Abraham N. M. Shashy, Jr.
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224

Attention: Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

Re: ***Interpretation of Tax Division Directive No. 96***

Dear Mr. Shashy:

I appreciate the opportunity that I had to meet with Mr. Finkelstein and the Deputy Regional Counsel for Criminal Tax on December 15, 1992. Face-to-face discussions of issues that concern all of us are always helpful. In our discussions, we left one issue involving referral of electronic filing (ELF) cases unresolved, and I am writing to express my views on that topic.

Tax Division Directive No. 96 delegated to the United States Attorneys the authority to authorize grand jury investigations of matters under the purview of the Tax Division in certain, limited circumstances. Counsel in the regions have interpreted the scope of that delegation of authority differently in situations involving schemes that recruit individuals to file fraudulent returns in their own names, using their own social security numbers. Tax Division Directive No. 96 provides that United States Attorneys may authorize grand jury investigations in cases prosecutable under 18 U.S.C. 286, 287 where:

> 1 * * * an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax returns to which he/she is not entitled. All other cases must be referred to the Tax Division for authorization of the grand jury investigation.

Deputy Regional Counsel Shipley and Waller have interpreted the phrase "in the names of real taxpayers who do not intend the returns to be their own" to exclude situations in which the target has recruited real individuals to file returns in their names. They have reasoned that even though the information used on the return is fictitious, the "taxpayers" have filed returns that affect those taxpayers' accounts and that can be treated as their returns by the Service. They have concluded that such cases fall outside the terms of Directive No. 96 and must be referred to the Tax Division to authorize the grand jury investigation. Other regions have reasoned that the "taxpayers" involved in such situations do not intend the returns to be their real returns, and thus referral directly to the United States Attorneys for grand jury investigation is permitted under Directive No. 96.

We agree with Messrs. Shipley and Waller that when real individuals file returns using their own names and social security numbers the case falls outside Tax Division Directive 96. The "taxpayer" intends to file a tax return in his or her own name, and the Service must treat that filing as a "return." Thus, such cases must be referred to the Tax Division and cannot be directly referred to the United States Attorneys. The purpose of Directive No. 96 was to extend to the United States Attorneys the authority to institute grand jury investigations in cases in which they already had authority to authorize prosecutions (18 U.S.C. 286, 287 charges in false paper return cases) and in other false claims cases falling into that same pattern. The prior delegation of authority did not extend to the United States Attorneys the authority to authorize prosecution of an individual who filed a return in his or her own name, using the correct social security number. The facts that the taxpayers are not targets of the investigation and that the real target may know that such returns are fictitious does not bring the case within Directive 96, and such cases may not be referred directly to the United States Attorneys.

I would appreciate it if you would insure that my views on this subject are communicated to the Deputy Regional Counsels for Criminal Tax. If Mr. Finkelstein or any of the Deputy Regional Counsel have further comments or questions on this issue, they may contact me or our ELF coordinator, Tony Whitledge.

Sincerely,

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

March 31, 1992

MEMORANDUM

TO: George T. Kelley
Chief
Northern Criminal Enforcement Section
Tax Division

FROM: Robert E. Lindsay
Chief, Criminal Appeals & Tax
Enforcement Policy Section
Tax Division

SUBJECT: ***Bluesheet Concerning Plea Procedures***

Attached hereto is a copy of a bluesheet to the United States Attorney's Manual, issued February 7, 1992. This bluesheet sets forth, *inter alia*, general plea procedures and procedures dealing with substantial assistance pleadings under the Guidelines.

The bluesheet requires a formal system for approval of negotiated pleas and for approval of pleadings seeking a downward departure for substantial assistance. In the case of negotiated pleas, it provides that the plea must be approved by at least a supervisory attorney of a litigating division. In the case of substantial assistance pleadings (and Rule 35(b) motions), the bluesheet provides that approval authority shall be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals. Acting Assistant Attorney General Bruton has directed that approval authority within the Tax Division for both negotiated pleas and substantial assistance pleadings shall reside, for the time being, in the Section Chiefs.

The bluesheet also requires that negotiated pleas to felonies and misdemeanors negotiated down from felonies must be in writing and that a copy of the plea agreement should be maintained in the office case file or elsewhere. Similarly, the bluesheet requires that documentation of the facts behind and justification for each substantial assistance pleading must be maintained. The repository or repositories for this documentation need not be the case file itself. Acting Assistant Attorney General Bruton has decided that, on an interim basis, such written documentation shall be maintained in separate files, one for negotiated pleas and one for substantial assistance pleadings.

None of these Tax Division procedures are intended to be permanent. Please look over the bluesheet and give me your views on what we should establish on a permanent basis as the approval process and the memorialization system. I would like to receive your views no later than April 30, if possible. In the meantime, you should inform your line attorneys of the requirements contained in the bluesheet and of the interim approval process.

Attachment

cc: Mr. Bruton

October 22, 1992

MEMORANDUM

TO: All United States Attorneys

FROM: George J. Terwilliger, III
Deputy Attorney General

SUBJECT: ***Nonfiler Initiative***

Commissioner of Internal Revenue Shirley D. Peterson has asked for this Department's assistance in addressing the increasingly serious problem of taxpayers who fail to file income tax returns. The Internal Revenue Service has recently launched a nonfiler initiative and is attempting to attack the problem on a number of fronts, including taxpayer education and assistance, simplified installment payment procedures, and a criminal enforcement initiative that will focus on hard core nonfilers. The purpose of this letter is to introduce the Service's nonfiler strategy and enlist the full support of the United States Attorneys in pursuing this important initiative.

As you know, our income tax system is founded upon voluntary compliance by taxpayers. But the Internal Revenue Service has recently determined that only approximately 84 percent of the amount of income taxes that should be collected on income from lawful sources is actually being paid voluntarily by taxpayers. In some parts of the country and in some industries the noncompliance rate is even greater. The IRS and the General Accounting Office have determined that the difference between the amount of taxes owed and the amount voluntarily paid by taxpayers, the so-called "tax gap," is expected to grow to an estimated $113.7 billion annually. Nearly 10 million taxpayers who are obliged to file returns fail to do so each year. These nonfilers are responsible for a significant portion of the tax gap.

The IRS describes its nonfiler strategy as "a carrot and a stick" approach. The "carrot" involves a major public relations campaign, designed to encourage nonfilers to contact the IRS and receive assistance in returning to the taxpaying rolls. The "stick" involves criminal investigation and prosecution of egregious cases involving those who willfully resist the Service's efforts to draw them back into the system. This initiative will be supported by a combined total of approximately 2,000 civil and criminal agents and is likely to produce a large volume of new criminal tax cases over the coming years.

Your offices will, obviously, play a critical role in the success of the criminal aspects of this program. It is my understanding that the Service intends to focus its criminal investigative resources on cases involving large amounts of tax and a substantial history of noncompliance. In addition, whenever possible, the Service intends to seek evidence supporting felony tax evasion rather than failure to file misdemeanor charges. The Tax Division is working with the IRS to assure improvements in the quality of nonfiler cases referred to the Department for prosecution and to prevent an unmanageable increase in the volume of cases referred. The Tax Division has agreed to review these cases on a priority basis and has offered to provide prosecutors to assist your offices, when necessary.

Although the Service's initiative is obviously important, it is likely to present some problems that must be recognized. Failure to file cases are normally charged as misdemeanors under 26 U.S.C. §7203, and it will abe difficult giving priority to such cases when it is burdensome enough moving your heavy felony dockets. Although the Service will be pursuing felony investigations whenever possible, it will often be necessary to prosecute misdemeanors, as well.

Furthermore, because the impending November 1, 1992, Federal Sentencing Guideline Amendments will diminish the likelihood of meaningful jail sentences in tax cases sentenced during the 1993 tax filing season, your assistants may question whether these cases are significant and, indeed, whether we can achieve the desired deterrent impact from prosecution. Both the Department and the IRS opposed application of the changes in the Sentencing Table scheduled to take effect in November to tax cases, and the Sentencing Commission has included possible revision of the tax guidelines in its 1992-1993 study of the guidelines governing white collar crimes. Although it is difficult to predict how the Commission will respond to the Department's ongoing efforts to bolster the tax guidelines, it is essential that we promptly prosecute these cases, even when low or probationary sentences seem likely, to demonstrate the need for stiffer penalties in this vital area of tax compliance.

I have asked the Tax Division to work with your offices to expedite the handling of these cases and help coordinate efforts to bring groups of prosecutions simultaneously to draw public attention to the seriousness of this problem. The Office of Public Affairs has been involved in this initiative for some time and is equipped to assist your offices with press related issues. In the end, however, the success of the criminal aspects of the Service's nonfiler strategy rests most heavily on your offices and is dependent on your support. I am confident that you share my belief that this Department has a vital role to play in addressing this important national problem.

February 17, 1993

MEMORANDUM

TO: All Criminal Enforcement Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

SUBJECT: ***Tax Division Voluntary Disclosure Policy***

Recent new releases by the IRS and stories in the press have raised questions within the Division concerning the proper handling of cases in which a prospective criminal tax defendant claims to have made a voluntary disclosure. Notwithstanding the news stories and rumors to the contrary, the Division has not changed its policy concerning voluntary disclosure, and cases should be evaluated as they have in the past under the provisions of Section 4.01 of the Criminal Tax Manual.

The Service, takes the view that, notwithstanding reports to the contrary, it has not changed its voluntary disclosure practice. It claims that its press releases have been issued to inform the public of the manner it has historically applied the existing practice in referring nonfiler cases to the Department of Justice. The goal has been to demonstrate to the public that the practice has been applied liberally in the past and that a nonfiler interested in reentering the tax system should not be intimidated by a theoretical threat of criminal prosecution.

The Service's carefully worded press releases and public statements have been construed by some member of the press and the defense bar as an "amnesty". This is troublesome, because some inaccurate information has been and is being disseminated to the public by the press and members of the bar that is likely to cause confusion and could interfere with the prosecution of some criminal tax cases. At bottom, the Service's voluntary disclosure policy remains, as it has since 1952, an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers.

We in the Tax Division should have few occasions to consider whether the Service is properly adhering to its voluntary disclosure policy. If the Service has referred a case to the Division, it is reasonable and appropriate to assume that the Service has considered any voluntary disclosure claims made by the taxpayer and has referred the case to the Division in a manner consistent with its public statements and internal policies. As a result, our review is normally confined to the merits of the case and the application of the Department's voluntary disclosure policy set forth in Section 4.01 of the Criminal Tax Manual.

Cases may, however, arise in which there is some confusion over whether a local District Counsel's office has referred a nonfiler case that seems arguably to fall within one of the Service's press releases on voluntary disclosure or otherwise appears to have been referred to the Department in a manner inconsistent with our understanding of the Service's voluntary disclosure practice. If that occurs, Tax Division reviewing attorneys should not attempt to construe the Service's voluntary disclosure practice on their own but should bring all such questions to the immediate attention of their Section Chiefs. If it is determined that but for questions concerning the applicability of the Service's policy, prosecution of the case would be authorized (i.e., the case meets Tax Division prosecution criteria and does not violate the Division's voluntary disclosure policy set forth in Criminal Tax Manual §4.01), the Section Chief should forward the case (where applicable, consistent with limitations imposed upon the disclosure of grand jury information) to the Assistant Chief Counsel Criminal Tax (CC:CT) for that office's determination whether the Service's referral was consistent with its internal voluntary disclosure practice and whether the Service actually intends that the case be prosecuted. If the Office of Assistant Chief Counsel Criminal Tax determines that the referral was appropriate, the case should be processed by the Division in the normal manner.

Finally, Tax Division reviewing attorneys should exercise considerable care in drafting letters declining cases to ensure that they reflect Tax Division policy regarding voluntary disclosures. Assistant United States Attorneys and IRS field and National Office personnel rely on our correspondence as a reflection of Tax Division policy, and it is, therefore, crucial that our letters and memoranda addressed to other offices within the government accurately state our policies.

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February 12, 1993

MEMORANDUM

TO: All United States Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

RE: ***Lesser Included Offenses in Tax Cases***

The purpose of this memorandum is to provide guidance concerning the government's handling of lesser included offense issues in certain kinds of tax cases. Two petitions for writs of certiorari involving the issue of lesser included offenses in tax cases have recently been filed in the Supreme Court. In ***Becker v. United States***, No. 92-410, the defendant was convicted of attempting to evade taxes and of failure to file tax returns for the same years. The trial court sentenced the defendant to three years' imprisonment on the evasion counts and to a consecutive period of 36 months' imprisonment on the failure to file counts. The court of appeals affirmed. In his petition for a writ of certiorari, the defendant argued that the misdemeanor of failure to file a tax return is a lesser included offense of the felony of tax evasion and that the Constitution prohibits cumulative punishment in the same proceeding for a greater and lesser included offense.

In opposing certiorari on this question, the government argued that whether cumulative punishments could be imposed for a course of conduct that violated both 26 U.S.C. 7201 and 26 U.S.C. 7203 was solely a question of congressional intent. The government pointed to the statutory language of Sections 7201 and 7203 as clear evidence of Congress' intent to permit cumulative punishment where a defendant was convicted in a single proceeding of violating both Section 7201 and Section 7203. As further support for its position, the government argued that Sections 7201 and 7203 involve separate crimes under ***Blockburger v. United States***, 284 U.S. 299 (1932) (and, thus, that a violation of Section 7203 is not a lesser included offense of a violation of Section 7201). The ***Becker*** petition is currently pending before the Supreme Court.

In ***McGill v. United States***, No. 92-5842, the government argued, relying on ***Sansone v. United States***, 380 U.S. 343 (1965), that willful failure to pay taxes (26 U.S.C. 7203) is a lesser included offense of attempted evasion of payment of taxes (26 U.S.C. 7201). The Supreme Court denied certiorari in ***McGill*** on December 7, 1992.

The government's position in ***Becker*** reflects an adoption of the strict "elements" test (*see* ***Schmuck v. United States***, 489 U.S. 705 (1989)) and, consequently, a change in Tax Division policy. Accordingly, all attorneys handling tax cases should be notified of the following ramifications of this change in policy.

1. In cases charged as ***Spies***-evasion (*i.e.*, failure to file, failure to pay, and an affirmative act of evasion) under Section 7201, it is now the government's position that ***neither*** party is entitled to an instruction that willful failure to file (Section 7203) is a lesser included offense of which the defendant may be convicted. Thus, if there is reason for concern that the jury may not return a guilty verdict on the Section 7201 charges (for example, where the evidence of a tax deficiency is weak), consideration should be given to including counts charging violations of both Section 7201 *and* Section 7203 in the indictment.

The issue whether cumulative punishment is appropriate where a defendant has been convicted of violating both Section 7201 and Section 7203 generally will arise only in pre-guidelines cases. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. Thus, only in those cases involving an extraordinary tax loss will the sentencing court be required to consider an imprisonment term longer than five years. In those cases in which cumulative punishments are possible and the defendant has been convicted of violating both Sections 7201 and 7203, the prosecutor may, at his or her discretion, seek cumulative punishment. However, where the sole reason for including both charges in the same indictment was a fear that there might be a failure of proof on the tax deficiency element, cumulative punishments should not be sought.

2. Similarly, in evasion cases where the filing of a false return (Section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. *see* ***Schmuck v. United States***, 489 U.S. 705 (1989) (one offense is necessarily included in another only where the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with ***Spies***-evasion cases, prosecutors should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated Section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the false return charge, nothing generally would be gained by charging violations of both Section 7201 and 7206.

Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (*e.g.*, where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

3. Although the elements of Section 7207 do not readily appear to be a subset of the elements of Section 7201, the Supreme Court has held that a violation of Section 7207 is a lesser included offense of a violation of Section 7201. See ***Sansone v. United States,*** 380 U.S. at 352; ***Schmuck v. United States***, 489 U.S. at 720, n.11. Accordingly, in an appropriate case, either party may request the giving of a lesser included offense instruction based on Section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document.

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, *neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. *See e.g.*, ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992); ***United States v. Boone***, 951 F.2d 1526, 1541 (9th Cir. 1991); ***United States v. Kaiser***, 893 F.2d 1300, 1306 (11th Cir. 1990); ***United States v. Lodwick***, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set out in this memorandum be followed.

6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (i.e., assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, should be applied.

These guidelines will remain in effect unless or until the Supreme Court grants certiorari in ***Becker*** and rules inconsistently with the newly adopted policy. Prosecutors are encouraged to consult with the Tax Division whenever they are faced with a case raising questions addressed in this memorandum by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

March 12, 1993

MEMORANDUM

To: All United States Attorney

From: James A. Bruton
Acting Assistant Attorney General
Tax Division

Re: ***Policy Change in Tax Cases Involving Lesser Included Offenses***

On February 12, 1993, the Tax Division circulated a memorandum providing guidelines concerning the government's handling of lesser included offense issues in certain kinds of tax cases. In that memorandum, we referred to ***Becker v. United States*** (S. Ct. No. 92-410), where defendant sought certiorari on the ground that the misdemeanor of failure to file a tax return (26 U.S.C. § 7203) is a lesser included offense of the felony of attempted tax evasion (26 U.S.C. §7201) and that cumulative punishment for the greater and lesser offenses is therefore unconstitutional. The government opposed certiorari, arguing that Congress intended to authorize cumulative punishment for the two offenses and, in any event, that the willful failure to file a tax return is not a lesser included offense of attempted tax evasion. As we noted in our earlier memorandum the latter argument reflects an adoption of the strict "elements" test set forth in ***Schmuck v. United States***, 489 U.S. 705 (1989), and, consequently, a change in Tax Division policy.

On March 8, 1993, the Supreme Court denied the petition for a writ of certiorari in ***Becker***. Accordingly, there will no change in the guidelines set forth in the February 12 memorandum and they will remain in effect until further notice.

Prosecutors are encourage to consult with the Tax Division whenever they are faced with a tax case raising questions regarding lesser included offenses by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

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DEPARTMENT OF JUSTICE

TAX DIVISION

DIRECTIVE NO. 99

Re: Clarification of Tax Division Policy Concerning the Charging of Tax Crimes as Mail Fraud, Wire Fraud, or Bank Fraud (18 U.S.C. §§ 1341, 1343, 1344) or as Predicates to a RICO Charge or as the Specified Unlawful Activity Element of a Money Laundering Offense

The purpose of this directive is to clarify Tax Division policy concerning the charging of tax crimes as mail fraud, wire fraud, or bank fraud (18 U.S.C. §§ 1341, 1343, 1344), or as predicates to a RICO charge or as the specified unlawful activity element of a money laundering offense. Although primarily concerned with tax crimes charged as mail fraud, [3] wire fraud, or bank fraud, either directly or as a basis for some other charge, the policy stated herein is equally applicable to tax crimes charged under any statute -- be it one found in Title 26 or one found in Title 18 or any other title of the United States Code.

The extent of Tax Division jurisdiction in the criminal arena is set out in section 70(b), Subpart N, Part O of Title 28 of the Code of Federal Regulations (28 C.F.R. § 0.70(b)). That section provides that, with a few specified exceptions, all "[c]riminal proceedings arising under the internal revenue laws" * * * "are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division * * *." Tax Division jurisdiction, thus, depends not on the particular criminal statute utilized in charging the defendant, but on the nature of the underlying conduct. Whenever the violation can be said to be one arising under the internal revenue laws, Tax Division authorization is required before bringing any charges, irrespective of the statute or statutes under which they are brought. [1] In general, an offense can be said to arise under the internal revenue laws when it involves (1) an evasion of some responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

In particular, this means that the authorization of the Tax Division is required before

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1 The authorization of the Tax Division is also required in any case which involves parallel state and federal tax violations and the charges are based on the parallel state tax violations.

charging mail, wire or bank fraud, either independently or as predicate acts to a RICO charge or as the specified unlawful activity element of a money laundering charge, when the mailing, wiring, or representation charged is used to promote or facilitate any criminal violation arising under the internal revenue laws. In the exercise of its prosecutorial discretion, the Tax Division will grant such authorization only in exceptional circumstances. As a general rule, the use of such charges will not be approved (1) when the only mailing charged is a tax return or other internal revenue form or document, or a tax refund check; (2) when the only wire transmission is a transmission of tax return information to the IRS or the transmission of a refund to a bank account by electronic funds transfer; or (3) when the mailing, wiring, or representation charged is only incidental to a violation arising under the internal revenue laws (for example, although the mailing of a set of instructions to a cohort in a tax shelter scheme might support a mail fraud charge, such a mailing would be considered incidental to the primary purpose of the scheme which is to defraud the United States by abetting the filing of false income tax returns).

Normally, violations arising under the internal revenue laws should be charged as tax crimes and the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violations are involved, even though other crimes may have been committed. [2] Thus, for example, the filing of a false tax return, which almost invariably involves either a mailing or, in the case of an electronically-filed return, an interstate wiring, is a tax crime chargeable generally under 26 U.S.C. 7206(1) (if the violator is the taxpayer), 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or promoter of a fraudulent tax scheme), or under 18 U.S.C. 287. Moreover, in the exercise of its prosecutorial discretion, the Tax Division will only authorize tax charges or false claims charges, and will not authorize mail, wire or bank fraud charges, where the United States is defrauded in a revenue raising capacity and is the only one defrauded. Tax charges and the false claims statutes are the established means for litigating such criminal tax matters.

A mail, wire, or bank fraud charge arising out of a scheme to defraud the Government through the use of the revenue laws might be appropriate in addition to, but never in lieu of, other charges based on violations of the internal revenue laws, however, where the Government has also lost money in a non-revenue raising capacity or individuals or other entities have been the financial victims of the crime. The bringing of such charges will seldom, if ever, be justified by the mere desire to see a more severe term of imprisonment or fine imposed. Rather, they must serve some federal interest not adequately served by the bringing of traditional tax charges. Each individual

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2 Pursuant to 28 C.F.R. 0.70(b), the Tax Division has traditionally authorized prosecution of certain crimes under various provisions of Title 18 (e.g., 18 U.S.C. §§ 286, 287, 371, and 1001). While Title 26 offenses are the preferred vehicle for criminal tax prosecutions, charges for offenses arising under the internal revenue laws have never been limited to that title.

case will be reviewed to determine whether it warrants the use of charges in addition to the appropriate Title 26 charges or Title 18 charges (i.e., §§ 286, 287, 371, 1001).

For example, in an electronic filing fraud, a bank making a refund anticipation loan for the amount of the fictitious refund claim may be the financial victim in the scheme, and bank fraud charges, drafted to reflect that the bank was victimized by the scheme, may be appropriate. Similarly, in motor fuel excise tax evasion schemes and fraudulent tax shelter schemes in which individuals or entities other than the United States are demonstrably victimized in a direct, substantial and measurable way that will be charged, the use of mail or wire fraud charges may also be appropriate in a particular case.

A similar policy will be followed with respect to RICO or money laundering charges predicated on mail, wire, or bank fraud violations which involve essentially only a federal tax fraud scheme. Tax offenses are not predicate acts for RICO or specified unlawful activities for money laundering offenses -- a deliberate Congressional decision -- and converting a tax offense into a RICO or money laundering case through the charging of mail, wire or bank fraud based on a violation of the internal revenue laws as the underlying illegal act could be viewed as circumventing Congressional intent unless circumstances justifying the use of a mail, wire or bank fraud charge are present.

A United States Attorney who wishes to charge a RICO violation in any criminal matter arising under the revenue laws must obtain the authorization of the Tax Division prior to alleging the predicate act, [3] and must obtain the authorization of the Organized Crime and Racketeering Section of the Criminal Division prior to charging a RICO violation. The Tax Division and the Organized Crime and Racketeering Section will approve the use of the RICO statute in revenue matters as appropriate. In addition, traditional tax charges must also be brought, as noted above, and the prosecution package must allow for forfeitures under the Internal Revenue Code.

Tax Division authorization is also required before a money laundering charge may be brought where the specified unlawful activity is based on a violation arising under the internal revenue laws. [4] The Tax Division will approve the use of mail fraud, wire fraud, or bank fraud as the specified unlawful activity only in cases that meet the requirements set forth in this Directive. When a request is made to include such a money laundering charge in an indictment, the Tax Division will consult with or refer the case to the Money Laundering Section of the Criminal

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3 Tax Division authorization is also required when the predicate act is based on a state tax violation.

4 This is in addition to the requirement that Tax Division authorization is required for any prosecution under 18 U.S.C. § 1956(a)(1)(A)(ii).

Division, as the case may require, prior to authorizing the money laundering charges or the use of one of the fraud statutes as the specified unlawful activity. See USAM 9-105.00, as amended by bluesheet dated October 1, 1992. The Tax Division should be consulted early in any investigation to determine whether mail fraud, wire fraud, or bank fraud charge are appropriate.

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: March 30, 1993

June 3, 1993

MEMORANDUM

TO: All CES Attorneys

FROM: Stanley F. Krysa
Director
Criminal Enforcement Sections

SUBJECT: Civil Settlements in Plea Agreements

It is not unusual for the taxpayer, in the course of negotiating a plea agreement, especially in cases arising from a grand jury investigation, to seek to include a civil settlement for the years involved. Very often, in such a situation, the Internal Revenue Service is agreeable to settlement. The Internal Revenue Service often believes the money to be paid is likely all it could ever realize because of Rule 6(e) restrictions and scarce audit resources. The Tax Division, however, has long followed a policy against approving plea agreements that include such global settlements. This policy wisely reflects the substantial differences between criminal and civil tax litigation.

Criminal tax investigations are frequently narrow in focus and substantially more targeted than any civil audit. For example, a criminal investigation centering on a complex return will normally focus on large items of unreported income or improper deductions that are easily provable rather than complex tax adjustments that may result in further taxes due, which, either because of difficulties of proof or the uncertain state of the substantive tax law, cannot form the focus of a criminal case.

In a civil tax setting, the determination by the Internal Revenue Service that an item of income was realized or that a deduction claimed was not allowable constitutes a prima facie case for inclusion or disallowance, as the case might be, and the taxpayer bears the burden of proving that determination wrong. Accordingly, reasonable inferences from known facts can support a finding of civil liability, but often would not provide a basis for indictment.

The Tax Division cannot authorize a plea agreement in a case that, by its terms, bars the

Government from a further examination of the target's civil tax liabilities. We can and will, however, approve acceptance of a plea that includes certain civil admissions by the target. Thus, we would be willing to authorize a plea agreement in which the target would make the following civil admissions:

1. An admission by the defendant that he received enumerated amounts of unreported income or claimed enumerated amounts of illegal deductions for years set forth in the plea agreement.

2. A stipulation by the target that he was liable for the fraud penalty imposed by the Code (formerly Section 6653 and now Section 6663) on the understatements of liability for the years involved.

3. An agreement by the target that he or she will file, prior to the time of sentencing, initial or amended personal returns for the years subject to the above admissions, correctly reporting all previously unreported income or proper deductions, will provide the Internal Revenue Service information, if requested, regarding the years covered by the returns, and will pay at sentencing all additional taxes, penalties and interest owing. Such an agreement should also include a provision pursuant to which the target agrees that he or she will promptly pay any additional amounts determined to be owing with respect to that return because of computational errors.

4. An agreement by the target that he will not thereafter file any claims for refund of taxes, penalties or interest for amounts attributable to the return filed incident to the plea.

As a final note, all such provisions must be drafted with considerable care. A plea agreement is an undertaking by the United States and, if not properly crafted, could be construed to foreclose the civil side of the Internal Revenue Service from examining and making any civil audit adjustments to the returns involved after they are filed.

In reviewing or negotiating any proposed plea agreements the above principles should be applied. If you have any questions contact your respective Chiefs. All plea agreements negotiated by you should be in writing. They should be submitted for review and approval by the Chief before executed.

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1. A current list of supervisory personnel in the Tax Division's Criminal Enforecment Sections, as of July 15, 1994, is included in Section 1.02, ***supra***.

2. A current list of supervisory personnel in the Tax Division's Criminal Enforcement Sections, as of November 15, 1993, is included in Section 1.02, ***supra***.

3. Tax Division policy concerning the charging of tax crimes as mail fraud violations, either

independently or as predicate acts underlying a RICO charge, is set out in Section 6-4.211(1) of the United States Attorneys' Manual, ***Filing False Tax Returns : Mail Fraud Charges or Mail Fraud Predicates for RICO***. This directive clarifies that policy and explains how it fits into the overall Tax Division jurisdiction over criminal proceedings arising under the internal revenue laws.

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4.00 *TAX DIVISION POLICIES AND PROCEDURES*

4.00 *TAX DIVISION POLICIES AND PROCEDURES*

There are numerous policies governing the operation of the Department of Justice, many of which are set forth in the ***United States Attorneys' Manual*** (***USAM***). Some of these policies, as implemented by the Tax Division and not otherwise covered in this ***Manual***, are discussed in the sections which follow.

4.01 *VOLUNTARY DISCLOSURE*

4.01[1] ***Policy Respecting Voluntary Disclosure***

Prior to 1952, it was the policy of the Treasury Department not to recommend criminal prosecution where a taxpayer voluntarily revealed his commission of a tax crime to an appropriate IRS official before any investigation of his affairs had commenced.

Due to the controversy which ensued in the courts over what constituted a true "voluntary disclosure," and because it was difficult, "and sometimes impossible" to ascertain administratively whether the taxpayer had made a voluntary disclosure or had merely discovered he was under investigation, the Treasury Department abandoned this policy on January 10, 1952. Treasury Department Information Release No. S-2930, 1952 C.C.H., ¶ 6079. *See* ***United States v. Shotwell Manufacturing Co.***, 355 U.S. 233, 235 n.2 (1957).

In 1961, the Internal Revenue Service adopted an "informal" policy regarding voluntary disclosure, under which it considered voluntary disclosure, along with other facts and circumstances, on a case-by-case basis in determining whether or not to recommend prosecution. *See* Statement of Commissioner Mortimer M. Caplin, News Release IR-432, Dec. 13, 1961; IRM Part IX, §9781-342.14 and CCDM Part (31)134.

In December 1992, the IRS clarified, but did not change, its "informal" policy, noting that, in the past, it had not generally recommended prosecution if the taxpayer:

1. Informed the IRS of the failure to file for one or more taxable years;

2. Had only legal source income;

3. Made the disclosure prior to being contacted by the IRS in the form of a telephone call, letter, or personal visit informing the taxpayer that he is under criminal investigation;

4. Filed a true and correct tax return or cooperated with the IRS in ascertaining his correct tax liability; and

5. Made full payment of amounts due, or in those situations where the taxpayer was unable to make full payment, made bona fide arrangements to pay.

"Peterson [IRS Commissioner Shirley D. Peterson] Formalizes Practice of Not Prosecuting Non-Filers Who Come Forward," BNA Daily Tax Report (Dec. 7, 1992).

At present, the Department of Justice continues to give consideration to a "voluntary disclosure" on a case-by-case basis in determining whether to prosecute but such disclosure is not conclusive on the issue. *See* ***United States v. Hebel***, 668 F.2d 995 (8th Cir.) *cert. denied*, 456 U.S. 946 (1982). Specifically, the Tax Division considers the timeliness of the disclosure and whether the taxpayer fully cooperated with the Government in deciding whether a disclosure was voluntary.

4.01[2] ***Timeliness of Disclosure***

There are two elements to a voluntary disclosure: (1) it must be made timely and (2) the taxpayer must thereafter fully cooperate with the government. There has been considerable debate among practitioners as to the meaning of "timely." Some argue that the test for timeliness should be strictly objective, that is, a disclosure is timely if the disclosure is made before the taxpayer's return is selected by the Internal Revenue Service for audit regardless of the taxpayer's motivation for making the disclosure. Under this approach, a disclosure would not be timely if the return had been selected for audit, even if the taxpayer did not know that the return had already been selected for audit at the time of the disclosure.

The objective test does have simplicity of application in its favor. On the other hand, if all of the circumstances are considered, then whether or not a return has been selected for audit at the

time of disclosure is not necessarily conclusive. For example, if the disclosure followed closely upon an IRS inquiry directed to a third party which reasonably could be anticipated to lead to selection of the taxpayer's return for audit, then the disclosure reasonably could be described as "triggered," rather than as "voluntary." Although not yet subject to audit, the taxpayer was obviously attempting to place himself or herself in the best light possible after concluding that an audit was inevitable. ***United States v. McCormick***, 67 F.2d 867, 868 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). Conversely, if the taxpayer was in fact clearly unaware that his or her return had been selected for audit at the time of the disclosure and "triggering" circumstances are absent, then seemingly consideration should be given for having come forward voluntarily. *Cf.* ***United States v. Levy***, 99 F. Supp. 529, 533 (D.Conn. 1951). Similarly, there may be situations where an audit is already in progress, and the taxpayer discloses a transaction that almost certainly would not have been found by the auditing agent. On a strictly objective test, the disclosure of the unknown transaction would not be a "timely disclosure" since the return was under audit.

Because the objective test is essentially arbitrary, the Department has rejected it, and, instead, favors an "all events" test in assessing whether a disclosure was timely. That is, a disclosure is not timely if:

1. The IRS has already initiated an inquiry that is likely to lead to the taxpayer and the taxpayer is reasonably thought to be aware of that activity; or

2. Some event occurred before the disclosure which the taxpayer probably knew about and which event is likely to cause an audit into the taxpayer's liabilities, e.g., a newspaper article high- lighting commercial bribery in a particular industry or corruption in a governmental office. *Cf.* ***United States v. McCormick***, 67 F.2d 867 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934).

4.01[3] ***Cooperation of Taxpayer***

If it is concluded that the disclosure was timely, a second point of inquiry is whether the taxpayer has fully cooperated with the IRS in ascertaining and paying the taxes owed. Thus, the Department's position on cooperation is that the taxpayer must make a full disclosure of all facts and cooperate with the Service in determining the proper amount of taxes owed. If the taxes are not paid because of a claim of inability to pay, then full and accurate disclosure must be made by the taxpayer of his financial position.

At bottom, application of the "voluntary disclosure" policy is an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers. Whether there is or is not a voluntary disclosure is only a factor in evaluating a case, and even if there has been a voluntary disclosure, prosecution and conviction may still result. In short, a voluntary disclosure is not a bar to prosecution, but merely a factor to be considered. *See* ***United States v. Hebel***, 668 F.2d 995 (8th Cir.), *cert. denied*, 456 U.S. 946 (1982). *See* February 17, 1993, Tax Division memorandum on ***Tax Division Voluntary Disclosure Policy*** from Acting Assistant Attorney General James A. Bruton, Tax Division. A copy of this memorandum is contained in Section 3.00 of this ***Manual***.

4.02 *DUAL PROSECUTION AND SUCCESSIVE PROSECUTION*

4.02[1] *Applicability of Policy*

The dual prosecution policy "precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution." ***United States Attorneys' Manual*** (***USAM***), § 9-2.142. For an example of a dual prosecution, see ***Thompson v. United States***, 444 U.S. 248 (1980).

The successive prosecution policy is substantially identical in wording except that it applies when there has been a prior federal prosecution rather than a state prosecution. ***USAM***, § 9-2.142. For examples of successive prosecution, *see* ***Rinaldi v. United States***, 434 U.S. 22 (1977); ***Petite v.***

United States, 361 U.S. 529 (1960). Parenthetically, the ***Petite*** case has given its name to both policies, i.e., the courts have used the "Petite Policy" interchangeably for both dual and successive prosecutions. *Cf.* ***Thompson***, 444 U.S. at 249.

These policies are not based upon double jeopardy or any other legal principle. They were established "to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts." ***USAM***, § 9-2.142. *See* ***Rinaldi***, 434 U.S. at 27; ***Petite***, 361 U.S. at 530.

The two policies are set forth in detail in ***USAM***, § 9-2.142. In order to prevent unwarranted dual or successive prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to initiating or continuing the federal prosecution. ***USAM***, § 9-2.142. In criminal tax cases, this is the Assistant Attorney General, Tax Division. 28 C.F.R., §§ 0.70, 0.179.

A failure to obtain prior authorization of a dual or successive federal prosecution will result in a loss of any conviction as the prosecutor will be required to move to dismiss the charges, unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason to explain the failure to obtain prior authorization. ***USAM***, § 9-2.142. The Department applies a common sense, nontechnical approach to the scope of the dual and successive prosecution policy in order to achieve its salutary objectives.

Requests for the authorization of dual or successive federal prosecutions are evaluated on a case-by-case basis by the appropriate Assistant Attorney General based on the factors set forth in ***USAM***, § 9-2.142. A federal prosecution will not be authorized unless the state/prior federal proceeding left substantial federal interests demonstrably unvindicated. Even so, a dual or successive prosecution is not warranted unless a conviction is anticipated. If the state/prior federal proceeding resulted in a conviction, prosecution normally will not be authorized unless an enhanced sentence in the subsequent federal prosecution is anticipated.

Vacating a conviction after trial because of a failure to follow the administrative procedures governing dual and successive prosecutions is a waste of resources. Because this waste can be easily prevented by scrupulous adherence to the procedure set forth in ***USAM***, § 9-2.142, prosecutors should familiarize themselves with and follow the procedures therein.

4.02[2] ***Tax Prosecutions***

It can be argued that neither the dual nor successive prosecution policies really applies to income tax prosecutions because even if the acts and transactions of the prior prosecution were the same income-producing activities, the tax crime did not take place until the following year when the fraudulent income tax return was filed or the failure to file happened. In other words, the failure to report income is not usually an element of the prior criminal proceeding, e.g., an embezzlement charge. Nevertheless, the Tax Division adheres to the letter and spirit of these policies in conformity with ***USAM***, § 9-2.142 that they should be applied "in a common sense, nontechnical fashion."

Similarly, dual prosecution and successive prosecution policies technically are not implicated when venue considerations precluded joinder of all the offenses in one judicial district, when the defendant opposed a single trial, or when the evidence was not obtained until after the earlier prosecution was commenced. As a practical matter, however, when a tax case is being evaluated before indictment, the better course is not to rely on these technical points to conclude that the dual and successive prosecution procedures need not be followed. Under its discussion of these policies, the ***United States Attorneys' Manual*** specifically states that prosecution will not be authorized unless a conviction is anticipated for the subsequent case, and it is thought that the second conviction will result in an enhanced sentence. ***USAM***, § 9-2.142.

For example, assume that tax and non-tax charges arising out of the same transactions are brought, and venue precludes trying all of the charges in the same district. If the non-tax charges are tried first and result in a substantial sentence, then it is questionable whether the government

should subsequently proceed with the tax charges if an enhanced sentence cannot be anticipated, unless the federal interest was not substantially vindicated by the earlier prosecution because of circumstances extraneous to the case.

In the final analysis, when there is a question as to the applicability of the dual and successive prosecution policies, the procedures set forth in ***USAM***, § 9-2.142 should be followed. If the facts are compelling in support of the conclusion that the federal interest has not been substantially vindicated, securing the Assistant Attorney General's authorization does not impose a substantial burden to processing a case through the Tax Division. Conversely, if it is determined that the subordinate reviewing attorney erred in not obtaining the authorization of the appropriate Assistant Attorney General, then there is a substantial danger that all the effort spent in securing a conviction will have gone for naught.

4.02[3] ***Pretrial Diversion***

While no specific reference is made to pretrial diversion in the section of the ***United States Attorneys' Manual*** dealing with dual and successive prosecution, the safer course is to consider pretrial diversion as within the context of these two policies even though jeopardy has not attached in that situation. "The Department has sought to apply the policy in a common sense, non-technical fashion in order to effectuate its salutary objectives." ***USAM***, §9-2.142.

USAM, § 9-22.000 does address the pretrial diversion program, but requires, among other things, prior Tax Division approval in all cases under its jurisdiction. The Tax Division's long-standing, strict policy is that criminal tax cases should not be disposed of under the Department's pretrial diversion program. This policy is stated in the transmittal letter that accompanies all criminal tax cases sent from the Tax Division to a United States Attorney's office. Accordingly, criminal tax defendants should not be given pretrial diversion treatment.

4.03 *INCARCERATED PERSONS*

4.03[1] ***General***

Whenever a proposed tax defendant is incarcerated on other charges, an initial determination must be made as to whether the Department's policies on dual and successive prosecution (Petite Policy) are applicable. *See* 4.02, *supra*. If they are, the procedures for those policies are controlling and must be followed. If it is determined that there is no connection, direct or indirect, between the acts and transactions underlying the conviction(s) for which the proposed defendant is presently incarcerated and the contemplated tax-related prosecution, then other considerations nevertheless come into play in determining whether prosecution should be initiated or declined. These considerations are discussed in the section which follows.

4.03[2] ***Prosecution of Incarcerated Persons***

Principles of Federal Prosecution, as reprinted in ***USAM***, § 9-27.000, provides as follows (***USAM***, § 9-27.230):

> A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:
>
> 1. Federal law enforcement priorities;
>
> 2. The nature and seriousness of the offense;
>
> 3. The deterrent effect of prosecution;
>
> 4. The person's culpability in connection with the offense;
>
> 5. The person's history with respect to criminal activity;
>
> 6. The person's willingness to cooperate in the investigation or prosecution of others; and
>
> 7. The probable sentence or other consequences if the person is convicted.

The above list of relevant considerations is not intended to be all-inclusive and in a given case one factor may deserve more weight than it might in another case. ***USAM***, § 9-27.230,

Subsection B.

Principles of Federal Prosecution further emphasizes the weight to be given the probable sentence in the determination as to whether criminal proceedings should be instituted as follows (***USAM***, § 9-27.230(B)(8)):

> 8. The Probable Sentence
>
> > In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. * * * (I)f the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack.

This concept is probably best understood by example. Assume that the contemplated tax defendant is presently incarcerated for the killing of his spouse, committed in the heat of passion without any income-producing ramifications, that all appellate stages have been exhausted, and that

10 years are left to be served on his sentence. If the tax case involves nothing more than the skimming of income from the proposed defendant's sole proprietorship, it would be pointless to institute a criminal tax case, for there is no reason to believe that, even if convicted, a meaningful additional sentence would be imposed. The specific deterrent value to be derived from that case would be marginal. Under this hypothetical, it would be a more efficient use of resources to resort to an "adequate non-criminal alternative to prosecution," *e.g*., "civil tax proceedings." ***Principles of Federal Prosecution***, ***USAM***, § 9-27.250, Subsection B.

Conversely, if the tax crime was accomplished by a sophisticated scheme, such as promoting a widespread fraudulent tax shelter or refund scheme, prosecution could be appropriate even though the likelihood of an enhanced sentence for the tax crime would be remote. In that instance, the conviction for the tax crime could serve to deter other individuals from embarking on the same scheme.

There will obviously be situations between these two extremes. For example, if only one year is left to be served on the nontax conviction, there may be a reason for concluding that the tax prosecution could result in a substantial, additional sentence. Another example is the submission of fraudulent returns claiming refunds by a prisoner with a long term yet to be served. A tax prosecution, as a practical matter, may not lengthen the actual time ultimately served, but it might deter other prisoners from adopting the scheme.

The effect of present incarceration on the prosecution decision is to be made on a case-by-case basis. Incarceration, of itself, does not implicate any formal policy of the Department, and the personal authorization of the Assistant Attorney General is not a condition precedent to the institution of criminal proceedings simply because the proposed defendant is currently in jail. Incarceration, however, should alert the reviewing attorney to the possibility of the dual and successive prosecution policies being an issue.

4.04 *HEALTH POLICY*

4.04[1] *General Policy*

On February 19, 1953, the Attorney General ordered the abandonment of the so-called "health policy" in criminal tax cases. Department of Justice Press Release, February 19, 1953. The Treasury Department had earlier rescinded its identical policy on December 11, 1951. The question of whether an individual could physically survive the stress and strain of a trial is, therefore, no longer a controlling consideration in deciding for or against a tax prosecution at the administrative level. The Department's position is that whether a taxpayer should or should not be tried because of health reasons is a matter which can best be decided by the trial court, rather than on an administrative basis. Only when it is clear beyond all doubt that a proposed defendant will never be able to stand trial because of a terminal physical condition is a case disposed of for reasons of health at the administrative level.

4.04[2] *Court Determination of Health Status*

After the filing of an indictment or information, physical health questions should be left to the defendant to raise. The defense is customarily raised by way of a motion for continuance. The issues basically are whether the defendant is able to assist his counsel in his defense and/or whether the strain of a trial will pose a serious threat to the defendant's health. The United States Attorney should ensure that the health facts and the court's decision are made a matter of record. The following course is to be followed in this connection: (1) the special agent of the Internal Revenue Service should be asked to conduct a discrete investigation to determine the extent of the defendant's daily activities and to eliminate the possibility of malingering; (2) a request should be made of the court to have a court-appointed physician conduct an examination and, if possible, this should include a necessary period of observation in a hospital; and (3) there should be a hearing in open court to disclose for the record the results of (1) and (2) above and to enable the court to make a finding.

The court's finding probably will not embrace a prognosis beyond the immediate necessity for a continuance. But if the record, as developed, makes it apparent that the defendant cannot ever stand trial, the United States Attorney should request authority from the Tax Division to dismiss the indictment or information. If the physical condition is only temporarily disabling, only a continuance should be permitted.

4.05 *MENTAL INCOMPETENCY*

4.05[1] *Evaluation at Administrative Level*

In criminal tax cases, where the taxpayer is in a money-producing activity during the prosecution years, lack of mental responsibility defenses are highly questionable. Because of the nature of criminal tax cases, it would be rare for a case to be referred to the Tax Division for prosecution by the Internal Revenue Service where there is clear and convincing evidence of a

mental defense calling for a decision not to prosecute at the administrative level. In the usual case where there are allegations of a mental disorder, the case is evaluated at the administrative level in the framework of whether there is guilt beyond a reasonable doubt and a reasonable probability of conviction.

The net result is that except for cases where very serious mental disorders are obvious, the Tax Division takes the position that it is up to the court to determine whether a taxpayer is competent to stand trial. This determination should be made after an indictment has been returned or an information filed in accordance with the appropriate judicial procedures. See, in this connection, the discussion which follows in Section 4.05[2], ***Insanity Defense Reform Act of 1984.***

4.05[2] ***Insanity Defense Reform Act of 1984***

The ***Comprehensive Crime Control Act of 1984***, Pub. L. No. 98-473, 98 Stat. 1837, made a significant series of changes in numerous areas of the federal criminal justice system. Chapter IV of the Act contains the ***Insanity Defense Reform Act of 1984***, Pub. L. No. 98-473, 98 Stat. 1837, 2057, which governs, among other things, the insanity defense and the determination of mental competency to stand trial. Where applicable, the provisions of the Insanity Defense Reform Act can have a significant bearing on the administrative evaluation of criminal tax cases as well as on trial procedures.

The Department of Justice has issued a handbook which is designed to assist prosecutors and investigators in the review and implementation of the Comprehensive Crime Control Act of 1984, *supra*, and ten other statutes. ***Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress*** (Handbook), Department of Justice (December, 1984). [1]

The Handbook summarizes the changes made by the Insanity Defense Reform Act of 1984, and the applicability of those changes as follows (Chapter IV, p. 58):

> The most significant provisions of chapter IV: (1) significantly modify the standard for insanity previously applied in federal courts; (2) require the defendant to prove the defense of insanity by clear and convincing evidence; (3) limit the scope of expert testimony on ultimate legal issues; (4) eliminate the defense of "diminished capacity"; (5) create a special verdict of "not guilty only by reason of insanity" which triggers a federal civil commitment proceeding; and (6) provide for federal commitment of persons who become insane after having been found guilty or while serving a federal prison sentence.

Reference should always be made to the Handbook for questions relating to an insanity defense or where there is an issue as to mental competency to stand trial. In the latter connection, Chapter IV replaces the prior provisions of Chapter 313 of Title 18 with new statutory provisions, 18 U.S.C., Sec., 4241 through 4247. Section 4241 of Title 18 governs procedures for the determination of competency to stand trial and related commitments of the defendant. Under Section 4241, if competency is perceived to be an issue by the prosecutor, by defense counsel, or by the court itself, a psychiatric examination may be ordered and a hearing is to be held on the defendant's competency to stand trial. For a more complete examination of Section 4241, see the Handbook, at 62, E.1.

4.06 *SEARCH WARRANTS*

4.06[1] *Generally*

Department of Justice policy formerly required that all search warrants in criminal tax cases be approved in advance by the Tax Division. This policy was based upon the premise that the law on search warrants was so unsettled that strict scrutiny was warranted. In recent years, the case law concerning search and seizure developed to a point where it became clear that, upon a showing of probable cause, the government could conduct reasonable searches for the purposes of obtaining documentary evidence establishing the commission of a crime.

With case law becoming more settled, the Assistant Attorney General, Tax Division, by

Directive No. 52 (January 2, 1986), which superseded an earlier 1984 Directive No. 49, delegated to certain personnel in United States Attorneys' offices the authority to approve the execution of certain limited Title 26 or tax-related Title 18 search warrants directed at offices, structures, premises, etc., of targets or subjects of the investigation. The existing authority delegated to United States Attorneys' offices and the authority reserved to the Tax Division contained in Tax Division Directive No. 52, is reproduced in Section 3.00 of this ***Manual***. *See also* ***USAM***, § 6-4.130.

4.06[2] ***Procedures Under Directive No. 52***

In those instances where authority to approve a search warrant has been delegated to the United States Attorney's office, a direct request for a search warrant may be made by District Counsel, I.R.S., to the United States Attorney's office. Note, however, that in the United States Attorney's office, the only persons who can approve the application for a search warrant are the United States Attorney, the First Assistant United States Attorney, or the Chief of the Criminal Division in the office. This authority to approve cannot be delegated to anyone else in the office of the United States Attorney.

The name and telephone number of the Assistant United States Attorney(s) in each office who, in addition to the United States Attorney, is authorized to approve search warrants under the delegated authority is to be forwarded to the Tax Division. The names will be retained in the Tax Division files, with a copy given to the Internal Revenue Service.

Because the questions of privilege and status in the investigation remain sensitive legal issues, the Tax Division has delegated the authority to approve search warrants in tax cases only in those limited instances where the search warrant is directed at offices, structures, or premises owned, controlled, or under the dominion of the subject or target of a criminal investigation. The subject, or target, moreover, must not fall into the eight exempted categories listed in the delegation order (Directive No. 52, para. 4). The exempted categories, which include accountants, lawyers, physicians, public official/political candidates, members of the clergy, news media representatives,

labor union officials, or officials of 501(c)(3) tax exempt organizations, are deemed to be of such a sensitive nature that prior approval of the Tax Division is still required before a search warrant is obtained.

Aside from questions of strict legality, search warrants in tax investigations involve potential problems and issues intrinsic to tax cases. The concept of seizing personal or business books and records as the evidence or instrumentality of a crime is not as direct or simple as the seizure of contraband. These documents can contain information considered to be personal and confidential, and these very same documents, which, by their own nature, are not unusual, illegal, or dangerous, will be the evidence or the instrumentality of the crime to be charged. In addition to the controversial nature of such a seizure of documents, the requirement that the items to be seized must be named with specificity is more difficult to meet. In tax cases, the warrant must be specific, not only regarding the items to be seized and the place searched, but a specific time frame must also be stated, *e.g.*, records for the years 1990 and 1991.

4.07 ***APPEALS***

The procedures and rules governing appeals are set forth in the ***USAM***, § 2-1.000 *et seq.*, and § 9-2.171, and should be reviewed and followed when handling a criminal tax or other appellate matter. Attention is called to the particular following procedures set forth in the ***USAM***.

In all cases resulting in adverse decisions, all recommendations for and against appeal, the filing of a petition for certiorari, and direct appeal to the Supreme Court must be authorized by the Solicitor General. This includes interlocutory appeals under 28 U.S.C., Sec. 1292(b) and litigation in state courts subject to review by a higher state court or by the United States Supreme Court. It also includes the filing of an amicus curiae brief, petitions seeking mandamus or other extraordinary relief, and the filing of a suggestion for a rehearing *en banc*. ***USAM***, § 2-2.120 and § 9-2.171.

The United States Attorney has the appellate responsibility for the handling of criminal tax

cases in the courts of appeals that have been tried by the United States Attorney unless the Assistant Attorney General, Tax Division, elects that the Tax Division handle a particular category of cases or a case on appeal. ***USAM***, § 2-3.100.

The Tax Division, and specifically the Criminal Appeals & Tax Enforcement Policy Section (CATEPS), has the appellate responsibility for the handling of criminal tax cases that have been tried by personnel of the regional Criminal Enforcement Sections of the Tax Division. ***USAM***, § 2-3.100.

The need for immediate reporting of adverse decisions, whether at the trial level or the appellate level, is stressed in ***USAM***, § 2-2.110 as follows:

> In any civil or criminal action before a United States District Court or a United States Court of Appeals, in which the United States is a litigant, and a decision is rendered adverse to the government's position, the U.S. Attorney must immediately transmit a copy of the decision to the appellate section of the division responsible for the case.

To secure the necessary authority from the Solicitor General to appeal or not appeal a criminal tax case, the United States Attorney or the Chief of the appropriate regional Criminal Enforcement Section of the Tax Division "must promptly" make a report to the Chief, Criminal Appeals & Tax Enforcement Policy Section (CATEPS), Tax Division. See ***USAM***, § 2-2.110, *et seq*. The Tax Division prefers that such reports be made *promptly by telephone* to the Chief of CATEPS at (202) 514-3011.

Following receipt of an adverse decision, CATEPS solicits the views of the regional Criminal Enforcement Section of the Tax Division, the United States Attorney, and the Internal Revenue Service on appropriate further action. CATEPS then prepares a Tax Division memorandum for the Solicitor General which reflects the views and recommendation of the Tax Division, as well as the views of those solicited. In cases tried by Criminal Enforcement Section personnel of the Tax Division, the Tax Division prosecutor should confer with the United States

Attorney with respect to the recommendation to be made by the Criminal Enforcement Section to CATEPS. ***USAM***, § 2-3.100.

For these and other issues relating to appeals in criminal tax cases, contact the Chief, CATEPS, Tax Division at (202) 514-3011.

4.08 *REQUESTS FOR TRIAL ASSISTANCE*

While United States Attorneys usually have the initial responsibility for the trial of criminal tax cases, the Criminal Enforcement Sections of the Tax Division have staffs of highly qualified and specialized criminal tax trial attorneys who will prosecute or render assistance in the trial of criminal tax cases upon request. The assistance, for example, may be in the form of a senior Criminal Enforcement Section attorney of the Tax Division assuming all trial responsibilities of a particular case or in the form of a junior attorney of the Tax Division acting as co-counsel with an Assistant United States Attorney.

If trial assistance is needed, the request should be in writing, stating the relevant reasons, and made well in advance of any court setting. Requests for assistance should be addressed to the Chief of the appropriate Criminal Enforcement Section, Tax Division, Department of Justice, Washington, D.C. 20530. Where time is a factor, the request may be by phone to the appropriate Chief. Such telephone requests should be confirmed in writing. *See* Section 1.02 of this ***Manual***, *supra*.

4.09 *STATUS REPORTS*

After criminal tax cases have been referred to a United States Attorney, it is essential that the Tax Division be kept advised of all developments. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

1. A copy of the indictment returned (or no billed), or the information filed, which reflect the date of the return or filing, and the date of any no bill;

2. Date of arraignment and kind of plea;
3. Dates of trial;
4. Verdict and date verdict returned;
5. Date and terms of sentence; and
6. Date of appeal and appellate decision.

It is important that information regarding developments in pending cases be provided to the Tax Division in a timely manner in order that the Department's files reflect the true case status and so that, upon completion of the criminal case, the case can be timely closed and returned to the Internal Revenue Service for the collection of any revenue due through civil disposition.

4.10 *RETURN OF REPORTS AND EXHIBITS*

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the United States Attorney should return to witnesses their exhibits. All other grand jury material should be retained by the United States Attorney under secure conditions, in accordance with the requirement of maintaining the secrecy of grand jury material. Fed. R. Crim. P. Rule 6(e).

All non-grand jury reports, exhibits, and other materials furnished by the Internal Revenue Service for use in the investigation or trial should be returned by certified mail, return receipt requested, to the appropriate District Director, Internal Revenue Service, Attention: Chief, Criminal Investigation Division, as directed in the Tax Division's letter authorizing prosecution, or as directed by Regional Counsel in cases directly referred to the United States Attorney.

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1. The handbook is available for searching on JURIS in the ***Statlaw*** file group.

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5.00 *PLEAS AND SENTENCING: TAX DIVISION POLICY AND GUIDELINES*

5.00 *PLEAS AND SENTENCING: TAX DIVISION POLICY AND GUIDELINES*

5.01 *GENERALLY*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) created the United States Sentencing Commission (Commission) as an independent agency in the judicial branch. The Commission's task was the development of guidelines to further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. Accordingly, the Commission promulgated the United States Sentencing Guidelines (USSG) which became effective on November 1, 1987, and apply to all offenses committed on or after that date. Courts have recognized that the guidelines also apply to any offense involving a continuing course of conduct that began before November 1, 1987, but continues thereafter. ***United States v. Dale***, 991 F.2d 819, 853 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993) (citing cases); ***United States v. Gaudet***, 966 F.2d 959, 961-62 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1294 (1993).

In compliance with the mandate of the Act, the Commission created categories of offense behavior and offender characteristics. The Commission prescribed Guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. When the guidelines require imprisonment, the range must be narrow, with the maximum range not exceeding the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The guidelines contain three types of text: (1) the actual Guideline provisions; (2) the policy statements; and (3) commentary. The guidelines themselves are binding on the sentencing court unless the court finds the presence of an aggravating or mitigating factor of a kind or to a degree not given adequate consideration by the Commission. ***Mistretta v. United States***, 488 U.S. 361, 391 (1989). Likewise, policy statements are binding on federal courts. ***Williams v. United States***, 112 S. Ct. 1112, 1119 (1992). The Supreme Court recently held that "[c]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution, or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that

guideline." ***United States v. Stinson***, 113 S. Ct. 1913, 1915 (1993). Thus, all three varieties of text are binding on a sentencing court.

The Commission has the authority to submit Guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless legislation is enacted to the contrary. 28 U.S.C. § 944(p). The Commission has amended the guidelines regularly since their initial promulgation.

5.02 *GENERAL APPLICATION PRINCIPLES*

5.02[1] *Select the Appropriate Guidelines Manual*

Section 1B1.11(a) mandates that a court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced." The same is true of policy statements. ***United States v. Schram***, 9 F.3d 741, 742 (9th Cir. 1993). If the court determines, however, that the use of that Manual would violate the *ex post facto* clause, the court "shall use the Guidelines Manual in effect on the date that the offense was committed." USSG §1B1.11(b)(1). [1] Thus, if the sentencing Guideline in effect at the time the offense was committed is more favorable to the defendant than the Guideline at the time of sentencing, the court must apply the more favorable Guideline. ***United States v. Chasmer***, 952 F.2d 50, 52 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1703 (1992). Section 1B1.11 establishes the "one book" rule. This rule provides that the "Guidelines Manual in effect on a particular date shall be applied in its entirety." USSG §1B1.11(b)(2). When a court applies an earlier edition of the guidelines Manual, the court also must consider subsequent amendments when such amendments represent merely clarification rather than substantive changes. USSG §1B1.11(b)(2).

Some offenses, such as conspiracy, escape, and continuing criminal enterprise are continuing offenses. For continuing offenses, the guidelines apply if the offense continues until after the effective date of the guidelines. Thus, in these so-called "straddle cases," there is no *ex post facto* violation in applying guidelines which were in effect when the last affirmative act occurred rather than an earlier version which was in effect when the conspiracy began, even though the later version specified a higher offense level for the same conduct. ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); ***United States v. Walton***, 908 F.2d 1289, 1299 (6th Cir.), *cert. denied*, 498 U.S. 990 (1990); ***United States v. Walker***, 885 F.2d 1353, 1354 (8th Cir. 1989); ***United States v. Stanberry***, 963 F.2d 1323 (10th Cir 1992). Note, however, that one court has found that acts occurring after November 1987 which merely cover up a conspiracy and, thus, are not done in furtherance of the conspiracy, do not extend the life of a conspiracy or make the guidelines applicable to the conspiracy. ***United States v. Crozier***, 987 F.2d 893, 902 (2d Cir. 1993).

5.02[2] ***Guideline Calculation***

After determining which guidelines Manual applies to the case, the attorney should next follow the steps outlined in the Manual in order to calculate the appropriate Guideline range:

(a) Determine the applicable offense Guideline section from Chapter Two. *See* Section 1B1.2 and 2T1.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular Guideline in Chapter Two in the order listed.

(c) Apply the adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the Guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular Guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

(j) Check to make sure that the calculation complies with Department of Justice policies. For example, compute the possible Guideline range for each count of an indictment or information prior to accepting a plea to a single count to ensure that the plea is consistent with the Tax Division's major count policy. [2]

See USSG §1B1.1.

5.03 ***CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES*** **1**

Consistent with the overall plan of the Sentencing Guidelines, each tax guideline begins with a base offense level. This starting point for tax crimes is based upon the dollar amount found in the tax table at section 2T4.1. Most guidelines also contain "specific offense characteristics" which require the base offense level to be increased based on certain aggregating facts. The court determines the total offense level by making adjustments as described in section 1B1.1 of the guidelines. Following the determination of the total offense level, the court refers to the corresponding zone on the sentencing table. The sentencing table has three zones, Zone A, Zone B and Zone C, which permit the court to render a variety of sentences ranging from probation to split sentences to many months in prison.

5.03[1] ***The Base Offense Level***

Part T of Chapter Two of the Sentencing Guidelines contains the materials pertaining to tax crimes. In determining the starting point for the base offense level, most offenses refer to the "tax loss" as defined in the various subsections. *See* ***United States v. Moore***, 997 F.2d 55, 60-61 (5th Cir. 1993).

In determining the tax loss, both charged and uncharged conduct are properly considered. ***United States v. Meek***, 998 F.2d 776, 781 (10th Cir. 1993); ***United States v. Higgins***, 2 F.3d 1094, 1097-98 (10th Cir. 1993). Some confusion on this point arose from the decision in ***United States v. Daniel***, 956 F.2d 540, 544 (6th Cir. 1992), with some reading ***Daniel*** to preclude the inclusion in the "tax loss" calculation of any uncharged conduct. That, however, is an incorrect reading of ***Daniel***. ***Daniel*** merely held that insofar as uncharged conduct consisted of civil tax liability, it could not be considered in determining "tax loss." "***Daniel*** is best interpreted as standing only for the proposition that a sentencing court may not consider non-charged civil violations of the tax code in calculating the tax loss attributable to a defendant under § 2T1.1." ***Meek***, 998 F.2d at 783. *Accord* ***United States v. Harvey***, 996 F.2d 919, 922 (7th Cir. 1993) (***Daniel*** only holds that tax loss attributable to criminal activity must be reliably computed, and civil tax liability is not an adequate substitute for "tax loss"). Indeed, the Sixth Circuit itself has subsequently made clear that ***Daniel*** stands only for the proposition that civil tax liability is not part of the underlying conduct which may be taken into account in calculating the "tax loss" for sentencing purposes. ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994). Acquitted conduct can also be taken into account in calculating "tax loss." ***United States v. August***, 984 F.2d 705, 713 (6th Cir. 1992).

Tax loss from both guideline and pre-guideline years may be used to arrive at the total loss figures on which the guideline range is based. ***United States v. Stokes***, 998 F.2d 279 (5th Cir. 1993); ***United States v. Kienenberg***, 13 F.3d 1354 (9th Cir. 1994); ***United States v. Pierce***, 17 F.3d at 150. Moreover, the loss from years barred by the statute of limitations can be used in computing "tax loss." ***United States v. August***, 984 F.2d at 713. If a defendant is charged and convicted of both Guideline offenses and pre-Guideline offenses, the defendant may be sentenced to consecutive terms of imprisonment. ***United States v. Garcia***, 903 F.2d 1022, 1025 (5th Cir. 1990).

Likewise, future tax loss may be included in tax loss computation in certain situations. Relying on the commentary of section 2T1.3, the Fourth Circuit found that tax loss could be determined by calculating 28% of a false deduction even when there was no loss of tax revenue because it "set the groundwork for evasion of a tax that was expected to become due in the future." ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993). *Accord* ***United States v. Lorenzo***, 995 F.2d 1448, 1459-60 (9th Cir. 1993) (loss for falsely claimed tax refunds based on intended loss, not actual loss; nor does that intended loss need to be realistic).

Courts have found that payment of the taxes before sentencing does not alter the tax loss or offense level under the guidelines. ***United States v. Pollen***, 978 F.2d 78, 91 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); ***United States v. Mathis***, 980 F.2d 496, 497 (8th Cir. 1992).

Once the court determines the total tax loss attributable to a defendant, the defendant's base offense level is determined from the table contained in section 2T4.1. ***United States v. Meek***, 998 F.2d 776, 781 (10th Cir. 1993).

5.03[1][a] ***Section 7201***

Prior to the November 1, 1993, amendments, [3]

Consistent with the overall plan of the Sentencing Guidelines, each tax guideline begins with a base offense level. This starting point for tax crimes is based upon the dollar amount found in the tax table at section 2T4.1. Most guidelines also contain "specific offense characteristics" which require the base offense level to be increased based on certain aggregating facts. The court determines the total offense level by making adjustments as described in section 1B1.1 of the guidelines. Following the determination of the total offense level, the court refers to the corresponding zone on the sentencing table. The sentencing table has three zones, Zone A, Zone B and Zone C, which permit the court to render a variety of sentences ranging from probation to split sentences to many months in prison.

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5.03[1][a] ***Section 7201***

Prior to the November 1, 1993, amendments, [4] "tax loss" in evasion cases is "the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the `tax loss' defined in § 2T1.3." [1] USSG §2T1.1(a). This amount does not include penalties or interest. USSG §2T1.1, comment. (n.2). Tax loss is what is commonly called the "criminal deficiency," an amount which is determined by the same rules applicable in determining any other sentencing factor. USSG §2T1.1, comment. (n.2). Application Note 3 provides that in determining the total tax loss attributable to the offense, "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." USSG §2T1.1, comment. (n.3).

This tax loss calculation has been described as follows:

> In determining the tax loss, a court is required to engage in a two-step analysis. First, the court must decide which tax deficiencies to aggregate together. Second, it must decide how to calculate the amount of the aggregated deficiencies. *The aggregation determination is addressed by § 3D1.2, which requires aggregation of all counts of conviction "involving substantially the same harm," and § 1B1.3, which requires aggregation of all "relevant conduct," when determining a defendant's base level offense.* The formula for calculating the amount of the aggregated deficiencies is provided by §§ 2T1.1(a) and 2T1.3(a), which define the tax loss for any given year as the greater of the "total amount of tax that the defendant evaded or attempted to evade" . . . or "28% of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against the tax . . . ."

United States v. Meek, 998 F.2d 776, 781 (10th Cir. 1993) (emphasis added). [2]

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[1] *See* Section 5.03[1][c], *infra*.

[2] At least one court has rejected a due process challenge to section 2T1.3(a)(1). The defendant in ***United States v. Barski***, 968 F.2d 936 (9th Cir. 1993), maintained that section 2T1.3 created an irrebuttable presumption that tax loss is 28 percent of unreported taxable income when, in fact, the

Under section 1B1.3 of the guidelines a defendant's base offense level is determined on the basis of:

> all acts and omissions committed or aided and abetted by the defendant, or *for which the defendant would be otherwise accountable*, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense . . .

USSG §1B1.3 (emphasis added). In ***United States v. Charroux***, 3 F.3d 827 (5th Cir. 1993), the defendants were convicted of attempted evasion and conspiracy. Relying on the commentary to section 1B1.3, the ***Charroux*** court held each defendant responsible not only for the tax loss which he caused, but also for the tax loss caused by his co-defendant. [3] 3 F.3d at 838.

The Seventh Circuit relied on the tax loss definitions contained in 2T1.3 and 2T1.1 to determine the tax loss in an evasion of payment case in ***United States v. Brimberry***, 961 F.2d 1286, 1292 (7th Cir. 1992). In ***Brimberry***, the defendant had attempted to evade payment of taxes of $7 million and had hidden assets of approximately $77,000 to avoid paying the taxes. The court found that the language of the guidelines was unambiguous and that the correct basis for tax loss based on all of the conduct violating the tax laws was $7 million. ***Brimberry***, 961 F.2d at 1292.

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amount was less. The ***Barski*** court found that the section merely "establishes the legally operative fact as the amount of unreported income." ***Barski***, 968 F.2d at 937.

[3] Conduct for which the defendant would otherwise be accountable includes conduct of others in furtherance of the execution of a jointly-undertaken criminal activity that was reasonable foreseeable to the other defendant. USSG §1B1.3, comment. (n.1). Changes to this guideline were also made by the November 1, 1993, amendments.

Note that when a defendant has skimmed corporate receipts, the defendant is liable not only for the understatement of corporate income, but also for the understatement of his personal income. ***United States v. Dale***, 991 F.2d 819, 856 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993). If the defendant is a corporation, the court is to use 34 percent in lieu of 28 percent. USSG §2T1.3(a). This use of either 28 percent or 34 percent "applies the highest marginal rate to the amount of concealed income, disregarding deductions that would have been available had the taxpayer filed an honest return." ***United States v. Harvey***, 996 F.2d 919, 920 (7th Cir. 1993).

5.03[1][b] ***Section 7203***

The base offense level for cases involving willful failure to file a return, supply information, or pay tax in violation of 26 U.S.C. § 7203 is governed by section 2T1.2 of the guidelines. [5] Again, the base offense level is governed by tax loss. For purposes of violations of this section, tax loss is defined as "the total amount of tax that the taxpayer owed and did not pay" or "not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000." USSG §2T1.2(a). The alternative measure of the tax loss, 10 percent of gross income over $20,000, is provided because of the potential difficulty in determining the amount a taxpayer owed. USSG §2T1.2, comment. (backg'd.).

5.03[1][c] ***Section 7206(1)***

Section 2T1.3 of the guidelines governs tax loss for violations of 26 U.S.C.§ 7206(1). [6] Section 2T1.3(a) provides that the base offense level be taken from the tax table at section 2T4.1 if the offense was committed to facilitate evasion of a tax. In the alternative, the base offense level is 6. USSG §2T1.3(b). For purposes of the Guideline, the tax loss is 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. USSG §2T1.3. If the taxpayer is a corporation, the amount is 34 percent rather than 28 percent. USSG §2T1.3. Noting that tax loss is not an element of section 7206(1), the guidelines provide a calculation to assist in gauging the seriousness of the offense. USSG §2T1.3, comment. (backg'd.). Thus, the commentary to this section provides directions for this calculation:

> The amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax is calculated as follows: (1) determine the amount, if any, by which the gross income was understated; (2) determine the amount, if any, by which the taxable income was understated; and (3) determine the amount of any false credit(s) claimed (a tax "credit" is an item that reduces the amount of tax directly; in contrast, a 'deduction' is an item that reduces the amount of taxable income). Use the amount determined under step (1) or (2) whichever is greater, plus any amount determined under step (3).

USSG §2T1.3, comment. (n.4). This calculation disregards deductions that would have been available had the taxpayer filed an honest return. ***United States v. Harvey***, 996 F.2d 919, 920 (7th Cir. 1993).

In determining the total tax loss attributable to the offense, "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." USSG §2T1.3, comment. (n.3). Thus, "[i]f one person causes two taxpayers to understate their incomes, both underpayments count." ***Harvey***, 996 F.2d at 921.

5.03[1][d] ***Section 7206(2)***

The tax loss for defendants who have aided, assisted, procured, counseled, or advised tax fraud is governed by section 2T1.4.[7] This section provides that the base offense level be taken from the tax table level corresponding to the resulting tax loss, if any, or otherwise a level of 6.[4] USSG §2T1.4(a)(1) and (2). Tax loss is defined as "the tax loss, as defined in §2T1.3, resulting from the defendant's aid, assistance, procurance or advice."[5] USSG §2T1.4(a).

The amount of tax loss attributable to parties sentenced for aiding, assisting, procuring, counselling, or advising tax fraud, as well as making false statements on tax returns, is calculated in a manner similar to that of evasion. ***United States v. Moore***, 997 F.2d 55, 60 (5th Cir. 1993). If the defendant advises others to violate their tax obligations through filing returns which have no support in the tax laws and which are, consequently, false, the misstatements in all such returns will contribute to one aggregate tax loss. USSG §2T1.4, comment. (n.4). This is true whether or not the principals were aware of their falsity. USSG §2T1.4, comment. (n.4). Although tax loss is not an element in a false statement case, the defendant is properly sentenced for tax loss, which includes the amount of money a defendant attempts to obtain from an illegal tax scheme, regardless of an eventual failure to actually acquire and retain their illegal funds. ***Moore***, 997 F.2d at 59-60. *But cf.* ***United States v. Schmidt***, 935 F.2d 1440, 1451 (4th Cir. 1991) (holding that actual tax loss was proper basis for computing tax loss).

5.03[1][e] ***Section 7212(a)***

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[4] If the defendant is a tax preparer or adviser, his offense will be increased by two levels. USSG §2T1.4(b)(3).

[5] *See* Section 5.03[1][c], *supra*.

The omnibus clause of 26 U.S.C. § 7212(a) prohibits a defendant from corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of Title 26. The section is aimed at "prohibiting efforts to impede 'the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records.'" ***United States v. Hanson***, 2 F.3d 942, 947 (9th Cir. 1993) (citing ***United States v. Kuball***, 976 F.2d 529, 531 (9th Cir. 1992)).

The statutory index to the Sentencing Guidelines, USSG Appendix A, specifies that section 2A2.2, Aggravated Assault, and section 2A2.3, Minor Assault, are the guidelines ordinarily applied to a violation of 26 U.S.C. § 7212(a). However, the introduction cautions that:

> If, *in an atypical case*, the guideline section indicated for the statute of conviction is inappropriate because of the particular

> conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted.

USSG App. A (emphasis added). Thus, courts have not applied the assault Guideline to convictions under the section 7212(a) omnibus clause. ***United States v. Dykstra***, 991 F.2d 450, 454 (8th Cir.), *cert denied*, No. 93-5178 (U.S. Oct. 4, 1993); *see* ***Hanson***, 2 F.3d at 947; ***United States v. Shriver***, 967 F.2d 572, 574 (11th Cir. 1992).

The Eleventh Circuit in ***Shriver*** declined to apply the assault guidelines after finding that a defendant's section 7212(a) omnibus clause conviction was supported by evidence of his transferring real estate to his spouse and by filing an altered Lien Notice in an attempt to cause the release of that lien. The court decided that the Guideline which most closely tracked the defendant's actions was section 2F1.1, which governs sentencing in cases of fraud and deceit. ***Shriver***, 967 F.2d at 573-74. Likewise, the Ninth Circuit declined to apply the assault guidelines in ***Hanson***. The defendant in ***Hanson*** filed a false return seeking a refund and filed various false 1096 and 1099 forms. The court found that the Guideline most analogous to the defendant's conduct was section 2T1.5, which governs the sentencing of section 7207 offenses involving fraudulent returns, statements, or other documents. ***Hanson***, 2 F.3d at 947.

The Eighth Circuit decided that the most appropriate guideline to be applied to section 7212(a) omnibus clause violations was the general obstruction of justice guideline, USSG §2J1.2. [8] ***United States v. Dykstra***, 991 F.2d at 454. The ***Dykstra*** court noted that "the language and structure of § 7212 track part of certain federal obstruction of justice statutes," and that courts have used those statutes to interpret section 7212(a). ***Dykstra***, 991 F.2d at 454. Accordingly, the court approved the application of the general obstruction of justice guideline, USSG §2J1.2, in sentencing section 7212(a) omnibus clause violations. ***Dykstra***, 991 F.2d at 454. The amendments to the Sentencing Guidelines which went into effect on November 1, 1993, include a new reference in the statutory index for section 7212(a) omnibus clause violations, indicating that normally either

section 2J1.2, Obstruction of Justice, or section 2T1.1, Tax Evasion, should be applied.

5.03[1][f] ***Section 371***

Section 2T1.9 of the guidelines governs conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." USSG §2T1.9, comment. (n.1). The section applies to what is commonly called a "Klein conspiracy" as described in ***United States v. Klein***, 247 F.2d, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). The Guideline does not apply to taxpayers, such as husband and wife, who evade taxes jointly or file a fraudulent return. USSG §2T1.9, comment. (n.1). The Guideline directs the court to use the base offense level as determined by section 2T1.1 or section 2T1.3, whichever is applicable to the underlying conduct if that offense level is greater than 10. USSG §2T1.9, comment. (n.2). Otherwise, the base offense level is 10. USSG §2T1.9, comment. (n.2).

When a defendant is convicted of a count charging a conspiracy to commit more than one offense, the court is directed to treat that conviction "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." USSG §1B1.2(d). After calculating the offense level for each such "separate" conspiracy, the sentencing court then must "group the various offenses such that instead of sentencing the defendant for each object offense, the court would sentence the defendants on the basis of only one of the offenses." ***United States v. Dale***, 991 F.2d 819, 854 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993) (citing section 3D1.2 of the guidelines). The court then must sentence according to the offense level for the most serious counts comprising the group. ***Dale***, 991 F.2d at 854 (citing section 3D1.3 of the guidelines).

The offense level is based on the amount that the conspiracy "evaded or attempted to evade" according to section 2T1.1. ***Dale***, 991 F.2d at 854. The Fifth Circuit has found that it is proper to sentence each of two defendants on the total tax loss caused by both defendants. ***United States v.***

Charroux, 3 F.3d 827, 838 (5th Cir. 1993). Again, whether the conspirators completed the offense is irrelevant for purposes of determining this offense level. ***United States v. Dale***, 991 F.2d at 855; ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993).

The Third Circuit addressed the tax loss issue in the context of a computation based on uncharged conduct in a conspiracy in ***United States v. Seligsohn***, 981 F.2d 1418 (3d Cir. 1992). In ***Seligsohn***, the defendants paid cash as part of wages earned by employees, underreported their total payroll, filed false reports to the IRS regarding withholding taxes, and deprived a union welfare plan of its entitlement. Although the indictments charged only personal tax fraud conspiracy violations, the defendants' sentences were based upon a tax loss attributable to the defendants' companies rather than only the amount of individual loss. ***Seligsohn***, 981 F.2d at 1427. The court found that the tax fraud conspiracy was "clearly intended to encompass the tax losses attributable to the employees of the defendants' companies as well as the losses from the defendants' own personal tax evasion." ***Seligsohn***, 981 F.2d at 1427. In ***United States v. Lorenzo***, 995 F.2d 1448, 1459-60 (9th Cir. 1993), a tax protestor case, the court held each of the defendants accountable for the total of the falsely claimed tax refunds, approximately $4.9 million. In finding the co-conspirators responsible for all the reasonably foreseeable conduct of the other co-conspirators, the court relied on information presented against co-defendants. ***Lorenzo***, 995 F.2d at 1459-60.

5.03[2] ***Specific Offense Characteristics***

In addition to determining the base offense level from the table at section 2T4.1, the sentencing court must adjust the offense level according to the dictates of the specific offense characteristics of each subsection. [9]

5.03[2][a] ***Illegal Source Income***

The subsections dealing with violations of 26 U.S.C. §§ 7201, 7203, and 7206, with the exception of section 7206(2), require an increase in base offense level if the defendant either failed to report or to correctly identify income of over $10,000 in any year which results from criminal activity. "Criminal activity" is defined as "any conduct constituting a criminal offense under federal, state or local law." The Fourth Circuit reversed a lower court determination that a defendant's illegal source income of $8000 for 1987 and $2000 for 1988 could support the two-level enhancement. ***United States v. Schmidt***, 935 F.2d 1440, 1451-2 (4th Cir. 1991), *appeal after remand*, 983 F.2d 1058 (4th Cir. 1992). At least one circuit has determined that the plain language of the guidelines prevents a sentencing court from enhancing the base offense level of a defendant who received income exceeding $10,000 from a fraudulent scheme perpetrated in Canada. *See* ***United States v. Ford***, 989 F.2d 347, 350 (9th Cir. 1993). The amendments which went into effect on November 1, 1993, however, add the term "foreign" law to the definition of "criminal activity." USSG §2T1.1, comment. (n.3) (Nov. 1993).

5.03[2][b] ***Sophisticated Means***

The tax guidelines for violations of 26 U.S.C. §§ 7201, 7203, and 7206 provide for a two-level enhancement of the base offense level if the defendant used sophisticated means to impede discovery of the nature or extent of the offense. "Sophisticated means" is defined as conduct that is "more complex or demonstrates greater intricacy or planning than a routine tax evasion case." The use of offshore bank accounts or transactions through corporate shells are offered as examples of "sophisticated means" in the guidelines commentary.

An example of sophisticated means can be found in ***United States v. Becker***, 965 F.2d 383, 390 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993). In ***Becker***, the defendant received a two point enhancement pursuant to section 2T1.2(b)(2) for using a "warehouse bank" to hide his assets,

using a false social security number, eliminating all bank accounts in his own name, and depositing his earnings in his son's account. The appellate court agreed with the sentencing court's conclusion that these acts constituted sophisticated means which made it "difficult, if not impossible, to discover . . . [the defendant's] income and to inquire into his finances." ***Becker***, 965 F.2d at 390; *See also* ***United States v. Pierce***, 17 F.3d 146, 151 (6th Cir. 1994) (defendant presented an inapplicable IRS publication dealing with nonresident aliens to his employer in order to exempt himself from withholding; used several different mailing addresses from different IRS regional service centers to impede the IRS's discovery of him; changed his excessive number of withholding deductions in accordance with changes in IRS regulations so as not to alert the IRS; and, directed his wife to file misleading returns); ***United States v. Charroux***, 3 F.3d 827, 829 (5th Cir. 1993) (elaborate efforts to hide revenues including "land flips"); ***United States v. Hammes***, 3 F.3d 1081, 1083 (7th Cir. 1993) (numerous activities, including use of banks in the Cayman Islands, Switzerland, and the Mariana Islands; putting accounts in children's names, using aliases, and destroying records); ***United States v. Ford***, 989 F.2d 347, 351 (9th Cir. 1993) (use of foreign corporation to generate corporate foreign tax payments which are claimed on a domestic personal income tax return as foreign tax credits warrants enhancement pursuant to section 2T1.3); ***United States v. Jagim***, 978 F.2d 1032, 1042 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993) (extensively planned and executed scheme involving tax shelter and preparation of a number of false returns is more elaborate or carefully planned than routine tax-evasion case).

It is important to distinguish the use of sophisticated means in obtaining the money from the use of sophisticated means in furthering the tax crime. The Fifth Circuit reversed a sentencing court's two-level enhancement of a defendant's base offense level for using sophisticated means in ***United States v. Stokes***, 998 F.2d 279 (5th Cir. 1993). In ***Stokes***, the defendant had embezzled money from her employer which she put into two separate bank accounts. She then wrote checks to herself and transferred the money into cashiers checks which she used to purchase a car and land.

The trial court found that this behavior impeded discovery and gave a two-level enhancement pursuant to section 2T1.3(b)(2). The Fifth Circuit reversed, finding that the sophisticated means involved the hiding of embezzled funds but not the evasion of taxes, the crime for which the defendant was convicted. ***Stokes***, 998 F.2d at 282.

5.04 ***RELEVANT CONDUCT***

The provisions of Guideline § 1B1.1 permit a court to consider all of a defendant's relevant conduct in determining the base offense level. The government bears the burden of persuasion on this issue by a preponderance of the evidence. ***United States v. De La Rosa***, 922 F.2d 675, 679 (11th Cir. 1991). It is well-established that pre-Guideline conduct may be considered in arriving at the offense level. ***United States v. Collins***, 972 F.2d 1385, 1414 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). Likewise, a court can cross-reference to state law violations even when such violations consist of conduct that is outside the scope of the guidelines. *Id.*; ***United States v. Willis***, 925 F.2d 359, 360-62 (10th Cir. 1991); ***United States v. Smith***, 910 F.2d 326, 329-30 (6th Cir. 1990). Note, however, that at least one court has found that prosecution for conduct previously used to enhance offense level is barred by the multiple punishment prong of the double jeopardy clause. ***United States v. McCormick***, 992 F.2d 437 (2d Cir. 1993). *But see* ***United States v. Cruce***, 21 F.3d 70 (5th Cir. 1994).

5.05 ***ROLE IN THE OFFENSE***

The guidelines permit the sentencing court to adjust a defendant's offense level based upon its assessment of each offender's actions and relative culpability in the offense. The offense level may be enhanced by up to four levels upon a finding that the defendant played a leadership role. Upon a finding that a defendant was a "minor participant" in the offense, the court may reduce a defendant's offense level. USSG §3B1.2(b). Either finding is heavily dependent upon the facts of the particular case. ***United States v. Gregorio***, 956 F.2d 341, 344 (1st Cir. 1992).

5.05[1] ***Leadership Role in the Offense***

Section 3B1.1 permits an increase in the offense level as follows: (a) an increase of 4 levels if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; (b) an increase of 3 levels if the defendant was a manager or supervisor of such a criminal activity; or (c) an increase of 2 levels if the defendant was an organizer, leader, manager or supervisor in any criminal activity other than that described in (a) or (b). The purpose of this enhancement is to take into account the relative responsibilities of the participants. ***United States v. Schweihs***, 971 F.2d 1302, 1318 (7th Cir. 1992), *on remand*, 1993 WL 157450 (May 12, 1993), *on reconsideration*, 1993 WL 18620 (June 3, 1993). There can be more than one organizer in an extensive criminal operation. ***Morphew v. United States***, 909 F.2d 1143, 1145, (8th Cir. 1990).

The circuits are split on whether the language of Guideline section 3B1.1 requires that the sentencing court focus solely on the defendant's role in the offense of conviction rather than other criminal conduct in which he may have engaged. The Sixth Circuit has found that acquitted conduct can be considered. ***United States v. August***, 984 F.2d 705, 713 (6th Cir. 1992). *But see* ***United States v. Schweihs***, 971 F.2d at 1317; ***United States v. De La Rosa***, 922 F.2d 675, 679 (11th Cir. 1991) (holding that only behavior involved in the offense of conviction may be considered). The Ninth Circuit, however, has held that the 1990 amendment to the introductory commentary to Chapter 3, Part B permits the court to determine the defendant's role based on all of the defendant's conduct and is not limited to the offense of conviction. ***United States v. Lillard***, 929 F.2d 500, 503 (9th Cir. 1991). The Third and Tenth Circuits have found that the amended commentary constituted a substantive change, thus permitting the court to consider behavior beyond the offense of conviction only in crimes committed after the date of the November 1, 1990 amendment. ***United States v. Pollen***, 978 F.2d 78, 89 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); ***United States v. Johnson***, 971 F.2d 562, 577 (10th Cir. 1992).

5.05[2] ***Minor Role in the Offense***

In order to support a reduction in offense level for his role as a minor participant, the defendant must make a threshold showing that he is "substantially less culpable than the average participant." ***United States v. Gregorio***, 956 F.2d 341, 344 (1st Cir 1992); *accord* ***United States v. Ocasio***, 914 F.2d 330, 332 (1st Cir. 1990) (defendant has burden of proving his entitlement to downward adjustment for being a minor participant). The fact that a particular defendant may be the least culpable of the defendants does not, by itself, establish that he was a minor participant. ***United States v. Daniel***, 962 F.2d 100, 103 (1st Cir. 1992); ***United States v. Zaccardi***, 924 F.2d 201, 203 (11th Cir. 1991).

5.05[3] ***Abuse of Position of Trust or Use of a Special Skill***

Section 3B1.3 permits a sentencing court to increase the defendant's base offense level if the court finds that the defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or concealment of the offense. This enhancement may only be given when the use of the position of trust or the special skill contributed in a substantial way to the facilitation of the crime; it should not merely have provided an opportunity that was afforded to others. USSG §3B1.3, comment. (n.1). "Special skill" is defined as a "skill not possessed by members of the general public and usually requiring substantial education, training or licensing" such as pilots, lawyers, doctors, accountants, chemists, and demolition experts. USSG §3B1.3, comment. (n.2). Section 3B1.3 prohibits use of this enhancement in circumstances in which an abuse of trust or a special skill is included in the base offense level or is among the specific offense characteristics of the guideline being applied.

Courts interpreting this provision have found an abuse of trust or use of a special skill in a variety of circumstances. The Tenth Circuit affirmed an abuse of trust enhancement in an embezzlement case, even after acknowledging that "embezzlement by definition involves an abuse

of trust." ***United States v. Chimal***, 976 F.2d 608, 613 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1331 (1993). The ***Chimal*** court held that "embezzlement by someone in a significant position of trust warrants the enhancement when the position of trust substantially facilitated the commission or concealment of the crime." ***Chimal***, 976 F.2d at 613-14. Law enforcement officers who use their position to further criminal activity or to conceal their criminal activity may be subject to this enhancement. ***United States v. Rehal***, 940 F.2d 1, 5 (1st Cir. 1991) (officer used his position to follow up on the operations of federal investigators inquiring into his activity). Likewise, the Third Circuit found that a drug enforcement officer abused position of trust when he embezzled funds paid in fake drug transaction. ***United States v. Brann***, 990 F.2d 98, 102 (3d Cir. 1993). The court noted that "the primary trait that distinguishes a person in a position of trust from one who is not, is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." ***Brann***, 940 F.2d at 103 (citation omitted).

In a tax case, the Second Circuit enhanced the sentence of an accountant who used special skills in preparing fraudulent forms during a tax fraud conspiracy. ***United States v. Fritzson***, 979 F.2d 21, 22 (2d Cir. 1993). The defendant disputed the propriety of the enhancement, claiming that the forms in question, Forms W-2 and W-3, could be prepared by people without his special skills. The court found that "[a]n accountant's knowledge of the withholding process, including the roles of the claim and transmittal documents, and how and when to file them, exceed[ed] the knowledge of the average person." ***Fritzson***, 979 F.2d at 22-23. *But see* ***United States v. Santopietro***, 996 F.2d 17 (2d Cir. 1993) (remand for resentencing of certified public accountant because the sentencing court enhanced the defendant's offense level for use of special skill for bribery conviction instead of for tax conviction).

Note, however, that this enhancement for use of a special skill cannot be used if the defendant regularly acts as a return preparer or advisor for profit and is charged pursuant to 26 U.S.C. § 7206(2). USSG §2T1.4, comment. (n.3). The Specific Offense Characteristics of

section 2T1.4 include a two-level enhancement if the defendant was in the business of preparing or assisting in the preparation of tax returns. USSG §2T1.4(b)(3).

5.06 ***GROUPING***

Section 3D1.2 of the guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together." The purpose is to impose "incremental punishment for significant additional criminal conduct," but at the same time prevent double punishment for essentially the same conduct. ***United States v. Seligsohn***, 981 F.2d 1418, 1425 (3d Cir. 1992); ***United States v. Toler***, 901 F.2d 399, 402 (4th Cir. 1990).

Section 3D1.2 permits grouping when: (a) the counts involve the same victim and the same act or transaction; (b) the counts involve the same victim and two or more acts connected by a common criminal objective or a common scheme; (c) one of the counts is treated as a specific offense characteristic related to another count; or (d) when the offense level is determined largely on the basis of the total amount of harm or loss. Subsection 3D1.2(d) lists a number of offenses, including tax offenses, which are to be included in the category of offenses that have the offense level determined by loss, and a list of offenses specifically excluded from the operation of that subsection. In other words, the section "divides offenses into three categories: those to which the section specifically applies; those to which it specifically does not apply; and those for which grouping may be appropriate on a case-by-case basis." ***United States v. Gallo***, 927 F.2d 815, 823 (5th Cir. 1991). In victimless crimes, "'the grouping decision must be based primarily upon the nature of the interest invaded by each offense.'" ***Gallo*** 927 F.2d at 824 (citing USSG §3D1.2(d), comment. (n.2)).

Thus, money laundering and counts involving the failure to file currency transaction reports can be grouped, and the appropriate offense level determined by the aggregated quantity of money involved in all the grouped counts. ***United States v. Shin***, 953 F.2d 559, 562 (9th Cir. 1992), *cert.*

denied, 113 S. Ct. 2933 (1993). The Eleventh Circuit has suggested that grouping might be appropriate for counts involving both embezzlement and fraud. ***United States v. Harper***, 972 F.2d 321, 322 (11th Cir. 1992).

Grouping is not appropriate under section 3D1.2 when the guidelines measure harm differently. ***United States v. Taylor***, 984 F.2d 298, 303 (9th Cir. 1993) (holding that wire fraud and money laundering do not group); ***United States v. Johnson***, 971 F.2d 562, 576 (10th Cir. 1992) (holding that, because wire fraud measures the harm based on the loss resulting from the fraud and money laundering measures harm on the basis of the value of the funds, the two crimes do not group). The Third Circuit has held that grouping is inappropriate in a case involving both fraud and tax evasion. ***United States v. Astorri***, 923 F.2d 1052, 1056 (3d Cir.), *cert. denied*, 112 S. Ct. 444 (1991); *accord* ***Seligsohn***, 981 F.2d at 1425. The Second Circuit has determined that "the laws prohibiting perjury and tax evasion protect wholly disparate interests and involve distinct harms to society." ***United States v. Barone***, 913 F.2d 46, 50 (2d Cir. 1990). Thus, the two crimes cannot be grouped for sentencing purposes. ***Barone***, 913 F.2d at 50.

At least one circuit has found that verdicts entered at different times can be grouped for sentencing purposes. *See* ***United States v. Kaufman***, 951 F.2d 793 (7th Cir. 1992), *cert. denied*, 113 F.2d 2350 (1993). In ***Kaufman***, the defendant was indicted on four counts of money laundering and one count of attempted money laundering. At trial, the jury acquitted the defendant of counts one and two, convicted on count five, and was unable to reach a verdict on counts three and four. The court declared a mistrial as to counts three and four, leaving them unresolved. The sentencing court sentenced on count five, and the defendant appealed. The appellate court found that count five could be grouped for sentencing with counts three and four, if necessary, when counts three and four were resolved. ***Kaufman***, 951 F.2d at 796.

5.07 ***OBSTRUCTION OF JUSTICE***

The guidelines require a two-level increase in the offense level when the court finds that a defendant "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of his offense." USSG §3C1.1. Case law provides a variety of scenarios which justify an obstruction of justice enhancement. A defendant's failure to furnish a probation officer with information concerning the defendant's financial status when it was necessary to determine the defendant's ability to pay a fine or restitution is obstruction of justice. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990). It is obstruction of justice for a defendant to tell a witness to lie. ***United States v. Hollis***, 971 F.2d 1441, 1460 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993). It is obstruction of justice to make false statements to investigating agents and to falsify records or to prepare a false document which is used as evidence at trial. ***United States v. August***, 984 F.2d 705, 714 (6th Cir. 1992). Delaying trial by making false representations of a codefendant's health warrants the obstruction enhancement. ***United States v. Morphew***, 909 F.2d 1143, 1146 (8th Cir. 1990).

The Second Circuit has held that backdating a promissory note warrants an obstruction of justice enhancement. ***United States v. Coyne***, 4 F.3d 100, 114 (2d Cir. 1993). In ***Coyne***, the defendant was convicted of numerous charges including mail fraud and bribery, but was acquitted of a tax evasion which charged him with not reporting $30,000 which was reflected by a backdated note. The defendant argued that the jury must have concluded that the transaction was a loan and that he, therefore, did not obstruct the Internal Revenue Service investigation. The court found that the proof of the crime had to be supported beyond a reasonable doubt, but that the burden of proving obstruction of justice was by a preponderance of the evidence. Thus, the court "was free to find that the backdating was an intentional attempt to thwart the investigation of a bribe." ***United States v. Coyne***, 4 F.3d at 114.

The Supreme Court has held that when a defendant perjures himself on the stand, the court is warranted in enhancing the defendant's offense level for obstruction of justice. ***United States v.***

Dunnigan, 113 S. Ct. 1111, 1117 (1993). The trial court in so doing, however, must make findings on the record which encompass all of the factual predicates for a finding of perjury. ***Dunnigan***, 113 S. Ct. at 1117. The Court indicated that perjury requires: (1) the giving of false testimony; (2) concerning a material matter; (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. ***Dunnigan***, 113 S. Ct. at 1116. *Compare* ***United States v. Rubio-Topete***, 999 F.2d 1334, 1341 (9th Cir. 1993) (rejecting two-level enhancement for obstruction of justice in absence of factual findings by the sentencing court encompassing all of the factual predicates necessary for a finding of perjury).

Some courts have rejected a two-level enhancement for obstruction of justice for untruthful statements which are not made under oath and do not mislead or impede an investigation. The Tenth Circuit found that statements made to IRS agents denying the existence of bank accounts or taxable income amounted to "nothing more than a denial of guilt or `an exculpatory no.'" ***United States v. Urbanek***, 930 F.2d 1512, 1515 (10th Cir. 1991). *Accord* ***United States v. Shriver***, 967 F.2d 572, 575 (11th Cir. 1992) (statements made to IRS inspector which do not *significantly* obstruct or impede investigation do not warrant enhancement).

Note, however, that this enhancement cannot be applied for behavior constituting contempt of court when the defendant has been convicted of contempt for his behavior unless significant further obstruction occurred. USSG §3C1.1, comment. (n.6); ***United States v. Williams***, 922 F.2d 737, 739 (11th Cir.), *cert. denied*, 112 S. Ct. 258 (1991).

5.08 *ACCEPTANCE OF RESPONSIBILITY*

Section 3E1.1 allows the district court to reduce the offense level by two "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. . ." USSG §3E1.1(b). [10] A defendant may receive this reduction in offense level whether he pleads guilty or proceeds to trial. ***United States v. Mourning***, 914 F.2d 699, 705 (5th Cir. 1990). This reduction does not apply, however, to a defendant who denies the essential elements of the crime at trial. USSG §3E1.1, comment. (n.3). A defendant who enters a guilty plea is not entitled to an adjustment pursuant to 3E1.1 as a matter of right. USSG §3E1.1, comment. (n.3). The burden is on the defendant to demonstrate his acceptance of personal responsibility. ***Mourning***, 914 F.2d at 705; ***United States v. Lublin***, 981 F.2d 367, 370 (8th Cir. 1992). The guideline requires a showing of sincere contrition on the defendant's behalf in order to warrant such a reduction. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990). The range of conduct upon which a court may base its decision varies in the different circuits.

The commentary suggests that voluntary payment of restitution prior to adjudication of guilt may be evidence of acceptance of responsibility. USSG §3E1.1, comment. (n.1(b)). No acceptance of responsibility is demonstrated, however, by defendants who agree to payment of restitution in order to avoid forfeiture. ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993).

One question that divided the courts prior to the November 1, 1992, amendments was whether a defendant had to accept responsibility for all of his relevant conduct or only for the behavior associated with the crime of conviction. Some courts held that to require a defendant to admit to behavior beyond the crime of conviction would require a defendant to incriminate himself in violation of his Fifth Amendment privilege.

Generally, courts which found Fifth Amendment implications based their decisions on a line of Supreme Court cases holding that the government "may not impose substantial penalties because [an individual] elects not to exercise his Fifth Amendment right not to give incriminating testimony against himself." ***Lefkowitz v. Cunningham***, 431 U.S. 801, 805 (1977). Thus, according to these courts, a sentencing court could not condition the acceptance of responsibility reduction on admissions of conduct for which a defendant had not been convicted. *See, e.g.*, ***United States v. Perez-Franco***, 873 F.2d 455, 463 (1st Cir. 1989); ***United States v. Oliveras***, 905 F.2d 623, 632 (2d Cir. 1990); ***United States v. Frierson***, 945 F.2d 650, 659-60 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1515 (1992); ***United States v. Piper***, 918 F.2d 839, 841 (9th Cir. 1990).

Other circuits held that section 3E1.1 required a defendant to accept responsibility for all of his relevant conduct. These circuits:

> [A]void[ed] the impact of the Supreme Court's so-called "penalty cases" by distinguishing between a "denied benefit" and a "penalty." These circuits hold that denial of the two-level reduction does not constitute a penalty and thus does not implicate the Fifth Amendment.

United States v. Clemons, 999 F.2d 154, 159 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 707 (1994). *See* ***United States v. Frazier***, 971 F.2d 1076, 1084 (4th Cir. 1992), *cert denied*, 113 S. Ct. 1028 (1993); ***United States v. White***, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989); ***United States v. Saunders***, 973 F.2d 1354, 1362 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1026 (1993); ***United States v. Henry***, 883 F.2d 1010, 1011 (11th Cir. 1989).

The amendments which became effective November 1, 1992, clearly provide that "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction" for acceptance of responsibility. USSG §3E1.1, comment. (n.1(a)). "However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility . . . ." *Id. See* ***United States v. Hicks***, 978 F.2d 722, 726 (D.C. Cir. 1992).

5.09 ***DEPARTURES***

5.09[1] ***Departures for Aggravating or Mitigating Circumstances***

A guidelines sentence is mandatory, and departure is justified only as stated in 18 U.S.C. § 3553(b). The only circumstance justifying departure from the "mechanical dictates" of the guidelines is when the court finds that there exists an "aggravating or mitigating circumstance of a kind, or to a degree," which was not adequately taken into consideration by the Sentencing Commission. ***Burns v. United States***, 111 S. Ct. 2182, 2184-85, (1991).

The court first determines the Guideline sentence and then considers whether there is an aggravating or mitigating circumstance. ***United States v. Davern***, 970 F.2d 1490, 1493 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993). The defendant bears the burden of proof to establish any factors which would potentially reduce the sentence. ***United States v. Urrego-Linares***, 879 F.2d 1234, 1238 (4th Cir.), *cert. denied*, 439 U.S. 943 (1991). The sentencing court must state the specific reasons for the departure and the sentence imposed must be reasonable in light of the articulated reasons. ***United States v. Mourning***, 914 F.2d 699, 707-8 (5th Cir. 1990). A court may satisfy the requirement to state specific reasons for the departure by adopting legally sufficient facts as set forth in a presentence report. ***United States v. Dale***, 991 F.2d 819, 856-57 (D.C. Cir. 1993). *Cf.* ***United States v. Charroux***, 3 F.3d 827, 836 (5th Cir. 1993).

Courts have suggested that gang or organized crime connections can provide an appropriate basis for upward departure. ***United States v. Thomas***, 906 F.2d 323, 328 (7th Cir. 1990); ***United States v. Cammisano***, 917 F.2d 1057, 1064 (8th Cir. 1990). Courts consistently have held that ordinary family responsibilities do not warrant downward departure. ***United States v. Johnson***, 964 F.2d 124, 128 (2d Cir. 1992) (citing cases). However, extraordinary family circumstances have been accepted as a valid reason for departure. ***Johnson***, 964 F.2d at 128. *But see* ***United States v. Thomas***, 930 F.2d 526, 530 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991). A court cannot make an upward departure because it finds the defendant, who was a judge and lawyer, violates a special duty to the community because of his position. ***United States v. Barone***, 913 F.2d 46, 50 (2d Cir. 1990).

Rule 32, F.R.Crim.P., requires a district court to furnish reasonable notice to the parties of its intent to depart from the guidelines and to identify with specificity the ground on which it is contemplating a departure. ***Burns v. United States***, 111 S. Ct. 2182, 2187 (1991).

5.09[2] ***Departure Based on Substantial Assistance to Authorities***

Section 5K1.1 permits the sentencing court, upon motion by the government, to depart from the guidelines. The government motion must state that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense. The appropriate reduction shall be determined by the court for reasons stated, that may include the following considerations:

> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;[11]
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

USSG §5K1.1. Substantial assistance is directed to the investigation and prosecution of persons other than the defendant, while acceptance of responsibility is directed to the defendant's own affirmative recognition of responsibility for his own conduct.

USSG §5K1.1, comment. (n.2).

The Supreme Court has held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," such as race or religion. ***Wade v. United States***, 112 S. Ct. 1840, 1843-44 (1992). The Court also noted that a defendant must make a substantial threshold showing of improper motive to be entitled to discovery or an evidentiary hearing. ***Wade***, 112 S. Ct. at 1844. A mere showing of assistance is not sufficient grounds for relief. ***Wade***, 112 S. Ct. at 1844. The government is not obligated to move for departure merely because the defendant assisted in the prosecution of a codefendant. ***United States v. Mesa-Rincon***, 911 F.2d 1433 (10th Cir. 1990).

5.10 *TAX DIVISION POLICY*

It has long been a priority of the Tax Division to pursue vigorous prosecution of a wide range of tax crimes to deter taxpayer fraud and to foster voluntary compliance. Consistent with this long-standing priority, the Tax Division has issued a number of statements concerning policy and procedures regarding pleas and sentencing, including the Sentencing Guidelines.

5.11 *PLEA AGREEMENTS*

5.11[1] *Plea Agreements and Major Count Policy for Offenses Committed Before November 1, 1987*

In cases involving offenses committed prior to November 1, 1987, the overwhelming percentage of all criminal tax prosecutions were disposed of by a plea of guilty. The transmittal letter forwarding the case from the Tax Division to the United States Attorney specifies the count(s) deemed to be the major count(s). In these cases, only a few of which remain, the U.S. Attorney's office, without prior approval of the Tax Division, is authorized to accept a plea of guilty with respect to the major count(s). USAM 6-4.310 (Major Count Policy).

In these cases, the designation by the Tax Division of a count as a major count is premised on the following considerations:

a. Felony counts take priority over misdemeanor counts;

b. Tax evasion counts (26 U.S.C. § 7201) usually take priority over other counts;

c. Where a conspiracy (*e.g.* 18 U.S.C. § 371) and substantive tax counts are authorized, the circumstances of the case will determine whether the conspiracy or a substantive tax count is designated as the major count;

d. As between counts under the same statute, the count involving the greatest financial detriment to the United States (*i.e.*, the greatest additional tax due and owing) will be considered the major count; and

e. When there is little difference in financial detriment between counts under the same statute, the determining factor will be the relevant flagrancy of the offense.

USAM 6-4.310.

5.11[2] ***Plea Agreements and Major Count Policy for Offenses Committed After November 1, 1987***

As is true with tax offenses committed prior to November 1, 1987, the transmittal letter from the Tax Division to the United States Attorney's office for offenses committed after that date will designate one of the counts as the major count. Thereafter, the U.S. Attorney's office, without prior approval of the Tax Division, is authorized to accept a plea of guilty with respect to the major count. The only difference lies in the way in which the major count is selected.

On December 17, 1990, the Tax Division issued a "bluesheet" which sets forth the application of the Major Count Policy in Sentencing Guidelines Cases. USAM 6-4.311. The "bluesheet" coordinates the Major Count Policy with the Department of Justice's plea policy for Guideline cases as delineated in former Attorney General Thornburgh's Memorandum to Federal Prosecutors of March 13, 1989. The Department's plea policy provides that a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. [12] Thereafter, charges are not to be dismissed or dropped pursuant to a plea

bargain unless the prosecutor has a good faith doubt as to the government's ability to prove readily a charge for legal or evidentiary reasons. There are two exceptions to this policy. First, if the applicable Guideline range from which a sentence may be imposed would remain unaffected, readily provable charges may be dropped as part of the plea bargain. Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. Attorney General Thornburgh's Memorandum to Federal Prosecutors of March 13, 1989, at page 3.

Under the Sentencing Guidelines, sentencing ranges in criminal tax cases are primarily determined by the amount of "tax loss." The relevant "tax loss" includes the tax loss caused by the offense or offenses of conviction, plus the tax loss from any other year that is part of the same course of conduct or common scheme or plan as the offense of conviction. USSG §§2T1.1(a), 1B1.3(a)(2), and 2T1.1, comment. (n.3). Thus, according to the "bluesheet" regarding application of the Tax Division's Major Count Policy in Sentencing Guideline cases, the following considerations apply in selecting the major count:

a. In the majority of cases, where the tax offenses are all part of the same course of conduct or a common scheme, the Tax Division will designate a single Guideline year as the major count (even if there is a mix of Guideline and pre-Guideline year counts, because the tax loss from all years is taken into account in determining the tax loss of the offense to which a defendant pleads).

b. Where all of the tax charges are not part of the same course of conduct or common scheme, the Tax Division may either designate as major counts one count from each group of unrelated counts or designate one count from one of the groups of unrelated counts as the major count and have the prosecutor obtain a stipulation from the defendant establishing the commission of the offenses in the other group. *See* USSG §1B1.2(c). Guideline year counts will take precedence over pre-Guideline year counts.

c. Designation of more than a single year as the major count

may be required also where the computed Guideline sentencing range exceeds the maximum sentence that can be imposed under a single count.

d. A pre-Guideline year count will be selected as the major count, in addition to a Guideline year count, only if it was not part of the same course of conduct or common scheme *and* there is a significant reason for taking a plea to that count, *e.g.*, when the amount involved in the unrelated pre-Guideline year count is substantially greater than the amount in any Guideline year count.

e. In cases involving both tax and non-tax charges, the Tax Division may designate a less serious tax offense as the major count if (1) there is sufficient information to establish that it will not affect the applicable Guideline range *and* (2) there is adequate justification for a deviation from the usual policy.

USAM 6-4.310.

In the event that a defendant indicates in advance of indictment or the filing of an information that he intends to plead guilty to the major count, an indictment is still to be sought, or an information filed, which includes all counts authorized for prosecution. This procedure ensures that the public record contains all the offenses that were authorized. The government's statement of the factual basis for the prosecution, as required by Rule 11 of the Federal Rules of Criminal Procedure, will then include the full extent of defendant's conduct and intent. USAM 6-4.310. After a defendant's guilty plea to a major count has been accepted by the court and sentencing has occurred, the remaining counts of the information or indictment may be dismissed. USAM 6-4.310.

5.11[3] ***Nolo Contendere Pleas***

Tax Division policy requires all government attorneys to oppose the acceptance of *nolo contendere* pleas. When pleading "*nolo*," the defendant may create the impression that the government has only a technically adequate case which he elects not to contest. A guilty plea is preferred because it strengthens the government position when the defendant contests a civil fraud penalty in an ancillary proceeding, and a *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. A *nolo* plea may be unopposed by a federal prosecutor in only the most unusual case and *the Assistant Attorney General of the Tax Division must approve its acceptance.* USAM 6-4.320.

5.11[4] ***"Alford" Pleas***

In the landmark case of ***North Carolina v. Alford***, 400 U.S. 25 (1970), the Supreme Court upheld the validity of accepting a plea of guilty by a defendant who pleads guilty while maintaining his innocence. Despite such authority, U.S. government attorneys are to oppose the acceptance of "Alford" pleas because the entry of such pleas may create the appearance of prosecutorial overreaching. Again, only under the most unusual circumstances can a prosecutor agree to such a plea, and *the plea must be approved by the Assistant Attorney General, Tax Division*. USAM 6-4.330.

5.11[5] ***Pleas by Corporations***

Charges against an individual defendant will not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal. USAM 9-2.146.

5.12 *TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE*

Rule 20 of the Federal Rules of Criminal Procedure provides a procedure whereby a defendant who is arrested, held, or present in a district other than the district in which a case is pending against him can waive trial and enter a guilty plea or nolo plea in the district in which he is arrested, held, or present. Any proposed transfer must be approved by the United States Attorney for each district.

Some defendants have misused this provision as part of a plan to forum shop and have their cases transferred to what they believe to be a more lenient court. For this reason, it is requested that prior to consenting to any transfer under Rule 20 in a criminal tax case, United States Attorneys secure authorization from the Tax Division, which may have information as to the reason for the requested transfer that is not available to the United States Attorneys involved.

5.13 ***SENTENCING***

5.13[1] ***Departures from the Guidelines***

As noted above, the sentencing court is required to impose a sentence within the range specified by the guidelines unless it finds an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines. Tax Division attorneys may recommend, without further approval, a departure, either upward or downward, based on any of the factors listed in section 5K2 of the guidelines. However, within the Tax Division, approval of the appropriate Section Chief is required for an attorney to seek either: (a) a downward departure under section 5K1.1 for substantial assistance to authorities; or (2) an upward or downward departure for any factor other than one of those set out in section 5K2. *See* Tax Division Memorandum, March 31, 1992, regarding *"Bluesheet" Concerning Plea Procedures* contained in Section 3.00 of this Manual. Prior to making such a recommendation, the Tax Division attorney must consult with the local U.S. Attorney's office to insure that the proposed departure is consistent with the policy of that office. Assistant United States Attorneys who are handling tax cases should abide, of course, by the procedures established in their offices for complying with the requirements of the February 7, 1993, "bluesheet," affecting USAM 9-27.451. Under no circumstances, however, will the government attorney in a tax case recommend that there be no period of incarceration. USAM 6-4.340.

5.13[2] ***Costs of Prosecution***

The principal substantive criminal tax offenses (*i.e.*, 26 U.S.C. §§ 7201, 7203, 7206(1) and (2)) provide for the mandatory imposition of costs of prosecution upon conviction. Courts increasingly are recognizing that the imposition of costs in such criminal tax cases is mandatory and constitutional. *See, e.g.*, ***United States v. Saussy***, 802 F.2d 849 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Fowler***, 794 F.2d 1446 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); ***United States v. Chavez***, 627 F.2d 953 (9th Cir. 1980); ***United States v. Palmer***, 809 F.2d 1504 (11th Cir. 1987).

The policy statement on costs of prosecution in section 5E1.5 of the guidelines states that "[c]osts of prosecution shall be imposed on a defendant as required by statute." The commentary to section 5E1.5 states that "[v]arious statutes *require* the court to impose the costs of prosecution" and identifies 26 U.S.C. §§ 7201, 7202, 7203, 7206, 7210, 7213, 7215, and 7216 as being among the statutes requiring the imposition of costs. USSG §5E1.5, comment. (backg'd.) (emphasis added). In addition, section 8E1.3 authorizes the court to impose the costs of prosecution on an organization. The Tax Division strongly recommends that attorneys for the government seek costs of prosecution in criminal tax cases. USAM 6-4.350.

5.13[3] ***Appeal of Sentences***

Under prior practice, the sentence imposed by a district court judge was essentially unreviewable unless it was clearly outside the sentence authorized by statute. Section 3742 of Title 18, United States Code, now permits sentences imposed under the Federal Sentencing Guidelines to be appealed by both the defendant and the government under certain circumstances. The government may appeal a sentence in the following four situations:

a. When the sentence is imposed in violation of law;

b. When the sentence is imposed as a result of an incorrect application of the guidelines;

c. When the sentence is less than the sentence specified in

the applicable guidelines range; or

d. When the sentence is imposed for an offense for which there is no Sentencing Guideline and the sentence is plainly unreasonable.

18 U.S.C. § 3742(b)(1)-(4). Government appeal of a sentence is not authorized for a sentence within the correct sentencing Guideline or for a sentence above the guidelines even when there is an honest belief that the sentence is too low.

The government may file a notice of appeal in district court for review of an otherwise final sentence. However, any further actions require the approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General. *Department of Justice Memorandum of November 3, 1987, Interim Sentencing Advocacy and Case Settlement Policy Under New Sentencing Guidelines,* Stephen S. Trott, Associate Attorney General (hereinafter "*Trott Memorandum*").

Recommendations to the Solicitor General for government appeals of sentences on tax counts must be processed through the Tax Division, which should be notified immediately of any adverse sentencing decision. To assure consistent implementation of the guidelines, a government attorney in a tax case should notify the Tax Division of any "*significant* sentencing issue raised on appeal by a defendant that could pose a problem for the Department." *Trott Memorandum* (emphasis in original). The designated person to contact is the chief of the Criminal Appeals and Tax Enforcement Policy Section (CATEPS). The current telephone number is (202) 514-3011.

A notice of appeal must be filed within 30 days of the imposition of the sentence. Therefore, the government attorney who wishes to appeal an adverse sentencing decision should make the recommendation to the Tax Division along with accompanying documentation within seven days of the imposition of sentence. *Trott Memorandum*.

5.14 ***RESOLUTION OF CIVIL LIABILITY DURING THE CRIMINAL CASE***

5.14[1] ***As Part of a Plea Agreement***

Statutory authority exists for the Attorney General or his delegate to enter into agreements to compromise civil tax liability in cases referred to the Department of Justice. 26 U.S.C. § 7122(a). As a matter of longstanding policy, however, this authority is rarely exercised. USAM 4.360. The reason for this policy is to avoid the appearance that the criminal process is being used to aid in the collection of civil tax liabilities.

It is the Department's view that, in a criminal tax case, collection of the related civil liabilities, including fraud penalties, is a matter entirely separate from the criminal aspects of the case. The U.S. Attorney's Manual directs that "settlement of the civil liability [be] postponed until after the sentence has been imposed in the criminal case, except where the court chooses to defer sentence pending the outcome of such settlement." In this event, the IRS should be notified so that it can begin civil negotiations with the defendant. USAM 6-4.360.

The Tax Division may accept a plea agreement which includes certain civil admissions by the defendant: [13]

1. An admission by the defendant that he received enumerated amounts of unreported income or claimed enumerated amounts of illegal deductions or improper credits for years set forth in the plea agreement.
2. A stipulation by the defendant that he is liable for the fraud penalty imposed by the Code (formerly section 6653 and now section 6663) on the understatements of liability for the years involved. [6]
3. An agreement by the defendant that he or she will file, prior to the time of sentencing, initial or amended

[6] Normally, this stipulation should be required in any case in which the charges are for attempted evasion of tax, as well as in any case in which the charges are for filing false tax returns which understate tax liability. It may be more difficult to justify the inclusion of such a stipulation in a failure to file case (26 U.S.C. § 7203), since proof of a tax liability is not an element of the government's proof and a conviction, therefore, would not collaterally estop the defendant from contesting the fraud penalty. Nevertheless, it is within the discretion of the prosecutor to insist upon such a stipulation in a failure to file case where there, in fact, has been an understatement of tax liability.

> personal returns for the years subject to the above admissions, correctly reporting all previously unreported income and correcting all improper deductions and credits previously claimed, will,if requested, provide the Internal Revenue Service information regarding the years covered by the returns, and will pay at sentencing all additional taxes, penalties and interest which are due and owing. Such an agreement should also include a provision that the defendant agrees promptly to pay any additional amounts determined to be owing which result from computational errors. Finally, the agreement should include a provision that nothing in the agreement should be construed to foreclose the Internal Revenue Service from examining and making adjustments to the returns involved after they are filed.
>
> 4. An agreement by the defendant that he will not thereafter file any claims for refund of taxes, penalties, or interest for amounts attributable to the returns filed incident to the plea.

See Memorandum, United States Department of Justice, Tax Division, *Civil Settlements in Plea Agreement*, June 3, 1993.

5.14[2] ***Payment of Taxes as Acceptance of Responsibility***

The Tax Division recognizes that the Federal Sentencing Guidelines encourage a defendant to initiate payment of his taxes during the criminal case. The guidelines provide for a two-level reduction of the base offense level if the defendant shows "acceptance of personal responsibility" for his conduct. USSG §3E1.1.

The Tax Division considers the defendant's payment of tax liability to be one factor in determining whether to recommend a reduction in offense level based upon the defendant's acceptance of responsibility. Other factors may include: (1) voluntary termination or withdrawal from criminal conduct or associations; (2) voluntary and truthful admissions to authorities; (3) voluntary surrender to authorities; (4) voluntary assistance to authorities in recovering the fruits of the offense; and (5) the timeliness of defendant's conduct in manifesting acceptance of

responsibility. *See* USSG §3E1.1, comment. (n.1).

The defendant should initiate the process of resolving his tax liability during the pendency of the criminal case. The Tax Division will consider favorably the filing of a truthful and complete amended tax return accompanied by the payment of the tax due in determining whether to recommend the "acceptance of responsibility" sentence reduction. J. Bruton, Federal Tax Enforcement Tax Division Policies and Priorities, American Bar Association National Institute, White Collar Crime, (1993).

5.15 ***THE 1993 SENTENCING GUIDELINE AMENDMENTS***

The 1993 Guideline amendments, effective November 1, 1993, demonstrate an intent to increase the base offense level for tax loss and to clarify the meaning of the term "tax loss."

The changes will apply to crimes committed on or after November 1, 1993, and to offenses beginning before that date and continuing after that date. Because the penalties may be harsher than in prior years, the *ex post facto* prohibition might prevent use of the changes for sentencing for conduct occurring in years prior to the changes. Thus, prosecutors may continue to work with older editions of the guidelines for some years to come.

Because the November 1, 1993, changes have been in effect for only a few months, there is little, if any, case law interpreting them. Undoubtedly, problems and questions will arise as the new guidelines are applied. To insure a consistent approach, prosecutors are encouraged to contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-3011 with any questions.

5.15[1] ***The Amendment of the Sentencing Table***

When the guidelines initially were promulgated, the Sentencing Table's Zone A, Criminal History Category I, included offense levels one through six, inclusive. A large number of criminal tax cases fell in Zone A. In addition, most defendants convicted of a legal source income tax crime have no prior criminal history and, thus, are in Criminal History Category I. Thus, a large number of defendants convicted of tax crimes were eligible to receive a sentence of probation.

In 1992, in an effort to expand alternatives to incarceration in response to judicial complaints and prison overcrowding, the Commission amended the sentencing table and expanded Zone A to include two additional offense levels. Accordingly, the current sentencing table's Zone A, Criminal History Category I, includes offense levels one through eight. Each of these offense levels provides a sentencing range of from zero to six months incarceration and permits the courts to impose a sentence of probation. When the 1992 amendment to the Sentencing Table was made, no corresponding adjustment was made to the offense levels of the Tax Table of section 2T4.1. As a result, the number of those convicted of tax crimes who could receive a sentence of probation increased significantly.

In fashioning the 1993 tax amendments to the guidelines, the Commission had as its stated purpose "to provide increased deterrence for tax offenses." USSG App. C, Amend. 491, p.338. The proposed amendments, in essence, increased the Tax Tables by two levels throughout. This has the effect of (1) increasing the average period of incarceration by six months,[14] and (2) reducing the likelihood that a tax crime defendant will receive an alternative type of incarceration.

5.15[2] ***Amendment Regarding Tax Loss***

Under the guidelines as they existed prior to November 1, 1993, the determination of "tax loss" was dependent upon the definition in the particular offense guideline. For example, tax loss was defined for tax evasion in section 2T1.1 and for the filing of a false return in section 2T1.3. The post-November 1, 1993, guidelines consolidate several tax guidelines (sections 2T1.1, 2T1.2, 2T1.3 and 2T1.5) and adopt a uniform definition of "tax loss." The stated reason for this amendment is to eliminate "the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others." USSG App. C, Amend. 491, p.338. Section 2T1.1 creates a uniform definition of tax loss and applies to tax evasion, willful failure to file returns, supply information or pay a tax, and to fraudulent or false returns, statements, or other documents.

The new section 2T1.1 guideline gives special instructions which define the focus for calculating "tax loss" for attempted income tax evasion and filing false returns as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Notes then follow which create "presumptions" a court is to use in calculating "tax loss" in various situations. *See* USSG §2T1.1(c) Notes (A)-(C). *See also* USSG §2T1.1, comment. (n.1). The new section 2T1.1 guideline also defines "tax loss" for failure to file offenses (USSG §2T1.1(c)(2)), failure to pay offenses (USSG §2T1.1(c)(3)), and offenses involving improperly claiming a deduction (USSG §2T1.1(c)(4)). The commentary to USSG §2T1.1 provides that:

> In determining the tax loss attributable to the offense, the court should use as many methods as set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstance of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

USSG §2T1.1, comment. (n.1). The "presumptions" set out in §2T1.1(c) for calculating "tax loss" are to be used "unless the government or defense provides sufficient information for a more

accurate assessment of tax loss." USSG §2T1.1, comment. (n.1). [15]

5.15[3] ***Other Amendments to the Tax Guidelines***

5.15[3][a] ***Tax Loss For Individual and Corporate Liabilities***

An additional new Application Note to section 2T1.1 states:

> If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

USSG §2T1.1, comment. (n.7). This amendment to the Application Notes is most likely a clarification of existing law rather than a substantive change. *See* ***United States v. Harvey***, 996 F.2d 919, 920 (7th Cir. 1993).

5.15[3][b] ***Tax Protestors***

The Commentary to section 2T1.9 makes clear that some acts by tax protestors may warrant an enhancement under the specific offense characteristic provided in section 2T1.9(b)(2).

> Subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (*e.g.*, an offense involving a "tax protest" group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes).

Thus, conspiracies, including tax protest groups, which commit acts designed to encourage others to violate the tax laws will receive a two-level sentencing increase.

5.15[3][c] ***Income from Criminal Activity***

Section 2T1.1(b)(1) provides for a two-level enhancement "[i]f the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity." Prior to the amendments of November 1, 1993, "criminal activity" was defined as "any conduct constituting a criminal offense under federal, state or local law." The commentary to section 2T1.1 now provides, however, that "'criminal activity' means any conduct constituting a criminal offense

under federal, state, local, or foreign law." USSG §2T1.1, comment. (n.3). Presumably, this amendment was in response to the Ninth Circuit's opinion in ***United States v. Ford***, 989 F.2d 347 (9th Cir. 1993), holding that a court could not increase a defendant's base offense level pursuant to section 2T1.2(b)(1) for failure to report income derived from criminal activity in Canada.

1.. To determine which version of a particular Guideline was effective on a specific date, refer to the "Historical Note" at the end of the applicable Guideline. It will state the effective date of that Guideline and give reference to earlier versions which are reprinted in Appendix C of the Sentencing Guidelines.

2.. *See* Section 5.11[2], *infra*.

3.. Major changes to the definition of "tax loss" went into effect on November 1, 1993. *See* Section 5.15, *infra*. Because those changes are so recent, there is little case law applying the new guidelines. Consequently, most of the ensuing discussion deals with the guidelines as they existed prior to the November 1, 1993, amendments. In many cases, the guidelines that antedate November 1, 1993, will be the ones applied in any event because of *ex post facto* considerations.

4.. *See* n.3, *supra*.

5.. *But see* n.3, *supra*.

6.. *But see* n.3, *supra*.

7.. *But see* n.3, *supra*.

8.. *See* Section 17.09 of this Manual.

9.. *But see* n.3, *supra*.

10.. Effective November 1, 1992, the guidelines were amended to permit the sentencing court to reduce the offense level by three levels if two conditions are present: (a) the offense level is 16 or greater; and (b) the defendant has assisted authorities in the investigation or prosecution of his own misconduct. USSG §3E1.1(b).

11.. In making any evaluation on whether to make a downward departure, the court considers "the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1. Thus, when the defendant's assistance in an investigation became almost useless when the target of the investigation died, the court was within its discretion to consider that fact in determining the extent of any departure. ***United States v. Spiropoulos***, 976 F.2d 155, 162 (3d Cir. 1992).

12.. On October 12, 1993, Attorney General Reno issued a "bluesheet" intended to provide guidance with respect to 9-27.130; 9-27.140; 9-27.300 and 9-27.400 concerning Principles of Federal Prosecution. The "bluesheet" informs prosecutors that:

> [I]n determining the most serious offense that is consistent with the nature of the defendant's conduct . . . it is appropriate [to consider] such factors as the sentencing

> guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. *Note that these factors may also be considered by the attorney for the government when entering into plea agreements.*

Attorney General Reno, Memorandum dated October 12, 1993, affecting USAM § 9-27.000 regarding Principles of Federal Prosecution (emphasis added).

13.. Although it is not mandatory, the Tax Division strongly urges that any plea agreement in a tax case include these admissions and agreements.

14.. For example, a tax loss of more than $10,000 in the Tax Table in effect prior to November 1, 1993, is a level 9 with a sentencing range of 4-10 months. Under the Tax Table which went into effect on November 1, 1993, a tax loss of over $8,000 but less than $13,500 is a level 10 with a sentencing range of 6-12 months.

15.. It is the position of the Tax Division that the defendant should not be permitted to rely on this language to support the introduction of information tending to show that there was no actual tax loss. "Tax loss" is a term of art in the guidelines and the term should not be used interchangeably in one provision to mean both actual tax loss and some other amount. In other words, the language "unless a more accurate determination of the tax loss can be made" (*see* USSG § 2T1.1(c), Note (a)) does not mean the defendant can introduce evidence to show that there was no actual tax loss, but only that information can be provided which establishes that the calculated amount was not the amount that was "the object of the offense." For example, a defendant should not be entitled to come in and show that he had deductions which he forgot to claim.

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6.01 *GENERALLY*

6.01[1] *Constitutional and Statutory Provisions*

The Constitution and the federal laws of the United States grant defendants in criminal cases the right to be tried in the judicial district in which their offenses occurred. ***United States v. Maldonado-Rivera***, 922 F.2d 934, 968 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991); ***United States v. Griley***, 814 F.2d 967, 973 (4th Cir. 1987); ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990); ***United States v. Felak***, 831 F.2d 794, 798 (8th Cir. 1987).

Two provisions in the U.S. Constitution address this guarantee. Article III, section 2 of the U.S. Constitution states: "The trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, §2. The Sixth Amendment amplifies this guarantee and provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

U.S. Const. amend. VI.

Rule 18 of the Federal Rules of Criminal Procedure also provides for this guarantee:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.

Thus, the general rule is that a defendant in a criminal trial has the right to be tried in the district where the offense took place. An "exception" exists, however, for "continuing offenses" which are begun in one district and completed in another. ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). In these circumstances, the continuing offenses statute, 18 U.S.C. §3237(a), applies. This statute provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which the offense was begun, continued, or completed.

18 U.S.C. § 3237(a) (1988). Thus, under this statute the government has the option of prosecuting an offense in any district in which criminal activity took place. ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

While defendants have the right to be tried in the district where the offense took place, they do not have a right to trial in a particular division within that district. ***In re Chesson***, 897 F.2d 156, 158 (5th Cir. 1990). Rather, the courts apply a balancing test which weighs the convenience of the defendant and witnesses with the prompt administration of justice. 897 F.2d at 159.

6.01[2] ***Policy Considerations***

Prosecutors should be aware that it is the policy of the Department of Justice to generally attempt to establish venue for a criminal tax prosecution in the judicial district of the taxpayer's residence or principal place of business because prosecution in that judicial district usually has the most significant deterrent effect.

6.02 ***PROOF OF VENUE***

6.02[1] ***Government's Burden***

The government has the burden of proving venue as to each count charged against the defendant. ***United States v. Maldonado-Rivera***, 922 F.2d 934, 968 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991). Venue, however, is not an essential element of the government's case because failure to establish this element does not impact on the guilt or innocence of the defendant. ***United States v. Griley***, 814 F.2d 967, 973 (4th Cir. 1987); ***United States v. Netz***, 758 F.2d 1308, 1311 (7th Cir. 1987); ***United States v. Kaytso***, 868 F.2d 1020, 1021 (9th Cir. 1988).

As a result, unlike other elements of a crime which must be established beyond a reasonable doubt, venue need only be proved by a preponderance of the evidence. ***Maldonado-Rivera***, 922 F.2d at 968; ***Griley***, 814 F.2d at 973; ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987); ***United States v. Delgado***, 914 F.2d 1062, 1064 (8th Cir. 1990). Moreover, venue may be established either by direct or circumstantial evidence. ***Griley***, 814 F.2d at 973; ***Marrinson***, 832 F.2d at 1475; ***Netz***, 758 F.2d at 1311.

6.02[2] ***Waiver of Improper Venue***

The issue of improper venue may be waived if not timely raised by the defense. ***United States v. Netz***, 758 F.2d 1308, 1311 (8th Cir. 1985). Generally, where venue is improper on the face of an indictment, venue objections are waived if not made prior to trial. ***United States v. Black Cloud***, 590 F.2d 270, 272 (8th Cir. 1979). However, where the indictment contains a proper allegation of venue so that a defendant has no notice of a defect until the government rests its case, an objection is timely if made at the close of evidence. *Id*.

6.03 *VENUE IN TAX PROSECUTIONS*

6.03[1] *26 U.S.C. § 7201: Tax Evasion*

The courts have recognized that the crime of willfully attempting to evade or defeat a tax liability is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Felak***, 831 F.2d 794, 799 (8th Cir. 1987); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). As such, venue is proper in a section 7201 prosecution in any district where an act in furtherance of the crime was committed. This would include districts where the return was prepared, signed, mailed or filed. ***Slutsky***, 487 F.2d at 839; ***Felak***, 831 F.2d at 799; ***Marchant***, 774 F.2d at 891. In cases where a return was not filed, it would include districts where the affirmative acts of evasion took place. ***Slutsky***, 487 F.2d at 839; ***Felak***, 831 F.2d at 799; ***Marchant***, 774 F.2d at 891.

Notwithstanding the above rule, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7201 has the right to remove the case to the district where the defendant resided at the time the offense was committed if venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7201 cases, *see* Section 8.07, *infra*.

6.03[2] *26 U.S.C. § 7203: Failure to File*

Failure to file a tax return is a crime of omission. The place of venue for crimes of omission is any district where the duty could have been performed. ***United States v. Clines***, 958 F.2d 578, 583 (4th Cir.), *cert. denied*, 112 S. Ct. 2994 (1992); ***United States v. Garman***, 748 F.2d 218, 219 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

Section 6091 of Title 26 sets forth the places for filing individual income tax returns. Generally, a return must be filed either: (1) "in the internal revenue district in which is located the

legal residence . . . of the person making the return; or (2) "at a service center serving the internal revenue district referred to [above]." 26 U.S.C. § 6091(b)(1)(A) (1988). Thus, venue in a section 7203 prosecution is proper in either the district of residence or the district where the service center is located. ***Clines***, 958 F.2d at 583; ***Garman***, 748 F.2d at 219.

Notwithstanding the above rule, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7203 has the right to remove the case to the district where the defendant resided at the time the offense was committed. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7203 cases, *see* Section 10.04[7], *infra*.

6.03[3] ***26 U.S.C. § 7206(1): File False Tax Return***

The courts have recognized that the crime of willfully making or subscribing a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). As such, venue is proper in a section 7206(1) prosecution in any district where the false return was prepared and signed, even if filed and received elsewhere. ***United States v. Rooney***, 866 F.2d 28, 31 (2d Cir. 1989); ***Slutsky***, 487 F.2d at 839; ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987). Venue is also proper where the return was filed. ***Rooney***, 866 F.2d at 31; ***Slutsky***, 487 F.2d at 839.

Similarly, venue is proper in the district where the return preparer received information from the taxpayer, even though the taxpayer may have signed and filed the return in other districts. ***Rooney***, 866 F.2d at 31.

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7206(1) has the right to remove the case to the district where the defendant resided at the time the offense was committed where venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7206(1) cases, *see* Section 12.11, *infra*.

6.03[4] *26 U.S.C. § 7206(2): Aid in Preparation of False Return*

The courts have recognized that the crime of willfully aiding and assisting in the preparation of a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990). As such, venue is proper in a section 7206(2) prosecution in any district where the false return was prepared and signed, even though filed in another district. ***Hirschfeld***, 964 F.2d at 321; ***Bryan***, 896 F.2d at 72. Similarly, venue is proper in the district where the false return was filed. In addition, venue is proper in any district where the acts of aiding and assisting took place. ***Hirschfeld***, 964 F.2d at 321; ***Bryan***, 896 at 72.

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7206(2) has the right to remove the case to the district where the defendant resided at the time the offense was committed where venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7206(2) cases, *see* Section 13.08, *infra*.

6.04 *REMOVAL TO DISTRICT OF RESIDENCE*

6.04[1] *Section 3237(b)*

Section 3237(a) of Title 18 is the federal "continuing offenses" statute and allows the government certain discretion in establishing venue. Under section 3237(b), however, certain income tax violations are not subject to this discretion. Rather, the defendant is given the option to transfer venue to the district where he or she resided at the time the offense was committed. Section 3237(b) provides:

> Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code, or where venue for prosecution of an offense described in . . . section 7201 or 7206(1), (2) or (5) . . . is based solely on the mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the

> judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

18 U.S.C. § 3237(b) (1988). Thus, under section 3237(b), prosecutions under 26 U.S.C. §§ 7201, 7203, 7206(1), (2) or (5) may be subject to removal by the defendant, provided a motion is made within twenty days of arraignment.

Application of subsection (b) requires that the venue for offenses under Section 7201 or 7206(1), (2) or (5) be based solely on a mailing to the Internal Revenue Service. ***United States v. Melvan***, 676 F. Supp. 997, 1001-02 (C.D. Cal. 1987). This means the defendant has the right to transfer venue unless the government can establish contact within the designated district by means other than a mailing. ***United States v. Humphreys***, 982 F.2d 254, 260 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 61 (1993).

Subsection (b)'s mailing requirement does not apply to failure to file prosecutions under section 7203. In these cases, the defendant has the absolute right to transfer venue if the designated district was not the defendant's place of residence at the time the crime was committed. ***United States v. U.S. District Court***, 693 F.2d 68, 70 (9th Cir. 1982).

6.04[2] ***Rule 21(b)***

Rule 21(b) of the Federal Rules of Criminal Procedure provides an alternate basis for transfer of venue by the defendant. ***United States v. Benjamin***, 623 F. Supp. 1204, 1211 (D.D.C. 1985). The rule provides:

> For the convenience of parties and witnesses, and in the interests of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

Fed. R. Crim. P. 21(b).

The Supreme Court in ***Platt v. Minnesota Mining & Mfg. Co.***, 376 U.S. 240 (1964), analyzed the factors relevant to a Rule 21(b) transfer decision. These factors included: (1) location of the defendants; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business; (6) expense to the parties; (7) location of counsel; (8) accessibility of the place of trial; (9) docket condition of each district; and (10) special considerations unique to the case. 376 U.S. at 243-44.

In exercising the discretion afforded the government to place venue in a particular district, prosecutors should be cognizant of the factors enumerated above and the possibility of transfer under Rule 21(b).

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7.00 *STATUTE OF LIMITATIONS*

7.01 *GENERALLY*

7.01[1] *Statutory Provisions*

This section gives a general overview of statute of limitations issues in criminal tax cases. For a more detailed discussion of a specific offense, reference should be made to the applicable chapter in this Manual.

Section 6531 of Title 26 controls the statute of limitations periods for most criminal tax offenses. This statute provides:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years --
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document);
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);
>
> (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);
>
> (7) for offenses described in section 7214(a) committed by

> officers and employees of the United States; and
>
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

Thus, under section 6531, the general rule is that a three-year statute of limitations exists for Title 26 offenses. However, a six-year period applies to certain excepted offenses. Section 6531 switches back and forth between enumerating the exception by specific Code reference and by a description of the offense. For example, 26 U.S.C. §§ 7206(1), 7202, 7212(a) and 7214(a), and 18 U.S.C. § 371 (conspiracy to evade taxes), are all specifically designated by code section as falling within the six-year exception. Failure to file an income tax return and failure to pay a tax, 26 U.S.C. § 7203, however, are designated by description rather than code section.

Generally, the statute of limitations begins to run when an offense is completed. ***Toussie v. United States***, 397 U.S. 112, 115 (1970). Prosecutors should be aware that not all tax offenses are completed upon the filing of a tax return. For example, in a tax evasion case where the affirmative act of evasion is a subsequent false statement to IRS agents, the crime is completed at the time the false statement is made, not when the false return is filed. ***United States v. Goodyear***, 649 F.2d 226 (4th Cir. 1981). Consequently, careful examination of the various elements is required to determine when a specific tax offense is completed.

7.01[2] ***Limitations Periods for Common Tax Offenses***

Description of Offense	***Code Section***	***Statute of Limitations***	***Code Section***
Tax Evasion	26 U.S.C. § 7201	6 years	26 U.S.C. § 6531(2)
Failure to Collect, Account For or Pay Over	26 U.S.C. § 7202	6 years [1]	26 U.S.C. § 6531(4)
Failure to Pay Tax	26 U.S.C. § 7203	6 years	26 U.S.C. § 6531(4)
Failure to File a Return	26 U.S.C. § 7203	6 years [1]	26 U.S.C. § 6531(4)
Failure to Keep Records	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Failure to Supply Information	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Supply False Withholding Exemption Certificate	26 U.S.C. § 7205	3 years	26 U.S.C. § 6531
File False Tax Return	26 U.S.C. § 7206(1)	6 years	26 U.S.C. § 6531(5)
Aid or Assist in Preparation of False Tax Return	26 U.S.C. § 7206(2)	6 years	26 U.S.C. § 6531(3)
Deliver or Disclose	26 U.S.C. § 7207	6 years	26 U.S.C. § 6531(5)

1 A number of exceptions exist to the six-year rule. Section 6531(4) exempts returns which are required to be filed under part III of subchapter A of chapter 61. Part III refers to information returns required to be filed under 26 U.S.C. §§ 6031-6060, and includes, for example, partnership returns, returns of exempt organizations, subchapter S returns, estate returns and trust returns. Part III also includes returns relating to cash received in trade or business (Form 8300). Reference should be made to these specific Code provisions for a more detailed discussion of applicable limitations periods.

False Document			
Attempt to Interfere With Administration of Internal Revenue Laws	26 U.S.C. § 7212(a)	6 years [2]	26 U.S.C. § 6531(6)
Conspiracy to Commit Tax Evasion	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(8)
Conspiracy to Defraud the Internal Revenue Service	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(1)
False Claim for Refund	18 U.S.C. § 286/287	5 years	18 U.S.C. § 3282
False Statement	18 U.S.C. § 1001	5 years	18 U.S.C. § 3282

2 Section 7212(a) refers to two types of offenses: (1) impeding employees of the United States acting in an official capacity; and (2) impeding the administration of the Internal Revenue laws. Section 6531(6) applies the six-year limitations period to the first prong of section 7212(a), not the second prong. Nonetheless, the Tax Division believes the six-year limitations period applies to offenses under the second prong of section 7212(a) pursuant to 26 U.S.C. § 6531(1). This section's broad description of "offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner" encompasses the conduct prohibited under section 7212(a)'s second clause. Reference should be made to the discussion of this issue in the chapter dealing with Section 7212(a). *See* Chapter 17.00, *infra*.

7.02 *TRIGGERING OF STATUTE OF LIMITATIONS*

7.02[1] *Filing a False Tax Return*

7.02[1][a] *General Rule*

The general rule is that the statute of limitations for the filing of a false tax return starts on the day the return is filed. ***United States v. Habig***, 390 U.S. 222, 223 (1968). *See also* ***United States v. Kelly***, 864 F.2d 569, 574 (7th Cir.), *cert. denied*, 493 U.S. 811 (1989); ***United States v. Marrinson***, 832 F.2d 1465, 1475-76 (7th Cir. 1987). However, if the return is filed early (*i.e.*, before the statutory due date), the statute of limitations does not start to run until the statutory due date. 26 U.S.C. § 6513(c)(1) (1988). *See also* ***Habig***, 390 U.S. at 225. For example, if a tax return that is due to be filed on April 15, 1992, is filed early on January 26, 1992, the statute of limitations on the return would not begin to run until April 15, 1992.

Conversely, if a return is filed late (*i.e.*, after the statutory due date), the statute of limitations begins running the day the return was filed. ***Habig***, 390 U.S. at 225. Thus, if a return that was due on April 15, 1992, was filed late on June 1, 1992, the statute of limitations commences on June 1, 1992.

In cases where an extension of time to file at a later date has been obtained, the statute of limitations begins to run from the date the return was filed, regardless of whether it was filed before or after the extension date. ***Habig***, 390 U.S. at 225-27. Thus, where a return due on April 15, 1992, is granted an extension to August 15, 1992, and actually filed on August 1, 1992, the statute of limitations begins to run on August 1, 1992. Similarly, if the extension is to August 15, 1992, and the return is filed October 1, 1992, the statute of limitations begins to run on October 1, 1992.

The statutory due date for filing a return depends upon the type of tax and the return involved. Section 6072 of Title 26 sets out the statutory due dates for the filing of various tax returns. Individual income tax returns made on a calendar year basis are due on April 15th of the following year. 26 U.S.C. § 6072(a) (1988). Returns made on a fiscal basis are due on the fifteenth

day of the fourth month of the following fiscal year. 26 U.S.C. § 6072(a) (1988). Corporate returns made on a calendar year basis are due on March 15th of the following year. 26 U.S.C. § 6072(b) (1988). Corporate returns made on a fiscal basis are due on the fifteenth day of the third month of the following fiscal year. 26 U.S.C. § 6072(b) (1988).

7.02[1][b] ***Definition of Timely Filed***

A tax return is generally considered timely filed when it is received by the Internal Revenue Service on or before the due date of the return. Typically, when a return is received on or before the statutory due date, it is not date stamped. However, in cases where a return is filed after the statutory due date, the return is date stamped on the date received by the Service Center. This date then becomes the date of filing for statute of limitation purposes.

Prosecutors should be aware of the timely filed/timely mailed exception. Section 7502 of Title 26 allows the date of mailing by the taxpayer (as opposed to the date of receipt by the Internal Revenue Service) to be the date of filing where: (1) the return is sent by U.S. Mail and contains a U.S. postmark on or before the statutory due date; (2) the return is deposited in the mail addressed to the appropriate IRS office with postage prepaid; and (3) the return is delivered to the IRS after the date it was due. 26 U.S.C. § 7502 (1988).

In these circumstances, the return may be date stamped after the statutory due date and still deemed timely filed under section 7502.

7.02[2] ***Failing to File a Tax Return***

Generally, the statute of limitations does not begin to run until the crime is complete. ***Toussie v. United States***, 397 U.S. 112, 115 (1970). In cases where the defendant has failed to file a tax return, the statute of limitations begins to run when the return is due. ***Phillips v. United States***, 843 F.2d 438, 443 (11th Cir. 1988). For example, if a tax return that is due to be filed on April 15, 1992, is not filed by the defendant, the statute of limitations on the return would not begin to run until April 15, 1992.

If a defendant has obtained an extension of time to file a tax return, there is no duty to file until the extension date. ***Phillips***, 843 F.2d at 442-43. Thus, if a defendant obtains an extension to file from April 15, 1992, to August 15, 1992, and fails to file on
the extension date, the statute of limitations would begin to run on August 15, 1992.

Section 6081 of Title 26 governs extensions. The IRS regulations for section 6081 detail the application procedures and extension times for filing various returns. Treas. Reg. § 1.6081-1, *et seq.* (26 C.,F.R.) Generally, the regulations provide for an automatic four-month extension of time for filing individual income tax returns. Treas. Reg. § 1.6081-4(a)(1). Prosecutors should be aware that taxpayers cannot extend their time to pay, only their time to file. Treas. Reg. § 1.6081-4(b). Thus, an extension request is valid only when accompanied with payment of the taxpayer's estimated tax liability. Treas. Reg. § 1.6081-4(a)(4).

7.02[3] ***Tax Evasion***

In order to commit tax evasion, the defendant must commit some affirmative act to evade a tax. While this act most often is the filing of a false tax return, it may also be "any conduct the likely effect of which would be to mislead or conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943).

The general rule is that the statute of limitations for tax evasion begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. ***United***

States v. Beacon Brass Co., 344 U.S. 43, 46 (1952); ***United States v. DiPetto***, 936 F.2d 96, 97 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991); ***United States v. Payne***, 978 F.2d 1177, 1179 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993).

Thus, in cases where the affirmative act of evasion is the filing of a false tax return, the statute of limitations begins to run on the date the return is filed or the statutory due date, whichever is later. ***Beacon Brass Co.***, 344 U.S. at 46. Prosecutors should be aware of the applicable early filing, late filing and extension filing rules enumerated in section 7.02[1][a], *supra*.

Additionally, in cases where a false return is filed coupled with an affirmative act of evasion after the filing date, the statute of limitations commences on the date the last affirmative act took place or the statutory due date, whichever is later. ***Beacon Brass Co.***, 344 U.S. at 46; ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987); ***United States v. Townsell***, 367 F.2d 815, 816 (7th Cir. 1966). For example, if a false 1991 tax return is timely filed on April 15, 1992, and the defendant engages in further affirmative acts of evasion (*e.g.*, lying to agents of the IRS) on September 15, 1993, regarding his 1991 taxes, the statute of limitations would begin to run on September 15, 1993.

Further, in cases where no return is filed and some other act constitutes the affirmative act of evasion, the statute of limitations begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. ***DiPetto***, 936 F.2d at 97; ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); ***Payne***, 978 F.2d at 1179; ***United States v. Winfield***, 960 F.2d 970, 973-74 (11th Cir. 1992).

For example, if a 1991 tax return that is due to be filed on April 15, 1992, is not filed by the defendant, and the defendant had committed an act of evasion (*e.g.*, filing a false Form W-4 exemption certificate) on June 6, 1991, relating to his 1991 taxes, the statute of limitations would commence on April 15, 1992. Conversely, if a 1991 tax return that is due to be filed on April 15, 1992, is not filed by the defendant, and the defendant had committed an act of evasion (*e.g.*, lying to agents of the IRS) on December 1, 1993, relating to his 1991 taxes, the statute of limitations would

commence on December 1, 1993.

7.02[4] ***Conspiracy***

The statute of limitations for a conspiracy to evade taxes under the offense clause of section 371 is six years. Similarly, the statute of limitations for a ***Klein*** conspiracy under the defraud clause of section 371 is six years. Both of these offenses are controlled by 26 U.S.C. § 6531. Occasionally, defendants charged with a tax conspiracy under section 371 will argue that a five-year statute of limitations should apply to section 371, pursuant to 18 U.S.C. § 3282, which is the general limitations statute for Title 18 offenses. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See* ***United States v. Aracri***, 968 F.2d 1512, 1517 (2d Cir. 1992); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Lowder***, 492 F.2d 953, 955-56 (4th Cir.), *cert. denied*, 419 U.S. 1092 (1974); ***United States v. Fruehauf***, 577 F.2d 1038, 1070 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); ***United States v. White***, 671 F.2d 1126, 1133-34 (8th Cir. 1982); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. Brunetti***, 615 F.2d 899, 901 (10th Cir. 1980); ***United States v. Waldman***, 941 F.2d 1544, 1548 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 2938 (1992).

The statute of limitations in a conspiracy begins to run from the last overt act proved. ***Grunewald v. United States***, 353 U.S. 391, 397 (1957). The government, however, is not required to prove that each member of a conspiracy committed an overt act within the statute of limitations. ***Hyde v. United States***, 225 U.S. 347, 369-70 (1912). *See also* ***United States v. Read***, 658 F.2d 1225, 1234 (7th Cir. 1981) (interpreting the ***Hyde*** decision). Once the government shows a member joined the conspiracy, their continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See, e.g.*, ***United States v. Juodakis***, 834 F.2d 1099, 1103 (1st Cir. 1987); ***United States v. Barsanti***, 943 F.2d 428, 437 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980); ***United States***

v. Finestone, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987).

However, a showing of withdrawal before the limitations period (*i.e.*, more than 6 years prior to the indictment where the limitations period is 6 years) is a complete defense to conspiracy. ***Read***, 658 F.2d at 1233. The defendant carries the burden of establishing this affirmative defense. ***Juodakis***, 834 F.2d at 1102-03; ***United States v. Borelli***, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); ***United States v. Lash***, 937 F.2d 1077, 1083 (6th Cir.), *cert. denied*, 112 S. Ct. 397 (1991); ***United States v. Boyd***, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); ***Krasn***, 614 F.2d at 1236; ***United States v. Parnell***, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); ***Finestone***, 816 F.2d at 589. *But see* ***Read***, 658 F.2d at 1236 (burden of production on defendant, burden of persuasion remains on government to negate withdrawal defense); ***United States v. Jannoti***, 729 F.2d 213, 221 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984) (initial burden on defense, then shifted to government); ***United States v. West***, 877 F.2d 281, 289 (4th Cir.), *cert. denied*, 493 U.S. 860 (1989) (government retains burden of persuasion); ***United States v. MMR Corp.***, 907 F.2d 489, 501 (5th Cir. 1990) (burden is two step process on defense and government); ***Model Criminal Jury Instructions for the Ninth Circuit***, §8.05D (1992) (following ***Read***).

The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See* ***Juodakis***, 834 F.2d at 1102; ***Lash***, 937 F.2d at 1083; ***Krasn***, 614 F.2d at 1236; ***United States v. Gonzalez***, 797 F.2d 915, 917 (10th Cir. 1986); ***Finestone***, 816 F.2d at 589.

The government technically is not required to prove that each member of the conspiracy committed an overt act within the statute period. However, in practice, the prosecutor should critically review those conspirators whose membership predates the limitations period, and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

7.03 *TOLLING PROVISION: FUGITIVE OR OUTSIDE U.S.*

Section 6531 of Title 26 contains its own tolling provision. The statute provides:

> The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for commencement of such proceedings.

26 U.S.C. § 6531 (1988). Thus, the statute of limitations in Title 26 cases can be tolled if the defendant is outside the United States or is a fugitive.

"Outside the United States" and "fugitive from justice" are interpreted in the disjunctive. Mere absence from the United States without any intent to become a fugitive is sufficient to toll the statute of limitations. ***United States v. Marchant***, 774 F.2d 888, 892 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

For example, in ***Marchant***, 774 F.2d at 892, the Eighth Circuit held that defendant's eleven-day health and pleasure trip to Switzerland tolled the statute of limitations under 26 U.S.C. § 6531. According to the court, under section 6531 persons are "outside the United States" whenever they cannot be served with criminal process within the jurisdiction of the United States under Rule 4(d)(2) of the Federal Rules of Criminal Procedure. ***Marchant***, 774 F.2d at 892.

The "fugitive of justice" clause in section 6531 refers to 18 U.S.C. § 3290. This statute provides: "No statute of limitations shall extend to any person fleeing from justice." 18 U.S.C. § 3290 (1988). The circuits are split as to the intent required under this statute. The District of Columbia and Eighth Circuits have held that mere absence from the jurisdiction, regardless of intent, is sufficient to toll the statute of limitations. ***In Re Assarsson***, 687 F.2d 1157, 1162 (8th Cir. 1982); ***McGowen v. United States***, 105 F.2d 791, 792 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939).

The First, Second, Fifth, Seventh and Ninth Circuits have held that intent to avoid arrest or prosecution must be proved before section 3290 applies. ***Brouse v. United States***, 68 F.2d 294, 296

(1st Cir. 1933); ***Jhirad v. Ferrandina***, 486 F.2d 442, 444-45 (2d Cir. 1973); ***Donnell v. United States***, 229 F.2d 560, 563-65 (5th Cir. 1956); ***United States v. Marshall***, 856 F.2d 896, 897-900 (7th Cir. 1988); ***United States v. Wazney***, 529 F.2d 1287, 1289 (9th Cir. 1976).

7.04 *COMPLAINT TO EXTEND STATUTE OF LIMITATIONS*

Section 6531 of Title 26 contains a mechanism for extension of the statute of limitations period. The statute provides:

> Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

26 U.S.C. § 6531 (1988). Thus, the government may file a complaint within the limitations period and effectively extend the statute period nine months.

However, section 6531 was not designed to grant the government greater time in which to make a case. ***Jaben v. United States***, 381 U.S. 214, 219 (1965). Rather, it was intended to be used in situations where the government has made its case within the limitations period but cannot obtain an indictment within the limitations period because of the grand jury schedule. ***Jaben***, 381 U.S. at 219-20. *But see* ***United States v. O'Neal***, 834 F.2d 862, 865 (9th Cir. 1987) (investigation and case preparation need not cease upon filing of complaint; whether government improperly invoked extension is tested by sufficiency of the complaint at the preliminary hearing).

In ***Jaben***, the Supreme Court addressed the requirements for a valid complaint under section 6531. The Court held that a complaint must allege sufficient facts to support a probable cause finding that a tax crime has been committed by the defendant. ***Jaben***, 381 U.S. at 220. Further, the government must fully comply with the complaint process and afford the defendant a preliminary hearing. 381 U.S. at 220.

As a practical matter, a complaint should only be filed for the year in which the statute of limitations would otherwise expire. This procedure will not preclude development before the grand

jury of counts for subsequent years in which the statute has not expired. Prosecutors should be aware, however, that the filing of a complaint may trigger the Speedy Trial Act as to the charge which is the subject of the complaint and, as a practical matter, may shorten the time within which the government can act on the remaining tax years under investigation. *See* 18 U.S.C. § 3161(b).

7.05 *SUSPENSION OF STATUTE: SUMMONS ENFORCEMENT*

Section 7609(e)(1) of Title 26 provides for the suspension of the statute of limitations in certain types of summons enforcement proceedings. This statute provides:

> If any person takes any action as provided in subsection (b) [intervenes] and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations . . . under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

26 U.S.C. § 7609(e)(1) (1988).

It is beyond the scope of this Manual to treat in detail the nuances of summons enforcement proceedings. Any reliance on the suspension issue in this area requires a thorough analysis of section 7609, and particular care must be taken in measuring and documenting any period for which the statute of limitations is suspended.

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1. There is a difference of opinion as to the limitations period for section 7202 offenses. The Second and Tenth Circuits hold that a six-year statute of limitations period applies. ***United States v. Musacchia***, 900 F.2d 493, 500 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991); ***United States v. Porth***, 426 F.2d 519, 521-22 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). At least one district court has held that a three-year limitations period applies. ***United States v. Block***, 497 F. Supp. 629, 630-32 (N.D. Ga.), *aff'd*, 660 F.2d 1086 (5th Cir. 1980). The Tax Division takes the position that the Second and Tenth circuits are correct, and that the six-year limitations period under 26 U.S.C. § 6531(4) applies to section 7202.

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8.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7201*

§7201. ***Attempt to evade or defeat tax***

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> *For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7201, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

8.02 *GENERALLY*

The Supreme Court has stated that section 7201 includes two offenses: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax. ***Sansone v. United States***, 380 U.S. 343, 354 (1965). Evasion of assessment entails an attempt to prevent the government from determining a taxpayer's true tax liability. Evasion of payment entails an attempt to evade the payment of that liability. *See* ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984). Although ***Sansone*** has been cited for the proposition that evasion of payment and evasion of assessment constitute two distinct crimes, *see, e.g.*, ***United States v. Hogan***, 861 F.2d at 315, several circuits have recently rejected duplicity challenges to indictments by holding that section 7201 proscribes only one crime, tax evasion, which can be committed either by attempting to evade assessment or by attempting to evade payment. *See* ***United States v. Mal***, 942 F.2d 682, 686 (9th Cir. 1991); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990), *judgment vacated*, 111 S. Ct. 747 (1991), *ruling on duplicity issue reinstated on remand*, 927 F.2d 955, 956 (7th Cir. 1991); ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992). Furthermore, although the First Circuit initially expressed some skepticism concerning whether ***Masat*** and ***Dunkel*** were consistent with ***Sansone***, *see* ***United States v. Waldeck***, 909 F.2d 555, 557-58 (1st Cir. 1990), it subsequently relied on ***Dunkel*** in rejecting a duplicity claim: "No matter how one resolves the semantic question,

moreover, it is beyond reasonable dispute that the indictment charged [defendant] with a single, cognizable crime, and that the jury convicted him of the same crime. *See* ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990)." ***United States v. Huguenin***, 950 F.2d 23, 26 (1st Cir. 1991). [2] *Cf*. ***United States v. Pollen***, 978 F.2d 78, 84-85 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) ("Pollen's indictment, however, raises a unique question: whether a defendant can be charged and punished separately for several distinct affirmative acts of evasion committed with regard to taxes owed for the identical set of years"). It is the position of the Tax Division that section 7201 proscribes a single crime -- attempted evasion of tax -- which can be committed by evading the assessment of tax or by evading the payment of tax.

Regardless of whether they are viewed as separate offenses or as different means of committing the same offense, both evasion of assessment of taxes and evasion of payment of taxes require the taxpayer to take some action, that is, to carry out some affirmative act for the purpose of the evasion. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and section 7201 expressly refers to "attempts in any manner." The most common attempt to evade or defeat a tax is the affirmative act of filing a false tax return that omits income and/or claims deductions to which the taxpayer is not entitled. As a result, the tax on the return is understated, and the correct amount of tax is not reported by the taxpayer. By reporting a lesser amount, there is an attempt to evade or defeat tax by evading the correct assessment of the tax.

In evasion of payment cases, evading or defeating the correct assessment of the tax is not the issue. Evasion of payment generally occurs only after the existence of a tax due and owing has been established, either by the taxpayer reporting the amount of tax due and owing, by the Internal Revenue Service examining the taxpayer and assessing the amount of tax deemed to be due and owing, or by operation of law on the date that the return is due if the taxpayer fails to file a return and the government can prove a tax deficiency. *See* ***United States v. Daniel***, 956 F.2d 540 (6th Cir. 1992). The taxpayer then seeks to evade the payment of the taxes assessed as due and owing. [1] As in an attempt to evade and defeat a tax through evasion of assessment, it must be established in an evasion of payment case that the taxpayer took some affirmative action. Merely failing to pay assessed taxes, without more, does not constitute evasion of payment. [2] Generally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay taxes or the removal of assets from the reach of the Internal Revenue Service.

Historically, it is the crime of willfully attempting to evade and defeat a tax through evasion of assessment, as opposed to willfully attempting to evade the payment of a tax, which is the principal revenue enforcement offense. Section 7201 and its underlying concepts, which make tax cheating a serious crime, are fundamental to any criminal tax enforcement program. Although the

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1 This is not to imply that an affirmative act to evade payment of a tax can never occur prior to its assessment. *See* ***United States v. McGill***, 964 F.2d 222, 231 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992).

2 Willfully failing to pay taxes, however, is a misdemeanor covered by 26 U.S.C. § 7203 of the Internal Revenue Code.

basic elements of the crime are relatively simple, the proof can be difficult.

8.03 *ELEMENTS OF EVASION*

To establish a violation of section 7201, the following elements must be proved:

1. An attempt to evade or defeat a tax or the payment thereof. ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Spies v. United States***, 317 U.S. 492, 498-99 (1943).

2. An additional tax due and owing. ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Lawn v. United States***, 355 U.S. 339, 361 (1958);

3. Willfulness. ***Cheek v. United States***, 498 U.S. 192, 195 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 359 (1973); ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Holland v. United States***, 348 U.S. 121, 139 (1954).

The government must prove each element beyond a reasonable doubt. ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990); ***United States v. Williams***, 875 F.2d 846, 849 (llth Cir. 1989).

8.04 *ATTEMPT TO EVADE OR DEFEAT*

The means by which there can be an attempt to evade are unlimited. As noted above, section 7201 expressly provides that the attempt can be "in any manner." The only requirement is that the taxpayer take some affirmative action. Conversely, failing to act or do something does not constitute an attempt. For example, failing to file a return, standing alone, is not an attempt to evade. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. Nelson***, 791 F.2d 336, 338 (5th Cir. 1986).

The general rule is that "any conduct, the likely effect of which would be to mislead or to conceal" for tax evasion purposes constitutes an attempt. ***Spies***, 317 U.S. at 499. Even an activity that would otherwise be legal can constitute an affirmative act supporting a section 7201 conviction, so long as it is carried out with the intent to evade tax. ***United States v. Jungles***, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of section 7201); *see also* ***United States v. Conley***, 826 F.2d 551 (7th Cir. 1987) (use of nominees and cash done with

intent to evade payment of taxes).

Although the government must prove some affirmative act constituting an attempt to evade, it need not prove each act alleged. *See* ***United States v. Mackey***, 571 F.2d 376 (7th Cir. 1978), where the government introduced evidence of six affirmative acts and the court pointed out that proof of one act is enough. "[T]he prosecution need not prove each affirmative act alleged." ***Mackey***, 571 F.2d at 387. *See also* ***United States v. Conley***, 826 F.2d 551, 556-57 (7th Cir. 1987). *Cf.* ***United States v. Miller***, 471 U.S. 130 (1985) (government's proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act).

8.04[1] ***Attempt To Evade Assessment***

Filing a false return is the most common method of attempting to evade the assessment of a tax. *See, e.g.*, ***United States v. Habig***, 390 U.S. 222 (1968); ***Sansone v. United States***, 380 U.S. 343 (1965). However, the requirement of an attempt to evade is met by any affirmative act with a tax evasion motive, regardless of whether a false return has been filed. The Supreme Court "by way of illustration, and not by way of limitation," set out examples of what can constitute an "affirmative willful attempt" to evade in ***Spies***, 317 U.S. at 499:

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Failing to file a return, coupled with an affirmative act of evasion, has come to be known as a ***Spies*** evasion, an example of which is found in ***United States v. Goodyear***, 649 F.2d 226 (4th Cir. 1981). The Goodyears failed to file a tax return for the year in question and later falsely stated to Internal Revenue Service agents that they had earned no income in that year and were not required to file a return. The false statements to the agents were the affirmative acts of evasion supporting the Goodyears' section 7201 convictions. ***Goodyear***, 649 F.2d at 228.

False statements to Internal Revenue Service agents are frequently alleged as affirmative acts of evasion. *See, e.g.*, ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (holding that repeated false statements to IRS agents were sufficient evidence to support a jury finding of at least one affirmative act); ***United States v. Ferris***, 807 F.2d 269, 270-71 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987); ***United States v. Calles***, 482 F.2d 1155, 1160 (5th Cir. 1973); ***United States v. Neel***, 547 F.2d 95, 96 (9th Cir. 1976). *But cf.* ***United States v. Romano***, 938 F.2d 1569 (2d Cir. 1991) (considering defendant's overall cooperative and voluntary attitude during customs inspection, defendant who was stopped trying to transport $359,500 to Canada did

not commit affirmative act of evasion when he initially admitted having only $30,000 to $35,000 in cash and only gradually acknowledged the full amount to U.S. customs officials).

It makes no difference whether the false statements are made before, simultaneously with, or after the taxpayer's failure to file a return. ***United States v. Copeland***, 786 F.2d 768, 770 (7th Cir. 1985). *See also* ***United States v. Beacon Brass Co.***, 344 U.S. 43, 45-46 (1952); ***United States v. Dandy***, 998 F.2d 1344 (6th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 386 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) (indictment does not fail for alleging that affirmative acts occurred on or about filing due date when they in fact occurred earlier); ***United States v. Mal***, 942 F.2d 682, 684 (9th Cir. 1991); ***United States v. Winfield***, 960 F.2d 970, 973 (11th Cir. 1992) (allegation that defendant made false statements six years after failure to file satisfies affirmative act element).

Courts have uniformly held that the filing of a false Form W-4 constitutes an affirmative act of evasion. ***United States v. Waldeck***, 909 F.2d 555 (1st Cir. 1990); ***United States v. DiPetto***, 936 F.2d 96 (2nd Cir.), *cert. denied*, 112 S. Ct. 193 (1991); ***United States v. Connor***, 898 F.2d 942, 944-45 (3d Cir.), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); ***United States v. Copeland***, 786 F.2d 768 (7th Cir. 1985). Moreover, a false W-4 filed prior to prosecution years is an affirmative act in each year that it is maintained, since the taxpayer is under a continuing obligation to correct intentional misrepresentations on the form. ***Williams***, 928 F.2d at 149 (defendant properly convicted of tax evasion regarding years 1983-85 where false Form W-4 claiming 50 exemptions was filed in 1983 and remained in effect through the prosecution years); ***United States v. DiPetto***, 936 F.2d at 96. For a more detailed discussion of ***Spies*** evasion through the filing of a false W-4, *see* Section 40.04, *infra*.

The Seventh Circuit has held that instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion. ***United States v. Beall***, 970 F.2d 343, 346-47 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993). The court held also that the government need not prove the defendant received any of the money, so long as the defendant earned it. ***Beall***, 970 F.2d at 345. *See also* ***United States v. Jungles***, 903 F.2d 468, 474 (7th Cir. 1990) (employee use of "independent contractor" agreement and Mid-America Commodity and Barter Association warehouse bank to evade income tax are affirmative acts).

A false return does not need to be signed to be an affirmative act of evasion as long as it is identified as the defendant's return. ***United States v. Robinson***, 974 F.2d 575, 578 (5th Cir. 1992) (Fifth Circuit rejected defendant's claim of variance between indictment's allegation that she filed a false return and evidence proving she filed an unsigned Form 1040, stating, "[t]he government did not have to prove that the false Form 1040 was a 'return' in order to show an affirmative act of evasion"); ***Montgomery v. United States***, 203 F.2d 887, 889 (5th Cir. 1953); ***United States v. Maius***, 378 F.2d 716, 718 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); ***Gariepy v. United States***, 220 F.2d 252, 259 (6th Cir.), *cert. denied*, 350 U.S. 825 (1955). Nor does the fact that the return was signed by someone other than the defendant preclude a finding that the defendant knew of its

falsity and had it filed in an attempt to evade. ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989).

A return or other tax document signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it and had knowledge of its contents. 26 U.S.C. § 6064; ***United States v. Kim***, 884 F.2d 189, 195 (5th Cir. 1989); ***United States v. Harper***, 458 F.2d 891, 894-95 (7th Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); ***United States v. Brink***, 648 F.2d 1140, 1143 (8th Cir.), *cert. denied*, 454 U.S. 1031 (1981); ***United States v. Wainwright***, 413 F.2d 796, 801-02 (10th Cir.), *cert. denied*, 396 U.S. 1009 (1970).

8.04[2] ***Attempt To Evade Payment***

The affirmative acts of evasion associated with evasion of payment cases almost always involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. Obstinately refusing to pay taxes due, possession of the funds needed to pay the taxes, and even the open assignment of income, *without more*, do not meet the requirement of the affirmative act necessary for an evasion charge.

Examples of affirmative acts of evasion of payment include: placing assets in the names of others; dealing in currency; causing receipts to be paid through and in the name of others; causing debts to be paid through and in the name of others; and paying creditors instead of the government. ***Cohen v. United States***, 297 F.2d 760, 762, 770 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962). *See also* ***United States v. McGill***, 964 F.2d 222, 233 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); ***United States v. Pollen***, 978 F.2d 78, 88 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992) (defendant used others' credit cards, used cash extensively, placed assets in others' names); ***United States v. Hook***, 781 F.2d 1166, 1169 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986) (defendant did not file a false return or fail to file, but concealed assets); ***United States v. Beall***, 970 F.2d 343, 346-47 (7th Cir. 1992) (defendant instructed employer to pay income to a tax protest organization); ***United States v. Brimberry***, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax); ***United States v. Conley***, 826 F.2d 551, 553 (7th Cir. 1987) (defendant concealed nature, extent, and ownership of assets by placing assets, funds, and other property in names of others and by transacting business in cash to avoid creating a financial record); ***United States v. Voorhies***, 658 F.2d 710, 712 (9th Cir. 1981) (defendant removed money from the United States and laundered it through Swiss banks); ***United States v. Shorter***, 809 F.2d 54, 57 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987) (defendant maintained a "cash lifestyle" in that he conducted all of his personal and professional business in cash, possessed no credit cards, never acquired attachable assets, and maintained no bank accounts, ledgers, or receipts or disbursements journals). *But see* ***McGill***, 964 F.2d at 233 (mere failure to report the opening of an account in one's own name and in one's own locale is not an affirmative act).

8.05 *ADDITIONAL TAX DUE AND OWING*

8.05[1] *Generally*

A tax deficiency is a critical element of an evasion case. The absence of a tax deficiency means that there may be a false return case, or some other kind of case, but not an evasion case.

For purposes of trial preparation and the trial itself, tax computations prepared by the Internal Revenue Service are furnished to the prosecuting attorney. In addition, a revenue agent or special agent is assigned to the case to make any additional tax computations necessitated by changes during preparation and at the trial. In any hard-fought case, it is more often the case than not that trial developments will necessitate a change in the figures set forth in the indictment.

Although a tax deficiency must be established in all section 7201 cases, the proof can often be much simpler in an evasion of payment case. Thus, if the taxpayer has filed a return and not paid the tax reported as due and owing, the reporting of the tax is a self-assessment of the tax due and owing. The tax due and owing is thus established by the introduction of the return. By the same token, if the Service has assessed the tax, then proof of the tax due and owing can consist of merely introducing the Internal Revenue Service's certificate of assessments and payments assessing the tax due and owing. Note that it has been held that unless an assessment by the Service has been challenged as invalid by the taxpayer either administratively or judicially, a certificate of assessments and payments is prima facie correct and, therefore, "adequate evidence" of the amount of the tax liability. ***United States v. Voorhies***, 658 F.2d 710, 715 (9th Cir. 1981).

If the defendant has not assessed his own tax deficiency by filing a return, it is not essential that the Service has made an assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992). In ***Daniel***, the defendant argued that there was no tax deficiency since no assessment or demand for payment had been made. The court rejected this reasoning, holding that a tax deficiency arises by operation of law on the date that the return is due if the taxpayer fails to file a tax return and the government can show a tax liability. ***Daniel***, 956 F.2d at 542. *See also* ***United States v. Hogan***, 861 F.2d 312, 315-16 (1st Cir. 1988) (no need to make a formal assessment of tax liability when government finds tax due and owing).

8.05[2] *Each Year -- Separate Offense*

Because income taxes are an annual event, an alleged evasion of assessment must relate to a specific year and it must be shown that the income upon which the tax was evaded was received in that year. ***United States v. Boulet***, 577 F.2d 1165, 1167-68 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).[3] Consequently, in most evasion of assessment cases, each tax year charged stands alone as a separate offense. Thus, a charge that a taxpayer attempted to evade and defeat taxes for the years 1990, 1991, and 1992 would constitute three separate counts in an indictment.

Evasion of payment, on the other hand, often involves single acts which are intended to evade the payment of several years of tax due the government. Thus, in evasion of payment cases, it is sometimes permissible to charge multiple years of evasion in one count. ***United States v. Shorter***, 809 F.2d 54, 56-57 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987). In ***Shorter***, the court approved the use of a single count to cover several years of tax evasion when charged "as a course of conduct in circumstances such as those . . . where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes" for those years. ***Shorter***, 809 F.2d at 56. For the twelve years covered by the single count in the indictment, the defendant in ***Shorter*** had conducted all of his personal and professional business in cash, avoided the acquisition of attachable assets, and failed to record receipts and disbursements. These activities demonstrated a continuous course of conduct, and each affirmative act of evasion was intended to evade payment of all taxes owed, or anticipated, at the time. The court noted that the same evidence used to prove one multi-year count would be admissible to support twelve single year counts. ***Shorter***, 809 F.2d at 57. *See also* ***United States v. Pollen***, 978 F.2d 78 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) (each of four counts covered the same seven years but indictment not duplicitous when each count alleged a different affirmative act); ***United States v. England***, 347 F.2d 425 (7th Cir. 1965) (defendants charged with one count of evasion of payment of taxes owed from three consecutive years).

Questions concerning the unit of prosecution often lead to challenges to the indictment. In ***United States v. Pollen***, 978 F.2d 78 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993), the defendant made several international transfers of hundreds of thousands of dollars in attempts to evade payment of seven years' taxes. Some of these transfers were made in one year. The four counts of the indictment each specified all seven years, but each alleged a distinct affirmative act. The court held that "section 7201 permits a unit of prosecution based on separate significant acts of evasion." ***Pollen***, 978 F.2d at 86. Therefore, separate counts of an indictment may relate to evasion of payment for the same years without raising a duplicity problem, provided each count alleges a different affirmative act.

8.05[3] *Substantial Tax Deficiency*

Tax evasion prosecutions are not collection cases and it is not necessary to charge or prove the exact amount of the tax that is due and owing. ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Marcus***, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); ***United States v. Thompson***, 806 F.2d 1332, 1335-36 (7th Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573-74 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); ***United States v. Harrold***, 796 F.2d 1275, 1278 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987).

It is enough to prove that the defendant attempted to evade a substantial income tax, even though the actual amount of tax that he owes may be greater than the amount charged in the criminal case. Indeed, the criminal tax figures will almost invariably be lower than the civil tax

figures since, for example, items turning on reasonably debatable interpretations of the Tax Code which increase the tax due and owing are not included in the criminal case. In other words, any doubts as to taxability are resolved in favor of the defendant in a criminal case even though they may ultimately be resolved against him or her civilly.

As noted, it is enough in a criminal case to prove that the defendant attempted to evade a substantial income tax. And as long as the amount proved as unreported is substantial, it makes no difference whether that amount is more or less than the amount charged as unreported in the indictment. ***United States v. Johnson***, 319 U.S. 503, 517-18 (1943); ***United States v. Marcus***, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963). *See, e.g.*, ***United States v. Burdick***, 221 F.2d 932, 934 (3d Cir.), *cert. denied*, 350 U.S. 831 (1955), upholding a conviction where the indictment charged $33,000 as unreported taxable income and the proof at trial established only $14,500 as unreported. Similarly, in ***United States v. Costello***, 221 F.2d 668, 675 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the court upheld a conviction where the bill of particulars alleged $244,000 gross income as unreported and $288,000 was proved at trial. In ***United States v. Citron***, 783 F.2d 307 (2d Cir. 1986), the court upheld an "open-ended" 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the defendant had attempted to evade "a large part" of the income tax due and that the tax due was "substantially in excess" of the amount he reported. ***Citron***, 783 F.2d at 314-15.

Since the government only has to prove that a substantial tax was due and owing, any bill of particulars that is filed should note that proof of an exact amount is not required and any figures furnished in a bill of particulars represent only an approximation. Whether a tax deficiency is substantial or not is a jury question and the cases suggest that relatively small sums can be deemed substantial. ***United States v. Gross***, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961) (unreported income of $2500 deemed "substantial"); ***United States v. Nunan***, 236 F.2d 576, 585 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957) ("A few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution."). *See also* ***United States v. Cunningham***, 723 F.2d 217 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (additional tax of $2,617 as compared to a total tax due of $33,539 held to be substantial); ***United States v. Siragusa***, 450 F.2d 592, 595-96 (2d Cir. 1971), *cert. denied*, 405 U.S. 974 (1972) (taxes of $3,956, $900 and $2,209 in three successive years held to be substantial); ***United States v. Davenport***, 824 F.2d 1511, 1517 (7th Cir. 1987) ($3,358 in taxes due sufficient to support taxpayer's conviction).

The Ninth Circuit has held that there is no substantiality requirement for a section 7201 violation. ***United States v. Marashi***, 913 F.2d 724 (9th Cir. 1990). The court held that both section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade "any tax" and impose no minimum amount in their language. ***Marashi***, 913 F.2d at 735. As a result, the court reasoned, the trier of fact needs to find only "some tax deficiency" to warrant a conviction. ***Marashi***, 913 F.2d at 736.

8.05[4] ***Method of Accounting***

The general rule is that in computing income, the government must follow the same method of accounting as that used by the taxpayer. ***United States v. Vardine***, 305 F.2d 60, 64 (2d Cir. 1962); ***Fowler v. United States***, 352 F.2d 100, 103 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Conversely, if the defendant has used a particular method of reporting income, then the defendant is bound by that choice at trial. Thus, a defendant cannot report his income on a cash basis and then defend at trial by showing that on an accrual basis unreported income would be far less than the government proved on a cash basis. ***Clark v. United States***, 211 F.2d 100, 105 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955); *see also* ***United States v. Helmsley***, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992) (defendant having used one depreciation method during the prosecution years cannot recalculate her taxes under another depreciation method during trial).

In a similar vein, if the taxpayer has used a hybrid method of accounting, then the taxpayer "is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." ***Morrison v. United States***, 270 F.2d 1, 4 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959); ***United States v. Lisowski***, 504 F.2d 1268, 1275 (7th Cir. 1974).

8.05[5] ***Loss Carryback -- Not a Defense***

A defendant will sometimes argue that there is no tax deficiency and hence no evasion because a loss carryback from a subsequent year wipes out the tax deficiency in the prosecution year. A defendant may admit not reporting certain income in 1989, but argue that he is not guilty of attempting to evade, because a 1990 loss carryback eliminates any tax deficiency for 1989. This defense is not valid; the "lucky loser argument" was expressly rejected in ***Willingham v. United States***, 289 F.2d 283, 287 (5th Cir.), *cert. denied*, 368 U.S. 826 (1961). The crime was completed when, with willful intent, a false and fraudulent return was filed -- any adjustment from a loss in a subsequent year does not change in any way the fraud committed in the earlier year. Any evidence of a loss in a subsequent year is therefore irrelevant. ***Willingham***, 289 F.2d at 288.

The same argument was rejected where the net operating loss in a subsequent year was for a Subchapter S corporation. ***United States v. Keltner***, 675 F.2d 602, 604 (4th Cir.), *cert. denied*, 459 U.S. 832 (1982). The applicable principle is that each tax year is treated as a separate unit, and all items of gross income and deductions must be reflected as they exist at the close of the tax year. *See* ***United States v. Cruz***, 698 F.2d 1148, 1151-52 (11th Cir.), *cert. denied*, 464 U.S. 960 (1983), for an application of this principle to a situation involving a claimed foreign tax credit. *Cf.* ***United States v. Suskin***, 450 F.2d 596 (2d Cir. 1971) (corporate carryforward loss not available to individual).

8.05[6] ***Methods of Proof***

The general rule is that unreported income may be established by several methods of proof, and the government is free to use all legal methods available in determining whether the taxpayer has correctly reported his income. ***Holland v. United States***, 348 U.S. 121, 132 (1954); ***United States v. Baum***, 435 F.2d 1197, 1201 (7th Cir.), *cert. denied*, 402 U.S. 907 (1971); ***United States v. Doyle***, 234 F.2d 788, 793 (7th Cir.), *cert. denied*, 352 U.S. 893 (1956).

The several methods of proof used in tax cases to establish unreported income are discussed in detail in the sections of this Manual treating methods of proof, Sections 30.00 - 33.00, *infra*. Briefly, the specific items method of proof consists of direct evidence of the items of income received by a taxpayer in a given year, *e.g.*, testimony by third parties as to monies paid to the taxpayer for goods or services. The net worth method of proof reflects increases in the wealth of the taxpayer as contrasted with reported income. A variation of the net worth method is the expenditures method of proof, which reflects the expenditures made by a taxpayer. The expenditures method is particularly appropriate in the case of a taxpayer who does not purchase durable assets, such as stocks and real estate, but spends monies for consumable items, such as vacations, entertainment, food, drink, and the like. Another indirect method of proof is the bank deposits method, which is essentially a reconstruction of income by an analysis of bank deposits by a taxpayer who is in an income-producing business and makes regular and periodic deposits to bank accounts.

The Seventh Circuit has approved a variation of the expenditures method which could be called the cash method of proof. ***United States v. Hogan***, 886 F.2d 1497 (7th Cir. 1989). With this method, the government compares the taxpayer's cash expenditures with his known cash sources, including cash on hand, for each tax period. If such expenditures exceed sources, the excess is presumed to be unreported income.

Except for the so-called cash method, which to date is limited virtually to the ***Hogan*** case, each of these methods of proof is discussed in detail ahead and reference should be made to these sections for the applicable case law.

8.05[7] ***Income Examples***

Examples of income which may be charged in criminal tax cases, which are not expressly set out in 26 U.S.C. §§ 61, 62, and 63, are the proceeds from:

1. Campaign contributions, when used for personal purposes. ***United States v. Scott***, 660 F.2d 1145, 1152 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

2. Gambling proceeds. The taxpayer must report winnings and may deduct losses only to the extent of winnings. ***McClanahan v. United States***, 292 F.2d 630, 631-32 (5th Cir.), *cert. denied*, 368 U.S. 913 (1961); ***Garner v. United States***, 501 F.2d 228, 233 (9th Cir. 1974); *aff'd on other grounds*, 424 U.S. 648 (1976).

3. Embezzlement. Embezzled funds constitute taxable income to the recipient. ***United States v. Harris***, 942 F.2d 1125, 1135 (7th Cir. 1991). The funds are considered to be income in the year of embezzlement. ***James v. United States***, 366 U.S. 213, 219-21 (1961); ***United States v. Milder***, 459 F.2d 801, 804 (8th Cir.), *cert. denied*, 409 U.S. 851 (1972); ***United States v. Kleifgen***, 557 F.2d 1293, 1299 (9th Cir. 1977); ***United States v. Lippincott***, 579 F.2d 551, 552 (10th Cir.), *cert. denied*, 439 U.S. 854 (1978) (alleged loan from embezzled funds).

4. Extortion. Money obtained by extortion is income taxable to the extortionist. ***Rutkin v. United States***, 343 U.S. 130, 131 (1952); ***United States v. Cody***, 722 F.2d 1052, 1061 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (income generated by union officials through extortion and kickbacks and acceptance of valuable services); ***United States v. Greger***, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (economic extortion).

5. Fraud. ***Moore v. United States***, 412 F.2d 974, 978 (5th Cir. 1969). *See also* ***United States v. Dixon***, 698 F.2d 445, 446 (11th Cir. 1983).

6. Alleged loans, no intention to repay. ***United States v. Pomponio***, 429 U.S. 10, 13 & n.4 (1976); ***United States v. Rosenthal***, 470 F.2d 837, 842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); ***United States v. Rochelle***, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); ***United States v. Swallow***, 511 F.2d 514, 519 (10th Cir. 1974), *cert. denied*, 423 U.S. 845 (1975).

7. Commercial bribes and kickbacks. ***United States v. Sallee***, 984 F.2d 643 (5th Cir. 1993); ***United States v. Fogg***, 652 F.2d 551, 555-56 (5th Cir.1981), *cert. denied*, 456 U.S. 905 (1982); ***United States v. Wyss***, 239 F.2d 658, 660 (7th Cir. 1957).

8. Bribery. ***United States v. Anderson***, 809 F.2d 1281, 1288 (7th Cir. 1987); ***United States v. Isaacs***, 493 F.2d 1124, 1161 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (racetrack stock "purchase" by government official for a fraction of actual value).

9. Gratuities received by government employees. ***United States v. St. Pierre***, 377 F. Supp. 1063 (S.D. Fla. 1974), *aff'd*, 510 F.2d 383 (5th Cir. 1975).

10. Corporate diversions. ***United States v. Helmsley***, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989); ***United States v. Thetford***, 676 F.2d 170, 175 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983). The funds are taxable to the recipient once he exercises dominion and control over them; even when the defendant is the sole shareholder in the corporation, dominion and control over the funds can be sufficient to give rise to individual tax liability. ***United States v. Curtis***, 782 F.2d 593, 598 (6th Cir. 1986); ***United States v. Toushin***, 899 F.2d 617, 623-24 (7th Cir. 1990). *See also* ***United States v. Knight***, 898 F.2d 436, 437 (5th Cir. 1990). Constructive distribution rules need not be automatically applied in a criminal tax case. ***United States v. Miller***, 545 F.2d 1204, 1214 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977) ("whether diverted funds constitute constructive corporate distributions depends on the factual circumstances involved in each case under consideration").

11. Narcotics sales. ***United States v. Palmer***, 809 F.2d 1504, 1505 (11th Cir. 1986) (court implicitly included narcotics sales proceeds in income by considering concealment of those proceeds to be affirmative act of evasion).

8.06 ***WILLFULNESS***

8.06[1] ***Definition***

Willfulness has been defined by the courts as a voluntary, intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Therefore, the taxpayer must be shown to have been aware of his or her obligations under the tax laws. ***United States v. Buford***, 889 F.2d 1406, 1409 (5th Cir. 1989); ***United States v. Peterson***, 338 F.2d 595, 598 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965); ***United States v. Conforte***, 624 F.2d 869, 875 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). As the Seventh Circuit Court of Appeals has stated, there must be "proof that the appellant knew he was violating a 'known legal duty.'" ***United States v. Fitzsimmons***, 712 F.2d 1196, 1198 (7th Cir. 1983).

Willfulness is determined by a subjective standard, thus the defendant is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Regan***, 937 F.2d 823, 826 (2d Cir. 1991), *amended by*, 946 F.2d 188 (2nd Cir.), *cert. denied sub nom.* ***Zarzecki v. United States***, 112 S. Ct. 2273 (1992); ***United States v. Whiteside***, 810 F.2d 1306, 1311 (5th Cir. 1987); ***United States v. Powell***, 955 F.2d 1206 (9th Cir. 1992). The inquiry, therefore,

must focus on the knowledge of the defendant, not on the knowledge of a reasonable person. However, the jury may "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993).

Although ignorance and misunderstanding of the law may be asserted to foreclose a finding of willfulness on the part of the defendant, disagreement with the constitutional validity of the law may not. Once it has been established that the defendant was aware of a legal duty and intentionally violated that duty, it is no defense that the defendant believed that the law imposing the duty was unconstitutional. ***Cheek v. United States***, 498 U.S. at 205-06. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. ***Cheek***, 498 U.S. at 206. *See also* ***United States v. Bonneau***, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge's redaction of constitutionality arguments from defendant's reading materials did not unfairly prejudice the defense). *But see* ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992) (defendant should have been allowed to read excerpts of court opinions upon which he relied in determining whether he was required to file tax returns).

In some of its opinions prior to ***United States v. Pomponio***, 429 U.S. 10 (1976), the Supreme Court spoke of willfulness in terms of "bad faith or evil intent." ***United States v. Murdock***, 290 U.S. 389, 398 (1933), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," ***Spies v. United States***, 317 U.S. 492, 498 (1943). This caused some confusion in the circuits, which was cleared up in ***United States v. Pomponio***, 429 U.S. 10 (1976).

In ***Pomponio***, the court stated that its references to bad faith or evil intent meant nothing more than that there was "an intentional violation of a known legal duty." *Id.* at 12. The clarification is important since it is the answer to defense contentions for an instruction that speaks in terms of a bad purpose or evil intent that goes beyond an intentional violation of the law. Such an instruction would impose an undue burden on the government that is counter to the teachings of the Supreme Court. Otherwise stated, "willfully" connotes a voluntary, intentional violation of a known legal duty, and "it does not require proof of any other motive." ***United States v. Jerde***, 841 F.2d 818, 821 (8th Cir. 1988) (citing ***United States v. Pomponio***, 429 U.S. 10, 12 (1976)); *accord*, ***United States v. Moylan***, 417 F.2d 1002, 1004 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) ("to require a bad purpose would be to confuse the concept of intent with that of motive"); ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978) (proof of evil motive or bad intent not required); ***United States v. Patrick***, 542 F.2d 381, 389 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) ("bad" before "purpose" may be omitted from willfulness instruction).

The Ninth Circuit has said that a showing of bad motive or evil purpose can substitute for a showing of intentional violation of a known legal duty as a means of establishing willfulness. ***United States v. Powell***, 955 F.2d 1206, 1211 (9th Cir. 1992). In ***Powell***, the court stated that bad motive or evil purpose could be used by the government to establish that the defendants acted willfully but that such proof was not required. Rather, the government had the alternative of

showing that the defendants had voluntarily and intentionally violated a known legal duty, in which case proof of evil motive or bad purpose would not be necessary. ***Powell***, 955 F.2d at 1211.

Notwithstanding the alternative methods of proving willfulness set forth in ***Powell***, the fact remains that the Supreme Court has definitively and unequivocally defined willfulness as the "voluntary, intentional violation of a known legal duty." Thus, the government should never rely on any "alternative method" of proof that does not establish the defendant's voluntary and intentional violation of his known legal duty. Similarly, juries should always be instructed that it is the government's burden to prove such a violation.

Good motive is not a defense to a finding of willfulness, and the Supreme Court has upheld as proper a jury instruction that "'[g]ood motive alone is never a defense where the act done or omitted is a crime,' and that consequently motive was irrelevant except as it bore on intent." ***United States v. Pomponio***, 429 U.S. at 11; *accord*, ***United States v. Dillon***, 566 F.2d 702, 704 (10th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

The Supreme Court in ***United States v. Bishop***, 412 U.S. 346 (1973), rejected the historical view that there are different types of willfulness required in felony and misdemeanor cases, holding that the willfulness requirement in either class of offense is the same -- "a voluntary, intentional violation of a known legal duty." ***Bishop***, 412 U.S. at 360-61. Thus, while some tax crimes are felonies (*e.g.*, 26 U.S.C. § 7201, attempt to evade or defeat a tax), and others are misdemeanors (*e.g.*, 26 U.S.C. § 7203, failure to file an income tax return), the word "willfully" has the same meaning in both types of offenses. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).8.06[2] ***Proof of Willfulness***

The element of willfulness can be the most difficult element to prove in an evasion case. Absent an admission or confession, which is seldom available, or accomplice testimony, willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Magnus***, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); ***United States v. Ashfield***, 735 F.2d 101, 105 (3d Cir.), *cert. denied*, 469 U.S. 858 (1984); ***United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989); ***Paschen v. United States***, 70 F.2d 491, 498-99 (7th Cir. 1934); ***United States v. Marchini***, 797 F.2d 759 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984); ***United States v. Ramsdell***, 450 F.2d 130, 133-34 (10th Cir. 1971). Once the evidence establishes that the tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from this conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse or creditors. ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. DeTar***, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

Inferring willfulness from the evidence, however, must be left to the trier of fact. The government may not present witnesses to testify that the circumstantial evidence proves the defendant's willfulness. ***United States v. Windfelder***, 790 F.2d 576 (7th Cir. 1986). In ***Windfelder***, IRS agents opined in their trial testimony as to the defendant's willfulness, based on their

impression of the relevant circumstantial evidence. Although the court of appeals found the admission of the testimony to have been harmless error, it held that it was inadmissible under Rule 704(b) of the Federal Rules of Evidence. ***Windfelder***, 790 F.2d at 582-83.

There are obvious questions raised as to willfulness when the law is vague or highly debatable, such as whether a transaction has generated taxable income. While the case is unusual, and readily distinguishable from most tax cases, an example of the foregoing is ***United States v. Critzer***, 498 F.2d 1160 (4th Cir. 1974). In ***Critzer***, the court found that there was a disputed question as to whether the "income" the defendant earned from business interests operated on the Cherokee Indian Reservation was taxable and that different branches of the government had reached directly opposite conclusions on this question. In the light of these findings, the court held that, "[i]t is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it." ***Critzer***, 498 F.2d at 1162. *See also* ***United States v. Garber***, 607 F.2d 92 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was novel and unsettled question); ***United States v. Harris***, 942 F.2d 1125 (7th Cir. 1991) (law on tax treatment of payments received by mistresses from wealthy widower provided no fair warning that failure to report such payments as income would be criminal activity, and case law favored proposition that payments be treated as gifts); ***United States v. Heller***, 830 F.2d 150 (11th Cir. 1987) (existence of a prior case in which Tax Court approved "case-closed method" of reporting advance payments of costs and fees received by an attorney meant that use of the method was not proscribed in reasonably certain terms, and therefore prior case was sufficient, as a matter of law, to make it inappropriate to impose criminal liability upon defendant-attorney for using the same method).

Care should be taken to distinguish a case such as ***Garber***, which is based on "unique, indeed near bizarre, facts." ***United States v. Burton***, 737 F.2d 439, 444 (5th Cir. 1984); *see also* ***United States v. Daly***, 756 F.2d 1076, 1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985). In ***Burton***, the court explained and limited its opinion in ***Garber***. The court stated that "apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance," explaining that "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." ***Burton***, 737 F.2d at 444. And, in ***United States v. Curtis***, 782 F.2d 593, 599-600 (6th Cir. 1986), the Sixth Circuit rejected ***Garber*** for the following reasons: (1) ***Garber*** allows juries to find that uncertainty in the law negates willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) requires the jury to assume the judge's "responsibility to rule on questions of law".

In those few courts which recognize uncertainty in the law as a potential defense, the court must find that the law clearly prohibited the defendant's alleged conduct. ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); ***United States***

v. Solomon, 825 F.2d 1292, 1297 (9th Cir.), *cert. denied*, 484 U.S. 1046 (1987). In ***Dahlstrom***, the court reversed the convictions of the defendants, who had instructed investors on creating and carrying out abusive tax shelters, because the legality of the shelters was "completely unsettled." ***Dahlstrom***, 713 F.2d at 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. ***United States v. Krall***, 835 F.2d 711, 714 (8th Cir. 1987). *Compare* ***United States v. Mallas***, 762 F.2d 361 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) *with* ***Krall***, 835 F.2d at 714 (although precise foreign trust arrangement had not yet been declared illegal, the sham trusts used to avoid taxation violated well-established principles of tax law, thus defendant could not claim that his conviction violated due process), ***United States v. Schulman***, 817 F.2d 1355, 1359-60 (9th Cir.), *cert. dismissed*, 483 U.S. 1042 (1987) (illegality of tax shelters based on sham transactions is a settled legal issue); ***United States v. Crooks***, 804 F.2d 1441, 1449 (9th Cir. 1986) (requirement of transaction substance over form is well-ensconced in tax law); and ***United States v. Tranakos***, 911 F.2d 1422 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled).

To aid in establishing willfulness at trial, items turning on reasonably debatable interpretations of the Tax Code and questionable items of income should be eliminated from the case, and, whenever possible, complicated facts should be simplified. This is advantageous both for purposes of presentation to the jury and to strengthen the government's argument that there is no doubt that this was a criminal act to evade taxes, because the taxability and tax consequences were known to the taxpayer.

The Supreme Court has furnished excellent guidance on the type of evidence from which willfulness can be inferred. In the leading case of ***Spies v. United States***, 317 U.S. 492, 499 (1943), the Supreme Court, "by way of illustration and not by way of limitation," set forth the following as examples of conduct from which willfulness may be inferred:

> [K]eeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Particularly noteworthy is the Court's reference to "any conduct, the likely effect of which would be to mislead or to conceal." It is apparent that the Court was intent on making it clear that there are no artificial limits on the type of conduct from which willfulness can be inferred, and that evidence is admissible of any conduct at all, as long as the "likely effect" of the conduct would be to mislead or conceal.

8.06[3] ***Examples: Proof of Willfulness***

1. Willfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income. ***United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989) (evidence of willfulness was sufficient where taxpayer failed to report $182,601 of income over three years); ***United States v. Kryzske***, 836 F.2d 1013, 1019-20 (6th Cir. 1988), *cert. denied*, 488 U.S. 832 (1988) (willfulness found where taxpayer failed to file complete tax returns over a four-year period and underreported his income by $940.50 for one of those years); *see also* ***United States v. Skalicky***, 615 F.2d 1117 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980); ***United States v. Larson***, 612 F.2d 1301 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980); ***United States v. Gardner***, 611 F.2d 770 (9th Cir. 1980).

2. Failure to supply an accountant with accurate and complete information. ***United States v. Samara***, 643 F.2d 701, 703 (l0th Cir.), *cert. denied*, 454 U.S. 829 (1981) (taxpayer kept receipt books for cash received but did not supply them to accountant, thus concealing cash receipts); *see also* ***United States v. Michaud***, 860 F.2d 495, 500 (1st Cir. 1988); ***United States v. Ashfield***, 735 F.2d 101, 107 (3d Cir. 1984); ***United States v. Chesson***, 933 F.2d 298, 305 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); ***United States v. Brimberry***, 961 F.2d 1286, 1290 (7th Cir. 1992); ***United States v. Scher***, 476 F.2d 319 (7th Cir. 1973); ***United States v. Meyer***, 808 F.2d 1304, 1306 (8th Cir. 1987); ***United States v. Conforte***, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

3. The question of willfulness is not removed from jury consideration merely because the defendant claims inefficient bookkeeping and a negligent accountant. ***United States v. Venditti***, 533 F.2d 217, 219 (5th Cir. 1976).

4. Taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape criminal responsibility for the resulting false returns. ***United States v. Garavaglia***, 566 F.2d 1056 (6th Cir. 1977); ***United States v. O'Keefe***, 825 F.2d 314, 318 (11th Cir. 1987).

5. False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. ***United States v. Callanan***, 450 F.2d 145, 150 (4th Cir. 1971); ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991);; ***United States v. Jett***, 352 F.2d 179, 182 (6th Cir. 1965); ***United States v. Walsh***, 627 F.2d 88 (7th Cir. 1980); ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (taxpayer

falsely stated that she did not receive income from other employees who worked in her massage parlor and that she deposited most of her income in the bank); ***United States v. Tager***, 481 F.2d 97, 100 (10th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974); *see also* ***United States v. Adonis***, 221 F.2d 717, 719 (3d Cir. 1955); ***United States v. Pistante***, 453 F.2d 412 (9th Cir. 1971).

6. Keeping a double set of books. ***United States v. Daniels***, 617 F.2d 146 (5th Cir. 1980).

7. Destroying, throwing away, or "losing" books and records. ***United States v. Walker***, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid records and assets in an attempt to conceal them from the IRS). *See* ***United States v. Chesson***, 933 F.2d 298, 304-05 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); (taxpayer altered and destroyed invoices after undergoing a civil audit for underreporting income); ***Gariepy v. United States***, 189 F.2d 459, 463 (6th Cir. 1951); ***United States v. Holovachka***, 314 F.2d 345, 357 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963); ***United States v. Conforte***, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

8. Making or using false documents, false entries in books and records, false invoices, and the like. ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); ***United States v. Walker***, 896 F.2d 295, 298 (8th Cir. 1990) (defendants submitted false invoices to their family company so that the company would treat their personal expenses as business expenses).

9. Destruction of invoices to customers. ***United States v. Garavaglia***, 566 F.2d 1056, 1059 (6th Cir. 1977).

10. Nominees. Placing property or a business in the name of another. ***United States v. Woodner***, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963); ***United States v. Daniel***, 956 F.2d 540 (6th Cir. 1992); ***United States v. Peterson***, 338 F.2d 595, 597 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965); ***Banks v. United States***, 204 F.2d 666, 672 (8th Cir. 1953), *vacated and remanded*, 348 U.S. 905 (1955), *reaff'd*, 223 F.2d 884 (8th Cir. 1955), *cert. denied*, 350 U.S. 986 (1956).

11. Extensive use of currency and cashier's checks. ***United States v. Daniel***, 956 F.2d 540 (6th Cir. 1992) (defendant used cash extensively, immediately converted checks to cash, and paid employees and insurance policies in cash); ***United States v. Holovachka***, 314 F.2d 345, 358 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963); ***Schuermann v. United States***, 174 F.2d 397,

398 (8th Cir.), *cert. denied*, 338 U.S. 831 (1949).

12. Spending large amounts of cash which could not be reconciled with the amount of income reported, ***United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, ***United States v. Skalicky***, 615 F.2d 1117 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980). *See also* ***United States v. Mortiner***, 343 F.2d 500, 503 (7th Cir.), *cert. denied*, 382 U.S. 842 (1965) (money orders and cashier's checks); ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831 (1978).

13. Bank accounts held under fictitious names. ***United States v. Ratner***, 464 F.2d 101 (9th Cir. 1972); ***Elwert v. United States***, 231 F.2d 928 (9th Cir. 1956); *cf.* ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

14. Checks cashed and the currency deposited in an out-of-town bank account. ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

15. Unorthodox accounting practices with deceptive results. ***United States v. Slutsky***, 487 F.2d 832, 834 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Waller***, 468 F.2d 327, 329 (5th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

16. Repetitious omissions of items of income, *e.g.*, income from various sources not reported. ***United States v. Walker***, 896 F.2d 295, 299 (8th Cir. 1990) (over a two-year period taxpayer failed to report interest income totalling $20,476); ***Sherwin v. United States***, 320 F.2d 137, 141 (9th Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); ***United States v. Tager***, 479 F.2d 120, 122 (10th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

17. Prior and subsequent similar acts reasonably close to the prosecution years. ***United States v. Magnus***, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); ***United States v. Johnson***, 386 F.2d 630 (3d Cir. 1967); ***United States v. Alker***, 260 F.2d 135 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959); ***Matthews v. United States***, 407 F.2d 1371, 1381 (5th Cir. 1969), *cert. denied*, 398 U.S. 968 (1970); *cf.* Fed. R. Evid. Rule 404(b).

18. Alias used on gambling trip -- relevant to an intent to evade taxes. ***United States v. Catalano***, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

19. The defendant's attitude toward the reporting and payment of taxes

generally. ***United States v. Hogan***, 861 F.2d 312 (1st Cir. 1988); ***United States v. O'Connor***, 433 F.2d 752, 754 (lst Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); ***United States v. Taylor***, 305 F.2d 183, 185 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); ***United States v. Stein***, 437 F.2d 775 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971).

20. Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. ***United States v. Smith***, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); ***United States v. Rischard***, 471 F.2d 105, 108 (8th Cir. 1973). *See* ***United States v. Diamond***, 788 F.2d 1025 (4th Cir. 1986); ***United States v. MacKenzie***, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business). Caution: *compare and distinguish* ***Bursten v. United States***, 453 F.2d 605 (5th Cir. 1971), *cert. denied*, 409 U.S. 843 (1972).

21. Offer to bribe witness or government agent. ***Ewing v. United States***, 386 F.2d 10, 15 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968) (attempt to bribe government witness); ***Barcott v. United States***, 169 F.2d 929, 932 (9th Cir. 1948), *cert. denied*, 336 U.S. 912 (1949) (attempt to bribe revenue agent).

22. Use of false names and surreptitious reliance on the use of cash. ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831 (1978); ***United States v. Walsh***, 627 F.2d 88, 92 (7th Cir. 1980).

23. Backdating documents, such as receipts, contracts, and the like, to gain a tax advantage. ***United States v. Drape***, 668 F.2d 22 (1st Cir. 1982); ***United States v. Crum***, 529 F.2d 1380 (9th Cir. 1976); ***United States v. O'Keefe***, 825 F.2d 314 (llth Cir. 1987).

24. Illegal sources of income. ***United States v. Palmer***, 809 F.2d 1504, 1505-06 (llth Cir. 1987).

8.06[4] ***Willful Blindness***

It is a defense to a finding of willfulness that the defendant was ignorant of the law or of facts which made the conduct illegal, since willfulness requires a voluntary and intentional violation of a known legal duty. However, if the defendant deliberately avoided acquiring knowledge of a fact or the law, then the jury may infer that he actually knew it and that he was merely trying to

avoid giving the appearance (and incurring the consequences) of knowledge. *See* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* ***McCreary v. United States***, 476 U.S. 1186 (1986).[4] In such a case, the use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) -- may be appropriate.

A number of courts have approved the use of such instructions under proper circumstances. *See, e.g.*, ***United States v. Picciandra***, 788 F.2d 39, 46 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986); ***United States v. Callahan***, 588 F.2d 1078 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Bussey***, 942 F.2d 1241, 1246 (8th Cir.), *cert. denied*, 112 S. Ct. 1936 (1991) (post-***Cheek*** decision); ***United States v. Fingado***, 934 F.2d 1163, 1166-1167 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several 9th Circuit cases).[3] Thus, it is advisable not to request such an instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the Government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case.[4] Further, to avoid potential confusion with the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance."[5]

8.07 ***VENUE***

Venue in an evasion case lies in any district where an affirmative act occurred. As previously noted, the most common attempt to evade involves the filing of a false return. Thus, venue can always be laid in the district where a false return was filed. ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); ***Holbrook v. United States***, 216 F.2d 238 (5th Cir. 1954), *cert. denied*, 349 U.S. 915 (1955).

In addition to the district of filing, venue will also lie in the district where a false return was prepared or signed, even though the return is filed in a different district. ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Marrinson***,

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3 *But see* ***United States v. Rodriguez***, 983 F.2d 455, 457 (2d Cir. 1993) (Second Circuit more willing than Ninth Circuit to authorize use of this type of instruction).

4 Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

5 It is suggested that any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

832 F.2d 1465, 1475 (7th Cir. 1987); ***United States v. Humphreys***, 982 F.2d 254 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 61 (1993); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); 18 U.S.C. § 3237(a). This is also true in cases in which the affirmative act of evasion is the filing of a false withholding Form W-4 rather than a false tax return: venue is proper where the false W-4 was prepared and signed, or where it was received and filed. ***United States v. Felak***, 831 F.2d 794, 798-99 (8th Cir. 1987).

Venue is not limited, however, to the district of signing, filing, or preparation. The rule is that venue will lie in any district where an attempt to evade took place, *e.g.*, the district where a false statement was made to an I.R.S. agent, ***United States v. Goodyear***, 649 F.2d 226, 228 (4th Cir. 1981), where the making of false records or the concealment of assets took place, ***Beaty v. United States***, 213 F.2d 712, 715 (4th Cir. 1954), *vacated and remanded*, 348 U.S. 905, *reaff'd*, 220 F.2d 681 (4th Cir.), *cert. denied*, 349 U.S. 946 (1955), where false returns were prepared, ***United States v. Albanese***, 224 F.2d 879, 882 (2d Cir.), *cert. denied*, 350 U.S. 845 (1955), or where there was a concealment of assets, ***Reynolds v. United States***, 225 F.2d 123, 128 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

Reference should also be made to the discussion of venue in Section 6.00, *supra*.

8.08 *STATUTE OF LIMITATIONS*

The statute of limitations is six years "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof." 26 U.S.C. § 6531(2). For a discussion as to the measurement of the six-year period of limitations, *see* Section 7.00, *supra*.

The general rule is that the six-year period of limitations begins to run from the last affirmative act constituting an attempt to evade. ***United States v. Beacon Brass Co.***, 344 U.S. 43, 45-46 (1952). Thus, if the filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. However, where a false return is filed before the statutory due date, the statute of limitations does not start running until the statutory due date arrives. ***United States v. Habig***, 390 U.S. 222, 225 (1968); ***United States v. Silverman***, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 1918 (1972); ***United States v. Ayers***, 673 F.2d 728, 729 (4th Cir. 1982). When the affirmative act occurs before the tax deficiency, the statute of limitations begins at the time of the tax deficiency. ***United States v. Payne***, 978 F.2d 1177, 1179 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993).

In all evasion cases, affirmative acts of evasion carried out after the statutory due date renew the limitations period and allow it to extend beyond six years from the time filing was required (or unpaid taxes were due). ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987) (false statements by defendant to revenue agents and prosecutor regarding income from prior year in question were affirmative acts which triggered the statute of limitations computation); ***United States v. Dandy***, 998 F.2d 1344 (6th Cir. 1993) ("To hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed"); ***United States v. DeTar***, 832 F.2d 1110, 1113

(9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable over six years ago).

In ***Spies*** evasion cases, where no return is filed, the statute of limitations period runs from the later of the due date of the tax return at issue or the commission of the affirmative act. ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); ***United States v. Winfield***, 960 F.2d 970, 974 (11th Cir. 1992). Thus, if the defendant committed the affirmative act during the tax year (*e.g.*, filed a false Form W-4), then the limitations period runs from the due date of the tax return. If the defendant committed the affirmative act after the filing due date (*e.g.*, lied to investigating agents), then the limitations period does not start until the date of the affirmative act.

8.09 ***LESSER INCLUDED OFFENSES***

Tax Division Memorandum dated February 12, 1993, regarding Lesser Included Offenses in Tax Cases (hereinafter "Memorandum") explains the Tax Division's policy on lesser included offenses. The Memorandum states the government's adoption of the strict "elements" test of ***Schmuck v. United States***, 489 U.S. 705, 709-10 (1989). This test makes one offense included in another only when the statutory elements of the lesser offense are a subset of the elements of the greater offense. *Id*. The policies relevant to tax evasion appear quoted below.

(Section 7203)

> 1. In cases charged as ***Spies***-evasion (*i.e.*, failure to file, failure to pay, and an affirmative act of evasion) under section 7201, it is now the government's position that *neither* party is entitled to an instruction that willful failure to file (section 7203) is a lesser included offense of which the defendant may be convicted. Thus, if there is reason for concern that the jury may not return a guilty verdict on the section 7201 charges (for example, where the evidence of a tax deficiency is weak), consideration should be given to including counts charging violations of both section 7201 *and* section 7203 in the indictment. [Note, however, that a willful failure to pay is a lesser included offense of a willful attempt to evade the payment of tax.]
>
> The issue whether cumulative punishment is appropriate where a defendant has been convicted of violating both section 7201 and section 7203 generally will arise only in pre-guidelines cases. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. Thus, only in those cases involving an extraordinary tax loss will the sentencing court be required to

consider an imprisonment term longer than five years. In those cases in which cumulative punishments are possible and the defendant has been convicted of violating both sections 7201 and 7203, the prosecutor may, at his or her discretion, seek cumulative punishment. However, where the sole reason for including both charges in the same indictment was a fear that there might be a failure of proof on the tax deficiency element, cumulative punishments should not be sought. Memorandum at 2.

(Section 7206)

2. Similarly, in evasion cases where the filing of a false return (section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. *See* ***Schmuck v. United States***, 489 U.S. 705 (1989) (one offense is necessarily included in another only when the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with ***Spies*** evasion cases, prosecutors should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the false return charge, nothing generally would be gained by charging violations of both sections 7201 and 7206.

Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (*e.g.*, where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

(Section 7207)

Although the elements of section 7207 do not readily appear to be a subset of the elements of section 7201, the Supreme Court has held that a violation of section 7207 is a lesser included offense of a violation of section 7201. *See* ***Sansone v. United States***, 380 U.S. 343, 352 (1965); ***Schmuck v. United States***, 489 U.S. at 720, n.11. Accordingly, in an appropriate case, either party may

> request the giving of a lesser included offense instruction based on section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document. Memorandum at 3.

(Other Offenses)

> 6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (*i.e.*, assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, should be applied. Memorandum at 4.

(General Warning)

> 5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. *See, e.g.*, ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992); ***United States v. Boone***, 951 F.2d 1526, 1541 (9th Cir. 1991); ***United States v. Kaiser***, 893 F.2d 1300, 1306 (11th Cir. 1990); ***United States v. Lodwick***, 410 F.2d 1202,1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set out in this memorandum be followed. Memorandum at 3.
>
> [T]hese guidelines will remain in effect unless or until the Supreme Court . . . rules inconsistently with the . . . policy. Memorandum at 4.

The policy statement was issued partially in response to recent appellate court decisions on the issue of whether section 7203 is a lesser included offense of section 7201. The Seventh Circuit held in ***United States v. Becker***, 965 F.2d 383 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993), that failure to file was not a lesser included offense of tax evasion ("[s]ection 7203 does not require 'an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense. . . .") ***Becker***, 965 F.2d at 391 (quoting ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986)).

In ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992), however, the Third Circuit held that failure to pay was a lesser included offense of evasion

of payment. McGill was charged with five counts of evasion of payment. The jury convicted the defendant of three counts of evasion of payment and of failure to pay regarding the other two years. McGill argued that section 7203 is not a lesser included offense of section 7201 "because one element of the misdemeanor -- failure to pay a tax -- requires different proof than the parallel affirmative act of evasion under § 7201 which as the court held in ***Spies*** cannot be the mere failure to pay". The court disagreed: "McGill's argument overlooks the fact that it is exactly in the situation where proof of the affirmative act to evade payment fails, that the lesser included offense of willful failure to pay may become relevant." ***McGill***, 964 F.2d at 239.

Prosecutors dealing with tax cases involving lesser included offense issues are encouraged to consult with the Tax Division's Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

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1. Changed to 18 U.S.C. § 3571, commencing Nov. 1, 1986.

2. The First Circuit also rejected the defendants' duplicity claims in both ***Huguenin*** and ***Waldeck*** on the grounds that the defendants in those cases were clearly apprised that the government was proceeding on an evasion-of-assessment theory. *See* ***Huguenin***, 950 F.2d at 26; ***Waldeck***, 909 F.2d at 558.

Although the court in ***Waldeck*** stated (909 F.2d at 558) that "the indictment could have been clearer by specifying that the crime charged was attempting to evade and defeat the assessment of taxes," the Tax Division believes that an indictment which tracks the first part of the statute and alleges an attempt to evade and defeat a tax clearly charges an attempt to evade tax by evasion of assessment. Similarly, an indictment which tracks the second part of the statute and alleges an attempt to evade payment of a tax clearly alleges an attempt to evade tax by evasion of payment. This analysis is consistent with the result in both ***Huguenin*** and ***Waldeck***.

3. The government's proof of additional tax in a given year cannot be based upon income which should have been reported in an earlier or later year. ***United States v. Wilkins***, 385 F.2d 465, 469 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

4. Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). *But see* ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986).

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9.00 *WILLFUL FAILURE TO COLLECT OR PAY OVER TAX*

9.00 *WILLFUL FAILURE TO COLLECT OR PAY OVER TAX*

9.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7202*

§7202. ***Willful failure to collect or pay over tax***

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined* not more than $10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.
>
> * As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623, which increased the maximum permissible fines for misdemeanors and felonies. Where 18 U.S.C. § 3623 [1] is applicable, the maximum fine under section 7202 for offenses committed after December 31, 1984, would be at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

9.02 *GENERALLY*

This statute describes two offenses: (1) a willful failure to collect; and (2) a willful failure to truthfully account for and pay over. It was designed primarily to assure compliance by third parties obligated to collect excise taxes and to deduct from wages paid to employees the employees' share of Federal Insurance Contribution Act (FICA) taxes and the withholding tax on wages applicable to individual income taxes. The withheld sums are commonly referred to as "trust fund taxes." *See* ***Slodov v. United States***, 436 U.S. 238, 242-48 (1978); ***United States v. H.J.K. Theatre Corporation***, 236 F.2d 502 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957). The legislative history of the statute prior to 1975 is discussed in ***United States v. Poll***, 521 F.2d 329, 333-34 n.2 (9th Cir. 1975). *See also* ***United States v. Poll***, 538 F.2d 845 (9th Cir.), *cert. denied*, 429 U.S. 977 (1976).

9.03 ***ELEMENTS***

To establish a violation of section 7202, the following elements must be proved beyond a reasonable doubt:

1. Duty to collect, and/or to truthfully account for and pay over;
2. Failure to collect, ***or*** truthfully account for and pay over; and
3. Willfulness.

Section 7202 has been seldom used, and there are few reported cases to use as a guide. Cases prosecuted under this statute usually involve the willful failure to truthfully account for and pay over social security taxes (FICA) and withholding tax. The duty of employers to truthfully account for and pay over is created by sections 3102(a), 3111(a), and 3402 of the Internal Revenue Code of 1986. *See* ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). Specifically, it is the individual with the duty to truthfully account for and pay over who is culpable when there is a failure to perform this duty. For an example of the criteria used to determine the individual with the duty to truthfully account for and pay over, *see* ***Datlof v. United States***, 252 F. Supp. 11, 32 (E.D. Pa.), *aff'd*, 370 F.2d 655 (3d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967), involving a civil penalty under 26 U.S.C. § 6672 for unpaid federal withholding and employment taxes.

The Tax Division's position historically has been that a willful failure truthfully to account for and pay over is a "breach of an inseparable dual obligation." ***Manual for Criminal Tax Trials***, United States Department of Justice, Tax Division, Criminal Section, 5th Ed. 1973, p. 26. Under this theory, a willful failure to pay after a truthful accounting is made, by filing a return, would still leave "the duty as a whole unfulfilled and the responsible person subject to prosecution."

The requisite element of willfulness under section 7202 is the same as in other offenses under Title 26. *See* Section 8.06, *supra*. It must be shown that a defendant voluntarily and intentionally acted in violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192

(1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Traditionally, however, this element has been difficult to establish in the context of a section 7202 prosecution.

The difficulty in proving willfulness resulted in the enactment of section 7215, a misdemeanor, for prosecution of "trust fund" cases. S. Rep. No. 1182, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. & Ad. News 2187, 2189. The Senate Report on what became section 7215 commented on the criminal penalty provided for by section 7202, as follows:

> This criminal penalty also has proved to be of limited usefulness because of the difficulty of proving willfulness, which to a lesser extent has also been a problem in the case of the civil penalty. The courts, for example, in the criminal cases generally have refused to treat as "willful" those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government.

The difficulty in the approach taken by the courts is illustrated by ***United States v. Poll***, 521 F.2d 329 (9th Cir. 1975). In ***Poll***, the parties stipulated that the amount of taxes which should have been withheld was correctly shown on the corporate books but that the defendant knowingly signed and filed false returns (Forms 941), which did not correctly reflect the amount withheld from wages. In reversing the conviction, the Ninth Circuit held that to establish a willful failure to truthfully account for and pay over taxes required to be withheld, both the failure to truthfully account for and the failure to pay over must be willful. As the Ninth Circuit viewed it, in addition to establishing a willful failure to truthfully account for taxes required to be withheld:

> [t]he Government must establish beyond a reasonable doubt that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

Poll, 521 F.2d at 333.

The ***Poll*** court also concluded that it was error not to allow the defendant to introduce evidence that the corporation lacked the money to pay the full amount of the taxes and that the defendant intended to make up the deficiencies later. This view ignores the fact that the duty imposed is not simply the duty to pay taxes, but also includes the duty to truthfully account for taxes, and that defendant Poll admittedly filed false returns. Contrary to the ***Poll*** decision, an inability to pay does not excuse the duty to truthfully account for the taxes that are due. [2]

Poll is incorrectly decided. However, where there is a willful failure to truthfully account for withheld taxes and some additional burden is imposed by the court, as suggested by ***Poll***, the government can meet that burden with testimony by employees or suppliers that other creditors were paid during the period in question and that any lack of funds to pay was voluntary and intentional.

It should be noted that Poll did not go free. Following the reversal of his conviction, the government promptly secured a new indictment that did not charge him with a section 7202 violation, but with filing a false return in violation of section 7206(1). His conviction was affirmed on appeal. ***United States v. Poll***, 538 F.2d 845 (9th Cir.), *cert. denied*, 429 U.S. 977 (1976). For a successful conviction under section 7202, *see* ***United States v. Scharf***, 558 F.2d 498 (8th Cir. 1977), where the court held that evidence that the defendant had altered records was admissible for the purpose of showing, "motive, intent, and willfulness." ***Scharf***, 558 F.2d at 501. For a case in which the court had no difficulty in concluding that defendant's conduct was willful in a section 7202 prosecution, *see* ***United States v. Bailey***, 789 F. Supp. 788, 814 (N.D. Tex. 1992) (failure to pay over taxes withheld from employees' paychecks for almost a decade found to be willful).

9.03[1] ***Motor Fuel Excise Tax Prosecutions***

Care must be exercised to insure that section 7202 is not applied to those who have the duty to pay the tax at issue. Section 7202 applies to a person who is not the taxpayer but is under a duty to collect the tax from the taxpayer and then to truthfully account for the collected tax to the government and pay it over. Often, the one responsible for the tax will pass it on to another, as, for example, by including it as part of the price of goods. But the fact that the taxpayer "collects" the tax from another in this sense does not mean that he is responsible under the law for collecting the tax and, thus, potentially subject to prosecution under section 7202.

Consequently, it is the position of the Department of Justice that section 7202 charges are not appropriate in a motor fuel excise tax case. There is no obligation, within the meaning of section 7202, to collect and pay over these gasoline taxes. *See* ***United States v. Musacchia***, 955 F.2d 3 (2d Cir. 1991) (vacating defendant's conviction under section 7202 after being advised by Department of Justice that section 7202 "does not apply to the gasoline taxes at issue here"). ***Musacchia***, 955 F.2d at 4.

9.04 ***VENUE***

If a statute does not indicate where Congress considers the place of committing a crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). Although no venue cases have been found, venue would appear to be proper in a section 7202 prosecution in the judicial district in which the defendant was required to collect or pay over the tax.

For a general discussion of venue, *see* Section 6.00, *supra*.

9.05 ***STATUTE OF LIMITATIONS***

The statute of limitations for prosecutions under section 7202 is six years. *See* ***United States v. Musacchia***, 900 F.2d 493, 499-500 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir.), *cert. denied*, 111 S. Ct. 2887 (1991); ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). Be aware, however, that one district court to consider the question has concluded that the statute of limitations for section 7202 prosecutions is three years. ***United States v. Block***, 497 F. Supp. 629, 630-32 (N.D. Ga. 1980), *aff.d* 660 F.2d 1086 (5th Cir. 1980).

In the ***Block*** court's view, the omission of the language "collect, account for, and pay over" from the subsections of 26 U.S.C. § 6531, which establish the longer six-year period of limitations, demonstrates that Congress did not intend to make the failure to "pay over" third party taxes subject to the six-year statute of limitations. ***Block***, 497 F. Supp. at 630-32.

The court also noted in ***Block***, 497 F. Supp. at 632, that section 6531(4) was not directed at a class of offenses but rather to "the offense of willfully failing to pay any tax." The court reasoned that it was "quite clear" that failure to pay over third-party taxes was substantively different from a failure to pay taxes; thus, the exception contained in section 6531(4) was found not to apply to the failure to pay over third-party taxes. *But see* ***Wilson v. United States***, 250 F. 2d 312, 320 (9th Cir. 1958).

The Second Circuit, in ***Musacchia***, reviewed the ***Block*** decision and concluded that that "court's analysis is not convincing." ***Musacchia***, 900 F.2d at 499-500. The ***Musacchia*** court found that although 26 U.S.C. § 6531(4) does not track the language of section 7202 exactly, the terms "pay" and "pay over" were used interchangeably by the Supreme Court in deciding ***Slodov v. United States***, 436 U.S. 238, 249 (1978), and thus the fact that section 6531(4) uses the term "pay" rather than "pay over" is not dispositive.

Instead, the ***Musacchia*** court found persuasive the government's argument that "it would be

inconsistent for Congress to have prescribed a six-year limitations period for the misdemeanor offense defined in 26 U.S.C. § 7203 . . . while providing only a three-year limitation period for the felony offense defined in Section 7202." ***Musacchia***, 900 F.2d at 500. The court also noted that the language of section 6531(4) supports the conclusion that the six-year limitations period applies in a section 7202 prosecution. ***Musacchia***, 900 F.2d at 500.

The Tax Division takes the position that ***Porth*** and ***Musacchia*** are correctly decided and that the six-year statute of limitations provided for in section 6531(4) is applicable to prosecutions under section 7202.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. For cases holding that in a prosecution under 26 U.S.C. § 7203, the government need not prove that at the time the defendant filed his returns, he possessed readily available funds with which to pay his taxes, *see* ***United States v. Ausmus***, 774 F.2d 722, 725 (6th Cir. 1985), and ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir. 1982). ***Ausmus*** and ***Tucker*** rejected ***United States v. Andros***, 484 F.2d 531, 533-34 (9th Cir. 1973), a case in which the Ninth Circuit stated, in dicta, that to establish a willful failure to pay under section 7203, the government must prove that the taxpayer possessed sufficient funds to meet his tax obligations and that the taxpayer voluntarily and intentionally did not pay the tax due.

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10.00 *FAILURE TO FILE, SUPPLY INFORMATION OR PAY TAX*

10.00 *FAILURE TO FILE, SUPPLY INFORMATION OR PAY TAX*

10.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7203*

§7203. ***Willful failure to file return, supply information, or pay tax***

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined* not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."

*For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the misdemeanor offenses set forth in section 7203, the maximum permissible fine for offenses committed after December 31, 1984, is at least $100,000 in the case of individuals. As to corporations, the maximum permissible fine is at least $200,000. For felony offenses in section 7203 involving willful violations of section 6050I, the maximum permissible fine is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

10.02 *GENERALLY*

Section 7203 covers four different situations -- each of which constitutes a failure to perform in a timely fashion an obligation imposed by the Internal Revenue Code. The four categories set forth in section 7203 are: (1) failure to pay an estimated tax or tax; (2) failure to make (file) a return; (3) failure to keep records; and, (4) failure to supply information.

With the exception of cases involving willful violations of any provision of section 6050I of the Internal Revenue Code, all of the offenses under section 7203 are misdemeanors. Therefore, except for the above-referenced felonies, section 7203 prosecutions may be initiated either by information or indictment. Reference should be made to Section 25.00, *infra*, for additional

discussion of violations of section 6050I.

The charge most often brought under section 7203 is the failure to make (file) a return. A fair number of cases are also brought under section 7203 for failure to pay a tax. Note that the attempt to evade or defeat the payment of a tax is a felony under section 7201 of the Code. Willfulness is the same for both misdemeanor offenses and felony offenses under the Internal Revenue Code. The difference in the offenses is that failure to file or pay under section 7203 involves merely a failure to do something (an omission), whereas there must be an affirmative act or a "willful commission" to raise the offense to a section 7201 felony. ***Sansone v. United States***, 380 U.S. 343, 351 (1965). Note also that, by its express terms, section 7203 does not apply to a "failure to pay an estimated tax" if there is no "addition to tax" pursuant to the rules provided for in section 6654 (Failure By Individuals To Pay Estimated Income Tax) and section 6655 (Failure By Corporation To Pay Estimated Tax).

Some cases have also been brought charging a failure to supply information and these are noted below. The charge of failing to "keep any records" is not commonly used and is not treated separately in this manual.

10.03 ***PERSON LIABLE***

Each of the categories set forth in section 7203 specifies a distinct and separate obligation. Failure to perform an obligation in any one of the categories may constitute an offense. *See* ***Sansone v. United States***, 380 U.S. 343, 351 (1965). An offender may be charged with failure to perform each obligation as often as the obligation arises. *See* ***United States v. Stuart***, 689 F.2d 759, 763 (8th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (defendant who failed to file for three years guilty of three separate offenses rather than one continuing offense); ***United States v. Harris***, 726 F.2d 558, 560 (9th Cir. 1984) (same).

Any "person" who fails to perform an obligation imposed by the Internal Revenue Code and the applicable regulations may be liable for prosecution under section 7203. The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Internal Revenue Code section 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

10.04 ***FAILURE TO FILE***

10.04[1] ***Elements***

To establish the offense of failure to make (file) a return, the government must prove three essential elements beyond a reasonable doubt:

1. Defendant was a person required to file a return;
2. Defendant failed to file at the time required by law; and,
3. The failure to file was willful.

United States v. Foster, 789 F.2d 457, 460 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993); ***United States v. Buras***, 633 F.2d 1356, 1358 (9th Cir. 1980); ***United States v. Harting***, 879 F.2d 175, 766-67 (10th Cir. 1989); ***United States v. Williams***, 875 F.2d 846, 850 (11th Cir. 1989).

10.04[2] ***Required by Law to File***

Various provisions of the Internal Revenue Code (and regulations thereunder) specify the events which trigger the obligation to file a return. Section 6012 of the Internal Revenue Code lists the persons and entities required to make returns with respect to income taxes.

The receipt of a specified amount of gross income generally determines whether an income tax return must be filed. "Gross income" is broadly defined in section 61(a) of the Code to mean:

> [A]ll income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
>
> (2) Gross income derived from business;
>
> (3) Gains derived from dealings in property;
>
> (4) Interest;
>
> (5) Rents;
>
> (6) Royalties;
>
> (7) Dividends;
>
> (8) Alimony and separate maintenance payments;
>
> (9) Annuities;
>
> (10) Income from life insurance and endowment contracts;
>
> (11) Pensions;
>
> (12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

The amount of gross income which serves to trigger the filing requirement has changed over the years. Consequently, care must be exercised to insure that the amount of gross income received by the defendant was sufficient to require the filing of a return in the particular year at issue. For taxable years beginning after December 31, 1984, section 6012 provides a formula based on gross income to determine whether an individual must make a return.

To meet its burden, the government need prove only that a person's gross income equals or exceeds the statutory minimum. ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); ***United States v. Bell***, 734 F.2d 1315, 1316 (8th Cir. 1984). Where the government is unable to present direct evidence of gross income, its burden may be satisfied by means of an indirect method of proof. ***United States v. Bianco***, 534 F.2d 501, 503-06 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976) (evidence of expenditures in excess of the statutory minimum plus evidence negating nontaxable sources); ***United States v. Shy***, 383 F. Supp. 673, 675 (D. Del. 1974) (net worth).

Gross income is different and distinguishable from gross receipts. "Gross receipts cannot be called gross income, insofar as they consist of borrowings of capital, return of capital, or any other items which the IRS Code has excluded from gross income." ***United States v. Ballard***, 535 F.2d 400, 404 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976). *See* ***United States v. Goldstein***, 56 F.R.D. 52, 55 (D. Del. 1972). Nevertheless, gross receipts remaining, after appropriate adjustment, may properly reflect gross income. ***Clark v. United States***, 211 F.2d 100, 102 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955). *See also* ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); ***Ballard***, 535 F.2d at 405.

For manufacturing, merchandising, or mining enterprises, where the filing requirement is predicated upon gross income, gross income is determined, in part, by subtracting the cost of goods sold from gross receipts or total sales. Treas. Reg. § 1.61-3 (26 C.F.R.); ***Ballard***, 535 F.2d at 400, 404-05. To meet its burden, the government need prove only that gross receipts exceed the cost of goods sold by an amount sufficient to trigger the reporting requirement. ***Siravo v. United States***, 377 F.2d 469, 473 (1st Cir. 1967); ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir.), *cert. denied*, 446 U.S. 922 (1980). *See* ***United States v. Gillings***, 568 F.2d 1307, 1310 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978). The burden then shifts to the enterprise to come forward with evidence of offsetting expenses. ***Siravo***, 377 F.2d at 473-74; ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984); ***United States v. Bahr***, 580 F. Supp. 167, 170-71 (N.D. Iowa 1983). *See also* ***Garguilo***, 554 F.2d at 62; ***Gillings***, 568 F.2d at 1310.

Effective January 1, 1985, 26 U.S.C. § 6050I requires any person engaged in a trade or business who receives more than $10,000 in cash [2] in one transaction (or two or more related)

transaction(s) to file an information return (Form 8300). The return is due the 15th day after the cash is received.

Attorneys are not exempted from section 6050I's requirement that a Form 8300 must be filed each time a person engaged in a trade or business receives more than $10,000 in cash in the course of such trade or business. This requirement, as applied to attorneys, does not violate the Fourth, Fifth, or Sixth Amendments. ***United States v. Goldberger & Dubin, P.C.***, 935 F.2d 501 (2nd Cir. 1991). Nor does it violate the attorney-client privilege. ***United States v. Leventhal***, 961 F.2d 936 (11th Cir. 1992). Section 6050(I)(f)(1) and (2) criminalize the willful failure to file a Form 8300. Section 7203 criminalizes the failure to file. The government need not cite in the indictment or information the provision of the Code which requires the filing of the particular return involved. ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993). It is enough that an indictment allege the elements of section 7203 "with sufficient clarity to apprise [the defendant] of the charges against him and is drawn with sufficient specificity to foreclose further prosecution upon the same facts." ***Vroman***, 975 F.2d at 671.

10.04[3] ***Return Not Filed at Time Required by Law***

10.04[3][a] ***What is a Return***

The mere fact that an individual or entity files a tax form does not necessarily satisfy the requirement that a return of income be filed. For example, tax protestors or individuals who receive illegal source income sometimes file the correct form but do not provide meaningful or complete information. Such filings may include assertions of various constitutional privileges.

"A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner." ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). The test is "whether the defendants' returns themselves furnished the required information for the I.R.S. to make the computation and assessment . . ." ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984). *See also* ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979) ("conglomeration of papers filed with almost blank 1040"); ***United States v. Edelson***, 604 F.2d 232, 234 (3d 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (where taxpayer included bottom line assertion of liability, but did not include information from which to derive that figure); ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984) (taxpayer must divulge "sufficient financial circumstances" to determine tax liability); ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 F.2d 954 (1986) (Form 1040 with word "object" written in all spaces requesting information is not a return); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075

(10th Cir. 1983); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979) ("unknown" or claimed "Fifth Amendment" responses on Forms 1040 are not returns). *See also* discussion at Section 40.02[2], *infra*.

The determination of what is an adequate return is a legal question, and the district court properly may decide the question. ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985) (if tax return does not contain any information relating to a taxpayer's income from which a tax may be computed, it cannot be classified as a return within the meaning of the Internal Revenue Code). Some courts, however, have cautioned that such a ruling may improperly invade the province of the jury. *See* Section 40.02[3], *infra*. Therefore, a return that contained "absolutely no information" about the defendant's tax status but merely stated "all details available on proper demand" is not a return, and the "court was right in telling the jury so." ***United States v. Klee***, 494 F.2d 394, 397 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). *See also* ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (jury instructions regarding whether form filed constitutes return, and invocation of Fifth Amendment privilege).

Note, however, that the Ninth Circuit has held that a Form 1040 which contains only zeroes cannot form the basis for a section 7203 violation since the zeroes constitute information as to income from which a tax could be computed. ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). The ***Long*** court conclusion that a "return containing false or misleading figures is still a return" suggests that a more proper charge could be made pursuant to section 7206(1). ***Long***, 618 F.2d at 75-76. Other circuits which have considered the issue presented by ***Long*** have reject that court's reasoning. In rejecting ***Long***, the Seventh Circuit concluded that "there must be an honest and reasonable intent to supply the information required by the tax code," and "when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return." ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). *See also* ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980) (returns which contained nothing but zeroes and constitutional objections plainly did not even purport to disclose the required information); ***Mosel***, 738 F.2d at 158 (we align ourselves with those circuits which have specifically considered and rejected the Ninth Circuit's decision in ***Long***); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980) (disagreement with the ***Long*** decision).

10.04[3][b] ***Return Not Filed at Time Required by Law***

The basis for a failure to file offense is that the government is entitled to have a required return filed on time. In the leading case of ***Spies v. United States***, 317 U.S. 492, 496 (1943), the Supreme Court noted the importance given to timely filing:

> Punctuality is important to the fiscal system, and these are [criminal] sanctions to assure punctual as well as faithful performance of these duties.

In a number of instances the Internal Revenue Code sets forth the time when a given return must be filed. Thus, section 6072 of the Code prescribes the time for filing income tax returns. *See* Treas. Reg. §§ 1.6072-1, 1.6072-2 (26 C.F.R.).

Individuals on a calendar year basis are required to file on or before the 15th day of April following the close of the calendar year. 26 U.S.C. § 6072(a). Corporations are generally required to file on or before the fifteenth day of the third month following the close of the taxable year, *i.e.*, March 15th for a calendar year corporation. 26 U.S.C. § 6072(b). Sections 6075 and 6076 fix the time for filing other returns, such as estate and gift tax returns, and windfall profit tax returns. Forms 8300 are due the 15th day after the cash is received. *See* Treas. Reg. § 1.6050I-1(e) (26 C.F.R.).

When the last day for filing a return falls on a Saturday, Sunday, or a legal holiday, the return will be considered timely filed if it is filed on the next day which is not a Saturday, Sunday, or legal holiday. 26 U.S.C. § 7503. Thus, if a return is due on April 15th and April 15th falls on a Saturday or a Sunday, the return would not be due until the following Monday, unless the Monday is a legal holiday, in which event, a return would not be due until the next day -- Tuesday.

Where the Code does not fix a time for the filing of a return, the Secretary is directed to prescribe the time "by regulations" for filing any return, statement, or document required to be filed by the Code or by regulations. 26 U.S.C. § 6071.

Because the time required by law for filing a return is crucial to the offense, the government's failure in its charge to properly allege the date when the legal duty to file arose may jeopardize a prosecution. ***United States v. Bourque***, 541 F.2d 290, 293-94 (1st Cir. 1976) (IRS regulations allow a new corporation to determine its own fiscal year and therefore date return due); ***United States v. Goldstein***, 502 F.2d 526, 528 (3d Cir. 1974).

Pursuant to section 6081(a) of the Code, the Secretary is authorized to grant a "reasonable extension of time" for filing any return, declaration, statement, or other document required to be filed for a period of up to six months. In general, individuals may request an automatic extension (Form 4868) until August 15th. An additional extension, until October 15th, may also be requested. A corporation may have an automatic extension of six months for filing a return if it meets the conditions set forth in the Code and applicable regulations. 26 U.S.C. § 6081(b).

As a practical matter, this means that in any failure to file case a search must be undertaken of IRS records, so that a determination can be made as to whether the taxpayer has obtained an extension of time in which to file. An attempt should always be made to obtain the filed extension form from the IRS. Many professional return preparers routinely keep in their files unsigned extensions on behalf of their clients but an extension application signed by the taxpayer provides evidence the taxpayer knew a return was due. Moreover, because the extension application bears a perjury jurat, a materially false signed extension application can form the basis for a felony prosecution under 26 U.S.C. § 7206(1).

There can be no crime of failing to file an individual return by April 15th if the taxpayer has obtained extensions of time in which to file. *See*, ***Goldstein***, 502 F.2d 526, reversing a conviction

where Goldstein was indicted for failing to file before April 15th, but at trial it developed that Goldstein had applied for an extension and, thus, had no duty to file until May 7th.

The following chart summarizes some of the filing requirements for the most common taxpaying entities:

FILING REQUIREMENTS

TAXPAYER	***RETURN/FORM***	***GROSS INCOME***	***DATE DUE***
Individual (Single)*	1040, 1040A 1987 1040EZ	$4,440	15th day of 4th month after close of tax year
		1988 $4,950	
		1989 $5,100	
		1990 $5,300	
		1991 $5,550	
		1992 $5,900	
		1993 $6,050	
Married Filing Jointly	1040, 1040A 1988	$8,900	Same
		1989 $9,200	
		1990 $9,550	
		1991 $10,000	
		1992 $10,600	
		1993 $10,900	
Corporation	1120	N/A	15th day of 3rd month after close of tax year
Sub S Corporation	1120S	N/A	Same
Partnership	1065	N/A	15th day of 4th month after close of tax year
Fiduciary (trust or estate income)	1041	$600 gross or any taxable income	15th day of 4th month after close of tax year
Person in Trade or Business	8300 (CTR)	receipt of more than $10,000 cash	15th day after cash received

Employer	941	collected with-holding tax (income and FICA)	Quarterly - last day of month following quarter**
Estate	706	Gross estate of $600,000 at time of death if after 1986	9 months after date of death

* Note that the minimum amount for a married individual whose spouse filed separately is less.

** If the corporation has already deposited full amount, there is an additional 10 days in which to file.

10.04[4] ***Proof of Failure to File***

The mechanics of establishing that there was a failure to file are simple. It can be done either with a witness or by a certification procedure. A combination of the two methods also may be employed.

Witness Procedure If a witness is to be used, a representative of the appropriate Service Center, *i.e.*, one from the Service Center having custody of returns for the required place of filing, is called to testify. The witness will testify that he or she is a representative of the Director of the Service Center, that he or she has custody of returns for a given area, that the defendant was required to file with his or her "office", that records are kept reflecting the returns filed, and that a search of the records revealed that no return was filed by the defendant. If this procedure is followed, the witness should personally conduct or direct the search of the records. In addition, the witness should be interviewed ahead of time, and it should be brought out on the direct examination that the witness is not a tax expert. This is important, and a failure to do this can lead to confusion and a very uncomfortable witness. In some cases, particularly those involving tax protestors with experienced counsel, cross-examination concerning Service Center procedures and various codes on IRS account transcripts may be extensive. The questioning may also focus on the witness's knowledge that the Service Center has lost or misplaced returns or that the computerized taxpayer account system is faulty. Reference should be made to the discussion of tax protestor prosecutions in Section 40.00, *infra*.

For two cases where the witness procedure was used, *see* ***United States v. Greenlee***, 517 F.2d 899, 902-03 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975); ***United States v. Wellendorf***, 574 F.2d 1289, 1291 (5th Cir. 1978).

Certification Procedure A failure to file by a given taxpayer can be established without a witness by obtaining a certified transcript of account from the appropriate Service Center stating that the taxpayer has not filed a return for the year(s) in question. ***United States v. Spine***, 945 F.2d 143 (6th Cir. 1991); ***United States v. Ryan***, 969 F.2d 238 (7th Cir. 1992) (trial court's decision to admit IRS computer printouts will be reversed only for abuse of discretion); ***United States v. Farris***, 517 F.2d 226, 227-29 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (IRS certified computer records admissible as self-authenticating documents; Fed. R. Evid. 902(4)); ***United States v. Neff***, 615 F.2d 1235, 1241-42 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); *accord*, ***United States v. Yakobov***, 712 F.2d 20, 27 (2d Cir. 1983).

Proof of a negative is provided for by Rule 803(10) of the Federal Rules of Evidence, which states that the proof can be by way of testimony or in the form of a certification in accordance with Rule 902 of the Federal Rules of Evidence.

10.04[5] ***Willfulness***

Reference should be made to the discussion of willfulness in each section of this manual involving crimes of willfulness, particularly Section 8, *supra*, ***Attempt to Evade or Defeat Tax***.

Willfulness is the state of mind which must be proven to establish intent, and whether the charge is a felony (*e.g.*, evasion) or a misdemeanor (*e.g.*, failure to file), the willfulness or intent that must be established is the same. ***United States v. Bishop***, 412 U.S. 346, 361 (1973).

Willfulness in criminal tax violations means a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973); ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982); ***United States v. Moon***, 718 F.2d 1210, 1222 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Edelson***, 604 F.2d 232, 235-36 (3d Cir. 1979); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Buckley***, 586 F.2d 498, 503-04 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); ***United States v. Grumka***, 728 F.2d 794, 796 (6th Cir. 1984); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir.), *cert. denied*, 479 U.S. 358 (1986); ***United States v. Verkuilen***, 690 F.2d 648, 655 (7th Cir. 1982); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Dahlstrom***, 713 F.2d 1423, 1427 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984); ***United States v. Rothbart***, 723 F.2d 752, 754 (10th Cir. 1983). Particular reference should be made to the discussion of the subjective standard for willfulness in Sections 8.00 and 40.00, *supra.*

Thus, in a failure to file prosecution, the government is required to establish that the offender voluntarily and intentionally failed to file returns which he knew were required to be filed. ***United States v. Quimby***, 636 F.2d 86, 90 (5th Cir. 1981). The government need not, however, prove "evil motive or a bad purpose". ***United States v. Powell***, 955 F.2d 1206, 1211 (9th Cir. 1992). *See also* ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); ***Cooley v. United States***, 501 F.2d 1249, 1252-53 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). The only bad purpose necessary to meet the willfulness requirement of section 7203 is a deliberate intention not to file returns that the offender knew ought to be filed. ***United States v. Evanko***, 604 F.2d 21, 23 (6th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); ***United States v. Hawk***, 497 F.2d 365, 366-69 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974); ***United States v. Brown***, 600 F.2d 248, 258 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979).

Similarly, demonstration of a good purpose is not a defense to a charge of willful failure to file. If it is shown that the taxpayer intentionally violated a known duty, the reason for doing so is irrelevant. ***United States v. Dillon***, 566 F.2d 702, 703 (10th Cir. 1977), *cert. denied*, 435 U.S. 971 (1978) (attempt to test constitutionality of income tax laws). In ***United States v. McCorkle***, 511 F.2d 482 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 826 (1975), the court flatly rejected the defendant's argument that to prove a willful failure to file the government had to establish an intent to defraud. The jury instruction upheld by the court is reprinted in a footnote to the opinion. *See* ***McCorkle***, 511 F.2d at 484 n.2. The ***McCorkle*** case furnishes a good example of evidence that is not admissible in defense of a failure to file, *e.g.*, contemplating suicide, no funds available to pay taxes, fear of IRS liens on property, involved in divorce, offering to pay civil liabilities, and not keeping accurate records. 511 F.2d at 486. *See also* ***United States v. Klee***, 494 F.2d 394, 395 n.1 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974) ("no necessity that the government prove that the

defendant had an intention to defraud it, or to evade the payment of any taxes . . . .").

Willfulness is thus established when the government proves that the failure to file was "voluntary and purposeful and with the specific intent to fail to do that which he knew the law required." ***United States v. Wilson***, 550 F.2d 259, 260 (5th Cir. 1977); ***Cooley***, 501 F.2d at 1253 n.4. But willfulness is not established if the government proves only a "careless and reckless disregard" for the obligation to file. ***United States v. Eilertson***, 707 F.2d 108, 109-10 (4th Cir. 1983) (trial court improperly used pre-***Bishop*** "careless disregard" jury instruction). *See* ***United States v. Wolters***, 656 F.2d 523, 525 (9th Cir. 1981) (jury instruction sufficiently defined willful so as to exclude "reckless disregard").

10.04[5][a] ***Proof of Willfulness***

Proof of willfulness may be, and usually is, shown by circumstantial evidence alone. ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979) (previously filed corporate and personal returns; reminder by accountant); ***United States v. Brown***, 548 F.2d 1194, 1199 (5th Cir. 1977) (letters from Service Center); ***United States v. Grumka***, 728 F.2d 794, 796-97 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984) (section 7201) (list of acts from which willfulness can be inferred); ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963) (section 7201).

Willfulness is suggested by a pattern of failing to file for consecutive years in which returns should have been filed. ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975). This may include years prior or subsequent to the prosecution period. ***United States v. Farris***, 517 F.2d 226, 229 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986).

Willfulness may also be shown by such acts as mailing tax protest materials to the IRS, disregarding IRS warning letters, and filing contradictory forms. ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986) (defendant filed a W-4 claiming he was exempt from withholding only four days after filing a W-4 claiming three allowances); *see also* ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (defendant sent protestor materials to IRS); ***United States v. Poschwatta***, 829 F.2d 1477, 1481-82 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) (willfulness shown by past failure to file, application for extension of filing deadline, and knowledge of criminal penalties of failure to file).

There is also an element of common sense in establishing willfulness in a failure to file case. Thus, willfulness can be shown by such factors as: the background of the defendant; the filing of returns in prior years, ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Birkenstock***, 823 F.2d 1026, 1028 (7th Cir. 1987); ***Poschwatta***, 829 F.2d at 1481; ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986); that the defendant was a college graduate with accounting knowledge; that the defendant was familiar with books and records and

operated a business, ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989); that the defendant earned a large gross income, ***Bohrer***, 807 F.2d at 161. *See also* ***United States v. Ostendorff***, 371 F.2d 729, 731 (4th Cir.), *cert. denied*, 386 U.S. 982 (1967); ***United States v. MacLeod***, 436 F.2d 947, 949 (8th Cir.), *cert. denied*, 402 U.S. 907 (1971).

In a similar vein, where the defendant received a standard Form W-2, it has been held that:

> the jury was entitled to view the W-2 Forms as reminders of the duty to file received shortly before or during the period in which filing was required.

United States v. Cirillo, 251 F.2d 638, 639 (3d Cir. 1957), *cert. denied*, 356 U.S. 949 (1958). The Form W-2 does not serve as a return, whether filed by the taxpayer or employer. ***Birkenstock***, 823 F.2d at 1030. *See also* Section 40.14[16], *infra*.

Also, evidence that a defendant had filed returns in other years when he claimed refunds while there was a substantial tax due for the years he failed to file is relevant evidence and more than enough to establish willfulness. ***Garguilo***, 554 F.2d at 62.

10.04[5][b] ***Willful Blindness***

Because willfulness requires a voluntary and intentional violation of a known legal duty, it is a defense to a finding of willfulness that the defendant was ignorant of facts which made the conduct illegal. Such ignorance is not a defense, however, if the defendant purposefully sought to avoid knowledge. *See* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* ***McCreary v. United States***, 476 U.S. 1186 (1986) (mail and wire fraud). When a defendant claims ignorance as to facts necessary for a finding of willfulness, the defendant's knowledge may be inferred from conduct. Evidence that a defendant avoided knowledge of facts that would alert the defendant to a duty under the tax laws may prove knowledge circumstantially. The prosecution may argue that the jury should infer guilty knowledge from the charade of deliberate avoidance of knowledge. ***Ramsey***, 785 F.2d at 189. The use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) -- may be appropriate in circumstances where the defendant claims a lack of knowledge and the evidence supports a finding that the ignorance was intentional.

A number of courts have approved the use of such instructions under proper circumstances. *See, e.g.*, ***United States v. Picciandra***, 788 F.2d 39, 46 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986); ***United States v. Callahan***, 588 F.2d 1078 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Bussey***, 942 F.2d 1241, 1246 (8th Cir.), *cert. denied*, 112 S. Ct. 1936 (1991) (post-***Cheek*** decision); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several 9th Circuit cases).[3] Thus, it is advisable not to request such an

instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case. [1] Further, to avoid potential confusion with the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance." [2]

10.04[6] ***Tax Deficiency Not Necessary***

The crime of failing to file a return is complete if a return was required to be filed at a given date and the taxpayer intentionally did not file a return. There is no requirement that the government prove a tax liability, as long as the proof establishes that the taxpayer had sufficient gross income to require the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979). As a practical matter, evidence establishing a tax deficiency usually will be offered as a part of the government's evidence of willfulness but, as noted, this is technically not necessary. *See* ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986) (evidence of tax liability relevant and not prejudicial in failure to file case). *See also* ***United States v. Hairston***, 819 F.2d 971, 974 (10th Cir. 1987) (defendant not allowed to show that he would have received refund to negate willfulness).

10.04[7] ***Venue - Failure to File***

Reference should be made to the discussion of venue in Section 6.00, *supra*.
The general rule is that venue in a failure to file case is found in any judicial district in which the taxpayer is required to file, *i.e.*, the district in which the crime was committed. ***United States v. Rice***, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89 (5th Cir. 1981).

Section 6091 of the Code sets forth the places for filing returns. In those instances where the Code does not provide for the place of filing, the Secretary "shall by regulations" prescribe the place for filing. 26 U.S.C. § 6091(a).

The general rule is that individual tax returns are to be filed either in the internal revenue district where the taxpayer resides or has his principal place of business, or at the Service Center serving the internal revenue district where the taxpayer resides or has his principal place of business. 26 U.S.C. § 6091(b); Treas. Reg. § 1-6091-2 (26 C.F.R.); ***United States v. Garman***, 748 F.2d 218, 219 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). "'Legal residence' means the

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1 Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

2 It is suggested that any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

permanent fixed place of the abode which one intends to be his residence and to return to it despite temporary residences elsewhere, or absences." ***United States v. Calhoun***, 566 F.2d 969, 973 (5th Cir. 1978). Note that, "(a)n individual employed (exclusively) on a salary or commission basis . . . does not have a 'principal place of business' within the meaning of this section." Treas. Reg. § 1.6091-2(a)(2) (26 C.F.R.).

One exception for individuals is that if the taxpayer's legal residence is outside the United States or if his return bears a foreign address, the return should be filed with the Director of International Operations, Internal Revenue Service, Washington, D.C., or the district director, or the director of Service Center, depending on the return form or in the instructions issued with the return. Treas. Reg. § 1.6091-3(b) (26 C.F.R.). Another exception is that if an individual, although continuously present in the United States, has no legal residence or principal place of business in any internal revenue district, the return should be filed with the District Director in Baltimore, Maryland. Treas. Reg. § 1-6091-2(a)(1) (26 C.F.R.).

For a corporation, the general rule is substantially the same as for individuals, except that the "principal office or agency of the corporation" is substituted for "legal residence." Treas. Reg. § 1.6091-2(b) (26 C.F.R.).

While no case exactly on point has been located, it would seem that the place of performance is to be determined on the basis of the taxpayer's legal residence or principal place of business at the time the return was due, because 26 U.S.C. § 6091 is written in the present tense.

Returns can also be filed by hand-carrying to the appropriate Internal Revenue Service office (26 U.S.C. § 6091(b)(4)). The regulations provide, for example, that an individual return "filed by hand-carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone, or local office constituting a permanent post of duty within the internal revenue district of such director) . . . ." Treas. Reg. § 1.6091-2(d)(1) (26 C.F.R.). The reference to the district director or local office refers back to the district "in which is located the legal residence or principal place of business" of the taxpayer. *Id.*

As a practical matter, all of this means that venue in the usual individual failure to file case can be placed in the district where the appropriate Service Center is located, or in the district where the taxpayer resides or has his principal place of business. Note, however, that under the statute governing venue in continuing offenses, 18 U.S.C. § 3237, specific reference is made to cases brought pursuant to sections 7201, 7203, and 7206(1), (2), and (5). Section 3237(b) provides that where an offense is described in section 7203 or when venue for a prosecution of an offense described in section 7201 or section 7206(1), (2), or (5) is based solely on a mailing to the IRS and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, the case may be transferred upon motion by the defendant to the district in which he was residing at the time the offense was committed. *See also* Section 6.00, *supra*, on venue in this Manual.

10.04[8] ***Statute of Limitations***

Reference should be made to Section 7.00, *supra*, discussing the statute of limitations in

criminal tax cases.

The statute of limitations for a failure to file a return is six (6) years, except for information returns required under Part III of subchapter A of Chapter 61 of the Internal Revenue Code. 26 U.S.C. § 6531(4). For information returns required by the Code, including returns (Forms 8300) required pursuant to section 6050I, the period of limitations is three (3) years, as is the period of limitations for failure to supply information or keep records.

The statute of limitations is computed from the due date of the return. *See* Section 10.04(3), *supra*. In the case of an individual, this will usually be April 15th, unless an extension of time in which to file is granted (26 U.S.C. § 6081), in which event the statute is computed from the extended compliance date. *See* ***United States v. Goldstein***, 502 F.2d 526 (3d Cir. 1974); ***United States v. Pandilidis***, 524 F.2d 644 (6th Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

The statute of limitations is tolled by the filing of the information or indictment. ***United States v. Saussy***, 802 F.2d 849, 851 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (claim that information must be "verified" by affidavit or other prior determination of probable cause rejected). The statute is also tolled when the defendant is outside the United States or is a fugitive from justice, 26 U.S.C. § 6531, and during certain summons enforcement proceedings, 26 U.S.C. § 7609(e).

10.05 ***FAILURE TO PAY***

10.05[1] ***Elements***

To establish the offense of failure to pay a tax, the government must prove beyond a reasonable doubt that:

(1) The defendant had a duty to pay a tax;

(2) The tax was not paid at the time required by law; and,

(3) The failure to pay was willful.

United States v. Tucker, 686 F.2d 230, 232 (5th Cir.), *cert. denied*, 459 U.S. 1071 (1982). *See* ***Sansone v. United States***, 380 U.S. 343, 351 (1965). Prosecutions of a willful failure to pay "are rare". ***United States v. Tucker***, 686 F.2d at 233.

10.05[2] ***Required by Law to Pay***

This element should not pose any undue difficulty. If the taxpayer has not filed a return, the charge would be a failure to file. However, when a return has been filed reflecting a tax due and owing, there are at least two possible charges, depending on the facts -- an attempted evasion of payment, in violation of 26 U.S.C. § 7201, or a failure to pay a tax, in violation of 26 U.S.C. § 7203. The charge would be under section 7203 if there was no affirmative attempt to evade the payment by, for example, the concealment of assets or the use of nominees, but, rather, simply a failure to pay a tax that was due and owing.

As to the time of payment, section 6151(a) of the Code sets forth the general rule as follows:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return . . . .

See ***United States v. Drefke***, 707 F.2d 978, 981 (8th Cir.), *cert. denied*, 464 U.S. 359 (1983).

In the usual failure to pay case, the taxpayer will have filed a return and then failed to pay the tax. While most assessments are based on filed returns, it is not necessary that the Service assess the tax as due and owing, because a tax deficiency arises by operation of law on the date the return is due. 26 U.S.C. § 6151(a); ***United States v. Voorhies***, 658 F.2d 710, 714 (9th Cir. 1981) (an evasion of payment case but the principle is applicable here). Otherwise stated, it is not necessary that there be an administrative assessment before a criminal prosecution may be instituted. ***Voorhies***, 658 F.2d at 714-15. *Accord*, ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992); ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984).

10.05[3] ***Failure to Pay***

The Internal Revenue Service will provide a qualified witness and/or a certified transcript of account or a certificate of assessments and payments establishing the failure to pay the tax. A search of the Internal Revenue Service records should always include a search as to whether any extensions of time have been granted. While section 6151(a) of the Code provides that a tax is due at the time of filing "without regard to any extension of time," the reference to "any extension of time" merely fixes the date when the tax is due -- not when it necessarily must be paid. If an extension is granted, the tax would not have to be paid until the extended date. *See* ***Voorhies***, 658 F.2d at 713. *See also* the discussion in Section 10.04(4), Proof of Failure to File.

10.05[4] ***Willful Failure to Pay***

See the discussion of willfulness in Sections 8.06 and 10.04[4], *supra*.

In ***United States v. Andros***, 484 F.2d 531 (9th Cir. 1973), the court, in sustaining a conviction for willful failure to pay, took the position that to establish willfulness the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so. *Id.* at 531. But the court also stated that willfulness connotes bad faith or evil intent in view of all the financial circumstances of the taxpayer. This premise is no longer viable after ***United States v. Pomponio***, 429 U.S. 10 (1976).

In ***United States v. Tucker***, 686 F.2d 230 (5th Cir.), *cert. denied*, 459 U.S. 1071 (1982), the Fifth Circuit rejected the defendant's contention that the government had to prove the defendant was financially able to pay the tax when it became due, saying (686 F.2d at 233):

> Tucker's second argument is that, in order to show willfulness under Section 7203, the government must prove that the taxpayer was financially able to pay his tax debt when it came due. Tucker argues that he was unable to pay his taxes when due because his checking accounts had either very low or negative balances, and because he had no other assets available to satisfy the debt. He thus concludes that his failure to pay was not willful. This argument borders on the ridiculous. Every United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under Section 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability.

The court declined to follow the Ninth Circuit in ***Andros***, 484 F.2d 531, taking the position that the language in ***Andros***, to the effect that it must be shown that a taxpayer has sufficient funds to pay the tax on or about the day the tax was due, was dicta. ***Tucker***, 686 F.2d at 233. Again, it would seem to be only common sense that a taxpayer who has dissipated his assets on luxury items should not be able to avoid criminal prosecution by showing that he had no funds to pay the taxes he owed. *See also* Section 9.03, *supra*.

10.05[5] ***Venue***

Reference should be made to the discussion of venue in Sections 6.00 and 10.04[7], *supra*.

Generally, a person required to pay a tax must pay the tax at the place fixed for filing the return. Venue would therefore normally be in the district where the return was filed. As previously noted, where there is no filing the charge normally would be a failure to file rather than a failure to pay a tax.

10.05[6] ***Statute of Limitations***

The statute of limitations is six years "for the offense of willfully failing to pay any tax . . . at the time or times required by law or regulations." 26 U.S.C. § 6531(4). *See* ***United States v. Smith***, 618 F.2d 280, 281-82 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980).

The six-year period of limitations begins to run when the failure to pay the tax becomes willful, not when the tax is assessed or when payment is demanded. ***Andros***, 484 F.2d at 532-33. *See also* ***United States v. Pelose***, 538 F.2d 41, 44-45 (2d Cir. 1976); ***United States v. Sams***, 865 F.2d 713, 716 (6th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989) ("the limitation period begins to run when the taxpayer manifests some act of willful nonpayment").

10.06 ***SENTENCING***

Reference should be made to Section 5.00 *infra*, which discusses the application of the Federal Sentencing Guidelines to criminal tax cases.

10.07 ***DEFENSES***

There are a number of defenses that have been litigated and ruled on by the courts. A list of some of the common defenses raised in failure to file cases and their treatment by the courts follows.

10.07[1] ***Intent to Pay Taxes in Future***

The intent to report and pay taxes due in the future does not constitute a defense and "does not vitiate" the willfulness required for a failure to file or, for that matter, for an attempt to evade. ***Sansone v. United States***, 380 U.S. 343, 354 (1965).

10.07[2] ***Absence of a Tax Deficiency***

There is no requirement that the government establish a tax liability, as long as the taxpayer had a gross income that required the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979).

10.07[3] ***Delinquent Filing***

The defense of filing late returns has been rejected in failure to file cases. In addition, evidence offered by the defendant of late filing and the late payment of taxes has been excluded. ***United States v. Greenlee***, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd.*, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975); ***United States v. Ming***, 466 F.2d 1000, 1005 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972).

The First Circuit, in ***United States v. Bourque***, 541 F.2d 290, 294 (1st Cir. 1976), noted the principle that "subsequent conduct cannot relieve a taxpayer from criminal liability for failure to file tax returns on or before their due date." In this connection, the Seventh Circuit has upheld the exclusion of evidence by the defendant that he had eventually paid his taxes, even though the government was allowed to prove the amount of taxes the defendant owed for the years in issue. ***United States v. Sawyer***, 607 F.2d 1190 (7th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

10.07[4] ***Civil Remedy Not Relevant***

The fact that the government could proceed civilly, instead of criminally, is "irrelevant to the issue of criminal liability and the defendant is not entitled to an instruction that the government could assess the taxes without filing criminal charges." ***United States v. Buras***, 633 F.2d 1356, 1360 (9th Cir. 1980); ***United States v. Merrick***, 464 F.2d 1087, 1093 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972).10.07[5] ***Inability to Pay***

The Seventh Circuit has stated that a defendant is not entitled to an instruction on inability to pay where no foundation was laid in the evidence that the defendant lacked the money to pay his taxes:

> Lewis had money to pay the other expenses of his business; he just assigned a lower priority to paying withholding taxes than to meeting his other expenses. This does not "show inability to pay" and the judge was not required to give an instruction that was premised on such inability.

United States v. Lewis, 671 F.2d 1025, 1028 (7th Cir. 1982). *See also*, ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir.), *cert. denied*, 459 U.S. 1071 (1982).

10.07[6] ***IRS Required to Prepare Returns***

Section 6020 of the Internal Revenue Code provides that if a person fails to file a return or makes a willfully false return, the Secretary "shall make such return from his own knowledge or from such information as he can obtain." Courts have uniformly disapproved the use of this section as a defense in failure to file cases. *See*, *e.g.*, ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988) ("[t]he Secretary of Treasury's execution of a return on behalf of a taxpayer does not relieve the taxpayer of his obligation to file a return."). *Accord*, ***United States v. Lacy***, 658 F.2d 396, 397 (5th Cir. 1981); ***Moore v. C.I.R.***, 722 F.2d 193, 196 (5th Cir. 1984).

A defendant in the Eastern District of New York claimed that the government was barred from prosecuting him for failure to file, because he had filed partnership returns, which triggered the IRS's duty to file individual returns for him under section 6020(b) of the Code. Rejecting this defense and holding that the government was not barred from prosecuting for a failure to file, the court stated that the defendant's interpretation of the statutes was "inherently implausible" and that section 6020(b) "cannot be interpreted as foreclosing civil or criminal sanctions for acts or omissions of the taxpayer." ***United States v. Harrison***, 30 A.F.T.R. 72-5367 (E.D.N.Y. 1972), *aff'd. without opinion*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

In ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980), the court held that there was "no merit to Millican's claim of entitlement to an instruction that the Internal Revenue Service was under a duty pursuant to 26 U.S.C.A. section 6020(b)(1) to prepare his tax return."

In a similar vein, the Seventh Circuit upheld a jury instruction on section 6020(b) which stated that while the law permits the Secretary to prepare a return, "the law does not require the

Secretary to do so and the Secretary's discretion in this matter in no way reduces the obligation of the individual taxpayers to file their returns." ***United States v. Verkuilen***, 690 F.2d 648, 656 (7th Cir. 1982).

10.07[7] ***Marital and Financial Difficulties***

The refusal of the trial judge to allow an attorney charged with a failure to file to introduce evidence of marital and financial difficulties has been upheld on the grounds that "evidence of financial and domestic problems are not relevant to the issue of willfulness" as used in section 7203. ***Bernabei v. United States***, 473 F.2d 1385 (6th Cir.), *cert. denied*, 414 U.S. 825 (1973). *See also* ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).

10.07[8] ***Fear of Filing***

Saying it was "no defense," the Second Circuit upheld the refusal of the trial judge to instruct the jury that it must acquit if it found the defendant did not file his returns because of a fear of incriminating himself for prior violations. ***United States v. Egan***, 459 F.2d 997, 998 (2d Cir.), *cert. denied*, 429 U.S. 875 (1972).

10.07[9] ***Claim That Returns Were Mailed***

A jury could find that returns not received by the Internal Revenue Service were in fact mailed as claimed by a defendant. But a thorough explanation by a representative of the appropriate Service Center respecting the manner in which returns are received and processed, coupled with evidence that the Service Center never received the returns, is sufficient to support a conviction under section 7203. ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir.), *cert. denied*, 423 U.S. 985 (1975).

10.07[10] ***Complicated Records***

While characterizing the defense as "lame" and upholding the conviction on failure to file charges, the Sixth Circuit held that it was error not to permit the defendant to introduce in evidence some of his records to corroborate his claim that the records were so complicated he could not file accurate returns on time. ***United States v. Dark***, 597 F.2d 1097, 1099-1100 (6th Cir.), *cert. denied*, 444 U.S. 927 (1979).

10.07[11] ***Paperwork Reduction Act***

The Paperwork Reduction Act, 44 U.S.C. § 3512 (PRA), provides that no person shall be subject to any penalty for failing to provide information if an agency's request does not display an Office of Management and Budget (OMB) number. Tax returns are agency requests within the

scope of the PRA and bear OMB numbers. However, return instruction booklets do not bear OMB numbers and tax protestors have attempted to manufacture a defense on this basis. The absence of an OMB number from tax return instruction booklets does not excuse the duty to file the return. ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992) (IRS instruction booklets merely assist taxpayers rather than independently request information); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir.), *cert. denied*, 113 U.S. 419 (1992). Also, it is not necessary that an expiration date appear on a return. ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992) (year designation, *e.g.*, "1990" is sufficient). *See also* Section 40.14[20], *infra*.

10.07[12] ***Other Defenses***

In ***United States v. Dunkel***, 900 F.2d 105, 107-08 (7th Cir. 1990), *vacated and remanded on other grounds*, 111 S. Ct. 747 (1991), *rev'g on other grounds*, 927 F.2d 955 (7th Cir.), a tax protestor defendant claimed that the requirement to "make a return" was unconstitutionally vague. The defendant posited different interpretations of the word "make," including to "construct a return out of raw materials." ***Dunkel***, 900 F.2d at 107. The Court had little sympathy for this frivolous argument and rejected it by stating that "statutes are not unconstitutional just because clever lawyers can invent multiple meanings." ***Dunkel***, 900 F.2d at 108.

10.08 *LESSER INCLUDED OFFENSE/RELATIONSHIP TO TAX EVASION*

In charging and sentencing determinations, the question sometimes arises whether section 7203 is a lesser included offense of section 7201, tax evasion. Reference should be made to the detailed discussion of this issue in Section 8.09, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing Nov. 1, 1986.

2. The term "cash" includes foreign currency and, to the extent provided in regulations prescribed by the Secretary of the Treasury, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000. 26 U.S.C. § 6050I(d)(1) & (2). Treas. Reg. § 1.6050I-1(c)(1) (26 C.F.R.). The term generally does not include a check drawn on the account of the writer.

3. *But see* ***United States v. Rodriguez***, 983 F.2d 455, 457 (2d Cir. 1993) (Second Circuit more willing than Ninth Circuit to authorize use of this type of instruction).

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11.00 *FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION*

11.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7205(a)*

§7205. ***Fraudulent withholding exemption certificate or failure to supply information***

(a) ***Withholding on wages***. -- Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined* not more than $1,000, or imprisoned not more than 1 year, or both. [1]

*As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 **1** which increased the maximum permissible fines for both misdemeanors and felonies. For the misdemeanor offenses set forth in section 7205, the maximum permissible fine for offenses committed after December 31, 1984, is at least $100,000 for individuals. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

11.02 *GENERALLY*

Section 7205(a) is directed at employees who attempt to thwart the income tax wage withholding system by submitting false Forms W-4 or W-4E (hereinafter referred to as Forms W-4) to their employers. [2] Until the above-noted (n.1, *supra*) statutory amendment in 1984, section 7205 had been one of the government's only prosecutorial weapons in combatting employees' attempts to pay no taxes and to remove themselves from the federal income tax system. In the first instance, the employee, often a tax protestor, submits a false employee withholding certificate (Form W-4) to an employer, claiming either an excessive number of withholding allowances or, more typically, an exemption from withholding, based on a claim of having incurred no tax liability in the previous year and anticipating no tax liability in the present year. The result is the prevention of periodic tax withholding on wages throughout the year. Subsequently, when an income tax return is due, the

1 Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

employee fails to file a return.

Prior to the 1984 statutory change, the government's prosecutive approaches to the furnishing of false Forms W-4 included: (1) charging the supplying to an employer of a false or fraudulent Form W-4 as a violation of 26 U.S.C. § 7205; (2) charging in one count the supplying of a false Form W-4, in violation of 26 U.S.C. § 7205, and, in a second count, charging a failure to file an income tax return, in violation of 26 U.S.C. § 7203; or (3) charging only the section 7203 offense, where no income tax return was filed, and using the filing of the false Form(s) W-4 as evidence of willfulness.

Since the 1984 statutory change, the government now typically charges the filing of a false Form W-4 as an affirmative act in a ***Spies***-evasion felony prosecution rather than bringing the misdemeanor 7205 charge. *See* ***United States v. Connor***, 898 F.2d 942 (3rd Cir.), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Foster***, 789 F.2d 457, 460-61 n.4 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) (explaining why, following statutory changes, the government was no longer limited to charging the filing of a false Form W-4 as a violation of section 7205, as some courts had suggested). *See* Section 8.04[01], *supra*, dealing, among other things, with ***Spies***-evasion and false Forms W-4, and Section 40.04[01], *infra*, ***Tax Protestors***. However, in appropriate cases, section 7205 charges are still available. *See* ***Foster***, 789 F.2d at 460-61 (charging section 7201 and 7205 violations); ***United States v. Copeland***, 786 F.2d 768, 770-71 (7th Cir. 1986) (same).

11.03 *ELEMENTS OF SECTION 7205(a)*

To establish a violation of section 7205(a), the following elements must be proved beyond a reasonable doubt:

> 1. The defendant was required to furnish an employer with a signed withholding exemption certificate (Form W-4) relating to the number of withholding exemptions claimed;
>
> 2. The defendant supplied his or her employer with a signed withholding statement [or failed to supply the employer with a signed withholding exemption certificate]; [3]

3. The information supplied to the employer was false or fraudulent;

4. The defendant acted willfully.

United States v. Herzog, 632 F.2d 469, 471-72 (5th Cir. 1980); ***United States v. Olson***, 576 F.2d 1267, 1271 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978).

11.04 ***DUTY TO COMPLETE AND FILE FORM W-4***

The employee's duty to supply an employer with information relating to the number of withholding exemptions claimed is contained in 26 U.S.C. § 3402(f)(2)(A), as follows:

> On or before the date of commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

The defendant's status as an employee is an essential element of the offense which the government must establish beyond a reasonable doubt. ***United States v. Bass***, 784 F.2d 1282, 1284 (5th Cir. 1986); ***United States v. Herzog***, 632 F.2d 469, 472 (5th Cir. 1980); ***United States v. Johnson***, 576 F.2d 1331, 1332 (8th Cir. 1978); *see* ***United States v. Pryor***, 574 F.2d 440, 442 (8th Cir. 1978).

In most instances, proof of this element should not present any difficulty, because the actual filing of a Form W-4 or multiple Forms W-4 are a defendant's admission(s) of his employee status. *See* Fed. R. Evid. Rule 801(2); 26 U.S.C. § 6064. Moreover, the records and testimony of the employer, including the Form(s) W-2 and payroll records, will provide the necessary proof of employee status.

On the other hand, the precise time or date of filing a false form W-4 is not an essential element of section 7205. ***Johnson***, 576 F.2d at 1332. *See also* ***United States v. Pryor***, 574 F.2d 440, 442 (8th Cir. 1978).

11.05 ***FALSE OR FRAUDULENT INFORMATION***

Section 7205(a) proscribes providing false ***or*** fraudulent information on a Form W-4. The government must thus establish that the withholding form that was filed was false or fraudulent. *See* ***United States v. Malinowski***, 472 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973); ***United States v. Buttorff***, 572 F.2d 619, 625 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Peterson***, 548 F.2d 279, 280 (9th Cir. 1977); ***United States v. Hinderman***, 625 F.2d 994, 995 (l0th Cir. 1980); ***United States v. Smith***, 484 F.2d 8, 10 (l0th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

The Eighth Circuit, in ***Hinderman***, 528 F.2d at 102, held that section 7205 does not require that a statement be "false in the sense of deceptive." *See also* ***United States v. Lawson***, 670 F.2d 923, 928 (l0th Cir. 1982); ***United States v. Hudler***, 605 F.2d 488, 490 (l0th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) ("The criterion is not whether the employer and the government were, or could have been, deceived. The crime is the willful furnishing of false or fraudulent information.").

The Form W-4 filed by a defendant typically is asserted to be false or fraudulent insofar as it claims either an excessive number of withholding allowances or exemption from withholding. In ***United States v. McDonough***, 603 F.2d 19 (7th Cir. 1979), the defendant argued for a reversal on the grounds that the government failed to prove beyond a reasonable doubt the number of exemptions to which the defendant actually was entitled. The Seventh Circuit acknowledged that the government must establish that the information supplied was false or fraudulent, but stated that:

> [p]roof of falsehood does not, however, require a showing of what is true. The evidence in this case contains many reasonable inferences that the information given by the defendant was untrue. The testimony of the IRS agent, together with the other evidence, was sufficient for the jury reasonably to conclude beyond a reasonable doubt that the information was false. That the agent's testimony did not establish beyond a reasonable doubt that the defendant was entitled to a certain number of exemptions is immaterial.

McDonough, 603 F.2d at 24; *cf.* ***United States v. Peister***, 631 F.2d 658, 664-65 (l0th Cir. 1980),

cert. denied, 449 U.S. 1126 (1981) (government does not have to establish that taxpayer was not exempt where false information supplied).

As noted, one device used to violate section 7205 is to falsely claim an exemption from withholding. Instructions on Forms W-4 require the employee to read the certificate to determine whether the employee can claim exempt status. The 1993 Form W-4, at line 7, requires the employee to certify the following before claiming exempt status:

> I claim exemption from withholding for 1993 and I certify that I meet **ALL** of the following conditions for exemption:
>
> * Last year I had a right to a refund of **ALL** Federal income tax withheld because I had **NO** tax liability; **AND**
>
> * This year I expect a refund of **ALL** Federal income tax withheld because I expect to have **NO** tax liability; **AND**
>
> * This year if my income exceeds $600 and includes nonwage income, another person cannot claim me as a dependent.

(Emphasis in original.) *See also* 26 U.S.C. § 3402(n) (employer not required to deduct and withhold any tax upon wages if a Form W-4 certifies that the employee: (1) incurred no tax for the prior year; and (2) anticipates no tax liability for the current year).

In cases where the defendant has claimed exempt status, the government often can introduce a tax return for the prior year which reflects a tax liability. The prior year tax return serves as an admission that the defendant knew he owed federal income tax "last year" and thereby knowingly filed a false Form W-4 in the prosecution year. Alternatively, computations of the defendant's taxable income and income tax liability for each of the years in question may be introduced to demonstrate the false or fraudulent nature of the exempt Form(s) W-4 filed. The fact that aggregate withholding in a particular year exceeds an individual's income tax liability for such year *does not* alter the fact that a tax liability for such year exists. ***United States v. Echols***, 677 F.2d 498, 499 (5th Cir. 1982). *See* ***United States v. Hinderman***, 528 F.2d 100, 101 (8th Cir. 1976). The foregoing is illustrated by an example in the regulations. Thus, Treas. Reg. § 31.3402(n)-l (1993), provides as follows:

> Example (2). Assume the facts are the same as in example (1) except that for 1970 A has taxable income of $8,000, income tax liability of $1,630, and income tax withheld of $1,700. Although A received a refund of $70 due to income tax withholding of $1,700, he may not state on his exemption certificate that he incurred no liability for income tax imposed by subtitle A for 1970.

An administrative assessment under 26 U.S.C. § 6201 is not required before an individual can have a tax liability. ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985).

Furthermore, the government need not prove an employer relied on the forms submitted. ***United States v. Thomas***, 788 F.2d 1250, 1254 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

11.06 ***WILLFULNESS***

11.06[1] ***Generally***

Willfulness in a section 7205 prosecution is the same as it is in all specific intent criminal tax offenses -- "a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 194 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Flitcraft***, 803 F.2d 184, 186-87 (5th Cir. 1986); ***United States v. Grumka***, 728 F.2d 794, 796 (6th Cir. 1984); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1987); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985); ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978); ***United States v. Olson***, 576 F.2d 1267, 1272 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978); ***United States v. Hinderman***, 625 F.2d 994, 996 (l0th Cir. 1980).

Whether the defendant "subjectively" had a good faith misunderstanding of the law, as opposed to a disagreement with the law, is a jury question. *See* ***United States v. Schiff***, 801 F.2d 108, 112 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); ***United States v. Turner***, 799 F.2d 627, 629 (10th Cir. 1986). Failure to instruct a jury on this defense is reversible error. ***Cheek***, 498 U.S. at 194; ***United States v. Aitken***, 755 F.2d 188 (lst Cir. 1985); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***Flitcraft***, 803 F.2d at 187. *See* also the discussion of willfulness in Sections 8.06,

supra and 40.09, *infra*.

11.06[2] ***Examples: Proof of Willfulness***

1. Evidence that the defendant had a tax liability in a prior year and then filed a Form W-4 in which 99 exemptions were claimed and a document that falsely declared he had no tax liability in the prior year and anticipated none in the year in issue. ***United States v. Arlt***, 567 F.2d 1295, 1298 (5th Cir.), *cert. denied*, 436 U.S. 911 (1978); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

2. The filing of protest returns and notice by the IRS that the protest returns were invalid. ***Grumka***, 728 F.2d at 797.

3. Both the failure to file a return and the failure to pay taxes show a general motive to avoid taxes, which makes it more likely that the defendant willfully filed fraudulent withholding exemption claims. ***United States v. McDonough***, 603 F.2d 19, 23 (7th Cir. 1979).

4. The large number of exemptions claimed. ***McDonough***, 603 F.2d at 24.

5. Evidence of prior tax paying history and of attempts by the defendant's employer and the Internal Revenue Service to explain legal requirements to the defendant is sufficient to sustain the jury's finding that the defendant was aware of his legal obligations and intentionally chose not to comply. ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986); ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978).

6. Defendants, husband and wife, filed Forms W-4 for prior years claiming five withholding allowances; the husband attended a tax protest seminar and three days later both husband and wife changed their withholding certificates to claim a total of 28 withholding allowances, gave "vague answers" to their employers when questioned about the "sudden increase," and made no claim at trial that they expected to have 28 allowances. ***United States v. Anderson***, 577 F.2d 258, 260, 262 (5th Cir. 1978).

7. No error to admit in evidence a copy of a civil suit filed against the IRS challenging the constitutionality of the income tax laws. "Evidence of a person's philosophy, motivation, and activities as a tax protester is relevant and material to the issue of intent." ***United States***

v. Reed, 670 F.2d 622, 623 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982).

8. Defendant's filing of "Affidavits of Revocation" stating that she was not required to file returns or pay taxes, and letters to IRS stating that wages are not income are evidence of willfulness. ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1987).

11.07 *VENUE*

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed . . . ." *See* Fed. R. Crim. P. R. 18. *See* the discussion of venue in Section 6.00, *supra*.

If a statute does not indicate where Congress considers the place of committing a crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7205 prosecutions, venue is proper in the judicial district in which the false Form W-4 is submitted to the employer. Note that where a defendant is charged with evasion under section 7201 and the filing of a false or fraudulent Form W-4 is an affirmative act of evasion, venue is proper where a false withholding statement is prepared and signed, where it is received and filed, or where an attempt to evade otherwise occurred. *See* ***United States v. Felak***, 831 F.2d 794, 799 (8th Cir. 1987).

11.08 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7205 offenses is three years from the time the false or fraudulent Form W-4 is filed. 26 U.S.C. § 6531. The three-year limitations period can pose difficulties in combining a section 7205 charge with other tax charges which have a six-year statute of limitations (*e.g.*, 26 U.S.C. §§ 7201, 7203). If charges are brought only under these other sections, because the statute of limitations has expired on charging a false Form W-4, the false form can be introduced to show the defendant's willfulness in the section 7203 or 7201 prosecution. *See* ***United States v. McDonough***, 603 F.2d 19, 23 (7th Cir. 1979) (admissibility of evidence of a general motive to avoid taxes).

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1. A change was made in the language of section 7205 by the Deficit Reduction Act of 1984 (Pub. L. No. 98-369, 98 Stat. 494), effective date July 18, 1984. Section 7205 previously provided that a violation would be subject to the punishment provided for in section 7205, "in lieu of any other penalty provided by law...." This language was amended by the Senate to read, "in addition to any other penalty provided by law."

2. For the criminal offense applicable to persons required to furnish a withholding statement (*e.g.*, an employer required to withhold taxes on wages) who willfully furnish a false or fraudulent statement, or who willfully fail to furnish a statement, *see* 26 U.S.C. § 7204 which is not separately treated in this manual.

3. The discussion in this section is limited to the supplying of false or fraudulent information, but section 7205(a) also makes criminal the failure to supply an employer with a signed withholding exemption certificate as required by 26 U.S.C. § 3402(f)(2)(A).

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12.00 *FRAUD AND FALSE STATEMENT*

12.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7206(1)*

§7206. ***Fraud and false statements***

Any person who --

(1) ***Declaration under penalties of perjury***. --
Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

12.02 *GENERALLY*

Section 7206(1) makes it a felony to knowingly submit a false document, if the document was signed under penalties of perjury. Section 7206(1) is one of the more flexible prosecutorial weapons in the government's arsenal against criminal tax offenses. Because Section 7206(1) does not require proof of a tax deficiency, it permits prosecution in cases in which there is either no tax deficiency, a minimal tax deficiency, or a tax deficiency which would be difficult to prove.

Because section 7206(1) makes the falsehood itself criminal, it is referred to as the tax perjury statute. Under traditional perjury law, corporations cannot commit perjury because a corporation cannot take an oath to tell the truth. A corporation, however, can be prosecuted for a section 7206(1) violation because section 7206(1) expressly refers to "any person," and 26 U.S.C.

§ 7701(a)(1) specifically defines "person" to include a corporation. ***United States v. Ingredient Technology Corp.***, 698 F.2d 88, 99 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983). *See also* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986).

The "exculpatory no" doctrine (deemed applicable to 18 U.S.C. § 1001 prosecutions in certain instances) does not apply to section 7206(1) prosecutions. ***United States v. Hajecate***, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). *See* Section 24.08[1], *infra*.

A false tax return is the usual charge, and the discussion which follows is generally in terms of a false return, but the principles are applicable to any false statement or document signed under penalties of perjury.

12.03 ***ELEMENTS***

The elements of a section 7206(1) prosecution are as follows:

1. The defendant made and subscribed a return, statement, or other document which was false as to a material matter;
2. The return, statement, or other document contained a written declaration that it was made under the penalties of perjury;
3. The defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and
4. The defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Bishop, 412 U.S. 346, 350 (1973); ***United States v. Drape***, 668 F.2d 22, 25 (1st Cir. 1982); ***United States v. Robinson***, 974 F.2d 575, 579 (5th Cir. 1992); ***United States v. Wilson***,887 F.2d 69, 72 (5th Cir. 1989); ***Hoover v. United States***, 358 F.2d 87, 88 (5th Cir.), *cert. denied*, 385 U.S. 822 (1966); ***United States v. Borman***, 992 F.2d 124 (7th Cir. 1993); ***United States v. Whyte***, 699 F.2d 375, 381 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); ***United States v. Marabelles***, 724 F.2d 1374, 1380 (9th Cir. 1984); ***United States v. Brooksby***, 668 F.2d 1102, 1103 (9th Cir. 1982); ***United States v. Howard***, 855 F.2d 832, 835 (11th Cir. 1988).

12.04 *RETURN, STATEMENT, OR DOCUMENT*

Section 7206(1) expressly applies to "any return, statement, or other document" signed under penalties of perjury. While most section 7206(1) prosecutions involve income tax returns, there are cases which do not involve income tax returns. *See e.g.*, ***United States v. Droms***, 566 F.2d 361 (2d Cir. 1977) (affirmed section 7206(1) conviction for the falsification of a financial information statement submitted to the IRS for settlement purposes); *see also* ***United States v. Cohen***, 544 F.2d 781 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977) (false statement made in an offer in compromise, Form 656); ***Jaben v. United States***, 349 F.2d 913 (8th Cir. 1965) (false statement in application for extension of time for filing).

In one case, the application of 7206(1) was limited to documents required by statutes or regulations. Thus, in ***United States v. Levy***, 533 F.2d 969 (5th Cir. 1976) the court of appeals held that section 7206(1) was restricted to any statement or document required either by the Internal Revenue Code or applicable regulations to be filed or submitted. ***Levy's*** interpretation of section 7206(1), however, has been rejected by other circuits and subsequently limited by the Fifth Circuit itself. *See* ***United States v. Damon***, 676 F.2d 1060 (5th Cir. 1982); ***United States v. Taylor***, 574 F.2d 232 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

In ***United States v. Holroyd***, 732 F.2d 1122 (2d Cir. 1984), the Second Circuit refused to follow ***Levy*** and held that a statement made on an IRS form, the use of which is not expressly authorized by statute or regulation, may provide the basis for a section 7206(1) prosecution. In connection with an ongoing assessment of his ability to pay a tax liability, the defendant had signed under penalties of perjury and filed with the IRS two false IRS Collection Information Statements -- Form 433-AB and Form 433-A. The court below dismissed the indictment on the authority of ***Levy*** because Form 433-AB was not a required form. The Second Circuit, however, rejected the ***Levy*** court's restrictive interpretation of section 7206(1), concluding:

> 26 U.S.C. Section 7206(1) means what it says on its face. It applies to any verified return, statement or other document submitted to the IRS. The indictment against Holroyd . . . did state a crime cognizable under that section.

Holroyd, 732 F.2d at 1128.

Similarly, the defendants in ***United States v. Franks***, 723 F.2d 1482, 1485 (10th Cir. 1983), *cert. denied* 469 U.S. 817 (1984), argued that because the question concerning the existence of foreign bank accounts on their 1974 income tax returns, as well as the Forms 4683 attached to their amended 1974 and 1975 returns, were not authorized by the Internal Revenue Code or by any regulation, the responses to those questions could not support a section 7206(1) prosecution. The Tenth Circuit refused to apply the ***Levy*** rationale and rejected this argument:

> Like the Fifth Circuit, in cases decided subsequent to ***United States v. Levy***, *supra*, we do not believe the rationale of ***Levy*** should be extended, and, in our view, such does not apply to the schedules here appended to a Form 1040, or to an answer made in response to a question contained in the Form 1040. In the instant case, it is clearly established that the defendants in their 1974 tax return gave a false answer to a direct question concerning their interest in foreign bank accounts, and that they attached to their amended tax return for 1974 and their tax return for 1975 a completed Form 4683 which did not identify *all* of the foreign bank accounts over which they had signatory authority. Such, in our view, comes within the purview of 26 U.S.C. Section 7206(1).

Franks, 723 F.2d at 1486.

12.05 *"MAKES" ANY RETURN, STATEMENT, OR DOCUMENT*

The plain language of the statute does not require that the return, statement or other document be filed. Nevertheless, some courts have held that although "make and subscribe," as used in section 7206(1), are words that connote "preparing and signing" a completed Form 1040 does not become a 'return,' and a taxpayer does not 'make a return,' until the form is filed with the Internal Revenue Service. ***United States v. Gilkey***, 362 F. Supp. 1069, 1071 (E.D. Pa. 1973). *See also* ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) (section 7206(2) conviction reversed because the return in question was never filed).

The maker of the return does not have to be the actual preparer of the return. In ***United States v. Badwan***, 624 F.2d 1228 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981), the defendants argued that they did not "make" the return, as required by section 7206(1), since their returns were prepared by their accountant. The Fourth Circuit rejected the argument that the defendant had to actually prepare the return:

> The evidence did clearly show, however, that the accountant who prepared the returns did so solely on the basis of information provided to him by the Badwans, and that the Badwans then signed and filed the returns. This satisfies the statute.

Badwan, 624 F.2d at 1232. *See also* ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989); ***United States v. Duncan***, 850 F.2d 1104 (6th Cir. 1988), *cert. denied*, 493 U.S. 1025 (1990).

Additionally, the individual who does prepare the return can be charged under section 7206(1) for willfully making and subscribing a false tax return for a taxpayer. ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986). In ***Shortt Accountancy***, one of the defendant accounting firm's accountants had prepared and signed a client's Form 1040 which contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. On appeal from the conviction under section 7206(1), the defendant firm argued that a tax preparer cannot "make" a return within the meaning of the statute since it is the taxpayer, not the preparer, who has the statutory duty to file the return. The court

rejected this argument, however, holding that the prohibitions of section 7206(1) are not based on the taxpayer's duty to file; rather, section 7206(1) simply prohibits perjury in connection with the preparation of a federal tax return. ***Shortt Accountancy***, 785 F.2d at 1454. In the court's opinion, "sections 7206(1) and 7206(2) are "closely related companion provisions" that differ in emphasis more than in substance", and perjury in connection with the preparation of a tax return is chargeable under either. ***Shortt Accountancy***, 785 F. 2d at 1454. Generally, however, it is the better practice to charge a violation of section 7206(2) against the person who prepares a false return for the individual required to file.

12.06 ***"SUBSCRIBES" ANY RETURN, STATEMENT, OR DOCUMENT***

12.06[1] ***Generally***

The submission of a false, unsigned return cannot, without more, serve as the basis for a 7206(1) prosecution because the act of subscribing (signing) a return, statement, or other document, is an element of the offense. An unsigned return, however, can provide the basis for a tax evasion charge (but not a section 7206(1) violation) if the evidence shows that the unsigned return was filed by the defendant as his return and was intended to be such. ***Montgomery v. United States***, 203 F.2d 887, 889 (5th Cir. 1953) (decided under the 1939 Code).

Section 7206(1) does not require that the defendant personally sign the return if ". . . there are sufficient circumstances present from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it." ***United States v. Ponder***, 444 F.2d 816, 822 (5th Cir. 1971), *cert. denied,* 405 U.S. 918 (1972); ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989).

12.06[2] ***Proof of Signature***

Assuming that the document is signed, the government must still authenticate the signature -- establish that the signature is what the government alleges it to be, *i.e.*, that the named person actually signed the document. The signature can be authenticated by the use of any one of the three methods provided by the Federal Rules of Evidence:

1. ***Lay testimony on handwriting*** -- any witness who is familiar with the defendant's handwriting may testify as to whether a questioned signature is that of the defendant. The limitation on this approach is that the familiarity of the witness with the handwriting of the defendant must not have been acquired for purposes of the litigation. Fed. R. Evid. 901(b)(2).

2. ***Expert testimony*** -- a qualified expert may compare the questioned signature with authenticated specimens of the defendant. Fed. R. Evid. 901(b)(3).

3. ***Jury comparison*** -- the finder of fact may compare authenticated specimens with the questioned signature without expert help. Fed. R. Evid. 901(b)(3).

For purposes of comparison, 28 U.S.C. § 1731, provides:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

Furthermore, the authentication of a signature is aided by the statutory presumption provided by the Internal Revenue Code, 26 U.S.C. § 6064 (1986):

> The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

See also 26 U.S.C. §§ 6062 and 6063 (1986) for similar presumptions concerning corporate and/or partnership returns.

Accordingly, if an individual's name is signed to a return, statement, or other document, there is a rebuttable presumption that the document was actually signed by such individual. ***United***

States v. Kim, 884 F.2d 189, 195 (5th Cir. 1989). This presumption applies to both civil and criminal cases. ***United States v. Cashio***, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970). As with presumptions in all criminal cases, the presumption of authentication is rebuttable, and the jury must decide that the signature is authentic. *See* ***United States v. Wainwright***, 413 F.2d 796, 802 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970).

This presumption can have practical consequences at trial, because it is not necessary to present direct evidence showing that the defendant actually signed the returns; it is sufficient that the defendant's name is on the returns and the returns are true and correct copies of returns on file with the Internal Revenue Service. ***United States v. Carrodeguas***, 747 F.2d 1390, 1396 (11th Cir. 1984), *cert. denied*, 474 U.S. 816 (1985). *See also* ***United States v. Wilson***, 887 F.2d 69, 72 (5th Cir. 1989). For a jury instruction, *see* ***United States v. Wainwright***, 413 F.2d at 801-02.

12.07 *MADE UNDER PENALTIES OF PERJURY*

Section 7206(1) requires that the return, statement, or other document be made "under the penalties of perjury." This element should be self-evident as the document either does or does not contain a declaration that it is signed under the penalties of perjury. A signature plus the declaration is sufficient; the document need not be witnessed or notarized. As required by 26 U.S.C. § 6065 (1986), all income tax returns contain such a declaration.

If a taxpayer presents a return or other document in which the jurat is stricken, then prosecution should not be brought under section 7206(1) as the document is not signed under the penalty of perjury. However, 26 U.S.C. § 7201 (tax evasion) or 18 U.S.C. § 1001 (false statement) charges may be considered in this instance.

12.08 *FALSE MATERIAL MATTER*

12.08[1] *Generally*

Section 7206(1) requires that a return, statement, or other document must be "true and

correct as to every material matter." Accordingly, the government must prove that the matter charged as false is material. Materiality is a question of *law* for the court and not a question of fact for the jury to decide. ***United States v. Romanow***, 509 F.2d 26, 28 (1st Cir. 1975); ***United States v. Greenberg***, 735 F.2d 29, 31 (2d Cir. 1984); ***United States v. Rogers***, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); ***United States v. Taylor***, 574 F.2d 232, 235 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); ***United States v. Fawaz***, 881 F.2d 259, 261 (6th Cir. 1989); ***United States v. Whyte***, 699 F.2d 375, 379 (7th Cir. 1983); ***United States v. Holecek***, 739 F.2d 331, 337 (8th Cir. 1984); ***United States v. Flake***, 746 F.2d 535, 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985); ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir.), *cert. denied*, 449 U.S. 841 (1980); ***United States v. Gaines***, 690 F.2d 849, 858 (11th Cir. 1982). *But see* ***United States v. Gaudin***, No. 90-30334, slip op. at 6655 (*dictum*), 1994 WL 271930 (9th Cir. June 21, 1994) (*en banc*).

The "substantiality of the misstatements" is not relevant to a prosecution under section 7206. The issue is whether the misstatements were material, not whether they were substantial. ***Gaines***, 690 F.2d at 858. In ***Gaines***, the court held that although the substantiality of the misstatement would be relevant to a tax evasion prosecution, it was not relevant to a section 7206(1) prosecution. ***Gaines***, 690 F.2d at 858. *See also* ***United States v. Hedman***, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (false statements relating to gross income are material regardless of the amount of the discrepancy). ***United States v. Citron***, 783 F.2d 307, 313 (2d Cir. 1986); ***United States v. Marashi***, 913 F.2d 724 (9th Cir. 1990). *Accord*, ***United States v. Holland***, 880 F.2d 1091 (9th Cir. 1989).

In ***United States v. Reynolds***, 919 F.2d 435, 437 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991), the defendant filed a Form 1040EZ reporting all the categories of income requested on the form, but omitting a category of income not called for on that form. The defendant's responses on the form were literally true, but the prosecution characterized these responses as misleading. The Seventh Circuit held that, although the form was misleading, the literal truth of the statements

on the form precluded a 7206(1) conviction. The court explicitly stated, however, that Reynolds could be tried for violations of section 7201 (evasion) or section 7203 (failure to supply information). ***Reynolds***, 919 F.2d at 437. ***United States v. Borman***, 992 F.2d 124 (7th Cir. 1993), echoes the views of the ***Reynolds*** court with respect to Form 1040A (both Form 1040A and Form 1040EZ are simplified tax forms.).

12.08[2] ***Proof of One Material Item Enough***

A section 7206(1) indictment may charge in a single count that several items in one document are false. If one count in an indictment charges three items on a single return as false (*e.g.*, dividends, interest, and capital gains) then it is sufficient if only one of those items is proven to be false. The government does not have to prove that every item charged is false. The same is true of a charge that the defendant omitted several items from his return. ***Silverstein v. United States***, 377 F.2d 269, 270 (1st Cir. 1967). *See* ***Griffin v. United States***, 112 S. Ct. 466, 473 (1991) (when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient as to any one of the acts charged); ***United States v. Helmsley***, 941 F.2d 71, 91 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); ***United States v. Duncan***, 850 F.2d 1104, 1108-13 (6th Cir. 1988), *cert. denied*, 493 U.S. 1025 (1990).

While a jury must reach a unanimous verdict as to the factual basis for a conviction, a general instruction on unanimity is sufficient to insure that such a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of confusion. ***United States v. Schiff***, 801 F.2d 108, 114-15 (2d Cir. 1986) *cert. denied*, 480 U.S. 945 (1987). At least one court, however, has held that when a single false return count contains two or more factually distinct false statements, the jury must reach unanimity on the willful falsity of at least one statement. ***Duncan***, 850 F.2d at 1113. In ***Duncan***, one count in the indictment against two defendants alleged two false statements, one involving an interest deduction and one involving an income characterization. The court vacated the section 7206(1) convictions of the defendants

because the trial judge failed to instruct the jury, after a specific request by the jury during its deliberations, that a conviction required unanimity on at least one of the alleged willful false statements. The court found that in the context of the case and given the juror's request for clarification, there was a "tangible risk of jury confusion and of nonunanimity on a necessary element of the offense charged." ***Duncan***, 850 F.2d at 1113-14. *But cf.* ***Schad v. Arizona***, 111 S. Ct. 2491 (1991) (plurality opinion) (jury was not required in first-degree murder prosecution to agree on one of alternative theories of premeditated or felony-murder); ***United States v. Sanderson***, 966 F.2d 184, 187-89 (6th Cir. 1992) (court held that trial court's failure to give specific unanimity instruction was not plain error in prosecution charging in a single count theft of government property and theft of employee time).

12.08[3] ***Tests of Materiality***

Courts have applied two tests in determining whether a false statement in a section 7206(1) prosecution is material. Under one test, any item required on an income tax return that is necessary for a correct computation of the tax is a material matter. ***Siravo v. United States***, 377 F.2d 469, 472 (1st Cir. 1967); ***United States v. Null***, 415 F.2d 1178, 1181 (4th Cir. 1969); ***United States v. Taylor***, 574 F.2d 232, 236 (5th Cir.), *cert. denied*, 493 U.S. 893 (1978); ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir.) *cert. denied*, 449 U.S. 841 (1980). A second test of materiality, the so-called ***DiVarco*** test, is whether the false item has a natural tendency to influence or impede the Internal Revenue Service in ascertaining the correctness of the tax declared or in verifying or auditing the returns of the taxpayer. *See* ***United States v. Greenberg***, 735 F.2d, 29, 31 (2d Cir. 1984) (holding that section 7206(1) is intended to prevent misstatements that could hinder the IRS in verifying the accuracy of a return; accordingly, such false statements are material); *see also* ***United States v. Fawaz***, 881 F.2d 259, 264 (6th Cir. 1989); ***United States v. DiVarco***, 343 F. Supp. 101, 103 (N.D. Ill. 1972), *aff'd*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

Section 7206(1) does not require a showing that the government relied on the false

statements. "[I]t is sufficient that they were made with the intention of inducing such reliance." ***Gentsil v. United States***, 326 F.2d 243, 245 (1st Cir.), *cert. denied*, 377 U.S. 916 (1964).

12.08[4] ***Examples: Material Matter***

1. Amounts listed on returns as receipts from a business, improperly claimed deductions, and the like, have a direct bearing on a tax computation and are material. ***United States v. Morse***, 491 F.2d 149, 157 (1st Cir. 1974); ***United States v. Engle***, 458 F.2d 1017, 1019-20 (8th Cir.), *cert. denied*, 409 U.S. 875 (1972).

2. Gross income falsely reported is clearly material. "This Court has . . . held that false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1)." ***United States v. Hedman***, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *See also* ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990); ***United States v. Wilson***, 887 F.2d 69, 75 (5th Cir. 1989); ***United States v. Young***, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987).

3. Omitted gross receipts on Schedule F, farm income, are material. ***United States v. Taylor***, 574 F.2d 232, 235 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

4. False schedule designed to induce allowance of unwarranted depreciation is material. The Ninth Circuit could "scarcely imagine anything more material." ***United States v. Crum***, 529 F.2d 1380, 1383 (9th Cir. 1976) (section 7206(2) violation, but principle applies to section 7206(1)).

5. Schedule C claiming business loss deductions to which the taxpayers were not entitled rendered the returns false as to a material matter. ***United States v. Damon***, 676 F.2d 1060, 1064 (5th Cir. 1982).

6. Omission of a material fact makes a statement false, just as if the statement included a materially false fact. *See* ***United States v. Cohen***, 544 F.2d 781, 783 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977) (defendant had $30,000 in checks which he did not include on an Offer in Compromise, Form 656).

7. Understatement of gas purchases by gas station operator was material because it restricted ability of the Internal Revenue Service to verify his income tax returns and his diesel fuel excise tax returns. If purchases are unreported, a number of related items, such as inventory, income, or other costs, could also be incorrect. "Auditability" of the entire calculation may be more difficult because of the misstatements. ***United States v. Fawaz***, 881 F.2d 259, 263-64 (6th Cir. 1989).

8. Failure to report source of income. ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

12.08[5] ***Tax Deficiency Not Required***

Because a tax deficiency is not an element of the crime, proof thereof is unnecessary to a section 7206(1) prosecution. ***Silverstein v. United States***, 377 F.2d 269 (1st Cir. 1967); ***United States v. Olgin***, 745 F.2d 263 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); ***United States v. Garcia***, 553 F.2d 432 (5th Cir. 1977); ***United States v. Jernigan***, 411 F.2d 471, 473 (5th Cir.), *cert. denied*, 396 U.S. 927 (1969); ***Schepps v. United States***, 395 F.2d 749 (5th Cir.), *cert. denied*, 393 U.S. 925 (1968); ***United States v. Young***, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987); ***United States v. Ballard***, 535 F.2d 400, 404 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976); ***United States v. Marashi***, 913 F.2d 724 (9th Cir. 1990); ***United States v. Carter***, 721 F.2d 1514, 1539 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984).

The falsehood is the crime. ***Gaunt v. United States***, 184 F.2d 284 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). The ***Gaunt*** court described the statutory predecessor of section 7206(1): [2]

> [T]he subsection's purpose is to impose the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood.

Gaunt, 184 F.2d at 288.

Although referred to as the tax perjury statute, section 7206(1) prosecutions are not perjury prosecutions. Accordingly, the heightened requirement of proof traditionally applicable in perjury prosecutions does not apply to section 7206(1) prosecutions. ***Escobar v. United States***, 388 F.2d 661, 665 (5th Cir. 1967), *cert. denied*, 390 U.S. 1024 (1968); ***United States v. Carabbia***, 381 F.2d 133, 137 (6th Cir.), *cert. denied*, 389 U.S. 1007 (1967) (holding that the two-witness rule applicable to perjury prosecutions was not required in section 7206(1) prosecutions, even though it would have been met in the instant case).

Where no evidence of a tax deficiency is introduced by the government, the defense will sometimes attempt to show an overpayment of taxes. The relevancy of such a showing depends on the facts of the particular case. When such evidence is offered merely to show a lack of tax deficiency, it is irrelevant as a tax deficiency is not an element of a section 7206(1) charge. ***Schepps***, 395 F.2d at 749; ***Marashi***, 913 F.2d at 736. However, such evidence may be relevant as a defense to willfulness, such as accident, mistake, negligence, inadvertence, or good faith reliance on accountant. Even here, however, the underlying facts would have to support such a claim. Moreover, in deciding whether to receive such evidence, the trial court may appropriately consider, in its discretion, the danger of jury confusion and considerations of judicial economy. Fed. R. Evid. 403. *See e.g.*, ***United States v. Johnson***, 558 F.2d 744, 745-47 (5th Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978) (while evidence of failure to claim permissible deductions, resulting in a tax overpayment, was indirectly relevant on the issue of reliance on one's accountants, such evidence was of no appreciable impact as defendant withheld relevant information from his accountants; moreover, trial court did allow direct evidence of reliance on accountants); ***United States v. Fritz***, 481 F.2d 644, 645 (9th Cir. 1973) (evidence of potential adjustments to tax liability not relevant to willfulness as no evidence presented that defendant considered making the proposed adjustments).

12.08[6] ***Examples: No Tax Deficiency***

12.08[6][a] ***Failure to Report a Business***

In ***Siravo v. United States***, 377 F.2d 469 (1st Cir. 1967), the defendant reported wages he had earned but did not report either his jewelry business or substantial gross receipts he received in connection therewith. The defendant argued that his omissions did not constitute false statements. The First Circuit affirmed his conviction, holding that for a statement to be "true and correct," it must be both accurate and complete.

12.08[6][b] ***Failure to Report Gross Receipts***

In ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831 (1978), the defendant did not report gross receipts from a gambling and bootlegging operation conducted at his service station. Although the government did not prove that the defendant received any profits or income from the illicit business, the failure to report substantial gross receipts was sufficient to support a conviction.

12.08[6][c] ***Include Net Business Income, Not Gross Income***

In ***United States v. Young***, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987), the court rejected defendant's claim that because the income from his bail bonding business was included on the corporate return as net income, the failure to include it as gross income on the return did not make the return untruthful, but only incomplete. Omissions from a tax return of material items which are necessary for a computation of income means the return is not true and correct within the meaning of section 7206(1).

12.08[6][d] ***Report False Source But Correct Figures***

In ***United States v. DiVarco***, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974), the government proved that income reported by the defendant as commissions from a mortgage and investment business did not come from that business. The fact that the source stated on the return was false was sufficient to support a Section 7206(1) conviction because "a misstatement as to the source of income is a material matter." ***DiVarco***, 484 F.2d at 673.

12.08[6][e] ***Gambling Losses Deducted as Business Expenses***

In ***United States v. Rayor***, 204 F. Supp. 486, 489-92 (S.D. Cal. 1962), the defendant claimed deductions for personal gambling losses on the corporate tax return of his construction business. A subsequent audit revealed that there would have been an overpayment of corporate taxes even if the gambling losses had not been falsely deducted. The defendant claimed in a motion to dismiss that there was no offense charged as there was no deficiency for the year in question.

The district court denied the motion to dismiss, concluding that "what is claimed as deductible from gross income must be stated truthfully and is of utmost materiality." ***Rayor***, 204 F. Supp. at 491. Moreover, the court continued:

> The Government was entitled, as of March 7, 1956, to a statement which stated the gross income truthfully and correctly and which *did not* claim as legitimate business expenses personal gambling losses. The auditing of the return, in the light of the returns for the other years, which later developed that the omission of these falsely claimed deductions would have made *no* difference in the defendant's tax liability for the year 1955, cannot be retrojected to the date of the false statement so as to confer verity on it.

Rayor, 204 F. Supp. at 492.

12.08[6][f] ***Failure to Report Income from Illegal Business***

In ***United States v. Garcilaso de la Vega***, 489 F.2d 761, 765 (2d Cir. 1974), the defendant was charged with failing to report income which he earned from selling narcotics. The government's case was premised on the defendant's failure to report the additional income, not his failure to report that narcotics sales were the source of this additional income. The charge to the jury made it clear that it was the failure to report income, not the failure to report the illegal source of the income, that constituted the violation of section 7206(1). ***Garcilaso de la Vega***, 489 F.2d at 765. *See* ***Garner v. United States***, 424 U.S. 648 (1976) (defendant, who reported his occupation as "professional gambler" on his tax return instead of claiming Fifth Amendment privilege against self-incrimination, could not later rely on privilege to preclude use of return against him in a criminal prosecution). *See also* ***United States v. Barnes***, 604 F.2d 121, 147-48 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

12.08[6][g] ***Foreign Bank Account Questions on Tax Forms***

In ***United States v. Franks***, 723 F.2d 1482, 1485-86 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), the defendants falsely answered "No" to questions on income tax returns asking if they had any interest in or signature authority over a bank account in a foreign country. They also attached a form to their amended return which did not list "all of their foreign accounts over which they had control." The court affirmed the false return convictions holding that the false responses to these questions "comes within the purview of 26 U.S.C. § 7206(1). ***Franks***, 723 F.2d at 1486.

12.09 ***WILLFULNESS -- DOES NOT BELIEVE TO BE TRUE AND CORRECT***

Section 7206(1) is a specific intent crime requiring a showing of willfulness. Proof of this element is essential, and neither a showing of careless disregard nor gross negligence in signing a tax return will suffice. ***United States v. Claiborne***, 765 F.2d 784, 797 (9th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

The Supreme Court has defined "willfulness" as "a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 200 (1991). *See also* ***United States v. Doyle***, 956 F.2d 73 (5th Cir. 1992); ***United States v. Bussey***, 942 F.2d 1241 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992); ***United States v. Lankford***, 955 F.2d 1545 (11th Cir. 1992). For a more complete discussion of willfulness and the legal ramifications of the ***Cheek*** case, *see* Section 8.06, *supra*, and Section 40.11, *infra*.

In ***United States v. Pomponio***, 429 U.S. 10, 11 n.2 (1976), a section 7206(1) prosecution, the Supreme Court approved the following jury instruction on willfulness:

> In explaining intent, the trial judge said that "[t]o establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law." The jury was told to "bear in mind the sole charge that you have here, and that is the violation of 7206, the willful making of the false return, and subscribing to it under perjury, knowing it not to be true and [sic] to

all material respects, and that and that alone."

The defendant's signature on a document can also help establish willfulness. ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982) (defendant's signature on his return is sufficient to establish knowledge once it has been shown that the return was false); *see also* ***United States v. Romanow***, 505 F.2d 813, 814 (1st Cir. 1974) (the jury could conclude from nothing more than the presence of his uncontested signature that he had in fact read the Form 941); ***United States v. Mohney***, 949 F.2d 1397, 1407 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992) (signature is *prima facie* evidence that the signer knows the contents of the return); ***United States v. Bettenhausen***, 499 F.2d 1223, 1234 (10th Cir. 1974).

A showing of "collective intent" on the part of a corporate defendant can satisfy the willfulness requirement in a section 7206(1) prosecution of a corporate defendant. ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir.), *cert. denied*, 478 U.S. 1007 (1986). In ***Shortt Accountancy***, an accountant employed by the defendant accounting firm prepared and signed a tax return for a client which contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. The accountant, acting on information provided to him by the chief operating officer, was unaware of the fraudulent nature of the deductions. The Ninth Circuit found that the accountant's lack of intent to make and subscribe a false return did not prevent the conviction of the defendant corporation under section 7206(1), because the defendant's chief operating officer acted willfully. The officer's willfulness and the accountant's act of making and subscribing the false return were sufficient to constitute an intentional violation of section 7206(1) on the part of the defendant corporation. The court reasoned that precluding a finding of willfulness in this situation would allow a tax return preparer to "escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return." Thus, a corporation is liable under section 7206(1) when its agent intentionally causes it to violate the statute. ***Shortt Accountancy,*** 785 F. 2d at 1454. *See* ***United States v. Bank of New England, N.A.***, 821 F.2d 844, 855-56 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987) (prosecution of bank for

currency transaction reporting violations); ***United States v. Gold***, 743 F.2d 800, 822-23 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985) (medicare fraud prosecution of medical corporation).

In a section 7206(1) prosecution, the government is not required to show an intent to evade income taxes by the defendant. ***United States v. Taylor***, 574 F.2d 232, 234 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); ***United States v. Engle***, 458 F.2d 1017, 1019 (8th Cir.), *cert. denied*, 409 U.S. 875 (1972).[3] There is also "no requirement that showing the specific intent for a section 7206(1) violation requires proof of an affirmative act of concealment; it is enough that the government show the defendant was aware that he was causing his taxable income to be underreported." ***United States v. Barrilleaux***, 746 F.2d 254, 256 (5th Cir. 1984). Moreover, the government may rely solely on circumstantial evidence to prove willfulness. ***United States v. Schiff***, 801 F.2d 108, 111 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); ***United States v. MacKenzie***, 777 F.2d 811, 818 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); ***United States v. Moon***, 718 F.2d 1210, 1222 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); ***Claiborne***, 765 F.2d at 798. *See also* ***United States v. Gurtunca***, 836 F.2d 283, 287 (7th Cir. 1987) (defendant's failure to report the funds anywhere on his return demonstrates that he attempted to hide the funds from the IRS, and undercuts any argument that his failure to report the funds was not willful -- defendant had failed to include business income received through fraud on his Schedules C).

Although an inference of willfulness may be based on circumstantial evidence, the Second Circuit has held that the defendant's filing of an amended return after filing a false return cannot provide the sole basis for an inference of willfulness. ***United States v. Dyer***, 922 F.2d 105, 108 (2d Cir. 1990). In ***Dyer***, the court reversed a section 7206(1) conviction because the trial judge's instructions allowed the jury to conclude that the defendant's amended return, by itself, could support a finding that he had known his original return to be false when he filed it. The filing of an amended return may indicate that a taxpayer now believes the original return was inaccurate, but it does not prove he had such knowledge at the time of the false filing. Thus, without more, an

amended return provides only an inference of mistake, rather than of fraud. ***Dyer***, 922 F.2d at 108.

Similarly, if a defendant underreported income on a false return, the inclusion of the income on a subsequent return does not establish a lack of willfulness at the time the original return was filed. The Seventh Circuit has held that a subsequent return is not probative of the defendant's state of mind at the time he filed the false return. ***United States v. McClain***, 934 F.2d 822, 834-35 (7th Cir. 1991).

Reliance by the defendant on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return, if the defendant can show that he provided the preparer with complete information and then filed the return without any reason to believe it was false. ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989); ***Bursten v. United States***, 395 F.2d 976, 981 (5th Cir. 1968); ***United States v. Duncan***, 850 F.2d 1104, 1117 (6th Cir. 1988), *cert denied*, 493 U.S. 1025 (1990); ***United States v. Brimberry***, 961 F.2d 1286, 1290 (7th Cir. 1992); ***Claiborne***, 765 F.2d at 798.

It is a defense to a finding of willfulness that the defendant was ignorant of the law or of facts which made the conduct illegal, since willfulness requires a voluntary and intentional violation of a known legal duty. However, if the defendant deliberately avoided acquiring knowledge of a fact or the law, then the jury may infer that he actually knew it and that he was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir.), *cert. denied sub nom.* ***McCreary v. United States***, 476 U.S. 1186 (1986).[1] In such a case, the use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976) -- may be appropriate.

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1 Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 SS. Ct. 320 (1991). *But see* ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986).

A number of courts have approved the use of such instructions under proper circumstances. *See, e.g.*, ***United States v. Picciandra***, 788 F.2d 39, 46 (1st Cir.), *cert. denied*, 479 U.S. 847 (1986); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986); ***United States v. Callahan***, 588 F.2d 1078 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Bussey***, 942 F.2d 1241, 1246 (8th Cir.), *cert. denied*, 112 S. Ct. 1936 (1991) (post-***Cheek*** decision); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several 9th Circuit cases). [2] Thus, it is advisable not to request such an instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case. [3] Further, to avoid potential confusion with the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance." [4]

12.10 *LESSER INCLUDED OFFENSE CONSIDERATIONS*

Tax Division Memorandum, dated February 12, 1993, regarding Lesser Included Offenses in Tax Cases (hereinafter "Memorandum") explains the Tax Division's policy. A copy of this

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2 *But see* ***United States v. Rodriguez***, 983 F.2d 455, 457 (2d Cir. 1993) (Second Circuit more willing than Ninth Circuit to authorize use of this type of instruction).

3 Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

4 It is suggested that any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

memorandum is included in Section 3.00, *supra*. The Memorandum states the government's adoption of the strict "elements" test of ***Schmuck v. United States***, 489 U.S. 705, 709-10 (1989). This test provides that one offense is necessarily included in another only when the statutory elements of the lesser offense are a subset of the elements of the greater offense. The sections of the above-noted Tax Division Memorandum relevant to false returns are as follows:

(Section 7206 and 7201) (*Memorandum* at 2-3)

> 2. [I]n evasion cases where the filing of a false return (Section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. *See* ***Schmuck v. United States***, 489 U.S. 705 (1989) (one offense is necessarily included in another only where the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with ***Spies***-evasion cases, prosecutors should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated Section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the false return charge, nothing generally would be gained by charging violations of both Sections 7201 and 7206.
>
> Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (*e.g.*, where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

(Section 7206 and 7207) (*Memorandum* at 3)

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, *neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

(Other Offenses) (*Memorandum* at 4)

6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (*i.e.*, assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, should be applied.

(General Warning) (*Memorandum* at 3)

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum.

> *See e.g.*, ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992); ***United States v. Boone***, 951 F.2d 1526, 1541 (9th Cir. 1991); ***United States v. Kaiser***, 893 F.2d 1300, 1306 (11th Cir. 1990); ***United States v. Lodwick***, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set in this memorandum be followed.

With the advent of the Sentencing Guidelines, the issue of cumulative punishments generally will arise only in pre-guidelines cases. *Memorandum* at 2. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. In the extraordinary case in which cumulative punishments are possible, the Memorandum provides discretion to the prosecutor to seek cumulative punishment.

Prosecutors dealing with issues of lesser included offenses, cumulative punishment, and related issues in tax cases are encouraged to contact the Tax Division's Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

See also the discussions of lesser-included offenses in Sections 8.00 and 10.00, *supra*, and 16.00, *infra*.

12.11 ***VENUE***

Venue in a section 7206(1) prosecution will lie in the district of filing even though the return was prepared and signed in a different district. ***United States v. Lawhon***, 499 F.2d 352, 355 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975). Venue also lies in the district where the false return was prepared and signed. ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987).

Reference should be made to the discussion of venue in Section 6.00, *supra*.

12.12 ***STATUTE OF LIMITATIONS***

The statute of limitations for section 7206(1) offenses is six years from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(5); ***United States v. Samara***, 643 F.2d 701, 704 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981). *See also* ***Marrinson***, 832 F.2d at 1476 (7th Cir. 1977).

For a further discussion of the statute of limitations, *see* Section 7.00, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. 26 U.S.C. § 145(c) (1939).

3. Of course, to the extent that the government can show the defendant was motivated by a desire to evade taxes, the case is more attractive to a jury. Consequently, this is one of the factors considered by the Tax Division in deciding whether to authorize prosecution.

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13.00 *AID OR ASSIST FALSE OR FRAUDULENT DOCUMENT*

13.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7206(2)*

§7206. ***Fraud and false statements***

Any person who . . .

(2) ***Aid or assistance***. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . .

shall be guilty of a felony and, upon conviction thereof, shall be fined* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984, 18 U.S.C. § 3612, [1] increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

13.02 *GENERALLY*

Section 7206(2) has been described as the Internal Revenue Code's "aiding and abetting" provision. ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981). It is frequently used to prosecute individuals who advise or otherwise assist in the preparation or presentation of false documents, *e.g.*, fraudulent tax return preparers. However, this statute is not limited to preparers, but applies to anyone who causes a false return to be filed. While frequently the false document will be a tax return or information return, any document required or authorized to be filed with the Internal Revenue Service can give rise to the offense.

The constitutionality of section 7206(2) has been upheld against challenges based on the First Amendment free speech clause and the Fifth Amendment due process clause. ***United States v.***

Damon, 676 F.2d 1060 (5th Cir. 1982) (statute not unconstitutionally vague); ***United States v. Buttorff***, 572 F.2d 619, 624 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978) (First Amendment); ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (statute not unconstitutionally vague); ***United States v. Moss***, 559 F. Supp. 37 (D.Or. 1983) (First Amendment). *But see* ***United States v. Dahlstrom***, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984).

Because similar concepts apply to both section 7206(2) and section 7206(1) violations, reference should be made to the discussion of section 7206(1) in Section 12.00, *supra*.

13.03 *ELEMENTS OF SECTION 7206(2) OFFENSE*

To establish a section 7206(2) offense, the government must prove the following elements beyond a reasonable doubt:

1. Defendant aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws;
2. The document was false as to a material matter;
3. The act of the defendant was willful.

United States v. Perez, 565 F.2d 1227, 1233-34 (2d Cir. 1977); ***United States v. Sassak***, 881 F.2d 276, 278 (6th Cir. 1989); ***United States v. Hooks***, 848 F.2d 785, 788-89 (7th Cir. 1988); ***United States v. Salerno***, 902 F.2d 1429, 1432 (9th Cir. 1990); ***United States v. Crum***, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976).

13.04 *AIDING AND ASSISTING*

13.04[1] *Persons Liable*

The purpose of the statute is to make it a crime for one to knowingly assist another in preparation and presentation of a false and fraudulent income tax return. ***United States v. Jackson***, 452 F.2d 144, 147 (7th Cir. 1971). Section 7206(2) and its predecessor statutes have been directed against fraudulent tax return preparers since as early as 1939. In ***United States v. Kelley*** 105 F.2d 912 (2d Cir. 1939), Justice Learned Hand described the statutory predecessor of section 7206(2):

> The purpose was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.

Kelley, 105 F.2d at 917.

Although directed against return preparers, section 7206(2) is not limited to return preparers. The argument that section 7206(2) "is applicable only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns" was flatly rejected by the Third Circuit in ***United States v. McCrane***, 527 F.2d 906, 913 (3d Cir. 1975), *vacated and remanded on another issue*, 427 U.S. 909, *reaff'd on section 7206(2) counts, vacated and remanded on other counts*, 547 F.2d 204 (3d Cir. 1976). The statute "has a broad sweep, and makes all forms of willful assistance in preparing a false return an offense." ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988); *see also* ***United States v. Coveney***, 995 F.2d 578, 588 (5th Cir. 1993). Courts have held that anyone who causes a false return to be filed or furnishes information which leads to the filing of a false return can be guilty of violating section 7206(2). The question is whether the defendant consciously did something that led to the filing of a false return.

The defendant in ***United States v. Crum,*** 529 F.2d 1380, 1382 (9th Cir. 1976), was involved in a scheme designed to furnish high income doctors with backdated beaver purchase contracts for use in obtaining a fraudulent depreciation deduction. Crum, who bred and sold beavers, did not participate in the preparation of the returns, but he did attend two meetings with doctors where the scheme was discussed. He also signed two backdated beaver purchase contracts, one of which was signed to exhibit to an IRS agent. ***Crum***, 529 F.2d at 1381-82. In affirming Crum's conviction under section 7206(2), the court described the following jury instruction as "a proper statement of the law":

> In order to aid and abet another to commit a crime it is necessary that the accused wilfully associate [sic] himself in some way with the criminal venture, and wilfully participates in it as he would in something he wishes to bring about; that is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed.
>
> In making a determination as to whether the defendants aided or assisted in or procured or advised the preparation for filing of false income tax returns, the fact that the defendants did not sign the income tax returns in question is not material to your consideration.

Crum, 529 F.2d at 1382-83 n.4.

Accordingly, the court in ***Crum*** rejected the contention that section 7206(2) applies only to preparers of tax returns. "The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of [a taxable business] interest . . . ." ***Crum***, 529 F.2d at 1382 (citing ***United States v. Johnson***, 319 U.S. 503, 518 (1943)).

In ***United States v. Maius***, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967), the defendant was convicted, even though he did not participate in the actual preparation of the false return. Maius managed a casino's bar and restaurant. As part of his duties, he prepared false daily sheets of the casino gambling loss collections. The figures were entered into the casino books and ultimately reflected on its income tax returns. The defendant's knowledge that the records would be

used in preparing the tax returns was held sufficient to sustain his conviction. ***Maius***, 378 F.2d at 718.

In ***United States v. Hooks***, 848 F.2d 785 (7th Cir. 1988), the defendant withheld $375,000 worth of bearer bonds from the bank administering his deceased father-in-law's $8 million estate. ***Hooks***, 848 F.2d at 787. He then cashed the bonds through a transaction structured to conceal his connection with the sale. As a result, the value of the bonds was not included in the federal estate tax return prepared by the bank, and $96,564.58 in estate tax was evaded. The court found that the defendant's activities resulted in the filing of the false return. Even though he did not actually prepare the returns and regardless of whether the preparer (the bank) knew of the fraud, the defendant had violated section 7206(2). ***Hooks***, 848 F.2d at 791.

In ***United States v. McCrane*** 527 F.2d at 913, the defendant solicited political contributions as finance chairman for a gubernatorial candidate. The basic scheme was that the defendant would advise donors to the political campaign that he would have false invoices for advertising services sent to them so they could deduct the disguised contributions as business expenses. Even though the defendant did not prepare or assist in the preparation of the two false returns for which he was convicted, he "was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses." ***McCrane***, 527 F.2d at 913.

United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978), provides another example of what might be termed the underlying causation theory that can support a section 7206(2) violation. Wolfson was charged with supplying inflated appraisals to persons who donated their yachts to a university. The taxpayers subsequently claimed a charitable deduction on their returns based on the inflated appraisals. Although Wolfson's conviction was reversed on evidentiary grounds, the court rejected his contention that his actions were not within section 7206(2) because he did not actually prepare a return (the defendant had provided an appraisal which the taxpayer or his accountant had used to prepare a return). ***Wolfson***, 573 F.2d at 225. Rejecting this argument, the court concluded:

> Wolfson does not have to sign or prepare the return to be amenable to prosecution. If it is proved on remand that he knowingly gave a false appraisal with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime.

Wolfson, 573 F.2d at 225.

13.04[2] ***Signing of Document Not Required***

Section 7206(2) prohibits the aiding or assisting in, procuring, counseling, or advising the preparation or presentation of a false document. The fact that the defendant does not actually sign or file the document itself "is not material." ***United States v. Coveney***, 995 F.2d 578 (5th Cir. 1993); ***United States v. Bryan***, 896 F.2d 68, 74 (5th Cir.), *cert. denied*, 498 U.S. 847 (1990); ***United States v. Maius***, 378 F.2d, 716, 718 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); ***United States v. Crum***, 529 F.2d 1380, 1382 n.4. (9th Cir. 1976). *See also* ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991).

In this respect, a section 7206(2) prosecution differs from a section 7206(1) prosecution because one of the elements of a 7206(1) violation is subscribing (signing) any return, statement, or other document under penalties of perjury.

13.04[3] ***Knowledge of Taxpayer***

It is no defense to a 7206(2) prosecution that the taxpayer who submitted the return was not charged, even when the taxpayer was aware of the falsity of the return, went along with the scheme, and could have been charged with a violation. Any criminal mental state (or lack thereof) on the part of the taxpayer is not relevant to the legality of a defendant's prosecution pursuant to section 7206(2). Accordingly, both a defendant supplying false information to an entirely innocent taxpayer and a defendant supplying false information to a taxpayer who willingly accepts and uses the false information are guilty of violating section 7206(2). This is clear from the language of

section 7206(2) which provides that it applies "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . ."

The Fourth Circuit, after surveying other circuit precedent involving section 7206(2) prosecutions of individuals who did not prepare the false returns, stated that all that is required for a section 7206(2) prosecution is that a defendant knowingly participate in providing information which results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements. ***United States v. Nealy***, 729 F.2d 961, 963 (4th Cir. 1984). *Accord* ***United States v. Wolfson***, 573 F.2d 216, 225 (5th Cir. 1978); *See also* ***United States v. Dunn***, 961 F.2d 648, 651 (7th Cir. 1992); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991); ***United States v. Zimmerman***, 832 F.2d 454, 457 (8th Cir. 1987); ***United States v. Greger***, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); ***United States v. Crum***, 529 F.2d 1380, 1382 (9th Cir. 1976); ***United States v. Kopituk***, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983); *cf.* ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and, therefore, violated section 7206(2), regardless of whether the tax preparer knew of the falsity or fraud).

Occasionally, the primary witness against the person charged with aiding and assisting in the preparation or presentation of a false tax return may be the taxpayer, who may also be culpable. In order to enable the jury to weigh properly the credibility of the witness, it may be necessary in such a case to instruct the jury on the requirements for accomplice testimony. ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963).

13.04[4] ***Filing of Documents***

The Ninth Circuit in ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984), found that the filing of a return is an element of a section 7206(2)

violation. The dissent argued, however, that "the statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented." ***Dahlstrom***, 713 F.2d at 1431.

The government has similarly argued that an offense under section 7206(2) may be committed without the filing of a document. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. Therefore, the offense can be committed simply by counseling a taxpayer to file a false return: nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense to be committed. In ***United States v. Feaster***, No. 87-1340 (6th Cir. April 15, 1988) (unpublished opinion), *cert. denied*, 488 U.S. 898 (1988), the Sixth Circuit agreed with the government and held that "***Dahlstrom*** is contrary to the plain language of 26 U.S.C. § 7206(2)." *Cf.* ***United States v. Monteiro***, 871 F.2d 204, 209-10 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989) (court questioned, but did not decide, whether there is a filing requirement for a section 7206(2) conviction).

Even though the crime may not be completed until a return is filed, it is not necessary that the defendant be the same individual who actually filed the false return, as long as the defendant's willful conduct led to the false filing. ***United States v. Kellogg***, 955 F.2d 1244 (9th Cir. 1992).

Moreover, the filing requirement is not applicable in situations where the taxpayer is required to provide information to an intermediary who, in turn, is required to file a form with the Internal Revenue Service. In such circumstances, the offense is complete when the taxpayer has presented the false document or information to the entity required by law to transmit it to the Internal Revenue Service. ***United States v. Monteiro***, 871 F.2d 204, 210-11 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989) (defendant's tax avoidance scheme caused race track to report wrong persons as winners on the track's Forms 1099); ***United States v. Cutler***, 948 F.2d 691, 694 (10th Cir. 1991) (defendant provided false information to stock brokerage firm which caused the firm to file Forms

1099-B containing false statements).

13.05 *FALSE MATERIAL MATTER*

13.05[1] *Generally*

Both sections 7206(1) and 7206(2) require that the falsity be material. Accordingly, reference should be made to the discussion of materiality in Section 12.08, *supra*.

In prosecutions under section 7206(1), courts have held that materiality is a question of law for the court and not a question of fact for the jury, although the jury must still decide whether the document was willfully falsified. *See* Section 12.08, *supra*. A number of courts interpreting section 7206(2) have reached this same conclusion. ***United States v. Rogers***, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); ***United States v. Haynes***, 573 F.2d 236, 240 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978); ***United States v. Cutler***, 948 F.2d 691, 697 (10th Cir. 1991). *See also* ***United States v. Hutchison***, 1993 WL 137780, (9th Cir. January 13, 1993) (court specifically found, in a section 7206(2) case, that false taxpayer identification constituted a material matter).

As noted in the discussion of a false material matter in Section 12.08, *supra*, the courts apply two tests in determining materiality. One standard is that any item on a tax return that is necessary for a correct computation of the tax involved is a material item. The other is the so-called ***DiVarco*** test -- whether the false item has a tendency to influence or impede the Internal Revenue Service in checking on the accuracy of the return regardless of the tax consequences of the falsehood. ***United States v. DiVarco***, 343 F. Supp. 101 (N.D. Ill. 1972), *aff'd*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974). *See* cases cited in Section 12.08[3], *supra*.

13.05[2] ***Tax Deficiency Not Necessary***

It is not necessary in section 7206(2) cases to prove a tax deficiency, an intent to evade, or any pecuniary loss to the government. The falsity of the material matter is the crime, regardless of the tax consequences of the falsehood. Accordingly, in ***Baker v. United States*** , 401 F.2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970), the defendant argued that the indictment did not charge a section 7206(2) offense because the count complained of "alleged a 'wash' transaction having no tax consequences." The court rejected this argument, holding that "a false statement may be 'material' notwithstanding the lack of tax consequences." ***Baker***, 401 F.2d at 987 (footnote omitted). Similarly, in ***United States v. Hull***, 324 F.2d 817, 823 (5th Cir. 1963), the Fifth Circuit held that an indictment under section 7206(2) was sufficient even though it failed to state the amount of unreported income. "We further conclude that there is no merit in Hull's contention that the trial court erred in failing to charge the jury that a showing of a tax deficiency is a prerequisite to conviction." ***Hull***, 324 F.2d at 823. *See also* ***United States v. Abbas***, 504 F.2d 123, 126 (9th Cir. 1974), *cert. denied*, 421 U.S. 988 (1975) (rejecting defendant's argument that the items alleged to be false must be material to the computation of the correct tax liability to support a conviction of 26 U.S.C. § 7206(2)) (citing ***Edwards v. United States***, 375 F.2d 862, 865 (9th Cir. 1967)).

In ***United States v. Helmsley***, 941 F.2d 71, 92-93 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992), the defendant reported certain payments as ordinary business expenses which the government argued were actually nondeductible constructive dividends to defendant and her husband. The testimony of the government's expert witness on cross-examination, however, implied that the payments were a form of salary compensation to the Helmsleys which were properly deductible as a business expense. The trial court instructed the jury that it could convict whether the deductions were improper, as the government argued, or whether they were mischaracterized, as suggested by the government's expert. On appeal, the defendant challenged the conviction, claiming that mischaracterization of deductions was insufficient to support a section

7206(2) conviction. The court, however, affirmed the conviction and held that whether the deductions were improperly taken or whether they were mischaracterized was inconsequential. In either case, the court reasoned, the tax return entries were false, as proscribed by the statute. ***Helmsley***, 941 F.2d at 93.

13.05[3] ***Examples: "Material Matter"***

In ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982), the defendant tax return preparers argued on appeal that their conviction under section 7206(2) was improper because the documents containing the false information, defendants' Schedules C, "were not specifically and explicitly required by statute or regulation . . . ." ***Damon***, 676 F.2d at 1063. The Fifth Circuit affirmed the conviction on the grounds that the schedules prepared by defendants were "integral parts of such returns and were incorporated therein by reference." ***Damon***, 676 F.2d at 1064.

In ***United States v. Taylor***, 574 F.2d 232 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978), the court held that the omission of a substantial amount of livestock receipts on tax return schedules constituted the omission of a material matter as a matter of law because the schedules were integral parts of the tax return. At trial, Taylor was permitted to introduce evidence that he did not believe that the omission of livestock receipts was material because offsetting expenses rendered the omission without tax consequences. The Fifth Circuit noted that the existence of offsetting expenses did not go to the materiality of the omitted receipts, "but to the lack of *mens rea* in their omission." ***Taylor***, 574 F.2d at 237. Accordingly, the defendant's belief of a lack of tax consequences may be admissible on the willfulness of the omission, even if not relevant to the materiality of the omission.

Although ***Taylor*** was a section 7206(1) case, the same principles apply to section 7206(2) violations. *See* ***Damon***, 676 F.2d at 1063-64.

13.06 ***WILLFULNESS***

Willfulness has the same meaning in section 7206(2) cases as it does in other criminal tax violations. "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." ***United States v. Bishop***, 412 U.S. 346, 360; (1973); *See also* ***Cheek v. United States***, 498 U.S. 192, 196 (1991). For additional discussions of willfulness, *see* Sections 8.06 and 12.09, *supra*.

In ***Edwards v. United States***, 375 F.2d 862 (9th Cir. 1967), the defendant tax attorney collected estimated tax payments from his clients, pocketed the money, and reported on the clients' returns that the estimated tax payments had been made and were properly credited against the tax due. The defendant argued that he did not intend to evade tax but only wanted to gain a little time. The court summarized the applicable law:

> The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsification and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section.

Edwards, 375 F.2d at 865; *see also* ***United States v. Greer***, 607 F.2d 1251, 1252 (9th Cir.), *cert. denied*, 444 U.S. 993 (1979) ("section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return").

It is not enough that the defendant's purposeful conduct merely resulted in the filing of a false return; the false filing must also have been a deliberate objective of the defendant. *See* ***United States v. Salerno***, 902 F.2d 1429, 1438 (9th Cir. 1990) (convictions reversed because government failed to show that casino employee knew or understood that his embezzlement scheme would affect preparation of the casino corporate returns); *cf.* ***United States v. Gurary***, 860 F.2d 521 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (government presented sufficient evidence to show that defendants, who sold fraudulent purchase invoices to corporations, knew their scheme

would result in corporations using the fraudulent invoices in the preparation of the tax returns). *See also* ***United States v. Aracri***, 968 F.2d 1512, 1523 (2d Cir. 1992) (government presented sufficient evidence for jury to find that defendants intended that fuel companies file false gasoline excise tax returns).

Section 7206(2) charges often arise in prosecutions of promoters of abusive tax shelters. In this context, a few cases have recognized uncertainty in the law as a defense to a finding of willfulness. *See* ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) (court reversed the section 7206(2) convictions of the defendants, who had instructed investors on creating and carrying out a tax avoidance scheme, because the legality of the shelters was "completely unsettled"). The Ninth Circuit, however, has narrowed the circumstances in which such a defense may be raised to situations in which the defendant has merely advocated tax strategies that were of debatable legality. *See* ***United States v. Schulman***, 817 F.2d 1355, 1359 (9th Cir.), *cert. dismissed*, 483 U.S. 1042 (1987). Accordingly, ***Dahlstrom*** has been held not to provide a defense for defendants whose participation in an illegal scheme extended beyond advocacy and included actual assistance in effectuating the tax avoidance strategies. ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir.), *cert. denied*, 493 U.S. 811 (1989); ***United States v. Krall***, 835 F.2d 711, 713-14 (8th Cir. 1987); ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir.), *cert. denied*, 484 U.S. 1046 (1987); ***United States v. Tranakos***, 911 F.2d 1422, 1430-31 (10th Cir. 1990).

In instances where the defendant's promotion of the tax avoidance scheme extended beyond mere advocacy, the government may show that, although the law was asserted (by the defendant) to be unclear as to the scheme's legality, the defendant's conduct was clearly prohibited. *See* ***Solomon***, 825 F.2d at 1297 (even assuming that the patent tax shelter itself was legal or of unsettled legality, defendants could not rely on an uncertainty of the law defense since their conduct in administration of the scheme was so clearly fraudulent); *see also* ***Schulman***, 817 F.2d at 1359.

While mere advocacy may not be sufficient for a finding of aiding in the filing of false documents, it is not necessary that the defendant have a definite relationship (*i.e.* business partners, etc.) with the filing party. *See* ***Aracri***, 968 F.2d at 1524 (defendants' aiding in the filing of false documents rendered them criminally liable regardless of relationship to filing organization).

13.07 *CASE EXAMPLES*

13.07[1] *Return Preparers*

In ***United States v. Jackson***, 452 F.2d 144, 147 (7th Cir. 1971), the Seventh Circuit affirmed the conviction of a return preparer. Twelve taxpayer witnesses testified that they paid the defendant to prepare their returns, which contained itemized deductions and exemptions in excess of any amount they could correctly claim. The returns contained false deductions, such as medical deductions, charitable deductions, special work clothes, interest expense, and the like. All of the deductions were fictitious and supplied by the defendant, who told the taxpayers they would receive a refund. The defendant argued that his conviction was unfair because the client-taxpayers had an incentive to lie. The court concluded that "the innocence or guilty knowledge of a taxpayer is irrelevant to such a prosecution." ***Jackson***, 452 F.2d at 147; *see also* ***United States v. Haynes***, 573 F.2d 236 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978).

13.07[2] *Sham Circular Financing Transactions*

In ***United States v. Clardy***, 612 F.2d 1139 (9th Cir. 1980), check kiting and check swapping were used by defendants as a basis for deducting non-existent interest payments. The jury was instructed on a good faith belief defense, but was also instructed: "If you find from the evidence that transactions do not exist except in form and are otherwise unreal or sham, you are to consider whether the defendant willfully engaged in such conduct for the purpose of procuring, counseling, advising, or preparing or presenting false federal income tax returns as charged in the indictment."

Clardy, 612 F.2d at 1152.

13.07[3] ***Inflated Values***

In ***United States v. Barshov***, 733 F.2d 842 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), the defendants' general partners had formed limited partnerships to purchase motion pictures for distribution and exhibition. The defendants inflated the purchase price and the income generated by the films to maximize the depreciation costs and the investment credit, and caused returns to be filed based on the inflated numbers. The Eleventh Circuit affirmed the conviction for aiding and assisting in the preparation of false partnership returns and individual returns.

13.07[4] ***Political Contributions Deducted as Business Expenses***

In ***United States v. McCrane***, 527 F.2d 906 (3d Cir. 1975), *vacated and remanded on another issue*, 427 U.S. 909, *reaff'd on section 7206(2) counts, vacated and remanded on other counts*, 547 F.2d 204 (3d Cir. 1976), the defendant, who was the finance chairman for a gubernatorial candidate, solicited political contributions, but issued fictitious invoices through a public relations firm describing the money as payment for advertising services in order to disguise the payments as business expenses for the contributors. The contributors then deducted the contributions as business expenses on their returns. One corporation deducted a $2,000 contribution as a business expense on the basis of the fictitious advertising bills. Another corporation deducted a $15,000 political contribution as a business expense on the basis of the fictitious invoices. A witness testified that the defendant said he would furnish fictitious bills to facilitate the deduction of the political contribution as a business expense. The defendant argued that section 7206(2) applies only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns. Defendant's conviction was affirmed. The Court noted that "[t]he defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses . . . [and] [h]e also advised and counseled the contributors to

use these expenditures as tax deductions." ***McCrane***, 527 F.2d at 913.

13.07[5] ***Winning Racetrack Tickets -- Not Cashed by True Owner***

Winners at the racetrack often pay another person to cash winning tickets so that the real winner's name will not appear on the Form 1099, which the racetrack files with the Internal Revenue Service.

In ***United States v. Haimowitz***, 404 F.2d 38 (2d Cir. 1968), two people testified that they had cashed about $100,000 worth of winning tickets for the defendants for a commission of 2 1/2% or 3%. A third witness testified that he had cashed $200,000 worth of winning tickets. The defendant apparently told two of the cashing parties that they would be given sufficient losing tickets to offset the winnings attributed to them. The Second Circuit upheld the conviction because the "scheme of causing the track to record another person as the winner was calculated to defeat the government in its tax collection." ***Haimowitz***, 404 F.2d at 40. *See also* ***United States v. Monteiro***, 871 F.2d 204 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989). Similarly, in ***United States v. McGee***, 572 F. 2d 1097, 1099 (5th Cir. 1978), the Fifth Circuit affirmed the conviction, under section 7206(2), of a defendant who cashed winning racetrack tickets for others under his own name in return for a 10% commission. The court stated that "[t]he statute is written disjunctively and it is sufficient for the government to prove either that the information was supplied with the intent to deceive or that the information was false in the sense of being deceptive." ***McGee***, 572 F. 2d at 1099 (citing ***United States v. Snider***, 502 F.2d 645 (4th Cir. 1974)).

13.07[6] ***Payoffs to Union Officials Designated as Commissions and Repairs***

In ***United States v. Kopituk***, 690 F.2d, 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983), the defendants made payoffs to union officials, but falsely reflected the payments in corporate records as being for commissions, repairs, and other items. Pointing out that even if it were true that the defendants never examined the returns, which had been prepared by their

accountant, the Eleventh Circuit held that "[s]ince the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms." ***Kopituk***, 690 F.2d at 1333 (citations omitted).

13.08 *VENUE*

Venue will lie where the acts of aiding and assisting took place or where the return was filed. ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993). *But see* ***United States v. Griffin***, 814 F.2d 806, 810 n.7 (1st Cir. 1987) (court chose to leave open the question of whether the district of filing provides a sufficient basis for venue in a section 7206(2) prosecution).

For further information, *see* the discussion of venue in Section 6.00, *supra*, and the discussion of venue in connection with section 7206(1) violations in Section 12.11, *supra*.

13.09 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7206(2) offenses is six years from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(3) (1986); ***United States v. Habig***, 390 U.S. 222, 223 (1968).

Where the defendant's act of aiding a false filing precedes the filing of a return, the significant event is the filing of the false document, not the defendant's act that aided or caused the filing. Thus, although the defendant may have provided false information to the filer more than six years prior to the filing of the return, the filing of a subsequent return based on the false information renews the limitations period every time such filing occurs. *See, e.g.*, ***United States v. Kelley***, 864 F.2d 569, 574-75, (7th Cir.), *cert. denied*, 493 U.S. 811 (1989) (although defendant sold an abusive tax shelter more than six years ago, his clients' annual claims for illegal deductions arising from the shelter within the six years prior to his prosecution made the charges timely).

For further information, *see* the discussion of the statute of limitations in Section 7.00, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

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14.00 *REMOVAL OR CONCEALMENT WITH INTENT TO DEFRAUD*

14.00 *REMOVAL OR CONCEALMENT WITH INTENT TO DEFRAUD*

14.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7206(4)*

§7206. ***Fraud and false statements***

Any person who --

(4) Removal or concealment with intent to defraud. -- Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title * * * shall be guilty of a felony and, upon conviction thereof, shall be fined* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than three years, or both, together with the costs of prosecution.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206(4), the maximum permissible fine for offenses committed after December 31, 1984, is increased to at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

14.02 *GENERALLY*

Section 7206(4) prosecutions are rarely brought because in the usual criminal income tax case the violation is covered by section 7201 (evasion) or section 7206(1) (subscribing to a false return) of the Internal Revenue Code (Title 26). However, it is available as a prosecutorial tool, and there are some factual situations that lend themselves to a section 7206(4) prosecution.

Section 7206(4) and its predecessor [2] have been used from an early date in cases involving the sale of untaxed liquor. *E.g.*, ***United States v. Champion***, 387 F.2d 561 (4th Cir. 1967); ***United States v. Davis***, 369 F.2d 775 (4th Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); ***United States v. Goss***, 353 F.2d 671 (4th Cir. 1965); ***Hyche v. United States***, 286 F.2d 248 (5th Cir. 1961); ***Ingram v. United States***, 241 F.2d 708 (5th Cir.), *cert. denied*, 353 U.S. 984 (1957); ***Price v. United States***,

150 F.2d 283 (5th Cir.), *cert. denied*, 326 U.S. 789 (1945). Cases involving the sale of untaxed liquor are beyond the scope of this manual, but some of those cases are helpful in interpreting the statute.

Congress expanded the scope of the offense by amending section 7206(4) of the 1954 Internal Revenue Code to include not only concealment of goods or commodities, but also, conduct committed in order to avoid levies. ***United States v. Swarthout***, 420 F.2d 831, 835 (6th Cir. 1970) (citing H.R. Rep. No. 1337 in 3 U.S.C. Cong. & Ad. News, p. 4573 (1954)).

14.03 *ELEMENTS OF OFFENSE*

To establish a section 7206(4) offense, the following elements must be proved beyond a reasonable doubt:

1. Removes, deposits, or conceals or is concerned in removing, depositing, or concealing;
2. Goods or commodities where a tax is or shall be imposed, or any property upon which levy is authorized by section 6331 (Title 26);
3. Intent to evade or defeat the assessment or collection of any tax imposed by Title 26.

14.04 *REMOVES, DEPOSITS, OR CONCEALS*

Section 7206(4) applies to any person who removes, deposits, or conceals certain goods, commodities or property upon which a tax is or shall be imposed, or upon which a levy is authorized. By its own terms, the statute is not limited to persons who directly conceal goods, commodities, or property, but extends to any person "concerned in" those acts. 26 U.S.C. § 7206(4). As such, the concept of "conceals" is not limited to a physical concealment of the property. ***United States v. Bregman***, 306 F.2d 653 (3d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963).

In ***Bregman***, the one-count indictment charged the defendants as follows:

> That on or about October 30, 1954, at Philadelphia, in the Eastern District of Pennsylvania, Rudolph R. Bregman and Milton H.L. Schwartz, with intent to evade and defeat the collection of taxes assessed against Rudolph Motor Service, Inc., did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motor Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code of 1954 . . . .

Bregman, 306 F.2d at 654. Defendant Bregman argued that there was a variance between the indictment and the proof because the indictment charged the concealment of 18 trailers and "the government's proof only established a false entry with respect to possession of the trailers." ***Bregman***, 306 F.2d at 655. The court rejected the defendant's argument:

> When Bregman falsified Rudolph's corporate records to show that the trailers had been "repossessed" the effect of that falsification was to "conceal" Rudolph's possession of the trailers.

Bregman, 306 F.2d at 655. According to the court, the applicable principle is that the word "conceal" does not merely mean to secrete or hide away. It also means "to prevent the discovery of or to withhold knowledge of." ***Bregman***, 306 F.2d at 656. Therefore, the court concluded that:

> The government's proof that Bregman falsified the records pertaining to the trailers -- property of Rudolph -- to show that they had been "repossessed" was foursquare with the charge of "concealment" in the indictment and not by any stretch of the imagination at variance with it.

Bregman, 306 F.2d at 656.

Proof of any one of the prohibited acts -- "removing, depositing or concealing" -- is sufficient for conviction, even if they are charged conjunctively. ***United States v. Davis***, 369 F.2d 775, 779 (4th Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); ***Hyche v. United States***, 286 F.2d 248, 249 (5th Cir. 1961); ***Price v. United States***, 150 F.2d 283, 285 (5th Cir.), *cert. denied*, 326 U.S. 789 (1945).

14.05 *TAX IMPOSED OR LEVY AUTHORIZED*

Care should be exercised in drafting indictments charging violations of section 7206(4). Where the defendant is charged with removing, depositing, or concealing goods or commodities for or in respect whereof any tax is or shall be imposed, the prohibited acts may be based on actions committed prior to the time the tax is due. However, if the charge is based upon the commission of the prohibited actions with "regard to property upon which levy is authorized," at least one court has held that such actions must have occurred after a tax has been assessed and the taxpayer has refused to pay after notice and demand for payment. ***United States v. Swarthout***, 420 F.2d 831, 833 (6th Cir. 1970).

Concealment of assets *prior* to assessment or levy may be charged under section 7201. By including concealment of assets among the prohibited conduct in section 7206(4), Congress did not intend to provide the exclusive criminal remedy for such conduct. ***United States v. Hook***, 781 F.2d 1166, 1170 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986). The government is not foreclosed from charging those who conceal assets, either before or after assessment or levy, under the general evasion statute. ***Hook***, 781 F.2d at 1170; *but see* ***United States v. Minarik***, 875 F.2d 1186, 1195 (6th Cir. 1989) (Sixth Circuit reversed conviction, finding that government should have charged defendant with violating offense prong of conspiracy statute with reference to section 7206(4), rather than with violating general defraud prong). [3]

14.06 ***WILLFULNESS***

The word "willfully" is not used in section 7206(4). Rather, the statute uses the phrase "with the intent to evade or defeat." 26 U.S.C. § 7206(4). Thus, it is not enough to show a voluntary, intentional violation of a known legal duty. Instead, it must be shown that the defendant's purpose was to evade or defeat the assessment or collection of a tax. Nevertheless, the same type of evidence used to establish willfulness in an attempted evasion prosecution often may be used to prove an intent to evade or defeat tax. Reference should accordingly be made to the discussion of willfulness in Sections 8.06 and 12.09, *supra*.

14.07 ***VENUE***

The Sixth Amendment to the Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed * * * ." *See* Fed. R. Crim. P. Rule 18. If a statute does not indicate where Congress considers the place of committing a crime to be, "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7206(4) prosecutions, venue is proper in the judicial district in which the act of concealment took place. Venue also may be laid where the return was filed if the charge is an attempt to evade and defeat the assessment of a tax. *See* discussion of venue in Section 6.00, *supra*.

14.08 ***STATUTE OF LIMITATIONS***

The statute of limitations for section 7206(4) offenses is three years. 26 U.S.C. § 6531. For a discussion as to the measurement of the statute of limitations, *see* Section 7.00, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.
2. Internal Revenue Code of 1939, Sec. 3321(a) (26 U.S.C. 1952 ed.).
3. ***Minarik*** has not fared well over time. The Sixth Circuit has limited it, *see* ***United States v.***

Sturman, 951 F.2d 1466, 1473 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); ***United States v. Mohney***, 949 F.2d 899, 902-03 (6th Cir. 1991), and other circuits have shown no inclination to follow it, ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1092 (4th Cir. 1993); ***United States v. Harmas***, 974 F.2d 1262, 1267 (11th Cir. 1992).

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15.00 *COMPROMISES AND CLOSING AGREEMENTS*

15.00 *COMPROMISES AND CLOSING AGREEMENTS*

15.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7206(5)*

§7206. ***Fraud and false statements***

Any person who * * *

(5) Compromises and closing agreements. -- In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully --

(A) Concealment of property. -- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. -- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206(5), the maximum permissible fine for offenses committed after December 31, 1984, is increased to at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

15.02 ***GENERALLY***

Section 7206(5) prosecutions are very rare. Only one reported case has been located charging a section 7206(5) violation, ***Gentsil v. United States***, 326 F.2d 243 (1st Cir.), *cert. denied*, 377 U.S. 916 (1964). And even ***Gentsil*** involved a prosecution for violations of section 7206(1), as well as section 7206(5)(B) (false offers in compromise). In the usual situation, the availability of the commonly used section 7206(1) charge will, in virtually all instances, obviate the need for using section 7206(5). *See* ***United States v. Cohen***, 544 F.2d 781 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977) (a material omission in an "Offer in Compromise" filed with the Internal Revenue Service was prosecuted as a section 7206(1) violation). For principles applicable to section 7206(5), reference should be made to the discussion of section 7206(1) in Section 12.00, *supra*.

15.03 ***SCOPE OF SECTION 7206(5)***

By its terms, section 7206(5) applies to: (1) closing agreements as provided for in section 7121 of the Internal Revenue Code (Title 26); [2] and (2) compromises of any civil or criminal case, as provided for in section 7122 of the Internal Revenue Code (Title 26). [1]

If either situation is present, then a violation occurs if the taxpayer willfully: (A) conceals from an employee of the United States any property belonging to the estate of a taxpayer or other person liable for the tax; or (B) withholds, falsifies, or destroys records or makes a false statement as to the estate or financial condition of the taxpayer or other person liable for the tax.

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1 Regarding criminal liability, a "compromise" within the meaning of the statute is not a settlement of the criminal case alone, unrelated to civil liability. ***United States v. McCue***, 178 F. Supp. 426,434 (D. Conn. 1959). In other words, a "compromise" is not simply a plea agreement. Rather, a "compromise" encompasses settlement of the civil liability. The purpose of the statute is to facilitate the money settlement of tax liabilities. *Id.* Nevertheless, it is the long-standing policy of the Department not to settle civil tax liability while the criminal case is pending. *See* ***United States Attorneys' Manual*** (USAM), Title 6, Sec. 6.200.

15.04 ***WILLFULNESS***

The word "willfully" has the same meaning in a section 7206(5) violation as it does in the other criminal tax violations -- a voluntary, intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Bishop***, 412 U.S. 346, 359-60 (1973). *See* the discussion of willfulness in Sections 8.06 and 12.09, *supra*.

15.05 ***VENUE***

Venue for a section 7206(5) violation may be laid in any district in which any of the acts prohibited by section 7206(5) occur. *See* the discussion of venue in connection with section 7206(1) offenses in Section 12.11, *supra*. *See* also the general discussion of venue in Section 6.00, *supra*.

15.06 ***STATUTE OF LIMITATIONS***

The statute of limitations for section 7206(5) offenses is three years. 26 U.S.C. § 6531. *See* also the general discussion of the statute of limitations in Section 7.00, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. "A closing agreement is a written agreement between an individual and the Commissioner [the Commissioner of the Internal Revenue Service] which [finally] settles . . . the liability of that individual with respect to any Internal Revenue tax for a taxable period." 14 Mertens, ***Law of Federal Income Taxation***, Sec. 52.01 (Rev. 1986).

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16.00 *FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS*

16.00 *FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS*

16.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7207*

Section 7207 of the Internal Revenue Code (Title 26) provides, in pertinent part:

§7207. ***Fraudulent returns, statements, or other documents***

> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined* not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. [1]
>
> * As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 **1** which increased the maximum permissible fines for both felonies and misdemeanors. For the misdemeanor offenses set forth in section 7207, the maximum permissible fine for offenses committed after December 31, 1984, is increased to $100,000 in the case of individuals and $200,000 in the case of corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

16.02 *POLICY LIMITING THE USE OF SECTION 7207*

The Tax Division's policy regarding the use of section 7207 in criminal prosecutions has undergone dramatic changes. For a number of years, prosecutions were not authorized under this section. [2] On September 17, 1976, the Attorney General approved a Tax Division proposal to modify this policy. The modification in policy approved by the Attorney General allowed for the use of section 7207 in a limited number of criminal tax cases, commonly referred to as altered document cases. Such cases routinely involve the submission to the Internal Revenue Service of checks containing amounts which had been altered (usually, increased) after the checks had cleared the bank ("raised cancelled checks"), altered invoices, and similar altered documents as support for overstated deductions.

Section 7207 prosecutions, however, were not authorized where the altered document was a

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1 Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

federal tax return. Otherwise stated, prosecution under this section was limited to cases involving the falsification of documents other than federal tax returns.

Furthermore, the use of section 7207 was restricted to those cases where the Tax Division determined that the circumstances did not warrant a felony prosecution. Under this policy, the Tax Division would consider the following factors in determining whether prosecution under the misdemeanor section was justified: (1) the computed tax deficiencies were such as to be considered *de minimis* in relation to the circumstances of the particular case under consideration; and (2) the means and methods utilized in committing the offense were commensurate with charging a misdemeanor rather than a felony.

Recognizing that its policy created obstacles for the government in negotiating with lower-echelon individuals in a wider scheme who expressed a desire to cooperate in ongoing or future investigations in return for leniency, the Tax Division reconsidered its long-standing position that an income tax return could not form the basis of a section 7207 prosecution. On March 21, 1989, the Tax Division issued Directive No. 75 which modified its original position, permitting misdemeanor prosecution under section 7207 where the false document was a federal income tax return under *very limited* circumstances. The guidelines set forth the following provisions:

> The Department of Justice, Tax Division, agrees to consider approving plea agreements with charges brought under 26 U.S.C., Section 7207 for witnesses cooperating in Title 18 and Title 26 grand jury investigations and in no other circumstances under the following conditions:
>
> 1. Approval for Section 7207 charges will not be given in any case in which the Tax Division has previously authorized charges against the subject under Section 7206(1), Section 7201, or a tax (***Klein***) conspiracy.
>
> 2. The Tax Division must be provided with a prosecution statement or letter describing the outlines of the Title 26 and/or Title 18 investigation, the

involvement of the cooperating witness who will plead, and the anticipated cooperation that the witness is expected to provide in the investigation.

3. The subject must have agreed to be a cooperating witness in a Title 18 or Title 26 investigation to which the witness' proposed income tax violation related.

4. In addition to his cooperation in the ongoing criminal investigation and prosecution, the subject must agree to cooperate fully and truthfully with the Internal Revenue Service in any civil audit or adjustment of the tax liability arising out of the circumstances of the criminal case.

5. The subject must be informed that any plea agreement to tax misdemeanors under 26 U.S.C. § 7207 is subject to the approval of the Tax Division, Department of Justice. No such plea agreement is to be executed until authorized by the Tax Division or, if executed, unless it contains a provision that the plea agreement is subject to the approval of the Tax Division.

6. Approval for use of Section 7207 will not be given, hence should not be requested, if the underpayment of taxes resulting from the false statements in the return exceeds $2500 in any of the years. In such cases the plea must be to a tax felony.

7. The IRS must make a referral pursuant to 26 U.S.C. § 6103(h)(3)(A). The United States Attorney must have obtained tax disclosure confirming the filing of the return(s). The Tax Division should be provided with an abbreviated SAR, a computation of the taxes due, the tax return(s) involved, and a copy of the plea agreement or a statement of its terms. Section 7207 approval will not be given if the tax disclosure material suggests that a tax misdemeanor would be

an inappropriate disposition of the case.

8. The subject must sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved in all the years under investigation.

Tax Division Directive No. 75, dated March 21, 1989.

Willfully delivering to the Secretary any false or fraudulent list, return, account, statement, or other document can serve, with appropriate Tax Division approval, as the basis for other charges, including felony charges. For example, a false document can constitute an attempt to evade and defeat a tax in violation of section 7201 of the Code (Title 26). *See* Section 8.04, ***Attempt To Evade Or Defeat***, *supra*. A false document can also be the basis for a felony charge of violating 18 U.S.C. § 1001 even though the document could also be the basis for a section 7207 misdemeanor violation. ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977) (concurring opinion); ***United States v. Fern***, 696 F.2d 1269, 1274 (11th Cir. 1983). In ***Fern***, the defendant's argument that he should have been prosecuted under section 7207 instead of 18 U.S.C. § 1001 was rejected. This argument failed because of the long-established principle that where statutes overlap, the government can select the statute under which it wishes to prosecute. In ***United States v. Batchelder***, 442 U.S. 114, 123-24 (1979), the Court explained that:

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.

[Citations omitted].

16.03 ***ELEMENTS***

To establish a violation of section 7207, the following elements must be proved beyond a reasonable doubt:

1. Submitting to the Internal Revenue Service a return, statement, or other document;
2. The return, statement, or other document is false or fraudulent as to a material matter; and,
3. Willfulness.

Sansone v. United States, 380 U.S. 343, 352 (1965).

16.04 *RETURN, STATEMENT, OR OTHER DOCUMENT*

By its express terms, section 7207 applies to "any list, return, account, statement, or other document." Aside from the policy considerations discussed above, there is no limit on the type of document that can be the subject of a violation. The usual situation will involve an Internal Revenue Service audit and the submission to the auditor of altered cancelled checks, altered invoices, or altered receipts and the like, as support for overstated deductions. Unlike a section 7206(1) violation, there is no requirement that the document be signed under penalties of perjury or even that the document be signed. *See* ***United States v. Bishop***, 412 U.S. 346, 357 (1973). It is enough to show that the document was delivered or disclosed to the Internal Revenue Service. 26 U.S.C. § 7207; ***Bishop***, 412 U.S. at 358.

16.05 *FALSE OR FRAUDULENT MATERIAL MATTER*

The requirement of establishing that the document in issue is false or fraudulent as to a material matter is an element that is common to sections 7206(1), 7206(2), and 7207 violations -- "does not believe to be true and correct as to every material matter," 26 U.S.C. § 7206(1); "fraudulent or is false as to any material matter," 26 U.S.C. § 7206(2); "fraudulent or to be false as to any material matter," 26 U.S.C. § 7207. Reference should accordingly be made to the discussion of materiality in Sections 12.08 and 13.05, *supra*.

Materiality in a section 7207 case does not depend on whether the false statement has any bearing on the tax liability of the defendant. To the contrary, the Supreme Court has pointed out

that conduct can violate section 7207 where the false material statement does not have the effect of reducing the defendant's tax liability. ***Sansone v. United States***, 380 U.S. 343, 352 (1965).

16.06 *WILLFULNESS*

Section 7207 is a misdemeanor, but the word "willfully" has the same meaning in the "misdemeanor and felony sections of the Revenue Code." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); *see* ***United States v. Bishop***, 412 U.S. 346, 361 n.9 (1973). In both the misdemeanor and felony provisions of the Code, willfully "generally connotes a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Bishop***, 412 U.S. at 360.

For a discussion of willfulness, *see* Sections 8.06 and 12.09, *supra*.

16.07 *LESSER-INCLUDED OFFENSE CONSIDERATIONS*

The Tax Division, on February 12, 1993, outlined its position with respect to lesser-included offenses in a memorandum to the United States Attorneys by then Acting Assistant Attorney General Bruton. With respect to a section 7201 charge, the Tax Division, relying upon the Court's holdings in ***Sansone v. United States***, 380 U.S. 343 (1965), and ***Schmuck v. United States***, 489 U.S. 705 (1989), stated that a lesser included offense instruction based on section 7207 could be appropriate. Yet, where the defendant has been charged with violating section 7206(1), the Tax Division has unequivocally stated that "*neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (section 7207) is a lesser included offense of which the defendant may be convicted." Memorandum from Acting Assistant Attorney General Bruton, dated February 12, 1993, p.3. If the government fears that "there may be a failure of proof as to one of the elements unique to section 7206(1), the prosecutor may wish to consider including charges under both section 7206(1) and section 7207 in the same indictment, ..." Memorandum, at p.3. Therefore, the government should object to a

request for a charge that section 7207 is a lesser-included offense of section 7206(1).

16.08 *VENUE*

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." *See* Fed. R. Crim. P. Rule 18.

If a statute does not indicate where Congress considers the place of committing a crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7207 prosecutions, venue is proper in the judicial district in which the false document is delivered or disclosed to the Internal Revenue Service.

See also the discussion of venue in Section 6.00, *supra*.

16.09 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7207 offenses is six years from the time the false or fraudulent document is delivered or disclosed to the Internal Revenue Service. 26 U.S.C. § 6531(5).

See also the discussion of the statute of limitations in Section 7.00, *supra*.

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1. That portion of section 7207 dealing with information furnished to the Internal Revenue Service in connection with section 6047(b) of the Code (information relating to certain trusts and annuity plans), and section 6104(d) of the Code (public inspection of private foundations' annual reports) is not covered in this manual.

2. As a matter of history, section 7207's statutory predecessor was section 3616(a) of the Internal Revenue Code of 1939. The Supreme Court held, in ***Achilli v. United States***, 353 U.S. 373 (1957), that Congress did not intend section 3616(a) to apply to income tax returns. *See also* ***Berra v. United States***, 351 U.S. 131 (1956). With the adoption of the 1954 Internal Revenue Code, however, Congress placed section 7207 with the other sections of the Code, clearly making the section applicable to income tax violations. In addition, the language in section 3616(a) requiring

an intent to evade or defeat a tax was eliminated, thus conforming the language of section 7207 to the language in other misdemeanor provisions. The result was that the Supreme Court reversed its prior holding and found that section 7207 "applies to income tax violations." ***Sansone v. United States***, 380 U.S. 343, 347-49 (1965).

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17.00 *26 U.S.C. § 7212(a) "OMNIBUS CLAUSE"*

17.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7212(a)"OMNIBUS CLAUSE"*

§7212. ***Attempts to interfere with administration of the Internal Revenue Laws.***

(a) Corrupt or forcible interference.

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threat of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede the due administration of this title, shall, upon conviction thereof, be fined* not more than $5,000 or imprisoned not more than three years or both.

*As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7212, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

17.02 *GENERALLY*

Section 7212(a) of Title 26 contains two clauses. The first clause prohibits threats or forcible endeavors designed to interfere with United States agents acting pursuant to Title 26. *See* ***United States v. Przybyla***, 737 F.2d 828 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985). The second more general clause, known as the omnibus clause, prohibits any act that either corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue Code. ***United States v. Williams***, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981); ***United States v. Popkin***, 943 F.2d 1535, 1539 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992).

The Tax Division's policy on the omnibus provision of section 7212(a) is set out in Tax

Division Directive No. 77 (1989). That directive states: In general, the use of the "omnibus" provision of Section 7212(a)

should be reserved for conduct occurring after a tax return has been filed -- typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. 371 charges are unavailable due to insufficient evidence of conspiracy. However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties.

(*See* Section 3.00, *supra*). Use of the omnibus clause is, nevertheless, not limited to conduct occurring after the return has been filed. "Continually assisting taxpayers in the filing of false tax returns or engaging in other conduct designed to make audits difficult; and other numerous large-scale violations of 26 U.S.C. 7206(2) or 18 U.S.C. 287 . . . are examples of situations when Section 7212(a) charges might be appropriate." Directive 77, p.1.

The Eleventh Circuit, in ***Popkin***, discussed the value of section 7212(a):

> In a system of taxation such as ours which relies principally upon self reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that "variety of corrupt methods that is limited only by the imagination of the criminally inclined." ***Martin***, 747 F.2d at 1409. We believe that § 7212(a) is such a statute . . . .

Popkin, 943 F.2d at 1540.

17.03 *ELEMENTS OF THE OMNIBUS CLAUSE*

To establish a section 7212(a) violation, the government must prove the following three essential elements beyond a reasonable doubt that the defendant: (1) whoever in any way corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code. ***United States v. Williams***, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981).

17.04 *IN ANY WAY CORRUPTLY*

"Corruptly" in the context of section 7212(a) means to act with the intent to secure an unlawful advantage or benefit either for oneself or another. ***United States v. Reeves (Reeves I)***, 752 F.2d 995, 998 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985) (cited with approval in ***United States v. Popkin***, 943 F.2d 1535, 1540 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992)). The Fifth Circuit in ***Reeves I*** stated:

> It is unlikely that 'corruptly' merely means 'intentionally' or 'with improper motive, or bad or evil purpose.' First, the word 'endeavor' already carries the requirement of intent; one cannot 'endeavor' what one does not 'intend.' Similarly, the mere purpose of obstructing the tax laws is 'improper' and 'bad'; therefore, to interpret 'corruptly' to mean either 'intentionally' or 'with an improper motive or bad or evil purpose' is to render 'corruptly' redundant.

Reeves I, 752 F.2d at 998. *See also* ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992); ***United States v. Hanson***, 2 F.3d 942 (9th Cir. 1993).

A broad reading of the term "corruptly" is further dictated by its modifying phrase "in any other way". *See* ***United States v. Mitchell***, 985 F.2d 1275, 1279 (4th Cir. 1993) (the language of the clause encourages a broad construction and should be read to include the full scope of conduct that such a construction commands). "Section 7212(a) is directed at efforts to bring about a particular advantage such as impeding collection of one's taxes, taxes of another, or the auditing of one's or another's tax records," ***Reeves I***, 752 F.2d at 998, or financial gain, ***Dykstra***, 991 F.2d at 453. Use of the word "corruptly" does not limit the reach of the statute to some action taken against another person as the object of the action. ***Mitchell***, 985 F.2d at 1277-78.

In ***Dykstra***, the defendant retaliated against federal officials involved in an IRS collection action by sending the officials IRS Forms 1099 indicating that the defendant had paid the officials nonemployee compensation. The defendant then notified the IRS that the officials failed to pay

taxes on the nonemployee compensation and requested a reward from the IRS for supplying the information. The court held that the defendant acted corruptly because he attempted to secure an "unwarranted financial gain for himself," namely to prevent his home from being seized by the IRS to satisfy his tax liability and to obtain rewards for reporting alleged tax violations. ***Dykstra***, 991 F.2d at 453. *See also* ***United States v. Kuball***, 976 F.2d 529 (9th Cir. 1992) (defendant acted corruptly where, in order to obtain a substantial tax refund, he sent false Forms 1099 and threatening letters to IRS employees).

The benefit sought by the defendant need not be financial for the "corruptly" element to be satisfied. In ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992), the defendant engaged in a Form 1099 scheme directed at over 100 individuals involved in the liquidation of his farm and his son's prosecution on state alcohol possession charges. Relying on ***Reeves I***, 752 F.2d 995, Yagow argued that the prosecution had failed to prove that he acted "corruptly," because there was no evidence that he had sought financial advantage from his Form 1099 scheme. The Eighth Circuit held that proof that Yagow acted to get his property back or receive money he claimed was owed to him was sufficient to prove he acted "corruptly," and stated:

> While we are inclined after examining ***Reeves*** to reject Yagow's assertion that the term corruptly is limited to situations in which the defendant wrongfully sought or gained a financial advantage, we need not decide this issue, as ample evidence was presented to show that Yagow acted with the motive of securing financial gain.

Yagow, 953 F.2d at 427. The ***Yagow*** court relied on the Fifth Circuit's opinions in ***Reeves I*** and ***United States v. Reeves (Reeves II)***, 782 F.2d 1323, 1325-26 (5th Cir.), *cert. denied*, 479 U.S. 837 (1986), which implies that a financial motive is not the only benefit which satisfies the "corruptly" element of section 7212(a). The court in ***Reeves II*** noted:

> [o]n remand, the court found that Reeves had acted with the intention of securing benefits to himself insofar as the filing of the lien on . . . [an IRS agent's] property would divert his time and attention from pursuing tax investigations against Reeves and others. The district court concluded as a matter of law that Reeves had violated § 7212(a).

Reeves II, 782 F.2d at 1326. The Fifth Circuit held that the inference that the defendant acted with the intent of diverting the agent's energies from the investigation was reasonable and affirmed Reeves' conviction. ***Reeves II***, 782 F.2d at 1326.

Mere "harassment" of an agent, if it is not done to obtain an undue advantage, may not rise to the level of a section 7212(a) violation. The court in ***Reeves I*** stated:

> [T]here is no reason to presume that *every* annoyance or impeding of an IRS agent is done *per se* "corruptly." A disgruntled taxpayer may annoy a revenue agent with no intent to gain any advantage or benefit other than the satisfaction of annoying the agent. Such actions by taxpayers are not to be condoned, but neither are they "corrupt" under Section 7212(a).

Reeves I, 752 F.2d at 999 (emphasis in original).

Conduct can be corrupt under the provisions of the omnibus clause even if it is not directed at individual officers or employees of the Internal Revenue Service. The omnibus clause of § 7212(a) "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States Government.'" ***Dykstra***, 991 F.2d at 452 (quoting ***Popkin***, 943 F.2d at 1539). Two of the many victims of the Form 1099 scheme in ***Dykstra*** were not government agents. One was the former employer of Dykstra's wife and the other was a bank employee who released Dykstra's wife's bank funds to the IRS. ***Dykstra***, 991 F.2d at 451-52. The Eighth Circuit held that the section 7212(a) charge properly included the defendant's actions against the nongovernment victims. ***Dykstra***, 991 F.2d at 452.

"Misrepresentation and fraud . . . are paradigm examples of activities done with an intent to gain an improper benefit or advantage." ***United States v. Mitchell***, 985 F.2d 1275, 1278 (4th Cir.

1993). In ***Mitchell***, the District Court had dismissed a section 7212(a) charge where the defendant, a U.S. Fish and Wildlife Service employee, applied for tax exempt status for his consulting business, American Ecological Union (AEU). ***Mitchell***, 985 F.2d at 1276. The government alleged the application falsely stated that AEU's purpose was to promote ecological research, and that AEU actually arranged big-game hunting trips in Pakistan and China, for which AEU was paid tax deductible "contributions." ***Mitchell***, 985 F.2d at 1277. In reversing the dismissal, the Fourth Circuit concluded that "fraudulently representing to the IRS that his organization was involved in tax exempt activities, using his tax exempt status to solicit contributions that were not used for tax exempt purposes, and inducing hunters to file false returns" fit "neatly" within the ***Reeves I*** definition of "corruptly." ***Mitchell***, 985 F.2d at 1278.

An endeavor may be corrupt even when it involves means that are not illegal in themselves. ***Mitchell***, 985 F.2d at 1279 (and cases cited); ***Popkin***, 943 F.2d at 1537 (attorney acted corruptly where he created a corporation "expressly for the purpose of enabling the defendant to disguise the character of illegally earned income and repatriate it from a foreign bank").

17.05 *ENDEAVORING*

The second element of the omnibus clause of section 7212(a) is "endeavoring." The courts have looked to case law interpreting similar language in the obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505, to aid in defining the term for purposes of section 7212(a). ***United States v. Williams***, 644 F.2d 696, 700-01 & n. 11 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981); ***United States v. Martin***, 747 F.2d 1404, 1409 (11th Cir. 1984).

Relying on the Supreme Court's definition of "endeavor" in ***Osborn v. United States***, 385 U.S. 323, 333 (1966), the Eleventh Circuit in ***Martin*** defined "endeavor" as "any effort . . . to do or accomplish the evil purpose that section was intended to prevent." ***Martin***, 747 F.2d at 1409. The court in ***United States v. Dykstra***, 991 F.2d 450 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993),

relying on another obstruction case, ***United States v. Silverman***, 745 F.2d 1386, 1393, 1396 n. 12 (11th Cir. 1984), defined "endeavor" as follows:

> [T]o effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue Laws.

The manner by which a defendant can "endeavor" to impede the due administration of the internal revenue laws is unlimited. As noted above, the omnibus clause contains broad language that prohibits conduct that impedes the due administration of the internal revenue laws "in any way."

The most common way to endeavor to impede or obstruct the due administration of the tax code is to take direct action against officials involved in investigating or prosecuting tax charges. In ***United States v. Martin***, 747 F.2d 1404 (11th Cir. 1984), a taxpayer knowingly filed a false complaint with the IRS alleging agent misconduct during an audit. ***Martin***, 747 F.2d at 1408, 1410. The Eleventh Circuit affirmed the defendant's section 7212(a) conviction, holding that the filing of a false complaint against an IRS agent was an endeavor to impede the due administration of the internal revenue laws. ***Martin***, 747 F.2d at 1409-10. *But see* ***United States v. Hylton***, 710 F.2d 1106 (5th Cir. 1983), *aff'g*, 558 F. Supp. 872 (S.D. Tex. 1982) (section 7212(a) conviction can not be based on nonfraudulent complaint against IRS agents).

In ***Williams***, 644 F.2d at 700-01 & n. 11, the Eighth Circuit affirmed the conviction of defendant Terrell, holding that "conduct assisting the preparation and filing of false W-4 forms constitutes an endeavor to impede or obstruct the due administration of the Internal Revenue Code. We conclude that section 7212's omnibus clause plainly comprehends this conduct." ***Williams***, 644 F.2d at 701.

The Form 1099 scheme previously described in Section 17.04, *supra*, is a method frequently used to impede the administration of the internal revenue laws. In ***United States v. Yagow***, 953 F.2d 427 (8th Cir. 1992), a typical Form 1099 scheme case, the defendant sent bills and

Forms 1099-MISC to several officials involved in the liquidation of his farm which falsely claimed that he had paid the officials nonemployee compensation. The defendant also filed the Forms 1099 with the IRS. The court found that the Form 1099 scheme was an attempt to impede the administration of the tax laws. ***Yagow***, 953 F.2d at 427. *See also* ***Dykstra***, 991 F.2d at 453; ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993); ***United States v. Kuball***, 976 F.2d 529, 532 (9th Cir. 1992).

A number of other activities also have been found to violate the omnibus clause. ***United States v. I.H. Hammerman***, 528 F.2d 326, 328 (4th Cir. 1975) (defendant pled guilty to section 7212(a) charge based on his acting as "bagman" for Vice President Spiro Agnew in tax evasion scheme); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (sending false bills to numerous individuals, claiming the billed amount as forgiven debt on IRS forms and requesting rewards for reporting the debtors to the Internal Revenue Service); ***United States v. Shriver***, 967 F.2d 572, 573-74 (11th Cir. 1992) (transfer of real estate into spouse's name and filing of an altered Lien Notice in attempt to release IRS lien).

17.06 *TO OBSTRUCT OR IMPEDE THE DUE ADMINISTRATION OF THE INTERNAL REVENUE LAWS*

The omnibus clause is aimed at prohibiting efforts to impede the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax record. ***United States v. Kuball***, 976 F.2d 528, 531 (9th Cir. 1992).

Although it is necessary in omnibus cases to prove that a defendant attempted to impede or obstruct the administration of the internal revenue laws, there is no requirement that a defendant's actions have an adverse affect on the government's investigation. ***United States v. Rosnow***, 977 F.2d 399 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993). In ***Rosnow***, the defendants, who were being investigated for various internal revenue violations, filed false Forms 1099 against IRS agents and other law enforcement officials in an

attempt to impede the investigations. ***Rosnow***, 977 F.2d at 403. The defendants claimed that they could not be convicted under the omnibus clause because they did not successfully impede the IRS investigation. The Eighth Circuit found that filing false Forms 1099 was an attempt to impede the investigation which was punishable under the omnibus clause even though the attempt was unsuccessful. ***Rosnow***, 977 F.2d at 410.

There is also no requirement that a defendant attempt to impede the IRS on his own behalf; impeding the IRS on another's behalf violates the omnibus clause. *See* ***United States v. Popkin***, 943 F.2d 1535, 1541 (11th Cir 1991), *cert. denied*, 112 S. Ct. 1760 (1992) (an attorney can be prosecuted under the omnibus clause where he creates a corporation intended to assist a client to avoid reporting taxable income from drug transactions).

Action need not be taken against a government agent to constitute a violation of the omnibus clause. A violation occurs whenever a defendant intends to impede the administration of the tax laws. ***United States v. Mitchell***, 985 F.2d 1275, 1277 (4th Cir. 1993). In ***Mitchell***, the court held that the omnibus clause prohibits attempts to violate the due administration of the internal revenue laws and should be read broadly to include behavior like the defendant's that was not directed at IRS officials.

17.07 *VENUE*

Venue for a section 7212 prosecution lies in the district where the defendant committed the corrupt act(s) constituting an endeavor to impede the administration of the Internal Revenue Code. *See* 18 U.S.C. § 3237. *See* Section 6.00, *supra*.

17.08 *STATUTE OF LIMITATIONS*

Section 6531 of the Internal Revenue Code contains the statute of limitations provisions for violations of section 7212(a). Section 6531(6) provides a six-year statute of limitations for offenses described in section 7212(a) "relating to intimidation of officers of the United States." It is the

position of the Internal Revenue Service and the Tax Division that this provision encompasses only the first or more specific clause of section 7212(a) and not the omnibus clause. Section 6531(1) contains broad language similar to that which appears in the omnibus clause and is not, as section 6531(6) appears to be, limited to intimidation of officers of the United States. Section 6531(1) provides a six-year statute of limitations for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner. 26 U.S.C. § 6531(1). Therefore, section 6531(1) should be used for omnibus clause offenses.

Accordingly, the statute of limitations for an omnibus clause offense will run six years from the last act which constitutes a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(1). *See* Section 7.00, *supra*.

17.09 ***SENTENCING GUIDELINES***

The most appropriate sentencing guideline to be applied to section 7212(a) violations is the general obstruction of justice guideline, USSG §2J1.2. ***United States v. Dykstra***, 991 F.2d 450, 454 (8th Cir.), *cert. denied*, 114 s. Ct. 222 (1993). Noting that "the language and structure of § 7212 track part of certain federal obstruction of justice statutes" and that the courts have used those statutes to interpret section 7212(a), the Eighth Circuit in ***Dykstra*** approved the application of the general obstruction of justice guideline, USSG §2J1.2, in sentencing section 7212(a) violations. ***Dykstra***, 991 F.2d at 454 (quoting ***United States v. Williams***, 644 F.2d 696, 699 n.11 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981)).

Courts have also sentenced section 7212(a) violations under Part 2T, Offenses Involving Taxation, of the sentencing guidelines. In ***United States v. Hanson***, 2 F.3d 942 (9th Cir. 1993), the Ninth Circuit held that the district court's application of § 2T1.9, Conspiracy to Impair, Impede, or Defeat Tax, was improper because the evidence indicated that Hanson acted alone in his Form 1099 scheme. The Ninth Circuit "conclude[d] that § 2T1.5, Fraudulent Return, Statements, or Other

Documents, more closely fits Hanson's conduct." ***Hanson***, 2 F.3d at 947. In a factually similar case, ***United States v. Krause***, 786 F. Supp. 1151 (E.D.N.Y.), *aff'd*, 978 F.2d 906 (2d Cir. 1992), the court considered which subsection of section 2T1.3(a), Fraud and False Statements Under Penalty of Perjury, should be applied in sentencing the defendant's section 7212(a) conviction. Section 2T1.3(a) provides:

> (a) Base Offense Level:
>
> (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; if the offense was committed in order to facilitate evasion of a tax, or
>
> (2) 6, otherwise.

USSG §2T1.3(a). The court held that section 2T1.3(a)(2) should be applied to the defendant's Form 1099 scheme because "the government suffered no actual tax loss through Krause's tax protest activities. In addition, Krause was not charged or convicted with tax loss or tax evasion or false tax credit." ***Krause***, 786 F. Supp. at 1158.

However, the Eleventh Circuit, in ***United States v. Shriver***, 967 F.2d 572 (11th Cir. 1992), upheld the trial court's application of sentencing guideline § 2F1.1 Fraud and Deceit, to the defendant's section 7212(a) violation, reasoning that the Fraud and Deceit guideline most closely tracked Shriver's actions attempting to defeat an IRS lien.

The November 1993 changes to the Sentencing Guidelines direct a court to apply either the Obstruction of Justice guideline (§2J1.2) or the Tax Evasion guideline (§2T1.1). USSG App. A.

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1. Changed to 18 U.S.C. §3571, commencing Nov. 1, 1986.

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18.00 *OFFENSES WITH RESPECT TO COLLECTED TAXES*

18.01 *STATUTORY LANGUAGE: 26 U.S.C. §§ 7215 & 7512*

§7215. ***Offenses with respect to collected taxes***

(a) ***Penalty***.--Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined* not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

(b) ***Exceptions***.--This section shall not apply--

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the misdemeanor offense set forth in section 7215, the maximum permissible fine for offenses committed after December 31, 1984, is increased to at least $100,000 for individuals and $200,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

§ 7512. ***Separate accounting for certain collected taxes, etc.***

(a) ***General rule***.--Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C or chapter 33 --

(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

(2) is notified, by notice delivered in hand to such person, of

any such failure,

then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee, shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(b) ***Requirements***.-- Any person who is required to collect, account for, and pay over any tax imposed by subtitle C or chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C or chapter 33, which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

(c) ***Relief from further compliance with subsection (b)***.--Whenever the Secretary is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of such cancellation.

18.02 *GENERALLY*

It is a crime under section 7215 to fail to comply with any provision of section 7512(b) of the Internal Revenue Code, which requires employers (among others), upon notice, to collect employment taxes and deposit the withheld taxes in a special bank account held in trust for the United States. ***United States v. Paulton***, 540 F.2d 886, 888 (8th Cir. 1976); ***United States v. Erne***, 576 F.2d 212, 215 (9th Cir. 1978); ***United States v. Merriwether***, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971), *aff'd*, 469 F.2d 1406 (5th Cir. 1972).

Employment taxes are based on an employer-employee relationship, and they include the following:

1. Old-Age, Survivors, and Disability Insurance taxes and Hospital Insurance taxes, all commonly known as social security or F.I.C.A. taxes, which are levied as a tax against the wage income of an employee and as an excise tax against the wages paid by an employer. 26 U.S.C. §§ 3101 & 3111. The taxes are to be paid by the employer, who is required to deduct the employee's share of social security taxes from the employee's wages, and add to this amount the employer's share of the tax. 26 U.S.C. § 3102.

2. Federal unemployment taxes, commonly known as F.U.T.A. taxes, which are levied as an excise tax against the employer, based on the total wages paid with respect to employment. 26 U.S.C. § 3301. The actual F.U.T.A. tax ordinarily is inconsequential, because contributions to state unemployment funds are credited against F.U.T.A. taxes, up to 90 percent of the latter. 26 U.S.C. § 3302.

3. Employees' income taxes deducted by an employer from the wages paid to employees, for payment by the employer to the Internal Revenue Service. 26 U.S.C. §§ 3402, 3403.

Employers are required, under the above-noted provisions of the Internal Revenue Code, to: (1) withhold social security, unemployment, and income taxes from the wages of employees; (2) make quarterly returns of their withholdings on Forms 941; and (3) pay over to the Internal Revenue Service the amounts of taxes withheld and the corresponding amounts paid by the employee. If an employer is delinquent with respect to his obligations regarding withholding, the Internal Revenue Service may invoke the provisions of section 7512.

18.03 *ELEMENTS OF "TRUST FUND" CASES*

To establish a violation of section 7215, the government must prove the following elements beyond a reasonable doubt:

1. The defendant was a person required to collect, account for, and pay over income tax withholding on wages and F.I.C.A. taxes.
2. The defendant was notified of the failure to collect, account for, and pay over;
3. The defendant failed to collect, account for, and pay over the taxes, while not entertaining a reasonable doubt as to whether the law required the defendant to do so, and the failure was not due to circumstances beyond the defendant's control.

United States v. Hemphill, 544 F.2d 341, 343-44 (8th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); ***United States v. Erne***, 576 F.2d 212, 213 (9th Cir. 1978); ***United States v. Polk***, 550 F.2d 566, 567 (9th Cir. 1977).

18.04 *PERSON REQUIRED TO COLLECT, ACCOUNT FOR, AND PAY OVER*

18.04[1] *Person Required -- "Employer"*

Although the cases often use the term "employer," technically section 7215 refers to "person" and does not use the term "employer." Section 7343 of Title 26 defines the word "person" for purposes of section 7215. ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975); ***United States v. Merriwether***, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971), *aff'd*, 469 F.2d 1406 (5th Cir. 1972); ***United States v. Stevenson***, 540 F. Supp. 93, 95 (Del. 1982). Section 7343 states that "person" includes "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 7343.

The Seventh Circuit stated, in ***McMullen***, that the term "person" includes all those with significant control over the financial decision-making process within a corporation. ***McMullen***, 516 F.2d at 921. Thus, if a defendant had such control, then the defendant is a person who has the legal duty to collect, truthfully account for, and pay over the withholding taxes of the employer's entity. ***McMullen***, 516 F.2d at 920.

The court in ***McMullen*** further stated that the fact that the defendant's signature did not appear on some payroll checks was immaterial and was no basis for not admitting these checks into evidence -- "responsibility for withholding taxes does not turn on the ministerial act of signing checks but on authority to control the disposition of funds." ***McMullen***, 516 F.2d at 921.

In ***United States v. Stevenson***, 540 F. Supp. 93 (D. Del. 1982), the defendants, who were the president and vice-president of a corporation, moved to dismiss the indictment on the grounds that it charged them individually with failing to make the required deposits and did not charge the corporation, which was the actual employer. The court held that the defendants were "persons" under section 7215 because they were under a duty to make the required deposits. Therefore, the indictment was sufficient to charge an offense, even though the corporation was not charged. ***Stevenson***, 540 F. Supp. at 95-96.

In ***United States v. Merriwether.*** 329 F. Supp. 1156, the court took a different approach to the issue of corporation versus officer, but reached the same result on criminal liability. The court first concluded that in the case of a corporation, it was the corporation that was the "person" required to collect taxes from the wages of its employees and not the corporate officers. The corporation was not charged, but the court found the defendant, who was the president and principal officer of the corporation, guilty of violating section 7215 on the grounds that:

> [T]he Government has proven facts showing that defendant, Merriwether, aided and abetted Dixie Engineering Corporation, a person within the purview of Section 7501, in its failure to collect and pay over withholding taxes. It is well settled that an aider and

> abettor is guilty and punishable as a principal. 18 U.S.C.A. Section 2.
>
> An aider and abettor may be indicted directly with commission of the substantive crime, and such a charge may be supported by proof that he only aided and abetted in its commission. ***Nassif v. United States***, 370 F.2d 147 (8th Cir. 1966). One need not be charged as an aider and abettor to be held as one. ***Yeloushan v. United States***, 339 F.2d 533 (5th Cir. 1964). Evidence showing an offense to have been committed by a principal is necessary, although it is not required that the principal be convicted, or even that identity of the principal be established. ***Pigman v. United States***, 407 F.2d 237, 239 (8th Cir. 1969).

Merriwether, 329 F. Supp. at 1159-60.

For a lengthy discussion on who is a person required to collect, truthfully account for, and pay over withholding taxes, *see* ***Pacific National Insurance v. United States***, 422 F.2d 26, 29-32 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970), a civil case under section 6672 of the Internal Revenue Code.

18.04[2] ***Employees***

To establish the requirement for withholding taxes, the government must prove that the taxes in issue relate to employees of the defendant or the defendant's business. On this issue, the jury can consider all of the circumstances surrounding the relationship between the defendant and those individuals pointed to as employees.

The fundamental test is the common law test of the employer's right to control the workers. This right to control must include control of the activity of the workers, not only with regard to the result accomplished, but also the means by which this result is accomplished. ***United States v. Polk***, 550 F.2d 566, 567 (9th Cir. 1977). *See* ***Lifetime Siding, Inc. v. United States***, 359 F.2d 657, 660 (2d Cir.), *cert. denied*, 385 U.S. 921 (1966). Essentially, the government must prove that the workers were employees and not independent contractors.

18.05 *REQUIREMENTS OF SECTION 7512(b)*

18.05[1] *Notice of Failure to Collect, Account For, and Pay Over*

The Internal Revenue Service first must notify the employer of his failure to comply, "by notice delivered in hand . . . ." 26 U.S.C. § 7512(a)(2). Thus, personal service of the notice is required. In the case of a formal business or legal entity, however, service on any corporate officer will suffice as notice to all other officers. ***United States v. McMullen***, 516 F.2d 917, 920 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975); ***United States v. Stevenson***, 540 F. Supp. 93, 96 (D. Del. 1982).

The Internal Revenue Service uses Form 2481, Notice to Make Special Deposits of Taxes, as the formal notice served pursuant to section 7512. The recipient signs this form as proof of having received notice. A defendant can be prosecuted, however, even if there is a refusal to sign the Form 2481, as long as it is shown that the defendant actually received it. *See* ***United States v. McMullen***, 516 F.2d 917, 919 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975).

Form 2481 sets forth the requirement that the employer open a special trust account in a bank for the benefit of the United States and deposit in that account all taxes withheld from wages within two banking days after the taxes are collected. 26 U.S.C. § 7512(b). Furthermore, the employer must pay over the taxes monthly, instead of quarterly, with the filing of Form 720, Quarterly Federal Excise Tax Return, or Form 941M, Employer's Monthly Federal Tax Return. The requirements set forth in Form 2481 cannot be waived and remain in effect until the employer receives written notice from the District Director cancelling these obligations. *See* ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978).

18.05[2] *Bank Account For Trust Deposits*

The bank account used for the trust deposits must be designated as a special fund in trust for the United States, payable to the United States by the employer as trustee. 26 U.S.C., Sec. 7512(b). The fact that a defendant had three general bank accounts in his own name does not meet this requirement. ***United States v. McMullen***, 516 F.2d 917, 920-21 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975). As a practical matter, however, unless there are unusual circumstances present, an employer probably should not be prosecuted for failing to establish such a special account, if the employer has paid the required taxes monthly by filing Forms 720 or 941M. In such a situation, the government is receiving its money on a timely basis.

Section 7512(b) requires the employer to make a deposit with each pay period, even though the employer does not have to formally pay over the funds to the United States until the end of each month. Thus, with every pay period that the employer fails to deposit the withheld taxes to the trust account, the employer is committing a violation of section 7215. Otherwise stated, where there is a series of failures to deposit over numerous pay periods, each failure is a separate offense and not part of one continuing offense. ***United States v. Paulton***, 540 F.2d 886, 893 (8th Cir. 1976).

It is not necessary for the government to prove the exact amount of each deposit required. The essence of a section 7215 offense is failing to make timely deposits to a trust account. If no deposits were made at all, then the government need only prove that a deposit was due to show noncompliance with section 7512 and, therefore, a violation of section 7215. ***United States v. Gay***, 576 F.2d 1134, 1138 (5th Cir. 1978).

18.05[3] ***Prior Failures to Pay***

A defendant's earlier failures to pay withholding and F.I.C.A. taxes for periods before those named in the indictment or information have been held admissible as prior similar acts. ***United States v. Polk***, 550 F.2d 566, 568 (9th Cir. 1977). In ***Polk***, the court stated that such evidence went to the defendant's state of mind and intent, and, as such, was admissible. ***Polk***, 550 F.2d at 568.

The holding of ***Polk*** is questionable, however, because intent is not an element of section 7215; it is a strict liability offense. *See* Section 18.07, *infra*. *But see* ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975) (holding evidence of prior tax deficiencies was necessary and material, because section 7512(b) is triggered by prior failures to properly collect, account for, or pay over taxes).

18.05[4] ***Dates of Payroll Checks***

Questions over the dates of employees' checks and the dates that the checks were cashed are inconsequential. "It is not material that [payroll] checks may not have been delivered on the exact dates appearing thereon or that particular employees may not have cashed their checks immediately after receiving them." ***United States v. Gay***, 576 F.2d 1134, 1138 (5th Cir. 1978) (quoting ***United States v. Paulton***, 540 F.2d 886, 891 (8th Cir. 1976)). The mere fact that some checks were not dated on the actual pay days listed in the indictment or information is inconsequential and a harmless variance. ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975).

18.05[5] ***Expert Testimony Excluded***

The Fifth Circuit has approved the exclusion of expert testimony at trial concerning the requirements of section 7512. A defendant's legal obligations under this section are a matter for the court's instructions to the jury on the law and are not properly a subject for testimony by an expert witness. ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978).

18.06 *CIRCUMSTANCES BEYOND CONTROL*

Section 7215(b)(2) provides that there is no violation if the defendant "shows" that the failure to collect, account for, or pay over the tax was "due to circumstances beyond his control." Section 7215(b) also provides that a lack of funds existing immediately after the payment of wages, whether or not caused by the payment of the wages, "shall not be considered to be circumstances beyond the control of a person." The scope of this "circumstances beyond control" exception to the statute "was intended to be narrow." ***United States v. Randolph***, 588 F.2d 931, 932-33 (5th Cir. 1979).

The legislative history of section 7215 includes examples of acceptable circumstances beyond an employer's control, which would cause a lack of funds after (but not immediately after) the payment of wages. These include theft, embezzlement, destruction of the business from fire or other casualty, and the failure of the bank in which the employer had deposited funds prior to transferring them to the trust account for the government. ***Randolph***, 588 F.2d at 933. Conversely, a lack of funds caused by the defendant taking care of other liabilities and paying other creditors is not considered a circumstance beyond a person's control and is not a viable defense. ***United States v. Plotkin***, 239 F. Supp. 129, 131 (E.D. Wis. 1965).

18.07 *INTENT*

Section 7215 imposes strict criminal liability for a violation. The government is not required to prove any particular mental state, intent, or willfulness, as it must in other criminal tax violations. ***United States v. Dreske***, 536 F.2d 188, 196 (7th Cir. 1976); ***United States v. Gorden***, 495 F.2d 308, 310 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); ***United States v. Paulton***, 540 F.2d 886, 890-91 (8th Cir. 1976); ***United States v. Erne***, 576 F.2d 212, 213-15 (9th Cir. 1978); ***United States v. Stevenson***, 540 F. Supp. 93, 97 (D. Del. 1982).

18.08 ***DEFENSES***

18.08[1] ***Constitutional Contentions***

Sections 7215 and 7512 have been upheld in the face of various constitutional challenges. The argument that section 7512 is unconstitutional because it does not provide for a prior administrative hearing before an employer is required to comply with subsection (b) has been rejected. ***United States v. Paulton***, 540 F.2d 886, 889 (8th Cir. 1976); ***United States v. Patterson***, 465 F.2d 360, 361 (9th Cir.), *cert. denied*, 409 U.S. 1038 (1972); ***United States v. Plotkin***, 239 F. Supp. 129, 131-32 (E.D. Wis. 1965).

The Eighth Circuit also stated, in ***Paulton***, that the exceptions appearing in section 7215(b) do not unconstitutionally place on a defendant the burden of proving his innocence and, therefore, do not impermissibly infringe on a defendant's privilege against self-incrimination. ***Paulton***, 540 F.2d at 891-92.

Finally, the contention that a sentence of imprisonment for violation of section 7215 is contrary to the Fifth Amendment of the United States Constitution has been rejected. Defendants have been unsuccessful in claiming that they were being imprisoned for debt because they were unable to pay the taxes. ***United States v. Gorden***, 495 F.2d 308, 310 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); ***United States v. Patterson***, 465 F.2d 360, 361 (9th Cir.), *cert. denied*, 409 U.S. 1038 (1972).

18.08[2] ***Selective Prosecution***

Courts also have rejected claims of selective, discriminatory prosecution. ***United States v. Erne***, 576 F.2d 212, 216-17 (9th Cir. 1978); ***United States v. Stevenson***, 540 F. Supp. 93, 97-98 (D. Del. 1982). These holdings, rather than being based on the nature of the statute, simply rested on the defendants' failure of proof.

18.08[3] ***Prior Excess Deposits***

Making advance deposits into the trust account, in excess of withheld amounts, for pay periods prior to those charged, is not a defense to the failure to make the proper deposits for the pay periods named in the indictment or information. "To ensure collection of withheld taxes, section 7215 imposes strict compliance with the deposit requirements of section 7512 and any deviation from these provisions constitutes an offense." ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978). Note, however, that evidence of overpayment for prior pay periods may be admissible as proof that the defendant had a reasonable doubt as to his obligation to collect taxes in the charged pay periods, because he may already have deposited any taxes due. ***Gay***, 576 F.2d at 1137.

18.08[4] ***Late Payment of Taxes***

Evidence of late payments of withholding taxes is no defense, because "the focus of section 7512 is not eventual payment, but timely payment, and an offense under section 7215 has nothing directly to do with payment at all, but with failure to comply with mandatory accounting procedures," which were designed to avoid late payments. ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975).

18.08[5] ***Lack of Funds***

The Seventh Circuit has rejected the defense of lack of funds immediately prior or subsequent to the payment of the employer's payroll. ***United States v. Dreske,*** 536 F.2d 188, 195 (7th Cir. 1976). Section 7215 also specifically rejects "lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages)" as being an exception to the sanctions of the statute.

18.08[6] ***Embezzlement***

Congress has stated that embezzlement is an example of an acceptable circumstance beyond

a person's control, which may bring the person within the exceptions to section 7215. ***United States v. Randolph***, 588 F.2d 931, 933 (5th Cir. 1979); S. Rep. No. 1182, 85th Cong., 2d Sess. ([1958] U.S. Code Cong. & Ad. News 2179, 2191-92). The court, in ***Randolph***, held that there was insufficient proof to support the embezzlement defense, where the evidence consisted only of a co-owner of the defendant having been involved with a competitor. The court noted that in order to assert a viable embezzlement defense, a defendant must prove that the embezzling co-owner or employee lied to the defendant about the bank balances at the time the payroll checks were drawn, or embezzled the funds after the payroll checks were drawn, leaving insufficient funds to make the trust deposits. Embezzlement before payroll checks are drawn would not constitute a defense if the defendant knew or should reasonably have known of the embezzlement. ***Randolph***, 588 F.2d at 933.

18.09 *POLICY CONSIDERATIONS*

Trust fund cases under section 7215 are one of the categories of criminal tax cases authorized by the Department of Justice to be referred directly from the Internal Revenue Service to United States Attorneys' offices. USAM 6-4.243. This does not mean that such cases should be treated lightly.

The importance of employer taxes is noted in the Comptroller General's Report to the Congress, Fictitious Tax Deposit Claims Plague IRS, GGD-81-45, dated April 28, 1981, at pages 1-2:

> In fiscal year 1979, employment trust fund taxes accounted for $298 billion (65 percent) of the $460 billion in internal revenue collections. In IRS' 1979 annual report the Commissioner noted that nonpayment of taxes withheld from employee's wages is one of the most serious delinquency problems. IRS initiated collection action against employers for nonpayment of $2.4 billion in trust fund taxes during fiscal year 1976, the latest year for which data is available.

. . . .

> Requiring employers to withhold taxes and periodically deposit them to a Federal bank account facilitates tax collection. In addition, it avoids the hardships to individual taxpayers of making lump-sum payments at the end of a year and minimizes the potential for individuals to avoid tax payment. One problem, however, is that it gives employers the opportunity to use the withheld taxes for their own benefit if they do not pay them to the Government. Testifying in 1976 before the Oversight Subcommittee of the House Ways and Means Committee, IRS officials expressed concern that employers use the withheld taxes as low-interest loans from the Federal Government.

As noted, the numbers that relate to delinquent employment taxes are in the billions of dollars, and the collection of employee income taxes at their source is one of the most important of all the government's tax-gathering methods. Criminal tax prosecutions of all kinds act as a deterrent to others, and prosecutions under section 7215, in particular, can act as an aid to the proper collection of employment taxes.

18.10 ***VENUE***

The Sixth Amendment of the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed . . . ." *See also* Fed. R. Crim. P. 18.

If a statute does not indicate what Congress considers the location of the crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7215 prosecutions, venue is proper in the judicial district in which the employer had his place of business or in which he maintained his special trust bank account, if he ever opened such an account.

See also the discussion of venue in Section 6.00, *supra*.

18.11 ***STATUTE OF LIMITATIONS***

The statute of limitations for section 7215 offenses is three years from the date the defendant was required to make the deposit to the trust account and failed to do so. 26 U.S.C. § 6531. According to section 7512(b), the deposit must be made by the end of the second banking day following payday. Where proper deposits have been made but the defendant later withdraws the funds from the trust account and uses them for purposes other than payment to the IRS, then presumably the statute of limitations commences to run from the date the defendant made such withdrawal(s).

See also the discussion of the statute of limitations in Section 7.00, *supra*.

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

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21.00 *AIDING AND ABETTING*

21.00 *AIDING AND ABETTING*

21.01 *STATUTORY LANGUAGE: 18 U.S.C. § 2*

§2. ***Principals***

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21.02 *GENERALLY*

A person may be convicted of a crime even if he or she personally did not do every act constituting the crime. The basis for this liability is section 2 of Title 18, the accomplice statute. Under this statute, an individual may be indicted as a principal for commission of a substantive offense and may be convicted by proof showing he or she to be an aider and abettor. ***Nye & Nissen v. United States***, 336 U.S. 613, 618-20 (1949); ***United States v. Horton***, 847 F.2d 313, 321-22 (6th Cir. 1988); ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984).

Aiding and abetting, however, is not an independent crime. ***United States v. Causey***, 835 F.2d 1289, 1291 (9th Cir. 1987); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985). One cannot aid or abet oneself. Some underlying criminal offense must be pled and proved in order for liability to attach under 18 U.S.C. § 2. ***United States v. Roan Eagle***, 867 F.2d 436, 445 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989); ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984).

Section 2 covers two types of aiding and abetting. ***United States v. Causey***, 835 F.2d 1289, 1291-92 (9th Cir. 1987). Subsection (a) of the statute is aimed at traditional aiding and abetting, which requires proof of a substantive offense. ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). Under subsection 2(a), the government must prove that someone committed a crime, and that another person aided and abetted in the commission of that crime. ***Causey***,

835 F.2d at 1292. In effect, the second person is made a "coprincipal with the person who takes the final step and violates a criminal statute." ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990).

Under subsection 2(b), the government is not required to prove that someone other than the defendant was guilty of a substantive offense. ***Causey***, 835 F.2d at 1292. This subsection is aimed at the person "who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and . . . is innocent of the substantive offense." ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 (11th Cir. 1983).

Under subsection 2(b), it is irrelevant whether the agent who committed the criminal act is innocent or acquitted. ***United States v. Ruffin***, 613 F.2d 408, 412 (2d Cir. 1979); ***Motley***, 940 F.2d at 1081. Moreover, it is irrelevant whether the agent lacked a criminal intent to commit the offense. ***Causey***, 835 F.2d at 1292. Similarly, it makes no difference whether the accused lacked the capacity to commit the criminal offense without the agent's involvement. ***Smith***, 891 F.2d at 711.

21.03 *ELEMENTS*

To establish a violation of 18 U.S.C. § 2, the government must establish the following elements beyond a reasonable doubt:

1. The defendant associated with the criminal venture;
2. The defendant knowingly participated in the venture; and,
3. The defendant sought by his or her actions to make the venture succeed.

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949). *See also* ***United States v. Abreu***, 962 F.2d 1425, 1429 (1st Cir. 1992); ***United States v. Labat***, 905 F.2d 18, 23 (2d Cir. 1990); ***United States v. Singh***, 922 F.2d 1169, 1173 (5th Cir.), *cert. denied*, 112 S. Ct. 260 (1991); ***United States v. Torres***, 809 F.2d 429, 433 (7th Cir. 1987); ***United States v. Lanier***, 838 F.2d 281, 284 (8th Cir. 1988); ***United States v. Perez***, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840

(1991).

21.03[1] ***Need Underlying Offense***

In order to sustain a conviction under subsection 2(a), the government must present evidence showing an underlying offense to have been committed by a principal and that the principal was aided and abetted by the accused. ***United States v. Elusma***, 849 F.2d 76, 78 (2d Cir. 1988), *cert. denied*, 489 U.S. 1097 (1989); ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984). The government is not required, however, to show that the principal was indicted, convicted or even identified. ***United States v. Campa***, 679 F.2d 1006, 1010 (1st Cir. 1982); ***Ray v. United States***, 588 F.2d 601, 603-04 (8th Cir. 1978); ***United States v. Powell***, 806 F.2d 1421, 1424 (9th Cir. 1986). Moreover, the fact that the principal may have been acquitted of the underlying offense does not bar prosecution of the aider and abettor for the same offense. ***Standefer v. United States***, 447 U.S. 10, 14 (1980).

Under subsection 2(b), the government does not have to establish the guilt of the actor, but only that of the accused who caused the actor to commit the offense. ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). The government need only show that the aider and abettor caused the act to be performed. ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990).

21.03[2] ***Association Defined***

Association with the criminal venture has been interpreted to mean the defendant "shared the criminal intent of the principal." ***United States v. Roan Eagle***, 867 F.2d 436, 445 n.15 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989). In prosecutions under subsection 2(a), this means that the government must show that: (1) the perpetrator had the requisite criminal intent to commit the underlying offense and (2) the aider and abettor had the same requisite intent. ***United States v. Labat***, 905 F.2d 18, 23 (2d Cir. 1990); ***United States v. Lindell***, 881 F.2d 1313, 1323 (5th Cir.

1989), *cert. denied,* 496 U.S. 926 (1990); ***United States v. Lard***, 734 F.2d 1290, 1298 (8th Cir. 1984); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Perez***, 922 F.2d 782, 785 (11th Cir.), *cert. denied,* 111 S. Ct. 2840 (1991).

Under subsection 2(b), the government need only show that the one causing the commission of the prohibited act had the requisite criminal intent to commit the underlying offense. The intent of the actor who committed the criminal act is irrelevant. ***United States v. Rucker***, 586 F.2d 899, 905 (2d Cir. 1978); ***United States v. Laurins***, 857 F.2d 529, 535 (9th Cir. 1988), *cert. denied,* 492 U.S. 906 (1989).

The government may use circumstantial evidence to establish the aider and abettor's intent. ***United States v. Castro***, 887 F.2d 988, 995 (9th Cir. 1989). Further, the government is not required to show that the aider and abettor knew every detail of the underlying crime. ***United States v. Torres***, 809 F.2d 429, 433 (7th Cir. 1987); ***Lard***, 734 F.2d at 1298; ***United States v. Smith***, 832 F.2d 1167, 1170 (9th Cir. 1987); ***Perez***, 922 F.2d at 785.

21.03[3] ***Participation and Success of Venture***

In order to aid and abet, one must do more than merely be present at the scene of a crime and have knowledge of its commission. ***United States v. Lindell***, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied,* 496 U.S. 926 (1990); ***United States v. Morrow***, 923 F.2d 427, 436 (6th Cir. 1991); ***United States v. Lard***, 734 F.2d 1290, 1298 (8th Cir. 1984); ***United States v. Esparsen***, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied,* 112 S. Ct. 882 (1992); ***United States v. Payne***, 750 F.2d 844, 860 (11th Cir. 1985). The element of participation requires the government to show some active participation or encouragement, or some affirmative act designed to further the crime. ***Morrow***, 923 F.2d at 436; ***United States v. Perez***, 922 F.2d 782, 785 (11th Cir.), *cert. denied,* 111 S. Ct. 2840 (1991).

This element may be established by circumstantial evidence. ***United States v. Smith***, 832 F.2d 1167, 1170 (9th Cir. 1987). Further, the evidence may be of "relatively slight moment."

Esparsen, 930 F.2d at 1470. While mere presence and association alone are insufficient to sustain a conviction under section 2, they are factors which may be considered along with other circumstantial evidence establishing participation. ***Lindell***, 881 F.2d at 1323; ***United States v. Ivey***, 915 F.2d 380, 384 (8th Cir. 1990).

21.04 *PLEADING REQUIREMENTS*

Because section 2 does not define a separate offense, the defendant must also be charged with a substantive offense as to which the defendant was an aider and abettor. ***London-Gomez v. INS***, 699 F.2d 475, 477 (9th Cir. 1983); ***United States v. Cowart***, 595 F.2d 1023, 1031 n.10 (11th Cir. 1979). Section 2 may be applied to any statute in the federal criminal code. ***United States v. Sopczak***, 742 F.2d 1119, 1121 (8th Cir. 1984); ***United States v. Jones***, 678 F.2d 102, 105 (9th Cir. 1982). *But see* ***United States v. Southard***, 700 F.2d 1, 19-20 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983) (listing exceptions -- *e.g.*, a victim whose conduct significantly assisted in the commission of the crime, such as a person who pays extortion).

While it is preferable that an indictment charge a violation of section 2 if the government intends to proceed on a theory of aiding and abetting, it need not be specifically alleged in an indictment. ***United States v. Tucker***, 552 F.2d 202, 204 (7th Cir. 1977); ***United States v. Beardslee***, 609 F.2d 914, 919 (8th Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980); ***United States v. Vaughn***, 797 F.2d 1485, 1491 n.1 (9th Cir. 1986); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 (11th Cir. 1983).

Rather, all indictments for substantive offenses must be read as if the alternative provided by 18 U.S.C. § 2 were embodied in the indictment. ***United States v. Sabatino***, 943 F.2d 94, 99-100 (1st Cir. 1991); ***United States v. Perry***, 643 F.2d 38, 45 (2d Cir.), *cert. denied*, 454 U.S. 835 (1981); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Bullock***, 451 F.2d 884, 888 (11th Cir. 1971).

One may be convicted of aiding and abetting even though it is not alleged in the indictment, provided: (1) the jury is properly instructed on the aiding and abetting charge and (2) the defendant had sufficient notice of the aiding and abetting charge and was not unfairly surprised. ***Tucker***, 552 F.2d at 204; ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984).

If an indictment charges section 2, it is not necessary for the indictment to state particulars such as who, when, how, and in what manner the defendant aided and abetted another in the commission of a substantive offense. ***United States v. Garrison***, 527 F.2d 998, 999 (5th Cir. 1975).

21.05 *APPLICATION IN TAX CASES*

21.05[1] *Aiding in Preparation/Filing of False Return: 26 U.S.C. § 7206(2)*

Section 7206(2) of Title 26 makes it a felony to:

> Willfully aid[] or assist[] in . . . the preparation or presentation under . . . the internal revenue laws . . . of a return . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . . .

This statute is known as the Internal Revenue Code's aiding and abetting provision, and applies not only to tax return preparers but to anyone who causes a false return to be filed. ***United States v. Sassak***, 881 F.2d 276, 277-78 (6th Cir. 1989); ***United States v. Hooks***, 848 F.2d 785, 789 (7th Cir. 1988); ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981). Reference should be made to the discussion of this statute in the section of this Manual dealing with section 7206(2). *See* Section 13, *supra*.

In prosecutions under subsection 2(a), the government must prove that an underlying offense was committed by someone. Under section 7206(2), proof of the underlying offense is unnecessary. ***United States v. Griffin***, 814 F.2d 806, 811 (1st Cir. 1987). *See also* ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991) (language of section 7206(2) makes it clear that government does not have to show the taxpayers had guilty knowledge). Consequently, in false return cases, section 7206(2) should be charged rather than section 2(a).

21.05[2] *Filing False Claim for Refund: 18 U.S.C. § 287*

Section 287 of Title 18 makes it a felony to "make[] or present[] . . . a claim upon or against the United States . . . knowing such claim to be false, fictitious or fraudulent." 18 U.S.C. § 287 (1988). Sections 287 and 2(b) are commonly used in false claim for refund schemes.

For example, in ***United States v. Causey***, 835 F.2d 1289, 1292 (9th Cir. 1987), the Ninth Circuit upheld the conviction of the defendant for causing 18 individuals to file false tax returns claiming refunds, in violation of 18 U.S.C. §§ 287 and 2. The defendant argued that the government failed to establish that the persons actually submitting the false claims knew they were false. The Ninth Circuit distinguished the two subsections of 18 U.S.C. § 2 and found that under subsection 2(b) a person "may be guilty of causing a false claim to be presented to the United States even though he or she uses an innocent intermediary to actually pass on the claim to the United States." 835 F.2d at 1292. The court then held that in a section 2 prosecution for violation of section 287, the government does not need to allege or prove that the person actually submitting the claims knew them to be false. *Id.*

Consequently, in prosecutions for false refund claims, it is recommended that prosecutors charge sections 287 and 2(b).

21.06 *VENUE*

Venue in an aiding and abetting charge is proper not only in the district in which the underlying offense took place, but also in the district where the accessorial acts took place. ***United States v. Griffin***, 814 F.2d 806, 810 (1st Cir. 1987); ***United States v. Delia***, 944 F.2d 1010, 1013 (2d Cir. 1991); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Kilpatrick***, 458 F.2d 864, 867-68 (7th Cir. 1972).

For a general discussion of venue in criminal tax cases, *see* Section 6.00, *supra*.

21.07 *STATUTE OF LIMITATIONS*

The statute of limitations for the offense of aiding and abetting is the statute of limitations applicable to the substantive offense.

For a general discussion of statute of limitations in criminal tax cases, *see* Section 7.00, *supra*.

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§287. ***False, fictitious or fraudulent claims***

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined* not more than $10,000 or imprisoned not more than five years, or both.

§286. ***Conspiracy to defraud the Government with respect to claims***

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined* not more than $10,000 or imprisoned not more than ten years, or both.

* For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in sections 286 and 287, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

22.02 *GENERALLY*

The ***United States Attorneys' Manual*** (USAM) contains a general explanation of section 287 of Title 18. ***USAM***, Sec. 9-42.210. This section focuses on the use of the false claims statute and false claims conspiracy statute in the prosecution of false claims for tax refunds.

The purpose of 18 U.S.C. § 287 is to protect the government from false, fictitious, or fraudulent claims. ***United States v. Montoya***, 716 F.2d 1340, 1344 (10th Cir. 1983). *See also* ***United States v. Computer Science Corp.***, 689 F.2d 1181, 1187 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). The majority of tax false claims cases are brought against individuals who, within the same year, file multiple, fictitious income tax returns claiming refunds

of income tax. The introduction of electronic filing (ELF) of income tax returns has led to a proliferation of multiple defendant, multiple return cases. Many false claim for refund cases could also be charged as violations of 26 U.S.C. § 7206(1) or as violations of 18 U.S.C. § 1001. Sections 286 and 287, however, are the preferred charges when one or more false claims for refund are made on false or fictitious income tax returns.

22.03 ***18 U.S.C. § 287 -- ELEMENTS***

In order to establish a violation of 18 U.S.C. § 287, the following elements must be proved beyond a reasonable doubt:

1. The defendant made or presented a claim to a department or agency of the United States for money or property;
2. The claim was false, fictitious or fraudulent (and material);
3. The defendant knew at the time that the claim was false, fictitious or fraudulent.

Johnson v. United States, 410 F.2d 38, 46 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969); ***United States v. Computer Science Corp.***, 511 F. Supp. 1125, 1134 (E.D. Va. 1981), *rev'd on other grounds*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). *See also* ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982); ***United States v. Miller***, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977).

22.03[1] ***Claim Against the United States***

To establish a violation of section 287, the government must prove that the defendant filed or caused to be filed a claim against the United States, or any department or agency of the United States, for money or property. ***United States v. Neifert-White Co.***, 390 U.S. 228 (1968); ***United States v. Mastros***, 257 F.2d 808, 809 (3d Cir.), *cert. denied*, 358 U.S. 830 (1958); ***Johnson v. United States***, 410 F.2d 38, 44 (8th Cir.), *cert. denied*, 396 U.S. 822 (1969). A tax return seeking a

refund is a claim against the United States. ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982). Proof that a return was filed may include the IRS transcript of the account in which the refund claim was made. *See* ***United States v. Bade***, 668 F.2d 1004, 1005 (8th Cir. 1982).

A claim must be made or presented to fall within section 287. For paper returns, the indictment may charge that the false claim was made by filing a return with the IRS. Although an ELF return is not a complete return until both the electronic portion and the paper Form 8453 are filed with the IRS, a section 287 violation is complete when the electronic portion of an ELF return is received by the IRS. Therefore, ELF indictments should charge the filing or causing to be filed with the IRS of a false claim for a refund of income taxes, without specifying that a "return" was filed. [2]

Although the language of the statute would appear to require that the government receive the claim, it does not require that the defendant present it directly to the government. *See* ***United States v. Blecker***, 657 F.2d 629, 634 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982), holding that presentation of the claim to an intermediary authorized to accept the claim for presentation to the government satisfies the "presentation" requirement of section 287:

> [T]here was substantial evidence that . . . [one of the defendants] submitted invoices for hourly rates based on falsified resumes with knowledge that . . . [defendant's corporation] would seek reimbursement for the payment of the invoices from the GSA. This evidence amply supported the government's charge that . . . [defendants] violated section 287 by submitting false claims to the government through an intermediary, and we find that theory of prosecution to be consonant with the language and meaning of the false claims statute.

ELF returns can only be filed through an approved preparer or electronic return originator (ERO). Preparers and electronic return originators should be considered intermediaries, and should not be characterized as "agents" of the IRS. *See* ***United States v. Catena***, 500 F.2d 1319, 1322 (3d Cir. 1974); ***Blecker***, 657 F.2d at 634. The defendant need not be the person who actually filed

the claim for refund. *See* 18 U.S.C. § 2. *See also* ***Scolnick v. United States***, 331 F.2d 598 (1st Cir. 1964); ***Blecker***, 657 F.2d at 633. The offense is complete on the filing of the claim with the government. The statute does not require that the government pay or honor the claim. Thus, violations of section 287 are chargeable even if the government has not lost money due to the false or fictitious claim. ***United States v. Miller***, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977); ***United States v. Coachman***, 727 F.2d 1293, 1302 (D.C. Cir. 1984).

22.03[2] ***False, Fictitious, or Fraudulent Claim***

22.03[2][a] ***False, Fictitious or Fraudulent***

Section 287 is phrased in the disjunctive. Thus, charges under the statute may be based on proof that a claim submitted to the government is either false, fictitious, or fraudulent. ***United States v. Blecker***, 657 F.2d 629, 634 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); ***United States v. Maher***, 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); ***United States v. Milton***, 602 F.2d 231, 233 n.5 (9th Cir. 1979); ***United States v. Irwin***, 654 F.2d 671, 683 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). ***United States v. Murph***, 707 F.2d 895, 897 (6th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) ("the government may prove and the trial judge may instruct in the disjunctive form used in the statute"). The conduct proscribed by section 287 has been defined as follows in ***Irwin***, 654 F.2d at 683 n.15:

> A claim is false or fictitious within the meaning of Section 287 "if untrue when made, and then known to be untrue by the person making it or causing it to be made." A claim is fraudulent "if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted." ***United States v. Milton***, *supra*, 602 F.2d at 233 & n.6 quoting 2E. Devitt & Blackmar, Federal Jury Practice and Instructions §28.04 (3d ed. 1977).

See ***United States v. Haynie***, 568 F.2d 1091 (5th Cir. 1978) (duplicate returns). A return may be false or fictitious under the statute if the facts and figures used on the return are fictitious, even

though the taxpayer might be entitled to a refund if a true return were filed. For example, an individual who recruits others to file false returns based on fictitious reports of wages and withholding (Form W-2) could be charged under Section 287 even if the recruited taxpayers are legally entitled to a refund. The returns filed are false, and the taxpayers are not entitled to a refund on the facts represented on those returns. Similarly, a return may be false under the statute if the defendant files a correct return in the name of another taxpayer in an attempt to obtain for himself the refund that is due to the other taxpayer. *See*, *e.g.*, ***Kercher v. United States***, 409 F.2d 814, 818 (8th Cir. 1969), ("What Kercher was trying to do . . . was to lay claim . . . to what were claims of the taxpayers against the government. Therein lies the falsity . . . .").

22.03[2][b] ***Materiality***

Section 287 does not specifically require that a claim be false as to a "material" matter. There is a split among the circuits, however, on whether materiality is an essential element of section 287. The Second and Tenth Circuits, while recognizing that other circuits are to the contrary, have held that materiality is not an essential element of section 287 and need not be alleged in an indictment charging a violation of that statute. ***United States v. Elkin***, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); ***United States v. Irwin***, 654 F.2d 671, 682 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). The Fifth and Eighth Circuits have held that, even assuming that materiality is an element of the crime, materiality is an issue "for the trial judge to handle as a question of law." ***United States v. Haynie***, 568 F.2d 1091 (5th Cir. 1978); ***United States v. Pruitt***, 702 F.2d 152, 155 (8th Cir. 1983). [3] The Fourth Circuit, to the contrary, has stated that materiality is an element of section 287. ***United States v. Snider***, 502 F.2d 645, 652 n.12 (4th Cir. 1974). As a practical matter, materiality usually will not be an issue in false tax claims cases because the object of the claim -- a refund of taxes to which the defendant is not entitled -- is material and will usually be specified in the indictment.

22.03[3] ***Knowledge -- Intent -- Willfulness***

Section 287 requires the government to prove that a false claim against the government was made, "knowing such claim to be false, fictitious or fraudulent . . . " A section 287 indictment should allege such knowledge, and the proof that the defendant knew the return was false is part of the government's burden of proof. ***United States v. Holloway***, 731 F.2d 378, 380-81 (6th Cir.), *cert. denied*, 469 U.S. 1022 (1984). [4]

It is not necessary to allege willfulness in the indictment. The term "willfully" is not used in section 287 and is not "an essential element" of section 287. ***United States v. Irwin***, 654 F.2d 671, 682 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

The circuits vary, however, on the proof of intent necessary to convict for a violation of section 287. In ***United States v. Maher***, 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied*, 439 F.2d 1115 (1979), the court approved a jury instruction stating that under section 287 criminal intent "could be proved by either a showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law." In ***United States v. Milton***, 602 F.2d 231, 234 (9th Cir. 1979), the court held that no instruction on "intent to defraud" is necessary where a false claim is charged (because it is not an element of the offense), but left open whether an "intent to deceive" is an element of a charge of submitting "fraudulent" claims. 602 F.2d at 233 n. 7. The Eighth Circuit, in ***Kercher v. United States***, 409 F.2d 814, 817 (8th Cir. 1969), did not draw a distinction between false and fraudulent claims, but held without elaboration that section 287 requires proof of criminal intent.

22.04 *18 U.S.C. § 286 -- ELEMENTS*

Section 23 of this Manual discusses the law of conspiracy in detail. This section addresses only those aspects of 18 U.S.C. § 286 that differ from the general conspiracy to defraud statute, 18 U.S.C. § 371. For a further discussion of the differences between section 286 and section 371, *see* ***United States v. Lanier***, 928 F.2d 887, 891-95 (11th Cir.), *cert. denied*, 112 S. Ct. 208 (1991).

In order to establish a violation of 18 U.S.C. § 286, the following elements must be proved beyond a reasonable doubt:

1. An agreement, combination, or conspiracy to defraud the United States;
2. by obtaining or aiding to obtain the payment of any false, fictitious or fraudulent claim.

The crime proscribed by section 286 is the entering into an agreement to defraud the government in the manner specified. In order to convict, the government must prove that the defendants agreed to engage in a scheme to defraud the government and knew that the objective of the scheme was illegal. The government need not charge or establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of section 286 because, unlike section 371, an overt act is not an element of a section 286 conspiracy. ***United States v. Lanier***, 920 F.2d at 892.

The government must also prove that the conspirators agreed to defraud the government by obtaining the payment of false claims against the government. There is no requirement that the coconspirators actually obtained the payment or that the government prove that any steps were taken to consummate the filing of a false claim, so long as the existence of the agreement can be proved. As a practical matter, the proof in section 286 cases generally does not differ from proof in section 371 tax cases, because in most false claims conspiracy cases the existence of the agreement will be proved by acts that were undertaken in furthering the conspiracy or in consummating the attempt to obtain payment of the claim. There is no need, however, to charge an overt act in the indictment. [5]

22.05 ***VENUE***

The general venue statute provides that prosecution can be brought in any district where an offense was begun, continued, or completed. 18 U.S.C. § 3237(a). Venue has been found proper where the claim was made or prepared or in the district where the claim was presented to the government, ***United States v. Blecker***, 657 F.2d 629, 632 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); ***United States v. Massa***, 686 F.2d 526, 528 (7th Cir. 1982), and where the claim was acted upon, ***Fuller v. United States***, 110 F.2d 815 (9th Cir.), *cert. denied*, 311 U.S. 669 (1940). In ELF cases, venue may be proper in the district in which the false return was submitted to a preparer or electronic originator, in addition to the districts in which it was prepared or filed with the Internal Revenue Service.

Venue may be proved either by direct or circumstantial evidence. It need only be established by a preponderance of the evidence, not by proof beyond a reasonable doubt. Proof of venue, although an essential element of the government's proof, has been held to be more akin to jurisdiction than to a substantive element of the crime. Therefore, where venue is not disputed, it may be ruled on by the court as a matter of law and need not be submitted to the jury with an instruction. ***United States v. Massa***, 686 F.2d at 530-531. *See* Section 6.00, *supra*, for a general discussion of venue, and Section 23.11, *infra*, for a discussion of venue for conspiracy charges.

22.06 *STATUTE OF LIMITATIONS*

18 U.S.C. § 3282 provides a five-year statute of limitations for crimes for which a period of limitations is not otherwise specified. Section 6531(1) of the Internal Revenue Code, however, provides a six-year statute of limitations "for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." That section provides the statute of limitations for conspiracies to defraud the United States brought under 18 U.S.C. § 371. *See* Section 23.12, *infra*. That six-year limitations period may well apply to section 286 and 287 cases, but there is no case law on that point. The safer course is to bring false claims cases within five years of the commission of the offense. The plain language of the statute, however, provides an argument for a six-year limitations period in cases which have not or cannot be indicted within the five-year period.

22.07 *THE MECHANICS OF A FALSE RETURN*

In general, most false return schemes are based on Forms W-2 which are false or fictitious. The paper refund fraud schemes generally involve one individual filing multiple false returns on which refunds are claimed to be due. Typically, a fictitious Form W-2 showing income tax withheld in excess of the computed tax liability is used to generate the false refund claim. In some instances, the Form W-2 may show a real employer and the proper employer identification number (EIN), while in other schemes both the employer and the identification number are fictitious. Although less common, some false returns are based on a fictitious Schedule C (reporting the income of a self-employed individual) or a false corporate income tax return (Form 1120) and fictitious estimated quarterly tax payments.

In some schemes, the individual or individuals involved may obtain a list of names and social security numbers (SSN) of persons who probably will not file income tax returns, and use those names and SSNs on the fictitious returns. In other instances, the name and SSN of the "taxpayer" are fictitious. The fictitious refunds generally are all directed to a common address or a

mail drop. Those types of schemes are relatively simple and do not present unusual problems in developing sufficient facts to prosecute those responsible. Once the targets have been identified and linked to the false returns, prosecution is usually straightforward.

ELF schemes are typically larger, more organized, and involve more people (usually 3 to 7) than a false paper return scheme. Recruiters, or "runners," recruit individuals to act as "taxpayers." One or more of the scheme participants prepare false W-2s (and, in some cases, the false return as well) for each "taxpayer," using the "taxpayer's" real name and SSN. The false W-2 forms generally show an amount of income that would entitle the "taxpayer" to claim the Earned Income Credit as part of the refund. (The Earned Income Credit is the sum of three refundable credits for low-income taxpayers who support dependent children. It offsets tax liability and the portion of it that exceeds the tax due is payable directly to the taxpayer. The three-part credit has been replaced with a single credit for tax year 1994 and later years.)

If only W-2 forms were prepared, a recruiter, or runner, escorts each "taxpayer" to a tax return preparer's office, where the "taxpayer" requests a return to be prepared from the phony W-2s and other information supplied by the runners. If the participants in the scheme prepared a complete return, the runner escorts the "taxpayer" to an ERO where the return is filed using the "taxpayer's" name and social security number. In either case, the "taxpayer" applies for a refund anticipation loan. When the proceeds of the loan are available (usually within one or two days), the runner and the "taxpayer" pick up the check and cash it at a check cashing service. The "taxpayer" receives a portion of the loan amount (usually $400 to $500) and the participants split the remainder of the funds. Many false claims for refund are just under the maximum refund anticipation loan limit of $3,300. ELF schemes may involve as few as one or two returns, or as many as hundreds of returns and over $1,000,000 in false claims. One scheme involving 23 individuals filed false claims exceeding $2 million in a matter of months. Several other schemes have exceeded $1 million in false claims. [6]

22.08 *AUTHORIZATION OF INVESTIGATIONS AND PROSECUTIONS*

22.08[1] *Authorization of Grand Jury Investigations -- Tax Division Directive No. 96*

On March 18, 1991, the Assistant Attorney General issued a temporary order that delegated to the United States Attorneys the authority to initiate grand jury investigations in 18 U.S.C. §§ 286 and 287 false and fictitious return cases referred to them by the IRS. With minor changes, that temporary delegation of authority was made permanent by Tax Division Directive No. 96, dated December 31, 1991. A copy of Directive No. 96 and the bluesheet amending sections of the USAM are included in Sections 2.00 and 3.00, *supra*.

Tax Division Directive No. 96 confers upon all United States Attorneys the authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. § 286 and 18 U.S.C. § 287. That authority is limited to cases involving one or more individuals who have, for a single tax year, "filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled." [7]

Due to the sensitive nature of criminal investigations of professional tax return preparers, cases potentially targeting return preparers were excluded from the delegation of authority. (A "return preparer" is "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A." Section 7701(a)(36)(A) of the Internal Revenue Code.) Further, multi-year cases and cases involving Title 18 charges other than 286 and 287 and/or any Title 26 charges are outside the scope of the delegation of authority, and must be referred by the IRS to the Tax Division for authorization of a grand jury investigation. The Directive also requires that in all direct referral cases a copy of the letter requesting a grand jury investigation be sent to the Tax Division by overnight courier or express mail. In cases involving arrests or other exigent circumstances, the request for grand jury investigation letter must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax. Any case directly referred by the IRS to a United States Attorney's office for grand jury investigation which does not meet the terms of the Directive is considered an improper referral and outside the scope of the delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

22.08[2] ***Authorization of Prosecution in False Claims Cases***

In section 6-4.243(B) of the United States Attorneys' Manual, the Tax Division delegated to the United States Attorneys the authority to authorize prosecution for violations of section 286 and 287 where the case involved an individual or individuals (other than income tax preparers) who had filed multiple false or fictitious paper income tax returns claiming refunds of taxes for a single tax year. The authority to authorize prosecution in all other paper return cases and in all ELF false claims cases has been retained by the Tax Division, and was not delegated to the United States Attorneys. Charges in multi-year paper return cases must be authorized by the Tax Division. The Tax Division has determined that the unique problems posed by electronically filed false and fictitious claims for refunds make it desirable to retain the authority to authorize prosecution of all ELF cases where prosecution is deemed appropriate at the conclusion of a grand jury investigation. Tax Division authorization is required prior to indictment in any ELF case. Authorizations in ELF cases will be handled on an expedited basis by the Tax Division. [8]

22.09 *SENTENCING GUIDELINES CONSIDERATIONS*

The Sentencing Guidelines generally require that a criminal sentence be based on the total harm caused by the defendant's conduct. USSG, §1B1.3(a)(2) provides that the enhancement for monetary loss from theft or a scheme to defraud includes the aggregate of losses intended or caused by "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG §1B1.3(a)(2). In false claims cases, the defendant should be held accountable for the total amount of false or fictitious refunds claimed by the defendant and/or co-conspirators that can be determined prior to sentencing.

Determining the total harm to the government may not be an easy task in some cases. The total number of false paper returns may not be determinable by the Internal Revenue Service in any given scheme. Therefore, additional investigation may be necessary to determine the scope of the scheme and the amount of the government's losses. Many ELF cases are referred for grand jury

investigation before the full extent of a scheme is known. Even though there may be sufficient evidence to indict and convict one or more individuals at the time of the referral, it is important, when possible, to develop the case as fully as circumstances permit. Preferably, an indictment should not be sought until the scope of the scheme has been sufficiently developed so that at the time of sentencing there will be enough information to demonstrate to the court the severity of the defendant's conduct. In certain circumstances, however, an arrest or indictment may be necessary before the case can be fully developed. In those cases, the prosecutor and agents should continue to develop evidence regarding any additional false returns and participants.

1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. On January 6, 1993, the Tax Division mailed to each United States Attorney an information package on ELF returns, entitled ***Prosecuting Electronic Filing Fraud***, which explains the ELF program and ELF fraud in detail and contains sample indictments and plea agreements. Additional copies of that information package may be obtained from the Tax Division.

3. In ***Pruitt***, the court defined "materiality" for purposes of section 287 as: "A statement is material if it has a tendency to induce the government to act by placing the claimant in a position to receive government benefits." 702 F.2d at 155.

4. Although the element of knowledge can sometimes be established through proof of "willful blindness," extreme care should be exercised in seeking and framing appropriate jury instructions. *See* Section 8.06[4], *supra*.

5. There is a sample section 286 indictment attached to the Electronic Filing Fraud Package mentioned in note 1, *supra*, and also included in the forms in this Manual.

6. It appears that 18 U.S.C. § 287 cannot be used in ELF cases in which the electronic return preparer, or ERO, has not transmitted the return to the IRS. Section 287 punishes those false claims that an individual "makes or presents" to the government, but does not punish attempts. Where the preparer or return originator has notified the IRS of a suspicious return and has not transmitted that return, the individual(s) who attempted to file the return should be charged with making a false statement in a matter within the jurisdiction of the IRS, in violation of 18 U.S.C. § 1001. A false statement punishable under section 1001 need not be submitted directly to the government. *See*, *e.g.*, ***United States v. Suggs***, 755 F.2d 1538, 1542 (11th Cir. 1985); ***United States v. Blecker***, 657 F.2d 629, 634 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982);

7. Cases involving schemes that recruit real individuals to file returns in their own names, under their correct social security numbers, do not fall within the terms of the delegation of authority and

must be referred to the Tax Division for authorization of the grand jury investigation.

8. Tax Division authorization is also required before charging false claims for refunds as any other violation of Title 18 (such as the mail, wire or bank fraud statutes or as a money laundering violation). *See* Tax Division Directive No. 99, Section 3.00, *supra*.

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23.00 *CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES*

23.01 *STATUTORY LANGUAGE: 18 U.S.C. § 371*

§371. ***Conspiracy to commit offense or to defraud United States***

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined* not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623, which increased the maximum permissible fines for misdemeanors and felonies. Where 18 U.S.C. § 3623 [1] is applicable, the maximum fine under section 371 for felony offenses committed after December 31, 1984, would be at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

23.02 *GENERALLY*

The criminal tax statutes in Title 26 of the United States Code do not include a statute for the crime of conspiracy. [2] As a result, tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371, the general conspiracy statute. Section 371 sets out two types of conspiracies. ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1091 (4th Cir. 1993).

One may violate section 371 by conspiring or agreeing to engage in conduct which is prohibited by a substantive criminal statute. In criminal tax prosecutions, this conduct typically involves agreements to commit substantive Title 26 offenses, such as income tax evasion (26 U.S.C. § 7201) or filing false income tax returns (26 U.S.C. § 7206).

Section 371 may also be violated by conspiring or agreeing to defraud the United States. "To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924). In criminal tax prosecutions, this conduct is typically charged as a "Klein conspiracy," where the government alleges the defendant conspired to defraud the United States by "impeding, impairing, obstructing and defeating the lawful government functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes." ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). *See also* ***United States v. Cambara***, 902 F.2d 144, 146 (1st Cir. 1990); ***United States v. Helmsley***, 941 F.2d at 90-91; ***United States v. Vogt***, 910 F.2d 1184, 1202 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Sturman***, 951 F.2d 1466, 1472 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); ***Alexander v. Thornburgh***, 943 F.2d 825, 829 (8th Cir. 1991).

The body of law on conspiracy covers a large number of issues which have been thoroughly analyzed and summarized in various treatises and other sources. *See, e.g.*, P. Marcus, ***Prosecution and Defense of Criminal Conspiracy Cases*** (1979); Devitt & Blackmar, ***Federal Jury Practice and Instructions: Criminal*** (4th Ed. 1990), 118-209; Goldstein, ***Conspiracy to Defraud the United States***, 68 Yale L.J. 405 (1959). As such, the following discussion is intended to highlight only those issues relevant to criminal tax prosecutions.

23.03 ***ELEMENTS***

To establish a violation of 18 U.S.C. § 371, the following elements must be proved beyond a reasonable doubt:

1. The existence of an agreement by two or more persons to commit an offense against the United States or defraud the United States;

2. The defendant's knowing and voluntary participation in the conspiracy; and

3. The commission of an overt act in furtherance of the conspiracy.

United States v. Falcone, 311 U.S. 205, 210 (1940); ***United States v. Porter***, 764 F.2d 1, 15 (1st Cir. 1985); ***United States v. Wiley***, 846 F.2d 150, 153-54 (2d Cir. 1988); ***United States v. Rankin***, 870 F.2d 109, 113 (3d Cir.), *cert. denied*, 493 U.S. 840 (1989); ***United States v. Tedder***, 801 F.2d 1437, 1446 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987); ***United States v. Yamin***, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989); ***United States v. Bostic***, 480 F.2d 965, 968 (6th Cir. 1973); ***United States v. Mealy***, 851 F.2d 890, 896 (7th Cir. 1988); ***United States v. Cerone***, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 F.2d 1006 (1988); ***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir. 1987); ***United States v. Gonzalez***, 797 F.2d 915, 916 (10th Cir. 1986); ***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986); ***United States v. Treadwell***, 760 F.2d 327, 333 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

23.04 ***AGREEMENT***

23.04[1] ***Proof of Agreement***

The essence of the crime of conspiracy is the agreement. ***United States v. Falcone***, 311 U.S. 205, 210 (1940). Stated another way, without an agreement there can be no conspiracy. Further, because the agreement is the crime, success of the conspiracy is irrelevant. ***United States v. Labat***, 905 F.2d 18, 21 (2d Cir. 1990); ***United States v. Nicoll***, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982); ***United States v. Kibby***, 848 F.2d 920, 922 (8th Cir. 1988). It is for this reason that a defendant may be charged with conspiracy as well as the substantive offense which served as the object of the conspiracy. ***Iannelli v. United States***, 420 U.S. 770, 791 (1975); ***Pinkerton v. United States***, 328 U.S. 640, 645-46 (1946).

The agreement need not be expressly stated or be in writing or cover all the details of how it is to be carried out. ***United States v. DePew***, 932 F.2d 324, 328 (4th Cir.), *cert. denied*, 112 S. Ct.

210 (1991); ***United States v. Hopkins***, 916 F.2d 207, 212 (5th Cir. 1990); ***United States v. Pearce***, 912 F.2d 159, 161 (6th Cir. 1990), *cert. denied*, 498 U.S. 1093 (1991); ***United States v. Powell***, 853 F.2d 601, 604 (8th Cir. 1988); ***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1992).

Rather, the existence of an agreement may be proved by inference from the actions and statements of the conspirators or from the surrounding circumstances of the scheme. ***Glasser v. United States*** , 315 U.S. 60, 80 (1942); ***United States v. Mariani***, 725 F.2d 862, 865-66 (2d Cir. 1984); ***United States v. Ellzey***, 874 F.2d 324, 328 (6th Cir. 1989); ***United States v. Ballard***, 663 F.2d 534, 543 (6th Cir. 1981); ***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir. 1987); ***United States v. Young***, 954 F.2d 614, 618-19 (10th Cir. 1992).

Moreover, the government is not required to prove that the members of the conspiracy directly stated to each other the purpose of the agreement or all of the details of the agreement. ***United States v. Schultz***, 855 F.2d 1217, 1221 (6th Cir. 1988); ***United States v. McNeese***, 901 F.2d 585, 599 (7th Cir. 1990); ***United States v. Gonzalez***, 940 F.2d 1413, 1417 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 910 (1992).

23.04[2] ***Two or More Persons***

A defendant cannot conspire with himself or herself. ***Morrison v. California***, 291 U.S. 82, 92 (1934). In order to establish the existence of an agreement, the government must show that the defendant and at least one other person reached an understanding or agreement to carry out the objective of the conspiracy. ***United States v. Giry***, 818 F.2d 120, 125 (1st Cir.), *cert. denied*, 484 U.S. 855 (1987); ***United States v. Barnes***, 604 F.2d 121, 161 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); ***Sears v. United States***, 343 F.2d 139, 141-42 (5th Cir. 1965).

It makes no difference whether that other person is another defendant or even named in the indictment. ***Rodgers v. United States***, 340 U.S. 367, 375 (1951) ("identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown"). *See also* ***United States v. Allen***, 613 F.2d 1248, 1253 (3d Cir. 1980);

United States v. Anderson, 611 F.2d 504, 511 (4th Cir. 1979); ***United States v. Lewis***, 902 F.2d 1176, 1181 (5th Cir. 1990); ***United States v. Rey***, 923 F.2d 1217, 1222 (6th Cir. 1991); ***United States v. Galvan***, 961 F.2d 738, 742 (8th Cir. 1992).

23.04[2][a] ***Limitation on Naming Unindicted Coconspirators***

Prosecutors should be aware that it is the position of the Department of Justice that, in the absence of some sound reason, it is not desirable to identify unindicted coconspirators in conspiracy indictments. United States Attorneys' Manual (USAM) 9-11.130 (Oct. 1, 1990). The recommended practice in such cases is to merely allege that the defendant "conspired with another person or persons known to the grand jury" and supply the identity, if requested, in a bill of particulars. The above policy does not apply, however, where the fact of the person's conspiratorial involvement is a matter of public record or knowledge.

23.04[2][b] ***Conspiring With Government Agents***

Because there must be at least two culpable parties to reach an agreement, proof of an agreement solely between a defendant and a government agent or informer will not support a conspiracy conviction. ***Rogers v. United States***, 340 U.S. 367, 375 (1951); ***Morrison v. California***, 291 U.S. 82, 92 (1934); ***United States v. Giry***, 818 F.2d 120, 125 (1st Cir.), *cert. denied*, 484 U.S. 855 (1987); ***United States v. Barnes***, 604 F.2d 121, 161 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); ***United States v. Pennell***, 737 F.2d 521, 536 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); ***United States v. Escobar de Bright***, 742 F.2d 1096, 1099 (9th Cir. 1984).

Even though it is impossible to conspire with an undercover agent or informer, this issue should be distinguished from instances where a valid agreement exists between two or more conspirators, one of whom committed overt acts solely with a government agent. In these situations, it is proper to charge and prove at trial an overt act that involves only one of the conspirators and an undercover agent. ***United States v. Enstam***, 622 F.2d 857, 867 (5th Cir. 1980),

cert. denied, 450 U.S. 912 (1981).

23.04[2][c] ***Corporations as Conspirators***

A corporation may be criminally liable for conspiracy under section 371. ***United States v. S & Vee Cartage Co.***, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983); ***United States v. Stevens***, 909 F.2d 431, 432-34 (11th Cir. 1990). Moreover, a corporation can enter into a conspiracy with its own employees. ***United States v. Ams Sintering Co.***, 927 F.2d 232, 236 (6th Cir. 1990); ***United States v. Hartley***, 678 F.2d 961, 972 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

23.04[3] ***Scope of the Agreement -- Single or Multiple Objects***

A single conspiracy may have multiple objectives which involve a number of sub-agreements to commit each of the specified objectives. ***Braverman v. United States***, 317 U.S. 49, 53 (1942); ***United States v. Maldonado-Rivera***, 922 F.2d 934, 963 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991); ***United States v. Rodriguez***, 585 F.2d 1234, 1248-49 (5th Cir. 1978); ***United States v. Warner***, 690 F.2d 545, 550 n.8 (6th Cir. 1982). In these cases, the issue of single or multiple conspiracies is frequently raised. Such a determination looks to whether there is one agreement to commit multiple objectives or more than one agreement, each with a separate object.

The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. ***United States v. Leavis***, 853 F.2d 215, 218 (4th Cir. 1988); ***United States v. Warner***, 690 F.2d 545, 548-49 (6th Cir. 1982); ***United States v. Springer***, 831 F.2d 781, 784 (8th Cir. 1984); ***United States v. Arbelaez***, 719 F.2d 1453, 1457 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

A single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles. ***United States v. Cambindo-Valencia***, 609 F.2d 603, 625 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); ***United States v. Richerson***, 833 F.2d 1147, 1153-54 (5th Cir. 1987); ***United States v. Spector***, 793 F.2d 932, 935-36 (8th Cir.

1986), *cert. denied*, 479 U.S. 1031 (1987); ***United States v. Mayes***, 512 F.2d 637, 642 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975). In determining this issue, the courts apply a totality of the circumstances test under which a combination of the following factors are considered: (1) commonality of goals; (2) nature of the scheme; and (3) overlapping of participants in the various dealings. ***United States v. Smith***, 789 F.2d 196, 201-02 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); ***United States v. Marable***, 578 F.2d 151, 154 (5th Cir. 1978); ***United States v. Bastone***, 526 F.2d 971, 979-80 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); ***United States v. DeLuna***, 763 F.2d 897, 918 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985); ***United States v. Mayo***, 646 F.2d 369, 372 (9th Cir.), *cert. denied*, 454 U.S. 1127 (1981); ***United States v. David***, 940 F.2d 722, 724 (10th Cir. 1991); ***United States v. Plotke***, 725 F.2d 1303, 1308 (11th Cir.), *cert. denied*, 469 U.S. 843 (1984); ***United States v. Tarantino***, 846 F.2d 1384, 1392-93 (D.C. Cir.), *cert. denied*, 488 U.S. 840 (1988).

23.05 ***MEMBERSHIP***

23.05[1] ***Intent Requirement***

In order to establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and that he or she intended to join it and to accomplish the object of the conspiracy. ***United States v. Flaherty***, 668 F.2d 566, 580 (1st Cir. 1981); ***United States v. Southland***, 760 F.2d 1366, 1169 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985); ***United States v. Rankin***, 870 F.2d 109, 113 (3d Cir.), *cert. denied*, 493 U.S. 840 (1989); ***United States v. Norris***, 749 F.2d 1116, 1121 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); ***United States v. Yanin***, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); ***United States v. Brown***, 934 F.2d 886, 889 (7th Cir. 1991); ***United States v. Zimmerman***, 832 F.2d 454, 457 (8th Cir. 1987); ***United States v. Esparza***, 876 F.2d 1390, 1392 (9th Cir. 1989); ***United States v. Lynch***, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992); ***United States v. Dale***, 991 F.2d 819, 851 (D.C. Cir.),

cert. denied, 114 S. Ct. 286, 650 (1993). A defendant may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing all of the members. ***Blumenthal v. United States***, 332 U.S. 539, 557 (1947); ***United States v. Diecidue***, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 F.2d 946 (1980); ***United States v. Noble***, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985); ***United States v. Massa***, 740 F.2d 629, 636 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); ***United States v. Horn***, 946 F.2d 738, 740 (10th Cir. 1991).

Similarly, a defendant may become a member of a conspiracy even if that person agrees to play a minor role in the conspiracy, so long as he or she understands the essential nature of the scheme and intentionally joins in it. ***United States v. Warner***, 690 F.2d 545, 550 (6th Cir. 1982); ***United States v. Medina***, 940 F.2d 1247, 1250 (9th Cir. 1991); ***United States v. Andrews***, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992). Further, the government is not required to prove any special mens rea beyond the degree of criminal intent required for the object offense. ***United States v. Feola***, 420 U.S. 671, 686-96 (1975).

23.05[2] ***Proof of Membership***

Although the government must prove that a defendant was a member of a conspiracy, this may be satisfied by a showing of only a "slight connection" to the conspiracy, *i.e.*, circumstantial evidence as to the defendant's knowledge of the conspiracy and its scope. ***United States v. Cooper***, 567 F.2d 252, 253 (3d Cir. 1977); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); ***United States v. Moya-Gomez***, 860 F.2d 706, 758 (7th Cir. 1988), *cert. denied*, 492 F.2d 908 (1989); ***United States v. Ivey***, 915 F.2d 380, 384 (8th Cir. 1990); ***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1991).

Thus, a defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. ***United States v. David***, 940 F.2d 722, 724 (1st Cir.), *cert. denied*, 112 S. Ct. 605 (1991); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); ***United States v. Beale***, 921 F.2d 1412, 1430 (11th Cir.), *cert. denied*, 112 S. Ct. 99 (1991).

Generally, this knowledge can be inferred from the defendant's own acts and statements. ***United States v. Martin***, 920 F.2d 345, 348 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2038 (1991); ***United States v. Kane***, 944 F.2d 1406, 1410 (7th Cir. 1991).

However, mere presence at the scene of a transaction or event is insufficient, of itself, to make someone a member of a conspiracy. ***United States v. Cintolo***, 818 F.2d 980, 1003 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987); ***United States v. Marian***, 725 F.2d 862, 865 (2d Cir. 1984); ***United States v. Holcomb***, 797 F.2d 1320, 1327 (5th Cir. 1986); ***United States v. Bostic***, 480 F.2d 965, 968 (6th Cir. 1973); ***United States v. Raymond***, 793 F.2d 928, 932 (8th Cir. 1986).

Similarly, merely acting in the same way as others or merely associating with others does not prove that someone joined in an agreement or understanding. ***United States v. Davenport***, 808 F.2d 1212, 1218 (6th Cir. 1987); ***United States v. Apker***, 705 F.2d 293, 298 (8th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). Also, mere knowledge that something illegal is going on is insufficient to show membership in a conspiracy. ***United States v. Webb***, 359 F.2d 558, 562 (6th Cir.), *cert. denied*, 385 F.2d 824 (1966); ***United States v. Brown***, 584 F.2d 252, 260 (8th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979); ***United States v. Schmidt***, 947 F.2d 362, 365 (9th Cir. 1991).

23.05[3] ***Pinkerton Liability***

A conspirator is responsible for offenses committed by another member of the conspiracy if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy. ***Pinkerton v. United States***, 328 U.S. 640, 645-48 (1946). The government is not required to prove that each defendant specifically agreed or knew that the offense would be committed. ***United States v. Etheridge***, 424 F.2d 951, 965 (6th Cir. 1970); ***United States v. Lemm***, 680 F.2d 1193, 1204 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983). Rather, it is sufficient if the government establishes that the offense was in furtherance of the conspiracy or was reasonably foreseen as a necessary or natural consequence of the unlawful agreement. ***United States v. Labat***, 905 F.2d 18,

21 (2d Cir. 1990); ***United States v. Cummings***, 937 F.2d 941, 944 (4th Cir.), *cert. denied*, 112 S. Ct. 395 (1991); ***United States v. Tilton***, 610 F.2d 302, 309 (5th Cir. 1980); ***United States v. Van Hee***, 531 F.2d 352, 357 (6th Cir. 1976); ***United States v. Redwine***, 715 F.2d 315, 322 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984); ***United States v. Heater***, 689 F.2d 783, 788 (8th Cir. 1982); ***United States v. Carpenter***, 961 F.2d 824, 828 (9th Cir.), *cert. denied*, 113 S. Ct. 332 (1992); ***United States v. Eyster***, 948 F.2d 1196, 1206 (11th Cir. 1991).

Moreover, there is some authority for the proposition that a person who joins a conspiracy adopts the prior acts of the other conspirators and may be held responsible for offenses committed before he or she joined the conspiracy. ***United States v. Rea***, 958 F.2d 1206, 1214 (2d Cir. 1992); ***United States v. Cimini***, 427 F.2d 129, 130 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970).

23.06 ***OVERT ACT***

23.06[1] ***Definition***

In order to establish a conspiracy, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy. The function of the overt act requirement is to show that the conspiracy is at work and is simply not an agreement sitting solely in the minds of the conspirators. ***United States v. Yates***, 354 U.S. 298, 334 (1957); ***United States v. Arboleda***, 929 F.2d 858, 865 (1st Cir. 1991).

An overt act is any act done by a member of the conspiracy for the purpose of carrying out or accomplishing the object of the conspiracy. ***United States v. Falcone***, 311 U.S. 205, 210 (1940). In addition, an overt act need not be a criminal act nor a crime. It may be totally innocent and legal. ***United States v. Hermes***, 847 F.2d 493, 495 (8th Cir. 1988).

The government is not required to prove all of the overt acts alleged in an indictment. Proof of at least one overt act committed in furtherance of the conspiracy is sufficient. ***United States v. Anderson***, 611 F.2d 504, 510 (4th Cir. 1979); ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); ***United States v. Zielie***, 734 F.2d 1447, 1456

(11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985).

Also, it is not essential that the government establish that each conspirator knew of all the activities of the other conspirators, or that each conspirator participated in all of the activities of the conspiracy. ***United States v. Brunetti***, 615 F.2d 899, 903 (10th Cir. 1980); ***United States v. Colson***, 662 F.2d 1389, 1391 (11th Cir. 1981).

In connection with discovery of overt acts, the government is not required to disclose all of the overt acts it will establish at trial. ***United States v. Carroll***, 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied*, 426 F.2d 923 (1976); ***United States v. Armocida***, 515 F.2d 49, 54 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); ***United States v. Murray***, 527 F.2d 401, 411 (5th Cir. 1976). Moreover, the government may prove at trial overt acts not charged in the indictment. ***United States v. Fassoulis***, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); ***United States v. Diecidue***, 603 F.2d 535, 563 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); ***United States v. Johnson***, 575 F.2d 1347, 1357 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979); ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

23.06[2] ***Acts of Concealment***

Acts of concealment may constitute overt acts. However, these acts are only admissible if they were committed prior to the object of the conspiracy being fully accomplished. Once accomplished, the conspiracy is over and subsequent overt acts are not probative of the conspiracy. ***Grunewald v. United States***, 353 U.S. 391, 405 (1957).

In ***Grunewald***, the Supreme Court was concerned with the government's attempts to lengthen indefinitely the duration of a conspiracy by simply showing that the conspirators took steps to bury their traces in order to avoid detection and punishment after the central criminal purpose had been accomplished. The Court stressed that a "distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been obtained, for the purpose only of covering up after the crime." 353 U.S. at 405.

In the context of criminal tax conspiracies, the object of the crime is usually to conceal income and expenses from the IRS. Indeed, the very definition of an affirmative act of tax evasion is "any conduct, the likely effect of which would be to mislead or conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943). Thus, criminal tax conspiracies contemplate acts of concealment to further the crime and such acts are admissible as overt acts. *See, e.g.*, ***United States v. Cunningham***, 723 F.2d 217, 229 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); ***United States v. Vogt***, 910 F.2d 1184, 1201-02 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Mackey***, 571 F.2d 376, 383-84 (7th Cir. 1978); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. Feldman***, 731 F. Supp. 1189, 1197 (S.D.N.Y. 1990).

23.07 *CONSPIRACY TO DEFRAUD THE UNITED STATES*

23.07[1] *Generally*

23.07[1][a] *Sec. 371: Two Forms of Conspiracy*

Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies. ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1091 (4th Cir. 1993). The first part of the statute, which is generally known as the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes. The second part of the statute, which is generally known as the "defraud clause," prohibits conspiring to defraud the United States. ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992); ***United States v. Touhey***, 867 F.2d 534, 536 (9th Cir. 1989); ***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986).

The offense clause requires reference in the indictment to another criminal statute which defines the object of the conspiracy. The defraud clause, however, stands on its own and does not need to refer to another statute to define the crime. ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. Minarik***, 875 F.2d 1186, 1187

(6th Cir. 1989). In criminal tax prosecutions, section 371 is used to charge conspiracies to commit tax offenses and/or to defraud the Internal Revenue Service. ***United States v. Jerkins***, 871 F.2d 598, 602 (6th Cir. 1989); ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980); ***United States v. Little***, 753 F.2d 1420, 1442 (9th Cir. 1984).

It should be noted that although section 371 provides for two distinct types of violations, the courts have consistently held that the statute provides for one offense, not two. ***Braverman v. United States***, 317 F.2d 49, 52-53 (1942); ***United States v. Hope***, 861 F.2d 1574, 1578 n.8 (11th Cir. 1988); *but see* ***United States v. Haga***, 821 F.2d 1036, 1039 (5th Cir. 1987) (section 371 makes out two separate offenses).

23.07[1][b] ***Scope of Defraud Clause***

The defraud clause of section 371 is very broadly stated and encompasses a vast array of conduct, including acts which do not constitute a crime under a separate federal statute. ***United States v. Tuohey***, 867 F.2d 534, 537 (9th Cir. 1989). This is because the term "defraud" when used in section 371 is broader than its common law definition and even goes beyond the definition used in the mail and wire fraud statutes. ***McNally v. United States***, 483 U.S. 350, 356 (1987); ***Dennis v. United States***, 384 U.S. 855, 861 (1966); ***Tuohey***, 867 F.2d at 537-38.

The Supreme Court has held that "conspiracy to defraud the United States" means: (1) to cheat the government out of money or property; or (2) to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by dishonest means. ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924).

Under the defraud clause, the government does not have to establish a pecuniary loss to the United States. ***Hammerschmidt***, 265 U.S. at 188; ***Tuohey***, 867 F.2d at 537; ***United States v. Puerto***, 730 F.2d 627, 630 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984). Moreover, the government is not required to show that the scheme to defraud was a success or that the government was actually harmed. ***United States v. Rosengarten***, 857 F.2d 76, 79 (2d Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989); ***United States v. Everett***, 692 F.2d 596, 599 (9th Cir. 1982).

More importantly, however, under the defraud clause the government is not required to show that the "fraud" was a crime on its own. ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989). This means the prosecutor is not burdened with having to establish all of the elements of an underlying offense (*e.g.*, tax evasion) and each member's intent to commit that offense (*e.g.*, willfulness). Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions. ***United States v. Hurley***, 957 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992); ***United States v. Nersesian***, 824 F.2d 1294, 1313 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987); ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989).

Though a conspiracy to defraud may exist where no substantive offense has been committed, deceit or trickery in the scheme is essential to satisfying the defrauding requirement in the statute. ***Hammerschmidt***, 265 U.S. at 188. Similarly, since the purpose of section 371 is to protect the integrity of the programs and policies of the United States and its agencies, the prosecutor must establish that the target of the fraud was the United States or one of its agencies. ***United States v. Johnson***, 383 U.S. 169, 170 (1966); ***United States v. Pintar***, 630 F.2d 1270, 1278 (8th Cir. 1980); ***United States v. Lane***, 765 F.2d 1376, 1379 (9th Cir. 1985).

23.07[1][c] ***Pleading Requirements***

Because of the broad scope of section 371's defraud clause, the Supreme Court in ***Dennis v. United States***, 384 U.S. 855 (1966), warned the lower courts to proceed with care in interpreting section 371 cases, stating:

> [I]ndictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.

384 U.S. at 860.

Following the warning in ***Dennis***, the Third Circuit in ***United States v. Shoup***, 608 F.2d

950 (3d Cir. 1979), added that the courts "must be mindful that the statute is a broad one, and that there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the federal criminal sanction." 608 F.2d at 955-56. *See also* ***United States v. Rosenblatt***, 554 F.2d 36, 41 n.6 (2d Cir. 1977) ("potential for abuse" under defraud clause much greater than under offense clause because (1) under the former the charge is "broader and less precise"; (2) the former expands scope of conspiracy and thus liability for crimes, coconspirators, and admissibility of coconspirators' declarations; (3) the former includes more overt acts and thus both lengthens period of statute of limitations and increases number of jurisdictions where venue can be laid; and, (4) charges under the former may avoid the limit placed on penalty for conspiracy to commit misdemeanor).

Thus, the courts have held that when the government proceeds under the conspiracy to defraud clause it must plead the "essential nature" of the alleged fraudulent scheme. *See, e.g.*, ***United States v. Helmsley***, 941 F.2d 71, 91 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992). It is not sufficient for the indictment to simply reallege the language in the statute, rather, it must allege the fraudulent scheme in its particulars. ***United States v. Rosenblatt***, 554 F.2d 36, 41 (2d Cir. 1977). This means that a defraud clause indictment should include: (1) the name of the agency impeded; (2) what functions of the agency were impeded; (3) what means were used to impede the agency; and (4) identify who did the impeding. ***United States v. Mohney***, 949 F.2d 899, 904 (6th Cir. 1991).

23.07[2] ***Klein Conspiracy***

23.07[2][a] ***Generally***

Conspiracies to defraud the IRS are generally charged under section 371's defraud clause. Such a conspiracy is commonly referred to as a "Klein conspiracy." *See, e.g.*, ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In a ***Klein*** conspiracy, the standard charging language is as follows:

> [T]o defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes.

Klein, 247 F.2d at 915. *See also* ***United States v. Cambara***, 902 F.2d 144, 146 (1st Cir. 1990); ***United States v. Helmsley***, 941 F.2d 71, 90-91 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); ***United States v. Vogt***, 910 F.2d 1184, 1202 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Sturman***, 951 F.2d 1466, 1472 (6th Cir.), *cert. denied*, 112 S. Ct. 2964 (1992); ***Alexander v. Thornburgh***, 943 F.2d 825, 829 (8th Cir. 1991).

In the ***Klein*** case, the Second Circuit upheld the government's use of the defraud clause to charge conduct that impeded the functions of the IRS and upheld the conspiracy conviction, finding sufficient evidence to make out the crime. 247 F.2d at 916. The court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS. These acts included:

1. Alteration of the books to make liquidating dividends appear as commissions;
2. Alteration of the books to make a gratuitous payment of $1,500,000 appear as a repayment of a loan;
3. A false entry in the books disguising as commissions what was actually a dividend, which in turn was diverted to corporate nominees;
4. A false statement in Klein's personal income tax return regarding the payment for a stock purchase;
5. Klein's false answer to Treasury interrogatories seeking to identify the owners of various Cuban corporations;
6. A return falsely reporting that stock was sold in 1950 for an immense profit;
7. The evasive affidavit of Klein's secretary denying that he remembered altering certain books; and
8. Income tax returns which falsely claimed a sale of stock.

247 F.2d at 915.

While it is not necessary to have evidence of acts as pronounced as those in ***Klein***, the government must introduce evidence establishing that the intent of each member of the conspiracy was to impede the functions of the IRS.

23.07[2][b] ***Examples: Klein fact patterns***

First Circuit

1. **United States v. Hurley**, 957 F.2d 1 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992) (money laundering scheme through the use of front companies set up in Panama and the Bahamas, use of unconventional business practices such as $100,000 transactions in currency, and checks made out in names of third parties).
2. ***United States v. Cambara***, 902 F.2d 144 (1st Cir. 1990) (laundering money through use of real estate management company as front company, structuring cash withdrawals, purchasing large assets with currency).
3. ***United States v. Lizotte***, 856 F.2d 341 (1st Cir. 1988) (money laundering scheme using cash to purchase real estate through nominees).
4. ***United States v. Tarvers***, 833 F.2d 1068 (1st Cir. 1987) (money laundering scheme through the use of nail polish remover company set up as front, using cash to purchase real estate through nominees).

Second Circuit

1. ***United States v. Aracri***, 968 F.2d 1512 (2d Cir. 1992) (***Klein*** conspiracy in federal gasoline excise tax context, creation of sham paper sales of gas among various entities, creation of shell corporations to hold tax exemption licenses).
2. ***United States v. Bilzerian***, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991) (dual objective conspiracy -- to defraud SEC and IRS by parking stock to generate false tax losses and false claims for deductions, accumulating stock through nominees, failing to comply with SEC reporting

requirements under § 13(d)).

3. ***United States v. Attanasio***, 870 F.2d 809 (2d Cir. 1989) (creating false capital gain transactions, laundering $600,000 through attorney trust accounts).

4. ***United States v. Gurary***, 860 F.2d 521 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (creation of phoney invoices for non-existent goods which companies would buy and include in their cost-of-goods sold figure on corporate tax returns).

5. ***United States v. Rosengarten***, 857 F.2d 76 (2d Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

6. ***United States v. Turoff***, 853 F.2d 1037 (2d Cir. 1988) (failure to report substantial interest income derived from mail fraud scheme monies deposited into a credit union which did not report interest to the IRS).

7. ***United States v. Mollica***, 849 F.2d 723 (2d Cir. 1988) (issuing phoney corporate checks with forged endorsements to create funds used to pay personal expenses that were then deducted as business expenses, diverting earned income into secret bank accounts, not reporting interest income received on loans).

8. ***United States v. Nersesian***, 824 F.2d 1294 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987) (converting $117,000 in cash into money orders and traveler's checks in amounts less than $10,000 increments to avoid CTR filings).

9. ***United States v. Sigalow***, 812 F.2d 783 (2d Cir. 1987) (use of third party as a frontman owner of massage parlors under investigation by IRS, systematic destruction of business records).

10. ***United States v. Heinemann***, 801 F.2d 86 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987) (sale of ministries in purported tax exempt churches offering vow of poverty and false charitable deductions).

Third Circuit

1. ***United States v. American Investors of Pittsburgh, Inc.***, 879 F.2d 1087 (3d Cir. 1989), *cert. denied*, 493 U.S. 955 (1990) (money laundering scheme where bank customers structure currency transactions, unauthorized use of other customer accounts to funnel currency).

2. ***United States v. Olgin***, 745 F.2d 263 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (use of corporate checks to fictitious payees to generate cash proceeds, failure to record cash sales, failure to issue receipts for cash sales).

Fourth Circuit

1. ***United States v. Hirschfeld***, 964 F.2d 318 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993) (complex series of financial transactions designed to create significant tax losses and provide cash flow from illegal underwriting of a small corporation, creation of fraudulent settlement of sham lawsuit to generate $2.1 million false tax deduction).

2. ***United States v. Schmidt***, 935 F.2d 1440 (4th Cir. 1991) (scheme to sell trusts known as Unincorporated Business Organizations (UBOs) where participants could assign income and assets to the trusts and take false business deductions on personal expenses, as well as hide their income in financial institutions in the Marshall Islands).

3. ***United States v. Vogt***, 910 F.2d 1184 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991) (money laundering scheme using front corporations and foreign bank accounts).

4. ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985) (leader of tax protestor organization who counseled members to claim exempt status on Forms W-4 to avoid withholding, to report zero wages on tax returns, and to deal only in cash).

Fifth Circuit

1. ***United States v. Bourgeois***, 950 F.2d 980 (5th Cir. 1992) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

2. ***United States v. Breque***, 964 F.2d 381 (5th Cir. 1992), *cert.*

denied, 113 S. Ct. 1253 (1993) (money laundering scheme using money exchange business to exchange U.S. currency into pesos without CTRs being filed).

3. ***United States v. Chesson***, 933 F.2d 298 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991) (corporation paying personal expenses of owner as well as construction costs for new church and school, all of which were written off as business deductions or charitable donations, alteration of invoices).

4. ***United States v. Montalvo***, 820 F.2d 686 (5th Cir. 1987) (money laundering scheme using front companies and foreign bank accounts which disguised drug proceeds as loan repayments).

5. ***United States v. Lamp***, 779 F.2d 1088 (5th Cir.), *cert. denied*, 476 U.S. 1144 (1986) (drug trafficker under IRS criminal investigation concocts story with codefendant to justify his increases in net worth and corroborate his lack of ownership of certain property and assets).

Sixth Circuit

1. ***United States v. Sturman***, 951 F.2d 1466 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992) (creation of 150 corporations, five of which were in foreign countries with strict secrecy laws and listing nominees as owners of the corporations, use of the corporations to conceal income and make it difficult to trace income, expenses and cash skims, destruction of corporate records after receipt of subpoenas).

2. ***United States v. Mohney***, 949 F.2d 899 (6th Cir. 1991) (used nominees as owner of adult entertainment businesses, skimmed cash receipts, use of corporate checks to pay personal expenses).

3. ***United States v. Iles***, 906 F.2d 1122 (6th Cir. 1990) (promotion and sale of three sham tax shelters and preparation of tax returns of investors in the shelters).

4. ***United States v. Jerkins***, 871 F.2d 598 (6th Cir. 1989) (money laundering scheme with real estate being purchased in the name of nominees in an effort to conceal income, structuring of currency deposits, filing false returns).

Seventh Circuit

1. ***United States v. Price***, 995 F.2d 729 (7th Cir. 1993) (conceal corporate receipts using secret bank account, second sales journal, alteration of deposit tickets, false notations on memo portion of corporate checks, forged sales invoices supplied to IRS auditor).

2. ***United States v. Brown***, 944 F.2d 1377 (7th Cir. 1991) (money laundering scheme using a nearly bankrupt mortgage brokerage firm to engage in elaborate and time-consuming transfers of funds, structuring currency transactions).

3. ***United States v. Beverly***, 913 F.2d 337 (7th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991) (drug trafficker uses codefendant as nominee owner of certain assets, real estate and businesses in an effort to conceal true ownership from IRS, use of codefendant's bank account to pay expenses of drug trafficker).

4. ***United States v. Bucey***, 876 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 1004 (1989) (money laundering scheme using bogus church as a front to move proceeds to offshore bank accounts and foreign corporations).

5. ***United States v. Hooks***, 848 F.2d 785 (7th Cir. 1988) (10 bearer bonds worth $375,000 were diverted from inclusion in $10 million estate and off the estate tax return, bonds liquidated through nominee to conceal ownership and receipt of income).

Eighth Circuit

1. ***United States v. Sileven***, 985 F.2d 962 (8th Cir. 1993) (money laundering scheme of untaxed cash receipts from business transferred to Canada and returned as nontaxable loan proceeds).

2. ***United States v. Tierney***, 947 F.2d 854 (8th Cir. 1991) (promotion and sale of ethanol plants as tax shelters, backdating documents to create a paper trail to falsely corroborate that the plants had been placed in service by the end of 1982).

3. ***United States v. Derezinski***, 945 F.2d 1006 (8th Cir. 1991) (money laundering scheme by precious metals dealer attempting to conceal income of drug dealer, structuring of currency transactions, falsifying business records by using fictitious names for the trades).

4. ***Alexander v. Thornburgh***, 943 F.2d 825 (8th Cir. 1991) (owner of adult entertainment business set up sham corporations and operated his companies using false names and names of employees).

5. ***United States v. Telemaque***, 934 F.2d 169 (8th Cir. 1991) (organizer of Form 1099 scheme who sold the packages to participants).

6. ***United States v. Zimmerman***, 832 F.2d 454 (8th Cir. 1987) (sale of ministries in Universal Life Church which allowed participants to engage in sham transactions, check kiting, and fund rotation schemes).

Ninth Circuit

1. ***United States v. Hobbs***, 991 F.2d 569 (9th Cir. 1993) (brokered real estate transactions for a narcotics dealer, arranged for properties to be put in name of nominee, structured purchase of cashier's checks).

2. ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993) (use of warehouse bank where participants used numbered bank accounts, no records kept of financial transactions, participants' bills paid with generic bank account).

3. ***United States v. Bosch***, 914 F.2d 1239 (9th Cir. 1990) (laundered drug sale proceeds using CTRs which did not reveal the true source of the money).

4. ***United States v. Murphy***, 809 F.2d 1427 (9th Cir. 1987) (money laundering scheme using foreign corporation and foreign bank accounts; supplied false or incomplete information for preparation of CTRs).

5. ***United States v. Crooks***, 804 F.2d 1441 (9th Cir. 1986) (promotion and sale of bogus mineral royalty tax shelters, check cyclone system used to create canceled checks

representing loans and tax deductible payments from the shelter).

6. ***United States v. Moran***, 759 F.2d 777 (9th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (money laundering scheme using foreign bank accounts and foreign corporations).

7. ***United States v. Little***, 753 F.2d 1420 (9th Cir. 1985) (promotion and sale of real estate tax shelters, retroactive application to new partner of partnership losses attributable to periods prior to new partner's entry into partnership).

Tenth Circuit

1. ***United States v. Tranakos***, 911 F.2d 1422 (10th Cir. 1990) (selling sham common law trusts attempting to redirect income and avoid taxation).

2. ***United States v. Pinto***, 838 F.2d 426 (10th Cir. 1988) (concealed drug income by using cash to purchase the first in a series of three homes and later obtaining sham mortgages to create the appearance that the purchase money came from loans).

3. ***United States v. Kapnison***, 743 F.2d 1450 (10th Cir.), *cert. denied*, 471 U.S. 1015 (1985) (scheme to obtain loans from banks for various borrowers and then received kickbacks from the proceeds of the loans which were not reported on tax returns).

Eleventh Circuit

1. ***United States v. Hernandez***, 921 F.2d 1569 (11th Cir.), *cert. denied*, 111 S. Ct. 2271 (1991) (money laundering scheme where funds get converted to money orders then deposited into a nominee bank account for nightclub owned in name of third party).

2. ***United States v. Lafaurie***, 833 F.2d 1468 (11th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (money laundering scheme using foreign bank accounts, front corporations, structuring purchases of cashier's checks and money orders to avoid CTR filing).

3. ***United States v. Cure***, 804 F.2d 625 (11th Cir. 1986) (money

laundering scheme where purchases of cashier's checks were structured).

4. ***United States v. Carrodeguas***, 747 F.2d 1390 (11th Cir. 1984), *cert. denied*, 474 U.S. 816 (1985) (scheme to avoid reporting of bonus income by arranging for corporate accounting records to be falsified).

5. ***United States v. Barshov***, 733 F.2d 842 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (promotion and sale of limited partnership to buy movies where purchase price was inflated thereby overstating depreciation costs and investment credits).

6. ***United States v. Sans***, 731 F.2d 1521 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985) (money laundering scheme using structured currency transactions to avoid CTR filings).

7. ***United States v. Browning***, 723 F.2d 1544 (11th Cir. 1984) (money laundering scheme using investment counseling firm as front, use of foreign bank accounts, money returned in form of fictitious loans or salaries from offshore companies).

District of Columbia Circuit

1. ***United States v. Dale***, 991 F.2d 819 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286, 650 (1993) (scheme to defraud by falsifying deductions, misclassifying payments, creating phony debts, etc.).

2. ***United States v. Treadwell***, 760 F.2d 327 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986) (scheme to misappropriate assets from a low-income housing project by misapplication, diversion, and theft).

23.07[2][c] *Extra Element in Ninth Circuit: Caldwell*

Prosecutors charging ***Klein*** conspiracies in the Ninth Circuit should be aware of ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993). There, the court of appeals found the district court's jury instructions concerning the charge of conspiracy to defraud to be deficient, because the court did not tell the jurors that in order to convict the defendant they had to find that she agreed to

defraud the United States by "deceitful or dishonest means." ***Caldwell***, 989 F.2d at 1060. According to the court, the Supreme Court had made it clear that the term "defraud" as used in section 371 was limited to wrongs done by "deceit, craft or trickery, or at least by means that are dishonest" and obstructing governmental functions in other ways did not amount to "defrauding." ***Caldwell***, 989 F.2d at 1059 (citing ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924)). The court of appeals concluded that, under the instructions given, the jury might have improperly convicted based solely on a determination that the defendant agreed to obstruct the IRS. ***Caldwell***, 989 F.2d at 1060-61.

Although the Department does not believe that the jury instructions in ***Caldwell*** were deficient, the wiser course of action may be to use jury instructions incorporating language similar to that found in ***Hammerschmidt v. United States***, 265 U.S. at 188. In other words, the prudent course of action is to instruct the jury that section 371 prohibits not only conspiracies to defraud the United States by cheating the government out of money, such as income tax payments, or property, but also conspiracies to defraud the United States that involve the impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. *See*, *e.g.*, pattern jury instructions cited in ***Caldwell***, 989 F.2d at 1060.

23.07[3] *Overlapping Conspiracies*

As stated earlier, section 371 provides for two forms of conspiracies depending on which clause in the statute is charged. These two clauses overlap, however, when a fraud on the United States also violates a specific federal statute. ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992). The question then becomes which clause should be charged.

In ***United States v. Minarik***, 875 F.2d 1186 (6th Cir. 1989), the Sixth Circuit held that in order to properly alert defendants of the charges against them, prosecutors must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate

a specific statute. 875 F.2d at 1187.

Other circuits reject the holding in ***Minarik*** and allow the government to charge the defraud clause where the fraud constitutes a separate federal criminal offense. ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992); ***United States v. Bilzerian***, 926 F.2d 1285, 1301-02 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1092 (4th Cir. 1993); ***United States v. Reynolds***, 919 F.2d 435, 438-39 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991); ***Alexander v. Thornburgh***, 943 F.2d 825, 830-31 (8th Cir. 1991); ***United States v. Notch***, 939 F.2d 895, 901 (10th Cir. 1991); ***United States v. Harmas***, 974 F.2d 1262, 1266-67 (11th Cir. 1992).

The Sixth Circuit itself has severely restricted ***Minarik*** to its facts. ***United States v. Sturman***, 951 F.2d 1466, 1473-74 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); ***United States v. Mohney***, 949 F.2d 899, 902-03 (6th Cir. 1991). Nonetheless, a review of the relevant case law is instructive on this issue.

In ***Minarik***, defendant Aline Campbell had been issued three tax assessments totalling $108,788.15. Campbell told the IRS she did not owe the money. Campbell then solicited the aid of her friend, defendant Robert Minarik, to help her sell her home and conceal the sales proceeds. The home was sold, with the buyer issuing seven checks to Campbell in the amount of $4,900 each and one check in the amount of $3,732.18. Campbell and Minarik began cashing the checks at various branches of the same bank. When Campbell cashed two checks at the same branch, the IRS was contacted. The defendants were charged with conspiracy to "defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." 875 F.2d at 1187-88.

The Sixth Circuit found that the defendant's conduct could have been properly charged under 26 U.S.C. § 7206(4), which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed. The court then held that "the offense and defraud clause as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy

under the offense clause to violate 26 U.S.C. § 7206(4)." 875 F.2d at 1187.

The Sixth Circuit articulated three rationales for its decision. First, the court stated that the purpose of the defraud section "was to reach conduct not covered elsewhere in the criminal code" and thus should not be used when a specific provision covers that conduct. 875 F.2d at 1194. Second, section 371's misdemeanor clause, which limits punishment of conspiracies whose object is defined as a misdemeanor, would be defeated if those crimes could be prosecuted as felonies under the defraud clause. 875 F.2d at 1194. Finally, the court found that the prosecution created impermissible confusion as to the notice of the charge to the defendants by incorrectly charging a conspiracy to violate 26 U.S.C. § 7206(4) as a conspiracy to defraud, where it failed to allege the essential nature of the scheme and then changed its theory of the case at trial. 875 F.2d at 1195.

The Sixth Circuit revisited the section 371 overlapping issue raised in ***Minarik*** two years later in ***United States v. Mohney***, 949 F.2d 899 (6th Cir. 1991). Here, defendant, Harry Virgil Mohney, and three others were charged with conspiring to "defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue." The indictment charged the object as follows:

> [T]o defraud the United States by concealing the true ownership and control of particular adult oriented sexually explicit entertainment businesses, for the purpose of concealing the source of funds used to acquire and expand their businesses, their source of supply and their customers, and the amount and disposition of their income.

949 F.2d at 904.

The defense moved to dismiss the conspiracy, asserting that it was impermissibly brought under the defraud clause instead of the offense clause. The district court, relying on ***Minarik***, granted the motion to dismiss, finding that 26 U.S.C. § 7206(1), which prohibits the filing of false tax returns, "fits perfectly the conduct which is the core, the very essence of the government's charge in Count I." 949 F.2d at 904.

The Sixth Circuit reversed the lower court's decision. The court limited ***Minarik*** to the

specific facts of that case, and stressed that ***Minarik*** was not to be read as requiring "all prosecutors to charge all conspiracies to violate a specific statute under the offense clause of section 371." 949 F.2d at 902. The court also acknowledged that other circuits have allowed prosecutions under the defraud clause despite the availability of a separate applicable substantive offense. 949 F.2d at 902-03.

In explaining its position, the Sixth Circuit offered two justifications. First, in this case, unlike in ***Minarik***, there were no "constantly shifting government theories depriving the defendants of notice of the charges against them." 949 F.2d at 903. Instead, the indictment "tracked the language of section 371, named the agency impeded and explained how, and by whom, the agency was impeded, and clearly charged a violation of the defraud clause of section 371." 949 F.2d at 903-04. Second, the court found that the conduct charged under the conspiracy did not all fit under section 7206(1). Rather, the court found that the conduct involved violations of several statutes, including 26 U.S.C. § 7206(1), § 7206(2), § 7203, § 7201, § 7202 and 18 U.S.C. § 1001. As a result, the court concluded that "where the conduct charged violates several statutes, the most complete description of the objective may be a conspiracy to defraud a particular agency of the government." 949 F.2d 904, 905.

In ***United States v. Sturman***, 951 F.2d 1466 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992), the Sixth Circuit directly addressed the situation where the conduct charged did violate several statutes and still was charged under the defraud clause. The defendant, Reuben Sturman, and others were charged with a ***Klein*** conspiracy. The defense filed a motion to dismiss, relying on ***Minarik***, and argued that the conduct alleged in the conspiracy should have been charged under the offense clause to commit either a violation of 26 U.S.C. § 7206(1) or § 7206(4). The district court denied the motion. 951 F.2d at 1472.

The court of appeals upheld the district court's decision, finding that the broad nature of the conspiracy and the associated violation of several statutes distinguished the case from ***Minarik***. The court highlighted the "broad nature" of Sturman's conduct, stating:

> Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No provision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code, but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses.

951 F.2d at 1473.

Thus, ***Minarik*** has been limited to its facts and it would appear that it is applicable only if the following conditions exist: (1) the government charged a conspiracy under the defraud clause when the facts show that the alleged conduct violated a ***single*** separate federal criminal offense; (2) the government failed to charge the essential nature of the scheme or the details of how the United States was impeded and impaired; and, (3) the government constantly changed its prosecution theory and failed to adequately inform the defendant of the charges.

23.07[4] ***Scope of Intent***

23.07[4][a] ***Generally***

The crime of conspiracy includes an intent element which requires the government to show that each member of the conspiracy had knowledge of the object of the conspiracy and intended to join in achieving that object. ***Ingram v. United States***, 360 U.S. 672, 678 (1959). The government may use circumstantial evidence to establish this element. Further, the government need only show that a defendant knew of the essential nature of the scheme, and not all of the details or other members. *See, e.g.*, ***United States v. Browning***, 723 F.2d 1544, 1546 (11th Cir. 1984).

In the context of a ***Klein*** conspiracy, this typically means that the government must show that each member knew of the scheme to impede the functions of the IRS and intended to join in

that scheme. *See, e.g.*, ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980).

23.07[4][b] *Klein Conspiracy Coupled With a Narcotics or Money Laundering Prosecution*

Frequently, prosecutors will charge a ***Klein*** conspiracy in connection with narcotics and/or money laundering charges. These cases typically involve the failure to report income derived from the sale of narcotics and/or the laundering of drug proceeds to disguise the source of the funds. In these cases, the element of intent, especially as to the ***Klein*** objective, becomes an issue. A question is raised as to whether acts of concealing sources of income and disguising the character of narcotics proceeds are alone sufficient to infer an intent to impede and impair the functions of the IRS.

The courts are split on this issue. One line of authority reserves ruling on the issue and instead uses a fact-based analysis to determine a particular defendant's intent. *See* ***United States v. Vogt***, 910 F.2d 1184, 1202-03 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 955 (1991); ***United States v. Beverly***, 913 F.2d 337, 357-58 (7th Cir. 1990), *cert. denied*, 498 U.S. 1052 (1991); ***United States v. Bucey***, 876 F.2d 1297, 1311-13 (7th Cir.), *cert. denied*, 493 U.S. 1004 (1989); ***United States v. Montalvo***, 820 F.2d 686, 689-91 (5th Cir. 1987); ***United States v. Enstam***, 622 F.2d 857, 861-64 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); ***United States v. Hernandez***, 921 F.2d 1569, 1575-76 (11th Cir.), *cert. denied*, 111 S. Ct. 2271 (1991); ***United States v. Browning***, 723 F.2d 1544, 1546-49 (11th Cir. 1984).

For example, in ***United States v. Enstam***, 622 F.2d 857 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), the Fifth Circuit upheld the defendant's conviction under a ***Klein*** conspiracy, finding sufficient evidence of his intent to impede the IRS. The defendant and his associates sent drug money out of the country and returned it to the United States in the form of fictitious loans. The government charged Enstam with a ***Klein*** conspiracy. The defense argued that the object of the conspiracy was to hide the source of the drug profits and not to impede the IRS. 622 F.2d at 860-61.

The court of appeals found that there was a conspiracy to launder drug proceeds. However, it also found another object of the conspiracy was to obstruct the functioning of the IRS. 622 F.2d at 861-62. The court based its finding of the second object on the fact that the defendant's own explanations as to the purpose of the money laundering scheme, combined with his coconspirators references about their fear of the IRS, created a reasonable inference of an intent to "thwart the effective functioning of the Internal Revenue Service." 622 F.2d at 861-63.

Similarly, in ***United States v. Browning***, 723 F.2d 1544 (11th Cir. 1984), the Eleventh Circuit upheld the defendant's conviction under a ***Klein*** conspiracy, finding sufficient evidence of his intent to impede the IRS. Defendant Browning and three others were indicted on a ***Klein*** conspiracy relating to a scheme to launder large amounts of cash generated by illegal drug transactions.

The court of appeals found overwhelming evidence that one of the objectives of the conspiracy was to launder illegally obtained money. 723 F.2d at 1546. The court also found the evidence supported an additional object: "impairing the identification of revenue and the collection of tax due and owing on such revenue." In addressing the defendant's lack of intent on the ***Klein*** object, the court stated:

> Whether the form of the money laundering transaction alone is sufficient to support the jury's finding that one of the objectives of the conspiracy was to impair the identification of revenue and the collection of tax due and owing on such revenue is a question that, as in ***United States v. Enstam***, we do not reach on the record. In this case, there is ample evidence that one of the purposes of the money laundering schemes utilized by the conspirators was to thwart the effective functioning of the IRS.

723 F.2d at 1547.

This ample evidence included: (1) videotaped meetings in which Browning's coconspirators stated that the purpose in laundering the money was to hide the source of the income in the event of an audit by the IRS; (2) a videotaped meeting where one of Browning's coconspirators expressed a desire to have certain proceeds designated as a fictitious consulting fee and paid in the next taxable

year so as to avoid showing a large amount of income in any one taxable year and risk a possible IRS audit; and (3) a videotaped meeting with one of Browning's coconspirators in which he discussed his hesitation in setting up a corporation in the Grand Cayman Islands for fear that the authorities there might release information to the IRS. 723 F.2d 1547-49.

A second line of authority holds that when acts of concealment are reasonably explainable in terms other than a motivation to evade taxes, the government must produce independent evidence of an intent to evade taxes. ***United States v. Krasovich***, 819 F.2d 253, 256 (9th Cir. 1987); ***United States v. Pritchett***, 908 F.2d 816, 820-22 (11th Cir. 1990).

For example, in ***United States v. Krasovich***, 819 F.2d 253 (9th Cir. 1987), the Ninth Circuit reversed a defendant's ***Klein*** conspiracy conviction where the evidence failed to show a link between the defendant and the tax laws. 819 F.2d at 256. Krasovich was an auto mechanic for John and Andrea Drummond, who were cocaine traffickers. The evidence at trial showed that Krasovich knew the Drummonds sold narcotics and that Krasovich knowingly registered vehicles and equipment purchased by the Drummonds as his own, for the purpose of keeping title out of their names. 819 F.2d at 254.

The government charged Krasovich and the Drummonds with a ***Klein*** conspiracy relating to the personal income taxes of John Drummond. Krasovich argued that there was no direct or circumstantial evidence to indicate that he agreed with anyone to impede the functions of the IRS. The government pointed to the defendant's acts of concealment as circumstantial evidence of his intent. 819 F.2d at 255-56. The court of appeals rejected the government's position. The court found that when efforts at concealment can be explained in terms of motivation other than to evade taxes, the government must supply other evidence to show the defendant knew the purpose of the concealment was to impede the function of the IRS. 819 F.2d at 256.

The court based it holding on the Supreme Court case of ***Ingram v. United States***, 360 U.S. 672 (1959). There, the Court reversed the convictions of two low level coconspirators in a gambling operation who had been charged under the offense clause of section 371 with conspiracy

to evade the wagering tax. 360 U.S. at 673. The Supreme Court stressed that under the offense clause, the government must establish an intent to agree and an intent to commit the substantive offense itself. 360 U.S. at 678.

The Court found the record barren of any direct evidence to establish an underlying intent to evade taxes. Further, the Court held that the government could not use the acts of concealing the gambling operation to infer a tax motive because concealment is common to all crime and may be used to infer any number of motives. Without independent proof to show knowledge of the tax motive, the intent element could not be made out and the Court reversed the convictions. 360 U.S. at 678-80.

In ***United States v. Pritchett***, 908 F.2d 816 (11th Cir. 1990), the Eleventh Circuit followed the rationale of ***Ingram*** and ***Krasovich***. The defendants, David and Mark Pritchett, along with three others, were indicted for conspiracy to distribute cocaine and conspiracy to evade the personal income taxes of Joe Pritchett, in violation of 26 U.S.C. § 7201. The evidence showed that both defendants knew of the drug operation and participated in concealing the various assets of Joe Pritchett, including the unknown contents of several safe deposit boxes. 908 F.2d at 821.

Relying on ***Ingram***, and ***Krasovich***, the court found that:

> [T]hese two . . . [defendants'] efforts at concealing Joe's source of income and ownership interests are "not reasonably explainable only in terms of motivation to evade taxes." . . . Because David knew about and participated in the drug sales, his efforts at hiding the income are explained in terms of an effort to prevent detection of the drug business. The evidence does not show that Mark knew Joe's cash represented current income, and therefore only shows that Mark knew that Joe was hiding his ownership interests in various assets.

908 F.2d at 821.

The court distinguished its earlier cases of ***Enstam*** and ***Browning*** by pointing to the independent proof issue. According to the court, the opposite findings in these other two decisions were reconcilable because in those cases the government offered independent evidence of an intent to avoid income taxes. This evidence consisted primarily of statements made by coconspirators

evincing an intent to avoid taxes. 908 F.2d at 821-22.

The court in ***Pritchett*** did not address, however, the fact that: (1) the ***Enstam*** and ***Browning*** cases dealt with ***Klein*** conspiracies, not conspiracies to commit a specific offense like tax evasion; and (2) the coconspirator statements that evinced an intent to evade taxes were made outside the presence of the defendants and yet were being used to infer their intent to impede the IRS.

A third line of authority on this issue holds that the act of "laundering" money itself constitutes impeding the IRS in its ability to collect taxes. ***United States v. Hurley***, 957 F.2d 1, 4-8 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992); ***United States v. Paiva***, 892 F.2d 148, 162 (1st Cir. 1989); ***United States v. Tarvers***, 833 F.2d 1068, 1075-76 (1st Cir. 1987).

In the context of money laundering schemes charged under a ***Klein*** conspiracy theory, the First Circuit has held that an agreement to launder money derived from narcotics trafficking is evidence of an act of impeding the IRS in its collection of taxes. *See, e.g.,* ***United States v. Tarvers***, 833 F.2d 1068, 1076 (1st Cir. 1987).

Thus, in the First Circuit, the government need not necessarily be concerned about other motives behind acts of concealment or in establishing independent proof of the tax motive. However, the government must establish: (1) the defendant participated in or knew about the money laundering scheme; and (2) the defendant knew the money being laundered came from illegal activities. ***Tarvers***, 833 F.2d at 1076. Where possible, however, the prosecutor should seek to introduce evidence of an intent to impede the IRS.

23.08 ***STATUTE OF LIMITATIONS***

23.08[1] ***Generally***

The statute of limitations for a conspiracy to evade taxes under the offense clause of section 371 is six years. Similarly, the statute of limitations for a ***Klein*** conspiracy under the defraud clause of section 371 is six years. Both of these offenses are controlled by 26 U.S.C. § 6531, which provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years --
>
> > (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
> >
> > . . . .
> >
> > (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531 (1988).

Occasionally, defendants charged with a tax conspiracy under section 371 will argue that a five year statute of limitations should apply to section 371, pursuant to 18 U.S.C. § 3282, which is the general limitations statute for Title 18 offenses. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See* ***United States v. Aracri***, 968 F.2d 1512, 1517 (2d Cir. 1992); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Lowder***, 492 F.2d 953, 955-56 (4th Cir.), *cert. denied*, 419 U.S. 1092 (1974); ***United States v. Fruehauf***, 577 F.2d 1038, 1070 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); ***United States v. White***, 671 F.2d 1126, 1133-34 (8th Cir. 1982); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. Brunetti***, 615 F.2d 899, 901 (10th Cir. 1980); ***United States v. Waldman***, 941 F.2d 1544, 1548 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 2938 (1992).

23.08[2] ***Beginning of Limitations Period***

The statute of limitations in a conspiracy begins to run from the last overt act proved. ***Grunewald v. United States***, 353 U.S. 391, 397 (1957). *See also* ***United States v. Fletcher***, 928 F.2d 495, 498 (2d Cir.), *cert. denied*, 112 S. Ct. 67 (1991); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); ***United States v. Pinto***, 838 F.2d

426, 435 (10th Cir. 1988).

23.08[3] ***Withdrawal Defense***

The government is not required to prove that each member of a conspiracy committed an overt act within the statute of limitations. ***Hyde v. United States***, 225 U.S. 347, 369-70 (1912). *See also* ***United States v. Read***, 658 F.2d 1225, 1234 (7th Cir. 1981) (interpreting the ***Hyde*** decision). Once the government shows a member joined the conspiracy, their continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See, e.g.*, ***United States v. Juodakis***, 834 F.2d 1099, 1103 (1st Cir. 1987); ***United States v. Barsanti***, 943 F.2d 428, 437 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1474 (1992); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987).

However, a showing of withdrawal before the limitations period (*i.e.*, more than six years prior to the indictment where the limitations period is six years) is a complete defense to conspiracy. ***Read***, 658 F.2d at 1233. The defendant carries the burden of establishing this affirmative defense. ***Juodakis***, 834 F.2d at 1102-03; ***United States v. Borelli***, 336 F.2d 376, 385 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); ***United States v. Lash***, 937 F.2d 1077, 1083 (6th Cir.), *cert. denied*, 112 S. Ct. 397 (1991); ***United States v. Boyd***, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); ***Krasn***, 614 F.2d at 1236; ***United States v. Parnell***, 581 F.2d 1374, 1384 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); ***Finestone***, 816 F.2d at 589. *But see* ***Read***, 658 F.2d at 1236 (burden of production on defendant; burden of persuasion remains on government to negate withdrawal defense); ***United States v. Jannoti***, 729 F.2d 213, 221 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984) (initial burden on defense, then shifted to government); ***United States v. West***, 877 F.2d 281, 289 (4th Cir.), *cert. denied*, 493 U.S. 860 (1989) (government retains burden of persuasion); ***United States v. MMR Corp.***, 907 F.2d 489, 501 (5th Cir. 1990) (burden is two step process on defense and government); ***Manual of Model Criminal Jury Instructions for the Ninth Circuit*** (1992 Ed.), § 8.05D, p.122. (following ***Read***).

In ***United States v. U.S. Gypsum Co.***, 438 U.S. 422 (1978), the Supreme Court defined withdrawal from a conspiracy to mean:

> Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

438 U.S. at 464-65. The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See* ***Juodakis***, 834 F.2d at 1102; ***Lash***, 937 F.2d at 1083; ***Krasn***, 614 F.2d at 1236; ***Gonzalez***, 797 F.2d at 917; ***Finestone***, 816 F.2d at 589.

In short, the government technically is not required to prove that each member of the conspiracy committed an overt act within the statute period. However, in practice, the prosecutor should critically review those conspirators whose membership predates the limitations period, and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

23.09 ***VENUE***

The crime of conspiracy is a continuing offense, the prosecution of which is proper "in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a) (1988); ***United States v. Tannenbaum***, 934 F.2d 8, 12 (2d Cir. 1991).

Thus, venue is appropriate in any district where the agreement was made or where an overt act in furtherance of the conspiracy was committed. ***Hyde v. United States***, 225 U.S. 347, 363 (1912); ***United States v. Uribe***, 890 F.2d 554, 558 (1st Cir. 1989); ***United States v. Ramirez-Amaya***, 812 F.2d 813, 816 (2d Cir. 1987); ***United States v. Sandini***, 803 F.2d 123, 128 (3d Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987); ***United States v. Levy Auto Parts of Canada***, 787 F.2d 946, 952 (4th Cir.), *cert. denied*, 479 U.S. 828 (1986); ***United States v. Maceo***, 947 F.2d 1191, 1200-01 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1510 (1992); ***United States v. Turner***, 936 F.2d 221, 226 (6th Cir. 1991); ***United States v. Andrus***, 775 F.2d 825, 846 (7th Cir. 1985); ***United States v. Moeckly***, 769 F.2d 453, 460-61 (8th Cir. 1985), *cert. denied*, 475 U.S. 1015

(1986); ***United States v. Ahumada-Avalos***, 875 F.2d 681, 682 (9th Cir.), *cert. denied*, 493 U.S. 837 (1989); ***United States v. Record***, 873 F.2d 1363, 1366 (10th Cir. 1989); ***United States v. Smith***, 918 F.2d 1551, 1557 (11th Cir. 1990); ***United States v. Lam Kwong-Wah***, 924 F.2d 298, 301 (D.C. Cir. 1991).

The government is not required to show that all of the members of a conspiracy committed an overt act within the district of prosecution. So long as one conspirator committed an overt act within the district, venue is established as to all members of the conspiracy. *See*, *e.g.*, ***Uribe***, 890 F.2d at 558; ***United States v. Tannenbaum***, 934 F.2d 8, 13 (2d Cir. 1991); ***United States v. Meyers***, 847 F.2d 1408, 1411 (9th Cir. 1988).

The government's burden of proof in establishing venue is by a preponderance of the evidence. ***United States v. Moeckly***, 769 F.2d 453, 460 (8th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); ***Record***, 873 F.2d at 1366; ***Smith***, 918 F.2d at 1557. Moreover, the overt act serving as the basis of the venue need not be committed within the statute of limitations. *See* ***Tannenbaum***, 934 F.2d at 13 (rules governing venue and limitations serve different purposes).

Courts have also held that "where a criminal conspirator commits an act in one district which is intended to further a conspiracy by virtue of its effect in another district, the act has been committed in both districts and venue is properly laid in either." ***United States v. Lewis***, 676 F.2d 508, 511 (11th Cir. 1982), *cert. denied*, 459 U.S. 976 (1983); ***United States v. Brown***, 739 F.2d 1136, 1148 (7th Cir.), *cert. denied*, 469 U.S. 933 (1984). Finally, the government may rely on an overt act not alleged in the indictment as the basis for venue. ***United States v. Schwartz***, 535 F.2d 160, 164-65 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. 26 U.S.C. § 7214(a)(4) contains a provision prohibiting conspiracy to defraud the United States. However, this statute only applies to officers and employees of the United States acting in connection with any revenue law of the United States.

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24.00 *FALSE STATEMENTS*

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24.01 *STATUTORY LANGUAGE: 18 U.S.C. § 1001*

§1001. ***Statements or entries generally***

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined* not more than $10,000 or imprisoned not more than five years, or both.
>
> *As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offense set forth in section 1001, the maximum permissible fine for offenses committed after December 31, 1984, is increased to at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

24.02 *GENERALLY*

This statute has a history of more than one hundred years. It was first enacted "in the wake of a spate of (monetary) frauds upon the Government." ***United States v. Bramblett***, 348 U.S. 503, 504 (1955). Over the years, it was gradually expanded so that it would cover all frauds, including nonmonetary fraud, against all branches of the federal government. ***Bramblett***, 348 U.S. at 506-07. The courts have recognized that the statute is necessarily couched in very broad terms. "Congress could not hope to foresee the multitude and variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex governmental machinery, a complexity that renders vital the truthful reporting of material data." ***United States v. Beer***, 518 F.2d 168, 170 (5th Cir. 1975); *see also* ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983).

The statute technically describes two distinct offenses concerning any matter within the jurisdiction of a department of agency of the United States:

1. Falsifying, concealing, or covering up a material fact by any trick, scheme, or device.
2. Making false, fictitious, or fraudulent statements or representations; or making or using any false writing or document.

Each of these offenses requires different elements of proof. ***United States v. Mayberry***, 913 F.2d 719, 722 n.7 (9th Cir. 1990).

The purpose of section 1001 is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from" false information. ***United States v. Gilliland***, 312 U.S. 86, 93 (1941); *see* ***Bryson v. United States***, 396 U.S. 64, 70 (1969); ***United States v. Brack***, 747 F.2d 1142, 1151-52 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); ***United States v. Olson***, 751 F.2d 1126, 1128 (9th Cir. 1985).

In the criminal tax context, the statute is normally used in connection with false documents or statements submitted to an Internal Revenue agent during the course of an audit or investigation. The statute is not normally used in the case of a false statement on a return because, if the return is signed under the penalties of perjury, as most are, section 7206(1) of the Internal Revenue Code (Title 26) is considered a more appropriate charge.

Recently, the statute's prohibition against concealing material facts from governmental agencies has been utilized in money laundering prosecutions. Courts have held that individuals who cause financial institutions to fail to file currency transaction reports as required by law are guilty of violating section 1001. ***United States v. Nersesian***, 824 F.2d 1294 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987); ***United States v. Richeson***, 825 F.2d 17 (4th Cir. 1987); ***United States v. Cure***, 804 F.2d 625 (11th Cir. 1986). Addition to the statutory scheme of anti-structuring provisions imposing criminal liability on those who cause financial institutions to fail to file currency transaction reports has eliminated the need to use section 1001 to prosecute such violations. *See* 31 U.S.C. § 5324.

Pursuant to Tax Division Directive No. 71, October 3, 1989, before a section 1001 charge

may be included in a criminal tax indictment, authority must be obtained from the Director, Criminal Enforcement Sections, Tax Division. The Tax Division prefers to restrict authorization of section 1001 prosecutions to those instances where the false statement was made under oath or in writing, though each request will be considered on its merits.

24.03 ***ELEMENTS***

Limiting this discussion to offenses involving false statements or representations and false documents, the government must prove the following elements beyond a reasonable doubt to establish a violation of section 1001:

1. The defendant made a false statement or representation, or made or used a false document;
2. In a matter within the jurisdiction of a department or agency of the United States;
3. The false statement or representation, or false document related to a material matter; and,
4. The defendant acted willfully and with knowledge of the falsity.

United States v. Barr, 963 F.2d 641, 645 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); ***United States v. Norris***, 749 F.2d 1116, 1121-22 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); ***United States v. Race***, 632 F.2d 1114, 1116 (4th Cir. 1980); ***United States v. Baker***, 626 F.2d 512, 514 (5th Cir. 1980); ***United States v. Steele***, 933 F.2d 1313, 1318-19 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***United States v. Brack***, 747 F.2d 1142, 1146 n.4 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); ***United States v. Gilbertson***, 588 F.2d 584, 589 (8th Cir. 1978); ***United States v. Irwin***, 654 F.2d 671, 675-76 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); ***United States v. Gafczk***, 847 F.2d 685, 690 (11th Cir. 1988). *But see* ***United States v. Capo***, 791 F.2d 1054, 1068-69 (2d Cir. 1986) (materiality is not an element of section 1001 violation).

24.04 *FALSE STATEMENTS OR REPRESENTATIONS*

The term "statement" as used in section 1001 has been given a broad interpretation. The Supreme Court has recognized that the term includes both oral and written statements. ***United States v. Beacon Brass Co.***, 344 U.S. 43, 46 (1952). Either can be a violation of section 1001. The Second Circuit, in ***United States v. McCue***, 301 F.2d 452 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962), stated that:

> The appellant's contention that Section 1001 does not apply to oral statements is disputed by the language of the statute itself which penalizes the making of 'any false, fictitious or fraudulent statements' as well as the making or using of 'any false writing or document.'

McCue, 301 F.2d at 456 (citations omitted); *see also* ***United States v. Massey***, 550 F.2d 300, 305 (5th Cir. 1977); ***United States v. Steele***, 933 F.2d 1313, 1318 n.4 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***United States v. Fitzgibbon***, 619 F.2d 874, 878 (10th Cir. 1980).

There also is no requirement that the statement be under oath. The statute applies to unsworn, as well as sworn, statements. ***United States v. Adler***, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); ***Massey***, 550 F.2d at 305; ***United States v. Isaacs***, 493 F.2d 1124, 1157 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); ***Neely v. United States***, 300 F.2d 67, 70 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962).

A statement is false for purposes of this statute even if it is a technically true statement, but it is knowingly put to a false use. In ***Peterson v. United States***, 344 F.2d 419 (5th Cir. 1965), in response to the question of whether a payment was for past earned fees or fees to be earned, the defendant submitted a letter stating that his records showed the payment was an accrued fee, and accordingly, the payment was a deductible expense for a particular year. The court held that even if the literal language of the letter was true as to what the records reflected, it was clearly open to the jury to find that the statement in the letter as to the payment was false. ***Peterson***, 344 F.2d at 427. *See also* ***United States v. Brack***, 747 F.2d 1142, 1150 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216

(1985) ("even though the statements were accurate as to the total amount of the contract, they constituted false statements within the meaning of section 1001 by concealing the fraudulent nature of the contract"). *Cf.* ***Bronston v. United States***, 409 U.S. 352, 358 n.4 (1973) (fraudulent statements include "intentional creation of false impressions by a selection of literally true representations") (citations omitted).

A forged endorsement on a tax refund check has been held to be a false statement within the ambit of section 1001. ***Gilbert v. United States***, 359 F.2d 285 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966). In ***Gilbert***, the defendant, an accountant, endorsed checks with the taxpayer's name and his own name, and then deposited the checks into his (the defendant's) trust account. The court acknowledged that the defendant "made no pretense that the payees had themselves executed the endorsements," but held nevertheless that his endorsements constituted unlawful misrepresentations. ***Gilbert***, 359 F.2d at 286.

Section 1001 prohibits false statements generally, not just those statements or documents required by law or regulation to be kept or furnished to a federal agency. ***United States v. De Rosa***, 783 F.2d 1401, 1407 (9th Cir.), *cert. denied*, 477 U.S. 908 (1986); ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985); ***United States v. Irwin***, 654 F.2d 671, 678 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); ***United States v. Diaz***, 690 F.2d 1352, 1358 (11th Cir. 1982). Thus, it is not necessary that the alleged false statement be a statement that the defendant was required by law to make. ***Bryson v. United States***, 396 U.S. 64 (1969); ***United States v. Knox***, 396 U.S. 77 (1969); ***Neely***, 300 F.2d at 71; ***Knowles v. United States***, 224 F.2d 168, 172 (10th Cir. 1955). As the court stated in ***Bryson***, 396 U.S. at 72:

> Our legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

The lack of a need to prove a statutory or regulatory requirement for a section 1001 violation pertains only to the situation where the defendant is charged with making a false

statement. The proof for such a prosecution is substantially different, in this regard, from the proof needed for a prosecution alleging concealment as a violation of section 1001. If the defendant is charged with concealing or failing to disclose material facts, the government must prove that the defendant had a legal duty to disclose the material facts at the time the defendant allegedly concealed them. ***United States v. Dorey***, 711 F.2d 125, 128 (9th Cir. 1983); ***Irwin***, 654 F.2d at 678-79. *But see* ***United States v. Nersesian***, 824 F.2d 1294, 1310-13 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987) (recognizing a split in the circuits as to whether a bank customer can be prosecuted under the concealment provision of section 1001 for failing to reveal information which would trigger a duty on the part of a bank to file a currency transaction report where there is no statutory duty on the part of the customer to disclose); ***United States v. Richeson***, 825 F.2d 17, 20 (4th Cir. 1987) (by operation of 18 U.S.C. § 2, bank customer found liable as principle for violating section 1001 despite lack of statutory duty on customer).

In contrast to perjury statutes, 18 U.S.C. § 1621, *et seq.*, there are no strict requirements under section 1001 for the method of proving the falsity of statements. Thus, falsity may be proven by the uncorroborated testimony of a single witness. ***United States v. Marchisio***, 344 F.2d 653, 665 (2d Cir. 1965); ***Gevinson v. United States***, 358 F.2d 761, 766 (5th Cir.), *cert. denied*, 385 U.S. 823 (1966); ***United States v. Carabbia***, 381 F.2d 133, 137 (6th Cir.), *cert. denied*, 389 U.S. 1007 (1967); ***United States v. Killian***, 246 F.2d 77, 82 (7th Cir. 1957); ***Neely***, 300 F.2d at 70; ***Travis v. United States***, 269 F.2d 928, 936 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961); ***United States v. Fern***, 696 F.2d 1269, 1275 (11th Cir. 1983). Note that under 18 U.S.C. § 1623, the two-witness rule does not apply to perjury for false declarations in court proceedings or before grand juries. Section 1001 nevertheless differs from 18 U.S.C. § 1623 in that the perjury conviction requires proof of an oath while a false statement conviction does not. ***United States v. D'Amato***, 507 F.2d 26, 29 (2d Cir. 1974).

24.05 *MATTER WITHIN JURISDICTION OF A FEDERAL AGENCY*

To establish a violation of section 1001, the false statement or representation must be shown to have been made in a matter within the jurisdiction of a department or agency of the United States. Relying upon Congressional intent, courts have given the term "jurisdiction" an expansive reading. In ***United States v. Rodgers***, 466 U.S. 475 (1984), the Court stated that "[t]he term 'jurisdiction' should not be given a narrow or technical meaning for purposes of Section 1001." ***Rogers***, 466 U.S. at 480 (quoting ***Bryson v. United States***, 396 U.S. 64, 70 (1969)). Consequently, the jurisdiction of a department or agency within the meaning of the statute is not limited to the power to make final or binding determinations. Rather, it includes, as well, matters within an agency's investigative authority. ***Rodgers***, 466 U.S. at 480. Thus, "a 'statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under Section 1001.'" ***Rodgers***, 466 U.S. at 4512 (quoting ***Bryson***, 396 U.S. at 70-71); *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1300 (2d Cir.), *cert denied*, 112 S. Ct. 63 (1991). Likewise, a false statement submitted to a federal agency falls within the statute if the false statement relates to a "matter as to which the Department had the power to act." ***Ogden v. United States***, 303 F.2d 724, 743 (9th Cir. 1962), *after remand*, 323 F.2d 818 (9th Cir. 1963), *cert. denied*, 376 U.S. 973 (1964); *see* ***United States v. Adler***, 380 F.2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); ***United States v. Cartright***, 632 F.2d 1290, 1292 (5th Cir. 1980); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982).

Whether a matter is within the jurisdiction of a federal agency or department is a question of law. ***Pitts v. United States***, 263 F.2d 353, 358 (9th Cir.), *cert. denied*, 360 U.S.935 (1959); ***United States v. Goldstein***, 695 F.2d 1228, 1236 (10th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983); ***United States v. Gafyczk***, 847 F.2d 685, 690 (11th Cir. 1988); ***United States v. Lawson***, 809 F.2d 1514, 1517 (11th Cir. 1987).

It is uniformly conceded that the Internal Revenue Service is a "department or agency of the United States" within the meaning of 18 U.S.C. § 1001. ***United States v. McCue***, 301 F.2d 452, 455 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); ***United States v. Isaacs***, 493 F.2d 1124, 1156-57

(7th Cir.), *cert. denied*, 417 U.S. 976 (1974); ***United States v. Morris***, 741 F.2d 188, 190-91 (8th Cir. 1984); ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977); ***United States v. Ratner***, 464 F.2d 101 (9th Cir. 1972); ***United States v. Fern***, 696 F.2d 1269 (11th Cir. 1983). *See also* ***United States v. Knox***, 396 U.S. 77, 80-81 (1969) (Court simply accepted, without directly holding, the applicability of the statute to false documents submitted to the Internal Revenue Service). The statute, as noted above, has its origins in protecting the government from monetary frauds. ***United States v. Bramblett***, 348 U.S. 503, 504-7 (1955). Clearly, this could not be accomplished without prohibiting false representations made to the Internal Revenue Service on matters relating to tax liability.

For federal agency jurisdiction, the false statement need not be made directly to or even received by the agency or department. ***United States v. Gibson***, 881 F.2d 318, 322 (6th Cir. 1989); ***United States v. Oren***, 893 F.2d 1057, 1064 (9th Cir. 1990); ***United States v. Suggs***, 755 F.2d 1538, 1542 (11th Cir. 1985). If the defendant starts the statement or document in motion, that is sufficient. For example, a defendant who falsely endorsed tax refund checks and deposited them in his bank account was guilty of violating section 1001. ***Gilbert v. United States***, 359 F.2d 285, 287 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966). Moreover, false statements made to state, local or even private entities who either receive federal funds or are subject to federal supervision can form the basis of a section 1001 violation. *See* ***Gibson***, 881 F.2d at 322 (overstated invoices submitted by private party to Tennessee Valley Authority was a matter within federal jurisdiction).

Since the false statements or documents need not actually be received by the federal agency, the Tax Division has authorized prosecution pursuant to section 1001 for false claims which have been prepared, but have yet to be filed with the Internal Revenue Service. This scenario occurs, for example, in electronic filing prosecutions where the filer has been apprehended either after or at the time of the presentation of his false claim to a tax filing service, but before transmission is effectuated. Because the false claim has not been submitted to the Service, the commonly used 18 U.S.C. § 287 charge is unavailable. Section 1001 provides a mechanism by which these false

claims can be prosecuted. *See* Section 22.07, *infra*. Even though section 1001 is interpreted broadly, it is not proper to charge an individual with violating this section for making a false statement or introducing false documents as evidence in a judicial proceeding. The courts reject such a charge due to the lack of federal agency jurisdiction. ***United States v. Abrahams***, 604 F.2d 386, 393 (5th Cir. 1979); ***United States v. Erhardt***, 381 F.2d 173, 175 (6th Cir. 1967); ***United States v. Mayer***, 775 F.2d 1387 (9th Cir. 1985). Accordingly, a false statement submitted to a Department of Justice attorney in response to a federal grand jury subpoena has been held not prosecutable under section 1001. In ***United States v. Deffenbach Industries, Inc.***, 957 F.2d 749, 753 (10th Cir. 1992), the Tenth Circuit held that even though the false statement was submitted to a government attorney, and not directly to the grand jury, the attorney was acting "under the umbrella" of the grand jury which constituted part of the judicial process and, therefore, the false statement could not be prosecuted under section 1001.

A section 1001 charge, however, is viable where the false statement made by a criminal defendant in a judicial proceeding relates merely to an administrative matter. Hence, where a criminal defendant gave his brother's name, rather than his own, at the time of his first appearance before a federal magistrate, the Fourth Circuit upheld his section 1001 conviction. ***United States v. Holmes***, 840 F.2d 246, 248 (4th Cir.), *cert. denied*, 488 U.S. 831 (1988). In addition, false statements made during federal civil proceedings are actionable under section 1001 where such statements involve a "deception upon a federal investigative or regulatory agency." ***Lawson***, 809 F.2d at 1519 (presentation of false documents during a deposition was actionable under section 1001 even though the government was not officially a party because the government had a stake in the outcome).

24.06 ***MATERIALITY***

Although the word "material" is only explicitly mentioned in the first clause of section 1001, which refers to the falsification or concealment of a material fact, most courts "have read

such a requirement into . . . [the false statement and false document clauses] . . . 'in order to exclude trivial falsehoods from the purview of the statute.'" ***Hughes v. United States***, 899 F.2d 1495, 1498 (6th Cir. 1990) (citing ***United States v. Abadi***, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)); *see also* ***United States v. Baker***, 626 F.2d 512, 514 & n.5 (5th Cir. 1980); ***United States v. Adler***, 623 F.2d 1287, 1291 (8th Cir. 1980); ***United States v. Valdez***, 594 F.2d 725, 728 (9th Cir. 1979); ***United States v. Gafyczk***, 847 F.2d 685, 691 (11th Cir. 1988) (citing ***United States v. Lichenstein***, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980)). Thus, "[f]alse statements made to conceal a fraud are no less material for the purposes of Section 1001 than false statements designed to induce a fraud." ***United States v. Brack***, 747 F.2d 1142, 1150 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985). Even though materiality has been grafted onto the statutory scheme of the second and third clauses, failure to allege the false statement's or false document's materiality is not fatal to an indictment where the facts "advanced by the pleader warrant the inference of materiality." ***United States v. Oren***, 893 F.2d 1057, 1063 (9th Cir. 1990).

Unlike the other circuits, the Second Circuit has refused to read a materiality requirement into the second and third clauses of the statute. The Second Circuit has repeatedly held that "materiality is not an element of the offense of making a false statement in violation of Section 1001." ***United States v. Elkin***, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984). *See also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. Silva***, 715 F.2d 43, 49 (2d Cir. 1983) (the court lists elements of a section 1001 false statement prosecution without mentioning materiality); ***United States v. Gribben***, 792 F. Supp. 960 (S.D.N.Y. 1992), *rev'd on other grounds*, 984 F.2d 47 (2d Cir. 1993); ***United States v. Sprecher***, 783 F. Supp. 133, 157 (S.D.N.Y. 1992).

For those courts requiring a showing of materiality, the commonly used test is whether the falsity or concealment had a natural tendency to influence, or was capable of influencing, the agency or department. ***United States v. Norris***, 749 F.2d 1116, 1122 (4th Cir. 1984), *cert. denied*,

471 U.S. 1065 (1985); ***Baker***, 626 F.2d at 514 & n.5; ***United States v. Steele***, 933 F.2d 1313, 1319 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***Brack***, 747 F.2d at 1147; ***United States v. Jones***, 464 F.2d 1118, 1122 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973); ***United States v. De Rosa***, 783 F.2d 1401, 1408 (9th Cir.), *cert. denied*, 477 U.S. 908 (1986); ***United States v. Green***, 745 F.2d 1205, 1208 (9th Cir. 1984); ***Gonzales v. United States***, 286 F.2d 118, 122 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961); ***United States v. Grizzle***, 933 F.2d 943, 948 (11th Cir.), *cert. denied*, 112 S. Ct. 271 (1991); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982). *Accord* ***Kungys v. United States***, 485 U.S. 759 (1987) (false statements to Immigration and Naturalization Service in violation of 8 U.S.C. § 1451(a)); ***United States v. Goberman***, 458 F.2d 226, 229 (3d Cir. 1972) (18 U.S.C. § 1014 prosecution). As the Ninth Circuit stated:

> [T]he test for determining the materiality of the falsification is whether the falsification is calculated to induce action or reliance by an agency of the United States, -- is it one that could affect or influence the exercise of governmental functions, -- does it have a natural tendency to influence or is it capable of influencing agency decision?

United States v. East, 416 F.2d 351, 353 (9th Cir. 1969).

It is not essential that the agency or department actually rely on or be influenced by the falsity or concealment. ***Norris***, 749 F.2d at 1121; ***United States v. Markham***, 537 F.2d 187, 196 (5th Cir. 1976); ***Brack***, 747 F.2d at 1147; ***Jones***, 464 F.2d at 1122; ***Green***, 745 F.2d at 1208; ***United States v. Myers***, 878 F.2d 1142, 1143 (9th Cir. 1989); ***Gonzales***, 286 F.2d at 122; ***United States v. Lawson***, 809 F.2d 1514, 1520 (11th Cir. 1987); ***United States v. Fern***, 696 F.2d 1269, 1275 (11th Cir. 1983); ***Diaz***, 690 F.2d at 1357. *Accord* ***Goberman***, 458 F.2d at 229. Accordingly, in ***United States v. Parsons***, the Tenth Circuit found that false Forms 1099 were material despite the defendant's argument that the amount claimed "were so ludicrous that no IRS agent would believe them." ***Parsons***, 967 F.2d 452, 455 (10th Cir. 1992). On the contrary, the court explained

that the very fact that the amounts were high increased the likelihood that the Service would be influenced by the forms' contents:

> The large amounts involved do not reduce the forms to scraps of blank paper. If anything, the reverse is the case. They cry out for attention and it would be a blameworthy administration to ignore them.

Parsons, 967 F.2d at 455.

Nor is it required that the false statement be one which the defendant was obligated by statute or regulation to make. ***United States v. Hutchison***, 1994 WL 193972 (9th Cir. May 19, 1994) (rejected argument that false Forms 1099-S were not material because defendant was not required to file them). Moreover, as stated above, the federal agency need not actually receive the statement. ***United States v. Hooper***, 596 F.2d 219, 223 (7th Cir. 1979); ***United States v. Smith***, 740 F.2d 734, 737 (9th Cir. 1984). Simply stated, "[t]he false statement must . . . have the capacity to impair or pervert the functioning of a government agency." ***Lichenstein***, 610 F.2d at 1278.

Likewise, proof of pecuniary or property loss to the government is not necessary. ***United States v. Bramblett***, 348 U.S. 503, 507 n.4 (1955); ***Lichenstein***, 610 F.2d at 1278-79. For example, the fact that the government had begun its own tax investigation did not make the defendant's statements regarding income tax entries immaterial to a section 1001 prosecution. ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977).

It should be noted that there is a split in the circuits as to whether "materiality" is a question of law for the court or a question of fact for the jury. The Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have held that materiality is a question of law. ***Norris***, 749 F.2d at 1122; ***Baker***, 626 F.2d at 514 n.4; ***United States v. Abadi***, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); ***United States v. Hicks***, 619 F.2d 752, 758 (8th Cir. 1980); ***Grizzle***, 933 F.2d at 948; ***United States v. Rigson***, 874 F.2d 774, 779 (11th Cir.), *cert. denied*, 493 U.S. 958 (1989); ***Fern***, 696 F.2d at 1274. The Ninth and Tenth Circuits, on the other hand, have held that materiality is a factual question. ***United States v. Gaudin***, No. 90-30334 (9th Cir. June 21, 1994) (*en banc*); ***De Rosa***,

783 F.2d at 1408 (substantial evidence from which the jury could find materiality); ***Valdez***, 594 F.2d at 729; ***United States v. Irwin***, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

24.07 ***WILLFULNESS***

To establish a section 1001 violation, the government must prove that the defendant acted knowingly and willfully. ***United States v. Hildebrandt***, 961 F.2d 116, 118 (8th Cir.), *cert. denied*, 113 S. Ct. 225 (1992). As used in section 1001, the term "willful" simply means that the defendant did the forbidden act (*e.g.*, made a false, fictitious, or fraudulent statement) deliberately and with knowledge. ***Hildebrandt***, 961 F.2d at 118.

The government need not prove an intent to deceive. ***United States v. Yermian***, 468 U.S. 63, 69, 73 (1984); ***Hildebrandt***, 961 F.2d at 118. Nor need the government prove that the defendant had actual knowledge of federal agency jurisdiction -- *i.e.*, knowledge that the statements were made within federal agency jurisdiction. ***Yermian***, 468 U.S. at 69, 73; ***Hildebrandt***, 961 F.2d at 118-19. Furthermore, several courts have held that the element of knowledge can be satisfied by proof of "willful blindness" or "conscious avoidance." ***United States v. Sarrantos***, 455 F.2d 877, 881 (2d Cir. 1972); ***United States v. Abrams***, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); ***United States v. Evans***, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

For a further discussion of willfulness, *see, e.g.*, Sections 8.06, *supra*, and 40.09, *infra*.

24.08 ***DEFENSES***

24.08[1] ***Exculpatory No Doctrine***

Due to the sweeping language of this statute and the potential for governmental abuse, many courts have created an exception to prosecution which is commonly referred to as the "exculpatory no" doctrine. ***United States v. Medina de Perez***, 799 F.2d 540, 543-44 (9th Cir. 1986) (citing

United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972)). This judicially-created doctrine prohibits the government from prosecuting individuals who merely provide negative responses to questions put to them in the course of a federal criminal investigation. [2] The courts, however, have failed to formulate a single cohesive test concerning the doctrine's applicability.

The Fourth, Eighth and Ninth Circuits have a adopted a five-part test to determine the doctrine's applicability:

1. the false statement must be unrelated to a privilege or claim against the government;
2. the declarant must be responding to inquiries initiated by a federal agency or department;
3. a truthful answer would involve self-incrimination;
4. the government agency's inquiries must not constitute a routine exercise of administrative as opposed to investigative responsibility; and,
5. the false statement must not impair the basic functions entrusted by law to the agency.

United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); ***United States v. Taylor***, 907 F.2d 801, 805-7 (8th Cir. 1990); ***United States v. Becker***, 855 F.2d 644, 646 (9th Cir. 1988) (citing ***United States v. Medina de Perez***, 799 F.2d 540 (9th Cir. 1986)). Because the test is phrased in the conjunctive, the doctrine is only invoked where the false statement interferes with an agency's functions *and* when a truthful response would have incriminated the defendant. ***Becker***, 855 F.2d at 646; *see also* ***United States v. Morris***, 741 F.2d 188, 191 (8th Cir. 1984) ("exculpatory no" doctrine does not apply where an affirmative response to an IRS inquiry would not have involved possible self-incrimination); ***United States v. Myers***, 878 F.2d 1142, 1144 (9th Cir. 1989) ("exculpatory no" doctrine applied to statements made in response to Secret Service inquiries, but not to FAA inquiries concerning the same incident).

This five-part test, however, has been explicitly rejected by the Sixth Circuit. ***United States***

v. Steele, 933 F.2d 1313, 1320 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991). Indeed, although the court expressed concerns relating to the sweeping language of the statute, it concluded that these concerns did not legitimize the broad exception to the statute created by the five-part test, noting that the materiality requirement of the statute reasonably limited its applicability. In addition, the court noted that the mechanism of prosecutorial discretion upon which Congress appeared to have primarily relied was a valid means of limiting the potential application of the statute. ***Steele***, 933 F.2d at 1321.

The Second, Third and District of Columbia Circuits have refused to either adopt or reject the "exculpatory no" doctrine. ***United States v. Bakhtiari***, 913 F.2d 1053, 1061-62 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1319 (1991); ***United States v. Barr***, 963 F.2d 641, 647 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); ***United States v. White***, 887 F.2d 267, 273-74 (D.C. Cir. 1989). The Second Circuit, however, has indicated that if it were to adopt the doctrine, it would narrowly construe its applicability. Any statement that went beyond a simple "no" by containing affirmative misrepresentations would not fall within the exception. ***Bakhtiari***, 913 F.2d at 1062 (citing ***United States v. Capo***, 791 F.2d 1054, 1069 (2d Cir. 1986), *rev'd in part on other grounds*, 817 F.2d 947 (2d Cir. 1987)).

Despite a long history of adherence to the "exculpatory no" doctrine,[1] the Fifth Circuit, sitting *en banc*, recently overruled that exception to application of section 1001. In a comprehensive opinion, the Court concluded that there was no support for the doctrine in either the statute or reason. ***United States v. Rodriguez-Rios***, No. 92-8257 (5th Cir. Feb. 11, 1994) (*en banc*).

The law in this area remains in a state of flux. Consequently, when faced with a situation where an "exculpatory no" defense may be a viable defense to a charge under section 1001, thorough research of the appropriate circuit law should be undertaken.

24.08[2] ***Wrong Statute Charged***

In ***United States v. Fern***, 696 F.2d 1269 (11th Cir. 1983), the defendant argued that the enactment of 26 U.S.C. § 7207 made section 1001 inapplicable to a situation involving false statements made to the Internal Revenue Service. *See* Section 16.00 *supra*, for a discussion on section 7207. Since section 7207 is a misdemeanor and section 1001 is a felony, the argument is an important one. Although the Eleventh Circuit indicated a preference for specific statutes and noted that section 1001 is the more general statute and provides for a greater penalty, the court held that the government still may choose to prosecute under section 1001 when a false statement has been made to the Internal Revenue Service. ***Fern***, 696 F.2d at 1273-74.

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1 *See e.g.*, ***United States v. Hajecate***, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); ***United States v. Schnaiderman***, 568 F.2d 1208, 1212 (5th Cir. 1978); ***United States v. Bush***, 503 F.2d 813 (5th Cir. 1974).

A similar argument was raised by the defendant in ***United States v. Greenberg***, 268 F.2d 120 (2d Cir. 1959). There, the defendant claimed that he should have been prosecuted under the perjury statute, 18 U.S.C. § 1621, instead of section 1001, for aiding and abetting the submitting of false payroll reports to the Navy. The court held that the government was not barred from prosecuting under section 1001 merely because it also could have proceeded under section 1621: "a single act or transaction may violate more than one criminal statute . . . [and] the government had the authority to decide under which statute the offenses here were to be prosecuted." ***Greenberg***, 268 F.2d at 122. *See also* ***United States v. Bilzerian***, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. D'Amato***, 507 F.2d 26, 29 (2d Cir. 1974); ***United States v. Hajecate***, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (government has discretion to choose between section 1001 and 26 U.S.C. § 7206); ***United States v. Hughes***, 964 F.2d 536 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (double jeopardy did not prevent multiple convictions for section 1001 and 26 U.S.C. § 7204 for filing false Forms W-2).

24.08[3] ***Variance***

In ***United States v. Lambert***, 501 F.2d 943 (5th Cir. 1974), the defense of variance between the charge and the proof was upheld, and the indictment dismissed. The indictment specified certain false statements that the defendant allegedly made, but the evidence at trial did not establish that the defendant had made the specific statements charged. This decision emphasizes the need to use the precise false statements made when drafting charges and not generic language or a summary.

24.09 ***VENUE***

Venue in a section 1001 prosecution lies where the false statement was made or the false document was prepared and signed or where it was filed or presented. ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. Mendel***, 746 F.2d 155, 165 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); ***United States v. Herberman***, 583 F.2d 222, 225-27 (5th Cir. 1978). *See* ***United States v. Greene***, 862 F.2d 1512, 1515 (11th Cir.), *cert. denied*, 493 U.S. 809 (1989); ***United States v. Wuagneux***, 683 F.2d 1343, 1356 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); ***United States v. Reed***, 601 F. Supp. 685, 724 (S.D.N.Y. 1985). The general venue statute, 18 U.S.C. § 3237(a), provides that any offense "begun in one district and completed in another . . . may be prosecuted in any district in which such offense was begun, continued, or completed." Thus, in the case of a scheme, venue should lie where any overt act in furtherance of the scheme occurred.

In a case where the false statements were forged endorsements on tax refund checks, it was held that venue was proper in the district where the defendant deposited the checks into his bank account. ***Gilbert v. United States***, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966); *but see* ***Travis v. United States***, 364 U.S. 631 (1961) (venue was proper only in the district where the false document was filed since another federal statute provided that criminal penalties would attach for false affidavits on file with the National Labor Relations Board, and therefore, there was no federal jurisdiction until the NLRB actually received the affidavit); ***United States v. DeLoach***, 654 F.2d 763, 766-767 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 933 (1981) (limiting ***Travis*** to its facts).

Venue need only be established by a preponderance of the evidence, and not by proof beyond a reasonable doubt. Furthermore, such proof can be by circumstantial evidence alone. Direct evidence is not required. ***Wuagneux***, 683 F.2d at 1356-57.

24.10 *STATUTE OF LIMITATIONS*

The statute of limitations is five years for prosecutions under section 1001. 18 U.S.C. § 3262. The statute of limitations starts to run when the crime is completed, which is when the false statement is made or the false document is submitted. ***United States v. Roshko***, 969 F.2d 9, 12 (2d Cir. 1992). *See* ***United States v. Smith***, 740 F.2d 734, 736 (9th Cir. 1984). Where a scheme is charged, the statute of limitations does not start running until the scheme ends. ***Bramblett v. United States***, 231 F.2d 489, 491-92 (D.C. Cir.), *cert. denied*, 350 U.S. 1015 (1956).

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1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

2. An early Fifth Circuit case, ***Paternostro v. United States***, 311 F.2d 298 (5th Cir. 1962), sketched out the contours of the doctrine. In that case, a police lieutenant was asked a series of questions by an IRS Special Agent about his knowledge of graft within the police department. His answers were essentially negative responses:

> [H]e made no statement relating to any claim on his behalf against the United States or an agency thereof; he was not seeking to obtain or retain any official position or employment in any agency or department of the Federal Government; and he did not aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government. At most, assuming that appellant's answers to the agent were proved to be false by believable and substantial evidence, considering all he said, the answers were mere negative responses to questions propounded to him by an investigating agent during a question and answer conference, not initiated by the appellant.

Paternostro, 311 F.2d at 305.

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25.00 *TAX MONEY LAUNDERING*

25.00 *TAX MONEY LAUNDERING*

The focus of this chapter is primarily limited to tax-related money laundering involving 26 U.S.C. § 6050I -- Returns Relating to Cash Received in a Trade or Business -- and 18 U.S.C. § 1956(a)(1)(A)(ii) -- Laundering of Monetary Instruments. The Money Laundering Section of the Criminal Division has published a comprehensive two-volume reference guide, entitled ***Money Laundering: Federal Prosecution Manual*** (February 1992).

In addition, prosecutors interested in obtaining further information on money laundering in general, and authorization and consultation requirements in particular, should consult the ***United States Attorneys' Manual*** (USAM), section 9-105.000. With respect to procedures regarding money laundering prosecutions, particular attention is directed to the bluesheet to the ***United States Attorneys' Manual***, dated August 4, 1993. Attention is also directed to Tax Division Directive No. 99, dated March 30, 1993, a copy of which is included in Section 3 of this Manual, providing that, in addition to the requirement in the August 4, 1993, bluesheet that Tax Division authorization is also required for any prosecution under 18 U.S.C. § 1956(a)(1)(A)(ii), Tax Division authorization is required before a money laundering charge may be brought where the specified unlawful activity is based on a violation arising under the internal revenue laws.

25.01 *26 U.S.C. § 6050I -- RETURNS RELATING TO CASH RECEIVED IN TRADE OR BUSINESS (FORMS 8300)*

25.01[1] *Statutory Language: 26 U.S.C. § 6050I*

Section 6050I. RETURNS RELATING TO CASH RECEIVED IN TRADE OR BUSINESS

(a) Cash Receipts of More Than $10,000.--Any person--

(1) who is engaged in a trade or business, and

(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary [of the Treasury] may by regulations prescribe.

(b) Form and Manner of Returns.--A return is described in this subsection if such

return--

(1) is in such form as the Secretary may prescribe,

(2) contains

(A) the name, address, and TIN (taxpayer identification number) of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

(c) Exceptions.--

(1) Cash received by financial institutions.--Subsection (a) shall not apply to--

(A) cash received in a transaction reported under title 31, United States Code, if the Secretary determines that reporting under this section would duplicate the reporting to the Treasury under title 31, United States Code, or

(B) cash received by any financial institution (as defined in subparagraphs (A), (B), (C), (D), (E), (F), (G), (J), (K), (R), and (S) of section 5312(a)(2) of title 31, United States Code.

(2) Transactions occurring outside the United States.--Except to the extent provided in regulations prescribed by the Secretary, subsection (a) shall not apply to any transaction if the entire transaction occurs outside the United States.

(d) Cash Includes Foreign Currency and Certain Monetary Instruments.--For purposes of this section, the term "cash" includes--

(1) foreign currency, and

(2) to the extent provided in regulations prescribed by the Secretary, any monetary instrument (whether or not in bearer form) with a face amount of not more than $10,000.

Paragraph (2) shall not apply to any check drawn on the account of the writer in a financial institution referred to in subsection (c)(1)(B).

(e) Statements to be Furnished to Persons With Respect to Whom Information is Required.--Every person required to make a return under subsection (a) shall furnish to each person whose name is required to be set forth in such return a written statement showing--

(1) the name and address of the person required to make such return, and

(2) the aggregate amount of cash described in subsection (a) received by the person required to make such return.

The written statement required under the preceding sentence shall be furnished to the person on or before January 31 of the year following the calendar year for which the return under subsection (a) was required to be made.

(f) Structuring Transactions to Evade Reporting Requirements Prohibited.--

(1) **In general.**--No person shall for the purpose of evading the return requirements of this section--

(A) cause or attempt to cause a trade or business to fail to file a return required under this section,

(B) cause or attempt to cause a trade or business to file a return required under this section that contains a material omission or misstatement of fact, or

(C) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more trades or businesses.

(2) **Penalties.**--A person violating paragraph (1) of this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section.

25.01[2] ***Treasury Regulations: 26 C.F.R.***

As referred to in 26 U.S.C. § 6050I, the Secretary of the Treasury has promulgated Treasury Regulations to implement the statute, as it is not self-executing. The regulations are composed of both a final and a temporary component, found at 26 C.F.R. § 6050I-1 and 26 C.F.R. § 6050I-1T, respectively.

The final regulations, filed in September of 1986, cover reporting requirements for the receipt of cash payments generally, as well as circumstances when cash is received for the account of another, by agents, or in the form of multiple payments. For amounts received prior to February 3, 1992, "cash" is defined by these regulations as "the coin and currency of the United States or of any other country" and expressly includes both United States notes and Federal Reserve notes. Treas. Reg. § 1.6050I-1(c)(1) (26 C.F.R.) (hereinafter "26 C.F.R. §"). In addition, "trade or business" (26 C.F.R. § 1.6050I-1(c)(6)), "transaction" (26 C.F.R. § 1.6050I-1(c)(7)(i)), "related transactions" (including a specific example involving a criminal attorney being paid in a criminal case) (26 C.F.R. § 1.6050I-1(c)(7)(ii)), and "recipient" (26 C.F.R. § 1.6050I-1(c)(8)) are defined in the regulations.

Exceptions to the reporting requirements are also included and cover cash received by certain financial institutions (as set out in the statute itself), as well as additional exceptions for casinos under various specified circumstances, cash receipts outside the course of a trade or business, and transactions that occur entirely outside the United States, Puerto Rico, or any U.S. possession or territory.

The regulations also prescribe the time, manner, and form of reporting. Form 8300, the reporting document completed by a payee in order to comply with section 6050I, must be filed within 15 days of the receipt of payment or within 15 days of the payment which causes the aggregate amount to exceed $10,000. (26 C.F.R. §1.6050I-1(e)(1).)

Further, payees required to file Forms 8300 with the Service must also furnish notices ("statements") to the payors named therein. The statement must be provided to the payor on or

before January 31 of the calendar year following the year in which the Form 8300 was filed. (26 C.F.R. § 1.6050I-1(f).)

Payments Received After December 31, 1989:

The temporary regulations (26 C.F.R. §1.6050I-1T), enacted in July of 1990, pertain to cash payments received after December 31, 1989. They require persons obligated to make reports under the final regulations (above) to make additional reports each time subsequent cash payments are received within a one-year period for the same transaction or related transactions resulting in an aggregate amount over $10,000. Previously, an additional report was only required when a single subsequent payment exceeded $10,000. The temporary regulations also set forth the time period within which such a report must be made.

To the extent that they are not inconsistent with these temporary regulations, the final regulations remain applicable to cash payments received after 1989.

Payments Received On or After February 3, 1992:

In addition to the final and temporary regulations described above, all payments received on or after February 3, 1992, are also governed by final regulations which came into effect on that date. Under these regulations, the definition of "cash" for purposes of section 6050I is significantly broadened in particular instances to include cashier's checks, bank drafts, traveler's checks, and money orders, so long as they have face values of not more than $10,000. (26 C.F.R. § 1.6050I-1(c)(1)(ii).)

These specified monetary instruments are to be treated as cash only in retail sales of consumer durables, collectibles, in travel or entertainment activity, or in any transactions in which the recipient knows that the instrument is being used to avoid the reporting requirements of section 6050I. (26 C.F.R. §1,6050I-1(c)(1)(ii)(B).) The regulations also provide exceptions to treating the monetary instruments as cash when they are received in certain installment sales, certain down payment plans, or when documentation shows the instruments to be the proceeds of a bank loan. The new terms introduced into the reporting requirements, such as "consumer durable" (26 C.F.R.

§1.6050I-1(c)(2)) and "retail sale" (26 C.F.R. §1.6050I-1(c)(5)), are defined by the regulations, as well.

25.01[3] ***Attorney Fee Reporting***

Attorneys are not excepted from the reporting requirements of section 6050I. Neither the statutory exceptions nor the Treasury Regulations defining them provide any such exclusion. To the contrary, 26 C.F.R. 1.6050I-1(c)(3)(iii), example (2), illustrates, through the use of a hypothetical situation, a transaction in which the lawyer's obligation to file a Form 8300 would arise. In the hypothetical, an attorney represents a client in a criminal case, and ultimately, receives an aggregate fee of $12,000, which the client pays in cash. The regulations specifically state, at the end of example (2), that this "receipt of cash must be reported under this section."

Because the Treasury Regulations were promulgated pursuant to an express delegation of statutory authority, they are "legislative regulations" and are, therefore, entitled to considerable weight in the courts, and unless inconsistent with the statute, have the "force and effect of law." ***Maryland Casualty Co. v. United States***, 251 U.S. 342, 349 (1920); ***Allstate Insurance Co. v. United States***, 329 F.2d 346, 349 (7th Cir. 1964). *See also* ***United States v. Vogel Fertilizer Co.***, 455 U.S. 16, 24 (1982).

Despite their duty to file under section 6050I and the pertinent Treasury Regulations, some attorneys have either filed incomplete Forms 8300 or ignored the reporting requirement altogether. These attorneys claim that the mandated disclosures intrude upon an attorney-client relationship guaranteed by the Sixth Amendment and violate the client's Fifth Amendment rights, the attorney-client privilege, and the attorney's ethical obligations of confidentiality. The Department of Justice has concluded, however, that there is no legal or policy reason to justify an exemption for attorneys from the reporting requirements.

In response to incomplete Forms 8300 filed by law firms, the Internal Revenue Service has served summonses on numerous firms since early 1990, seeking the information necessary to complete the forms. In the first of these section 6050I summons enforcement cases, ***United States***

v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991), the Court of Appeals for the Second Circuit affirmed the district court's ruling to enforce summonses served on attorneys of two New York law firms who failed to comply with section 6050I.

The Second Circuit found that a client's Sixth Amendment right to counsel does not preclude the required disclosure of client identity and fee information on a Form 8300. ***Goldberger & Dubin***, 935 F.2d at 503, 504. In the pre-indictment setting, the Sixth Amendment is not even implicated. Sixth Amendment rights do not attach until "the time that adversary judicial proceedings have been initiated." ***In re Grand Jury Subpoena Served Upon Doe***, 781 F.2d 238, 244 (2d Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1108 (1986) (quoting ***Kirby v. Illinois***, 406 U.S. 682, 688 (1972)). Nor should the possibility that an attorney may ultimately be disqualified from representing a client as a result of making the required disclosures create a Sixth Amendment bar. The likelihood of disqualification, at the summons enforcement stage, is generally speculative. In similar cases involving grand jury subpoenas of attorneys who claim their testimony may later disqualify them from providing representation, courts have required a showing of "actual conflict" between attorney and client rather than "mere speculative assertions" to support a motion to quash. *E.g.*, ***In re Grand Jury Subpoena for Attorney Representing Reyes-Requena***, 913 F.2d 1118, 1130 (5th Cir. 1990); ***In re Grand Jury Subpoenas***, 906 F.2d 1485, 1494 (10th Cir. 1990). *See also* ***In re Grand Jury Subpoena for Attorney Representing Reyes-Requena***, 926 F.2d 1423 (5th Cir. 1991) (in a subsequent proceeding, existence of an actual conflict was established).

In the post-indictment stage, a client is protected by the Sixth Amendment from unnecessary or arbitrary disqualification of his or her counsel. ***Slotnick***, 781 F.2d at 250. The Sixth Amendment, however, does not guarantee that an individual will be represented by counsel of his or her choice. ***Morris v. Slappy***, 461 U.S. 1, 13-14 (1983). The risk of disqualification arising from an attorney's own testimony is determined at an *in limine* hearing by the trial judge who must weigh the probative value of the information which the government seeks against the loss of counsel of the client's choice. Thus, the Sixth Amendment guarantee against arbitrary or

unnecessary disqualification is safeguarded. ***Slotnick***, 781 F.2d at 250. *See also* ***Tornay v. United States***, 840 F.2d 1424, 1430 (9th Cir. 1988). Importantly, section 6050I does not preclude a would-be client from hiring the attorney he or she prefers, since one may avoid the reporting of fees by simply paying the attorney through some means other than cash. ***Goldberger & Dubin***, 935 F.2d at 504.

In addition, the strong governmental interest served by section 6050I in permitting taxation of otherwise hidden income and in tracing funds related to criminal activities may override any Sixth Amendment interest in keeping client identity and fee information confidential. *Cf.* ***Caplin & Drysdale, Chartered v. United States***, 491 U.S. 617 (1989) (strong government interest in recovering forfeitable assets overrides defendant's Sixth Amendment interest in using the assets to pay for his legal defense).

A client's Fifth Amendment privilege against self-incrimination does not shield the client from the disclosure required by section 6050I either. The mere prospect that the disclosure of a client's identity and fee information could incriminate the client is insufficient to defeat the strong policies embodied by the statute. *Cf.* ***United States v. Dichne***, 612 F.2d 632, 638-41 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (mere possibility of self-incrimination does not outweigh societal interest in the disclosure requirements of the Bank Secrecy Act). Further, section 6050I targets cash transactions regardless of their purpose and does not require disclosure of information that is necessarily criminal. ***Goldberger & Dubin***, 935 F.2d at 503. In any event, there is no compulsion being exercised against the client, and hence, no basis for a Fifth Amendment claim on behalf of the client. ***Couch v. United States***, 409 U.S. 322, 329 (1973).

Moreover, section 6050I does not conflict with the traditional attorney-client privilege. The identity of a client and information concerning attorneys' fees are generally not protected by the privilege, even if disclosure may incriminate the client. ***Goldberger & Dubin***, 935 F.2d at 504-05; ***In re Shargel***, 742 F.2d 61 (2d Cir. 1984); ***In re Grand Jury Matter***, 926 F.2d 348 (4th Cir. 1991); ***In re Grand Jury Investigation***, 723 F.2d 447 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984);

In re Osterhoudt, 722 F.2d 591 (9th Cir. 1983); ***In re Grand Jury Subpoenas***, 906 F.2d 1485 (10th Cir. 1990). *See also* ***In re Grand Jury Subpoena for Attorney Representing Reyes-Requena***, 913 F.2d 1118 (5th Cir. 1990). Some courts, however, have recognized the possibility of "special" or "exceptional" circumstances, such as when disclosure would also divulge confidential communications, which may, in rare cases, render such information privileged. *E.g.*, ***Goldberger & Dubin***, 935 F.2d at 505; ***In re Shargel***, 742 F.2d at 62; ***In re Grand Jury Subpoena for Attorney Representing Reyes-Requena***, 913 F.2d at 1123-27; ***In re Grand Jury Investigation***, 723 F.2d 447 (6th Cir. 1983); ***Tornay***, 840 F.2d at 1427-28; ***In re Grand Jury Subpoenas***, 906 F.2d 1485.

In ***Goldberger & Dubin***, 935 F.2d at 505, the court also stated that, even when the technical requirements of the attorney-client privilege have been satisfied, it should still yield in the face of section 6050I, a federal statute, which implicitly precludes application of the privilege.

Professional responsibility rules and bar association ethical opinions which require that an attorney maintain client confidences or which purport to compel an attorney to withhold information sought under section 6050I do not override the clear mandate of a statute enacted by Congress. In ***Caplin & Drysdale***, 491 U.S. 617, the Court stated that: "[t]he fact that a federal statutory scheme . . . is at odds with model disciplinary rules or state disciplinary codes hardly renders the federal statute invalid." 491 U.S. at 632, n.10. Additionally, most professional responsibility codes allow or require an attorney to disclose client confidences when such disclosure is required by law. *See, e.g.*, Model Code of Professional Responsibility DR 4-101(C)(2), DR 7-102(A)(3) (1981).

An IRS summons requesting information necessary to complete a Form 8300 is neither a "third-party recordkeeper" summons nor a "John Doe" summons within the meaning of 26 U.S.C. § 7609. ***Doe v. United States***, 777 F. Supp. 590 (E.D. Tenn. 1991); ***In re John Wesley Hall, Jr., P.A.***, 90-2 U.S.T.C. (CCH) ¶ 50,442 (E.D. Ark. 1990).

In ***United States v. Leventhal***, 961 F.2d 936 (11th Cir. 1992), attorney Leventhal reported

on a Form 8300 that he had received fees for legal services, but declined to reveal required identification information. The attorney claimed that the information he withheld was privileged. The IRS issued a summons, and the district court ordered Leventhal to provide some, but not all, of the requested information. The government appealed this order. Following ***Goldberger & Dubin, P.C.***, the Eleventh Circuit found that disclosure of identification information would not violate the attorney-client privilege. ***Leventhal***, 961 F.2d at 940-41. *See also* ***United States v. Ritchie***, 15 F.3d 592, 601-02 (6th Cir. 1994) (rejecting claims of Sixth Amendment, Fifth Amendment, and Due Process raised in defense to an IRS summons by an attorney who had filed incomplete Forms 8300). [1]

25.01[4] *Criminal Prosecution: Failing to File Correct Forms; Structuring to Evade Reporting*

With regard to section 6050I, criminal charges may be brought against persons who willfully violate either the duty to file correct Forms 8300 or the statute's prohibitions against structuring transactions to avoid or frustrate reporting requirements. However, a failure to furnish a correct statement to a payor named in a Form 8300, as required by section 6050I(e), brings civil penalties only.

As originally enacted, section 6050I did not contain any prohibition against structuring. Effective November 18, 1988, section 6050I(f), as enacted in the Anti-Drug Abuse Act of 1988, expressly prohibits the structuring of transactions for the purpose of evading the statute's reporting requirements. It also makes explicit prohibitions against causing or attempting to cause a trade or business to fail to file a Form 8300, as required, and against causing or attempting to cause a trade or business to file an incorrect Form 8300. Originally captioned "Actions by Payors," the subsection was given its present caption ("Structuring Transactions to Evade Reporting Requirements Prohibited") on November 5, 1990, to ensure that both payors and payees are subject to the anti-structuring language. [2]

25.01[4][a] *Duty To File Correct Forms 8300 -- WILLFULNESS*

Since Forms 8300 are required under the Internal Revenue Code, failures to file and filings of incorrect forms are criminal tax offenses within Title 26. Specifically, typical prosecutions will be for failure to file Forms 8300 or for filing or aiding the filing of false Forms 8300, punishable under 26 U.S.C. §§ 7203, 7206(1) and 7206(2), respectively. Similarly, prosecutions for structuring will also be brought pursuant to these statutes as Section 6050I(f)(2) states that "[a] person violating this subsection shall be subject to the same civil and criminal sanctions applicable to a person which fails to file or completes a false or incorrect return under this section." Prosecutions for violations of section 6050I will involve the same elements as traditional tax violations using these statutes. Therefore, reference should be made to the appropriate discussions in Sections 10.00, 12.00, and 13.00 of this Manual.

A section 7201 tax evasion prosecution is not available for violations of section 6050I, since there is no tax involved in Form 8300 reporting. However, the filing of a false Form 8300 or structuring activities either with respect to nonfiling or false filing of Forms 8300 could constitute affirmative acts for purposes of a traditional tax evasion prosecution involving, for example, individual income taxes on Form 1040.

Successful prosecutions under sections 7203, 7206(1), or 7206(2) require a showing of "willfulness." Willfulness in the criminal tax statutes is defined as "a voluntary, intentional violation of a known legal duty." ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Willfulness is absent when the violation occurs because of a good faith misunderstanding of the law or a good faith belief that one is not violating the law, even if the belief or misunderstanding is not objectively reasonable. ***Cheek v. United States***, 498 U.S. 192 (1991).

Because violations of section 6050I are prosecuted under the criminal tax statutes and because willfulness under those statutes requires a showing that the defendant knew of the legal duty he is charged with violating, there has never been much doubt that to establish a willful failure to file a Form 8300 or the willful filing of a false Form 8300, the government was required to prove that the defendant knew of the filing requirement. Until recently, however, there has been some

doubt whether the government was required to show in a prosecution for structuring to avoid the Form 8300 filing requirements (26 U.S.C. § 6050I(f)), that the defendant knew structuring was prohibited. The language of section 6050I(f) is virtually identical to the language of the anti-structuring provision in Title 31 (31 U.S.C. § 5324) and a number of courts had held that in a Title 31 structuring case the prosecution need only prove that the defendant knew of the reporting requirements and acted to avoid the requirements. Knowledge that structuring was illegal was held to be unnecessary. ***United States v. Caming***, 968 F.2d 232 (2d Cir.), *cert. denied* 113 S. Ct. 416 (1992); ***United States v. Rogers***, 962 F.2d 342 (4th Cir. 1992); ***United States v. Beaumont***, 972 F.2d 91 (5th Cir. 1992); ***United States v. Gibbons***, 968 F.2d 639 (8th Cir. 1992); ***United States v. Pitner***, 979 F.2d 156 (9th Cir. 1992). *See also* ***United States v. Hoyland***, 914 F.2d 1125 (9th Cir. 1990).

In ***Ratzlaf v. United States***, 114 S. Ct. 655 (1994), however, the Supreme Court rejected these cases and held that to establish a willful violation of the anti-structuring provision in Title 31, the government was required to prove that the defendant acted with knowledge that his conduct was unlawful. In other words, the government must prove that the defendant knew that structuring was illegal.

Given the similarity in language between the two anti-structuring provisions and the general requirement in tax cases that the government prove that the defendant was aware of the legal duty he is charged with having violated, it will be difficult to argue, following ***Ratzlaff***, that the government is not required to prove that a defendant charged with violating section 6050I(f) knew that structuring was prohibited. The sort of proof which can be used to establish the element of knowledge is the same sort of proof which has traditionally been used in tax cases. Thus, knowledge may be shown by such evidence as a prior history of filing Forms 8300, testimony of a cooperating insider, undercover findings, or proof of affirmative efforts to structure receipts around the filing requirement.

25.01[4][b] ***Title 18***

In addition to traditional Title 26 prosecution options for violations of section 6050I, in limited situations, prosecutors may also want to consider alternative possibilities under Title 18, including aiding and abetting (18 U.S.C. § 2); conspiracy, both to commit substantive offenses and to defraud the United States, including ***Klein*** conspiracy (18 U.S.C. § 371); false statements (18 U.S.C. § 1001); or, if the factual circumstances are present, money laundering (18 U.S.C. §§ 1956, 1957) and/or RICO (18 U.S.C. §§ 1961-68) charges.

As indicated at the outset of this chapter, prosecutors must consult and follow procedures and policies set forth in the ***United States Attorneys' Manual*** -- in particular, section 9-105.110 and bluesheet, dated August 4, 1993. In addition, Tax Division Directive 99, dated March 30, 1993, (set out in Section 3, *infra*), should be reviewed and followed.

25.01[5] ***Sentencing***

With respect to prosecutions under 26 U.S.C. § 7203 for willfully failing to file Forms 8300, the maximum permissible prison term for such offenses was changed from one year to five years by the Anti-Drug Abuse Act of 1988, effective November 18 of that year. The maximum fine is $250,000 ($500,000 for corporations). A willful failure to file Form 8300 is a felony offense, no longer a misdemeanor, pursuant to the Crime Control Act of 1990.

Violations of 26 U.S.C. § 7206 involving Forms 8300 are unaffected by the Anti-Drug Abuse Act and are still felonies punishable by up to three years' imprisonment and/or a fine of as much as $250,000 ($500,000 for corporations). Thus, in terms of Form 8300 offenses, a failure to file may be more severely punished statutorily than the filing of a false form. This is a noteworthy development because, in other areas, such as income tax reporting, false filings have traditionally been treated with greater severity than have failures to file. [3]

A conviction under 26 U.S.C. § 7206(1) or (2) for a filing completed after November 1, 1987, but before November 1, 1993, is sentenced under section 2T1.3 or section 2T1.4 of the

Federal Sentencing Guidelines, respectively. A conviction under 26 U.S.C. § 7203 for failing to file a Form 8300 after November 1, 1987, however, is not sentenced under Part T ("Offenses Involving Taxation"). Rather, section 2T1.2(c)(1) expressly provides that the defendant is to be sentenced under section 2S1.3 ("Failure to Report Monetary Transactions") of the guidelines.

For offenses committed after November 1, 1993, the recent amendments to the Sentencing Guidelines provide that for violations based upon 26 U.S.C. § 6050I, prosecuted under either 26 U.S.C. §§ 7203 or 7206, sentence is to be imposed pursuant to new section 2S1.3. This new section has been entitled "Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instruments Report; Knowingly Filing False Reports."

Prosecutors should also be aware that both sections 7203 and 7206 provide for mandatory costs of prosecution.

25.01[6] ***Venue***

Appropriate venue considerations will depend upon the statute (section 7203 or section 7206) pursuant to which the prosecution is brought. Reference should be made to the discussion of venue in the sections of this manual (Sections 10.00, 12.00, and 13.00, *supra*) addressing the pertinent offenses. Also, *see* Section 6.00, *supra*, for a general discussion of venue.

25.01[7] ***Statute of Limitations***

For prosecutions under 26 U.S.C. § 7203 for willful failure to file a Form 8300, the statute of limitations is *three* years and begins to run from the date the form was due to be filed. With respect to prosecutions under 26 U.S.C. § 7206 for filing a false Form 8300 or aiding such filing, the statute of limitations is six years and runs from the date the false form was filed.

Reference should be made to the statute of limitations for tax offenses, 26 U.S.C. § 6531. For a general discussion of the statute of limitations, *see* Section 7.00, *supra*.

25.01[8] ***Policy and Procedure***

Tax Division Directive No. 87-61, effective February 27, 1987, delegates the authority of the Assistant Attorney General of the Tax Division to authorize prosecutions of section 6050I offenses under 26 U.S.C. §§ 7203 and 7206. Under the limited delegation, the Service may refer such prosecution recommendations to United States Attorneys directly, so long as a copy of the referral is simultaneously sent to the Tax Division. This direct referral procedure obviates the usual requirement of Tax Division review in many cases. Instead, under the Directive, such prosecutions may be authorized by the Assistant Attorney General of the Criminal Division, his or her Deputies, or his or her Section Chiefs; a United States Attorney; a permanently appointed First Assistant United States Attorney; or a Chief of criminal functions within a United States Attorney's Office.

There are, however, exceptions to the direct referral process. The Tax Division continues to review all contemplated section 6050I prosecutions which are coupled with other tax offenses (*e.g.*, a ***Klein*** conspiracy charge, which cannot be indicted without Division approval). Moreover, the delegation of authority does not include section 6050I prosecutions to be brought against: accountants; physicians; attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; labor union officials; and, publicly-held corporations and/or their officers.

The Directive notes that, notwithstanding the delegation, the designated official has the discretion to seek Tax Division authorization of any proposed prosecution within the scope of the delegation or to request the advice of the Tax Division with respect to any such proposed prosecution.

The delegation of authority does not extend to any case in which a violation of section 6050I is the basis, in whole or in part, for a charge under any statute other than 26 U.S.C. § 7203 or § 7206.

25.01[8][a] ***Tax Return Disclosure***

Forms 8300 are subject to the provisions of 26 U.S.C. § 6103, which sets forth a general rule of confidentiality for all returns and return information. Section 6103(h) allows disclosure of returns or return information to certain federal officers and employees (including employees of the Departments of Treasury and Justice) for purposes of tax administration. Section 6103(i)(1) provides for disclosure of returns and return information pursuant to *ex parte* order for use in criminal investigations not relating to tax administration. Section 6103(i)(8) specifically provides for disclosure of Forms 8300, following written request to the Secretary of the Treasury, to officers and employees of any federal agency whose official duties require such disclosure for the administration of federal criminal statutes not related to tax administration. Prosecutors involved in Form 8300 prosecutions or other criminal tax cases should keep the requirements of section 6103 in mind and adhere to its provisions.

25.02 *18 U.S.C. § 1956(a)(1)(A)(ii) -- LAUNDERING OF MONETARY INSTRUMENTS*

25.02[1] *Statutory Language: 18 U.S.C. § 1956(a)(1)(A)(ii)* [4]

This statute provides, in pertinent part:

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

. . . .

(A)(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986;

. . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. * * * *

25.02[2] *Generally*

Sections 1956 and 1957 of Title 18 are the federal money laundering statutes created by the Anti-Drug Abuse Act of 1986. Their provisions describe four criminal offenses which may arise from participation in certain transactions involving the proceeds of specified unlawful activities. Specifically, the money laundering offenses are divided into the following categories: financial transactions, transportation, financial institutions, and monetary transactions. Section 1956(a)(1)(A)(ii), the subsection which is of particular relevance to tax crimes and which is addressed in this Section of the Manual, is a financial transaction offense. It was not included, however, in the statute until the passage of the Anti-Drug Abuse Act of 1988 and did not become effective until November 18, 1988.

25.02[3] *Elements*

To establish a violation of 18 U.S.C. § 1956(a)(1)(A)(ii), the following elements must be proved beyond a reasonable doubt:

1. defendant conducted or attempted to conduct a financial transaction;
2. defendant knew that the property involved in the transaction represented the proceeds of some form of unlawful activity;
3. the property did, in fact, represent the proceeds of "specified unlawful activity;" and,
4. defendant took part in the transaction with the intent to engage in conduct constituting tax evasion (under 26 U.S.C. § 7201) or tax fraud (under 26 U.S.C. § 7206).

The government must make an independent showing of participation, knowledge, and intent for each defendant tried as a party to the money laundering transaction. ***United States v. Cota***, 953 F.2d 753 (2d Cir. 1992).

25.02[4] ***Conduct Financial Transaction***

Section 1956 defines "financial transaction" very broadly. ***United States v. Blackman***, 904 F.2d 1250, 1257 (8th Cir. 1990). The term "transaction" is defined in section 1956(c)(3) to include a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property. When involving a financial institution, "transaction" covers nearly all common banking transactions and includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution. The placing of money in a safe deposit box was previously not a transaction within the meaning of the statute. ***United States v. Bell***, 936 F.2d 337 (7th Cir. 1991) (court opined that the list of banking transactions provided in the statute reveals Congress' intent to limit the meaning of "transaction" to activities where the bank actually retains control over the funds). However, effective October 28, 1992, this was legislatively overruled by section 1527 of the Anti-Money Laundering Act which amended section 1956(c)(3) to include the use of a safe deposit box in the definition of financial transaction. If the case involves a safe deposit box prior to October 28, 1992, in a circuit other than the Seventh, it is still worth pursuing, since the legislative history of the amendment suggests that it is only codifying what was already the law.

In order to qualify as a "financial transaction" within the purview of the statute, the transaction must involve either (1) the movement of funds by wire or other means or (2) one or more monetary instruments, which in any way or degree affect interstate or foreign commerce. Alternatively, the transaction must involve the use of a financial institution which is engaged in, or whose activities affect, interstate or foreign commerce. 18 U.S.C. § 1956(c)(4). The term "financial institution" includes any such entity meeting the broad definition set forth in 31 U.S.C. § 5312(a)(2). 18 U.S.C. § 1956(c)(6).

Unlike 26 U.S.C. § 6050I, which only applies to transactions involving more than $10,000, there is no threshold amount of money which must be involved in the financial transaction to constitute a violation of section 1956.

For the purposes of this statute, the term "monetary instruments" means the coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, and investment securities or negotiable instruments which are in bearer form or such form that title thereto passes upon delivery. 18 U.S.C. § 1956(c)(5).

The term "conducts" includes initiating, concluding, or participating in initiating or concluding a transaction. 18 U.S.C. § 1956(c)(2). Moreover, the offense explicitly includes *attempts* at "conducting" such transactions, as well as completed offenses.

The requirement that the transaction have some effect on commerce is for jurisdictional purposes and is derived from the Hobbs Act (18 U.S.C. § 1951). It is intended to embrace the full exercise of Congress' powers under the Commerce Clause of the United States Constitution. A minimal or potential effect on commerce should be sufficient to satisfy the standard.

25.02[5] ***Knowledge***

The defendant must have known that the property involved in the transaction or attempted transaction represented, in whole or in part, the proceeds of some form of activity which constitutes a felony under state, federal, or foreign law. It is not necessary to show that the defendant knew the proceeds were derived from a particular federal, state, or foreign offense, just that the property was the proceeds of some felonious conduct. Nor is it necessary, if the defendant did, in fact, believe that the proceeds were the result of a particular felonious activity, that the activity be a "specified unlawful activity" (discussed *infra*) within the meaning of the statute. 18 U.S.C. § 1956(c)(1).

For offenses committed before November 29, 1990, the knowledge requirement may only be satisfied if the defendant knew that the proceeds were derived from an activity constituting a felony under state or federal law. The statute was not amended to include knowledge of activity violative of foreign law until that year. *See* Crime Control Act of 1990, Pub. L. No. 101-647, section 106, 104 Stat. 4789, 4791 (1990).

Also, prior to November 29, 1990, the term "state" was not expressly defined in the statute. On that date, however, section 1956(c)(8) became effective and defined the term to include "a State

of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States."

The statute's legislative history makes clear that the knowledge requirement of the statute includes "willful blindness." The scant case law concerning the application of the willful blindness standard to section 1956 prosecutions, however, leaves judicial acceptance of the doctrine in this context uncertain. In one of the few cases dealing with the issue, a federal district judge interpreted the willful blindness doctrine narrowly and overturned the conviction of a real estate agent charged with the violation of two federal money laundering laws, including 18 U.S.C. § 1956(a)(1)(B)(i). ***United States v. Campbell***, 777 F. Supp. 1259 (W.D.N.C. 1991).

In ***Campbell***, the defendant sold a home to a drug dealer and filed a false statement with the Department of Housing and Urban Development, understating the house's selling price by $60,000 (the under-the-table amount paid in cash by the drug dealer). The government relied on a theory of willful blindness to satisfy section 1956's knowledge requirement. The prosecution presented evidence of the defendant's awareness of the drug dealer's flamboyant lifestyle and expensive tastes to prove her deliberate ignorance, but did not offer evidence that the realtor actually knew her client's illicit occupation.

In his instructions to the jury on willful blindness, the trial judge explained that the government had to "prove beyond a reasonable doubt that . . . [the defendant] purposely and deliberately contrived to avoid learning all of the facts;" mere proof that the defendant was negligent, reckless, or foolish in her ignorance would not be sufficient.

Despite the jury's subsequent finding of guilt, the trial judge entered a judgment of acquittal, holding that the government's evidence was insufficient to support an adequate finding of knowledge. In the court's opinion, the government was required to show more than the drug dealer's unusual outward appearance or image to establish the defendant's willful blindness. The standard was not whether the defendant "could've, should've, or would've known," but whether the defendant knew the transaction involved illegal proceeds. ***Campbell***, 777 F. Supp. at 1226.

25.02[6] ***Proceeds of Specified Unlawful Activity***

The actual source of the funds or property involved in the transaction or attempted transaction must have been, in fact, one or more of the statute's "specified unlawful activities," enumerated in section 1956(c)(7). The list is comprised of both state and federal offenses which either generate substantial economic proceeds or require substantial funds to commit. The list includes all federal offenses which are currently RICO predicates (other than Title 31 violations), all federal and foreign felony drug offenses, and an assortment of bribery, white collar, environmental, export control, and espionage crimes. (The list of specified unlawful activities has expanded each year. It is, therefore, recommended that the government attorney check the operative statute for the specific years involved).

Tax crimes, however, in and of themselves, are not among the crimes listed in the statute as "specified unlawful activity." S.Rep. No. 433, 99th Cong. 2d Session, 11-12 (1986). Nor can the omission of tax crimes as "specified unlawful activity" be overcome by charging an internal revenue violation under some other provision of the United States Code which is included in the list of "specified unlawful activity." ***United States v. Smith***, No. 92-1612 (5th Cir. Aug. 11, 1993) (unpublished opinion). *See also* Tax Division Directive No. 99 (March 30, 1993).

The source of the funds may be established through either direct or circumstantial evidence. ***United States v. Mickens***, 926 F.2d 1323 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992). *See* ***United States v. Blackman***, 904 F.2d 1250, 1257 (8th Cir. 1990). The prosecution does not have to trace the proceeds back to a particular criminal event (*e.g.*, to a particular drug sale) to show their illicit origin; however, the government cannot rely solely on proof that the defendant has no legitimate source of income. Rather, the evidence must show, beyond a reasonable doubt, that the funds were derived, in whole or in part, from a specified unlawful activity. ***Blackman***, 904 F.2d at 1257.

The funds involved in the transaction need not be composed entirely of proceeds from one or more specified unlawful activities. The intermingling of either legitimate income or the proceeds

of unlawful enterprises not specified in the statute with the proceeds of a statutorily specified crime does not prevent a financial transaction involving these funds from satisfying this element of the money laundering offense. ***United States v. Jackson***, 935 F.2d 832, 839-40 (7th Cir. 1991).

25.02[7] ***Intent to Evade Tax or Commit Tax Fraud***

To establish a violation under 18 U.S.C. § 1956(a)(1)(A)(ii), the prosecution must prove that the defendant took part in the financial transaction with the intent to engage in conduct which would constitute a violation of 26 U.S.C. § 7201 or § 7206. The tax involved need not be that of the defendant. The legislative history shows that the prohibitions also apply to a person who intends to aid another in violating the tax laws. 134 Cong. Rec. S17367 (daily ed. Nov. 10, 1988). Thus, the defendant may have been a party on either side of the transaction and need not have been the one seeking to launder criminally-derived money. In these circumstances, the defendant need not have shared the intent to commit either tax offense; he or she need only to have been aware that such was the purpose of the transaction.

Conduct constituting a violation of section 7201 involves attempted tax evasion (willful attempt in any manner to evade or defeat any tax or payment thereof). *See, e.g.*, ***Spies v. United States***, 317 U.S. 492, 498-99 (1943). Section 1956 does not contain any limitation on the type of tax covered or the type of document submitted. Thus, one could act with the intent to evade income tax, excise tax, estate tax, gift tax, or any other kind of tax. For a more complete discussion of section 7201 offenses, refer to Section 8.00, *supra*.

Conduct that will constitute a violation of section 7206 is manifold. The section may be violated through various activities, including the following: (1) willfully making or subscribing a false return or document under penalties of perjury; (2) willfully aiding or assisting in the preparation or presentation of a false return, affidavit, claim, or document; (3) falsely or fraudulently executing, signing, procuring, or conniving the false execution of any bond, permit, entry, or other document required under the Internal Revenue Code or Regulations; (4) removal or concealment of any goods or commodities for or in respect whereof any tax is or shall be imposed

or upon which levy is authorized by 26 U.S.C. § 6331, with intent to evade or defeat the assessment or collection of any tax imposed under Title 26; or (5) concealing property or falsifying information in connection with any offer in compromise. For additional discussion of conduct violative of section 7206, *see* Sections 12.00, 13.00, 14.00, and 15.00, *supra*.

Although the language of section 1956 requires that the defendant simply intend to engage in conduct which constitutes a violation of sections 7201 and/or section 7206, conduct is not truly violative of either section unless the defendant is aware of the duty the tax laws impose and voluntarily and intentionally violates that duty. ***Cheek v. United States***, 498 U.S. 192 (1991). Therefore, it must be proved that the defendant knew the transaction in question was for the purpose of circumventing tax obligations.

Proof of a completed violation under section 7201 or section 7206, related to a financial transaction, could be relied upon to prove that the defendant acted with the required intent; however, the language of section 1956(a)(1)(A)(ii) does not seem to require proof of a completed offense under either section for a successful prosecution. Instead, it is enough to show that the defendant's objective was to engage in conduct which constituted a violation of either section. Thus, an individual could be prosecuted under section 1956(a)(1)(A)(ii) for engaging in a prohibited financial transaction with the intent to violate section 7201, even when the tax year had not yet ended and the tax return was not yet due.

Clearly, proof that the defendant acted with the necessary intent will be easiest where the defendant has stated that the purpose of the financial transaction was to avoid paying taxes or to hide income from the Internal Revenue Service. In the absence of an express statement, however, care must be taken in selecting the acts relied upon to prove that the defendant acted with the requisite intent. Concealment may be undertaken for any number of reasons unrelated to noncompliance with the tax laws, *e.g.*, to hide an illegal business from the government, to perpetuate a fraud on business creditors or third persons, or to conceal assets in a divorce proceeding.

Thus, proof that the defendant's actions concealed sources of income or the ownership of assets might not be enough by itself to show an intent to act in violation of either section 7201 or section 7206. *See* ***Ingram v. United States***, 360 U.S. 672 (1959) (holding that defendants' participation in conducting, and attempting to conceal lottery operations was insufficient to convict them of conspiring with others to evade and defeat the payment of the federal taxes imposed on lottery operations, where they were merely employees who were not liable for the payment of such taxes and were not shown to have knowledge that the taxes had not been paid); ***United States v. Tarnopol***, 561 F.2d 466 (3rd Cir. 1977) (holding that proof that numerous sales *were* omitted from the books of two corporations was insufficient by itself to sustain conviction for conspiring to impede the IRS in regard to the taxes of the two corporations or the controlling stockholder of the two corporations); ***United States v. Krasovich***, 819 F.2d 253 (9th Cir. 1987) (holding that proof of defendant's purchase of a truck with funds provided by another and titling of the truck in his name were insufficient to show that he conspired to impede the IRS with regard to the other's taxes); ***United States v. Pritchett***, 908 F.2d 816, 821 (11th Cir. 1990) (when efforts at concealment are reasonably explainable in terms other than a motivation to evade taxes, the government must offer independent proof that those who participated in the concealment intended to evade taxes).

In short, there must be some proof that the defendant was aware that the transaction related in some way to an intended violation of section 7201 or section 7206. In some cases, proof may have to be found outside the financial transaction itself. In other cases, the form of money laundering transaction alone may provide proof that the transaction was undertaken for the purpose of tax evasion or fraud, *e.g.*, where taxable funds are laundered and returned through a series of transactions to the taxpayer in a nontaxable form, such as a purported loan or gift. *See* ***Pritchett***, 908 F.2d at 821-22.

25.02[8] ***Sentencing***

A conviction under this subsection may bring a maximum prison sentence of 20 years and/or a fine of up to $500,000 or twice the amount involved in the transaction, whichever is greater.

Offenses committed after November 1, 1987, are sentenced under section 2S1.1 of the Federal Sentencing Guidelines. In addition to a base offense level of 23, section 2S1.1 provides an increase of three in the offense level if the defendant knew the proceeds involved in the transaction derived from narcotics trafficking. It also provides a one to thirteen level increase depending on whether and by how much the amount of money involved in the transaction exceeded $100,000.

25.02[9] ***Venue***

Venue is proper in the district in which the offense was committed or in any district in which an act in furtherance of the crime was committed. 18 U.S.C. § 3237(a); Fed. R. Crim. P. 18.

For a general discussion of venue, *see* Section 6.00, *supra*.

25.02[10] ***Statute of Limitations***

Under 18 U.S.C. § 3282, the statute of limitations for violations of section 1956(a)(1)(A)(ii) is five years.

For a general discussion of the statute of limitations, *see* Section 7.00, *supra*.

25.02[11] ***Policy and Procedure***

On August 4, 1993, the Criminal Division of the Department of Justice issued a bluesheet amending the ***United States Attorneys' Manual*** with regard to review and prosecution of section 1956(a)(1)(A)(ii) cases which now has been incorporated in section 9-105.100. The bluesheet explains that the subsection exists to facilitate prosecution of money launderers, not to displace the appropriate use of traditional Title 18 and Title 26 charges in criminal tax cases. Prosecutors are to continue to bring charges under these Titles when the evidence so warrants. *See* Supplement to United States Attorneys' Manual section 9-105.100, dated August 4, 1993.

Tax Division authorization is required before indictments under this subsection may be sought, if the indictment will also include charges for which Tax Division authorization is ordinarily required or if intent to engage in conduct constituting a violation of 26 U.S.C. §§ 7201 or 7206 is the sole or principal purpose of the financial transaction which constitutes the subject of the money laundering count. *See* USAM, section 9-105.100; Tax Division Directive No. 99, dated March 30, 1993. Pursuant to normal procedure, IRS Regional Counsel review precedes such authorization by the Tax Division, except in Organized Crime Drug Enforcement Task Force cases.

In limiting the necessity of Tax Division authorization to the two circumstances set forth above, it is assumed that, in situations where such authorization is not required, the following facts exist: (1) the principal purpose of the financial transaction was to accomplish some other (non-tax related) covered purpose, such as carrying on some specified unlawful activity; (2) the circumstances do not warrant the filing of substantive tax or tax fraud conspiracy charges; and, (3) the existence of a secondary tax evasion or false return motivation for the transaction is one that is readily apparent from the nature of the money laundering transaction itself.

Finally, prosecutors should bear in mind the Memorandum of Understanding (revised August, 1990) between the Departments of Justice and the Treasury and the Postal Service regarding authority to investigate money laundering violations. This Memorandum gives the

Internal Revenue Service investigative jurisdiction over all violations of sections 1956 and 1957 where the underlying conduct is subject to investigation under Title 26 or the Bank Secrecy Act.

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1. The Sixth Circuit also noted that the attorney had abandoned the claim that disclosure of the summoned information, including the name of client, would violate the attorney-client privilege. Nevertheless, the court noted that virtually every court to consider the issue had concluded that client identity and payment of fees is not privileged information. 15 F.3d at 602.

2. Although the anti-structuring subsection was not included in the statute until 1988, prosecutions for such activity may have been permissible before its enactment. Referring to the amendment that added section 6050I(f), Congress declared in section 7601(a)(4) of Pub.L. 100-690 that "[n]o inference shall be drawn from the amendment . . . on the application of the Internal Revenue Code of 1986 without regard to such amendment." Thus, the addition of the subsection may simply have explicated prohibitions already implicit in the 1984 statute.

3. An anomaly, however, should be noted. Under 26 U.S.C. § 6531(4), the statute of limitations for failure to file a Form 8300 is only three years. The statute of limitations for filing a false Form 8300, on the other hand, is six years under 26 U.S.C. § 6531(5).

4. As earlier noted, the Money Laundering Section of the Criminal Division has published a comprehensive two-volume reference guide, entitled ***Money Laundering: Federal Prosecution Manual*** (February 1992).

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30.00 ***SPECIFIC ITEMS***

30.00 *SPECIFIC ITEMS*

30.01 *GENERALLY*

The specific items method of proof is a direct method of proof used to establish unreported income. This method of proof differs from the indirect methods of proof (net worth, bank deposits, and expenditures) in that it focuses on specific financial transactions and does not attempt to reconstruct the defendant's overall financial situation. The specific items method primarily relies on direct evidence, although circumstantial evidence may also be introduced.[1] By contrast, the indirect methods generally rely on circumstantial evidence to prove an understatement of income. Using the indirect methods of proof, the government shows "either through increases in net worth, increases in bank deposits, or the presence of cash expenditures, that the taxpayer's wealth grew during a tax year beyond what could be attributed to the taxpayer's reported income, thereby raising the inference of unreported income." ***United States v. Black***, 843 F.2d 1456, 1458 (D.C. Cir. 1988). The government often resorts to indirect methods of proof when the defendant deals in cash and has maintained inadequate records from which to reconstruct income.

The advantages of the specific items method of proof are that it is easy for the prosecutor to present and for the jury to understand, it generally involves less evidence and has relatively simple criminal computations compared to the indirect methods, and the government does not have to follow all of the technical requirements of the indirect methods of proof. The objective of the specific items method is to prove that a defendant earned more money than is reflected on the defendant's tax returns, or that reported deductions, expenses, or credits are either nonexistent or overstated. Both testimonial and documentary evidence relating to the amount of income received by the defendant may be introduced. This evidence may include admissions of the defendant, the defendant's books and records, bank records, the testimony of inside witnesses (*e.g.*, the defendant's employees and ex-spouse), testimony and documentation of witnesses engaged in the transactions which have been reported inaccurately, and the testimony of the defendant's accountant.

There are four general categories of specific items cases:

1. Unreported income, where the evidence establishes

that the total amount of income received is greater than the amount reported;

2. Unreported income, where the evidence establishes that identified items of income were not reported;

3. Failure to report a business or other source of income; [1]

4. Overstated deductions or expenses, including fictitious deductions and legitimate deductions that are inflated.

Generally, specific item cases will deal with income rather than deductions or expenses. The government usually attempts to produce evidence that the defendant received income, which was either not reflected at all on the return or which was under-reported. ***United States v. Horton***, 526 F.2d 884, 886 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976); ***United States v. Marabelles***, 724 F.2d 1374, 1377 n.1 (9th Cir. 1984). *See also* ***United States v. Genser***, 582 F.2d 292, 295-96 n.1 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979); ***United States v. Allen***, 551 F.2d 208 (8th Cir. 1977); ***United States v. Bray***, 546 F.2d 851, 856-57 (10th Cir. 1976).

As a practical matter, there are four basic steps to developing a specific items case involving unreported income: (1) proving that the relevant amounts are taxable income to the defendant; (2) proving the income was received by the defendant; (3) proving the income was not reported; and (4) showing the defendant's personal involvement in the failure to report the income and in disposition of the unreported income, *i.e.*, willfulness.

While the government must show that the defendant received unreported taxable income, it need not show how the defendant spent the money after it became his or her income. ***United States v. Martin***, 525 F.2d 703, 707 (2d Cir.), *cert. denied*, 423 U.S. 1035 (1975).

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1 *See* Section 12.00 False Returns, *infra*, for a discussion of cases in which a defendant reports a false source of income, but accurately reports the amount of income and is prosecuted for filing a false income tax return under 26 U.S.C. § 7206(1). ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

30.02 *UNREPORTED INCOME -- OVERCOMING AMOUNTS REPORTED ON RETURN*

In this type of specific items case, the proof establishes that the total income received is greater than the total reported. Thus, the evidence establishes that the defendant failed to report income by proving more income than the amount reported on the return. It is not necessary to show which particular items were not reported. For example, if the defendant reports real estate commissions of $20,000 and the evidence establishes real estate commissions of $60,000, then there is $40,000 in unreported income. It makes no difference whether a particular commission was reported. *See, e.g.*, ***United States v. Horton***, 526 F.2d 884, 886 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976) (amount of fees testified to by defendant's clients exceeded fees reported); ***United States v. Marabelles***, 724 F.2d 1374, 1378 & n.2 (9th Cir. 1984) (government proved gross receipts from defendant's painting business substantially in excess of reported amounts).

The proof required to overcome reported income can be fairly simple. For example, one can call witnesses to testify as to the amount of money they paid the defendant, add the amounts up, and compare the total to that on the return. Although there are a number of cases that lend themselves to this approach, it is not always practical. For example, it would impractical to call as witnesses hundreds of a retailer-defendant's customers. Locating enough of the customers to overcome reported income would be doubtful at best. In such a situation, specific items is not an available or practical method of proof. As a rule of thumb, this is usually the case where the defendant has reported a substantial gross income and his business is such that his income is derived from large numbers of customers, any one of whom has only paid the defendant a relatively small amount, and there is no available evidence beyond the testimony of the individual witnesses, such as books and records reflecting the amounts received from customers.

30.03 *UNREPORTED INCOME -- IDENTIFIED INCOME ITEMS NOT ON RETURN*

In this second type of specific items case, the items of income reported on the return can be identified and, therefore, any other items of income necessarily represent unreported income. The unreported income may include an entire category of income, such as the failure to report any capital gains income where there is evidence of capital gains income earned during the year. *See, e.g.*, ***Azcona v. United States***, 257 F.2d 462 (5th Cir. 1958), where the defendant reported only his salary from the police department and no other income, and the evidence established that he received graft payments.

This second group of cases also may include situations where the defendant has reported some, but not all, of the income in a particular category, and the government can identify all of the items that make up the reported amount. Any additional items of income necessarily constitute unreported income.

A common approach in this type of specific items case, where the defendant's books and records are obtained, is to reconcile the books and records to the return so as to determine which particular items of income have been reported. Any items of income not reflected in the books and records necessarily represent unreported income since it has been established that the return reports only those income items recorded in the books and records. Often the defendant's bookkeeper, office manager, secretary, or return preparer are the key witnesses in the case. The office employees can testify as to the office procedures used to record income, any instructions given to them by the defendant, and any admissions regarding unreported income. The return preparer can testify regarding the information used to prepare the return. Generally the return preparer has been given inaccurate summary documents by the defendant, or incomplete records. If the criminal case began with an examination audit, the Revenue Agent may also be called to testify regarding the reconciliation of the books and records to the return. Note that the government is not required to verify or corroborate the reported amounts of income. The government may take the defendant's

reported income as an admitted amount earned from designated sources. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). However, the reconciliation of the books and records to the return is of great benefit to the government. If the government can prove exactly what was reported and not reported, it lends credibility to the government's case.

The return alone often will lend itself to this type of specific items case. Thus, if the return fails to report any interest income, proof of the receipt of interest income will ordinarily establish unreported income. The prosecutor must be wary, however, of the defense that alleged unreported items of income were in fact reported, but in the wrong category or on the wrong line on the return. For example, assume the evidence establishes that the defendant received $3,000 in interest income and did not report any income designated as interest income. If, however, the defendant reported $6,000 in miscellaneous income, and the prosecutor is not able to identify the source of the reported miscellaneous income, then the government may have no answer to the allegation that the defendant did in fact report the $3,000 in interest income as part of the $6,000 reported as miscellaneous income. For this reason, every effort should be made to document the source(s) of reported income.

For other examples of specific items cases involving identified income items not reported on the return, *see* ***United States v. Venditti***, 533 F.2d 217 (5th Cir. 1976); ***United States v. Parr***, 509 F.2d 1381 (5th Cir. 1975); ***United States v. Allen***, 551 F.2d 208 (8th Cir. 1977); ***Swallow v. United States***, 307 F.2d 81 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963).

30.04 *FAILURE TO REPORT BUSINESS OR SOURCE OF INCOME*

When an individual receives and does not report income from a business enterprise during the course of a year, the specific items method of proof can be used to show that the defendant filed a false return or failed to file a required return. Again, the government would have to prove through the testimony of "inside" and customer witnesses that the defendant operated the business, prove the unreported income through the above witnesses' testimony, bank records, and business records, and, if appropriate, that the defendant did not inform his return preparer of the existence of the business.

The leading opinion on this type of case is ***Siravo v. United States***, 377 F.2d 469 (1st Cir. 1967). Siravo reported wage income on the tax returns he filed for three of the prosecution years and did not file a return for the fourth year. He did not report gross receipts from a jewelry company he operated. Siravo was charged with one count of failing to file a return, in violation of 26 U.S.C., Sec. 7203, and with three counts of subscribing to a false return, in violation of 26 U.S.C., Sec. 7206(1), in that he "failed and omitted to disclose . . . substantial gross receipts from a business activity . . . ." ***Siravo***, 377 F.2d at 471-72.

As to the false return counts, Siravo argued that the failure to attach a Schedule C to his return reporting his gross receipts was not a false statement or misrepresentation of his taxable income but merely an omission. Rejecting this argument, the court said:

> [W]e hold that a return that omits material items necessary to the computation of income is not "true and correct" within the meaning of section 7206. If an affirmative false statement be required, it is supplied by the taxpayer's declaration that the return is true and correct, when he knows it is not.

Siravo, 377 F.2d at 472

Regarding the failure to file count, the trial court "correctly instructed" the jury that total receipts must be reduced by the cost of goods sold and other costs representing a return of capital to

arrive at gross income for a manufacturing business, and that it was sufficient if the government showed that receipts exceeded cost of goods sold by at least $600. But there was no evidence as to the amount of costs except some testimony that substantially all materials were supplied by the defendant's customers. ***Siravo***, 377 F.2d at 473. Siravo argued that the government did not carry its burden since labor costs are part of the cost of goods sold and there was testimony that the volume of business was impossible for one man to handle. ***Siravo***, 377 F.2d at 473. Holding that the government had no such burden, the court said that ". . . [t]he applicable rule here is that uniformly applied in tax evasion cases -- that evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses, if any." *Id.* at 473 (citations omitted).

Note that if the defendant does come forward with evidence of offsetting costs or expenses in a failure to file case involving a manufacturing business, then the government would have the burden of establishing that the costs and expenses either were not allowable or were insufficient to reduce gross income below the level triggering the filing requirement. On the other hand, where the charge is filing a false return, as were three of the counts in ***Siravo***, defense evidence as to offsetting costs and expenses would not "go to the materiality of the omitted receipts, but to the lack of mens rea in their omission." ***United States v. Taylor***, 574 F.2d 232, 237 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

In ***Taylor***, the defendant did not file Schedules F for the first two prosecution years and filed a false Schedule F which understated his livestock receipts for the third year. The court held that proof of unreported gross receipts was sufficient to sustain the conviction, stating:

> [R]equiring the government to prove the omission of gross income comes near to requiring the proof of additional tax liability. Such a definition of "material" . . . would imperil the self-assessment nature of our tax system.

Taylor, 574 F.2d at 236.

In a failure to file case, ***United States v. Schutterle***, 586 F.2d 1201, 1205 (8th Cir. 1978),

the Eighth Circuit held that evidence of bonus or commission payments from a corporation to the defendants, as local supervisors, was sufficient to establish gross income necessary to trigger the filing requirement. In ***Schutterle***, the government did not prove that the defendants actually sold any products, but proved only that the defendants received bonuses or commissions based on the volume of products purchased, presumably for resale. In response to the defense that these payments from the corporation were merely discounts or rebates on volume purchases, the court stated the defendants had performed services for the corporation, as local distributors, and the payments were made in recognition of these services. Thus, the payments represented commissions and should have been reported.

In ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir.), *cert. denied*, 446 U.S. 922 (1980), the statement that the government has the burden of establishing "that gross receipts exceed the cost of goods sold by an amount sufficient to trigger the reporting requirements" appears, at first blush, to be contrary to ***Siravo***'s holding (377 F.2d at 473), that the government need prove only gross receipts and not the cost of goods sold. ***Francisco***, however, relied on ***Siravo*** and the language in its opinion merely sets forth the burden on the government and not the evidence required to meet this burden. Thus, the case is not contrary to the proposition that once the government establishes gross receipts sufficient to trigger the filing requirement, the burden of going forward with offsetting expenses is on the defendant. Note that in ***Francisco***, the court did not have to reach this issue since the parties stipulated to figures representing total sales less the cost of goods sold, with the court holding that the burden of coming forward with any expenses not stipulated shifted to the defendant. ***Francisco***, 614 F.2d at 618.

Contrary to the teaching of the foregoing cases as to the burden of producing evidence, the Tenth Circuit in ***United States v. Brewer***, 486 F.2d 507, 509-10 (10th Cir. 1973), *cert. denied*, 415 U.S. 913 (1974), reversed one count of a failure to file conviction due to insufficient evidence that the defendant earned enough income to trigger the filing requirement. The court stated that the evidence of a $17,000 sale "does not establish anything more than the fact that the defendant was a

person of some means. It fell short of establishing that any part of these proceeds constituted income". ***Brewer***, 486 F.2d at 509. *Contra* ***United States v. Bahr***, 580 F. Supp. 167, 171 (N.D. Iowa 1983), holding that where the government establishes the existence of unexplained receipts sufficient to give rise to the filing requirement and follows up reasonable leads as to the cost of goods sold, then the government has made out a *prima facie* case of failure to disclose gross income and it is up to the defendant to establish any offsetting expenses. *See also* ***United States v. Gillings***, 568 F.2d 1307 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978) (distinguishing ***Brewer***).

In this vein, care should be taken to frame the indictment so as to conform exactly to the evidence to be offered. If the government can only prove the failure to report "gross receipts", then the indictment should allege that the defendant failed to report "gross receipts" and not charge that the defendant did not report "income." *See, e.g.*, ***Taylor***, 574 F.2d at 236.

An unusual variation on this type of specific items case appears in ***United States v. Vario***, 484 F.2d 1052 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974). The defendant was charged with violating section 7206(1), "in that he had failed to disclose the fact that he was engaged in a gambling or 'policy' operation which produced gross income for him." ***Vario***, 484 F.2d at 1054. The government did not attempt to show specific amounts of income the defendant received, that he spent more than he reported on his returns, or that he had large bank deposits during the prosecution years. The government only sought to establish that the defendant was actively engaged in a gambling operation, and that the gambling operation produced income, which the defendant failed to report. The court held that this was sufficient to support a jury verdict of guilty under section 7206(1). ***Vario***, 484 F.2d at 1054.

30.05 ***OVERSTATED DEDUCTIONS OR EXPENSES***

30.05[1] ***Generally***

Cases involving overstated deductions or expenses fall into categories similar to cases involving an understatement of income. In some, the evidence will establish specific deductions

claimed on a return, to which the defendant was not entitled. In other cases, the evidence simply will show that the defendant was entitled to a lesser deduction than that claimed on the return. [2]

There are a limited number of cases dealing with false or overstated deductions. Since deductions are subtracted from gross income in arriving at taxable income and the tax due and owing, they are material to the contents of an income tax return. ***United States v. Warden***, 545 F.2d 32, 37 (7th Cir. 1976). Generally false deduction cases are proven by introducing evidence from the witnesses involved with the defendant in the transaction which is the subject of the deduction and comparing the records maintained by that witness with records maintained by the defendant. Often, the defendant's bank records prove that the deductions claimed were overstated. Many defendants attempt to support their false deductions by altering the amounts of checks or their payee and supplying the checks to the IRS, often with other false documentation, *i.e.*, phony invoices, receipts, and letters. Forensic analysis of these items generally establishes their falsity with relative ease, particularly in the case of checks which have altered amounts. Most defendants fail to realize that when checks are negotiated by the bank, the bank encodes the amount of the check on the face of the check, making it easy to determine the actual amount paid. Some false deductions cases, however, entail problems of proof which are greater than those routinely encountered in cases involving the omission of income, because the government must prove a negative, *i.e.*, that the expense was not incurred at all or not in the amount claimed.

30.05[2] ***Individuals and Businesses***

Cases involving individual taxpayers and businesses fall into numerous different fact patterns. The cases with the greatest jury appeal are those in which the defendant has diverted corporate funds to his or her personal use and deducted the diversions on the return as some form of corporate expenses. The tax benefit to the defendant in these cases is twofold: the corporation's tax liabilities are reduced because personal expenses are improperly deducted as business expenses on the corporate tax returns and the individual receiving the corporate diversion reduces his or her

individual tax liabilities by failing to report the diversions as income on his or her individual returns. This pattern was followed in ***United States v. Helmsley***, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992). The following cases have similar fact patterns: ***United States v. Greenberg***, 735 F.2d 29 (2d Cir. 1984) (corporation's payment of its owner's personal expenses improperly deducted as business expenses); ***United States v. Nathan***, 536 F.2d 988 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976) (defendant expensed Subchapter S corporation's checks that in fact he cashed for himself); ***United States v. Garcia***, 762 F.2d 1222 (5th Cir.), *cert. denied*, 474 U.S. 907 (1985) (defendant improperly claimed personal expenses as business deductions); ***United States v. Black***, 843 F.2d 1456 (D.C. Cir. 1988) (checks drawn on corporate accounts to pay personal expenses sufficient to sustain tax evasion conviction).

United States v. Bliss, 735 F.2d 294, 301 (8th Cir. 1984), provides a good example of how to use the specific items method to prove that the defendant has claimed false deductions. The defendant wrote checks on his business bank account to a fictitious company, prepared phony invoices, and had his employees cash the checks, returning most of the money to the defendant. The government introduced the checks, false invoices prepared by the defendant, and the testimony of the employees who admitted that the checks were not for purchases claimed by the defendant. The employees also testified that the defendant told them the money generated by the scheme was "tax free money" and instructed them to lie to the IRS after the investigation began. The defendant challenged the sufficiency of the evidence that he had filed false tax returns. The Eighth Circuit upheld the conviction, stating the evidence was "overwhelming." ***Bliss***, 735 F.2d at 301.

Relatively simple examples of overstated deductions or expenses may be found in ***United States v. Ragen***, 314 U.S. 513 (1942) (corporate profit distributions (dividends) were falsely expensed on the corporation's books and returns as commissions, resulting in an understatement in the taxable income and tax liability of the corporation); ***Spinney v. United States***, 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (dentist overstated deductions for dentures, dental supplies, and other professional expenses); ***United States v. Pechenik***, 236 F.2d 844 (3d Cir. 1956)

(corporation's capital expenditures improperly deducted as operating expenses, thereby understating taxable income); ***United States v. Wilkins***, 385 F.2d 465 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) (defendant claimed $10,000 in deductions, government proved $7,000 were fictitious); ***Eggleton v. United States***, 227 F.2d 493 (6th Cir. 1955), *cert. denied*, 352 U.S. 826 (1956) (defendant overstated costs of used cars he purchased for resale); ***United States v. Pacheco***, 912 F.2d 297 (9th Cir. 1990) (false partnership deductions); ***United States v. Berger***, 325 F. Supp. 1297 (S.D.N.Y. 1971), *aff'd*, 456 F.2d 1349 (2d Cir.), *cert. denied*, 409 U.S. 892 (1972) (domestic parent corporation improperly deducted expenses of its foreign subsidiary).

30.05[3] ***Return Preparers***

A large category of specific items cases with false deductions involve return preparers who falsely claim itemized deductions or expenses for their clients and who are prosecuted under section 7206(2). As with the other false deduction cases, these may include deductions that are totally fictitious or legitimate deductions that are inflated. ***United States v. Damon***, 676 F.2d 1060 (5th Cir. 1982) (false Schedules C overstating business expenses); ***United States v. Haynes***, 573 F.2d 236 (5th Cir. 1978), *cert. denied*, 439 U.S. 850 (1978) (false itemized deductions); ***United States v. Warden***, 545 F.2d 32 (7th Cir. 1976) (false itemized deductions). These cases often involve false charitable deductions, child care credits, and business expenses.

30.06 ***DEFENDANT'S ADMISSIONS***

30.06[1] ***Generally***

The importance of the defendant's admissions cannot be overestimated in a tax case. Admissions regarding income are available from many sources. Defendants often boast to friends, spouses, and co-workers that they are "cheating on their taxes". Many defendants leave a paper trail of admissions which present a view of their financial situation drastically different from that reflected on the income tax returns filed with the IRS. For example, most defendants file financial

statements with lenders to obtain mortgages, loans, credit cards, and credit accounts with retailers. In these situations, it is in the best interest of the defendant to portray his financial situation in as favorable a way as possible. Consequently, these financial statements can be very helpful in proving that the defendant was well aware he had more income than was reported.

Often, the most important admissions are those made on the defendant's income tax returns. The government frequently uses admissions made on income tax returns (1) which the defendant had prepared but which were never filed with the IRS ("dummy returns"), or which were filed delinquently or (2) which were timely filed and are used to prove income, deductions, and expenses.

30.06[2] ***Dummy Returns***

Many lenders require that tax returns be submitted with credit applications. Defendants often submit "dummy" returns which have not been filed with the IRS and report income substantially in excess of that reported to the IRS. These dummy returns often provide leads as to unreported sources of income, as well as income from known sources that has been underreported. Dummy returns are also extremely valuable in proving that the defendant acted willfully.

30.06[3] ***Delinquent Returns***

A rare type of specific items case is one based on the defendant's own admissions as to income and expenses, corroborated by independent evidence. In a failure to file case, for example, if the defendant has filed delinquent returns, which are determined to be correct, the government may be able to sustain its burden of proving that the defendant earned sufficient income to require the filing of returns by introducing the delinquent returns and independent corroborative evidence of the income figures reported on the returns. ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984).

In ***Bell***, the defendant was the sole proprietor of a business that provided tip sheets to bettors

at racetracks. On appeal, the court, relying on ***United States v. Smith***, 348 U.S. 147 (1954), recognized that the government cannot prove an essential element of a crime through only uncorroborated post-offense extrajudicial admissions of the defendant. [3] The court held, however, that testimony from various witnesses about the defendant's sale of tip sheets and receipt of income was "enough corroboration to render the income statements on his late-filed tax returns admissible." ***Bell***, 734 F.2d at 1317. *See also* ***United States v. Marshall***, 863 F.2d 1285, 1287 (6th Cir. 1988) (narcotics).

30.06[4] ***Timely Filed Returns***

The foregoing should be distinguished from the situation in an evasion or false return case where the defendant has timely filed returns. In such cases, the government "may take the taxpayer's reported income as an admitted amount earned from designated sources" and need not corroborate this reported income. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). Corroboration is not required because the statements in the defendant's return constitute pre-offense admissions and pre-offense admissions do not have to be corroborated. ***Warszower v. United States***, 312 U.S. 342, 347 (1941). *See* ***United States v. Pennell***, 737 F.2d 521, 536-37 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (narcotics and firearms); ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984) (false income tax returns); ***United States v. Marshall***, 863 F.2d 1285, 1290-91 (6th Cir. 1988) (dissent).

Similarly, in most cases, the government can rely on the deductions and expenses claimed on the defendant's tax return to prove the statutory offsets to gross income. Deductions claimed on a tax return are admissions and can be used to make a prima facie case. Fed. R. Evid. Rule 801(d)(2); ***United States v. Northern***, 329 F.2d 794, 795 (6th Cir.), *cert. denied*, 377 U.S. 991 (1964).

Once the government allows the deductions and expenses claimed on the tax return as filed, and any additional deductions the government can calculate without the defendant's assistance, the

burden of going forward falls on the defendant to show any additional allowable deductions not claimed on the return. ***United States v. Link***, 202 F.2d 592, 593-94 (3d Cir. 1953); ***United States v. Lacob***, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); ***United States v. Benderh***, 218 F.2d 869, 871-72 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955); ***United States v. Marabelles***, 724 F.2d 1374, 1383 (9th Cir. 1984); ***Elwert v. United States***, 231 F.2d 928, 933 (9th Cir. 1956). *See also* ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***United States v. Nathan***, 536 F.2d 988, 991 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976). *See also* ***United States v. Pacheco***, 912 F.2d 287, 303-04 (9th Cir. 1990) (district court did not err in refusing to allow defendant to introduce evidence regarding unclaimed deductions where deductions were not allowable as a matter of law).

30.07 *NO REASONABLE LEADS DOCTRINE*

In specific items cases, the government has no burden to follow reasonable leads provided by the defendant, as it does in indirect method of proof cases. ***United States v. Suskin***, 450 F.2d 596, 598 (2d Cir. 1971); ***United States v. Lawhon***, 499 F.2d 352, 356-57 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); ***United States v. Shavin***, 320 F.2d 308, 311 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963); ***United States v. Marabelles***, 724 F.2d 1374, 1379 n.3 (9th Cir. 1984); ***Swallow v. United States***, 307 F.2d 81, 84 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); ***United States v. Nemetz***, 309 F. Supp. 1336, 1339 (W.D. Pa. 1970), *aff'd*, 450 F.2d 924 (3d Cir. 1971), *cert. denied*, 405 U.S. 988 (1972). "[W]here the government's case is based on evidence showing *specific items* of unreported income, the safeguards required for indirect methods of proof are not necessary, as the possibility that the defendant may be convicted because non-taxable income is mistakenly presumed to be taxable income, or because cash expenditures are mistakenly assumed to be made from taxable income, is not present. ***United States v. Black***, 843 F.2d 1456, 1459 (D.C. Cir. 1988) (emphasis added.)

30.08 *PROPER CHARACTERIZATION OF METHOD OF PROOF*

The government must be careful to characterize the method of proof properly in cases where unreported income is proven by bank records. In many cases, the unreported income is proven by the introduction of checks which the defendant received or converted but did not report on the tax return. If the government can show by direct proof that each check was taxable income to the defendant, the method of proof is properly termed "specific items."

For example, in ***Black***, 843 F.2d at 1459, the defendant wrote checks on corporate accounts for personal expenses. The defendant claimed that these corporate diversions were not taxable income but were nontaxable loans. Although the government's method of proof was specific items (the specific items being the company checks diverted for the defendant's personal use), the defendant argued that the method of proof was actually bank deposits/cash expenditures and that his conviction should be reversed because the government did not prove that the expenditures were not made with funds from non-taxable sources. The D.C. Circuit rejected defendant's argument even though the expert witness and trial judge referred to the method of proof as the "expenditures method." ***Black***, 843 F.2d at 1461. "In the Government's view, Black received taxable income each time he wrote a check . . . to cover his personal expenses . . . [and] at no point in the trial was it suggested to the jury that evidence of personal expenditures, without more, would be sufficient to convict . . . ." ***Black***, 843 F.2d at 1459-61. *See also* ***United States v. Wilson***, 887 F.2d 69, 77 (5th Cir. 1989) (district court properly refused to give bank deposits instruction in specific items case in which proof of unreported income was based on the "transfer of specific and substantial funds" to defendants' bank accounts).

Similarly, direct evidence as to cash transactions could, in some circumstances, be a specific item of unreported income. For example, if transaction witnesses testified that they paid the defendant in cash for services, those items could be included as income. The mere deposit of cash into a bank account, without direct evidence that the cash was income to the defendant, however, would not be sufficient to prove unreported income in a specific items case.

30.09 ***CRIMINAL COMPUTATIONS***

30.09[1] ***Method Of Accounting***

In computing the defendant's taxable income and tax for each prosecution year, the government generally is required to follow the accounting method used by the defendant. If the defendant was on the cash basis during the prosecution year, then the government's proof also must be computed on the cash basis, with income being reported when it is received and expenses deducted only in the year they are actually paid. *See* ***United States v. Wiese***, 750 F.2d 674, 677 (8th Cir. 1984) (a bank deposits case which states the general rule that a cash basis taxpayer must report income in the taxable year of actual or constructive receipt). *See also* Treas. Reg. § 1.446-1(a)(1) & (c)(1)(i) (26 C.F.R.).

Similarly, if the defendant used a hybrid method of accounting, with some items treated on a cash basis and other items treated on an accrual basis, then the government also must use the same hybrid method in doing its computations. ***United States v. Marttila***, 434 F.2d 834, 837 (8th Cir. 1970).

The defendant also is bound to adhere to the accounting method used during the prosecution year when preparing computations for trial. In ***Clark v. United States***, 211 F.2d 100 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955), the defendant had reported income during the prosecution years on the cash basis. The trial court excluded testimony from the defendant's expert on what the effect would have been had the returns been prepared on the accrual basis, instead of the cash basis, on the ground that such testimony had no probative value. The court's ruling was upheld on appeal. ***Clark***, 211 F.2d at 105. Similarly, in ***United States v. Helmsley***, 941 F.2d 71, (2nd Cir. 1991), *cert. denied,* 112 S. Ct. 1162 (1992), the defendant followed one depreciation method during the prosecution years but argued at trial that allowable deductions would have offset tax deficiencies under another method. The court held that having selected a particular depreciation method, the defendant was not free to recalculate her taxes under another depreciation method. *See also* ***Fowler***

v. United States, 352 F.2d 100 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

Similarly, in ***United States v. Lisowski***, 504 F.2d 1268, 1274-75 (7th Cir. 1974), the defendant had used a hybrid method of accounting and the court did not permit hypothetical questions to the defense expert on a purely accrual treatment of the alleged unreported income, saying that "[w]hen the taxpayer has employed a hybrid or unauthorized accounting method, he is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." ***Lisowski***, 504 F.2d at 1275 (citations omitted).

30.09[2] ***Proper Income Allocation***

The government cannot establish a tax deficiency by attributing income to a year in which it does not belong. ***United States v. Wilkins***, 385 F.2d 465, 469-71 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

30.09[3] ***Treatment of Known Deductions***

Although there is no requirement in a specific items case that the government follow all reasonable leads provided by the defendant, the situation where the government discovers additional, unclaimed deductions or offsets during the course of the investigation, such as additional purchases, salaries paid, interest expenses, or errors in the books and records in the defendant's favor, must be distinguished. These known deductions or offsets, even though not reflected on the return, must be allowed in the government's criminal computations. *See* ***United States v. Link***, 202 F.2d 592, 593-94 (3d Cir. 1953).

30.10 *USING MULTIPLE METHODS OF PROOF*

Proof of specific items of omitted income may be corroborated by circumstantial proof, such as the net worth method of proof. ***Holland v. United States***, 348 U.S. 121, 126 (1954), and cases cited; ***United States v. Cramer***, 447 F.2d 210, 218 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); ***Lloyd v. United States***, 226 F.2d 9 (5th Cir. 1955); ***Eggleton v. United States***, 227 F.2d 493, 497-98 (6th Cir. 1955), *cert. denied*, 352 U.S. 826 (1956); ***Heasley v. United States***, 218 F.2d 86, 90 (8th Cir.), *cert. denied*, 350 U.S. 882 (1955), and cases cited. The specific items method also may be corroborated by the bank deposits method, ***United States v. Tafoya***, 757 F.2d 1522, 1528 (5th Cir.), *cert. denied*, 474 U.S. 921 (1985); ***United States v. Horton***, 526 F.2d 884, 886-87 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976); ***Canton v. United States***, 226 F.2d 313, 322-23 (8th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956), or the expenditures method of proof, ***United States v. McGuire***, 347 F.2d 99 (6th Cir.), *cert. denied*, 382 U.S. 826 (1965). *See also* ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986) (the government may also use a combination bank deposits and expenditures method of proof).

When an indirect method is used as corroboration only, it has been held that the government may not have a duty to comply with all of the technical requirements of the indirect method, such as tracking down all leads in a net worth analysis. ***Tafoya***, 757 F.2d 1522; ***Cramer***, 447 F.2d at 218. Furthermore, it has been held that the use of an indirect method of proof as corroboration is permissible even though the government has stated in a bill of particulars that it would rely on the specific items method. ***Horton***, 526 F.2d at 887; ***McGuire***, 347 F.2d at 101. Common sense dictates, however, that the corroborating method of proof be designated as such in a bill of particulars so as to avoid needless argument and the possibility of an adverse ruling.

When an indirect method of proof is used to corroborate specific items, the jury should be instructed to limit its consideration of the indirect analysis to corroboration of the specific items proof only. ***Horton***, 526 F.2d at 887-88. Although failure to give such a limiting instruction may

later be determined to be harmless error, there is always the risk that an appellate court could find otherwise.

The government also may use direct and indirect methods of proof in combination with each other in the same case. For example, in a three-year case, the government could prove unreported income in the first year by the specific items method, with unreported income for the next two years being proved by the net worth method. ***United States v. Dawson***, 400 F.2d 194, 203 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Additionally, both direct and indirect methods can be used for the same year. ***United States v. Rodriguez***, 545 F.2d 829 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977) (specific items and expenditures methods); ***Chinn v. United States***, 228 F.2d 151 (4th Cir. 1955) (net worth and specific items for one year, specific items alone for another year); ***United States v. Meriwether***, 440 F.2d 753 (5th Cir. 1971) (net worth and specific items); ***United States v. Scott***, 660 F.2d 1145, 1147-48 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (specific items and net worth); ***United States v. Lacob***, 416 F.2d 756 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970) (bank deposits and specific items); ***United States v. Bahr***, 580 F. Supp. 167 (N.D. Iowa 1983) (bank deposits and specific items, with a percentage computation to calculate cost of goods sold).

In ***Meriwether***, the government used two separate and distinct methods of proof in attempting to establish corrected taxable income -- the net worth and specific items methods of proof. [4] Neither method was used only as corroboration for the other, and the jury was instructed that it could rely on either method. The government failed to establish the defendant's opening net worth with reasonable certainty and the conviction was reversed because there was no way to determine the method upon which the jury relied. ***Meriwether***, 440 F.2d at 755, 757. *But cf.* ***Griffin v. United States***, 112 S. Ct. 466, 469-74 (1991) (general jury verdict of guilty on multiple-object conspiracy does not have to be set aside when evidence is inadequate to support the conviction as to one object).

1. *See* ***United States v. Marcus***, 401 F.2d 563, 565 (2d Cir.), *cert. denied*, 393 U.S. 1023 (1968) (defendant's income from check cashing service determined by multiplying standard check fee by amount of checks cashed).

2. Just as reporting a false source of income is prosecutable under section 7206(1) (*see* Section 30.01 n.1, *supra*), so, too, is a willful misstatement on a return as to the source of claimed deductions. ***United States v. Bliss***, 735 F.2d 294, 301 (8th Cir. 1984).

3. The justification for this rule is that post-offense statements made to an official charged with investigating the possibility of wrongdoing are often unreliable. *See* ***Smith v. United States***, 348 U.S. 147, 152-55 (1954). ***Bell*** involved delinquent tax returns filed after the defendant had been interviewed by special agents of the IRS concerning failure to file his returns. ***Bell***, 734 F.2d at 1317.

4. Where two methods of proof are used, the jury must be properly instructed on each method.

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The net worth method of proof is a long-established indirect method of proof regularly used by the government in criminal tax cases. Historically, the net worth method was used when correct taxable income could not be determined from the defendant's books and records, and the method provided the most expeditious and practical way of arriving at taxable income. *See*, *e.g.*, ***United States v. Johnson***, 319 U.S. 503, 517 (1943), involving gambling transactions where all records had been destroyed.

Every circuit now has cases endorsing the net worth method, and the Supreme Court has approved its use a number of times. *See*, *e.g.*, ***Massei v. United States***, 355 U.S. 595 (1958); ***United States v. Calderon***, 348 U.S. 160 (1954); ***Smith v. United States***, 348 U.S. 147 (1954); ***Friedberg v. United States***, 348 U.S. 142 (1954); ***Holland v. United States***, 348 U.S. 121 (1954); ***Johnson***, 319 U.S. 503. Although endorsing the net worth method, the Supreme Court has cautioned that "it is so fraught with danger for the innocent that the courts must closely scrutinize its use." ***Holland***, 348 U.S. at 125.

The net worth method produces an approximation. ***Holland***, 348 U.S. at 129; ***United States v. Giacalone***, 574 F.2d 328, 332 (6th Cir.), *cert. denied*, 439 U.S. 834 (1978). *See also* ***United States v. Schafer***, 580 F.2d 774, 777 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). It operates on the concept that if a taxpayer has more wealth at the end of a given year than at the beginning of that year, and the increase is not due to nontaxable sources such as gifts, loans, and inheritances, then the increase is a measure of taxable income for the year. Because nondeductible expenditures are added to any net worth increase, the method is sometimes referred to as the net worth and expenditures method.

A net worth computation thus demonstrates not only that the defendant had income but how that income was spent. The computation generally portrays the financial life of a taxpayer, both prior to and during the prosecution period. ***Holland***, 348 U.S. at 132; ***United States v. Mastropieri***, 685 F.2d 776, 778 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982).

It is important to remember when constructing a net worth computation that any included items or transactions must reflect tax consequences. For this reason, nontaxable items received during a prosecution year should be eliminated from the net worth computation. The treatment to be afforded an item on the net worth computation is often easy once it is determined whether or not the item has tax consequences.

For an example of a net worth computation, *see* Section 31.16, *infra*.

31.02 ***DESCRIPTION OF NET WORTH METHOD***

The First Circuit described the net worth method as follows:

> The Government makes out a prima facie case under the net worth method of proof if it establishes the defendant's opening net worth (computed as assets at cost basis less liabilities) with reasonable certainty and then shows increases in his net worth for each year in question which, added to his nondeductible expenditures and excluding his known nontaxable receipts for the year, exceed his reported taxable income by a substantial amount. The jury may infer that the defendant's excess net worth increases represent unreported taxable income if the Government either shows a likely source, or negates all possible nontaxable sources.
>
> [T]he jury may further infer willfulness from the fact of underreporting coupled with evidence of conduct by the defendant tending to mislead or conceal.

United States v. Sorrentino, 726 F.2d 876, 879-80 (1st Cir. 1984) (citations omitted). *See also* ***Holland v. United States***, 348 U.S. 121, 125 (1954); ***United States v. O'Connor***, 273 F.2d 358, 361 (2d Cir. 1959); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976); ***United States v. Terrell***, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985); ***United States v. Wirsing***, 719 F.2d 859, 871 (6th Cir. 1983); ***United States v. Goldstein***, 685 F.2d 179, 180 (7th Cir. 1982); ***United States v. Greene***, 698 F.2d 1364, 1370 (9th Cir. 1983).

The Fifth Circuit summarized the mechanical steps used to determine income when applying the net worth method of proof:

> The government established its case through the "net worth" approach, a method of circumstantial proof which basically consists of five steps: (1) calculation of net worth at the end of a taxable year, (2) subtraction of net worth at the beginning of the same taxable year, (3) addition of non-deductible expenditures for personal, including living, expenditures, (4) subtraction of receipts from income sources that are non-taxable, and (5) comparison of the resultant figure with the amount of taxable income reported by the taxpayer to determine the amount, if any, of underreporting.

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978).

31.03 ***USE OF NET WORTH METHOD***

31.03[1] ***Inadequate Books and Records***

The net worth method of proof frequently is used when it would be difficult or impossible to establish the defendant's taxable income by direct evidence. ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. 1981). Often, the defendant's books and records are inadequate, false, or not available to the government. Although a defendant's books and records can be helpful, they are not essential. "[I]n a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability," seeks to establish taxable income by the net worth method. ***United States v. Schafer***, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). *See also* ***Holland v. United States***, 348 U.S. 121, 125 (1954); *accord* ***United States v. Terrell***, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985).

A good example of a net worth prosecution in which the defendant's books were inadequate can be found in ***United States v. Notch***, 939 F.2d 895, 897-98 (10th Cir. 1991). In ***Notch***, the defendant managed six adult bookstores with video arcades and received 15% of the net profits as salary. The defendant and the bookstore owner reported only one-half of the arcade receipts. They

used perforated accounting sheets where the true cash receipts appeared on the bottom portion, which they discarded. They maintained a false figure on the top portion of the sheet, which they retained. *See also* ***United States v. Stone***, 531 F.2d 939, 940 n.1 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1240 (9th Cir. 1971).

Similarly, the net worth method can be used when the defendant has no books and records. In such a case, "willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income." ***Holland***, 348 U.S. at 128. *See also* ***Campodonico v. United States***, 222 F.2d 310, 313 (9th Cir.), *cert. denied*, 350 U.S. 831 (1955).

31.03[2] ***Adequate Books and Records***

Early cases held that the government could not use the net worth method in situations in which the defendant had "adequate" books and records. In 1954, the Supreme Court flatly rejected this early view stating:

> The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. Petitioners' accounting system was appropriate for their business purposes; and admittedly, the Government did not detect any specific false entries therein. Nevertheless, if we believe the Government's evidence, as the jury did, we must conclude that the defendants' books were more consistent than truthful, and that many items of income had disappeared before they had ever reached the recording stage . . . To protect the revenue from those who do not `render true accounts,' the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

Holland v. United States, 348 U.S. 121, 131-32 (1954).

In the wake of ***Holland***, the Fifth Circuit rejected a defendant's claim that the government's use of the net worth method of proof was improper because the government did not make a

preliminary showing regarding the state of the defendant's records. ***McGrew v. United States***, 222 F.2d 458, 459 (5th Cir. 1955); [1] *accord* ***United States v. Vanderburgh***, 473 F.2d 1313, 1314 (9th Cir. 1973) (government may use the net worth method of proof even where the defendant contends that he maintained an allegedly complete and adequate set of books of account); ***United States v. De Lucia***, 262 F.2d 610, 614 (7th Cir. 1958), *cert. denied*, 359 U.S. 1000 (1959).

Thus, the state of the defendant's records has no bearing on whether the net worth method of proof may be used. The governing principle is "the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history." ***Holland***, 348 U.S. 121, 132 (1954).

31.03[3] ***Use With Other Methods***

The government may use more than one method of proof. *See, e.g.*, ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986). In ***Abodeely***, a tax evasion prosecution where the defendant received unreported income from gambling and prostitution, the Eighth Circuit discussed the net worth, cash expenditures, and bank deposits methods of proof and stated:

> The government may choose to proceed under any single theory of proof or a combination method, including a combination of circumstantial and direct proofs.

Abodeely, 801 F.2d at 1023. *See also* ***United States v. Smith***, 890 F.2d 711, 713 (5th Cir.1989) (net worth and specific items methods of proof combined in a section 7201 prosecution).

31.04 ***PROOF OF NET WORTH -- GENERALLY***

In using the net worth method, the government must:

1. Establish an opening net worth with reasonable certainty, *i.e.*, the defendant's net worth at the beginning of the prosecution year.
2. Establish the defendant's net worth at the end of the prosecution year, with any excess over opening net

worth representing the net worth increase.

3. Establish a likely source of taxable income from which the jury could find the net worth increase sprang; or, in the alternative, negate nontaxable sources of income.

4. Negate "reasonable explanations" by the taxpayer inconsistent with guilt.

Holland v. United States, 348 U.S. 121 (1954). *See also* ***United States v. Massei***, 355 U.S. 595 (1958); ***United States v. Tracey***, 675 F.2d 433, 435 (1st Cir. 1982); ***United States v. Koskerides***, 877 F.2d 1129, 1137 (2d Cir. 1989); ***United States v. Grasso***, 629 F.2d 805, 807 (2d Cir. 1980); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976); ***United States v. Bethea***, 537 F.2d 1187, 1188-89 (4th Cir. 1976); ***United States v. Dwoskin***, 644 F.2d 418, 420, 422 (5th Cir. 1981); ***United States v. Blandina***, 895 F.2d 293, 301 (7th Cir. 1989); ***United States v. Scott***, 660 F.2d 1145, 1147 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); ***United States v. Hamilton***, 620 F. 2d 712, 714 (9th Cir. 1980); ***United States v. Notch***, 939 F.2d 895, 898 (10th Cir. 1991); ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987).

31.05 ***OPENING NET WORTH***

31.05[1] ***Proof -- "Reasonable Certainty"***

Net worth increases are determined by establishing a taxpayer's net worth (assets minus liabilities) at the beginning of a given year and then comparing this beginning net worth with the taxpayer's net worth at the end of the year. December 31 of the year preceding the first prosecution year (the opening net worth) is the point from which net worth increases are measured. For example, if the first prosecution year, or the year to be measured, is 1993, then the defendant's net worth as of December 31, 1992, would be the opening net worth from which to determine whether the defendant's net worth increased or decreased in 1993. The defendant's 1993 ending net worth would in turn become the opening net worth for 1994, and so on.

Establishing an opening net worth can be equated to the process followed when a person goes on a diet. One of the first things that a doctor does is weigh the patient to have a starting point from which to determine whether the patient has gained or lost weight. The patient is thereafter weighed at intervals, and comparisons are made with the weight at the previous weighing to determine whether or not the diet is working. The same process basically is followed in a net worth computation, except that the "weighing" is of the defendant's net worth or wealth on an annual basis.

The Supreme Court described the need to establish an opening net worth, and the standard of proof required to do so:

> Establishing a Definite Opening Net Worth. We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.

Holland v. United States, 348 U.S. 121, 132 (1954).

While every effort should be made to obtain all of the assets and liabilities of the defendant at the starting point, the government does not have to establish the starting point, or opening net worth, "to a mathematical certainty and each case presents its own peculiar difficulties." ***Smith v. United States***, 236 F.2d 260, 266-67 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956); ***United States v. Gardner***, 611 F.2d 770, 775 (9th Cir. 1980). It is sufficient if the government establishes the defendant's opening net worth with reasonable certainty -- more than this is not required. ***Holland***, 348 U.S. at 132; ***United States v. Sorrentino***, 726 F.2d 876, 879 (1st Cir. 1984); ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976); ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985); ***United States v. Carriger***, 592 F.2d 312, 313

(6th Cir. 1979); ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982); ***United States v. Honea***, 556 F.2d 906, 908 (8th Cir. 1977); ***United States v. Greene***, 698 F.2d 1364, 1372 (9th Cir. 1983).

Once the government has established the defendant's opening net worth with reasonable certainty, the defendant remains silent "at his peril." ***United States v. Stone***, 531 F.2d 939, 942 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); *see also* ***Holland***, 348 U.S. at 138-39. For more information concerning the defendant's burden to come forward with reasonable leads, *see* Section 31.13, *infra*, regarding the "reasonable leads doctrine."

Finally, the government is not required to prove every item in a net worth statement submitted in a bill of particulars. Items included in the starting point prior to trial may vary somewhat from the evidence admitted at trial. The Seventh Circuit has stated that:

> This net worth statement, which was introduced into evidence as Government's Exhibit 8, was, in essence, a bill of particulars. There is no merit in defendant's assertion that these items must be included in the starting point. There were several items contained in this statement, some of which favored defendant and some Government, which were not substantiated during the trial by admissible evidence. Government's starting point must be based upon items which are supported by evidence introduced during trial. It is certainly not unusual in cases of this type for the starting point as proved during the trial to vary from the bill of particulars or indictment which are prepared prior to trial.

United States v. Mackey, 345 F.2d 499, 505 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965).

31.05[2] ***Thorough Investigation a Necessity***

An extremely thorough investigation is crucial in proving that the government established the defendant's opening net worth with reasonable certainty. As the Ninth Circuit has noted, when the government chooses to proceed against a defendant using the net worth method of proof, "the Government assumes a special responsibility of thoroughness and particularity in its investigation and presentation." ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981). The burden on the government has been described as follows:

> The Government must affirmatively prove an initial amount available to the taxpayer, with evidence that excludes the possibility that the defendant relied on previously accumulated assets rather than unreported taxable income, ***United States v. Marshall***, 557 F.2d 527, 530 (5th Cir. 1977), without refuting all possible speculation as to sources of funds, however.

McFee v. United States, 206 F.2d 872, 874 (9th Cir. 1953), *vacated and remanded*, 348 U.S. 905 (1955), *aff'd*, 221 F.2d 807 (9th Cir.), *cert. denied*, 350 U.S. 825 (1955).

In ***United States v. Smith***, 890 F.2d 711, 713 (5th Cir. 1989), the Fifth Circuit stated that "[w]e join the Seventh Circuit in observing that sloppy or mediocre financial and accounting evaluation upon which a conviction is obtained can be the genesis for reversal." *See also* ***United States v. Breger***, 616 F.2d 634, 635-36 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) (the government must conduct a meticulous investigation, and the investigation techniques and figures are subject to close scrutiny).

A good example of a thorough and detailed investigation is found in ***Terrell***, 754 F.2d 1139, where the defendant was convicted of evasion for the years 1976 through 1979, and the government began its investigation of Terrell's funds with the year 1967. Saying, "we can only be surprised by appellant's attack on the thoroughness of the Government's investigation", the court described the investigation as follows:

> The investigation consumed three and one-half years. Approximately 20 agents canvassed public records to determine the extent of appellant's holdings. Thirty banks were contacted, and 20 banks produced documents or witnesses. Nearly 300 potential witnesses were interviewed, many of them several times. IRS agents identified in excess of 70 assets purchased and sold by Terrell, and questioned third parties involved in these transactions. Additionally, every expenditure made by Terrell was traced including all cashier's checks traced back to their sources to determine how they were purchased.

Terrell, 754 F.2d at 1147-48. For another example of the detailed steps required in conducting a net worth investigation, *see* ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984).

When using the net worth method, the scope of the investigation and the evidence developed must be carefully examined with a view to determining whether the evidence establishes to a reasonable certainty all of the defendant's assets and liabilities. If it is determined that the investigation was not thorough and failed to establish an opening net worth with reasonable certainty, then additional evidence must be developed.

31.05[3] ***Evidence Establishing Opening Net Worth***

The government has been highly successful in overcoming attacks on the legal sufficiency of the proof of opening net worth. This success can be attributed directly to the extensive and thorough investigations conducted by Internal Revenue Service agents in constructing a net worth computation.

As noted, the opening net worth must include all of the defendant's assets that are reasonably discoverable. This includes assets derived from nontaxable sources of income, such as gifts, loans, and inheritances, as well as assets derived from taxable income. It would distort taxable income for the year in which taxable income is being computed if assets derived from nontaxable sources were omitted from the starting point.

For example, assume that the prosecution year is 1990 and in 1989 the taxpayer inherited or

borrowed $100,000, which is not accounted for in the opening net worth. If the defendant purchases a house with the $100,000 in 1990, which is reflected on the defendant's 1990 net worth as an asset, this would result in incorrectly charging the defendant with a net worth increase of $100,000 in 1990, which is not the case since he had the $100,000 at the beginning of the year. Conversely, it should be noted that gifts, inheritances, and other nontaxable sources of income acquired during the year for which taxable income is being computed must be eliminated from the defendant's net worth in order to correctly compute the taxable income.

In ***United States v. Breger***, 616 F.2d 634 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980), the defendant was convicted of evasion and filing false income tax returns for the years 1972 through 1974. In upholding the starting point established by the government at trial, the court commented:

> We think the Government met its burden here. It used information gleaned from a 1969 mortgage application, traced a real estate and cash inheritance from appellant's mother in 1968, and investigated bond statements and checking accounts in order to ascertain appellant's access to funds as of January 1, 1972. We note that appellant adduced no specific evidence, such as a cash hoard, to suggest that the starting point was inaccurate or misleading.

Breger, 616 F.2d at 636.

Early income tax returns of a defendant are relevant and can play a significant role in developing a defendant's opening net worth. Thus, in ***United States v. Mackey***, 345 F.2d 499, 504 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965), the starting point of the net worth computation was December 31, 1955, and the court upheld the use by the government of "the income tax returns of defendant and his wife from 1929 through December 31, 1955, as a guide in determining defendant's net worth at the starting point." Also, net worth statements submitted by the defendant either to the government or to financial institutions can be particularly helpful in establishing an opening net worth. *See, e.g.*, ***Smith v. United States***, 348 U.S. 147, 149 (1954); ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated on other grounds*, 395 U.S. 710 (1969); ***United States v. Honea***, 556 F.2d 906, 908 (8th Cir. 1977).

In ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982), the court noted that less stringent standards with respect both to establishing opening net worth and to negating non-taxable income sources are justified in a case where the defendants were shown to have gone to great lengths to conceal their unreported increases in wealth. While the court observed that the investigation in that case should not be regarded as a model, the case does furnish an excellent example of a number of the steps that must be taken to establish an opening net worth. ***Mastropieri***, 685 F.2d at 779, 783. [2]

For additional cases holding that the government's evidence was sufficient to establish the defendant's opening net worth with reasonable certainty, *see* ***United States v. Goichman***, 407 F.Supp. 980, 986 (E.D. Pa. 1976), *aff'd*, 547 F.2d 778 (3d Cir. 1976); ***United States v. Mancuso***, 378 F.2d 612 (4th Cir. 1967), *amended*, 387 F.2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); ***United States v. Dwoskin***, 644 F.2d 418, 420 (5th Cir. 1981) (opening net worth based on a financial statement signed by the defendant and submitted to a bank); ***United States v. Schafer***, 580 F.2d 774, 778 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); ***United States v. Giacalone***, 574 F.2d 328, 331 (6th Cir.), *cert. denied*, 439 U.S. 834 (1978); ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982) (evasion charged for three years, conviction on only one year, sufficient if opening net worth established for year of conviction); ***United States v. Honea***, 556 F.2d 906, 908 (8th Cir. 1977); ***United States v. Greene***, 698 F.2d 1364, 1372 (9th Cir. 1983) (jury could draw adverse inferences from the late stage at which defense evidence was disclosed in spite of a motion for reciprocal discovery).

31.05[4] ***Opening Net Worth Not Established***

In a relatively small number of cases, the courts have found the government's proof of the defendant's opening net worth insufficient to support a conviction. For the most part, these are earlier cases, but they furnish examples of pitfalls that must be avoided if the opening net worth is to be established with reasonable certainty.

For an example of an erroneous opening net worth computation *see* ***United States v. Achilli***, 234 F.2d 797, 804 (7th Cir. 1956), *aff'd on other grounds*, 353 U.S. 373 (1957). In ***Achilli***, one count of a three-count conviction was reversed because the value of a residence sold by the defendant in the first prosecution year (1946) was erroneously omitted from the opening net worth computation and the error accounted for almost 80 percent of the deficit shown by the government's computation. The error seems to have resulted from an oversight by the government, because the sale of the residence omitted from the defendant's opening net worth was reported in the capital gains schedule of the defendant's 1946 return. Since the tax return was the only evidence with respect to the time when the defendant acquired the property, the government conceded that the property should have been included as an asset in the computation of the defendant's net worth as of December 31, 1945. ***Achilli***, 234 F. 2d at 804. *See also* ***United States v. Keller***, 523 F.2d 1009, 1011 (9th Cir. 1975) (because the government failed to pursue leads (regarding home improvements and furnishings) which were reasonably susceptible of being checked, the opening net worth for 1967 was not reasonably certain and the evidence as to the 1967 count was insufficient to go to the jury).

The importance of the testimony given by the agent who presents the government net worth computation and the necessity for testifying fully is illustrated in ***Merritt v. United States***, 327 F.2d 820, 821 (5th Cir. 1964). The ***Merritt*** court reversed a tax evasion conviction because the government failed in its burden of identifying the assets of the defendant which were not included in the opening net worth statement. The court based its decision on the following testimony of the special agent who drew up the net worth schedule:

> Q. As a matter of fact don't you know that . . . this taxpayer owned assets and had assets that you didn't even take into account in this case? Don't you know that of your own personal investigation?
>
> A. He has some other assets, yes, sir.
>
> Q. And this doesn't include all those assets does it?

A. No, sir.

. . . .

Q. Are you willing to swear under oath that these assets represented in your net worth schedule are all and complete the assets of this taxpayer and all and complete the liabilities of this taxpayer?

A. I know there are other assets of the taxpayer.

. . . .

A. My investigation disclosed that the taxpayer would have other assets. I know of no other liabilities.

Merritt, 327 F.2d at 821. The appellate court observed that "[n]either counsel asked the Special Agent what these other assets were, and his testimony does not reveal what he had in mind." ***Merritt***, 327 F.2d at 821. Thus, the appellate court was unable to "determine whether these assets were realty or personalty, or whether they were disposed of during the years in question." ***Merritt***, 327 F.2d at 822.

The lesson is clear -- the net worth computation must be reviewed in depth with the special agent and testimony developed to establish that the starting point includes, to a reasonable certainty, all of the defendant's assets and liabilities. If the agent had a good reason for leaving items out of the net worth schedules, then the agent should be asked about this on direct examination, along with questions as to what these items are and why they were omitted.

31.06 *CASH ON HAND*

31.06[1] *Definition -- Need to Establish*

As one court observed, "the most frequent challenge to the government's computations in a net worth case is the opening cash balance." ***United States v. Schafer***, 580 F.2d 774, 779 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). A defendant's claim of cash on hand is commonly referred to as a cash hoard defense. A typical cash hoard defense is based on a claim of prior gifts from family members or friends, or an inheritance which was received in an earlier year and spent during the prosecution period. The Supreme Court described the cash hoard defense as follows:

> Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention.

Holland v. United States, 348 U.S. 121, 127 (1954).

While it is often difficult to disprove the existence of a cash hoard, the government must establish with reasonable certainty the amount of cash that the defendant had in his possession at the beginning of the tax period. ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981). The necessity for establishing cash on hand "with reasonable certainty" is well summarized in ***United States v. Terrell***, 754 F.2d 1139, 1146-47 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985):

> The question of whether a defendant has a substantial amount of cash-on-hand at the beginning of the indictment period must be carefully investigated because the existence of a cash hoard could greatly distort the net worth evaluation. Unaccounted for funds that surface during the course of the net worth evaluation might be explained by the fact that a defendant accumulated large sums of cash which he kept on hand and began to spend during the indictment period.

See also ***United States v. Pinto***, 838 F.2d 426, 431 (10th Cir. 1988).

A cash hoard defense often can be refuted by circumstantial evidence establishing that the defendant either had no cash hoard or spent it before the prosecution period. ***United States v. Ford***, 237 F.2d 57 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957). One way to defeat such a claim is to show that the family member or friend did not have sufficient resources to give the defendant the amount claimed. *See* ***McGarry v. United States***, 388 F.2d 862, 865 (1st Cir. 1967), *cert. denied*, 394 U.S. 921 (1969); ***United States v. Breger***, 616 F.2d 634, 636 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Holovachka***, 314 F.2d 345, 354-55 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963) (gifts and loan defense). *See also* ***Friedberg v. United States***, 348 U.S. 142, 143 (1954); ***United States v. Calderon***, 348 U.S. 160, 165 (1954).

While cash on hand does include the amount of money that a defendant habitually carries in his pocket, ***Calderon***, 348 U.S. at 162, the concept of cash on hand is more expansive. It includes all monies or cash readily available to the defendant which are not deposited in a bank or other institution. Thus, monies that the defendant had in his safe or his business also would constitute cash on hand. ***Calderon***, 348 U.S. at 162. Similarly, cash kept in a safe deposit box would constitute cash on hand, as would money buried in the defendant's backyard. ***United States v. Bethea***, 537 F.2d 1187, 1190 (4th Cir. 1976); ***United States v. Carter***, 462 F.2d 1252, 1255-56 (6th Cir.), *cert. denied*, 409 U.S. 984 (1972).

Whenever the defendant claims a cash hoard prior to indictment, the prosecutor should learn the amount of this cash hoard, where it came from, when it was received, where the cash was

kept, and when and for what purpose all or part of the cash was used. Although the government must eliminate the possibility of a cash hoard when determining the defendant's cash on hand, not every wild story given by a defendant must be accepted at face value. *See* ***United States v. Smith***, 890 F.2d 711 (5th Cir. 1989) (defendant never disclosed the existence and source of cash transactions to the Special Agent during the investigation but at trial the defendant's spouse claimed to have $23,000 in cash in a flower vase and to have saved large cash gifts from her parents). For a cash hoard to have any bearing on a net worth computation, the defendant must have spent all or part of it during the prosecution years on assets or expenditures that appear in the government's net worth statement. If the cash hoard remains the same throughout the prosecution period, this money has no effect on the defendant's net worth. The failure to use the cash hoard during the prosecution years means that any assets acquired during those years were acquired with other funds. *See* Section 31.08[2], *infra*.

As a practical matter, once the evidence establishes that the defendant had cash available at the beginning of the prosecution period, the government must produce evidence from which an inference can be drawn that the cash was not utilized during the indictment period. Otherwise, any available cash on hand must be subtracted from the computed total reflecting the net worth increase and nondeductible expenditures. If it cannot be established that the amount of money in the cash hoard remained constant throughout the prosecution period, then it must be assumed that any computed net worth increase and nondeductible expenditures may be the result of the spending of the pre-existing cash. *See* ***McGarry***, 388 F.2d at 866.

31.06[2] ***Jury Question -- Burden of Proof***

The existence of cash on hand at the beginning of the prosecution period presents a factual issue for determination by the jury. ***Holland v. United States***, 348 U.S. 121, 134 (1954); ***United States v. Calderon***, 348 U.S. 160, 162-63 (1954); ***McGarry v. United States***, 388 F.2d 862, 868 (1st Cir. 1967), *cert. denied*, 394 U.S. 921 (1969); ***United States v. Breger***, 616 F.2d 634, 635

(2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Vardine***, 305 F. 2d 60, 64-65 (2d Cir. 1962) (conflicting testimony left to the jury and government properly based its net worth summary on its version of the facts); ***Hayes v. United States***, 407 F.2d 189, 193 (5th Cir.), *cert. dismissed*, 395 U.S. 972 (1969); ***United States v. Carter***, 462 F.2d 1252, 1256 (6th Cir.), *cert. denied*, 409 U.S. 984 (1972); ***Fowler v. United States***, 352 F.2d 100, 107 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

The foregoing cases demonstrate that as long as there is evidence from which a jury can conclude that the government has established the amount of cash on hand with reasonable certainty, the defendant is not entitled to a directed verdict on this issue. *See, e.g.*, ***Breger***, 616 F.2d 634; ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981); ***United States v. Blandina***, 895 F.2d 293, 302 (7th Cir. 1989).

Once the government has established that a thorough investigation failed to uncover evidence of cash on hand, the burden shifts to the defendant to come forward with evidence of cash and he remains quiet at his peril. ***United States v. Mackey***, 345 F.2d 499, 506 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965). This burden arises because "[w]hether defendant had substantial sums of cash at the starting point is a matter within defendant's knowledge." ***Mackey***, 345 F.2d at 506. *See also* ***Holland***, 348 U.S. at 138-39; ***United States v. Holovachka***, 314 F.2d 345, 354 (7th Cir. 1963); ***Fowler***, 352 F.2d at 107; ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982).

31.06[3] ***Amount of Cash on Hand***

The net worth computation must reflect the amount of the defendant's cash on hand for each year. However, once the government has established the initial cash on hand, it becomes a matter of showing for a subsequent year the amount of any prior cash that the defendant still had on hand plus any cash on hand acquired during the year under consideration. Any cash on hand acquired during a prosecution year, which is still on hand at the end of the year, will increase the defendant's

net worth unless the cash on hand was derived from a nontaxable source, such as a gift or inheritance.

The amount of cash on hand reflected in the defendant's opening net worth will depend on the evidence established by the investigation. In ***United States v. Goldstein***, 685 F.2d 179 (7th Cir. 1982), the defendant was charged with evasion and was acquitted for the tax years 1974 and 1975, but convicted for the tax year 1976. The government established the defendant's opening net worth as of 1973 and thereafter introduced evidence of the defendant's net worth for each of the years 1974, 1975, and 1976. With regard to the defendant's argument that cash on hand was underestimated by the government, the court pointed out that the government could establish a 1976 opening net worth by establishing a net worth in an earlier year and then calculating the effect of income and disbursements. The court concluded that the government need not prove the cash on hand at the beginning of each year with evidence independent of the other years because such a calculation is of no greater significance than other varied financial assets. ***Goldstein***, 685 F.2d at 181. *Accord* ***United States v. Pinto***, 838 F.2d 426, 431-32 (10th Cir. 1988). Thus, the government's calculations of income and disbursements based on a starting point were adequate to prove the opening net worth for 1976.

In some instances, cash on hand may be appropriately reflected as zero. *See*, *e.g.*, ***United States v. Mastropieri***, 685 F.2d 776, 779 (2d Cir.), *cert. denied*, 459 F.2d 945 (1982); ***United States v. Goichman***, 407 F. Supp. 980, 986 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976). In other instances, the evidence may be such that cash on hand can be reflected as a nominal amount. *See*, *e.g.*, ***United States v. Carriger***, 592 F.2d 312, 314 (6th Cir. 1979) ($500); ***Goldstein***, 685 F.2d at 181 ($100). In ***Carriger***, cash on hand had no effect on the defendant's net worth because the evidence established that the defendant had $500 in cash on hand at the beginning of the prosecution period and $500 on hand at the end of the prosecution period. Thus, there was no increase or decrease in the defendant's net worth arising from cash on hand.

There are also instances where the government investigation indicates a negative cash

position, *i.e.*, that an analysis of the defendant's financial transactions in years prior to the prosecution period indicates that the defendant spent more than was available on the basis of his prior returns.

The facts of a case may be such that the evidence justifies an assumption that any cash on hand that did exist remained constant, though unknown, throughout the period covered. This situation arose in ***United States v. Giacalone***, 574 F.2d 328 (6th Cir.), *cert. denied*, 439 U.S. 834 (1978), in which the defendant was a professional gambler, and the net worth statement assumed the existence of a bank roll of cash which remained approximately the same throughout the period covered. The government in its computation used a dash rather than a dollar amount to represent the cash on hand. The dashes symbolized an unknown, presumably constant, amount. The court concluded that the use of dashes did not invalidate the net worth statement and that "[t]he effect of using the dashes is no different from the use of zeroes approved in ***United States v. Goichman***, [407 F. Supp. 980 (E.D. Pa. 1976), *aff'd*, 547 F.2d 778 (3d Cir. 1976)]." ***Giacalone***, 574 F.2d at 331-33. Reflecting cash on hand with dashes was a practical solution -- it avoided "the untenable assumption that a professional gambler could operate without any cash." ***Giacalone***, 574 F.2d at 333. *Accord*, ***United States v. Scrima***, 819 F.2d 996 (11th Cir. 1987) (floating cash or "dash" method approved in prosecution of a marijuana smuggler).

31.07 ***EVIDENCE OF CASH ON HAND***

31.07[1] ***Evidence of Financial Deprivation***

In establishing cash on hand and disproving a claim of a cash hoard, the government may use circumstantial evidence to refute the claim of a cash hoard. This was the situation in the leading case of ***Holland v. United States***, 348 U.S. 121, 132 (1954). In ***Holland***, the defendants claimed opening cash on hand of $113,000 and the government allowed the defendants $2,153.09 as opening cash on hand. The government did not introduce any direct evidence to dispute the defendant's claim but relied instead on the inference that anyone who had the cash the defendants

claimed to have would not have "undergone the hardship and privation endured by the Hollands all during the late 20's and throughout the 30's." ***Holland***, 348 U.S. at 133. The case is an excellent example of a thorough investigation, which traced the financial living pattern of the Hollands as far back as 1913 (the first prosecution year was 1948), and serves as a model for the type of circumstantial evidence that is admissible to refute a cash hoard defense. For another example of the government "painstakingly" tracing the defendant's finances over a period of years and defeating a cash hoard defense, *see* ***Friedberg v. United States***, 348 U.S. 142, 143 (1954), which was decided the same day as the ***Holland*** case. *See also* ***United States v. Ford***, 237 F.2d 57, 59, 63 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957); ***Gariepy v. United States***, 189 F.2d 459, 461 (6th Cir. 1951).

On the other hand, it is not sufficient if the government merely introduces evidence which demonstrates that the defendant was poor at an early point in his life. The evidence must trace the defendant's financial history up to the starting point. "Proof that the taxpayer was impoverished by the depression, that he was working for his meals at $8 a week in 1935, is too remote, absent proof of the taxpayer's financial circumstances in the intervening years." ***United States v. Calderon***, 348 U.S. 160, 164 (1954) (first prosecution year was 1946). For another example of a thorough investigation from an early point on through the close of the final indictment year, *see* ***United States v. Carter***, 462 F.2d 1252 (6th Cir.), *cert. denied*, 409 U.S. 984 (1972).

31.07[2] ***Admissions of Defendant***

In establishing an opening net worth, the government will often rely on statements made by the defendant to investigating agents, as well as to third parties. *See, e.g.*, ***Holland v. United States***, 348 U.S. 121, 128 (1954) (statements made to agents); ***United States v. Goldstein***, 685 F.2d 179, 182 (7th Cir. 1982) (admissions in the form of financial statements). Statements made by a defendant are admissible as admissions. Fed. R. Evid. Rule 802(d)(2)(A).

Admissions are a fertile source for both establishing cash on hand and refuting cash hoard

defenses. A distinction must be made, however, between admissions made by a defendant prior to the crime (pre-offense admissions) and admissions made after the crime (post-offense admissions).

31.07[2][a] ***Pre-Offense Admissions***

Admissions made by a defendant prior to the crime do not have to be corroborated. ***Warszower v. United States***, 312 U.S. 342, 347 (1941); ***Fowler v. United States***, 352 F.2d 100 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966) (loan application was filed before crimes in controversy occurred, and admissions made on application need not be corroborated); ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984); ***United States v. Hallman***, 594 F.2d 198, 200-01 (9th Cir.), *cert. denied*, 444 U.S. 828 (1979) (corroboration not required of admission in financial statement filed by the defendant with a bank prior to the investigation conducted by the Internal Revenue Service).

31.07[2][b] ***Post-Offense Admissions***

As a general rule, post-offense admissions must be corroborated. ***Smith v. United States***, 348 U.S. 147, 152-53 (1954); ***United States v. Calderon***, 348 U.S. 160 (1954). Generally speaking, in a criminal tax case, a post-offense statement would be a statement made after the filing of a false return or, if no return is filed, after the return was due.

In ***Smith***, 348 U.S. 147, the defendant's opening net worth was based on a signed net worth statement given to the investigating agents by the defendant, as well as other extrajudicial admissions made by the defendant. ***Smith***, 348 U.S. at 152. The Court found that the government could corroborate the defendant's statement in one of two ways: (1) either by substantiating the opening net worth directly; or (2) by independent evidence as to the defendant's conduct during the prosecution years, "which tends to establish the crime of tax evasion without resort to the net worth computation." ***Smith***, 348 U.S. at 157-58.

The Court relied on the second method to determine that the government sufficiently

corroborated the defendant's post-offense admissions in ***Calderon***, 348 U.S. 160. The government presented independent evidence which tended to corroborate the defendant's statement regarding his cash on hand. ***Calderon***, 348 U.S. at 167.

Corroborative evidence of post-offense statements by a defendant regarding cash on hand is sufficient if it shows a substantial income deficiency for the overall prosecution period. It is not necessary for the corroborative evidence, as opposed to the evidence as a whole, to establish that there was a deficiency for each of the years in issue. ***Calderon***, 348 U.S. at 168. *Accord* ***United States v. Vardine***, 305 F.2d 60, 65 (2d Cir. 1962) (evidence that defendant periodically borrowed money to meet payrolls and other indebtedness, and that there were frequently judgments outstanding against him tended to corroborate figures defendant gave to agents). [3]

The Fifth Circuit, however, has held that it is not always necessary to corroborate post-offense admissions as to cash on hand. In ***United States v. Normile***, 587 F.2d 784, 786 (5th Cir. 1979), proof of cash on hand was based on the defendant's statement to the agent that "he kept no more than $100 in cash because he did not feel safe having larger amounts around." In response to the defendant's claim that the government failed to corroborate this statement, the court stated that it "was not necessary for the government to seek to corroborate the taxpayer's statement; indeed the inherent secrecy of the cash hoard makes it impossible for any but the keeper to know even of its existence, let alone the amount." ***Normile***, 587 F.2d at 786. Nevertheless, the court found that independent evidence of substantial bank accounts did "tend to corroborate" the defendant's admission, even though the government introduced no evidence to corroborate this directly. ***Normile***, 587 F.2d at 786-87. *See* ***United States v. Terrell***, 754 F.2d 1139, 1147 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) (corroboration requirement does not necessarily extend to admissions relating to cash-on-hand); ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981). *But see* ***United States v. Meriwether***, 440 F.2d 735, 756-57 (5th Cir. 1971), *cert. denied*, 417 U.S. (1974). *See also* ***United States v. Scrima***, 819 F.2d 996 (11th Cir. 1987) in which a marijuana smuggler told agents during the investigation that he maintained only $500 in cash on

hand but claimed at trial that he had an undisclosed cash hoard of $375,000 at the beginning of the indictment period. The court found that "the government is not required to corroborate the taxpayer's statement with respect to his cash on hand at the beginning of the tax period. After everything possible is done to verify the opening net worth, the issue of the amount of the defendant's cash hoard is properly submitted to the jury." ***Scrima***, 819 F.2d 996 n.3

31.07[3] ***Tax Returns As Admissions***

"Statements made in an income tax return constitute admissions." ***United States v. Dinnell***, 428 F. Supp. 205, 208 (D. Az. 1977), *aff'd without published opinion*, 568 F.2d 779 (9th Cir. 1978); ***United States v. Hornstein***, 176 F.2d 217, 220 (7th Cir. 1949) (cost of goods sold). Items reported on returns that are the subject of the prosecution, as well as earlier filed returns, are pre-offense admissions which do not have to be corroborated. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975) (citing cases). The government may take the taxpayer's reported income as an admitted amount earned from designated sources. As to the admissibility of a defendant's tax returns, *see also* Fed. R. Evid. Rule 801(d)(2)(A).

The defendant's income tax returns are frequently used in a net worth case as a guide in determining the defendant's net worth at the starting point. *See, e.g.*, ***United States v. Mackey***, 345 F.2d 499, 504 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965). Admissions found in the defendant's tax returns for earlier years can be particularly helpful in negating a cash hoard defense when the returns show that reported income in previous years was insufficient to enable the defendant to save any appreciable amount of money. ***Holland v. United States***, 348 U.S. 121, 134 (1954); ***Friedberg v. United States***, 348 U.S. 142, 143-44 (1954); ***United States v. Terrell***, 754 F.2d 1139, 1147 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985); ***United States v. Ross***, 511 F.2d 757, 761 (5th Cir.) *cert. denied*, 423 U.S. 836 (1975); ***United States v. Bush***, 512 F.2d 771, 772 (5th Cir. 1975) (defendant's tax return reflecting zero cash on hand supported government position); ***United States v. Carter***, 462 F.2d 1252, 1255 (6th Cir.), *cert. denied*, 409 U.S. 984 (1972); ***United***

States v. Northern, 329 F.2d 794, 795 (6th Cir.), *cert. denied*, 377 U.S. 991 (1964) (value of machines in inventory taken from defendant's tax return); ***Leeby v. United States***, 192 F.2d 331, 333 (8th Cir. 1951); ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980).

31.07[4] ***Statements Given to Financial Establishments***

Statements given to financial establishments are another fruitful source of evidence as to a taxpayer's cash on hand, as well as other assets and liabilities. ***Friedberg v. United States***, 348 U.S. 142, 144 (1954) (loan application); ***United States v. Norris***, 205 F.2d 828, 829 (2d Cir. 1953) (loan application); ***United States v. Dwoskin***, 644 F.2d 418, 420 (5th Cir. 1981) (financial statement); ***Fowler v. United States***, 352 F.2d 100, 107 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966) (loan applications); ***United States v. Hallman***, 594 F.2d 198, 200 (9th Cir.), *cert. denied*, 444 U.S. 828 (1979) (financial statement).

In ***Dwoskin***, 644 F.2d at 420, the defendant's opening net worth, including cash on hand and cash unrestricted in banks, was based on a signed financial statement the defendant had submitted to a bank. The government did not include $11,000 in an account on which the defendant was a trustee for his children. The court noted that there was no evidence that the defendant used the funds and indeed the account had a higher balance subsequent to the prosecution years.

Net worth assets are generally reflected at cost, and, therefore, care must be taken to determine whether a financial statement reflects assets at cost or at fair market value. If the financial statement reflects fair market value rather than cost, the figures cannot be used in the net worth computation unless (1) the asset falls within an exception calling for the use of value or (2) the asset is an across the board asset, which has no effect on the net worth computation. Even when a financial statement reflects value rather than cost, the statement may still be used as evidence of ownership.

Financial statements also can be used to impeach a defendant testifying at trial. Thus, in ***Bateman v. United States***, 212 F.2d 61, 67 (9th Cir. 1954), the defendant testified that he had

$13,000 in cash and the government introduced, "as competent impeaching evidence," a financial statement that the defendant had given a bank showing cash of only $100.

31.07[5] ***Defendant's Books and Records***

The defendant's business books and records are admissible, as records of a regularly conducted business activity, Fed. R. Evid. Rule 803(6), and as admissions. ***United States v. Hornstein***, 176 F.2d 217, 220 (7th Cir. 1949). *See* ***Paschen v. United States***, 70 F.2d 491, 501 (7th Cir. 1934) (not necessary for government to prove the books and records are correct).

In some instances, the defendant's books and records can establish the starting point. *See, e.g.*, ***United States v. Chapman***, 168 F.2d 997, 1002 (7th Cir.), *cert. denied*, 335 U.S. 853 (1948) (government entitled to expect that books furnished for examination by taxpayer would be correct, and a verification of their accuracy cannot be called an 'uncorroborated admission').

The defendant's books and records also can be used to refute an attack on the computation of cash on hand. In ***United States v. Mackey***, 345 F.2d 499, 505 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965), an annual statement of the defendant's corporation revealed that the corporation had less cash than the amount claimed by the defendant.

Finally, it should be noted that entries in the books and records of the defendant are valuable in establishing the financial history of the defendant in early years, the defendant's business activities during the prosecution years, and the defendant's assets and liabilities.

31.07[6] ***Statements of Accountants and Attorneys***

When the defendant directs the investigating agents to his accountant or bookkeeper for questions relating to taxes, any statements made by the accountant or bookkeeper are admissions, and agents can testify as to these statements. ***United States v. Diez***, 515 F.2d 892, 896 n.4 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); ***Hayes v. United States***, 407 F.2d 189, 192 (5th Cir.), *cert. dismissed*, 395 U.S. 972 (1969). Rule 801(d)(2)(D), Fed. R. Evid., provides that a statement

by the defendant's agent (*e.g.*, bookkeeper) "concerning a matter within the scope of his agency or employment made during the existence of the relationship" is an admission, whether the defendant has authorized the making of the particular statement or not. *See* ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974). Statements of the defendant's bookkeeper or accountant concerning matters within the scope of their activity or employment are admissible against the defendant as admissions. Fed. R. Evid. Rule 801(d)(2)(C) or (D); ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974).

There is no accountant-client privilege because the defendant has no expectation of privacy in documents and information provided to return preparers knowing that mandatory disclosure of much of the information therein is required on an income tax return. ***Couch v. United States***, 409 U.S. 322 (1973). The Court also noted that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases. ***Couch***, 409 U.S. 322 at 335 (citations omitted).

Although there is no accountant-client privilege, where the accountant has been employed by the defendant's attorney to assist the attorney in communicating with the client and rendering legal advice, statements of the accountant may fall within the attorney-client privilege. ***United States v. Gurtner***, 474 F.2d 297 (9th Cir. 1973); ***United States v. Mierzwicki***, 500 F. Supp. 1331, 1335 (D.Md. 1980). The most familiar situation occurs when the attorney hires the defendant's accountant to assist the attorney's representation of the taxpayer. *See* ***United States v. Kovel***, 292 F.2d 918 (2d 1961). A ***Kovel*** accountant is protected by an extension of the client's privilege.

In the case of attorneys, it must be shown that any statements made by an attorney are not barred by the attorney-client privilege and that the attorney was authorized to speak for the taxpayer. ***United States v. O'Connor***, 433 F.2d 752, 755-56 (1st Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); ***United States v. Ojala***, 544 F.2d 940, 945-46 (8th Cir. 1976). Finally, where an attorney is functioning solely as a return preparer, information disclosed on returns, and all the underlying data, is not privileged. ***In Re Grand Jury Investigation (Schroeder)***, 842 F.2d 1223 (11th Cir. 1987).

31.07[7] ***Accountant's Workpapers***

An accountant's workpapers can be useful in establishing opening net worth figures, including cash on hand, as well as in establishing assets and liabilities during the prosecution period. The workpapers can be obtained, since there is no accountant-client privilege, ***Couch v. United States***, 409 U.S. 322, 335 (1973), nor is there a work-product privilege with respect to workpapers. ***United States v. Arthur Young & Co.***, 465 U.S. 805, 817 (1984). With the proper foundation, an accountant's workpapers are admissible as records kept in the ordinary course of business. Fed. R. Evid. Rule 803(6).

31.07[8] ***Source and Application of Funds Analysis***

Another method of establishing starting point cash on hand is to analyze the defendant's available finances for the years leading up to the starting point. This method is known as a source and application of funds, and basically consists of determining the amount of money available to the defendant during the earlier years, and the amount that the defendant spent. For example, if the evidence shows that the defendant had $100,000 available from all sources, both taxable and nontaxable, and that the defendant spent $90,000, this would leave only $10,000 as cash on hand. This was the approach taken in ***United States v. Terrell***, 754 F.2d 1139, 1143 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985), where the defendant was credited with no cash on hand on the basis of a source and application of funds analysis showing that the defendant's expenditures exceeded his reported income plus nontaxable gifts by $229,000. As in the case of establishing opening net worth, a thorough investigation is required to support a source and application of funds analysis sufficient to establish cash on hand with reasonable certainty. ***Terrell***, 754 F.2d at 1146-47. *See also* ***United States v. Goichman***, 407 F. Supp. 980, 994-95 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

31.08 ***NET WORTH ASSETS***

31.08[1] ***Reflected at Cost -- Generally***

The general rule is that in constructing the net worth of a taxpayer, assets are reflected at cost and not at fair market value. Thus, if a taxpayer buys a house for $50,000, the house is reflected as a net worth asset at $50,000, even though the house may be worth $100,000 in the year for which the taxpayer's net worth is being constructed.

Assets are generally reflected in a net worth statement at cost since the net worth method is concerned not with value, but only with actual costs and expenditures. ***United States v. O'Connor***, 237 F.2d 466, 473 n.6 (2d Cir. 1956). *See* ***Hayes v. United States***, 407 F.2d 189 (5th Cir.), *cert. dismissed*, 395 U.S. 972 (1969) (cost taken from defendant's income tax return of partially constructed apartments, and cost of land based on information furnished by the defendant's accountant); ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) (using a cost basis to determine net worth means that assets preexisting the indictment period are a source of nontaxable funds only to the extent of that basis).

The exception to this general rule is that cost is not used when the Internal Revenue Code dictates that a basis other than cost be used in determining tax consequences. For example, if services are paid for in property, then the fair market value of the property is included as compensation in gross income. Treas. Reg. § 1.61-2(d) (26 C.F.R.). In this situation, property received in exchange for services would be reflected at its fair market value in the net worth computation. For other examples of situations where an asset would be reflected at other than cost, *see* 26 U.S.C. § 1014(a) (basis of property acquired from a decedent is the fair market value of the property at the date of the decedent's death); 26 U.S.C. § 1015 (basis of property acquired by gifts and transfers in trust).

31.08[2] ***Across the Board Assets***

An across the board asset is an asset in the opening year net worth, the ownership of which continues throughout the prosecution years, with no increase or decrease in the cost of the asset. Since a net worth computation measures changes, an across the board asset does not affect a taxpayer's net worth. For example, assume that the prosecution years are 1988 through 1991, and the defendant purchased stock for $10,000.00 in 1987 and still owned the same stock at the end of 1991. There would be no change in the basis of the stock, and the effect on the defendant's net worth would be zero. Because an across the board asset does not affect the net worth computation, it has been held that it is not error to leave such an asset out of the net worth computation. ***United States v. Mackey***, 345 F.2d 499, 505 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965).

It is not necessary for the government to establish the basis for every asset the taxpayer owns. ***United States v. Schafer***, 580 F.2d 774, 778 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). It is sufficient for the government to identify with reasonable specificity the basis in every asset, including cash, in which a purchase or sales transaction occurred in the tax years in question. ***Schafer***, 580 F.2d at 778. Note, however, that in ***Schafer***, the court assumed that possible omitted assets were across the board assets.

In ***United States v. Tolbert***, 406 F.2d 81, 84 (7th Cir. 1969), the government net worth computation reflected the defendant's accounts receivable as an across the board asset for all of the years in question. The government figure was based on a statement the defendant had given the agents. There was testimony at the trial that the accounts receivable had increased during the prosecution years. The defendant's argument that it was reversible error not to reflect the alleged increases was rejected, with the court pointing out that if the accounts receivable did increase during the prosecution years, the error in failing to reflect the increase was in the defendant's favor and did not prejudice him. The court found that there would be prejudice only if the evidence showed that the accounts receivable had decreased during the prosecution years. ***Tolbert***, 406 F.2d at 84. *See also* ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985); ***United States v. Dwoskin***, 644 F.2d 418, 421 (5th Cir. 1981); ***United States v.***

Scrima, 819 F.2d 996, 999 (11th Cir. 1987) ("government employed the floating cash or dash formula where cash is an unknown but constant factor throughout the net worth period").

31.08[3] ***Bank Accounts and Nominee Accounts***

Money in the bank represents an asset in a net worth computation. In the usual situation, it is a relatively simple matter to determine how much money the defendant had in the bank at the end of each year, with the balance being reflected in the net worth statement. However, all outstanding checks should be subtracted from the end of the year bank statement balance since the balance would otherwise be inflated. ***United States v. Vardine***, 305 F.2d 60, 65 (2d Cir. 1962). Similarly, deposits in transit are added to the end of the year statement balance.

In a number of instances, the taxpayer will have maintained bank accounts in the names of family members or in the names of third-party nominees. It must then be determined whether the money in the account was supplied by the defendant. If so, the bank balances are included in the defendant's net worth. This was the case in ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated and remanded on other grounds*, 395 U.S. 710 (1969), *aff'd after remand*, 436 F.2d 1212 (7th Cir.), *cert. denied*, 402 U.S. 953 (1971). There, the defendant attacked the propriety of including in his net worth cash that had been deposited in the bank in his name and the name of his nineteen-year old son. Rejecting the defendant's argument, the court found that the jury had ample grounds to believe that the money was in fact the defendant's, since the government proved that the defendant controlled the account and withdrew a substantial amount from it. ***Balistrieri***, 403 F.2d at 479. *See also* ***Talik v. United States***, 340 F.2d 138, 141 (9th Cir. 1965) (attributing entire balance in account to defendant was justified because either the account belonged to defendant or any money belonging to the daughter was a gift from her parents).

31.08[4] ***Assets and Liabilities of Husband and Wife or Children***

In determining a defendant's opening net worth, consideration must be given to assets and liabilities of a non-defendant spouse and children. Such assets and liabilities need not be included in the government's computation where the net effect of inclusion would be de minimis. The government, however, must have investigated this before deciding not to include a spouse's and/or child's assets and liabilities. ***United States v. Goichman***, 407 F. Supp. 980, 995-96 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

A failure to conduct such an investigation of the defendant's spouse resulted in a reversal in ***United States v. Meriwether***, 440 F.2d 753 (5th Cir. 1971), *cert. denied*, 417 U.S. 1974). The court held that the government failed to establish with reasonable certainty a definite opening net worth of the joint income of Meriwether and his wife, saying that the government "came near ignoring Mrs. Meriwether." ***Meriwether***, 440 F.2d at 755.

The Ninth Circuit appears to disagree with the Fifth Circuit, however, holding that the government is not required to establish the net worth of the defendant's spouse as part of its prima facie case. ***United States v. Hallman***, 594 F.2d 198, 200 (9th Cir.), *cert. denied*, 444 U.S. 828 (1979). Instead, the government's duty to investigate spousal assets only arises under its obligation to negate reasonable explanations or leads furnished by the defendant. ***Hallman***, 594 F.2d at 200. However, unless merited by the particular circumstances of a given case, consideration always should be given to the assets and liabilities of a spouse.

A somewhat different issue is whether the government can use a joint net worth statement for both husband and wife. The Fifth and Sixth Circuits have answered this in the affirmative. In ***United States v. Brown***, 667 F.2d 566 (6th Cir. 1982), both husband and wife were tried and convicted of income tax evasion. The court concluded that the government's use of a joint net worth statement was "justified," even though the wife was the nominal owner of the business that was the source of the unreported income, because "the financial affairs of the two defendants were

so intertwined as to justify a joint reconstruction of their income." ***Brown***, 667 F.2d at 568.

In a non-defendant spouse case, ***United States v. Giacalone***, 574 F.2d 328 (6th Cir.), *cert. denied*, 439 U.S. 834 (1978), the government's evidence showed that the defendant's wife earned no income prior to and during the prosecution years, that she made some nondeductible expenditures with funds furnished by her husband, and that she and her husband filed joint returns. Based on the fact that the defendant was charged with attempting to evade taxes owed by both him and his wife, and the fact that "her financial transactions were intertwined with those of her husband," the court approved the government's use of a joint net worth statement. ***Giacalone***, 574 F.2d at 333.

In ***United States v. Smith***, 890 F.2d 711, 714 (5th Cir. 1989), the Fifth Circuit relied on ***Brown*** and ***Giacolone*** in rejecting a defendant's claim that the government was required to exclude assets of the defendant's spouse and child to ensure the accuracy of the net worth analysis. In ***Smith***, the government excluded both the income of the defendant's daughter and gifts to the defendant's wife and daughter before arriving at a final net worth determination of the defendant and his spouse. The court stated that the "fabric of the financial blanket is so closely woven that a computation of net worth on the joint income of the spouses is clearly permissible." ***Smith***, 890 F.2d at 714.

31.08[5] ***Real Property***

Real property is reflected in the net worth computation at cost, unless the realty falls within one of the exceptions, such as realty received as an inheritance. Where cost cannot be established by direct evidence, a determination should be made as to whether or not the realty was purchased or sold at a time when revenue stamps were affixed to deeds pursuant to a federal statute which imposed a tax on deeds. 26 U.S.C. § 4361, repealed. If the realty was purchased or sold at a time when the tax on deeds was in effect, the revenue stamps can be used to compute the sales price of the realty. ***United States v. 18.46 Acres Of Land, Etc.***, 312 F.2d 287, 289 (2d Cir. 1963); ***Dickinson v. United States***, 154 F.2d 642, 643 (4th Cir. 1946); ***Ramming Real Estate Co. v. United States***, 122 F.2d 892, 895 (8th Cir. 1941).

Jointly owned property is especially common in the case of a husband and wife. For an example of proof that a jointly owned asset was properly included in full in the defendant's net worth, *see* ***O'Connor v. United States***, 203 F.2d 301, 303 (4th Cir. 1953). *See also* ***United States v. Costello***, 221 F.2d 668, 672 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956); ***United States v. Johnson***, 319 U.S. 503, 516 (1943) (jury could find that a string of gambling houses ostensibly conducted as separate enterprises by co-defendants was in fact a single, unified gambling enterprise owned by one defendant).

Finally, note that records of documents affecting an interest in property and statements affecting an interest in property may be admissible as exceptions to the hearsay rule. Fed. R. Evid. Rules 803(14) and (15).

31.08[6] ***Partnership Interest***

Where the taxpayer has invested money in a partnership, the taxpayer's share of the partnership capital is reflected as an asset. ***United States v. Mancuso***, 378 F.2d 612, 614-15 (4th Cir.), *amended*, 387 F.2d 376 (4th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968). In ***Mancuso***, the government had little direct evidence to establish the percentage interest the defendant had in

the partnership. Therefore, the government allocated an equal share of the partnership capital to all the partners, including the defendant, which followed the distribution of profits as reported on the partnership tax returns. The government agent testified that this "conformed to the ordinary legal presumption that in absence of evidence of an agreement to the contrary the partners' interests are equal." ***Mancuso***, 378 F.2d at 616.

31.08[7] ***Errors in Net Worth Computation***

If there is an error in the net worth computation for one of the prosecution years, the error will not necessarily affect other prosecution years. ***United States v. Keller***, 523 F.2d 1009, 1012 (9th Cir. 1975) (error did not carry over to a subsequent year since the asset was disposed of in the prior prosecution year). Moreover, even if an error does affect all of the prosecution years, the government is not required to prove its case to a mathematical certainty. If a substantial understatement remains after accounting for the error, then a guilty verdict will be upheld. ***Keller***, 523 F.2d at 1012.

31.09 *LIABILITIES*

The government must present evidence on a defendant's liabilities. These liabilities are subtracted from assets in arriving at a taxpayer's net worth. As with assets, the defendant's liabilities must be established with reasonable certainty.

For examples of evidence establishing liabilities, *see* ***Beard v. United States***, 222 F.2d 84, 89 (4th Cir.), *cert. denied*, 350 U.S. 846 (1955); ***United States v. Schafer***, 580 F.2d 774, 780 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). Testimony by the investigating agent as to the amount of a liability, without independent documentation or third-party testimony, is inadmissible hearsay. *See* ***United States v. Morse***, 491 F.2d 149, 153-55 (1st Cir. 1974) (a bank deposit case, but the principle is applicable to a net worth case).

On the other hand, when the agent's investigation reveals that there were no liabilities, the

agent can testify to the negative finding. It is not hearsay. ***Morse***, 491 F.2d at 154 n.8; ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. 1981). Otherwise stated, a witness may testify as to his or her failure to find records after a search. ***United States v. Robinson***, 544 F.2d 110, 114-15 (2d Cir. 1976), *cert. denied*, 434 U.S. 1050 (1978); ***McClanahan v. United States***, 292 F.2d 630, 637 (5th Cir.), *cert. denied*, 368 U.S. 913 (1961) ("[t]his, in fact, is frequently the only way in which a negative fact can be proved"); ***United States v. Lanier***, 578 F.2d 1246, 1255 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978); ***United States v. Jewett***, 438 F.2d 495, 497-98 (8th Cir.), *cert. denied*, 402 U.S. 947 (1971); ***United States v. DeGeorgia***, 420 F.2d 889, 891-92 (9th Cir. 1969); ***Charron v. United States***, 412 F.2d 657, 660 (9th Cir. 1969). *See also* Fed. R. Evid. Rules 803(7) and 803(10).

As a general rule, when the defendant is a cash basis taxpayer, the net worth computation would not include accrued liabilities. ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated and remanded*, 395 U.S. 710 (1969), *aff'd after remand*, 436 F.2d 1212 (7th Cir.), *cert. denied*, 402 U.S. 953 (1971). On the other hand, if the defendant has received cash or property in exchange for a liability, then the asset and liability are both included in the net worth computation whether the defendant is on a cash or accrual basis. For example, if the defendant buys a house in exchange for a mortgage, the house would be shown as an asset and the mortgage as a liability.

31.10 *NONDEDUCTIBLE EXPENDITURES*

31.10[1] *Added to Net Worth Increase*

After subtracting the ending net worth from the starting point, the resulting net worth increase is further adjusted by adding to the increase the taxpayer's nondeductible expenditures, including living expenses, during the year for items that do not show up as assets on the net worth statement. ***Holland v. United States***, 348 U.S. 121, 125 (1954); ***United States v. O'Connor***, 237 F.2d 466, 473 n.7 (2d Cir. 1956); ***United States v. Terrell***, 754 F.2d 1139, 1144 (5th Cir.), *cert.*

denied, 472 U.S. 1029 (1985); ***United States v. Skalicky***, 615 F.2d 1117, 1119 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980); ***United States v. Hiett***, 581 F.2d 1199, 1200 n.1 (5th Cir. 1978); ***United States v. Hamilton***, 620 F.2d 712, 714 n.1 (9th Cir. 1980). "The taxpayer's nondeductible expenditures are added to the adjusted net values of the defendant's assets at the end of the subject year and, consequently, increase the figure to be compared with the opening net worth." ***Hamilton***, 620 F.2d at 716. *See also*, ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987).

31.10[2] ***Burden on Government***

The government has the burden of establishing that the expenditures added to the net worth increase are nondeductible expenditures, as opposed to deductible expenses such as business expenses, and any addition to the net worth increase must be limited to nondeductible expenditures. ***Fowler v. United States***, 352 F.2d 100, 103 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). The government must establish the nature of an expenditure by independent documentary or testimonial evidence. ***Greenberg v. United States***, 280 F.2d 472 (1st Cir. 1960) (agent's testimony regarding expenses insufficient to establish nature of expenditure).

It is improper to designate an expenditure as personal based solely on a review of the taxpayer's checks by the investigating agent and the agent's testimony that a check is either for a personal or business purpose. The agent's testimony is hearsay. *See* ***Johnson v. United States***, 325 F.2d 709, 711 (1st Cir. 1963); ***Siravo v. United States***, 377 F.2d 469, 474 (1st Cir. 1967) (third parties testified and the court "was careful to exclude testimony by the special agent as to conversations with others").

Admissions by the defendant may establish whether expenditures are personal or business. Checks with a notation of "personal" written on them constitute a pre-offense admission. ***Fowler***, 352 F.2d at 103. *See also* ***United States v. Altruda***, 224 F.2d 935, 939 (2d Cir. 1955) (admitted personal living expenses were added to the net worth increases).

Finally, a nondeductible expenditure made by or on behalf of a spouse, children, or any

third party can be added to the defendant's net worth increase where it can be shown that the defendant furnished the funds for the expenditure. ***Ford v. United States***, 210 F.2d 313, 317 (5th Cir. 1954); ***United States v. Giacalone***, 574 F.2d 328, 333 (6th Cir.), *cert. denied*, 439 U.S. 834 (1978) (government proof traced a number of nondeductible expenditures by the wife to funds furnished by the defendant). *Cf.* ***United States v. Lawhon***, 499 F.2d 352, 355-56 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975) (citrus groves and certificates of deposit in the names of children); ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated and remanded on other grounds*, 395 U.S. 710 (1969), *aff'd after remand*, 436 F.2d 1212 (7th Cir.), *cert. denied*, 402 U.S. 953 (1971) (bank account in name of defendant and his minor son).

31.10[3] ***Nondeductible Expenditures -- Examples***

> Proof of non-deductible expenditures -- such as food, clothing, shelter and gifts -- is one factor in the net worth and expenditures method of proof. . . . Government tax experts routinely add living expenses to their net worth schedules.

United States v. Scott, 660 F.2d 1145, 1173 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). *See* ***United States v. Hamilton***, 620 F.2d 712, 716 (9th Cir. 1980).

In ***Scott***, the only daily living expense the government included in its net worth calculation was food. As Attorney General of the State of Illinois, Scott traveled on state business and his travel vouchers were used as a basis for arriving at his unreimbursed food expenditures. ***Scott***, 660 F.2d at 1151. In addition to food expenses, the government's net worth computation included cash travel expenses for personal trips that the government was able to document and the purchase of a stamp collection and a diamond ring. ***Scott***, 660 F.2d at 1150-51.

Living expenses can be based on estimates provided by the taxpayer. In ***United States v. Burdick***, 214 F.2d 768, 770 n.6 (3d Cir. 1954), *vacated*, 348 U.S. 905 (1955), *aff'd on remand*, 221 F.2d 932 (3d Cir.), *cert. denied*, 350 U.S. 831 (1955), the government estimated the defendant's living expenses at $2,000 a year on the basis of the defendant's admission that he spent $20 to $25 a

week for household expenses alone. *See also* ***United States v. Doyle***, 234 F.2d 788, 794 (7th Cir.), *cert. denied*, 352 U.S. 893 (1956) (expenditures for living expenses arrived at largely from defendant's own statements).

Another method of establishing living expenses is to rely on "independent estimates from the Bureau of Labor on what a person with (the taxpayer's) reported income and family and financial obligations would be expected to spend on non-deductible items." ***Hamilton***, 620 F.2d at 716. Caution must be exercised, however, in using Bureau of Labor estimates. The estimates are broken down into categories, such as food, clothing, household operations, alcohol, tobacco, gifts, and contributions, etc. The items selected for net worth purposes should be limited to necessities such as food, household operations, and clothing. Estimates of expenditures subject to greater variation, such as for recreation, transportation, and similar items, should not be used.

Personal insurance premiums and federal income taxes paid by a taxpayer are also items that can be added to the net worth increase. ***Dawley v. United States***, 186 F.2d 978, 980 (4th Cir. 1951). In ***Armstrong v. United States***, 327 F.2d 189, 192 (9th Cir. 1964), nondeductible expenditures included living expenses, payment of insurance premiums, fees paid to an attorney in the amount of $9,300, bond premiums in the amount of $3,375, and other nondeductible expenditures. Automobiles, antiques, and travel were added to the net worth increase as nondeductible expenditures in ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984). Gifts, vacation trips, payments for a maid, and gifts for a spouse and third parties are further examples of nondeductible expenditures. ***United States v. Goichman***, 407 F. Supp. 980, 989 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

Where the government is unable to trace expenditures for household goods or services, personal entertainment, or personal care items, the jury can properly conclude that the defendant must have incurred some expenses for these items and that these expenses would have added to the defendant's net worth increase and expenditures, beyond what the government proved. ***Scott***, 660 F.2d at 1151. Omitting personal expenditures for food and clothing does not permit the jury to

improperly speculate as to the defendant's personal expenses. ***United States v. Notch***, 939 F.2d 895, 900 (10th Cir. 1991). In ***Notch***, the Tenth Circuit recognized that "[t]his conservative approach to the net worth computation made the analysis appear more credible" and can be viewed "as showing that the jury need not consider personal expenses in order to conclude that defendant understated his income." ***Notch***, 939 F.2d at 900.

Note the difference in the net worth treatment when living expenses are to be used in determining cash on hand in the opening net worth as opposed to expenditures for living expenses made in a prosecution year. Where the purpose is to determine the opening cash on hand of the taxpayer, living expenses and other expenditures are subtracted from the available resources of the taxpayer in determining whether the taxpayer expended all or part of what might otherwise constitute cash on hand. Living expenses and other nondeductible expenditures in a prosecution year are added to the net worth increase, the purpose being to reflect the increase in wealth of the taxpayer.

31.11 ***REDUCTIONS IN NET WORTH***

The purpose of the net worth computation is to arrive at taxable income, and the computation therefore must reflect taxable consequences. This means that nontaxable items received by the taxpayer during the prosecution period must be eliminated or accounted for in the net worth computation. Thus, the following types of nontaxable items must be subtracted from the total reflecting the net worth increase and nondeductible expenditures: gifts received, inheritances, nontaxable pensions, the nontaxable portion of capital gains, veterans benefits, dividend exclusions, tax-exempt interest, proceeds from life insurance, and any other nontaxable items. An example of the treatment of such an item is found in ***United States v. Holovachka***, 314 F.2d 345, 355 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963), where the defendant had purchased bonds for investment purposes and received monies during the prosecution year representing the repayment of principal and nontaxable interest:

> Government treated the principal repayments as a tax free return of capital which correspondingly decreased defendant's investments in such bonds for those years. The yearly interest payments received on these bonds were considered to be tax free and were accordingly deducted from defendant's net worth. The trial court properly instructed the jury that the repayments of principal and the earned interest constituted non-taxable income.

Holovachka, 314 F.2d at 355.

Technical items and items that are clearly not fraudulent are also deducted from the taxpayer's computed net worth. Thus, the underreporting of an income item as the result of an inadvertent error of the defendant or his accountant should not be charged to the defendant. Any such item is subtracted, or otherwise accounted for, in arriving at taxable income.

In ***United States v. Altruda***, 224 F.2d 935, 940 (2d Cir. 1955), the defendant's accountant explained to the examining agent prior to trial that the defendant had made "errors" in underreporting income from realty holdings and the defendant was given credit for these amounts in the government's net worth computation. In ***United States v. Allen***, 522 F.2d 1229, 1231 (6th Cir.), *cert. denied*, 423 U.S. 1072 (1976), a technical adjustment was made, reducing the net worth computation to allow for an error discovered in one of the adding machine tapes used in preparing the defendant's return. The net effect was that the adjustment allowed the entire deduction claimed by the defendant on his return, and the defendant was not charged with the error at trial in the net worth computation.

31.12 *ATTRIBUTING NET WORTH INCREASES TO TAXABLE INCOME*

31.12[1] *Generally*

Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. "Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income." ***Holland v. United States***, 348 U.S. 121, 137 (1954); ***United States v. Dwoskin***, 644 F.2d 418, 422

(5th Cir. 1981); ***United States v. Mackey***, 345 F.2d 499, 506 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1241 (9th Cir. 1971).

There are two ways of supporting an inference that net worth increases are attributable to currently taxable income:

1. Proof of a likely source of taxable income. ***Holland***, 348 U.S. at 137-38.
2. Negating non-taxable sources of income. ***United States v. Massei***, 355 U.S. 595 (1958).

Either method is sufficient. *See also* ***United States v. Sorrentino***, 726 F.2d 876, 879-80 (1st Cir. 1984); ***United States v. Grasso***, 629 F.2d 805, 807-08 (2d Cir. 1980); ***Dwoskin***, 644 F.2d at 422; ***United States v. Hiett***, 581 F.2d 1199, 1201 (5th Cir. 1978); ***United States v. Scott***, 660 F.2d 1145, 1151 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

31.12[2] ***Proof of Likely Source of Taxable Income***

The government can establish a likely source of taxable income through direct or circumstantial evidence. The applicable rule requires "proof of a likely source, from which the jury could reasonably find that the net worth increases sprang." ***Holland v. United States***, 348 U.S. 121, 138 (1954). It is not necessary for the government to prove by direct evidence that the unreported income reflected by the net worth computation, in fact, came from the likely source established. ***United States v. Mackey***, 345 F.2d 499, 506-07 (7th Cir.), *cert. denied*, 382 U.S. 824 (1965). *See also* ***United States v. Costello***, 221 F.2d 668, 671-72 (2d Cir.), *aff'd*, 350 U.S. 359 (1956) (the evidence established that the defendant was a gambler and "gambling is an occupation with indeterminate possibilities"); ***United States v. Smith***, 890 F.2d 711, 714 (5th Cir. 1989) (likely source of income could be indicated by business operations, mineral interests, real estate, stocks, bonds, commodities, and gambling); ***United States v. Greene***, 698 F.2d 1364, 1373 (9th Cir. 1983) (the government need not prove a specific source, but only a likely source, and evidence established real estate sales, interest income on loans, and unreported securities transactions as likely sources of taxable income); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1241-42 (9th Cir. 1971) (grocery store ownership provided likely source).

Likewise, the government does not have to show that the likely source was capable of generating the entire amount of unreported income charged in the indictment. ***United States v. Costanzo***, 581 F.2d 28, 33 (2d Cir. 1978), *cert. denied*, 439 U.S. 1067 (1979). The court found that extensive proof that the defendant's bakery was a likely source of unreported taxable income because it was large enough to generate substantial amounts of unreported cash receipts. ***Costanzo***, 581 F.2d at 33. Evidence of specific items of unreported income is admissible to show a likely source from which the net worth increases may have come. ***Holland***, 348 U.S. at 138; ***United States v. Schafer***, 580 F.2d 774, 777 n.5 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). *See also* ***United States v. Hagen***, 470 F.2d 110, 111 (10th Cir. 1972), *cert. denied*, 412 U.S. 903 (1973), in

which the defendant claimed surprise and argued that the government introduced evidence as to specific items of unreported income to an extent that the specific items proof "changed the theory of the case or in any event overshadowed the net worth proof." The court noted that the specific items evidence assumed such a large role at the trial that "at the end it became difficult to say whether it still was a net worth case." ***Hagen***, 470 F.2d at 112. But the court continued:

> In any event the Government followed and met the requirements of ***Holland v. United States***. The evidence of specific items was proper as indicated to show wilfulness, but it was also proper to show a likely source under ***Smith v. United States***, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 and ***United States v. Calderon***, 348 U.S. 160, 75 S.Ct. 186, 99 L.Ed. 202.

470 F.2d at 113.

In a situation such as that in ***Hagen***, problems as to the government's method of proof can be avoided by clearly designating in a response to a motion for a bill of particulars the method of proof to be relied on by the government; for example, net worth method and specific items method, or net worth method corroborated by specific items of unreported income.

Once the government has introduced evidence of a likely source of taxable income, there is no burden on the government to negate all possible nontaxable sources of the unreported income. While the government does have a duty to check out reasonable leads, where no leads are furnished, "the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant." ***Holland v. United States***, 348 U.S. 121, 138 (1954). Caution must be exercised in following this principle, however, because the government has an obligation in net worth cases to conduct a thorough investigation, which would include searching for nontaxable sources of income.

Once a likely source is established, though, the government does not have to show that it has investigated "the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to disprove." ***Holland***, 348 U.S. at 138. The government is not limited to showing a

single likely source of taxable income but can introduce evidence of as many possible sources of taxable income as the investigation has developed. *See, e.g.*, ***Feichtmeir v. United States***, 389 F.2d 498, 502 (9th Cir. 1968) (evidence showed the defendant had interests in eight operating businesses, investments in real estate, a trust deed, a joint venture, stocks and bonds, and an undisclosed Mexican source of income).

31.12[3] ***Illegal Sources of Income***

There is no requirement that the likely source of income be a legal source. ***James v. United States***, 366 U.S. 213 (1961). "[G]ross income means all income from whatever source derived . . . ." 26 U.S.C. § 61.

Due to the possibility of undue prejudice, courts closely examine evidence of an illegal source of income. *See, e.g.*, ***United States v. Tunnell***, 481 F.2d 149, 151 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974) (likely source of the defendant's net worth increases could have been income from prostitution activities at a motel the defendant operated). When the likely source of income is illegal, the evidence must present more than suspicion and innuendo. *See* ***Ford v. United States***, 210 F.2d 313, 317 (5th Cir. 1954) (reversing a police chief's tax evasion conviction because testimony as to payoffs by prostitutes was not connected to the defendant). *But see* ***United States v. Windham***, 489 F.2d 1389, 1391 (5th Cir. 1974) (stating that ***Ford*** conviction was reversed because of the speculative, hearsay nature of the testimony, not because of its content).

Likewise, it must be clear that the purpose of introducing evidence of illegal activities is to establish a likely source of income, and the evidence must not be introduced or alluded to in a manner calculated to inflame the jury. In ***United States v. Abodeely***, 801 F.2d 1020 (8th Cir. 1986), the government presented evidence that the defendant derived his unreported income from illegal prostitution and from legal gambling activities. After a lengthy discussion of the Rule 403 probative/prejudice balancing test, the court concluded that it had:

> [N]o conceptual difficulty with the evidence concerning prostitution.

> While it is certainly prejudicial, it is highly probative of unreported taxable income. The gambling evidence, while having less direct probative value, is much less prejudicial, and indeed if its admission was error (which this court does not conclude), the error was harmless beyond a reasonable doubt. After all, having been shown that Abodeely ran a bar and a brothel, even the most straitlaced Iowa jury would hardly have been adversely affected by a showing of his participation in the legal, though perhaps sinful and worldly in the eyes of a midwestern jury, activity of gambling in Nevada.

Abodeely, 801 F.2d at 1026. *See also* ***United States v. Smith***, 890 F.2d 771, 716 (5th Cir. 1989) (defendant not prejudiced by introduction of evidence concerning his gambling activities); ***United States v. Tafoya***, 757 F.2d 1522, 1526-28 (5th Cir.), *cert. denied*, 474 U.S. 921 (1985) (income from payments for attempted assassinations; bank deposits case); ***Windham***, 489 F.2d at 1391; ***United States v. Vannelli***, 595 F.2d 402, 405-06 (8th Cir. 1979) (evidence of defendant's prior misdemeanor convictions of misappropriation of funds held admissible to show intent, opportunity, scheme, or plan from which unreported income could be derived and to show potential source of unreported income; bank deposits case). The illegal sources for generating income are virtually limitless. *See* ***United States v. Chapman***, 168 F.2d 997, 1000-01 (7th Cir.), *cert. denied*, 335 U.S. 853 (1948) (black market sales of meat likely source of income); ***United States v. Dall***, 918 F.2d 52 (8th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991) (illegal importation of veterinary drugs); ***Clinkscale v. United States***, 729 F.2d 940, 942 (8th Cir. 1984) (prostitutes turned over income to defendant, which he failed to report).

Skimming is another example of a likely source of taxable income which a jury could conclude accounts for the defendant's increase in net worth. ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984); ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980) (jury could have found that the likely source of taxable funds was the illegal diversion of money from slot machine revenues);[4] *See also* ***United States v. Koskerides***, 877 F.2d 1129, 1138 (2d Cir. 1989) (two diners operated as cash businesses may be likely source of unreported income where previous

owner had much higher revenue than defendant and testimony indicated the possibility of skimming).

Drug sales frequently provide a possible source of income. *See* ***United States v. Heyward***, 729 F.2d 297 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985);[1] ***United States v. Enstam***, 622 F.2d 857, 860 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); ***United States v. Lewis***, 759 F.2d 1316, 1328, 1336 (8th Cir.), *cert denied*, 474 U.S. 994 (1985); ***United States v. Horvath***, 731 F.2d 557, 563 (8th Cir. 1984); ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987); ***United States v. Palmer***, 809 F.2d 1504, 1505 (11th Cir. 1987); ***United States v. Browning***, 723 F.2d 1544, 1547 (11th Cir. 1984).

The government should make sure that the jury instructions make it clear that the defendant is on trial for tax evasion and for no other crimes. *See* ***Windham***, 489 F.2d at 1391 (commenting that this was done in ***United States v. Tunnell***, 481 F.2d 149 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974)). Limiting instructions are also advisable. ***Palmer***, 809 F.2d at 1505 (11th Cir. 1987) (trial court properly maintained jury's focus on tax issues and properly minimized any possible prejudice by giving clear limiting and final instructions).

31.12[4] ***Negating Nontaxable Sources of Income***

It is well established that "[s]hould all possible sources of nontaxable income be negated, there would be no necessity for proof of a likely source." ***United States v. Massei***, 355 U.S. 595 (1958). The Fifth Circuit summarized the government's burden where the defendant has failed to provide any leads as to nontaxable sources of income:

> We therefore hold that in an income tax evasion case based on the net worth method of proof, when the taxpayer gives no leads as to

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1 This case is of particular interest because the court admitted evidence that the defendant's plane was found in Georgia in 1980 loaded with over 4,000 pounds of marijuana and the prosecution years were 1978 and 1979.

> nontaxable sources, the government satisfies its burden of negating all possible nontaxable sources within the meaning of ***Massei*** by showing that it conducted a thorough investigation that failed to reveal any nontaxable source.

United States v. Hiett, 581 F.2d 1199, 1202 (5th Cir. 1978). In response to the defendant's argument that the government must negate every possible source of nontaxable income, the court in ***Hiett*** noted that this would be an impossible task because:

> [It] would require the government to exhaust the inexhaustible -- to conduct an absolutely limitless investigation. It would cast the government in the role of a conjurer, forcing it to pull nontaxable sources out of a hat. Appellant would require the government to embark on a Magellan-like expedition in order to prove that the unreported income was taxable. Not only would the Government have to circle the globe in its search, it would also have extraorbital responsibility, since appellant's position requires it to prove a cosmic negative. To state appellant's position is to establish its absurdity. If ***Massei*** and ***Holland*** are to have viability in our jurisprudence, they cannot be read to sanction such a result.

Hiett, 581 F.2d at 1201. *Accord* ***United States v. Notch***, 939 F.2d 895 (10th Cir. 1991); ***United States v. Schipani***, 362 F.2d 825, 830 (2d Cir.), *vacated and remanded on other grounds*, 385 U.S. 372 (1966) (government can meet its burden under ***United States v. Massei***, by negating all *reasonably* possible sources of nontaxable income). The investigating agent may testify that his investigation failed to uncover any sources of nontaxable income. ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. 1981); ***United States v. Penosi***, 452 F.2d 217, 219 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

In short, it is sufficient if the government's evidence establishes that there was a thorough investigation, "which removes any reasonable doubt that the defendant's unreported income came from non-taxable sources." ***United States v. Hiett***, 581 F.2d 1199, 1202 (5th Cir. 1978). *See also* ***United States v. Smith***, 890 F.2d 711, 714 (5th Cir. 1989). [5]

31.13 *REASONABLE LEADS DOCTRINE*

31.13[1] *Duty to Investigate Reasonable Leads*

Taxpayers frequently give leads to the government's agents indicating the specific sources from which claimed cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. ***Holland v. United States***, 348 U.S. 121, 127 (1954). The ***Holland*** reasonable leads doctrine places on the government the duty of "effective negation of reasonable explanations by the taxpayer inconsistent with guilt" -- a duty limited to the investigation of "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." ***Holland***, 348 U.S. at 135-36.

Thus, the government's duty to investigate leads provided by the taxpayer hinges on the presence of two factors: (1) the taxpayer's explanation must be relevant and reasonable; and (2) the explanation must be reasonably susceptible of being checked. ***Holland***, 348 U.S. at 135-36; ***United States v. Anderson***, 642 F.2d 281, 285 (9th Cir. 1981) (loan from acquaintance in Nigeria not a reasonable lead and not reasonably susceptible of being checked).

The government meets its burden when it "investigates reasonably possible sources of non-taxable income, and explores whatever leads the taxpayers or others may proffer." ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982). The government is not required to do the impossible. ***United States v. Greene***, 698 F.2d 1364, 1371 (9th Cir. 1983). Once the government establishes a prima facie case, the taxpayer "remains quiet at his peril." ***Mastropieri***, 685 F.2d at 785. *Accord* ***United States v. Goldstein***, 685 F.2d 179, 182 (7th Cir.1982) (information on nontaxable income should be supplied by the taxpayer). Although the burden of proof never shifts from the government, the defendant has the *burden of production* regarding any reasonable leads. ***United States v. Vardine***, 305 F.2d 60, 63 (2d Cir. 1962). It is up to the taxpayer to furnish the reasonable leads. ***United States v. Caswell***, 825 F.2d 1228, 1234 (8th Cir. 1987); ***United States v. Notch***, 939 F.2d 895, 899 (10th Cir. 1991). The government is not

required to pursue "phantom clues as to some mysterious sources and assets." ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980).

For cases in which the court found that the defendant's explanations were not reasonable or reasonably capable of being checked, *see* ***United States v. Ford***, 237 F.2d 57, 64 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957) (claims as to the receipt and disposition of various cash gifts so vague that they were not susceptible of further investigation); ***United States v. Potts***, 459 F.2d 412, 414 (7th Cir. 1972) (the government's failure to investigate leads from witnesses whose credibility was tenuous did not require a reversal); ***United States v. Londe***, 587 F.2d 18, 20 (8th Cir. 1978), *cert. denied*, 439 U.S. 1130 (1979) (lead found to be completely lacking in credibility and did not warrant follow-up beyond the production of the individual as a government witness, which did occur); ***Smith v. United States***, 236 F.2d 260, 267 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956) (explanation that his funds came from old mailbags and old iron pots not reasonably susceptible of being checked); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1242-43 (9th Cir. 1971) (when leads are "sketchy" and the defendant furnishes little useful information, there is less of a burden on the government).

Moreover, there is "at least a minimal burden upon the taxpayer, once he chooses to furnish leads to the government, to aid in the investigation of the purported nontaxable source." ***Hom Ming Dong***, 436 F.2d at 1242-43; ***United States v. Terrell***, 754 F.2d 1139, 1146 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) (taxpayer has a burden to furnish leads, and the government cannot be faulted for failure to identify any possible basis in cattle where the government was diligent in following up on all leads relating to the cattle, despite the fact that defendant was uncooperative in providing leads); ***United States v. Blandina***, 895 F.2d 293, 302-03 (7th Cir. 1989) (scope of government's investigation of reasonable leads does not require government to subpoena records which defendant refused to turn over).

For examples of adequate government investigation of taxpayer leads which were susceptible to investigation, *see* ***United States v. Smith***, 890 F.2d 711, 714-15 (5th Cir. 1989)

(court rejected a "reasonable leads" challenge regarding gifts to the defendant); ***United States v. Koskerides***, 877 F.2d 1129 (2d. Cir. 1989) (government negated defendant's claim that he had received non-taxable funds from family and friends in Greece). [6]

In situations where a taxpayer furnishes leads which might reasonably explain his net worth bulge in a manner inconsistent with guilt and the government fails to investigate these leads, the trial judge should consider the taxpayer's explanations as true. ***Vardine***, 305 F.2d at 63. However, when the defendant advances a specific explanation of the source of funds expended and that explanation is proved false, the government need not pursue possible nontaxable sources. ***Feichtmeier v. United States***, 389 F.2d 498, 503 (9th Cir. 1968); ***United States v. Holovachka***, 314 F.2d 345, 357 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963).

Failure of the government to investigate reasonable leads provided by the defendant can result in a severe remedy. The trial judge can consider such leads as true and find the case insufficient to go to the jury. ***Holland***, 348 U.S. at 135. The court can direct a verdict on any count where there would not be a substantial tax deficiency if the lead is assumed to be true. ***United States v. Keller***, 523 F.2d 1009, 1011 (9th Cir. 1975) (because the government failed to pursue leads which were reasonably susceptible of being checked, the opening net worth for 1967 was not reasonably certain, and the evidence as to the 1967 count was insufficient to go to the jury).

The failure to track down reasonable leads, however, is not always fatal to the government's case. If the uninvestigated lead is assumed to be true and there remains a substantial, unexplained tax deficiency, then reversal of a conviction (or a directed verdict) is not warranted. *See* ***Scanlon v. United States***, 223 F.2d 382, 388-89 (1st Cir. 1955) (government's failure to investigate this lead would require acquittal of the defendant if the government's case turned on that evidence but even assuming this lead to be true, the government's evidence was sufficient to convict); ***Anderson***, 642 F.2d at 285 (9th Cir. 1981) (even if the defendant's explanation were true, there would be more than $100,000 of unexplained income, and this difference would be sufficient to support the conviction).

At least one circuit has held that, if there is a challenge to the sufficiency of the government's investigation, it becomes a jury question whether or not the government was unreasonable in its failure to investigate alleged leads. ***Greene***, 698 F.2d at 1371.

The government's failure to investigate leads by the defendant has also been challenged unsuccessfully in the grand jury context. One court refused to dismiss an indictment, finding the defendant's contention that the government failed to exhaust leads during the grand jury investigation insufficient to warrant dismissal of the indictment. ***United States v. Todaro***, 610 F. Supp. 923, 925 (W.D.N.Y. 1985). In ***Todaro***, the court held that the pre-trial motion to dismiss was premature because this was a matter for trial, citing ***Holland***, 348 U.S. 121, and ***United States v. Scott***, 660 F.2d 1145, 1167 n.42 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

31.13[2] ***Leads Must Be Reasonable and Timely***

In addition to furnishing leads that are reasonable and reasonably susceptible of being checked, the taxpayer must furnish any leads in a timely manner. Therefore, leads must be provided to the government a sufficient amount of time before trial to permit investigation. ***United States v. Sorrentino***, 726 F.2d 876, 881 n.2 (1st Cir. 1984). Where there is no evidence that the defendant gave leads to the government before trial and the defendant testifies at trial that the net worth increase was due to the receipt of nontaxable income, the issue is one for the jury. ***United States v. Vardine***, 305 F.2d 60, 65 (2d Cir. 1962).

The underlying principle is that "the taxpayer has a burden to furnish 'leads'. . . so that the government can investigate and perhaps clear the taxpayer prior to trial." ***United States v. Schafer***, 580 F.2d 774, 779 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); ***United States v. Terrell***, 754 F.2d 1139, 1146 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985). *See* ***United States v. Dwoskin***, 644 F.2d 418, 423 n.4 (5th Cir. 1981) (had leads been provided during the investigative process, the government would have had an obligation to pursue them to the extent that they were relevant and reasonably susceptible of being checked).

In short, leads must be furnished well in advance of trial. ***Smith v. United States***, 236 F.2d 260, 263-64 (8th Cir.), *cert. denied*, 352 U.S. 909 (1956). A lead furnished "on the eve of indictment" is too late. ***United States v. Procario***, 356 F.2d 614, 617 (2d Cir.), *cert. denied*, 384 U.S. 1002 (1966) (a bank deposits case, but the same principle applies in a net worth case).

31.14 *NET WORTH SCHEDULES*

At the close of its case, the government typically calls to the stand a summary expert witness who then summarizes the evidence and introduces into evidence schedules reflecting the government's net worth computation. It is well established that a government agent can summarize the evidence and introduce into evidence computations and schedules reflecting the defendant's net worth. ***Costello v. United States***, 350 U.S. 359 (1956); ***United States v. Johnson***, 319 U.S. 503, 519 (1943); ***United States v. Sorrentino***, 726 F.2d 876, 884 (1st Cir. 1984); ***United States v. O'Connor***, 237 F.2d 466, 475 (2d Cir. 1956); ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980); ***United States v. Allen***, 522 F.2d 1229, 1234 (6th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); ***United States v. Lewis***, 759 F.2d 1316, 1329 n.6 (8th Cir. 1985) (summary exhibit used to verify the net worth theory); ***United States v. Gardner***, 611 F.2d 770, 776 (9th Cir. 1980); Fed. R. Evid. Rule 1006.

The net worth schedules must be based upon evidence in the record; otherwise, the schedules are not admissible. *See, e.g.*, ***Sorrentino***, 726 F.2d at 884; ***O'Connor***, 237 F.2d at 475; ***United States v. Diez***, 515 F.2d 892, 905 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); ***Allen***, 522 F.2d at 1234.

The government's net worth computation is not required to give effect to contentions of the defendant. Rather, the government's summary or net worth computation is based on a selection of that evidence which supports the government's contentions. It is a summary of evidence tending to prove guilt, and it reflects the government's version of the facts. ***United States v. Diez***, 515 F.2d at 905; ***United States v. Lawhon***, 499 F.2d 352, 357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121

(1975) (jury was instructed that the summary chart presented only the government's view of the case); ***Holland v. United States***, 209 F.2d 516, 523-24 (10th Cir.), *aff'd*, 348 U.S. 121 (1954) (charts purporting to graphically show the government's case based upon the government's version of the evidence used in closing argument to the jury).

To put it another way, the government's net worth computation is not intended to be a summary of all of the evidence introduced by the government. Neither does the summary purport to include theories of the defense brought out either on the direct or cross-examination of a government witness. As a matter of tactics, however, there are situations where the evidence is in conflict and the government computation will reflect the view that is more favorable to the defendant, *i.e.*, not all evidence favorable to the defendant should necessarily be disregarded.

Note the distinction made in ***Flemister v. United States***, 260 F.2d 513, 517 (5th Cir. 1958), where the court pointed out that a government summary need not give effect to the contentions of the accused, but if the summary purports to be a statement of all of the evidence then it must be a summary of all of the evidence. The summary must be what it purports to be. In ***Flemister***, the court found that the government summaries failed to show that they represented only the testimony of government witnesses and were not a summary of all of the relevant testimony. ***Flemister***, 260 F.2d at 517. To avoid this problem, the agent should testify clearly that the government's net worth computation is a summary only of government contentions and not a summary of all of the evidence in the record.

31.15 *JURY INSTRUCTIONS*

In a net worth case, detailed, comprehensive jury instructions on the method of proof are essential. "Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." ***Holland v. United States***, 348 U.S. 121, 129 (1954); ***United States v. Wirsing***, 719 F.2d 859, 861-62 n.4 (6th Cir. 1983); ***United States v. Carter***, 721 F.2d 1514, 1538 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984).

Convictions have been reversed when the trial judge failed to give full explanatory instructions on the net worth method. ***United States v. O'Connor***, 237 F.2d 466, 472 (2d Cir. 1956); ***United States v. Tolbert***, 367 F.2d 778, 781 (7th Cir. 1966); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981). "[T]he complete lack of any instruction on the nature of the [net worth] method and its concomitant assumptions and inferences affects a substantial right of the accused and constitutes plain error. . . and requires a reversal despite the lack of an objection by the defendant to such omission." ***Tolbert***, 367 F.2d at 781.

For a sample net worth jury instruction, *see* the section on jury instructions, *infra*.

31.16 *SAMPLE NET WORTH SCHEDULE*

On the next page is a reproduction of the net worth computation admitted into evidence in ***United States v. Carter***, 462 F.2d 1252, 1253 (6th Cir.), *cert. denied*, 409 U.S. 984 (1972).

RUSSELL L. CARTER
Computation of Unreported Taxable Income Based On
Net Worth and Personal Living Expenses

	12-31	12-31	12-31	12-31
ASSETS	1962	1963	1964	1965
Cash on Hand	$ 1.000.00	$ 1.000.00	$ 1.000.00	$ 1.000.00
Cash in Banks				
Checking Accounts	2.556.79	167.56	356.06	264.57
Bonds -- Series E	90.897.58	121.770.04	122.001.00	131.601.17
Stocks and				
Notes Receivable	2.983.72	1.983.72	983.72	13.487.50
Real Estate	9.386.92	9.386.92	9.386.92	51.886.92
Business Equipment	5.700.00	5.700.00	5.700.00	5.700.00
Automobiles	9.428.49	4.950.00	6.854.70	8.554.70
TOTAL ASSETS	$136.953.50	$159.958.24	$176.282.40	$242.494.86
LIABILITIES				
Mortgages and				
Loans Payable	$ 402.88	$ 49.93	$ -0-	$ 22.260.00
Allowance for				
Depreciation	7.059.11	5.105.90	4.089.00	6.040.85
TOTAL LIABILITIES	$ 7.461.99	$ 5.155.83	$ 4.089.00	$ 28.300.85
NET WORTH	$129.491.51	$154.802.41	$172.193.40	$214.194.01
Beginning Net Worth		(129.491.51)	(154.802.41)	(172.193.40)
Increase in				
Net Worth		$ 25.310.90	$ 17.390.99	$ 42.000.61
Personal Living				
Expenses		12.646.61	22.303.34	16.283.63
Adjustments to				
Net Worth		(1.144.97)	(861.14)	(1.039.21)
Adjusted Gross				
Income		$ 36.182.54	$ 38.833.19	$ 57.245.03
Deductions		(2.394.66)	(2.461.99)	(3.738.75)
Exemptions		(2.400.00)	(2.400.00)	(2.400.00)
Taxable Income				
Corrected		$ 32.017.88	$ 33.971.20	$ 51.106.28
Taxable Income				
Reported		(7.527.33)	(18.765.49)	(9.610.33)
Unreported Taxable				
Income		$ 24.490.55	$ 15.205.71	$ 41.495.95

1. The defendant contended that the use of the net worth method was not proper because the government did not make the necessary preliminary proof that (1) the taxpayer had no books; or (2) refused to produce them; or (3) the books did not clearly reflect his income; and (4) the circumstances were such that the net worth method did reflect his income with reasonable accuracy and certainty. ***United States v. McGrew,*** 222 F.2d 458, 459 (5th Cir. 1955).

2. As an evidentiary matter, the ***Mastropieri*** court criticized the fact that the record did not contain the "form of letter or letters" which the special agent sent to the banks, brokerage firms, and lending institutions that he canvassed as a part of the investigation. ***Mastropieri***, 685 F.2d at 779 n.3. This concern suggests that care should be taken in drafting such letters, because they may be used later to demonstrate the effort made to locate the defendant's assets and liabilities.

3. Where corroboration is required, the jury should be instructed of that requirement. *See* ***United States v. Marshall***, 863 F.2d 1285, 1288 (6th Cir. 1988) (reversing a jury verdict because the jury was not instructed that a defendant's extrajudicial statements needed to be corroborated with independent evidence).

4. It is interesting to note that in ***Hamilton***, 620 F.2d 712 (9th Cir. 1980), the court upheld as admissible, and found most convincing, the testimony of a statistical expert who had examined the slot machines, reviewed their reported performance, compared their performance with similar machines at other casinos and with the manufacturer's built-in specifications, and concluded that the odds against the machine performing as poorly as the records indicated were greater than two billion to one. ***Hamilton***, 620 F.2d at 715.

5. The Second Circuit suggested that in rare situations less stringent standards might apply with respect to both establishing opening net worth and to negating nontaxable income sources. These standards "are justified in a case like this where defendants were shown to have gone to such lengths to conceal their unreported increases in wealth." ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982).

6. ***Koskerides*** is also significant because the court held that the government's net worth calculations are not discoverable pursuant to Fed.R.Crim.P. 16(a)(2). ***Koskerides***, 877 F.2d at 1134. *But see* Fed.R.Crim.P. 16(a)(1)(E), effective December 1, 1993.

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32.00 *EXPENDITURES*

32.00 *EXPENDITURES*

32.01 *GENERALLY*

The expenditures method of proof and the net worth method of proof are essentially the same. The two computations are merely accounting variations of the same basic approach, with the expenditures method being an outgrowth of the net worth method. ***Taglianetti v. United States***, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Caserta***, 199 F.2d 905, 906 (3d Cir. 1952). Accordingly, in considering an expenditures case, reference should be made to Section 31.00, *supra*, which examines the net worth method of proof.

The use of the expenditures method of proof to establish unreported income was approved as early as 1943 in ***United States v. Johnson***, 319 U.S. 503, 517 (1943). Subsequently, in ***Caserta***, Judge Goodrich defined the expenditures method of proof as follows:

> It starts with an appraisal of the taxpayer's net worth situation at the beginning of a period. He may have much or he may have nothing. If, during that period, his expenditures have exceeded the amount he has reported as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received. Of course it is necessary, so far as possible, to negative nontaxable receipts by the taxpayer during the period in question.

Caserta, 199 F.2d at 907.

The expenditures method of proof tracks a taxpayer's expenditures for consumable goods and services (*i.e.*, items which do not increase one's net worth), as opposed to any acquisition of assets (*i.e.*, items such as stocks, bonds, or real estate which increase one's net worth). The expenditures method is designed to account for the taxpayer who spends his income on consumable items, such as food, vacations, travel, or gifts to third parties, which do not increase net worth. The expenditure method is distinct from the use of expenditures in an analysis of bank deposits. *See*, *e.g.*, ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986).

One advantage of using the expenditures method of proof, rather than the net worth method, is well summarized by the ***Taglianetti*** court:

> The government proceeded on a "cash expenditure" theory. This is a variant of the net worth method of establishing unreported taxable income. Both proceed by indirection to overcome the absence of direct proof. The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

Taglianetti, 398 F.2d at 562 (footnotes omitted).

32.02 *REQUIREMENTS FOR ESTABLISHING AN EXPENDITURES CASE*

The requirements for establishing an expenditures case are virtually identical to those required for establishing a net worth case. Thus, in an expenditures case, the government must:

1. Establish an opening net worth with reasonable certainty and demonstrate that the taxpayer's expenditures did not result from cash on hand, or the conversion of assets on hand at the beginning of the period;
2. Establish through independent evidence that the expenditures charged to the taxpayer are non-deductible;
3. Establish a likely source of income from which the expenditures sprang, or negate nontaxable sources of income; and

4. Investigate all relevant, reasonable leads which are reasonably susceptible of being checked.

Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969) (cited in ***United States v. Sutherland***, 929 F.2d 765, 780 (1st Cir. 1991)); ***United States v. Mastropieri***, 685 F.2d 776, 778 n.2 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982); ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980); ***United States v. Gay***, 567 F.2d 1206, 1207 (2d Cir. 1978); ***United States v. Bianco***, 534 F.2d 501, 504 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976); ***United States v. Fisher***, 518 F.2d 836, 841-42 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975); ***United States v. Caserta***, 199 F.2d 905, 907 (3d Cir. 1952); ***United States v. Marshall***, 557 F.2d 527, 529 (5th Cir. 1977); ***United States v. Newman***, 468 F.2d 791, 793 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973); ***United States v. Penosi***, 452 F.2d 217, 220 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); ***United States v. Caswell***, 825 F.2d 1228, 1231 (8th Cir. 1987); ***McFee v. United States***, 206 F.2d 872, 874 (9th Cir. 1953), *vacated and remanded*, 348 U.S. 905, *aff'd upon reconsideration per curiam*, 221 F.2d 807 (9th Cir.), *cert. denied*, 350 U.S. 825 (1955); *see also* ***United States v. Citron***, 783 F.2d 307, 315 (2d Cir. 1986); ***United States v. Marrinson***, 832 F.2d 1465, 1469-70 (7th Cir. 1987); ***United States v. Radseck***, 718 F.2d 233, 237-38 (7th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984); ***United States v. Pinto***, 838 F.2d 426, 431-32 (10th Cir. 1988).

Reference should be made to Section 31.00, *supra*, in which the net worth method of proof is discussed.

32.03 *CONCEPTS APPLICABLE TO EXPENDITURES CASES*

As noted above, the government has essentially the same burden in an expenditures case that it has in a net worth case. There are, however, a few wrinkles which deserve to be mentioned.

32.03[1] ***Opening Net Worth***

The requirement that the government must establish the defendant's opening net worth with reasonable certainty is derived from ***Holland v. United States***, 348 U.S. 121, 132, (1954). However, the government's method of proving an expenditures case is slightly different from the net worth method employed in ***Holland***. This distinction was examined by the ***Taglianetti*** court:

> In a typical net worth case, as ***Holland***, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures.

Taglianetti, 398 F.2d 558, 565 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969).

Thus, the government must prove not only that yearly expenditures exceeded reported income, but also, either directly or inferentially, that those expenditures were made with currently taxable income. Unless both requirements are met, a conviction cannot stand. *See, e.g.*, ***United States v. Marshall***, 557 F.2d 527, 529 (5th Cir. 1977). Thus, the government must present evidence indicating that the defendant did not liquidate assets acquired in a previous year or deplete a cash hoard to make the expenditures in issue.

Once the government establishes a starting point for the first prosecution year, it should then proceed to compute the total taxable and nontaxable receipts for each of the following consecutive years to prove its case. ***Marshall***, 557 F.2d at 530. In ***United States v. Bianco***, 534 F.2d 501, 504 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976), the government attempted to show that Bianco's beginning resources were nonexistent, and thus, could not have contributed at all to his expenditures during the tax years. The court described the extensive investigation by the government into Bianco's financial background, and concluded that the "totality of this evidence clearly was sufficient for the jury to have concluded that Bianco had insufficient assets at the

beginning of the prosecution period to have supported his expenditures in any of those years." ***Bianco***, 534 F.2d at 505. *See also* ***United States v. Fisher***, 518 F.2d 836, 841-42 (2d Cir.), *cert. denied*, 423 U.S. 1033 (1975) (government introduced evidence that Fisher had $30,000 in bank accounts and that this constituted all of the assets that Fisher and his wife possessed).

It is not necessary in an expenditures case, as it is in a net worth analysis, to reflect the opening and closing net worth position of the taxpayer in a formal net worth statement. Thus, reasonable certainty may be established without such a presentation, as long as the expenditures analysis takes into account the extent of any contribution, which beginning resources or a diminution of resources over time, could have made to the expenditures during the prosecution years. ***Taglianetti***, 398 F.2d at 565. In a footnote, the ***Taglianetti*** court discussed various expenditures cases and the absence of any requirement of a formal net worth statement. ***Taglianetti***, 398 F.2d at 565 n.7.

32.03[2] ***Cash on Hand***

Although formal proof of a net worth is not required in an expenditures case, establishment of cash on hand is essential and recognized to be the most difficult component of proof in such tax prosecutions. *See* ***United States v. Citron***, 783 F.2d 307, 316 (2d Cir. 1986) (an agent's investigation into the truth of a cash hoard defense was sufficient in establishing cash on hand). In ***Citron***, however, the Second Circuit reversed the convictions because the District Court admitted into evidence a summary chart containing figures not demonstrably supported by the evidence. ***Citron***, 783 F.2d at 317.

32.03[3] ***Cash Hoard Defense***

Similar to net worth cases, a cash hoard defense is frequently raised in expenditures cases. To assert a cash hoard defense, the taxpayer contends that expenditures during the relevant years were made with previously accumulated funds (cash on hand) and not with currently taxable

receipts. *See* Sections 31.06 and 31.07, *supra*.

In ***United States v. Radseck***, 718 F.2d 233, 239 (7th Cir. 1983), the government rebutted a cash hoard defense with testimony from the special agent "that in his experience in investigating thirty-five to forty attempted income tax evasion cases, people who have five bank accounts, thirteen savings and loan accounts and two brokerage accounts do not keep substantial amounts of cash on hand." The court found that the inference that the defendant did not keep cash at home was a permissible one.

In ***United States v. Gay***, 567 F.2d 1206, 1207 (2d. Cir. 1978), the defendant testified at trial that he had a cash hoard of more than $100,000 in spite of the fact that he had told the investigating agents that he and his wife had no more than $13,000. The $13,000 figure was used in the opening net worth computation. The court stated that "the jury was entitled to infer, as it apparently did, that appellant's 'cash hoard' testimony was a belated and blatant concoction which was not entitled to any credit." ***Gay***, 567 F.2d at 1207.

32.03[4] ***Duplication of Expenditures***

In establishing a taxpayer's expenditures, care must be taken to insure against a duplication of expenditures. In ***United States v. Caserta***, 199 F.2d 905, 907 (3d Cir. 1952), a new trial was ordered because a duplication resulted from the defendant being charged with both cash withdrawals from a bank account and expenditures for individual items since the evidence did not establish that the cash withdrawals were not applied to the cash purchases. For an excellent and detailed explanation of such an error, *see* the opinion of Judge Goodrich in ***Caserta***, 199 F.2d at 906-08. *Cf.* ***United States v. Radseck***, 718 F.2d 233, 238 (7th Cir. 1988) (the duplication of $2,766 as both a personal expenditure and an increase in assets did not render the government summary exhibits inadmissible because this error and others were revealed to the jury during cross-examination of the government's summary witness and acknowledged by the government during closing argument).

32.03[5] ***Likely Source of Income***

In an expenditures case, as in a net worth case, the government must establish a likely source of taxable income, or eliminate the possibility that the cash expenditures were made with nontaxable sources of income. *See, e.g.*, ***United States v. Bianco***, 534 F.2d 501, 506-07 (2d. Cir.), *cert. denied*, 429 U.S. 822 (1976); ***United States v. Marrinson***, 832 F.2d 1465, 1472 (7th Cir. 1987). Therefore, from a purely legal standpoint, the government need not negate nontaxable sources when it has already established a likely source of taxable income. However, as a matter of trial strategy, it is advisable not only to establish a likely source of taxable income, but also to eliminate any nontaxable sources for the funds. Such an approach makes a good impression on both judge and jury. This does not mean that unreasonable efforts need to be expended, however, since "once expenditures are established, the government cannot be expected to conduct an exhaustive nationwide investigation when the defendant supplies no relevant leads as to where he got the money he admittedly spent." ***United States v. Penosi***, 452 F.2d 217, 220 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972). *See also* Section 31.12, *supra*. Yet, if the investigation can include both approaches, the government's case will be that much stronger.

32.03[6] ***Summary Exhibits***

In an expenditures case, the government is not required to include the defendant's version of the facts in its summary exhibits. ***United States v. Radseck***, 718 F.2d 233, 239 (7th Cir. 1983). This is also true in net worth cases. *See* Section 31.14, *supra*.

32.04 *JURY INSTRUCTIONS*

In an expenditures case, as in a net worth case, it is essential that the charge to the jury "should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth [expenditures] method and the assumptions on which it rests, and the inferences available both for and against the accused." ***Holland v. United States***, 348 U.S. 121, 129 (1954). *Accord* ***United States v. O'Connor***, 237 F.2d 466, 472-73 (2d Cir. 1956); ***United States v. Tolbert***, 367 F.2d 778, 780-81 (7th Cir. 1966); ***United States v. Hall***, 650 F.2d 994, 998 (9th Cir. 1981). *See also* ***United States v. Meriwether***, 440 F.2d 753, 756-57 (5th Cir. 1971), *cert. denied*, 417 U.S. (1974) (section 7201 conviction reversed because trial court failed to instruct jury on method of proof).

A conviction on one count was reversed, in ***United States v. Carter***, 721 F.2d 1514 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984), where the court held that it was plain error to fail to instruct the jury on the expenditures method of proof:

> We find that the omission of the required explanatory instructions concerning the cash expenditures method of proof in this case "goes to the very basis of the jury's ability to evaluate the evidence," ***Hall***, 650 F.2d at 999 [***United States v. Hall***, 650 F.2d 994 (9th Cir. 1981)], and to the very core of the deliberative process necessary to guarantee the fairness of the proceedings. We therefore hold that the omission of the explanatory instructions required by ***Holland*** concerning the cash expenditure method of proof constituted plain error affecting appellant's substantial rights.

Carter, 721 F.2d at 1539 (citations omitted).

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33.00 *BANK DEPOSITS*

33.00 *BANK DEPOSITS*

33.01 *GENERALLY*

The bank deposits method of proof is one of two traditional indirect methods of proof used by the government in computing taxable income, the other being the net worth method of proof. *See* Section 31.00, *supra*. ***United States v. Boulet***, 577 F.2d 1165 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), contains a good description of the mechanics of a bank deposits computation:

> To prove its charges, the government relied upon one of the two traditional indirect methods of proof, analysis of the taxpayer's bank deposits and cash expenditures. Under this method, all deposits to the taxpayer's bank and similar accounts in a single year are added together to determine the gross deposits. An effort is made to identify amounts deposited that are non-taxable, such as gifts, transfers of money between accounts, repayment of loans and cash that the taxpayer had in his possession prior to that year that was deposited in a bank during that year. This process is called "purification." It results in a figure called net taxable bank deposits.
>
> The government agent then adds the amount of expenditures made in cash, for example, in this case, cash the doctor received from fees, did not deposit, but gave to his wife to buy groceries. The total of this amount and net taxable bank deposits is deemed to equal gross income. This is in turn reduced by the applicable deductions and exemptions. The figure arrived at is considered to be "corrected taxable income." It is then compared with the taxable income reported by the taxpayer on his return.

Boulet, 577 F.2d at 1167.

The bank deposits and the net worth methods of proof have certain features in common. Both methods are approximations which seek to show by circumstantial means that the taxpayer had income that was not reported. ***Holland v. United States***, 348 U.S. 121, 129 (1954); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981); ***United States v. Bray***, 546 F.2d 851, 856 (10th Cir. 1976) ("the bank deposits method of proof is not an exact science").

However, the focus in a bank deposits case is on funds deposited during the tax year, while

the net worth method considers year-end bank balances, as well as asset acquisitions and liabilities. But while "the mechanics of arriving at an income figure are different, both methods involve similar underlying assumptions and afford much of the same inferences for and against the accused." ***Hall***, 650 F.2d at 999.

33.01[1] ***Consistently Approved Method of Proof***

The bank deposits method of proof was approved in the still frequently cited case of ***Gleckman v. United States***, 80 F.2d 394 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936). Since that time, the bank deposits method of proof has "received consistent judicial approval." ***United States v. Morse***, 491 F.2d 149, 151 (1st Cir. 1974); ***United States v. Slutsky***, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Nunan***, 236 F.2d 576, 587 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); ***United States v. Venuto***, 182 F.2d 519, 521 (3d Cir. 1950); ***Morrison v. United States***, 270 F.2d 1, 2 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959); ***Skinnett v. United States***, 173 F.2d 129 (4th Cir. 1949); ***United States v. Tafoya***, 757 F.2d 1522, 1528 (5th Cir.), *cert. denied*, 474 U.S. 921 (1985); ***United States v. Normile***, 587 F.2d 784, 785 (5th Cir. 1979); ***United States v. Horton***, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976); ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974); ***United States v. Moody***, 339 F.2d 161, 162 (6th Cir. 1964); ***United States v. Ludwig***, 897 F.2d 875, 878 (7th Cir. 1990); ***United States v. Esser***, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); ***United States v. Stein***, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971); ***United States v. Lacob***, 416 F.2d 756, 759 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); ***United States v. Mansfield***, 381 F.2d 961, 965 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986); ***United States v. Vannelli***, 595 F.2d 402, 404 (8th Cir. 1979); ***United States v. Stone***, 770 F.2d 842, 844 (9th Cir. 1985); ***United States v. Soulard***, 730 F.2d 1292, 1296 (9th Cir. 1984); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir.

1981); ***United States v. Helina***, 549 F.2d 713, 720 (9th Cir. 1977); ***Percifield v. United States***, 241 F.2d 225, 229 & n.7 (9th Cir. 1957); ***United States v. Bray***, 546 F.2d 851, 853 (10th Cir. 1976); *see also* ***United States v. Black***, 843 F.2d 1456, 1458 (D.C. Cir. 1988) (recognized bank deposits method in order to distinguish it from the specific items method used in that case).

33.01[2] ***Used Alone or With Other Methods***

Proof of unreported income by the bank deposits method alone is sufficient. It is not necessary to use another method of proof as corroboration. ***United States v. Stein***, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971), and cases cited.

The bank deposits method can, however, be used as corroboration of other methods of proof. *See* ***United States v. Tafoya***, 757 F.2d 1522, 1528 (5th Cir.), *cert. denied*, 474 U.S. 921 (1985), where the primary method of proof was the specific items method, and "bank deposits evidence was admitted only to corroborate the evidence of specific payments." Similarly, in ***United States v. Horton***, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976), a specific items prosecution, "evidence of total bank deposits during the years in question was properly admissible as corroborative evidence." Where the bank deposits method of proof is used as corroboration, however, the jury should be instructed to limit its consideration of the bank deposits evidence to corroboration of the other method of proof. ***Tafoya***, 757 F.2d at 1528; ***Horton***, 526 F.2d at 887.

In ***United States v. Hall***, 650 F.2d 994, 996-97 (9th Cir. 1981), "the prosecution elicited testimony from its experts establishing appellants' income by both the 'net worth' and the 'bank deposits' methods of proof." The conviction was reversed, not because two methods of proof were used, but because of a failure to give explanatory instructions to the jury on the indirect methods of proof used by the government. ***Hall***, 650 F.2d at 999.

Many cases use the bank deposits method of proof in conjunction with the specific items method. For example, in ***United States v. Procario***, 356 F.2d 614, 616 (2d Cir.), *cert. denied*,

384 U.S. 1002 (1966):

> The government relied for proof partly on direct evidence from patients and their cancelled checks, and partly on the bank deposit method, modified so as to yield the rest of appellant's professional income.

Procario, 356 F.2d at 616.

See also ***United States v. Nunan***, 236 F.2d 576, 582, 586 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957), where the government introduced evidence in the form of the bank deposits method of proof and also introduced evidence of specific items of taxable income which had been omitted from the defendant's returns -- "proof relative to the specific items of taxable income which were omitted from the returns in the light of the evidence as a whole was of itself sufficient to support the verdict." ***Nunan***, 236 F.2d at 586.

33.01[3] ***Cross Reference***

It will help in understanding the discussion of the bank deposits method of proof which follows if reference is made to the sample bank deposits computation reproduced in Section 33.12, *infra*.

Reference also should be made to Section 31.00, *supra*, treating the net worth method of proof since, as noted above, a number of the underlying assumptions in the bank deposits method of proof are the same as those in the net worth method of proof.

Finally, reference should be made to the Manual section, *supra*, on the specific violation under consideration, since the bank deposits method of proof merely concerns the computation of income and not the other elements of a given offense.

33.02 ***PRELIMINARY FOUNDATION FOR USE***

The classic bank deposits case is ***Gleckman v. United States***, 80 F.2d 394 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936). As noted in ***Gleckman***, "the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount; nor would the bare fact that he received and cashed a check for a large amount, in and of itself, suffice to establish that income tax was due on account of it." *Id.* at 399. The court in ***Gleckman*** went on to describe the foundation for using the bank deposits method of proof as follows:

> On the other hand, if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.

Gleckman, 80 F.2d at 399.

The teaching of ***Gleckman*** and its progeny is that to use the bank deposits method of proof, the government must initially introduce evidence showing that:

1. The taxpayer was engaged in a business or income-producing activity from which the jury can infer that the unreported income arose;
2. Periodic and regular deposits of funds were made into accounts in the taxpayer's name or over which the taxpayer had dominion and control;
3. An adequate and full investigation of those accounts was made in order to distinguish between income and non-income deposits;
4. Unidentified deposits have the inherent appearance of income, *e.g.*, the size of the deposits, odd or even amounts, fluctuations in amounts corresponding to seasonal fluctuations of the business involved, source of checks deposited, dates of deposits, accounts into

which deposited, etc.

United States v. Morse, 491 F.2d 149, 152 (1st Cir. 1974); ***United States v. Slutsky***, 487 F.2d 832, 841-42 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Venuto***, 182 F.2d 519, 521 (3d Cir. 1950); ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986); ***United States v. Stone***, 770 F.2d 842, 844 (9th Cir. 1985); ***United States v. Helina***, 549 F.2d 713, 720 (9th Cir. 1977).

33.03 ***BUSINESS OR INCOME-PRODUCING ACTIVITY***

In the first instance, it must be shown that during the tax years in question the taxpayer was engaged in an income-producing business or calling. This is relatively simple and ordinarily does not present a problem -- the taxpayer was or was not involved in an income-producing activity.

As can be imagined, the cases involve a wide range of income-producing activities, including, for example: attorney, politician, and former Commissioner of Internal Revenue, ***United States v. Nunan***, 236 F.2d 576, 579 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); personal injury attorney, ***United States v. Lacob***, 416 F.2d 756, 758 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); doctors, ***United States v. Boulet***, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), and ***United States v. Esser***, 520 F.2d 213, 215 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); partners in a resort hotel in the Catskill Mountains, ***United States v. Slutsky***, 487 F.2d 832, 835 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); dealer in wholesale meat, ***United States v. Stein***, 437 F.2d 775, 776 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971); operator of a retail meat store, slaughterhouse, and rental properties, ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950); retailers, ***United States v. Hall***, 650 F.2d 994, 996 (9th Cir. 1981), and ***Graves v. United States***, 191 F.2d 579, 581 (10th Cir. 1951); seller of ice cream franchises, ***United States v. Soulard***, 730 F.2d 1292, 1296 (9th Cir. 1984); operator of a gambling casino, ***Percifield v. United States***, 241 F.2d 225, 226 (9th Cir. 1957); and, dealer in gravestones, ***United States v. Fowler***,

605 F.2d 181, 182 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980).

The income-producing business can be an illegal activity, *e.g.*, bribes, ***Malone v. United States***, 94 F.2d 281, 287-88 (7th Cir.), *cert. denied*, 304 U.S. 562 (1938); prostitution, ***United States v. Abodeely***, 801 F.2d 1020, 1025 (8th Cir. 1986); embezzlement, ***United States v. Vanelli***, 595 F.2d 402, 406 (8th Cir. 1979); and, income from attempted assassinations, ***United States v. Tafoya***, 757 F.2d 1522, 1526-27 (5th Cir.), *cert. denied*, 474 U.S. 907 (1985). Caution must be exercised, however, in the use and presentation of evidence relating to an illegal source of income. *See* Section 31.12(3), *supra*, Illegal Sources of Income.

33.04 ***ANALYSIS OF DEPOSITS***

33.04[1] ***Generally***

The basic underlying assumption in the bank deposits method of proof is that if a taxpayer is in an income-producing activity and regularly and periodically makes deposits to bank accounts, then those deposits, after adjustments, constitute taxable income. ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974); ***Gleckman v. United States***, 80 F.2d 394, 399 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936).

Heavy reliance is placed on an analysis of deposits in establishing a relationship between the deposits and the income-producing activity. The composition of each deposit is determined, to the extent possible, based on obtainable bank records, third-party records, and any admissions of the taxpayer.

The government then generally shows by direct evidence that a number of the deposited items are, in fact, taxable receipts. The number so verified varies from case to case. *See*, *e.g.*, ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950), where, in addition to the government introducing evidence that receipts from defendant's businesses were deposited regularly and currently, government agents testified that they analyzed the bank accounts and defendant's

check stubs and cancelled checks, verifying through third-party suppliers, actual purchases of merchandise bought for sale. In addition, the defendant's real estate income was verified through statements of receipts and disbursements prepared by the real estate firm that managed the defendant's business. *See also* ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976).

There is, however, no fixed requirement that the government verify a certain percentage of the defendant's deposits as income items. All that the government has to prove is that the defendant was engaged in an income-producing business, that regular deposits of funds having the appearance of income were in fact made to bank accounts during the year in question, and that the government did everything that was fair and reasonable to identify and deduct any non-income items. ***Esser***, 520 F.2d at 217. Obviously, the jury may feel more comfortable with a higher percentage of verified deposits.

For an example of an investigation of a sampling of total deposits, *see* ***United States v. Stone***, 770 F.2d 842, 844 (9th Cir. 1985), involving a doctor, where Internal Revenue Service agents obtained bank copies of signature cards, monthly statements, and deposit slips, and contacted a number of insurance companies requesting copies of checks issued to the defendant for medical services and claim forms submitted for medical services. The agents then analyzed the bank records of the checks deposited into the defendant's accounts:

> In order to discover what portion of Stone's total deposits represented payment for medical services rendered, the IRS selected 12 large deposits -- one for every other month in 1976 and 1977 -- as a representative sample, and had the bank produce a copy of every check deposited with those deposits.
>
> The IRS attempted to verify that these checks were payments for medical services rendered by writing or calling the makers of the checks. Although the IRS was only able to verify a small portion of the checks, almost all the checks so verified in the sampling process were payments for medical services. Checks that were for

> nonincome items were identified by the IRS and excluded from gross receipts from the medical practice.

Stone, 770 F.2d at 844.

33.04[2] ***Currency Deposits***

The usual bank deposits case will involve a mixture of check and cash deposits. If the case does include currency deposits, then any cash withdrawals or checks made payable to cash or the taxpayer and subsequently cashed must be deducted from the total amount of deposits, unless it can be shown that the cash withdrawals and the checks cashed were not used to make the currency deposits. If the taxpayer is not given credit under these circumstances for such potential redeposits, a duplication can result, yielding an inflated figure for taxable income.

For example, assume that during the year the taxpayer earned $25,000, which is in the form of $15,000 in checks and $10,000 in cash, all of which was deposited in the taxpayer's bank account. Assume further that during the year the taxpayer made out checks to cash totalling $7,000 and deposited the resulting cash into the account. The total amount of deposits would be $32,000 ($25,000 plus $7,000), indicating gross receipts of $32,000. This inflated amount is caused by a duplication -- the $7,000 was counted when it was deposited initially and again when it was redeposited, after having been withdrawn. In the example given, it would be necessary to deduct $7,000 from the total deposits in order to prevent duplication, *i.e.*, $32,000 minus $7,000 equals $25,000, which is what the taxpayer earned. Note that if the taxpayer had issued checks to cash totaling only $3,000, then it would be necessary to subtract only $3,000 from total deposits, since $3,000 would be the maximum amount of currency that could have been redeposited.

Additionally, if the taxpayer had checks to cash totalling $12,000, then it would not be necessary to subtract that amount. At most, $10,000 could have been redeposited, since that was the total amount of currency deposits for the year, and only $10,000 need be subtracted. Be careful, however, because this situation would leave the taxpayer with an additional $2,000 in cash that

could be redeposited in a subsequent year and create a duplication. If the $2,000 cannot be accounted for in an expenditure and the taxpayer has currency deposits in the following year, then this $2,000 may have to be subtracted from total currency deposits the following year depending on the circumstances of the case.

On the other hand, there would be no duplication and no need to subtract cash withdrawn from the total of the deposits if there were no currency deposits made during the year, since any checks to cash were obviously not cashed and deposited in the account. And even where there are currency deposits, it is still not necessary to subtract cash withdrawals from the total currency deposits if the resulting cash can be traced to a use other than the redepositing of the funds. Thus, if it can be shown that all currency deposits for the year precede the dates of any cash withdrawals or checks to cash, then no elimination is required. The timing establishes that the source of the currency deposits must have been funds other than those withdrawn from the account. In a similar fashion, no elimination of currency deposits is necessary if it can be shown that cash withdrawals were used for food, clothing, etc., and thus were not funds redeposited in the taxpayer's bank account. *See* ***Beard v. United States***, 222 F.2d 84, 87-88 (4th Cir.), *cert. denied*, 350 U.S. 846 (1955).

Although ***United States v. Caserta***, 199 F.2d 905 (3d Cir. 1952), is an expenditures case, the principles discussed are applicable to a bank deposits case. ***Caserta*** contains an excellent explanation of the duplication that can result in an expenditures case where deposits and withdrawals are not properly accounted for. In the words of the court:

> If a man has a bank account and puts everything he receives into the account, his expenditures are pretty well shown by what he spends it for in checking it out. But suppose he withdraws from his bank account a sum in cash, a check made payable to himself or an impersonal payee. Does that show expenditure? It may well do so if we proceed on the ordinary assumption that people do not draw money from bank accounts unless they are going to spend the money

> for something. On the other hand, suppose a man writes a check to "cash" for $500. and the same day buys an overcoat for $100. and a suit of clothes for the same amount. Now what do we charge him with, an expenditure of $700.? If cash withdrawals from a bank account are to be treated as cash receipts to a person, surely it is incorrect to charge individual items for which he has paid cash to his list of expenditures unless it is shown that the cash bank withdrawals had nothing to do with the individual items. Otherwise, a man doubles his taxable income when he writes a check for "cash" and spends the money he gets from his bank. This would be a very happy way of increasing one's income if it could be done.

Caserta, 199 F.2d at 907.

For the same reasons given in the ***Caserta*** case, it is error to charge a taxpayer in a bank deposits case with currency deposits, unless it can be shown that the source of the currency deposits was not funds withdrawn from the taxpayer's bank account.

33.04[3] ***Missing or Incomplete Bank Records***

An effort obviously should be made to obtain all of the bank records for a given year. This is not always possible. The effect of missing or unavailable records will depend on the nature of the missing records and whether a thorough government investigation and analysis can overcome the gap in records.

In ***Beard v. United States***, 222 F.2d 84 (4th Cir.), *cert. denied*, 350 U.S. 846 (1955), there were currency deposits made to one of the defendant's accounts, and the government agents were unable to identify withdrawals from this account since they did not have access to the defendant's cancelled checks. In affirming the conviction, the court pointed out that the agents conducted an "exhaustive search to ascertain what deductions should be made for possible duplications, business expenses, and amounts not attributable to the defendant's gambling operations" and, in addition, an extensive investigation was conducted to demonstrate the source of deposited items. ***Beard***, 222 F.2d at 86-88.

In ***United States v. Esser***, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976), "it was virtually impossible to introduce the deposit slips due to their poor quality, unreliability, and unavailability." The government introduced the bank statements and passbooks as the most reliable evidence available. On cross-examination, the defendant attempted to establish that the deposit slips and underlying items were capable of retrieval. The question was left as one of fact for the jury. The court rejected the argument that a failure by the government to specifically identify and analyze the defendant's deposit slips and underlying items was fatal to the government's case. The full investigation of the deposits and underlying items and the taking of reasonable steps to identify and deduct non-income items was sufficient. ***Esser***, 520 F.2d at 217. *Accord* ***United States v. Abodeely***, 801 F.2d 1020, 1025 (8th Cir. 1986).

A similar argument was rejected in ***United States v. Soulard***, 730 F.2d 1292, 1297 (9th Cir. 1984), where the defendant argued that the trial court erroneously admitted the government's bank deposits analysis because the government failed to establish that it had introduced into evidence complete sets of the defendant's bank records. The court rejected the argument, holding that the issue of the completeness of bank records goes to the jury's determination of the weight of the evidence, not its admissibility. ***Soulard***, 730 F.2d at 1298. *Cf.* ***United States v. Stone***, 770 F.2d 842, 844-45 (9th Cir. 1985) (IRS selected twelve large deposits as a representative sample, and had the bank produce a copy of every check deposited with those deposits).

33.05 *ELIMINATION OF NON-INCOME ITEMS*

33.05[1] *Generally*

An adequate and full investigation of the taxpayer's accounts must be conducted to distinguish between income and non-income deposits to support the inference that the unexplained excess in deposits is currently taxable income. ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974); ***United States v. Lawhon***, 499 F.2d 352, 356 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975).

The government is not required, however, to negate every possible non-income source of each deposit, particularly where the source of the funds is uniquely within the knowledge of the taxpayer and the government has checked out those explanations given by the taxpayer that are reasonably susceptible of investigation. ***United States v. Boulet***, 577 F.2d 1165, 1171 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

The adequacy of the investigation necessarily turns on the circumstances of each case. ***United States v. Slutsky***, 487 F.2d 832, 841 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). The rule is one of practicality. Although the government is not required to negate all possible non-income sources of deposits to the taxpayer's accounts, ***United States v. Slutsky***, 487 F.2d at 841, "[T]he agent does have an overall burden to prove that he has done the best he can to discover, and exclude, all non-income items from the reconstructed income," ***Morse***, 491 F.2d at 154. For examples of the investigative steps taken to distinguish between income and non-income deposits, *see* ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950); ***United States v. Stein***, 437 F.2d 775, 778 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971); ***United States v. Hall***, 650 F.2d 994, 1000 (9th Cir. 1981); ***United States v. Helina***, 549 F.2d 713 (9th Cir. 1977).

33.05[2] *Proof of Non-Income Items*

If the analysis categorizes certain deposits as "non-income", the direct evidence the agent

relied upon to make that determination must be introduced. It is error to rely merely on hearsay testimony of the investigating agent. ***United States v. Morse***, 491 F.2d 149, 152-55 (1st Cir. 1974).

In ***Morse***, the agent testified that after completing a thorough investigation, he identified non-income deposits into the defendant's bank accounts from loan proceeds, inter-bank transfers, proceeds from the transfer of land, and proceeds from the sale of a truck. ***Morse***, 491 F.2d at 153.

However, the government did not introduce available corroborating or related documents upon which the agent had relied, on the grounds that since the items were a credit to the defendant, no prejudice would result. The appellate court reversed because of the possible prejudice to the defendant if the government underestimated the amounts of the non-income deposits. ***Morse***, 491 F.2d at 154. The court stated "[w]here direct evidence is available as to their existence and magnitude, there is no need to rely on the agent's hearsay assertion that they were no larger than he had accounted for. Accordingly, we cannot accept the government's position." *Id*.

In ***Morse***, for example, although bank ledger cards were available to prove loan proceeds, the government did not introduce them, which deprived the court and jury of any knowledge of the particular banks from which the defendants received the loans, the dates of the loans, and the amount of each loan. ***Morse***, 491 F.2d at 154. Similarly, the court pointed out that the agent's hearsay testimony also affected non-income deposits regarding inter-bank transfers, returned checks, and sales proceeds. ***Morse***, 491 F.2d at 155 n.10.

The foregoing should be distinguished from the situation where the investigation does not disclose any non-income deposits or any non-income deposits in addition to those allowed. "To be sure, the court must rely on mere assertion when the agent testifies that he could find no evidence of other non-income items, but then, of course, no better evidence would exist." ***Morse***, 491 F.2d at 154 n.8.

33.05[3] ***Good Faith Errors***

In a bank deposits computation, as in any other tax case, unreported income which results from good faith accounting errors and the like (*i.e.*, a mathematical error by an accountant) should not be included in the computation of unreported income. ***United States v. Stein***, 437 F.2d 775, 777 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971). *See also* ***United States v. Altruda***, 224 F.2d 935, 940 (2d Cir. 1955); ***United States v. Allen***, 522 F.2d 1229, 1231 (6th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976). *See* Section 31.11, *supra*.

33.06 ***UNIDENTIFIED DEPOSITS***

After seeking to identify the sources of the bank deposits, those deposits which have not been established as either income or non-income deposits are denominated as "unidentified deposits". To the extent that such unidentified deposits have the inherent appearance of current income, they are included with identified income deposits in determining the taxpayer's income.

In ***Gleckman v. United States***, 80 F.2d 394, 397 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936), the bank deposits computation included over $92,000 in untraceable cash deposits and unidentified deposits. The defendant argued that those deposits "may just as well have been drawn from nontaxable transactions as from services or business." ***Gleckman***, 80 F.2d at 399. Rejecting this argument, the court pointed out that there was substantial circumstantial evidence in the record that the defendant had an unreported business, and that some of the deposits were derived from this business. Thus, the deposits were sufficiently shown to be of a taxable nature. ***Gleckman***, 80 F.2d at 399-400. Note that in ***Gleckman***, the government demonstrated that the defendant had an illegal business apart from the business described in his tax return, that property statements showed that the defendant's net worth had increased, and that the government auditor had spent weeks with the defendant's agent in unsuccessfully attempting to find explanations for the deposits that would justify eliminating them from taxable income. ***Gleckman***, 80 F.2d at 400.

United States v. Slutsky, 487 F.2d 832, 841 (2d Cir. 1973), *cert. denied*, 416 U.S. 937

(1974), involved approximately $18 million in total deposits over a three-year period and, of the total charged as income, approximately $8.6 million was in unidentified deposits and $1 million was in currency. The court held that the government's investigation was sufficient to support the inference that unexplained excess receipts were attributable to currently taxable income and that the government was not required to negate all possible non-income sources of the deposits. ***Slutsky***, 487 F.2d at 841. Holding that the government's investigation was "clearly sufficient under the particular circumstances of the case", the court found that the investigation included a detailed check of every item in an amount greater than $1,000, with very few specified exceptions, and a random check of 1447 items in amounts less than $1,000, with the analyzed items found to constitute income in virtually every instance. ***Slutsky***, 487 F.2d at 841-42. In addition, almost every item in an amount under $1,000 was reflected by a check with a room number encircled on the back (the defendants operated a resort in the Catskill Mountains). ***Slutsky***, 487 F.2d at 842. Commenting on the government investigation, the court concluded:

> To hold the government to a stricter duty of investigation than it performed here would be to ignore both the "reasonableness" and "fairness" strictures that have been imposed; it would also result in an exercise in diminishing returns in terms both of the provision of relevant information to the fact-finder and of the protection of the rights of taxpayers.

Slutsky, 487 F.2d at 842.

In ***United States v. Lacob***, 416 F.2d 756, 758 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970), the court upheld as adequate an investigation involving total deposits of $99,000 in one year by a lawyer who specialized in personal injury claims and received fees of 20% or 33 1/3% of the recovery obtained, depending on whether the case was a workmen's compensation claim or a personal injury claim. There were approximately $39,000 in unidentified and unexplained checks deposited. The defendant was charged with income equal to 20% of these checks, based on the assumption, in the absence of other proof, that these were the proceeds of the defendant's cases and that his fee was the lower of the two fee bases he used. Similarly, in ***United States v. Procario***, 356 F.2d 614, 617-18 (2d Cir.), *cert. denied*, 384 U.S. 1002 (1966), the defendant was a doctor, and more than one-third of the total alleged professional receipts were in the form of deposits not identified by the government. Rejecting the defendant's argument that there was no evidence from which the jury could have inferred that the unidentified deposits represented income from professional services, the court said:

> The government relied on the fact that it excluded all possible dividends, on the small size and relative frequency of the deposits, similar to deposits and other income proven to be professional receipts, and on the fact that appellant had patients other than those whose payments were included in Items 4 and 6, the directly proven items of income. This was sufficient.

Procario, 356 F.2d at 618.

The basis of the government's case in ***Graves v. United States***, 191 F.2d 579, 581-82 (10th Cir. 1951), was that the defendant, who operated drug stores, realized income that was not deposited in the store bank accounts, not entered in the books, and not reported on his return. The "purported income" was represented by currency deposits in various special and personal bank accounts of the defendant and his wife, the purchase of government bonds, the sale of cattle, a loan of money, and a personal check from a store manager representing store receipts. The court agreed with the defendant that currency deposits in the defendant's bank account, standing alone, did not

prove unreported income but went on to say that "currency deposits from unidentified sources which are not reflected in the books and records from which income tax returns are made and tax liability determined are substantial evidence of an understatement of income and it is incumbent upon the taxpayer to overcome the logical inferences which may be drawn from these proven facts." ***Graves***, 191 F.2d at 582.

In ***United States v. Ludwig***, 897 F.2d 875, 882 (7th Cir. 1990), the Seventh Circuit upheld a conviction based partly on unidentified deposits, which the defendants claimed were "irregular, not specifically identified as coming from any particular income source, were made to a personal rather than business account, and were placed in an account that [one defendant] had no control over." The court of appeals held that the jury was properly instructed that "the duty to reasonably investigate applies only to suggestions or explanations made by the defendant or to reasonable leads which otherwise turn up. The government is not required to investigate every possible source of non-taxable funds". ***Ludwig***, 897 F.2d at 882.

On the other hand, it is necessary that the facts and circumstances put in evidence by the government justify, by reasonable inference at least, that the unidentified deposits represent income items. ***Kirsch v. United States***, 174 F.2d 595, 601 (8th Cir. 1949). In reversing the conviction in ***Kirsch***, the court criticized the failure of the government to make any effort to investigate the unidentified deposits. The agent testified at the trial that he was aware that all of the deposits were not income, and instead of making an effort to find out the amounts of nonincome deposits, he simply assumed that all deposits were income. In doing so, he shifted the burden to the defendant to show how much was not income or suffer the consequences. This procedure, said the court, "cannot be approved." ***Kirsch***, 174 F.2d at 601. *See also* ***Paschen v. United States***, 70 F.2d 491, 497 (7th Cir. 1934). Ultimately, whether unidentified deposits are accepted as current receipts will depend on the strength of the evidence supporting the relationship of the deposits to an income-producing activity, the completeness of the analysis of deposits, and the thoroughness of

the investigation conducted.

33.07 *BANK DEPOSITS PLUS UNDEPOSITED CURRENCY EXPENDITURES*

33.07[1] *Generally*

In some cases it will be found that a taxpayer engaged in a business or income-producing activity, made regular and periodic deposits to a bank account and, in addition, made a number of cash expenditures by using cash that was never deposited in the taxpayer's bank account. In this situation, as explained in ***United States v. Boulet***, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), after the bank deposits have been added together and nontaxable amounts are eliminated, the amount of expenditures made in cash (but not deposited) is added to derive gross income. Applicable deductions and exemptions are then subtracted, resulting in corrected taxable income. ***Boulet***, 577 F.2d at 1167. *See also* ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974) (after totalling deposits and eliminating non-income items, "[t]he Government then includes any additional income which the taxpayer received during the tax year but did not deposit in any bank account"); ***United States v. Nunan***, 236 F.2d 576, 580 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957); ***United States v. Ayers***, 673 F.2d 728, 730 (4th Cir. 1982); ***Morrison v. United States***, 270 F.2d 1, 23 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959); ***Bostwick v. United States***, 218 F.2d 790, 794 (5th Cir. 1955); ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986); ***United States v. Berzinski***, 529 F.2d 590, 592 (8th Cir. 1976); ***Percifield v. United States***, 241 F.2d 225, 229 (9th Cir. 1957).

The underlying theory in including expenditures made with cash that did not go through the bank account in the analysis is that it may be inferred that the cash expenditures were made with current income, unless they are shown to have been made from non-income sources. *But see* ***Abodeely***, 801 F.2d at 1024 (government must demonstrate beyond a reasonable doubt that the unreported income came from a taxable source). ***Abodeely*** does not, however, require the

government to negate absolutely all possible sources of non-taxable income. Quoting ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975), the court in ***Abodeely*** stated that the government must "'do everything that is reasonable and fair . . . [in] the circumstance to identify any non-income transactions . . . .'" Alternatively, the government may prove a likely source of the income. ***Abodeely***, 801 F.2d at 1025. Technically, it should not be necessary to establish cash on hand in a bank deposits case, because the method is grounded on the concept that if the taxpayer is in an income-producing business and makes regular and periodic deposits to a bank account, any deposits remaining after eliminating non-income items represent taxable income. Where cash expenditures are added to deposits, however, the cases indicate that the government must establish the amount of cash the taxpayer had on hand at the start of the prosecution period. *See, e.g.*, ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***Boulet***, 577 F.2d at 1168; ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984). *See* Section 33.08, *infra*, Cash on Hand. This is done to prevent charging the taxpayer with income for expenditures made not with current income but with nontaxable prior accumulated funds.

The "bank deposits and cash expenditures" method is not an amalgamation of the "bank deposits" method and the "expenditures" method. ***Abodeely***, 801 F.2d at 1024. There is no need to show net worth when using this method. *Id*.

33.07[2] ***Amount of Cash Expenditures***

There are two ways of establishing the amount of cash expenditures. The first is by direct proof of specific currency expenditures from undeposited funds uncovered during the investigation. The second is by the indirect method of comparing known total disbursements for specific categories claimed on the tax return (*e.g.*, business expenses) with checks written for such disbursements, with any amount claimed on the return in excess of check expenditures treated as a currency expenditure. As to cash expenditures uncovered during the investigation, the proof consists of merely establishing that the currency expenditures were made with nondeposited funds. Thus, either through testimony or documents it is established that the taxpayer made expenditures in cash and not through a checking account. If the taxpayer has withdrawn cash from a bank account during the year, however, then any such cash withdrawals must be subtracted from the currency expenditures unless it can be shown that the withdrawn cash was not used to make a currency expenditure. Once this is done, the theory is that the undeposited currency expenditures were made with and represent current taxable income, after the elimination of any non-income items, in the same way that deposits represent taxable income.

The indirect method of establishing undeposited currency expenditures is to start with an expenditure claimed by the taxpayer on the tax return and compare this amount with checks written for the expenditure. If it can be shown that the taxpayer's checks do not account for all or a part of the expenditure, then any amount not paid by check must have been paid in cash. For example, if the taxpayer has claimed business expenses of $20,000, and checks can be shown as accounting for only $12,000 in business expenses, then it follows that the remaining $8,000 was paid in cash. Under these circumstances, the $8,000 paid in cash would be added to deposits in arriving at taxable income. For an example of the application of this method of establishing cash expenditures, *see* ***Greenberg v. United States***, 295 F.2d 903 (1st Cir. 1961):

> This leads us into the serious evidentiary objections. Gray's theory

> of building up the company's gross receipts by deducting from the merchandise expense item on the returns the amount paid for merchandise by check and attributing the balance to non-bank account cash, which, in turn, he labelled additional gross receipts, was entirely fair.

Greenberg, 295 F.2d at 903.

The conviction in ***Greenberg*** was reversed, however, because of hearsay testimony by the agent. Thus, in ***Greenberg***, the government sought to prove the purpose of checks drawn by the taxpayer solely through the conclusory testimony of the special agent that the checks he selected represented payments for merchandise and that any excess amount claimed on the return as a merchandise expense represented a cash expenditure. ***Greenberg***, 295 F.2d at 906. The special agent's analysis of the checks was based on inquiries which he had made previously to the payees of the checks. No payee or other third party, however, testified at the trial. Further, no records or admissions of the defendant as to the purpose of the checks was introduced. ***Greenberg***, 295 F.2d at 904. The court held that it was elementary that the purpose of the checks could not be established by what third parties had told the agent out of court, or by the agent's testimony of what he concluded from his examination of the checks. ***Greenberg***, 295 F.2d at 908. In the example given above, it would thus be error for the agent merely to review and classify certain checks as being for business purposes. It would be necessary to call the third-party payees as witnesses or to introduce other testimonial or documentary evidence establishing the purpose of the checks.

Note that where the agent has interviewed the taxpayer and the taxpayer states the purpose for which a check was issued, this constitutes an admission, and it is not necessary to call in the third parties. Fed. R. Evid. Rule 801(d)(2)(A). In this situation, it is common for the agent to prepare a check spread on the basis of the taxpayer's admissions and introduce the schedule, as an admission, into evidence.

33.08 ***CASH ON HAND***

33.08[1] ***Generally***

The rationale of the bank deposits method of proof supports the reasoning that affirmative proof as to opening cash on hand is not necessary. Net worth need not be established in a bank deposits case. ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986). Therefore, cash on hand should be relevant not as an asset, but as a potential source of deposits. The underlying evidence introduced to establish the relationship between deposits and the income-producing activity is often sufficient to support a finding that the deposits are current receipts. This argument is strongest when a substantial number of deposits are identified as income and there are not significant currency deposits or cash expenditures involved in the bank deposits analysis.

In ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974), the Second Circuit, in affirming a conviction for tax evasion, suggested that an essential element in all bank deposits cases is the establishment of cash on hand. However, the need for an adequate starting point was necessary in ***Slutsky*** because the case involved both currency deposits and the existence of a "cash on hand account" in proving unreported receipts. It would not seem appropriate to extend the rationale of ***Slutsky*** to all bank deposits cases, especially those cases not involving currency deposits or a cash on hand account.

A blind adherence to ***Slutsky*** can lead to an unrealistic and fanciful result. Thus, in ***United States v. Birozy***, 74-2 T.C. 9564 (E.D.N.Y. 1974), the trial judge entered a judgment of acquittal on the basis that the government failed to establish a starting cash on hand amount for the defendant. However, the record indicates that there was only $2,300 in cash deposits out of apparently some $200,000 in total deposits, and even if the $2,300 in cash deposits was eliminated, there still existed a substantial tax due and owing.

For a more realistic approach, *see* ***Scanlon v. United States***, 223 F.2d 382, 388-89 (1st Cir. 1955) (even if reasonable lead is assumed to be true, it accounted for only $3,000 out of $23,466, and the evidence was therefore sufficient to convict). The better and correct view would seem to be

that whether the government must establish the taxpayer's cash on hand will depend on the circumstances of a given case. Generally speaking, if the bank deposits computation does not include any currency deposits and undeposited cash expenditures are not added to deposits in arriving at taxable income, then it should not be necessary to establish the taxpayer's cash on hand. Under these circumstances, a cash hoard defense would be irrelevant because, even if there were a cash hoard, it could not have played a role in the bank deposits computation.

There can be exceptions to this general rule, depending on the facts of a given case. For example, in theory, a taxpayer could have a cash hoard, purchase a cashier's check with the cash hoard and then deposit that check in his bank account. This is a theoretical possibility, but unless the taxpayer volunteers such an explanation, the government should not have a duty to refute it. "The government is not required to negate all possible non-income sources of the deposits, particularly where the source of the income is uniquely within the knowledge of the taxpayer", and it is shown that a thorough investigation was conducted. ***United States v. Boulet***, 577 F.2d 1165, 1168-69 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). *See also* ***Slutsky***, 487 F.2d at 842.

On the other hand, if the bank deposits computation includes currency deposits, the cases indicate that the government must establish a beginning cash on hand figure. The underlying principle is that if the taxpayer deposited pre-existing cash into his bank accounts during the tax years in question, then this could explain the "excessive" deposits and reduce or eliminate the claimed understatement of income. ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984); ***United States v. Shields***, 571 F.2d 1115, 1120 (9th Cir. 1978). Similarly, cash on hand must be established where nondeposited cash expenditures are added to deposits in arriving at taxable income, unless it can be demonstrated clearly that any pre-existing cash on hand was not the source of the expenditures. *See* ***Boulet***, 577 F.2d at 1168.

33.08[2] ***Proof Of Cash On Hand***

The government is not obligated to prove cash on hand "with mathematical exactitude." ***United States v. Boulet***, 577 F.2d 1165, 1170 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). It is only required that the government prove cash on hand "with reasonable certainty." ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Normile***, 587 F.2d 784, 785 (5th Cir. 1979). Where a thorough government investigation does not develop any evidence of cash on hand, it is proper to "use a cash on hand figure of zero." ***United States v. Shields***, 571 F.2d 1115, 1120-21 (9th Cir. 1978). In the final analysis, the existence of any cash on hand presents a factual issue for determination by the jury. ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974).

For an extended discussion of concepts relating to cash on hand, reference should be made to Sections 31.06 and 31.07, *supra*.

33.09 ***REASONABLE LEADS***

The government must investigate reasonable, relevant leads furnished by a taxpayer, reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. ***United States v. Slutsky***, 487 F.2d 832, 843 n.14 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974) ("[t]he contention that the 'leads' doctrine should be confined to a net worth case is no longer tenable"); ***United States v. Boulet***, 577 F.2d 1165, 1169 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); ***United States v. Ludwig***, 897 F.2d 875, 882 (7th Cir. 1990); ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); ***United States v. Stein***, 437 F.2d 775, 778 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971); ***United States v. Hall***, 650 F.2d 994, 1000 (9th Cir. 1981); ***United States v. Ramsdell***, 450 F.2d 130, 132 (10th Cir. 1971).

If the government fails to investigate a reasonable lead furnished timely by the defendant, the trial court may consider the defendant's version as true and so instruct the jury. ***United States v. Hall***, 650 F.2d 994, 1000 (9th Cir. 1981); *see also* ***Holland v. United States***, 348 U.S. 121, 136

(1954). There is, however, a rule of reason and "the government's investigators are not obliged to track down every conceivable lead offered by the taxpayer to justify the non-income designation of a particular item." ***Esser***, 520 F.2d at 217. *See* ***United States v. Normile***, 587 F.2d 784, 786 (5th Cir. 1979) (agents not obliged to check every bank in the area nor to check every deposit slip in taxpayer's account to find "lead" to wife's account); ***Ludwig***, 897 F.2d at 882; ***United States v. Lenamond***, 553 F. Supp. 852, 855, 860 (N.D. Tex. 1982) (agents obliged to check lead regarding correctness of reported inventory figures, because lead was provided more than two years before trial and was reasonably verifiable, and the reported inventory figures were "astonishing" and "truly anomalous").

Leads furnished by a taxpayer must be both timely and reasonably susceptible of being checked. ***United States v. Procario***, 356 F.2d 614, 617 (2d Cir.), *cert. denied*, 384 U.S. 1002 (1966) (leads furnished "on the eve of indictment" were too late); ***Normile***, 587 F.2d at 786 ("[t]he government was not obliged to bay down rabbit tracks").

In considering questions concerning the reasonable leads doctrine, reference should be made to Section 31.13, *supra*.

33.10 *USE OF SUMMARY CHARTS AND SCHEDULES*

In a bank deposits case, just as in a net worth case, at the close of its case, the government calls to the stand a summary expert witness, who summarizes the evidence and presents schedules reflecting the government's bank deposits computation.

It is well established that a government agent can summarize the evidence and present computations and schedules reflecting the bank deposits computations. ***United States v. Morse***, 491 F.2d 149, 152-53 (1st Cir. 1974); ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976); ***United States v. Stein***, 437 F.2d 775, 780 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971) ("challenges advanced by defendant to the use of such summaries have

been long since considered and rejected by the Supreme Court"); ***United States v. Lacob***, 416 F.2d 756, 762 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); ***United States v. Soulard***, 730 F.2d 1292, 1300 (9th Cir. 1984) (summary charts are not to be admitted in evidence or used by the jury during deliberations but can be used as "testimonial aids" during the agent's testimony and during closing arguments); ***Graves v. United States***, 191 F.2d 579, 584 (10th Cir. 1951) (government agent's schedule "was clearly admissible").

The agent's schedules must be based on evidence in the record and should not contain captions that are "anymore conclusionary or impressive than required to make the summaries understandable." ***United States v. Lacob***, 416 F.2d 756, 762 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970); ***United States v. Esser***, 520 F.2d 213, 218 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976) ("record shows that the summary witness relied only upon the evidence received during the trial and that he was available for full cross-examination").

The testifying agent need not be involved in the investigation or original preparation of the government's case. Thus, a "summary expert" can be called to the witness stand to present the government's bank deposits analysis as long as the witness is qualified as an expert. ***Soulard***, 730 F.2d at 1299.

The same principles applicable to schedules and summaries in a net worth case are also applicable in a bank deposits case. ***Stein***, 437 F.2d at 780. Accordingly, reference should be made to Section 31.16, *supra*, Sample Net Worth Schedule.

33.11 *JURY INSTRUCTIONS*

The defendant is "clearly entitled to a special explanatory charge" when the government proceeds on the bank deposits method of proof. ***Greenberg v. United States***, 295 F.2d 903, 907 (1st Cir. 1961); ***United States v. Wiese***, 750 F.2d 674, 678 (8th Cir. 1984) ("[w]hen the government uses the bank deposit method, a trial court should instruct the jury on the nuances of that method of accounting"); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981) ("comprehensive explanatory instructions must be given when the bank deposits method of proof is used, just as is required by ***Holland*** for the net worth method").

For a sample bank deposits jury instruction, *see* the section on jury instructions, *infra*.

33.12 *SAMPLE BANK DEPOSITS COMPUTATION*

Reproduced on the page which follows is a hypothetical bank deposits summary computation. Note that ancillary schedules such as an analysis of deposits are not included in the example.

SAMPLE BANK DEPOSITS SUMMARY COMPUTATION

Bank Deposits plus Cash Expenditures and Specific Items Not Deposited

1992 Tax Year

Total Bank (Brokerage) Account Deposits				$100,675.00
Less: *Nontaxable receipts*				
Transfers from other accounts	$ 1,500.00			
Redeposits (Bad checks)	200.00			
Proceeds from borrowings (Loans)	1,000.00			
Proceeds from repayment of loan	500.00			
Gift	200.00			
Inheritance	2,000.00			
Other deposits - eliminated				1,500.0
Net Deposits				$ 93,775.00
Plus: Cash expenditures		$10,200.00		
Specific Items of Income -				
Not Deposited		5,100.00	15,300	
Gross Receipts				$109,075.00
Less: Business Expenses				*-21,000.00
Net Profit From Business				$ 88,075.00
Less: Itemized deductions				*-5,075.00
				$ 83,000.00
Less: Exemptions (4) x $1,000				-4,000.00
Corrected Taxable Income				$ 79,000.00
Less: Taxable Income per return				-41,000.00
Unreported Taxable Income				$ 38,000.00

* Generally determined from tax return filed. However, if investigation establishes amounts greater than those claimed on return(s) the larger amounts are used for criminal computation purposes.

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40.00 *TAX PROTESTORS*

40.00 *TAX PROTESTORS*

40.01 *GENERALLY*

Tax protestors have developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service under the guise of constitutional and other objections to the tax laws. These schemes range from a simple failure to file to use of warehouse banks to conceal financial transactions and harassment of government officials through Form 1099 schemes. These schemes give rise to charges under all the criminal tax statutes.[1] Thus, this section should be read in conjunction with those sections of the ***Manual*** treating the various substantive offenses in detail. *See* Sections 8.00 through 29.00, *supra*.

40.02 *FAILURE TO FILE -- 26 U.S.C. § 7203*

40.02[1] ***Generally***

The most common method used by tax protestors is to simply not file a return, or to file a return that reports no financial information and may espouse tax protest rhetoric. Generally, withholding of income taxes by employers is also prevented. *See* Section 10.00, *supra*.

40.02[2] ***What Constitutes a Return***

A Form 1040 must contain information relating to the taxpayer's income from which a tax can be computed to satisfy the requirements of the Internal Revenue Code. ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970); ***United States v. Daly***, 481 F.2d 28, 29 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973). The Forms 1040 filed in ***Porth*** and ***Daly*** contained only the taxpayers' names and addresses, and references to various constitutional provisions which assertedly excused them from filing tax returns.

Failure to file convictions in both cases were upheld, with the court in ***Porth*** saying:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

Porth, 426 F.2d at 523 (citations omitted). *See also* ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982) (Form 1040 reflected only the amount withheld from earnings and no other dollar figure, with refund claimed); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984); ***United***

States v. Kimball, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (asterisks and no signature not a return); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983) ("the test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere"); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984).

Forms 1040 which report only zeroes are not valid returns. ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.), *cert. denied*, 449 U.S. 868 (1980); ***Mosel***, 738 F.2d 157; ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) ("when apparent that the defendant is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980). *But* ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980) (zeros on Long's tax forms, unlike blanks, constituted information as to income from which a tax could be computed just as if the return had contained other numbers).

Similarly, courts have held that tax forms reporting nothing or small amounts in the blanks provided for income and expenses do not constitute legal returns within the meaning of the Internal Revenue Code. ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979) (total income figure based on his interpretation of "constitutional dollars" and a blanket claim of the Fifth Amendment as to all other items); ***United States v. Kimball***, 896 F.2d 1218 (9th Cir. 1990), *vacated*, 925 F.2d 356 (9th Cir. 1991) (*en banc*) (conviction upheld where returns only reported asterisks); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 U.S. 954 (1986) (Form 1040 with word "object" written in all spaces requesting information is not a return); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979) ("unknown" or claimed "Fifth Amendment" responses on Forms 1040 are not returns).

A Form 1040 that shows only a bottom line figure for taxable income with no information as to how the reported taxable income was derived (such as the source of the income, the amount of gross income and deductions, and the number of exemptions claimed) is not a valid income tax return, as a matter of law. ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984). The rule is one of reason; thus, the ***Grabinski*** court stated:

> On the other hand, omission of isolated information not seriously hampering the IRS's ability to check a taxpayer's asserted tax liability -- for example, the omission of a taxpayer's social security number or the nondisclosure of the names of one's dependent children -- does not invalidate a return under section 7203.

Grabinski, 727 F.2d at 686. Compare ***Grabinski*** with ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980), in which defendant filed Forms 1040 which were blank except for the defendant's signature and request for refund of income tax withheld and attached a Form W-2. The Ninth Circuit held that the Form 1040 with attached W-2s constituted returns because they provided "the IRS with ostensibly complete information from which a tax

could be computed" and upheld the defendant's conviction under section 7206(1) for filing false returns. ***Crowhurst***, 629 F.2d at 1300.

40.02[3] ***Return or Not -- Matter of Law***

The determination of "whether a return is valid for section 7203 purposes is a question of law for the court to decide." ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984); *see* ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980) (unsigned Form 1040 not a return as a matter of law); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986). The Eighth Circuit noted in ***Grabinski*** that such a ruling "in no way removes from the jury fact questions regarding whether a defendant was required to file a return, . . . actually failed to make a return, . . . and whether a failure to file was willful." ***Grabinski***, 727 F.2d at 686; *see also* ***Green***, 757 F.2d at 121.

However, some courts have cautioned that such a ruling may improperly invade the province of the jury. The Sixth Circuit has held that the trial court should only "properly stat[e] the law respecting the definition of a return, and [leave] it to the jury to decide whether [the] defendant had properly filed a return." ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). The Sixth Circuit held in ***Saussy*** that the following jury instructions were proper:

> A document which does not contain sufficient information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder. Whether any document submitted by the defendant constitutes tax returns is a matter for the jury to decide.

Saussy, 801 F.2d at 502.

Similarly, in ***United States v. Goetz***, 746 F.2d 705 (11th Cir. 1984), the Eleventh Circuit held that the trial court improperly invaded the province of the jury by "determin[ing] that the documents filed by the defendants did not contain any financial information, and conclud[ed] that, as a matter of law, these documents were not returns". ***Goetz***, 746 F.2d at 708.

40.03 *FRAUDULENT EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE -- 26 U.S.C. § 7205*

40.03[1] *Generally*

Supplying an employer with a false or fraudulent employee withholding allowance certificate, Form W-4, is an offense under 26 U.S.C. § 7205. [2] *See* Section 11.00, *supra*. When a protestor files a false withholding allowance certificate, either claiming an excess number of withholding allowances or claiming to be exempt from taxation, the protestor often subsequently fails to file an income tax return. If so, prosecution may be pursued under 26 U.S.C. § 7205, for the filing of the fraudulent Form W-4, and 26 U.S.C. § 7203, for failing to file a return, both of which are misdemeanors. Because prosecution generally should proceed under the most serious readily provable offense, if the government is able to prove a substantial tax deficiency, charges should be brought under 26 U.S.C. § 7201 (***Spies*** evasion) for the felony of attempted evasion of income taxes. The filing of the false Form W-4 could be used as the affirmative act of attempted evasion. In this connection, *see* Section 40.04, *infra*.

Willfulness in a section 7205 prosecution may be proven by circumstantial evidence. *See* ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979). The filing of protest returns for the years in issue is evidence of willfulness. *See* ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978); ***United States v. Foster***, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*,, 479 U.S. 883 (1986). The defendant's prior history of filing proper returns followed by a failure to file and protest activities is also circumstantial evidence of willfulness. ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

40.03[2] *Employee's Withholding Allowance Certificate, Form W-4*

The Form W-4 that must be filed with an employer and the Internal Revenue Code provisions requiring the filing of a Form W-4 use different terminology. The Form W-4 itself carries the title "Employee's Withholding Allowance Certificate" and the form and instructions speak in terms of allowances. The Internal Revenue Code, however, speaks in terms of withholding "exemptions" and refers to the required form as a "Withholding Exemption Certificate." *See, e.g.*, 26 U.S.C. §§ 3402(a)(2), (b), & (f). There is no real difference, however, arising out of the use of the term "allowances" in the Form W-4 and the term "exemptions" in the Code. Thus, the regulations provide that "Form W-4 is the form prescribed for the withholding exemption certificate required to be filed . . . [and it] shall be prepared in accordance with the instructions and regulations applicable thereto." Treas. Reg. § 31.3402(f) (5)-(1) (26 C.F.R.). The form that must be filed (a Form W-4) is the same whether it is termed a withholding exemption certificate or a withholding allowance certificate. The Fifth Circuit has addressed this issue at least twice. In ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978), the court held that the "meaning of exemption and allowance overlap sufficiently in this context to apprise the Andersons of the offense", in response to a sufficiency-of-the-indictment challenge by defendants who had been charged with "wrongfully claiming withholding exemptions." In ***United States v. Benson***, 592 F.2d 257, 258 (5th Cir. 1979), the trial court referred to Forms W-4 as withholding allowance certificates and the court of appeals called this a "simple misnomer," not prejudicial to any substantial rights of the defendant.

The Tax Division's policy is to use the term "Employee's Withholding Allowance Certificate, Form W-4" in all relevant indictments and informations. This conforms the charge and proof to the actual document alleged to be false. *See* ***United States v. Copeland***, 786 F.2d 768, 769 (7th Cir. 1986) (charging the filing of "a false withholding certificate"). *See also* ***United States v. Foster***, 789 F.2d 457, 458 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) ("one count of willfully filing a false employee's withholding allowance certificate, in violation of 26 U.S.C. Section 7205").

40.04 *SPIES EVASION -- 26 U.S.C. § 7201*

40.04[1] *Spies Evasion Via Filing False Form W-4*

An essential element of the crime of attempted evasion of income tax is an attempt "in any manner" to evade or defeat taxes. 26 U.S.C. § 7201. The Supreme Court, in ***Spies v. United States***, 317 U.S. 492, 499 (1943), held that section 7201 requires a "willful commission" rather than a mere "willful omission". Thus, to be subject to prosecution for attempted evasion of income tax, an individual must commit an affirmative act in an attempt to evade taxes. This affirmative act may be "any conduct, the likely effect of which would be to mislead or to conceal." ***Spies***, 317 U.S. at 499. *See also* Section 8.04, *supra*.

In traditional tax prosecutions, the "affirmative act" element is usually established through the filing of a false or fraudulent income tax return. Protestor prosecutions, however, are generally so-called ***Spies*** evasion cases because protestors usually do not file tax returns. Willfully failing to

file a return, coupled with an affirmative act of evasion "the likely effect of which would be to mislead or conceal" establishes a ***Spies*** evasion case. ***Spies***, 317 U.S. at 499. Thus, the government will have to prove that the defendant committed some affirmative act of evasion other than the filing of a false return. [3]

Affirmative acts common to protestor prosecutions include the filing of false Forms W-4, the filing of protest documents deemed not to be valid returns or deemed to be valid but false returns, the transfer of assets to spouses, relatives, or third parties to conceal ownership of such assets from the Internal Revenue Service, and substantial dealings in cash as a means of concealment. ***United States v. Waldeck***, 909 F.2d 555, 559-60 (1st Cir. 1990) (filing of Fifth Amendment returns and false Forms W-4 evidence of willfulness); ***United States v. McKee***, 942 F.2d 477, 478 (8th Cir. 1991) (filing false Forms W-4 and documents containing false social security numbers evidence of willfulness).

The filing of false Forms W-4 may be the sole affirmative acts of evasion. *See* ***United States v. DiPetto***, 936 F.2d 96, 97 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991) (filing and maintaining false Forms W-4 satisfied affirmative act requirement of ***Spies***); ***United States v. Davenport***, 824 F.2d 1511, 1519 (7th Cir. 1987); ***United States v. Foster***, 789 F.2d 457, 461 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) (conviction for ***Spies*** evasion, based on failing to file income tax returns and filing a false Form W-4, upheld); ***United States v. Copeland***, 786 F.2d 768, 770 (7th Cir. 1986) ("The act of filing a false and fraudulent tax withholding certificate, although a misdemeanor offense, constitutes valid and sufficient evidence of willful commission").

The false Form W-4 need not have been submitted during the year for which evasion is charged:

> Where a taxpayer has willfully failed to file a tax return in violation of Section 7203, a prior, concomitant or subsequent false statement may elevate the Section 7203 misdemeanor to the level of a Section 7201 felony.

Copeland, 768 F.2d at 770. For example, the defendant in ***Copeland*** filed false Forms W-4 on January 16, 1980, and on February 26, 1982, both of which were held willful attempts to evade his 1980 and 1981 taxes. ***Copeland***, 768 F.2d at 770.

Maintaining false Forms W-4 on file year after year may provide an affirmative act of evasion in subsequent years as well as in the year in which the taxpayer first filed a fraudulent Form W-4. ***United States v. Williams***, 928 F.2d 145, 148-49 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991). The act of "maintaining" a false W-4 constitutes an act "the likely effect of which [is] to mislead or conceal." ***Williams***, 928 F.2d at 149.

In failure to file/false W-4 cases, the Tax Division determines whether to bring misdemeanor (sections 7203 and 7205) or felony charges (section 7201) based on the totality of the circumstances of the case. Circumstances to consider include the egregiousness of the individual's tax protest actions, whether the individual is a leader or simply a follower, the extent of the tax protest problem in the jurisdiction, and the favorableness or unfavorableness of the relevant case

law in the jurisdiction where there is venue.

40.04[2] ***Section 7201 Indictments Not Duplicitous***

Indictments charging ***Spies*** evasion have been upheld against claims that they are duplicitous because they charge in a single count both evasion of assessment of tax and evasion of payment of tax. *See* ***United States v. Huguenin***, 950 F.2d 23, 26 (1st Cir. 1991); ***United States v. Waldeck***, 909 F.2d 555, 558 (1st Cir. 1990) ("nothing in text or history of § 7201 requires an indictment to treat § 7201 as if it were two sections of the United States Code"); ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992); ***United States v. Becker***, 965 F.2d 383, 386 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) ("section 7201 creates only one crime, tax evasion") (citing ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990)); ***United States v. Mal***, 942 F.2d 682-87 (9th Cir. 1991) (statute defines a single crime and it is proper to charge different means of committing crime in a single count of indictment). *See* Section 8.00 Tax Evasion, *supra*.

40.04[3] ***Statute of Limitations Considerations***

In a ***Spies*** evasion case, the statute of limitations is six years. 26 U.S.C. § 6531(2). The statute of limitations does not begin to run until the defendant has committed an affirmative act *and* incurred a tax deficiency. Therefore, in cases in which an affirmative act is committed prior to the due date of the return, the statute of limitations begins to run on the due date of the return. ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir. 1991); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); ***United States v. Payne***, 978 F.2d 1177, 1178-80 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993) (citing ***Toussie v. United States***, 397 U.S. 112, 115 (1970)). Similarly, affirmative acts committed after the due date of the return extend the statute of limitations. ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987); ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987); and cases cited above.

40.05 ***SUBSCRIBING TO A FALSE RETURN -- 26 U.S.C. § 7206(1)***

False return charges, unlike evasion charges, do not require proof of a tax deficiency. The government may choose to prosecute a tax protestor under section 7206(1), rather than section 7201, when, for example, the evidence does not establish a substantial tax deficiency beyond a reasonable doubt, but the protestor's actions warrant a felony prosecution. Such a situation may exist in the charitable contribution, fifty percent deduction cases discussed in Section 40.08, *infra*. For a discussion of section 7206(1), *see* Section 12.00, *supra*.

40.06 *FALSE STATEMENT OR DOCUMENT -- 18 U.S.C. § 1001*

A violation of 18 U.S.C. § 1001 can be an appropriate substitute charge for 26 U.S.C. § 7206(1) when the false document in question lacks the required signature or the document is not made under penalties of perjury. A common scenario for such an application of section 1001 is where the protestor files an unsigned income tax return. Section 1001 also can be used when the individual has lied to the agents during the investigation. For a discussion of section 1001, *see* Section 24.00, *supra*.

40.07 *AIDING AND ASSISTING PREPARATION OF FALSE RETURNS -- 26 U.S.C. § 7206(2)*

Tax protestors who cause third parties to prepare and file false returns may be charged under 26 U.S.C. § 7206(2). *See* ***United States v. Holecek***, 739 F.2d 331 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985) (return preparation); ***United States v. Kellogg***, 955 F.2d 1244, 1249 (9th Cir. 1992) (defendant assisted in preparation of returns filed by others); ***United States v. Condo***, 741 F.2d 238, 240 (9th Cir. 1984), *cert. denied*, 469 U.S. 1164 (1985) (preparation and mailing of false Forms W-4); ***United States v. Erickson***, 676 F.2d 408 (10th Cir.), *cert. denied*, 459 U.S. 853 (1982).

Providing advice and material to taxpayers, who in turn file false returns, is sufficient to sustain a section 7206(2) conviction. *See* ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985). In ***Kelley***, the defendant argued that he could not be lawfully convicted of violating section 7206(2) because "he . . . did not actually participate in the preparation of any of the forms [Forms W-4] but only gave advice that his listeners were free to accept or reject." ***Kelley***, 769 F.2d at 217. Rejecting this argument, the court said:

> The contention ignores reality, for he did participate in the preparation of the forms. He told the listeners what to do and how to prepare the forms. He did so with the intention that his advice be accepted, and the fact that the members paid him for the advice and promised assistance warranted an inference of an expectation that the advice would be followed. Moreover, he actually supplied forms and materials to be filed with W-4 forms. He did not take his pen in his hand to complete the forms, but his participation in their preparation was as real as if he had.

Kelley, 769 F.2d at 217.

40.08 *OMNIBUS CLAUSE PROSECUTION: SECTION 7212(a)*

Section 7212(a) provides that:

> [W]hoever . . . in any other way corruptly . . . endeavors to obstruct or impede, the due administration of this title shall be guilty of an offense against the United States. [4]

See Section 17, *supra*, for a discussion of section 7212(a) and Tax Division Directive 77, which sets forth the criteria for the statute's use. "Corrupt" endeavors to impede the administration of the tax laws are actions performed with the intent to secure an unlawful advantage or benefit either for oneself or another. ***United States v. Reeves (Reeves I)***, 752 F.2d 995, 998 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985); ***United States v. Popkin***, 943 F.2d 1535, 1540 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1760 (1992).

Tax protest schemes are generally ripe for prosecution under section 7212. *See* ***United States v. Mitchell***, 985 F.2d 1275, 1278 (4th Cir. 1993) (defendant submitted false application for tax exempt status for his consulting business and concealed income as "charitable contributions"); ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, No. 93-5178 (U.S. Oct. 4, 1993) (Form 1099 scheme directed against federal officials and two private individuals involved in IRS collection action); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (requesting rewards from IRS for debt "forgiven" to government employees); ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993) (Form 1099 scheme); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992) (Form 1099 scheme attempted to retrieve property seized by IRS); ***United States v. Williams***, 644 F.2d 696, 700-01 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981) (false Form W-4 scheme); ***United States v. Kuball***, 976 F.2d 529 (9th Cir. 1992) (Form 1099 scheme and attempted tax refund); ***Popkin***, 943 F.2d at 1537 (attorney created corporation to disguise character of illegally earned income and repatriate it from foreign bank); ***United States v. Shriver***, 967 F.2d 572, 573-74 (11th Cir. 1992) (attempts to defeat IRS lien); ***United States v. Martin***, 747 F.2d 1404 (11th Cir. 1984) (defendant knowingly filed false complaint alleging agent misconduct during an audit).

40.09 ***CHURCH SCHEMES***

40.09[1] ***Generally***

Some protestors feign ordination in a church to receive tax exempt status. Many become ministers in mail order churches, like the Universal Life Church, the Basic Bible Church of America, or the Life Science Church. Most often, the officers and members of the congregation will be limited to the protestor and members of the protestor's immediate family. Using a church framework, the protestor usually adopts one of two schemes. Under the first, a vow of poverty is executed, ostensibly assigning all income and worldly possessions to the protestor's church. The protestor then contends that his or her income is the church's income and, therefore, not taxable to the minister. The protestor uses the funds, ostensibly assigned to the church, to pay personal and other expenses, just as the protestor had done before taking the sham vow of poverty. *See*, *e.g.*, ***United States v. Ebner***, 782 F.2d 1120 (2d Cir. 1986); ***United States v. Masat***, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dube***, 820 F.2d 886 (7th Cir. 1987); ***United States v. Zimmerman***, 832 F.2d 454 (8th Cir. 1987).

A second scheme involves the protestor's making "charitable contributions" to a church, generally of 50 percent of the adjusted gross income of the protestor, which is the maximum amount that can be deducted as a charitable contribution under the Internal Revenue Code. 26 U.S.C. § 170(b). The protestor will deposit the "contribution" in a bank account he has opened in the name of the church. This charitable contribution is deducted on the protestor's individual return, reducing taxable income, even though the donated funds are thereafter used for personal purposes. *See* ***United States v. Heinemann***, 801 F.2d 86, 88 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

40.09[2] ***The Vow of Poverty Scheme***

A tax protest church is not organized and operated exclusively for religious purposes, with no personal inurement to any individual and, thus, it does not have a tax-exempt status. 26 U.S.C. § 501(c)(3), ***Exemption From Tax On Corporations, Certain Trusts, Etc.*** Generally, the government's proof takes the form of evidence showing that although the protestor signed a vow of poverty, the vow was not fulfilled in practice -- the protestor lived and carried out his or her economic and financial affairs the same as in the past. *See* ***United States v. Peister***, 631 F.2d 658 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), upholding the conviction of Peister for filing a false "withholding exemption certificate form W-4". Peister formed a church with himself as minister and his wife and parents as its trustees, took a vow of poverty in form only, set up church checking accounts, and used the funds in those accounts for personal purposes. ***Peister***, 631 F.2d at 660. The court stated:

> In the instant case the record contains adequate evidence from which the jury could infer that Peister set up the church to avoid taxes. Viewed most favorably to the government, the evidence showed the

> church was a shell entity, fully controlled by Peister and his wife, or at the least by them together with Peister's parents. The vow of poverty was one in form only, and had no substantive effect on defendant's lifestyle. The use of the purchased forms to establish the church and the sequence of events all indicate a deliberate plan to manufacture a religious order exemption. The jury apparently chose to disbelieve Peister's testimony of his belief in the church, and that was within the jury's power as the fact finder.

Peister, 631 F.2d at 660.

The courts determine whether a member of a religious order earns income in an individual capacity or as an agent of the order by considering numerous factors, including: the degree of control exercised by the order over the member; ownership rights between the member and the order; the purposes or mission of the order; the type of work performed by the member vis-a-vis the purposes or mission; the dealings between the member and the third-party employer, including the circumstances surrounding job inquiries and interviews, and the control or supervision exercised by the employer; and, dealings between the employer and the order. ***Fogarty v. United States***, 780 F.2d 1005, 1012 (Fed. Cir. 1986) (Jesuit priest liable for taxes on the income earned as a university professor). *See also* ***Schuster v. C.I.R.***, 800 F.2d 672 (7th Cir. 1986).

40.09[3] ***The Charitable Contribution Scheme***

As previously stated, in this scheme, the protestor purports to donate to his or her church 50 percent of adjusted gross income, which is the maximum allowable amount for a charitable contribution deduction. 26 U.S.C. §§ 170(a)(i) & 170(b)(1)(A) & (E). The donated funds are then used by the protestor for personal purposes. *See* ***United States v. Michaud***, 860 F.2d 495 (1st Cir. 1988). In these cases, the government must prove that either no contribution or gift to the church was made or that it was not made to a qualified church under 26 U.S.C. § 170(c)(2) which requires that "no part of the net earnings of which inures to the benefit of any private shareholder or individual."

There is no gift or contribution where there is no total relinquishment of dominion and control over property and funds allegedly given to the "church". *See* ***Stephenson v. C.I.R.***, 748 F.2d 331 (6th Cir. 1984); ***MacKlem v. United States***, 757 F. Supp. 6 (D.Conn. 1991); ***Gookin v. United States***, 707 F. Supp. 1156 (N.D. Cal. 1988). If gifts are made with the incentive of anticipated benefit of an economic nature, then no deduction is available even if the payment is made to a tax-exempt organization. *See* ***DeJong v. C.I.R.***, 309 F.2d 373 (9th Cir. 1962); ***Transamerica Corp. v. United States***, 902 F.2d 1540 (Fed. Cir. 1990); ***Dew v. C.I.R.***, 91 T.C. 615 (1988); ***Hess v. United States***, 785 F. Supp. 137 (E.D. Wash. 1991) (members of Universal Life Church made contributions to church with understanding that church was to pay all personal bills incurred by the "contributor"). To enjoy tax-exempt status under section 501(c)(3), an organization

must satisfy three conditions: (1) it must be organized and operated exclusively for an exempt purpose (the organizational test); (2) no part of its net earnings may inure to the benefit of any private shareholder or individual (the operational test); and, (3) no substantial part of its activity may include carrying on propaganda, or otherwise attempting to influence legislation, or participating or intervening in any political campaign. ***Ecclesiastical Order of ISM of AM v. Commissioner***, 80 T.C. 833, 838 (1983); ***Unitary Mission of Church v. Commissioner***, 74 T.C. 507, 512 (1980), *aff'd without published opinion*, 647 F.2d 163 (2d Cir. 1981); 26 U.S.C. § 501(c)(3). The Fifth Circuit has explained:

> Under the inurement requirement, although a church may pay subsistence allowances to its members, . . . a member's ready use of the religious organization's funds for personal use or receipt of an unreasonable salary for services rendered violates the inurement requirement . . . . Of course, any salary received by defendants would be taxable to them.

United States v. Daly, 756 F.2d 1076, 1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) (citations omitted). As noted in ***Daly***, if the minister receives an excessive or unreasonable salary from the net earnings of the church, this is deemed to be private inurement, and the church will fail the operational test. ***Daly***, 756 F.2d at 1083; ***United States v. Dykema***, 666 F.2d 1096, 1101 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); ***Hall v. C.I.R.***, 729 F.2d 632, 634 (9th Cir. 1984).

40.09[4] ***The First Amendment -- Freedom of Religion***

Tax protestors frequently attempt to use the Freedom of Religion clause of the First Amendment to prevent the government from questioning the integrity of the protestor's alleged religious activities. The courts have long held, however, that the Freedom of Religion clause cannot be used as a blanket shield to prevent the government from inquiring into the possible existence of criminal activity. ***Davis v. Beason***, 133 U.S. 333, 342-43 (1890); ***Cohen v. United States***, 297 F.2d 760, 765 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962).

Although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined. ***United States v. Seeger***, 380 U.S. 163 (1965). *See also* ***United States v. Moon***, 718 F.2d 1210, 1227 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Daly***, 756 F.2d 1076, 1081 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985); ***United States v. Dykema***, 666 F.2d 1096, 1098-1102 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); ***United States v. Ward***, 989 F.2d 1015, 1018 (9th Cir. 1992) ("focus of judicial inquiry is not definitional, but rather devotional . . . That is, is the defendant sincere? Are his beliefs held with the strength of traditional religious convictions?"); ***United States v. Peister***, 631 F.2d 658, 665 (10th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

In ***Moon***, the defendant argued that the trial court was obligated to charge the jury that it must accept as conclusive the Unification Church's definition of what it considered a religious purpose. The Second Circuit flatly rejected the defense argument, citing ***Davis v. Beason***, 133 U.S.

333 (1890), pointing out that foreclosing a court from analyzing a church's activities on the ground that the First Amendment forbids such inquiry "would mean that there are no restraints or limitations on church activities." ***Moon***, 718 F.2d at 1227. The Second Circuit concluded:

> The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Moon, 718 F.2d at 1227.

In ***United States v. Jeffries***, 854 F.2d 254 (7th Cir. 1988), the defendant argued that the IRS should not be permitted to define what constituted a church because to do so would result in the creation of a "federal church, which would restrict a person's individual religious beliefs." ***Jeffries***, 854 F.2d at 256. In rejecting this argument, the court stated:

> There is no need to try to resolve any conflict there may be between a person's personal view of what constitutes a church and that which the tax law recognizes as a church qualifying it for tax exempt status, even if we could. For tax purposes, the tax law prevails.

Jeffries, 854 F.2d at 257.

Furthermore, there is no First Amendment right to avoid federal income taxes on religious grounds. ***United States v. Ramsey***, 992 F.2d 831 (8th Cir. 1993). Therefore, it does not violate the First Amendment to order a defendant to comply with federal income tax laws as a condition of probation.

Defendants' religious objections to filing tax returns signed under penalty of perjury does not eliminate the requirement that tax returns be filed. *See* ***Hettig v. United States***, 845 F.2d 794 (8th Cir. 1988); ***United States v. Dawes***, 874 F.2d 746 (10th Cir. 1989); ***Borgeson v. United States***, 757 F.2d 1071 (10th Cir. 1985). "[T]he requirement that the tax return be signed under penalty of perjury is not an unconstitutional restriction on defendant's right to freedom of religion." ***Dawes***, 874 F.2d at 749. *But see* ***Ward***, 989 F.2d at 1018 (conviction of tax protestor overturned because trial court refused to allow him to swear oath of his own creation; "the court's interest in administering the precise form of oath must yield to Ward's First Amendment rights").

As to whether an organization qualifies as a tax-exempt organization or whether an individual's contribution qualifies as a deductible charitable contribution, the courts also have held that the Internal Revenue Code sets forth objective requirements or criteria (*e.g.*, 26 U.S.C. §§ 170 and 501), which enable the Internal Revenue Service to make the required determination without entering into the type of subjective inquiry that is prohibited by the First Amendment. ***Dykema***, 666 F.2d at 1100; ***Hall v. C.I.R.***, 729 F.2d 632, 635 (9th Cir. 1984); *see also* ***United States v. Masat***, 948 F.2d 923, 927 (5th Cir. 1991) (proper for district court to give instruction that allowed

jury to decide whether defendant was a minister in a tax-exempt organization as defined in 26 U.S.C. § 501(c)(3)).

40.10 ***FALSE FORM 1099 SCHEMES***

The false Form 1099 scheme is one of the fastest growing schemes used by protestors to impede the administration of the tax laws and harass government employees. In many cases, the apparent purpose of this scheme is more to impede and annoy the IRS than to actually evade taxes. Usually, the scheme involves a protestor sending target individuals, such as IRS agents, judges, and politicians, a Form 1099-MISC indicating that the protestor paid those individuals non-employee compensation. These target individuals, however, actually have never had any financial dealings with the protestor. The protestor will also notify the IRS that these individuals have received 1099 income from the protestor, and many request rewards. This is a nuisance to the recipient of the Form 1099, who has the burden of explaining to the IRS any discrepancy between his or her return and the 1099 income reported by the protestor. *See* ***United States v. Hildebrandt***, 961 F.2d 116 (8th Cir.), *cert. denied*, 113 S. Ct. 225 (1992). Protestors who have engaged in these bizarre schemes are often charged under 26 U.S.C. § 7206(1) regarding Forms 1096 (transmitting the Forms 1099 to the IRS) and Forms 1040 (claiming refunds based on the false Forms 1099) and 26 U.S.C. § 7212(a), but this conduct may also give rise to charges under 18 U.S.C. §§ 1001, 287, and 371. *See* ***United States v. Krause***, 786 F. Supp. 1151, 1152 (E.D.N.Y.), *aff'd*, 978 F.2d 706 (1992) (sections 7206(1) and 7212(a)); ***United States v. Wiley***, 979 F.2d 365, 367 (5th Cir. 1992) (18 U.S.C. §§ 371, 472, 1001 and 1002); ***United States v. Dykstra***, 991 F.2d 450, 451 (8th Cir.), *cert. denied*, No. 93-5178 (U.S. Oct. 4, 1993) (sections 7206(1) and 7212(a)); ***United States v. Higgins***, 987 F.2d 543, 544 (8th Cir. 1993) (sections 7206(1) and 7212(a)); ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993) (sections 7206(1) and 7212(a), and 18 U.S.C. § 371); ***United States v. Yagow***, 953 F.2d 423, 427 (8th Cir. 1992) (sections 7206(1) and 7212(a)); ***United States v, Citrowske***, 951 F.2d 899 (8th Cir. 1991) (18 U.S.C. § 1001); ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (18 U.S.C. § 371); ***United States v. Kuball***, 976 F.2d 529, 532 (9th Cir. 1992) (sections 7206(1) and 7212(a)); ***United States v. Parsons***, 967 F.2d 452, 453 (10th Cir. 1992) (18 U.S.C. §§ 287 and 1001).

40.11 ***WILLFULNESS***

40.11[1] ***Generally***

Willfulness in protestor cases involves the same underlying principles as it does in any criminal tax case. Accordingly, reference should be made to the discussion of willfulness in the Sections of the ***Manual*** pertaining to the other various tax offenses. *See* Section 8.06, *supra*.

Willfulness is the voluntary, intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United***

States v. Bishop, 412 U.S. 346, 360 (1973); ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); ***United States v. Schiff***, 801 F.2d 108, 110 (2d Cir. 1986), *cert. denied*, 480 U.S. 272 (1987); ***United States v. Snyder***, 766 F.2d 167, 170-71 (4th Cir. 1985); ***United States v. Masat***, 948 F.2d 923, 931 (5th Cir. 1991); ***United States v. Sassak***, 881 F.2d 276, 280 (6th Cir. 1989); ***United States v. Benson***, 941 F.2d 598, 613 (7th Cir. 1991); ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir. 1993); ***United States v. Kellogg***, 955 F.2d 1244, 1248 (9th Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1392 (10th Cir. 1991). It has the same meaning in both the felony and misdemeanor statutes of the Internal Revenue Code. *See* Section 8.06[1], *supra*.

Proof of willfulness may be based totally on circumstantial evidence. ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979); ***Hellman v. United States*** 339 F.2d 36, 38 (5th Cir. 1964); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Fingado***, 934 F.2d 1163, 1167 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). Because proof of willfulness usually must be established by circumstantial evidence:

> [T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.

United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989).

Circumstantial evidence, in protestor cases, held competent to establish willfulness includes:

1. Tax protest activities and philosophies. ***United States v. Turano***, 802 F.2d 10, 11-12 (lst Cir. 1986); ***United States v. Eargle***, 921 F.2d 56, 58 (5th Cir. 1991); ***United States v. Grosshans***, 821 F.2d 1247, 1252 (6th Cir. 1987);

2. Filing of blatantly false W-4 forms in one year relevant to show willfulness and absence of mistake in filing false Schedule C forms in earlier years. ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990);

3. Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and a letter from the Internal Revenue Service telling the defendant that his return "did not comply with tax laws and might subject him to criminal penalties." ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v.***

DeClue, 899 F.2d 1465 (6th Cir. 1990); ***United States v. Green***, 757 F.2d 116, 123-24 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988);

4. Subsequent taxpaying conduct. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Richards***, 723 F.2d 646, 649 (8th Cir. 1983);

5. Filing false Forms W-4. ***United States v. Connor***, 898 F.2d 942, 945 (3d Cir. 1990), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Carpenter***, 776 F.2d 1291, 1295 (5th Cir. 1985); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir.), *cert. denied*, 479 U.S. 933 (1986); ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986);

6. The amount of a defendant's gross income. ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986) [*i.e.*, the higher the defendant's gross income, the less likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent];

7. Proof that knowledgeable persons warned the defendant of tax improprieties. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993).

40.11[2] ***Good Faith Belief***

A defendant's conduct is not willful if the jury finds that the defendant's conduct resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that he was not a taxpayer within the tax laws, that wages are not income, that the Sixteenth Amendment did not authorize the taxation of individuals and that the Sixteenth Amendment was unenforceable. ***Cheek***, 498 U.S. at 195. The Court explained that:

> In the end, the issue is 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 is objectively reasonable.

Cheek, 498 U.S. at 202 (emphasis added). The Supreme Court held that the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous with reference to Cheek's non-constitutional arguments, stating:

> It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

Cheek, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that the tax laws are unconstitutional:

> 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. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.

Cheek, 498 U.S. at 206. *See also* ***United States v. Saussy***, 802 F.2d 849, 853 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***United States v. Burton***, 737 F.2d 439, 442 (5th Cir. 1984); ***United States v. Latham***, 754 F.2d 747, 751 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 833 n.l (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); ***United States v. Karsky***, 610 F.2d 548, 550 (8th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980); ***United States v. Mueller***, 778 F.2d 539, 541 (9th Cir. 1985); ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*,

459 U.S. 973 (1982).

The ***Cheek*** Court stated that a jury considering a good faith belief claim:

> would be free to consider any admissible evidence from any source showing that . . . [the taxpayer] was aware of his . . . [duties under the tax laws], including evidence showing his awareness of the Code or regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or any contents of the personal income tax return forms and accompanying instructions . . . .

Cheek, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law.

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Cheek, 498 U.S. at 203-04. After remand, the Seventh Circuit upheld Cheek's conviction, ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994), finding that the trial court's instruction that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good-faith" was proper. ***Cheek***, 3 F.3d at 1063. *See also* ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 112 S. Ct. 1411 (1993); ***United States v. Powell***, 955 F.2d 1206, 1212 (9th Cir. 1992) (jury may consider "the reasonableness of the interpretation of the law in weighing the credibility" of defendants' subjective belief that they were not required to file tax returns).

Tax protestors often claim that their beliefs that they are not required to file returns or pay taxes are based upon a careful study of legal decisions, statutes, legal treatises, and the like, and seek to have such materials admitted into evidence. *See, e.g.*, ***United States v. Bonneau***, 970 F.2d 929, 931 (1st Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1200 (1992). However, before such materials may be admitted, the taxpayer must lay a sufficient foundation of reliance. Nevertheless, the laying of such a foundation does not guarantee admissibility. Although legal and tax protestor materials upon which the defendant claims to have relied may be relevant to a good faith defense, there are competing interests which militate against the unrestricted admission of this type of evidence. The admission of such materials may confuse the jury as to the law, *see* ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***Willie***, 941 F.2d at 1395-97; ***United States v. Kraeger***, 711 F.2d 6, 7-8 (2d Cir. 1983); ***United States v. Stafford***, 983 F.2d 25, 28 n.14 (5th Cir. 1993); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Payne***, 978 F.2d 1177, 1181-82 (10th Cir. 1992), *cert. denied*, 112 S. Ct. 2441 (1993), and may assist a

defendant who wishes to undermine the authority of the court and turn his trial into a tax protestor circus, *see* ***Willie***, 941 F.2d at 1395 & n.8. The exclusion of such materials from evidence does not prevent a defendant from conveying the core of his defense to the jury: the defendant may still testify as to his asserted beliefs and how he supposedly arrived at them. *See* ***Barnett***, 945 F.2d at 1301; ***United States v. Hairston***, 819 F.2d 971, 973 (10th Cir. 1987). It is for the district court to weigh the various competing interests and determine, in its discretion, whether, to what extent, and in what form, legal materials upon which a defendant claims to have relied should be admitted in any given case. *See* ***Willie***, 941 F.2d at 1398; Fed. R. Evid. 403. [5]

A prosecutor should not seek to exclude such evidence in all situations. *See* ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992) (error not to allow defendant to read relevant excerpts of court opinions and Congressional Record upon which he assertedly relied in determining that he was not required to file tax returns); ***United States v. Powell***, 955 F.2d 1206, 1215 (9th Cir. 1992) ("In § 7203 prosecutions, statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element [willfulness] if the defendant lays a proper foundation which demonstrates such reliance."). Restraint should be exercised where appropriate so as not to jeopardize convictions on appeal. This is particularly true where the defendant has made a specific claim of reliance on a relatively limited amount of material. *See* ***Barnett***, 945 F.2d at 1301 n.3 (noting that exclusion of specific proffer of one or two sentences from an IRS handbook may have been error, albeit harmless, and contrasting this specific proffer with the "voluminous,'cover the waterfront' exhibits" that defendant had originally offered). In such a situation, the prosecutor should consider requesting a limiting instruction rather than opposing the admission of such evidence. [1]

For examples of jury instructions on willfulness and the good faith defense that have been upheld, *see* ***United States v. Droge***, 961 F.2d 1030, 1037-38 (2d Cir.), *cert. denied*, 113 S. Ct. 609 (1992); ***Stafford***, 983 F.2d at 27; ***United States v. Masat***, 948 F.2d 923, 931-32 (5th Cir. 1991); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993); ***United States v. Dykstra***, 991 F.2d 450, 452-53 (8th Cir. 1993); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991); ***United States v. Collins***, 920 F.2d 619, 622-23 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991).

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1 The prosecutor may be able to utilize the proffered evidence to demonstrate the implausibility of a defendant's claim of good-faith reliance.

40.12 *SELECTIVE PROSECUTION AND FREEDOM OF SPEECH*

40.12[1] *Generally*

Tax protestors have asserted that their prosecution violates their First Amendment right of freedom of speech. Protestors commonly argue that they are being prosecuted merely because of their vocalness. This is actually a selective prosecution defense, not a First Amendment defense. On the other hand, where the protestor is prosecuted under an aiding or abetting charge, *e.g.*, 18 U.S.C. § 2 or 26 U.S.C. § 7206(2), or a conspiracy charge, the protestor may claim that his or her counseling or advice to others was limited to speech, not action and, therefore, is protected under the First Amendment. It is this latter situation which may raise a true First Amendment freedom of speech issue.

40.12[2] *Selective Prosecution Defense*

The defense that protestors are being selectively prosecuted because of their vocalness, in violation of their First Amendment right of Freedom of Speech, is seldom successful and carries with it a heavy burden for the defendant. In ***United States v. Berrios***, 501 F.2d 1207 (2d Cir. 1974), the Second Circuit defined the defendant's burden on this issue as follows:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Berrios, 501 F.2d at 1211.

This standard has been widely adopted by other circuits. ***United States v. Michaud***, 860 F.2d 495, 499-500 (lst Cir. 1988); ***United States v. Damon***, 676 F.2d 1060, 1064 (5th Cir. 1982); ***United States v. McMullen***, 755 F.2d 65, 66 (6th Cir. 1984); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); ***United States v. Holecek***, 739 F.2d 331, 333-34 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985); ***United States v. Aguilar***, 883 F.2d 662, 705 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1990); ***United States v. Amon***, 669 F.2d 1351, 1356 n.6 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); ***United States v. Mangieri***, 694 F.2d 1270, 1273 (D.C. Cir. 1982).

The defendant has the initial burden of going forward and establishing the two parts of a *prima facie* case of selective prosecution. Once the defendant has made such a showing, the burden is on the government to show that there was no selective prosecution. The IRS is not required to

treat similarly all who engage in roughly the same conduct. ***Michaud***, 860 F.2d at 499. The defendant must overcome the presumption that the prosecution has been legitimately undertaken prior to being entitled to discovery or a hearing on the issue of selective prosecution. ***United States v. Bennett***, 539 F.2d 45, 54 (10th Cir.), *cert. denied*, 429 F.2d 925 (1976) (presumption exists that prosecution for violation of criminal law is in good faith).

This showing or "colorable basis" of selective prosecution is defined as "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." ***United States v. Berrios***, 501 F.2d at 1211-12. *See also* ***United States v. Moon***, 718 F.2d 1210, 1229 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986).

The Sixth, Seventh, and Eighth Circuits have held that the defendant must "raise a reasonable doubt about the prosecutor's purpose" to be entitled to a hearing. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983); ***United States v. Falk***, 479 F.2d 616, 623 (7th Cir. 1973); ***United States v. Catlett***, 584 F.2d 864, 866 (8th Cir. 1978).

The Third, Fifth, Sixth, and Ninth Circuits have used such phrases as "colorable entitlement" to the defense, "some credible evidence," and enough facts "to take the question past the frivolous stage" in setting the threshold for requiring discovery or a hearing. ***United States v. Torquato***, 602 F.2d 564, 569-70 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); ***United States v. Berrigan***, 482 F.2d 171, 181 (3d Cir. 1973); ***United States v. Damon***, 676 F.2d 1060, 1064-65 (5th Cir. 1982); ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983); ***United States v. Oaks***, 508 F.2d 1403, 1404 (9th Cir. 1974).

As a practical matter, the government should resist discovery or a hearing on this issue until the defendant has made the requisite showing of selective prosecution. Otherwise, defendants may use frivolous claims of selective prosecution to obtain documents they otherwise would not be entitled to under Fed. R. Crim. P. 16, such as internal government memoranda.

Generally, the courts have upheld the government's targeting of vocal tax protestors for prosecution against selective prosecution attacks by defendants. ***United States v. Johnson***, 577 F.2d 1304, 1309 (5th Cir. 1978); ***United States v. Pottorf***, 769 F. Supp. 1176, 1184 (D. Kan. 1991). The government's initiation of prosecution because of a defendant's "great notoriety" as a protestor would not, as a matter of law, be an impermissible basis for prosecution. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983). The defendant must also show that others similarly situated were not prosecuted and that the prosecution was based on some impermissible consideration, such as race or religion. ***United States v. Amon***, 669 F.2d 1351, 1356-57 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). *See also* ***United States v. Rice***, 659 F.2d 524, 527 (5th Cir. 1981) ("selection for prosecution based in part upon the potential deterrent effect on others serves a legitimate interest in prompting more general compliance with the tax laws"). As the court stated, in ***United States v. Kelley***:

> There is no impermissible selectivity in a prosecutorial decision to prosecute the ringleader and instigator, without prosecuting his foolish followers, when a prosecution of the instigator can be expected to bring the whole affair to an end.

Kelley, 769 F.2d 215, 218 (4th Cir. 1985).

40.12[3] ***Freedom of Speech***

Where a defendant's speech is combined with action, *e.g.*, where a protestor both encourages and is actually involved in the preparation of protest returns for others, the defendant has gone beyond the protection of the First Amendment and may be subject to criminal prosecution. ***United States v. Citrowske***, 951 F.2d 899, 901 (8th Cir. 1991) ("freedom of speech is not so absolute as to protect speech or conduct which otherwise violates or incites a violation of the tax law"); ***United States v. Freeman***, 761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986). *See also* ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982). A taxpayer cannot claim protection under the First Amendment simply by characterizing his filing of false information and tax returns as "petitions for redress." ***United States v. Kimball***, 976 F.2d 529, 532 (9th Cir. 1992). Yet, where the protestor's activity is arguably limited to the mere giving of advice or counsel and there is no involvement in the actual preparation of tax returns or causing returns to be prepared, there may be a viable defense that activity is protected by the First Amendment right to freedom of speech. *But see* ***United States v. Barnett***, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").

In ***Brandenburg v. Ohio***, 395 U.S. 444 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." ***Brandenburg***, 395 U.S. at 447. Thus, the Court created an exception to First Amendment protection for speech

that incites imminent lawless activity, as opposed to speech that merely advocates violation of law, which may still be constitutionally protected.

There are a few tax protestor cases that address the issue of when providing advice or counsel steps beyond the protection of the First Amendment. In ***United States v. Buttorff***, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978), the Eighth Circuit held that the defendant's activities went beyond the scope of protection of the First Amendment, stating:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

Buttorff, 572 F.2d at 624. *See also* ***United States v. Moss***, 604 F.2d 569, 571 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); ***United States v. Freeman***, 761 F.2d at 551 (section 7206(2) charges based on Freeman's instructional seminars reversed due to trial court's failure to instruct that First Amendment defense was a question of fact for the jury).

"Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used as so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." ***Freeman***, 761 F.2d at 552. *See also* ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982); ***United States v. Kelley***, 769 F.2d 215 (4th Cir. 1985).

In ***United States v. Turano***, 802 F.2d 10, 12 (1st Cir. 1986), the defendant in a section 7203 case claimed that his right to freedom of speech under the First Amendment had been violated by the introduction of evidence of his "tax protest" activities and instructions to the jury about "tax protestors." The court rejected this argument, explaining that the defendant:

> [W]as not convicted of speaking out against taxation or for encouraging others not to file but rather for willfully failing to file his own returns. In order to determine his state of mind, the jury was entitled to know what he said and did regarding federal income taxation. The First Amendment protects the appellant's right to express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.

Turano, 802 F.2d at 12.

40.13 *FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION*

Tax protestors often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. In ***United States v. Sullivan***, 274 U.S. 259 (1927), the Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for failing to file a return at all. The Court indicated, however, that the privilege could be claimed against specific disclosures sought on a return, saying:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

Sullivan, 274 U.S. at 263. *See also* ***Garner v. United States***, 424 U.S. 648, 650 (1976).

Sullivan is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. *See, e.g.*, ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Wunder***, 919 F.2d 34, 37 (6th Cir. 1990); ***United States v. Dack***, 987 F.2d 1282, 1284 (7th Cir. 1993); ***United States v. Poschwatta***, 829 F.2d 1477, 1482 n. 3 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); ***United States v. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***United States v. Stillhammer***, 706 F.2d 1072, 1076-77 (10th Cir. 1983); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982).

A taxpayer may refuse to answer specific questions or disclose specific information, if such disclosure would be incriminating. The courts have uniformly held, however, that disclosure of the type of routine financial information required on a tax return does not, in itself, incriminate an individual and does not violate one's Fifth Amendment right against self-incrimination. ***United States v. Schiff***, 612 F.2d 73, 77-83 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir.), *cert. denied*, 464 U.S. 918 (1983); ***United States v. Warner***, 830 F.2d 651, 653-54 (7th Cir. 1987); ***United States v. Drefke***, 707 F.2d 978, 982-83 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir.), *cert. denied*, 434 U.S. 1012 (1977). *See also* ***United States v. Green***, 757 F.2d 116 n.7 (7th Cir. 1985) (affirming use of jury instruction that reporting income from legitimate activities would not fall within the Fifth Amendment privilege); ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Carlson***, 617 F.2d 518 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980) (no valid Fifth Amendment privilege excusing failure to file Form 1040 to cover up false Form W-4 previously filed by defendant); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982).

A Fifth Amendment claim, however, may be asserted as to specific line items on tax forms. ***United States v. Sullivan***, 274 U.S. at 263; ***Edelson***, 604 F.2d at 234; ***United States v. Flitcraft***, 863 F.2d 342, 344 (5th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989); ***United States v. Shivers***, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source

may be); ***Heise***, 709 F.2d at 450-51; ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Turk***, 722 F.2d 1439, 1441 (9th Cir. 1983), *cert. denied*, 469 U.S. 818 (1984); ***United States v. Harting***, 879 F.2d 765, 770 (10th Cir. 1989).

The determination that the defendant's claim to the Fifth Amendment privilege against self-incrimination was invalid does not, however, prohibit the defendant from offering evidence to the effect that there was a good faith belief that he or she could properly assert the privilege. Such a good faith claim, even if erroneous, is a valid defense to the element of willfulness if believed by the jury. ***Shivers***, 788 F.2d at 1048 n.1; ***United States v. Saussy***, 802 F.2d 849, 854-855 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***Poschwatta***, 829 F.2d at 1482 n. 3; ***United States v. Goetz***, 746 F.2d 705, 710 (11th Cir. 1982).

Whether the defendant has validly exercised the privilege against self-incrimination is a question of law for the court. ***Turk***, 722 F.2d at 1440. Yet, whether the defendant has asserted the privilege in good faith, which could entitle the defendant to an acquittal on failure to file charges, is a question of fact for the jury to resolve. *Id.*; ***United States v. Smith***, 735 F.2d 1196, 1198 (9th Cir.), *cert. denied*, 469 U.S. 1076 (1984).

Returns containing little or no financial information from which a tax could be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purposes of proving evasion. *See* ***United States v. Waldeck***, 909 F.2d 555, 559 (1st Cir. 1990) ("filing of returns containing only name, a signature, a figure for federal income tax withheld, asterisks at numbered lines in lieu of information and the statement '[t]his means specific exception is made under the Fifth Amendment, U.S. Constitution,'" is an affirmative act of evasion); ***United States v. DeClue***, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information and on which was typed: "object: self-incrimination" is affirmative act of evasion).

40.14 *MISCELLANEOUS FRIVOLOUS DEFENSES*

40.14[1] *Wages Are Not Income*

A common defense raised by protestors is that salaries and wages are not "income" within the meaning of the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived . . ."

The courts have uniformly interpreted the term "income" in its everyday usage to include wages and salaries. ***United States v. Connor***, 898 F.2d 942, 943-44 (3d Cir.), *cert. denied*, 497 U.S. 1029 (1990); ***United States v. Burton,*** 737 F.2d 439, 441 (5th Cir. 1984); ***United States v. Sassak***, 881 F.2d 276, 281 (6th Cir. 1989); ***United States v. Becker***, 965 F.2d 383, 389 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993); ***United States v. Sloan***, 939 F.2d 499, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992); ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); ***United States v. Buras***, 633 F.2d 1356, 1361 (9th Cir. 1980); ***United States v. Tedder***, 787 F.2d 540, 542 n.3 (10th Cir. 1986). *See* ***Jones v. United States***, 551 F. Supp. 578, 580 (N.D.N.Y. 1982), for a list of cases holding that wages are included in gross income.

40.14[2] ***District Court Jurisdiction of Title 26 Offenses***

Despite protestors' claims to the contrary, it is clear that United States District Courts have jurisdiction over criminal offenses enumerated in the Internal Revenue Code, notwithstanding want of a statute within Title 26 conferring such jurisdiction. Generally, this is based on the reasoning that 18 U.S.C. § 3231 gives the district courts original jurisdiction over "all offenses against the laws of the United States" and the Internal Revenue Code defines offenses against the laws of the United States. ***United States v. Huguenin***, 950 F.2d 23, 25 n.2 (1st Cir. 1991); ***United States v. Isenhower***, 754 F.2d 489, 490 (3d Cir. 1985); ***United States v. Eilertson***, 707 F.2d 108, 109 (4th Cir. 1983); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992); ***United States v. Bressler***, 772 F.2d 287, 293 n.5 (7th Cir. 1985); ***United States v. Rosnow***, 977 F.2d 399, 412 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993); ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991) (citing cases); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). *See also* ***United States v. McMullen***, 755 F.2d 65, 67 (6th Cir. 1984), *cert. denied*, 474 U.S. 829 (1985). The argument that the United States has jurisdiction only over Washington, D.C., federal enclaves and territories, and possessions of the United States has similarly been rejected. *See* ***Ward***, 833 F.2d at 1539.

40.14[3] ***Voluntariness of Filing Income Tax Returns***

Protestors commonly argue that the filing of income tax returns is voluntary. Not so. If the taxpayer has received more than the statutory amount of gross income, then he or she is obligated to file a return. ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); ***United States v. Tedder***, 787 F.2d 540, 542 (10th Cir. 1986). *See also* ***United States v. Hurd***, 549 F.2d 118 (9th Cir. 1977); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982) ("Every income earner is required to file an income tax return.") Under ***Cheek***, a protestor could, of course, present evidence that he held a good faith belief that the payment of taxes is "voluntary." *See* ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991).

40.14[4] *Duty of IRS to Prepare Returns*

Protestors have argued that 26 U.S.C. § 6020(b)(1) [6] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file before or in lieu of criminal prosecution. There is no merit to this claim. This provision merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. It does not excuse the taxpayer from criminal liability for that failure. ***United States v. Harrison***, 30 A.F.T.R.2d 72-5367, 5368 (E.D.N.Y.), *aff'd*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1487 (1992); ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982); ***United States v. Poschwatta***, 829 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

When a defendant raises this argument during trial, the court may properly instruct the jury that while section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." ***Powell***, 955 F.2d at 1213.

40.14[5] *Fourth Amendment Right Against Unreasonable Searches and Seizures*

The government's use at trial of income tax returns or Forms W-4 filed by the defendant does not violate his Fourth Amendment right against unreasonable searches and seizures. ***United States v. Warinner***, 607 F.2d 210, 212-13 (8th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); ***United States v. Amon***, 669 F.2d 1351, 1358 (10th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

The IRS has the authority to obtain evidence through the execution of search warrants. ***United States v. Rosnow***, 977 F.2d 399, 409 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993). In ***Rosnow***, the court noted that "Congress gave the IRS wide authority to conduct criminal investigations, including the execution of search warrants, regarding those individuals suspected of violating the tax laws." ***Rosnow***, 977 F.2d at 399; ***United States v. Dunkel***, 900 F.2d 105, 106 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991) (use of financial records obtained from taxpayer's garbage dumpster does not violate Fourth Amendment).

40.14[6] ***Unconstitutional Vagueness***

Sections 7203, 7205 and 7206 have withstood challenges that they are unconstitutionally vague. ***United States v. Lachmann***, 469 F.2d 1043, 1046 (lst Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (section 7203); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991) (section 7203); ***United States v. Parshall***, 757 F.2d 211, 215 (8th Cir. 1985) (section 7203); ***United States v. Russell***, 585 F.2d 368, 370 (8th Cir. 1978) (section 7203); ***United States v. Pederson***, 784 F.2d 1462, 1463-64 (9th Cir. 1986) (section 7203); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (section 7205); ***United States v. Buttorff***, 572 F.2d 619, 624-25 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978) (section 7205); ***United States v. Annunziato***, 643 F.2d 676, 677-78 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981) (section 7205); ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (section 7206).

40.14[7] ***Ratification of Sixteenth Amendment***

The contention that the Sixteenth Amendment was never legally ratified and that the federal government does not, therefore, have the authority to collect an income tax without apportionment has been flatly rejected. ***United States v. Sitka***, 845 F.2d 43, 44-47 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988); ***United States v. Benson***, 941 F.2d 598, 607 (7th Cir. 1991); ***In re Becraft***, 885 F.2d 547, 549 (9th Cir. 1989); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). As stated in ***United States v. House***, 617 F. Supp. 237 (W.D. Mich. 1985):

> The sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land.

House, 617 F. Supp. at 240.

40.14[8] ***Violation of the Privacy Act***

Circuit courts also have rejected Privacy Act challenges to the IRS Form 1040 instruction booklet and to Forms W-4. ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (not error to refuse to dismiss for failure to publish, pursuant to Privacy Act, notice of specific criminal penalty which might be imposed); ***United States v. Bressler***, 772 F.2d 287, 292 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986) ("the IRS notice . . . adequately and clearly informs taxpayers that filing is mandatory"); ***United States v. Wilber***, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); ***United States v. Annunziato***, 643 F.2d 676, 678 (9th Cir.), *cert. denied*, 452 U.S. 966 (1981) (notice in Form W-4 instructions adequate); ***United States v. Rickman,*** 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate).

40.14[9] ***Defendant Not A "Person" or "Citizen"***

In a section 7203 prosecution, it has been argued that the defendant was not a "person" within the meaning of the statute, which imposes an obligation to file on "any person" meeting the necessary requirements. This argument has been dismissed as frivolous. ***United States v. Karlin***, 785 F.2d 90, 91 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). A similar argument has been rejected with respect to the term "individual" in section 7201 cases. *See* ***United States v. Studley***, 783 F.2d 934, 937 (9th Cir. 1986); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987). "All individuals, natural or unnatural, must pay federal income tax on their wages." ***Lovell v. United States***, 755 F.2d 517, 519 (7th Cir. 1984).

Protestors' "rejection" of citizenship in the United States in favor of state citizenship also does not relieve them of income tax requirements. *See* ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code); ***United States v. Sloan***, 939 F.2d 499, 500-01 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992) ("strange argument" rejected); ***United States v. Silevan***, 985 F.2d 962, 970 (8th Cir. 1993) (rejecting as "plainly frivolous" defendant's argument that he is not a "federal citizen").

40.14[10] ***Federal Reserve Notes are Not Legal Tender***

Some protestors have argued that because their wages were paid in Federal Reserve Notes, they need not pay any taxes on those wages. Their argument, which has been uniformly rejected, is that the notes are not valid "currency" or legal tender, and thus, those who possess them cannot be subject to a tax on them. *See* ***United States v. Martin***, 790 F.2d 1215, 1217 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986); ***United States v. Buckner***, 830 F.2d 102, 103 (7th Cir. 1987); ***United States v. Brodie***, 858 F.2d 492, 498 (9th Cir. 1988); ***United States v. Condo***, 741 F.2d 238, 239 (9th Cir. 1984).

40.14[11] ***Tax Protest Against Government Spending***

A protestor who contends that his refusal to pay taxes or file returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. In fact, arguments challenging "the constitutionality of or validity of the tax laws are precluded because they are necessarily premised on a defendant's full knowledge of the law . . . and therefore make irrelevant the issue of willfulness." ***Cheek v. United States***, 498 U.S. 192, 203 (1991). The failure to furnish information on income tax returns cannot be justified by an asserted disagreement with the tax laws or in protest against the policies of the government. ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982). Similarly, a taxpayer who contends that paying taxes would require him to violate his pacifist religious beliefs cannot take refuge in the First Amendment. A taxpayer "has no First Amendment right to avoid federal income taxes on religious grounds." ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993).

40.14[12] ***Reliance on Advice of Counsel***

Reliance on the advice of an attorney in the preparation of incomplete or "Fifth Amendment" returns is a defense raised by some protestors. If the evidence presented at trial is sufficient to warrant it, the court should instruct the jury that the defendant's conduct is not "willful" if he acted with a good faith misunderstanding based on the advice of counsel. *See* ***United States v. Snyder***, 766 F.2d 167, 169 (4th Cir. 1985) (testimony not sufficient to justify instruction concerning good faith reliance); ***United States v. Becker***, 965 F.2d 383, 387-88 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) (upholding refusal to give reliance instruction where there was no testimony that defendant told lawyer everything about his situation, that attorney gave defendant specific advice in response and that defendant followed that advice); ***United States v. Benson***, 941 F.2d 598, 615 (7th Cir. 1991) (proper to instruct jury that reliance on counsel was a "circumstance" to consider in determining willfulness).

The Seventh Circuit, in ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1055 (1994), used the following test to determine whether Cheek was entitled to a reliance on counsel defense instruction:

> In order to establish an advice of counsel defense, a defendant must establish that: " (1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report."

Cheek, 3 F.3d at 1061 (citing ***Liss v. United States***, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued on a course of illegal conduct begun prior to contacting counsel". ***Cheek***, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. ***Cheek***, 3 F.3d at 1062.

40.14[13] ***Rule 404(b) Evidence: Proof of Willfulness***

Prior or subsequent bad acts of the defendant are often admissible to prove willfulness. Such evidence will be relevant to the issue of willfulness where, for instance, the defendant claims that he relied on the advice of others, in good faith, in filing false returns and did not know his conduct was improper. ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990) (evidence that defendant submitted Form W-4 in 1987 claiming more allowances than he was entitled to and did not file a return in 1987, relevant to show willfulness and absence of mistake in filing false Schedule C forms from 1982 to 1986). A defendant's attendance at protestor meetings has been held admissible to show that she knew what she was doing and knew she had an obligation to pay taxes. ***United States v. Grosshans***, 821 F.2d 1247, 1253 (6th Cir.), *cert. denied*, 484 U.S. 987 (1987).

When willfulness is an issue in a section 7203 case, prior filings may be relevant not just to show defendant's knowledge of filing requirements, but also to demonstrate a single scheme or common pattern of illegal conduct. ***United States v. Birkenstock***, 838 F.2d 1026, 1028 (7th Cir. 1987); *see also* ***United States v. Fingado***, 934 F.2d 1163, 1165 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). A pattern is relevant because it shows that the failure to file was not due to inadvertence, mistake, or confusion. ***Birkenstock***, 838 F.2d at 1028. Therefore, evidence of a defendant's prior and subsequent acts is probative of willfulness and should be admitted as long as it is not unduly prejudicial. *See* ***United States v. McKee***, 942 F.2d 477, 480 (8th Cir. 1990) (citing cases); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir.), *cert. denied*, 112 S. Ct. 58 (1991) (evidence that defendant had sent tax protestor materials to the IRS and had failed to comply with tax laws in prior and subsequent years probative of willfulness). Prior tax offense convictions of the defendant may also be admissible. ***United States v. Poschwatta***, 829 F.2d 1477, 1484 (9th Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988).

40.14[14] ***Probable Cause Hearings***

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information, and issuing the defendant a summons instead of arresting him via a warrant. Protestors have argued, based on Fed. R. Crim. P. 9 and 4(a) requiring that a warrant shall not issue without probable cause, that use of a criminal summons violates their rights. The courts, however, have held to the contrary. *See* ***United States v. Saussy***, 802 F.2d 849, 851-52 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); ***United States v. Birkenstock***, 823 F.2d 1026, 1030-31 (7th Cir. 1987); ***United States v. Dawes***, 874 F.2d 746, 750 (10th Cir. 1989); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986).

40.14[15] ***Costs of Prosecution***

The imposition of the costs of prosecution is mandated by most of the Title 26 tax offenses. *See* United States Attorneys' Manual (USAM) 6-4.350. The imposition of costs, as authorized, does not constitute cruel and unusual punishment. ***United States v. Dawes***, 874 F.2d 746, 751 (10th Cir. 1989). The judgment of conviction can be amended to include the costs of prosecution even after the defendant has filed a notice of appeal. ***United States v. Dennis***, 902 F.2d 591, 592-93 (7th Cir.), *cert. denied*, 498 U.S. 876 (1990).

The criminal tax statutes do not define "costs" so courts regularly look to 28 U.S.C. § 1920 for guidance on what expenses should be included. ***United States v. Dunkel***, 900 F.2d 105, 108 (7th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 747 (1991). The expenses of transportation and subsistence for witnesses employed by the United States, including the case agent, may be included as part of "costs." ***Dunkel***, 900 F.2d at 108.

40.14[16] ***Form W-2: Outdated Federal Register Regulation***

Some protestors have relied on a 1946 Federal Register regulation, allowing the filing of a Form W-2 in lieu of a Form 1040 tax return, to argue that they were not required to file a return since the IRS received a copy of their W-2 form from their employer. *See* ***United States v. Lussier***, 929 F.2d 25, 31 (1st Cir. 1991); ***United States v. Birkenstock***, 823 F.2d 1026, 1030 (7th Cir. 1987). The court in ***Birkenstock*** noted two problems with this argument: (1) that particular 1946 Federal Register regulation was eliminated when the Federal Register was codified in the 1949 CFR; and, (2) even if the 1946 regulation survived the CFR codification, the regulation provides that the employee's original Form W-2 can substitute for a Form 1040; therefore, the employer's filing of a copy of the W-2 would not suffice. ***Birkenstock***, 823 F.2d at 1030.

However, the defendant could testify regarding his good faith reliance on the regulation in deciding not to file a return. The 1946 regulation itself could not be admitted as an exhibit. ***Lussier***, 929 F.2d at 31.

40.14[17] ***Civil Assessments***

Protestors have argued, unsuccessfully, that where evasion of payment is charged, the government is required to prove a valid tax assessment by the IRS. *See* ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985); ***United States v. Dack***, 747 F.2d 1172, 1174-75 (7th Cir. 1984); ***United States v. Voorhies***, 658 F.2d 710, 713 (9th Cir. 1981). The existence of a tax deficiency can be shown without proving a formal tax assessment. When the taxpayer fails to file a return, and the government is able to show a tax liability pursuant to the tax code, then a tax deficiency within the meaning of section 7201 is deemed to arise by operation of law on the date the return is due. ***Dack***, 747 F.2d at 1174; *but see* ***United States v. England***, 347 F.2d 425, 427 (7th Cir. 1965) (tax liability actually arose out of civil tax proceedings, and thus, government was required to prove a valid legal assessment).

40.14[18] ***Conditions of Probation***

Protestors frequently challenge the conditions of probation set by the court. The imposition of those conditions is reviewable for abuse of discretion. ***United States v. Schiff***, 876 F.2d 272, 275 (2d Cir. 1989). Tax offenders are generally required to file any delinquent returns and keep current with their taxes as a condition of probation. ***Schiff***, 876 F.2d at 275; ***United States v. Warner***, 830 F.2d 651, 653 (7th Cir. 1987); ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993); ***United States v. Shields***, 751 F.2d 247, 248 (8th Cir. 1984); ***United States v. Wolters***, 656 F.2d 523, 524-25 (9th Cir. 1981).

Discretionary conditions of probation must, however, be "reasonably related" to the goals of sentencing and involve only those deprivations of liberty and property that are reasonably necessary for such purposes. ***United States v. Stafford***, 983 F.2d 25, 28 (5th Cir. 1993) (citing 18 U.S.C. § 3563(b)). In ***Stafford***, the Fifth Circuit invalidated the requirement that the defendant give his probation officer access to "any financial information." ***Stafford***, 983 F.2d at 28. The court stated that:

> To the extent the conditions apply to tax years other than those which are the subject of this litigation, and for which Stafford may be held accountable during the period of probation, the broad obligation to provide access to *any* requested financial information interferes with Stafford's fourth and fifth amendment rights.

Stafford, 983 F.2d at 28.

The Fifth Amendment's privilege against self-incrimination will not shield a defendant from being required to file returns unless the defendant claims that the filing's contents would incriminate him by disclosing illegal income sources. ***Warner***, 830 F.2d at 655. "A taxpayer's fear of prosecution must arise from the return disclosing criminal activities independent of the return filing

process itself." ***Warner***, 830 F.2d at 656; *see also* ***Schiff***, 876 F.2d at 275-76.

40.14[19] ***26 U.S.C. § 6103(h)(5) Juror Audit Information***

Under 26 U.S.C. § 6103(h)(5), an attorney from the Department of Justice involved in "any judicial proceeding" and "any person (or his legal representative) who is a party to such proceeding" may obtain from the Secretary of the Treasury information as to whether any prospective juror has been the subject of an audit or other tax investigation by the IRS. The response of the Secretary is limited to a yes or no reply. In ***United States v. Hashimoto***, 878 F.2d 1126, 1132 (9th Cir. 1989), the Ninth Circuit considered, for the first time, the ramifications if such information cannot be or is not obtained prior to trial. The court held that although no specific requirements or conditions for inquiry and disclosure are set forth in the statute, "the statute itself contemplates that the defendant will be given sufficient time to send the list [of prospective jurors] to Washington, D.C. and receive a reply." ***Hashimoto***, 878 F.2d at 1132. In ***Hashimoto***, the list was given to the defense one week prior to trial. On appeal, the court held that the failure to supply the defendant with the jury panel list in enough time to inquire with the Secretary was reversible error because there existed a "significant *risk* of prejudice." ***Hashimoto,*** 878 F.2d at 1133-34. The court explained:

> Indeed, the fact that Congress saw fit to create such an absolute right suggests that there was a 'significant risk of prejudice.' This presumption might be overcome if the examination of the jurors during voir dire is such that the inference of risk of prejudice is negated.

Hashimoto, 878 F.2d at 1134. The court declined to decide whether an error under section 6103(h)(5) requires a *per se* rule of reversal or simply creates a presumptive risk of prejudice which could be overcome by the judge's *voir dire* questioning. The court held that under either test, reversal was required in the case before it because the *voir dire* was insufficient. In ***United States v. Nielsen***, 1 F.3d 855 (9th Cir. 1993), the Ninth Circuit held:

> [W]here, as here, there has been substantial disclosure by the IRS of persons audited and investigated, the trial court has supplemented the information by ***voir dire***, and there is no palpable suggestion of either party being prejudiced, § 6103(h)(5) was not violated.

Nielsen, 1 F.3d at 858.

In ***Nielsen***, the defendant moved for early disclosure of audit information on 100 potential venirepersons approximately five weeks before trial. The IRS was only able to respond positively regarding 17 individuals. In a hearing, the disclosure officer explained that the nonlisting of the 83 names meant that the IRS had been unable to recover information that the persons were audited, and that it was unlikely that additional searches would provide more information. The court found that the "statutory requirement had been substantially met," but stated that the court intended to ask each prospective juror whether the juror had been audited. ***Nielsen***, 1 F.3d at 858. The district court asked 24 out of 26 venirepersons about their audit history. The two who were inadvertently not questioned served on the jury without any objection from the defendant. *Id.* The Ninth Circuit held:

> The facts are more than sufficient to support a finding of substantial compliance. Indeed we are satisfied that the IRS made every effort which could reasonably be expected of it.

Id.

Other circuits have refused to establish a *per se* rule that reversal is required if a defendant does not receive juror information prior to trial as he is entitled to under section 6103(h)(5). *See* ***United States v. Droge***, 961 F.2d 1030, 1032-37 (2d Cir.), *cert. denied*, 113 S. Ct. 609 (1992); ***United States v. Masat***, 896 F.2d 88, 95 (5th Cir. 1990) ("any error in failing to grant Masat a continuance in order to obtain further information under 26 U.S.C. § 6103(h)(5) was harmless" because the jurors were asked the relevant questions by the trial judge); ***United States v. Spine***, 945 F.2d 143, 147 (6th Cir. 1991); ***United States v. Axmear***, 964 F.2d 792, 793 (8th Cir. 1992), *cert denied*, 113 S. Ct. 963 (1993); ***United States v. Callahan***, 981 F.2d 491, 495 (11th Cir.), *cert denied*, 113 S. Ct. 2972 (1993).

Most courts have held that errors in compliance with section 6103(h)(5) may be rendered harmless by appropriate *voir dire*. *See* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991); ***Droge***, 961 F.2d at 1034; ***Masat***, 896 F.2d at 95; ***Spine***, 945 F.2d at 148; ***Axmear***, 964 F.2d at 793; ***United States v. Sinigaglio***, 942 F.2d 581, 583 (9th Cir. 1991) (rejecting *per se* rule of reversal raised as possible standard in ***Hashimoto***); ***Callahan***, 981 F.2d at 495. Where the court asks, during *voir dire*, whether any juror has been audited, harbors any ill feelings toward the IRS or has been the subject of investigation, the presumption of prejudice will probably be overcome. ***Callahan***, 981 F.2d at 495; ***Spine***, 945 F.2d at 148. Inquiries during *voir dire* have been deemed sufficient because jurors are under oath and there is a presumption that jurors respond truthfully to questions on *voir dire*. ***Masat***, 896 F.2d at 95; ***Spine***, 945 F.2d at 148.

Tax Division policy is to oppose defense motions for early release of the jury list and continuance of trial. Instead, the government should propose *voir dire* questions to determine whether any of the prospective jurors have been the subject of an IRS audit or investigation. ***Peterson Memorandum to United States Attorneys dated September 14, 1989***, pp. 3-4. *See* Section 3.00, *supra*. However, prosecutors in the Ninth Circuit must be mindful of the case law in their circuit.

Section 6103(h)(5) requests are governed by the Internal Revenue Manual Disclosure of Official Information Handbook section 1272(22)70 *et seq*. and handled by the IRS disclosure officer in each district in coordination with the Clerk of Court. Each judicial district has established its own procedures for responding to these burdensome requests. In general, the government, in opposing defendants' motions for early disclosure or continuance, will attach an affidavit of the IRS disclosure officer estimating the time required to obtain tax information regarding each member of the jury panel. [7]

As a practical matter, the government should try to convince the defendant to stipulate to only requiring the IRS to search records for the current and five preceding years, otherwise the government will have to search microfilm records. In some districts, the court will order the Clerk of Court to mail a list of potential jurors, their social security numbers, and addresses, to the IRS disclosure officer to conduct a 6103(h)(5) search. The Court will order the Disclosure Officer to mail the response (yes or no) to the clerk (omitting the social security numbers and addresses), copies of which will be provided to the defendant and United States on the morning of trial. In the likely event that the IRS has been unable to obtain information as to every potential venireperson, the prosecutor should make a record of substantial compliance by having the Disclosure Officer prepare an affidavit describing the government's search and likelihood of obtaining any additional information, or have the Disclosure Officer available for a hearing on the IRS's compliance, and by proposing relevant voir dire questions.

40.14[20] ***Paperwork Reduction Act Defense***

The ***Paperwork Reduction Act of 1980***, 44 U.S.C. § 3501 *et seq.* ("PRA"), was enacted to limit federal agencies' information requests that burden the public. The "Public Protection" provision of the PRA states that no person "shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved does not display a current control number assigned by the Office of Management and Budget [OMB] Director." 44 U.S.C. § 3512.

Protestors claim that they cannot be penalized for failing to file Form 1040 because the instructions and regulations associated with the Form 1040 do not display any OMB control number. This argument has been uniformly rejected on different theories. Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and since the Form 1040 does have a control number, there is no PRA violation. *See* ***United States v. Wunder***, 919 F.2d 34, 38 (6th Cir. 1990); ***Salberg v. United States***, 969 F.2d 379, 383-84 (7th Cir. 1992); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir.), *cert. denied*, 113 S. Ct. 419 (1992); ***United States v. Dawes***, 951 F.2d 1189, 1191-93 (10th Cir. 1991). Other courts have held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." ***United States v. Neff***, 954 F.2d 698, 699 (11th Cir. 1992). *See also* ***United States v. Kerwin***, 945 F.2d 92 (5th Cir. 1991) (*per curiam*) (defendant was convicted under statutory requirement that

he file return and since statute is not an information request, there is no violation of the PRA); ***United States v. Bentson***, 947 F.2d 1353, 1355 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992) (defendant convicted of violating a statute requiring him to file, not a regulation lacking OMB number).

40.14[21] ***Admissibility of IRS Computer Records***

Computer data evidence is often introduced in tax cases to prove that the defendant did not file returns as required. Protestors often challenge such evidence and courts routinely reject such challenges. These records may be admitted under Federal Rule of Evidence 803(10) as certificates of lack of official records. *See* ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990); ***United States v. Spine***, 945 F.2d 143, 149 (6th Cir. 1991); ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992). Such records may be self-authenticating under Rule 902 if under seal or they may be authenticated by an IRS employee. No showing of the accuracy of the computer system needs to be made to introduce the documents. ***Ryan***, 969 F.2d at 240.

The introduction of the actual transcript of account through a witness can open the witness to cross-examination by the defense about every code and piece of information contained in the transcript. In order to avoid this problem, it may be wiser to simply offer the testimony of the IRS employee that a records search was conducted and it was revealed that no return was filed.

Some courts have admitted the records under Rule 803(8) notwithstanding the fact that since it is being offered in a criminal trial and is a matter "observed by law enforcement personnel," Rule 803(8)(C) would seem to forbid its introduction under that rule. These courts have distinguished between law enforcement reports prepared in routine, non-adversarial settings and those resulting from the more subjective endeavor or on-the-scene type investigations of a crime. *See* ***United States v. Wiley***, 979 F.2d 365, 369 (5th Cir. 1992); ***United States v. Wilmer***, 799 F.2d 495, 500-01 (9th Cir.), *cert. denied*, 481 U.S. 1004 (1987). In ***United States v. Hayes***, 861 F.2d 1225, 1230 (10th Cir. 1988), the Tenth Circuit agreed with the Fifth and Ninth Circuits that Rule 803(8)(C) does not compel the exclusion of documents which could properly be admitted under Rule 803(6) if the authoring officer or investigator testifies at trial, thus protecting the defendant's confrontation rights, which is the rationale underlying Rule 803(8).

40.14[22] ***Lack of Publication in the Federal Register***

Protestors have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the Federal Register. This defense has been deemed "meritless." ***United States v. Bentson***, 947 F.2d 1353, 1360 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2310 (1992). It is the tax code itself, which is statutory, not regulatory, that imposes the duty to file a return. *See also* ***United States v. Bowers***, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice; to reverse conviction court would need to find that the statutes provided no notice of obligation to pay taxes, the IRS forms and offices were secret although 2 million Americans know about them, and the defendants, who had previously filed returns, had forgotten about the required forms and the IRS offices).

40.14[23] ***IRS Agent's Testimony and Sequestration***

IRS agents usually testify during the course of a tax trial. Often such testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible. *See* ***United States v. DeClue***, 899 F.2d 1465, 1473 (6th Cir. 1990); ***United States v. Beall***, 970 F.2d 343, 347 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. Mann***, 884 F.2d 532, 539 (10th Cir. 1989). An IRS agent who does testify as an expert/summary witness should be allowed to remain in the courtroom during the trial, in addition to the case agent under Fed. R. Evid. 615. *See* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991).

40.14[24] ***Attorney Sanctions***

Attorneys representing protestors will sometimes engage in "inappropriate and disruptive behavior." Such behavior is sanctionable. *See* ***United States v. Dickstein***, 971 F.2d 446, 447 (10th Cir. 1992) (revoking defense counsel's *pro hac vice* status); ***United States v. Summet***, 862 F.2d 784, 786-87 (9th Cir. 1988); ***United States v. Collins***, 920 F.2d 619, 633-34 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); ***In re Becraft***, 885 F.2d 547, 550 (9th Cir. 1990) (imposing $2500 sanction for filing frivolous petition for rehearing).

40.14[25] ***Discovery of IRS Master Files***

Under Fed. R. Crim. P. 16, the IRS's Individual Master File (IMF) will not be discoverable absent some showing of materiality or that some particular item of exculpatory evidence is contained therein. *See* ***United States v. Pottorf***, 769 F. Supp. 1176, 1181 (D. Kan. 1991). The defendant seeking such a file must show a "reasonable probability" that if the file was disclosed, the result of the proceeding would be different. However, if an IRS custodian testifies, based on the IMF, that no returns were filed, it is error, if the defendant contends that he did file returns, to deny the defendant's request for production of the IMF and to fail to conduct an *in camera* inspection of the file to see if it contains exculpatory material. ***United States v. Buford***, 889 F.2d 1406, 1407-08 (5th Cir. 1989).

40.14[26] ***IRS Agents' Authority***

In the Eighth Circuit, protestors have recently raised the bizarre argument that IRS agents cannot investigate tax offenses or appear in court because they are not agents of the United States government but are agents of an alien foreign principal, the International Monetary Fund. *See* ***United States v. Rosnow***, 977 F.2d 399, 413 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993). This argument has been deemed "completely without merit [and] patently frivolous." ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993); *see also* ***United States v. Higgins***, 987 F.2d 543, 545 (8th Cir. 1993).

40.14[27] ***Indictment: Sufficient Notice of Illegality***

Despite one protestor's argument to the contrary, an indictment citing 26 U.S.C. §§ 7201 and 7203 violations properly charge crimes, even though it lacks a cite to 26 U.S.C. § 6012, the section that requires a return to be filed. *See* ***United States v. Vroman***, 975 F.2d 669, 670-71 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1611 (1993). So long as the indictment contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to "plead an acquittal or conviction in bar of future prosecution for the same offense," the indictment is constitutionally sufficient. ***Vroman***, 975 F.2d at 670 (quoting ***Hamling v. United States***, 418 U.S. 87, 117 (1974)).

In a similar vein, the Ninth Circuit has rejected the argument that an indictment charging a violation of 26 U.S.C. § 7206 and setting forth the elements of the offense was insufficient simply because the CFR provisions dealing with the enforcement of section 7206 reference the Bureau of Alcohol, Tobacco and Firearms, an agency unrelated to the case against the defendant. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993). An indictment need only provide "the essential facts necessary to apprise the defendant of the crime charged; it need not specify the theories or evidence upon which the government will rely to prove those facts." ***Cochrane***,

985 F.2d at 1031.

40.15 *MISCELLANEOUS PROCEDURAL ISSUES*

40.15[1] *Right to Counsel, Right to Counsel of Choice, Right to Representation by Lay Person or Unlicensed Counsel, Right to Defend Pro Se*

The Sixth Amendment grants a defendant the right to be represented by counsel and the right to defend *pro se*. This includes the right to be represented by counsel of his or her choice, so long as that choice does not unreasonably interfere with a court's need to control its schedule. ***Wheat v. United States***, 486 U.S. 153, 159 (1988); ***United States v. Lillie***, 989 F.2d 1054, 1055 (9th Cir. 1993); ***United States v. Collins***, 920 F.2d 619, 624-25 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991). "A defendant's right to retained counsel of his choice doesn't include the right to unduly delay the proceedings." ***Lillie***, 989 F.2d at 1056.

In protest prosecutions, an issue that often arises is whether the defendant has the right to be represented by a fellow protestor, who is not an attorney. A defendant has no constitutional right to be represented by or have the assistance or advice at trial of a lay person or unlicensed counsel. ***United States v. Lussier***, 929 F.2d 25, 28 (1st Cir. 1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986); ***United States v. Thibodeaux***, 758 F.2d 199, 201 (7th Cir. 1985); ***United States v. Schmitt***, 784 F.2d 880 (8th Cir. 1986); ***United States v. Turnbull***, 888 F.2d 636, 638 (9th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990); ***Tyree v. United States***, 892 F.2d 958, 959 (10th Cir. 1989); ***United States v. Dawes***, 874 F.2d 746, 748 (10th Cir. 1989).

A court may, however, in its discretion, allow a lay person to assist or advise the defendant. *See* ***United States v. Benson***, 592 F.2d 257, 258 (5th Cir. 1979); ***United States v. Whitesel***, 543 F.2d 1176, 1177-80 (6th Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

Defendants also frequently seek to represent themselves. A defendant's right to proceed *pro se* is conditioned on the court finding that the defendant has knowingly, intelligently, intentionally, and voluntarily waived his or her right to counsel. ***Faretta v. California***, 422 U.S. 806, 818, 835 (1975); ***United States v. Auen***, 864 F.2d 4, 5 (2d Cir. 1988); ***United States v. Verkuilen***, 690 F.2d 648, 658 (7th Cir. 1982); ***United States v. Causey***, 835 F.2d 1289, 1293 (9th Cir. 1987); ***United States v. Allen***, 895 F.2d 1577, 1578 (10th Cir. 1990). The court should engage in a colloquy with the defendant to ensure that the defendant knows the nature of the charges, the possible penalties, and the dangers of self representation. ***Causey***, 835 F.2d at 1293; ***United States v. Harris***, 683 F.2d 322, 324 (9th Cir. 1982).

The court can appoint counsel, even over the defendant's objection, to "standby" at trial and advise or provide information to the defendant regarding routine protocol, procedure, and evidentiary matters. There is no constitutional right, however, to standby counsel. ***McKaskle v. Wiggins***, 465 U.S. 168, 183, 184 (1984); ***United States v. Olson***, 576 F.2d 1267, 1270 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978); ***United States v. Gigax***, 605 F.2d 507, 517 (10th Cir. 1979). Standby counsel must allow the defendant to retain actual control over his or her case and not

destroy the jury's perception that the defendant is representing himself or herself. ***United States v. Walsh***, 742 F.2d 1006, 1007 (6th Cir. 1984). For a discussion of the proper role of standby counsel, *see* ***McKaskle v. Wiggins***, 465 U.S. 168, 177-85 (1984).

A defendant who does not wish to proceed *pro se*, but cannot afford to retain counsel of her choice, is not entitled to appointed counsel who shares her political or protest beliefs. ***United States v. Grosshans***, 821 F.2d 1247, 1251 (6th Cir.), *cert. denied*, 484 U.S. 987 (1987); ***United States v. Lillie***, 989 F.2d 1054, 1055 (9th Cir. 1993); ***Collins***, 920 F.2d at 625 n.8; ***United States v. Willie***, 941 F.2d 1384, 1391 (10th Cir. 1991).

Following trial, many protestors will allege ineffective assistance of counsel based on their attorney's failure to proceed with their defense in the way the protestor desired. Such arguments should be judged under the usual ***Strickland*** [***Strickland v. Washington***, 466 U.S. 668 (1984)] test. *See* ***United States v. Michaud***, 925 F.2d 37, 43 (1st Cir. 1991) (failure to cross-examine witness in particular manner demanded by defendant not ineffective assistance); ***United States v. Cochrane***, 985 F.2d 1027, 1030 (9th Cir. 1993) (failure to present unusual authorities on which defendant relied in deciding not to file was "reasonable trial strategy").

The reverse situation has also arisen. In ***United States v. Masat***, 896 F.2d 88 (5th Cir. 1990), the defendant claimed ineffective assistance after his attorney did exactly what the defendant asked him to do at trial. The court stated that defendant would not be permitted "to avoid conviction on the ground that his lawyer did exactly what he asked him to do." ***Masat***, 896 F.2d at 92. Similarly, a defendant who has knowingly and intelligently waived his right to counsel cannot complain of ineffective assistance of counsel on appeal. ***United States v. McMullen***, 755 F.2d 65, 66 (6th Cir. 1984).

Protestors may attempt to get continuances of a trial by purposely failing to obtain an attorney and requesting more time to do so. Such disruptions and delays need not be tolerated passively by the court. ***United States v. Studley***, 783 F.2d 934, 938-39 (9th Cir. 1986). A district court has broad discretion to grant or deny a continuance. Only an "unreasoning and arbitrary insistence on expeditiousness in the face of a justifiable request for delay" will constitute an abuse of that discretion. ***Lussier***, 929 F.2d at 28 (*quoting* ***United States v. Torres***, 793 F.2d 436, 440 (1st Cir.), *cert. denied*, 479 U.S. 889 (1986)); ***United States v. Rosnow***, 977 F.2d 399, 411 (8th Cir. 1992), *cert. denied sub nom.* ***Dewey v. United States***, 113 S. Ct. 1596 (1993); ***United States v. Bogard***, 846 F.2d 563, 566 (9th Cir. 1988). "The right to counsel as well as the right to counsel of one's choice may be waived if one able to afford counsel does not retain an attorney within a reasonable period of time." ***United States v. Thibodeaux***, 758 F.2d 199, 201 (7th Cir. 1985); *see also* ***United States v. Jagim***, 978 F.2d 1032, 1038 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2447 (1993).

Caution is advised, however, on forcing a defendant to trial without an attorney. In ***United States v. Kennard***, 799 F.2d 556 (9th Cir. 1986), the defendant waived counsel and proceeded with assistance of lay counsel. The jury was unable to reach a verdict, and the trial court, weary of the defendant's repeated attempts to delay and disrupt the trial, denied the defendant's motion for a continuance of the retrial to obtain representation. The Ninth Circuit overturned the resulting

conviction, holding that the earlier waiver of counsel had no effect on the defendant's right to counsel at the second trial. ***Kennard***, 799 F.2d at 557.

The reason for the court's denial of a continuance to obtain counsel should be made clear on the record. In ***United States v. Wadsworth***, 830 F.2d 1500 (9th Cir. 1987), the Ninth Circuit ordered a new trial because there was no record that the defendant was attempting to interfere with the efficient administration of justice by requesting a continuance to retain counsel. ***Wadsworth***, 830 F.2d at 1504-05. The court held that the defendant did not waive his right to counsel by failing to request a court-appointed attorney, stating, "[a]n indigent defendant's right to counsel under the Sixth Amendment is not contingent upon his request for appointed counsel." ***Wadsworth***, 830 F.2d at 1505.

In order to obtain court-appointed counsel, the defendant must prove he lacks the resources to retain counsel. A defendant who refuses, on Fifth Amendment grounds, to submit a financial affidavit to the court may impliedly waive his right to counsel. *See* ***United States v. Davis***, 958 F.2d 47, 48-49 (4th Cir.), *cert. denied*, 113 S. Ct. 223 (1992). In such cases, the court can order that the government not use the information supplied by the defendant as part of its direct case. The court need not grant defendant's request that such information be supplied to the court *in camera* and without the government's participation. *See* ***United States v. Harris***, 707 F.2d 653, 663 (2d Cir.), *cert. denied*, 464 U.S. 997 (1983); ***United States v. Sarsoun***, 834 F.2d 1358, 1363 (7th Cir. 1987). Until the government attempts to use the information obtained against the defendant at trial, "any encroachment on the Fifth Amendment protection against self-incrimination is speculative and prospective only." ***Sarsoun***, 834 F.2d at 1364. The defendant's Sixth Amendment rights are not violated when a court refuses to appoint counsel until the defendant completes the required forms. ***United States v. Krzyske***, 836 F.2d 1013, 1018-19 (6th Cir.), *cert. denied*, 488 U.S. 832 (1988).

40.15[2] ***Jury Nullification***

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law in a trial if they feel the law is unjust and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Protestors often argue that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is no constitutional right to a jury nullification instruction. ***United States v. Krzyske***, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you."); ***United States v. Drefke***, 707 F.2d 978, 982 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). *See also* ***United States v. Dougherty***, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972) for a thorough discussion of the issue of jury nullification and its historical origins.

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1. The Tax Division maintains a "Criminal Tax Protest Case Issues List" which tracks recurring issues in these prosecutions. The list is updated annually and contains more than 40 issues. The list is available on Juris in the Protest file within the tax file group. Prosecutors interested in obtaining a copy of the protest list should contact the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division at (202) 514-5396.

2. The statute of limitations for supplying a false Form W-4 in violation of section 7205 is three years -- *not* the six years common to most criminal tax offenses. 26 U.S.C. § 6531. But the statute of limitations is six years where the charge is a ***Spies*** evasion, pursuant to section 7201. *See* Section 40.04, *infra*.

3. Some courts have held that a defendant cannot be sentenced on both ***Spies*** evasion and failure to file charges regarding the same year because section 7203 is a lesser included offense of section 7201. ***United States v. Snyder***, 766 F.2d 167, 171 (4th Cir. 1985); ***United States v. Buckley***, 586 F.2d 498, 504-05 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Tax Division Memorandum dated February 12, 1993 Regarding Lesser Included Offenses adopts the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, 709-10 (1989), and concludes that a section 7203 failure to file is not a lesser included offense of a section 7201 attempted evasion of tax. *See* Section 8.08, *supra*.

4. This Section also prohibits assaults on Internal Revenue Service personnel. The Criminal Division has jurisdiction over this offense. *See* United States Attorneys' Manual (USAM) 9-65.601, 9-65.602, and 9-65.624.

5. Among the factors which would be relevant to such a determination would be the centrality of these materials to a defendant's claimed misunderstanding of the tax laws, the materials' length and potential to confuse the jury, *see* ***Barnett***, 945 F.2d at 1301 n.3, the degree to which such materials are merely cumulative to a defendant's testimony or to other evidence, the extent to which a defendant may be attempting to use them to instruct the jury on the law or to propagate tax protestor beliefs, and the potential utility of limiting instructions, *see and compare* ***United States v. Powell***, 955 F.2d 1206, 1214 (9th Cir. 1992), *and* ***Willie***, 941 F.2d at 1404 n.4 (Ebel, J., dissenting), *with* ***Willie***, 941 F.2d at 1395 (majority opinion).

6. Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.

7. A search of tax information regarding the current and five preceding years for 100 prospective jurors will generally take 5-10 business days, if the jurors' social security numbers and addresses are provided. However, information regarding some of the jurors may take longer to obtain if the juror has moved or remarried. A microfilm search of records from 1964 to the five years preceding the current year could take up to three months to perform.

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41.01 *INTRODUCTION*

This section provides a detailed analysis of the various means available to federal prosecutors for obtaining foreign evidence and other types of international assistance in criminal tax cases. The means analyzed here include mutual legal assistance treaties (MLATs) and similar processes, tax information exchange agreements (TIEAs) and tax treaties, court-sponsored procedures for taking foreign depositions, including letters rogatory, and the use of unilateral compulsory measures, such as subpoenas, for obtaining foreign evidence.

Obtaining foreign evidence and other types of international assistance under the various processes described here usually requires considerable amounts of time and can cause significant delays in an investigation or trial proceeding. Thus, a prosecutor should initiate seeking such evidence or assistance through the appropriate process as soon as possible.

It is extremely important to remember that no United States investigator or prosecutor should contact foreign authorities or witnesses, whether by telephone or other means, or undertake foreign travel,without obtaining the proper clearances or authorizations. Prosecutors under the jurisdiction of the Department of Justice are required to coordinate and clear all such contacts and travel through the Office of International Affairs ((202) 514-0000).

41.02 *OBTAINING FOREIGN EVIDENCE OR OTHER TYPES OF ASSISTANCE UNDER MUTUAL LEGAL ASSISTANCE TREATIES*

41.02[1] ***Background***

Mutual Legal Assistance Treaties (MLATs) create a routine channel for obtaining a broad range of legal assistance for criminal matters generally, including, *inter alia*, taking testimony or statements of persons, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. These treaties are concluded by the United States Department of Justice (primarily the Criminal Division) in conjunction with the United States Department of State. An MLAT creates a contractual obligation between the treaty partners to render to each other assistance in criminal matters in accordance with the terms of the treaty. It is designed to facilitate the exchange of information and evidence for use in criminal investigations and prosecutions. Unfortunately, while many of the MLATs currently in force cover most U.S. tax felonies, several others have only limited coverage at best for tax offenses.

41.02[2] ***MLATs Currently in Effect***

As of June 1, 1994, the United States has MLATs with 17 jurisdictions: Anguilla, Argentina, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Italy, Mexico, Montserrat, Morocco, the Netherlands (including the Netherlands Antilles and Aruba), Spain, Switzerland, Thailand, Turkey, the Turks and Caicos Islands, and Uruguay.

41.02[3] *The Extent of Tax Coverage in MLATs*

The MLATs with Argentina, Canada, Italy, Mexico, the Netherlands (excluding the Netherlands Antilles and Aruba), Spain, Thailand, and Turkey, cover all criminal tax felonies under the Internal Revenue Code. The remaining MLATs contain a variety of restrictions regarding assistance for tax offenses. Thus, the Swiss MLAT excludes tax and similar fiscal offenses from its scope except in cases involving organized crime. However, assistance is available from the Swiss under one of their domestic mutual assistance statutes in any tax matter where a foreign tax authority can establish "tax fraud" under Swiss law. Unfortunately, the Swiss consider the conduct underlying most U.S. criminal tax felonies as civil in nature, and establishing "tax fraud" under Swiss law is a difficult task. [1] The Cayman and Bahamian MLATs generally exclude offenses relating to tax laws except for tax matters arising from unlawful activities otherwise covered by the MLATs. **1** Furthermore, each of these three treaties contains specific limitations on the use of evidence obtained for covered offenses, and, thus, such evidence is generally not available for tax purposes in civil or criminal investigations or proceedings which are subsequently conducted. **2**

41.02[4] *Designation of a Central Authority to Administer the MLAT for Each Treaty Partner*

Every MLAT specifies central authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to generally administer the treaty relationship. Under all of the MLATs to which the United States is a party, the central authority designated for the United States is the Director, Office of International Affairs (OIA), Criminal Division, U.S. Department of Justice. [28 C.F.R § 0.64-1.] The central authority for the treaty partner is generally an entity located within the ministry of justice or its equivalent agency.

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1 Cayman MLAT, Article 19; Bahamian MLAT, Art. 2.
2 Swiss MLAT, Art. 5; Cayman MLAT, Art. 7; Bahamian MLAT, Art. 8.

41.02[5] ***Public Law Enforcement Purpose of MLATs***

The central authorities make requests under MLATs on behalf of law enforcement and judicial authorities in their respective countries who are legally responsible for investigating and prosecuting criminal conduct. For the United States, such authorities include federal and state prosecutors, as well as other governmental entities responsible for investigating criminal conduct or handling matters ancillary to criminal conduct such as civil forfeiture. Private parties are not permitted to make requests under MLATs.

41.02[6] ***Matters for Which Assistance Is Available under MLATs***

Assistance is available under the MLAT once an investigation or prosecution has been initiated by an appropriate law enforcement or judicial authority in the requesting state. Thus, the United States may initiate a request for assistance under an MLAT when a criminal matter is at the trial stage, or is under investigation by (1) a prosecutor, (2) a grand jury, (3) an agency with criminal law enforcement responsibilities, such as the Criminal Investigation Division of the Internal Revenue Service, or (4) an agency with regulatory responsibilities, such as the Securities and Exchange Commission.

41.02[7] ***Types of Assistance Available under MLATs***

Generally, MLATs provide for the following types of assistance:

a. serving documents in the requested state;

b. locating or identifying persons or items in the requested state;

c. taking testimony or statements from persons in the requested state;

d. transferring persons in custody in either state to the other for testimony or other purposes deemed necessary or useful by the requesting state;

e. providing documents, records, and articles of evidence located in the requested state;

f. executing requests for searches and seizures in the requested state;

g. immobilizing assets located in the requested state;

h. assisting in proceedings related to forfeiture and restitution; and

i. any other form of assistance not prohibited by the laws of the requested state.

MLATs are specifically designed to override local laws pertaining to bank secrecy and to ensure the admissibility of the evidence obtained. Thus, for example, MLATs typically contain provisions which, in conjunction with certain statutes, are directed at securing the admissibility of business records, or establishing chain of custody over an evidentiary item, without having to adduce the in-court testimony of a foreign witness.

41.02[8] ***Procedures for Making Requests for Assistance***

To make a request for assistance under a particular MLAT, a prosecutor or investigator should contact OIA at (202) 514-0000, request to speak to the attorney in charge of the country from which assistance will be requested, and collaborate on the preparation of the request. Once the Director of OIA signs a request, it must be translated into the official language of the requested state, unless the particular MLAT provides otherwise. The request will then be submitted in both language versions (English and the official language of the requested state) to the central authority of the requested state.

41.02[9] ***Contents of a Request***

Generally, MLATs require that a request contain the following information:

a. the name of the authority conducting the investigation, prosecution, or other proceeding to which the request relates;

b. a description of the subject matter and the nature of the investigation, prosecution, or proceeding, including the specific criminal offenses which relate to the matter;

c. a description of the evidence, information, or other assistance sought; and

d. a statement of the purpose for which the evidence, information, or other assistance is sought.

In addition, MLATs require that the following information be provided to the extent that such information is available:

e. information on the identity and location of any person from whom evidence is sought;

f. information on the identity and location of a person to be served, that person's relationship to the proceeding, and the manner in which service is to be made;

g. information on the identity and whereabouts of a person to be located;

h. a precise description of the place or person to be searched and of the items to be seized;

i. a description of the manner in which any testimony or statement is to be taken and recorded;

j. a list of questions to be asked of a witness;

k. a description of any particular procedure to be followed in executing the request;

l. information as to the allowances and expenses to which a person asked to appear in the requesting state will be entitled; and

m. any other information which may be brought to the

attention of the requested state to facilitate execution of the request.

41.02[10] ***Limitations on Use of Evidence or Information Obtained***

Generally, MLATs provide that the requested state may impose conditions on the use of information or evidence furnished under their provisions, including conditions of confidentiality. The requesting state, in using the information or evidence in the course of an investigation or prosecution, must use best efforts to comply with the conditions. Although some MLATs are more restrictive, generally, once the information or evidence, properly used in the investigation or prosecution becomes a matter of public record in the requesting state, it may be used for any purpose.

41.02[11] ***Obligation to Return the Items Provided***

Generally, MLATs provide that all original documents, records, or articles of evidence provided pursuant to an MLAT request must be returned as soon as possible to the state providing such items unless that state waives the right to have the items returned. Items are typically returned by the prosecutor through the central authority. Generally, copies of documents provided under an MLAT need not be returned unless the state which provides such copies specifically requests their return.

41.03 *MUTUAL LEGAL ASSISTANCE UNDER FOREIGN STATUTES WHERE NO FORMAL TREATY RELATIONSHIP EXISTS*

New effective approaches have been recently developed for obtaining assistance from countries with which the U.S. has no MLAT relationship. Thus, for example, with the assistance of the Office of the Assistant Legal Adviser, Law Enforcement and Intelligence, Department of State, the Director and Deputy Directors of OIA have recently been designated as competent authorities for initiating formal requests for legal assistance to Israel under the terms of the Israeli Law of Legal Assistance to Foreign States (1977).

As a result, letters rogatory issued by a court are no longer the exclusive means of securing formal legal assistance from the State of Israel. In addition to Israel, there are a number of other non-Mutual Legal Assistance Treaty (MLAT) countries with which OIA has established a practice of making and receiving formal legal assistance requests--either dealing directly with its foreign counterpart office or through the diplomatic channel.

Such requests typically follow a format similar to that employed under MLATs, and are sometimes referred to as "MLAT-Type" requests. Legal assistance in these circumstances is provided to the extent permitted by relevant domestic legislation. Countries in this category include Panama, Israel, the United Kingdom, Japan, Korea, Thailand, Australia, New Zealand, Channel Islands, Isle of Man, and Liechtenstein. Contact the appropriate OIA Team at (202) 514-0000 for further details.

41.04 *OBTAINING FOREIGN EVIDENCE UNDER TAX INFORMATION EXCHANGE AGREEMENTS AND TAX TREATIES*

41.04[1] *Background*

Tax information exchange agreements (TIEAs) and income tax treaties constitute bases for obtaining foreign-based documents and testimony, often in admissible form, for criminal and civil tax cases and investigations. These pacts are concluded by the United States Department of Treasury, with the assistance of the Internal Revenue Service and the Tax Division of the Department of Justice, and are administered by the Assistant Commissioner (International) of the IRS. For the purposes of obtaining foreign evidence, TIEAs are more specialized and effective than tax treaties.

41.04[2] ***Tax Information Exchange Agreements (TIEAs)***

TIEAs are agreements which specifically provide for mutual assistance in criminal and civil tax investigations and proceedings. This assistance comprises obtaining foreign-based documents, including bank records, and testimony in admissible form. TIEAs are statutory creatures of the Internal Revenue Code. *See* 26 U.S.C. §§ 274(h)(6)(C) and 927(e). This statutory framework initially authorized the Secretary of the Treasury Department to conclude agreements with countries in the Caribbean Basin (thereby qualifying such countries for certain benefits under the Caribbean Basin Initiative), but later expanded this authority to conclude TIEAs with any country.

41.04[3] ***TIEAs Currently in Effect***

As of June 1, 1994, the United States had TIEAs in effect with the following countries: Barbados, Bermuda, Costa Rica, Dominica, the Dominican Republic, Grenada, Guyana, Honduras, Jamaica, Mexico, Peru, St. Lucia, and Trinidad & Tobago. [2]

41.04[4] ***Information Exchange under Tax Treaties***

Virtually all U.S. income tax treaties, which are directed at the relief of double taxation on income, contain a provision for exchanging information similar in concept to TIEAs. Although these provisions are considered to be critical parts of the tax treaty process by both Treasury and the IRS, only a limited amount of time and space is allocated for their negotiation and inclusion in tax treaties, which typically contain around 30 other types of provisions. Consequently, the process for exchanging information under these mechanisms is not as thoroughly defined and detailed as similar processes embodied in TIEAs and MLATs, the entire focus of which is directed at evidence gathering for the agreement partner.

41.04[5] ***Tax Treaties Currently in Effect***

As of June 1, 1994, the United States had income tax treaties in force -- including exchange of information provisions -- with the following countries: Australia, Austria, Barbados, Belgium, Bermuda, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Korea, Luxembourg, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Romania, Russia, Slovak Republic, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, and the United Kingdom.

The Treasury Department is very active in the negotiation of new income tax treaties, as well as the renegotiation of income tax treaties currently in force. Thus, new treaty partners will be added to this list regularly.

41.04[6] ***Scope of TIEAs and Income Tax Treaties***

Under most of the TIEAs and tax treaties to which the United States is a party, requests for assistance may be made for any civil or criminal tax investigation or proceeding regarding any tax year not barred by the statute of limitations of the state seeking the information. A small number of our treaty partners, with Germany in the lead, however, recently have started to resist exchanging information for criminal cases, especially criminal matters which have reached the formal judicial process. *See* the discussion at subsection 41.04(11), *infra*, entitled *Possible Problems with Exchanging Information under TIEAs and Income Tax Treaties*.

41.04[7] *Designation of a Competent Authority to Administer TIEAs and Tax Treaties for Each Treaty Partner*

Every TIEA and tax treaty specifies competent authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to administer generally the treaty relationship. The Assistant Commissioner (International) (ACI), Internal Revenue Service, has been designated to act as the Competent Authority for exchanging information under TIEAs and tax treaties under the authority of the Secretary of Treasury. The specific office acting under the direction of the ACI to make and receive requests for information under TIEAs and income tax treaties is the Exchange of Information Team. The competent authority for the treaty partner is generally an entity located within the ministry of finance or its equivalent agency.

41.04[8] *Procedures for Making Requests For Information*

There are currently six Exchange Analysts on the Exchange of Information Team, each of whom has specific responsibility for certain countries. If you wish to explore making a request for evidence or information under a TIEA or tax treaty, simply call the general number for the team ((202) 874-1840) and ask to speak to the Exchange Analyst who is responsible for the country where the information is located. Usually, the investigator or prosecutor in charge of the case will draft the initial version of the request and forward this draft to the Exchange Analyst for review. Subsequently, the request is formalized and sent to the foreign Competent Authority for execution.

41.04[9] *Contents of a Request*

A request under a TIEA or income tax treaty should contain, *inter alia*, the following:

a. The taxpayer's (defendant's) name and address, and if applicable, social security number, place and date of birth, and whether the taxpayer is a citizen of the United States;

b. The names and addresses of pertinent entities affiliated with the taxpayer and the nature of such affiliations;

c. A brief resume of the case with particular reference to the

tax issues;

d. A detailed statement of the information sought and why it is needed;

e. A statement of the efforts made to secure the desired information prior to the request and why the efforts were not successful (including comment on any relevant data supplied by the taxpayer and the reasons for considering such data inadequate);

f. If the records of a foreign affiliate of the taxpayer are to be examined, the name and address of the custodian of the records and a document authorizing the custodian to permit the examination or an explanation as to why the authorization was not obtained;

g. All pertinent names, addresses, leads, and other information that may be helpful in complying with the request; and

h. Requests for bank account information should specify the branch.

To the extent known, the following information should also be transmitted with the request:

i. Date upon which a response is required (*i.e.*, for statute of limitations purposes) or any other facts indicating the urgency of the information;

j. Information concerning the importance of the case and any other facts which make the case unusual or worthy of preferential treatment; and

k. The taxable years and approximate tax liability or additional income involved.

41.04[10] ***Confidentiality of Information Obtained***

All of our TIEAs, and virtually all of our tax treaties, currently in effect contain language requiring that information obtained under such agreements be used only for tax purposes. Obviously, such language can raise troublesome issues for a prosecutor conducting a grand jury investigation directed at both tax and non-tax crimes. Indeed, recently certain treaty partners have resisted executing requests for information made in such cases based on their view that the obligation of confidentiality forbids use by a grand jury considering non-tax crimes. To address this situation, the Treasury Department and the Justice Department jointly decided to undertake using cautionary instructions to the grand and petit juries in such cases.

Under this approach, the prosecutor would caution the grand jury, as would the trial judge the petit jury, that the evidence obtained under the tax agreement could not be utilized to draw inferences of guilt regarding the non-tax offenses. This approach would also require the trial judge to ignore the evidence for the purposes of a defendant's motion to dismiss under Fed. R. Crim. P. 29.

41.04[11] *Possible Problems with Exchanging Information under TIEAs and Income Tax Treaties*

Although exchanging information under TIEAs and tax treaties has been relatively successful, there are a variety of problems which can arise. For example, officials of some countries having civil law systems, such as Germany, balk at executing requests in criminal tax cases made under a tax treaty, especially those arising from grand jury investigations, because they believe that tax treaties, which they consider to be part of an *administrative* governmental process, should not be used for *judicial* matters. This problem can be aggravated where non-tax offenses are also under investigation, given the ever-present provision in these agreements dealing with confidentiality. Also, certain other countries will provide treaty partners only with information which currently exists in their tax files regarding a given taxpayer, and will not undertake to gather information from other sources, including third parties. Finally, some treaty partners, even if they will undertake to gather information from sources other than their tax files, will not obtain and provide financial information, such as bank records, because of bank secrecy laws.

41.05 *USING LETTERS ROGATORY AND OTHER JUDICIAL PROCEDURES TO OBTAIN EVIDENCE IN CRIMINAL TAX CASES*

41.05[1] *Background*

Before the advent of tax treaties, MLATs, TIEAs, and other types of mutual assistance agreements, law enforcement authorities (just as private litigants) primarily relied upon deposition by stipulation, deposition by notice, deposition by commission, and letters rogatory, all judicially sponsored procedures, to obtain evidence abroad in both civil and criminal cases. *See* Fed. R. Crim. P. 15. This section briefly explores the basics of these various procedures and their limitations, especially in criminal tax cases.

41.05[2] ***Deposition by Stipulation, Notice, or Commission***

There are three types of procedures under which a U.S. prosecutor can obtain foreign source testimony without the assistance of foreign authorities, assuming the witness is willing to testify voluntarily and the foreign country's laws do not prohibit the litigant's taking of that testimony.

First, the parties to the litigation may agree to take testimony abroad by stipulation. *See* Fed. R. Crim. P. 15(g). Under this procedure, the parties simply agree as to the necessary circumstances of the deposition, *i.e.*, the official before whom the testimony will be taken, the time and place of the deposition, the type of notice to be given, the manner in which the deposition is to be conducted. If the parties can so agree, the stipulation procedure is the most expeditious method of taking foreign testimony.

Second, a litigant may take a foreign deposition by notice. *See* Fed. R. Crim. P. 15(d), providing that depositions in criminal matters shall be taken and filed in the same manner as civil actions (as provided for in Fed. R. Civ. P. 28(g)). Under this procedure, the moving party may arrange a deposition "on notice before a person authorized to administer oaths in the place in which the examination is [to be] held, either by the law thereof or by the law of the United States,..." Fed. R. Civ. P. 28(b)(1). This party must make the necessary arrangements for the deposition, such as assuring the presence of the witness, scheduling the services of an appropriate foreign official, a reporter for the transcript, and, if necessary, an interpreter.

Third, a litigant may take a foreign deposition by commission. *See* Fed. R. Crim. P. 15(d), providing that depositions in criminal matters shall be taken and filed in the same manner as civil actions (as provided for in Fed. R. Civ. P. 28(g)). Under this procedure, the moving party may arrange a deposition "before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony,..." Fed R. Civ. P. 28(b)(2). This procedure is similar to the notice procedure except that the court appoints the person, *i.e.*, the commissioner, before whom the deposition is to be taken.

Each of these procedures is available to United States prosecutors handling criminal tax

cases, [3] but, as mentioned above, only where the foreign-based witness voluntarily submits to the deposition and the particular country does not object to the evidence taking within its borders. The latter condition becomes prohibitive if the state in question is a civil law country. Such jurisdictions are inclined to regard evidence taking by any person other than their own legal authorities as violative of their sovereignty. Where such circumstances bar any of these three approaches and no treaties or agreements for assistance are available, the last resort is usually to a letter rogatory to obtain evidence abroad.

41.05[3] ***Depositions by Letters Rogatory***

The traditional method used by United States litigants to enlist the assistance of foreign authorities to obtain evidence abroad, in both civil and criminal cases, is a letter rogatory, also known as a letter of request.

Basically, a letter rogatory is a formal request from a court, in which an action is pending, to a foreign court to perform some judicial act. If the foreign court honors the request, it does so based on comity rather than any sort of strict obligation. As this definition suggests, a letter rogatory can usually only be used in a proceeding which has actually commenced, such as in the post-indictment stages of a criminal case or the post-complaint stages of a civil case, but this is not an iron-clad rule. [4] The route of a letter rogatory is quite circuitous and involves many diverse entities in an uncoordinated process. Typically, a litigant initiates the process by applying to the court, before which the particular action is pending, for the issuance of a letter rogatory, supporting the application with a set of complicated and formalistic pleadings.

Upon signature by the court, the letter rogatory must be transmitted through diplomatic channels, which involves not only the U.S. State Department but also the foreign ministry of the country involved. The foreign ministry delivers the request to the country's ministry of justice, which in turn delivers it to the foreign court originally contemplated to execute the letter request. If the request is successfully executed, the evidence must retrace the path of the request.

41.05[4] ***Procedures for Obtaining Assistance by Letters Rogatory***

The procedures for utilizing the letters rogatory process, once a prosecutor has secured the court's leave to do so under Fed. R. Crim. P. 15, are not as well defined and standardized as those for obtaining assistance under MLATs, TIEAs, and tax treaties. For example, the channel for sending a "letter request" (the term often employed for a letter rogatory request, especially for the countries following the common law system of the United Kingdom) to certain countries is the State Department, as generally described above. However, for certain countries, such as the United Kingdom and Hong Kong, OIA has developed an expedited channel for transmitting letter requests, so that certain stopping points along the way of the traditional channel have been eliminated, thereby speeding up the overall process.

Also, the form of the letter request can vary according to the country of destination. Thus, the best approach for initiating a letter request is to follow the initial phase of the MLAT procedure, namely, contact OIA (202-514-0000) and request to speak to the attorney in charge of the country from which assistance is sought.

41.05[5] ***Problems with the Letters Rogatory Process Generally***

While the letter rogatory procedure is the traditional method of obtaining assistance abroad, it is certainly not without its flaws. Thus, there is no obligation that the foreign country honor the request; the foreign country's enabling legislation, if any, may not provide any exceptions to that country's bank secrecy laws; there are no mutually agreed upon procedures which ensure the obtaining of evidence in admissible form; the multiple stages of the process, involving diverse entities, generate serious time delays; and, the procedure may not be available at crucial stage of a proceeding, *e.g.*, the investigation of a criminal offense, where it may be needed most. To address these critical problems, law enforcement authorities developed new methods to gather foreign evidence, such as the MLAT.

41.05[6] *Specific Problems with the Letters Rogatory Process When Used in Criminal Tax Cases*

In addition to the problems which afflict the letters rogatory process generally, prosecutors seeking to obtain foreign evidence through this process for tax cases may face a unique roadblock in jurisdictions following the common law tradition of the United Kingdom.[5] This possible obstacle is the international rule of comity that one nation will not directly or indirectly enforce the revenue laws of another nation.

In its most basic form, the rule is that the courts of one country will not enforce a judgment for taxes issued by the court of another country.[3] The rule seems to have originated in two opinions of Lord Mansfield in 1775 and 1779.[4] However, the modern bedrock of the rule seems to be the House of Lords' decision in ***Government of India v. Taylor***, [1955] 2 W.L.R. 303 (hereinafter ***India v. Taylor***),[5] where the tax authorities of India sued to collect moneys in the United Kingdom based on a tax judgment issued by an Indian court. While most common law jurisdictions, including the United States, seem to accept this basic form of the rule as elementary and without dispute,[6] its application beyond this realm has varied.[7] In one of its broader forms, the rule prohibits one country from granting another country's request for information or evidence for any tax-related proceeding in the requesting country, either in a civil[8] or criminal[9] matter.

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3 ***Her Majesty, Queen in Right, Etc. v. Gilbertson***, 597 F.2d 1161 (9th Cir. 1979) (hereinafter ***Gilbertson***), *aff'g* 433 F. Supp. 410 (D. Oregon 1977).

4 ***Gilbertson***, 597 F.2d at 1164.

5 For authorities relying primarily on ***India v. Taylor***, *see, e.g.*, ***State of Norway's Application***, [1987] 1 Q.B. 433, 445-46 (C.A.); ***R. v. Chief Metropolitan Stipendiary Magistrate***, [1988] 1 W.L.R. at 1207, 1214-15; ***United States v. First National City Bank***, 379 U.S. 378, 395-96 & n.16 (1965).
2d at 1163-66.

7 *See, e.g.*, ***R. v. Chief Metropolitan Stipendiary Magistrate***, [1988] 1 W.L.R. at 1207, 1214-15 (distinguishing permissible extradition of a Norwegian national for tax-related charges from impermissible assistance in the recovery of taxes for a foreign state). Also compare the dicta in ***State of Norway's Application***, [1987] 1 Q.B. at 448 (stating that simply providing evidence to another state for its civil determination of a tax liability is the enforcement, albeit indirect, of

In any event, until the decision was overturned, there had been serious fallout from the decision of the United Kingdom Court of Appeal in ***In re State of Norway's Application***, [1987] 1 Q.B. 433 (C.A.), where that Court construed the rule to operate in the broader sense. Thus, the United Kingdom and the common law countries which follow its legal precedent were rejecting the letter rogatory requests of U.S. tax authorities based on the dicta in that decision. Fortunately for U.S. prosecutors seeking foreign evidence in tax cases, the House of Lords, the highest court of the United Kingdom, reversed the Court of Appeal in ***In re State of Norway (No.1), et al.***, slip op. (H.L. Feb. 16, 1989) (consolidated appeals and cross appeals), holding that simply providing evidence to another state for that state to use to enforce its revenue laws does not constitute the direct or indirect enforcement of another state's revenue laws. This decision should dramatically enhance mutual assistance from countries following English Common Law in civil and criminal tax cases, especially between governmental authorities.

41.06 *USING COMPULSORY MEASURES TO OBTAIN FOREIGN EVIDENCE*

41.06[1] *Background*

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another state's revenue laws) with ***Re Request for International Judicial Assistance***, 102 D.L.R.3d 18, 38 (Can. 1979) (rejecting broader application of rule and stating that granting assistance to United States in criminal tax case is not tantamount to the collection of taxes for that state).

8 ***State of Norway's Application***, [1987] 1 Q.B. at 445-46.

9 ***In re the Criminal Proceedings before the U.S. District Court for the District of Kansas Concerning Marcel Samuel Lambert and Arloho Mae Pinto***, No. 962 (Bahamas Sup. Ct. 1986).

The United States tax authorities do not always have an effective mutual assistance means available to them for obtaining evidence abroad. For example, in a "pure tax" case involving evidence in the Cayman Islands or the Bahamas, United States authorities cannot use a tax treaty, [6] and the current MLATs with these countries exclude assistance for pure fiscal matters from their scope. Thus, the United States may have to resort to unilateral action, such as a subpoena, to obtain the needed evidence. The various types of unilateral compulsory process which can be directed at obtaining foreign-based evidence will now be explored.

41.06[2] ***The Use of Subpoenas or Summonses to Obtain Foreign Evidence Directly***

One form of process used by government attorneys to obtain evidence abroad is the subpoena power applied directly to a domestically-based entity having some relationship to the foreign-based entity holding the records.[7] If a Department of Justice attorney, or an Assistant United States Attorney, wants to use a grand jury or criminal trial subpoena to obtain evidence located in a foreign country, the prosecutor must obtain the concurrence of the OIA, Criminal Division, before both issuing and enforcing such subpoena.[10] In determining whether to concur in such actions, OIA considers the following factors: (1) the availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory; (2) the indispensability of the records to the success of the investigation or prosecution; and (3) the need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.[11] Once the concurrence of OIA to issue and enforce a subpoena for foreign records has been obtained, the prosecutor will then be required to plead a so-called comity analysis and the enforcement court will be required to balance the comity factors in favor of the government before the subpoena can be properly enforced.[12]

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10 Department of Justice, United States Attorneys' Manual (USAM) 9-13.525 (1989-2 Supplement).

11 USAM 9-13.525.

12 To resolve jurisdictional conflicts which may arise from an order for the production of foreign documents, U.S. courts apply the so-called comity analysis under Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987). *See* ***Societe Nationale Industrielle Aerospatiale v. United States District Court***, 482 U.S. 522, 543-44 & n. 28 (1987); ***Richmark Corp. v. Timber Falling Consultants***, 959 F.2d 1468, 1474-79 (9th Cir. 1992). Before this most recent version of the Restatement was adopted by the American Law Institute in 1987, U.S. courts applied a slightly different comity analysis under the Restatement (Second). *See, e.g.*, ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817, *cert. denied*, 469 U.S. 1106 (1985); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); ***Garpeg Ltd. v. United States***, 583 F. Supp. 789 (S.D.N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 584 F. Supp. 1080 (S.D.N.Y. 1984); ***United States v. First Nat. Bank***,

41.06[3] ***The Use of Subpoenas to Obtain Testimony of a Nonresident Temporarily in the United States***

Prosecutors assisting federal grand juries in their investigation can subpoena critical witnesses, such as foreign bankers, who are temporarily found in the United States. [8] United States courts have held that the principle of comity between nations does not require one state to relinquish its compulsory process on a potential witness, temporarily within that state, simply because his testimony may subject him to criminal prosecution in the other state. **[13]** Furthermore, such a witness must produce documentary evidence notwithstanding claims that the attorney-client relationship of the other state is broader than that of the jurisdiction issuing the subpoena. **[14]**

41.06[4] ***The Use of Compelled Directives to Obtain Disclosure of Financial Matters Covered by Foreign Secrecy Laws***

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699 F.2d 341 (7th Cir. 1983).

The Restatement of Law (Third) (Section 442(1)(c)) provides as follows:

> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; *the availability of alternative means of securing the information*; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. (Emphasis added.)

The major difference between the comity analyses under the newer and older versions of the Restatement is the introduction of the factor, "the availability of alternative means of securing the information," in the newer version of the Restatement. Accordingly, the courts will now inquire into whether mutual assistance alternatives to subpoenas exist before ordering enforcement. *See* ***Richmark Corp. v. Timber Falling Consultants***, 959 F.2d at 1475-76.

13 ***United States v. Field***, 532 F.2d at 407.

Prosecutors can seek court orders compelling an account holder to direct a foreign bank or other institution to disclose to the prosecutor matters protected by foreign financial secrecy laws. [9] The Supreme Court has ruled that an order directing an account holder to sign a hypothetically-framed disclosure directive does not violate his Fifth Amendment privilege against self-incrimination. [15]

Foreign courts have had mixed reactions to these directives. A court of the Cayman Islands, a dependency of the United Kingdom, has held that such compelled disclosure directives do not constitute voluntary and freely given consent for disclosure as required under the secrecy laws of that jurisdiction. [16] For other countries which do not have such stringent secrecy statutes and which follow the British common law, there is authority that such disclosures do constitute valid consent under the common law duty of a banker to keep the financial affairs of an account holder confidential. [17]

Prosecutors have enjoyed widespread success in using *compelled* disclosure directives to obtain financial records from most countries, and, indeed, have used *voluntary* disclosure directives to gather financial records from virtually every country. The use of disclosure directives is preferred over the use of compulsory process directly against U.S.-based branches or offices of financial institutions to obtain financial records located abroad, because using disclosure directives involves no real jurisdictional conflicts (except when seeking evidence in countries like the Cayman Islands) and lessens the inclination of most foreign countries to block production of the evidence.

41.06[5] ***The Use of Subpoenas Issued to United States Citizens or Residents Abroad***

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14 ***United States v. Bowe***, 694 F.2d at 1258.
15 ***Doe v. United States***, 487 U.S. at 206-218.
16 ***In Re ABC Ltd.***, 1984 CILR 130, 134-35 (Grand Court of the Cayman Islands, 1984).
17 ***Tournier v. National Provincial & Union Bank of England***, [1924] 1 K.B. 461 (C.A.).

Prosecutors can also use compulsory process to obtain documents or testimony from U.S. citizens or residents located in foreign countries. [10] Thus, federal law enforcement attorneys may issue court-ordered subpoenas to any such individuals in any federal proceedings, criminal or civil, under the provisions of 28 U.S.C. § 1783, and seek sanctions under 28 U.S.C. § 1784, if there is any failure to appear or produce documents.

41.06[6] ***Jurisdictional Conflicts Arising from the Use of Certain Unilateral Measures***

The use of certain of these unilateral measures, especially the subpoenas on domestic financial institutions for foreign-based records, are controversial and lead to protracted litigation which often fails to secure the intended result. Indeed, these jurisdictional controversies led the Justice Department to adopt section 9-13.525 of the United States Attorneys' Manual, described *supra*, which requires the concurrence of OIA for both the issuance and enforcement of such subpoenas in Department criminal matters. When U.S. authorities resort to the enforcement of such measures, they encounter strong opposition from many different quarters. For example, the financial institutions served with process typically resist strenuously and raise every possible issue for resolution, including the bedrock of their position, the jurisdictional conflict between the laws of the two countries involved. Even when these institutions suffer an adverse decision of the U.S. courts, they often choose to be subject to sizeable contempt sanctions rather than produce the subpoenaed or summonsed records. *See, e.g.*, ***In re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983). Officials of foreign jurisdictions also object to the use of these measures, by instructing their foreign ministries to complain to the U.S. State Department, entering *amicus* appearances in the protracted litigation, and sometimes directing their own law enforcement authorities to take blocking measures, which may include the seizure of the foreign-based records to thwart production. [11] Needless to say, production of the evidence sought by the use of certain of these unilateral measures is not a foregone conclusion.

At all events, as mentioned above, before a ***Bank of Nova Scotia***-type subpoena can be authorized by the Criminal Division (*see* U.S.A.M., Section 13.525) or enforced by a district court, a prosecutor will need to establish that no alternative methods exist for obtaining the foreign records sought.

41.07 *CONCLUSION*

New law enforcement treaties and agreements are being continually negotiated and concluded by the various responsible authorities. Accordingly, new means for obtaining foreign evidence may appear on the horizon following publication of this analysis. For further details regarding the matters set forth herein, or for developments following publication contact James P. Springer, Senior Counsel for International Tax Matters, Tax Division, Department of Justice, at (202) 514-2427.

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1. Indeed, the Swiss authorities and legal scholars are accustomed to referring to the term "tax evasion" as a civil matter, even if the conduct involved would constitute a felony under our law, such as filing a false federal income tax return. Thus, when the Swiss refer to fiscal crimes they use the term "tax fraud" which has a much more restricted meaning under Swiss law than under U.S. law. *See, e.g.*, U.S.--Swiss MLAT, Art. 1, Sec. 1(a), and Art. 2, Secs. 1 and 2; J. Knapp, ***Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy***. Case W. Res. J. Int'l L. 405-08, 418-20 (1988); J. Springer, ***An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases***, 22 Geo. Wash. J. Int'l L. & Econ. 277, 303-08 (1988); Aubert, ***The Limits of Swiss Banking Secrecy under Domestic and International Law***, 273 Int'l Tax & Bus. Law. 273, 286-288 (1984).

2. On July 21, 1993, the United States and Colombia signed a TIEA which will soon be placed into effect.

3. The Federal Rules of Criminal Procedure, *i.e.*, Fed. R. Crim. P. 15, specifically provide for these procedures, but in criminal cases, depositions, foreign or otherwise, can only be taken by order of the court, made in the exercise of discretion and on notice to all parties (Notes of the Advisory Committee on Rules), in contrast to the practice in civil cases where depositions may be taken as a matter of right by notice without permission of the court.

4. *See, e.g.*, United Kingdom Evidence (Proceedings in Other Jurisdictions) Act 1975, Secs. 1 and 5 (allowing for compulsory process to obtain evidence in the United Kingdom for judicial requests

of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted); Evidence Ordinance of Hong Kong, CAP. 8, Part VIII, Secs. 75 and 77B (allowing for compulsory process to obtain evidence in Hong Kong for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted or are likely to be instituted if the evidence is obtained); ***United States v. Reagan***, 453 F.2d 165, 171-74 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972) (affirming district court's issuance of a letter rogatory even though criminal case was in pre-indictment stage but noting some contrary authority).

5. The number of countries which follow British common law is quite large, since both the present and former dependencies of the United Kingdom fall into this category. For example, the Bahamas, Singapore, the Cayman Islands, and Hong Kong follow this legal precedent.

6. The United States does not have a tax treaty with either the Bahamas or the Cayman Islands.

7. *See, e.g.*, ***Matter of Marc Rich & Co. A.G. v. United States***, 707 F.2d 663 (2nd Cir.), *cert. denied*, 463 U.S. 1215 (1983), later proceeding, 731 F.2d 1032 (1984), later proceeding, 736 F.2d 864 (1984), later proceeding, 739 F.2d 834 (1984); ***United States v. Vetco, Inc.***, 644 F.2d 1324 (9th Cir.), *amended on rehearing*, 691 F.2d 1281, *cert. denied*, 454 U.S. 1098 (1981); ***United States v. Toyota Motor Corp.***, 561 F.Supp. 354, 355-56, 358 (C.D. Cal. 1983), later proceeding, 569 F. Supp. 1158 (1983); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817 (1984), *cert. denied*, 469 U.S. 1106 (1985); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983); the so-called "Gucci" or "Garpeg" summons enforcement decisions (***Garpeg Ltd. v. United States***, 583 F. Supp. 789 (S.D. N.Y. 1984); ***Garpeg, Ltd. v. United States***, 583 F. Supp. 799 (S.D. N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 584 F. Supp. 1080 (S.D. N.Y. 1984); ***Vanguard Intern. Mfg., Inc. v. United States***, 588 F. Supp. 1229 (S.D. N.Y. 1984); ***Vanguard Intern. Mfg., Inc. v. United States***, 588 F.Supp. 1234 (S.D. N.Y. 1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1237 (1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1239 (S.D.N.Y. 1984); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1240 (S.D.N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 590 F.Supp. 1160 (1984)); ***In Re Grand Jury 81-2***, 550 F. Supp. 24 (W.D. Mich. 1982); ***S.E.C. v. Banca Della Svizzera Italiana***, 92 F.R.D. 111 (S.D.N.Y. 1981); *Cf.* ***In Re Sealed Case***, 825 F.2d 494 (D.C. Cir. 1987); ***United States v. First Nat. Bank***, 699 F.2d 341 (7th Cir. 1983).

8. *See, e.g.*, ***United States v. Bowe***, 694 F.2d 1256, 1258 (11th Cir. 1982); ***United States v. Field***, 532 F.2d 404, 409 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976).

9. *See, e.g.*, ***Doe v. United States***, 487 U.S. 201 (1988); ***United States v. Ghidoni***, 732 F.2d 814 (11th Cir.), *cert. denied*, 469 U.S. 932 (1984); ***United States v. Lehder-Rivas***, 822 F.2d 682 (11th Cir. 1987); ***United States v. Davis***, 767 F.2d 1025 (2d Cir. 1985); ***In Re Grand Jury***

Proceedings, Western District of Louisiana (Juan A. Cid), 767 F.2d 1131 (5th Cir. 1985); ***In Re N.D.N.Y. Grand Jury Subpoena #86-0351-S,*** 811 F.2d 114 (2d Cir. 1987). *Contra*, ***In Re Grand Jury Proceedings***, 814 F.2d 791 (1st Cir. 1987); ***In Re ABC Ltd.***, 1984 CILR 130 (Grand Court of the Cayman Islands, 1984); ***Garpeg, Ltd. v. United States***, 583 F. Supp. 789, 799 (S.D.N.Y. 1984).

10. 28 U.S.C. §§ 1783-1784.

11. *See, e.g.*, ***In re Marc Rich & Co., A.G. v. United States***, 707 F.2d 663 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983).

TRIAL OF A CRIMINAL TAX CASE [1]

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TRIAL OF A CRIMINAL TAX CASE

GENERAL PRINCIPLES

1. Not a -- "what happened next officer" case
2. Preparation is essential -- organization is the key
3. Ultimate aim -- to make the case interesting and obvious
4. Three C's of a lawsuit: Comfort, Confidence, and Control

OPENING SCENE

1. DOJ letter -- authorization of prosecution or an investigation
2. Criminal Reference Letter (CRL) -- IRS recommendation and tax computations
3. Prosecution Memorandum -- DOJ analysis of case
4. Statements of the defendant
5. Special Agent's report (SAR) -- agent's evidence
6. Exhibits -- One volume to several boxes of documents

FIRST STEP TO TRIAL

1. Read (don't study) Nos. 1-5 above in the order listed
2. Get a stomach feel for what happened
3. Find a theme song as soon as you can:
   - -Tax deductions for sale
   - -The man who had a nest egg
   - -Playing is more fun than paying
   - -Angels don't conspire
4. Talk to the agents:
   - -Mechanical details will come later
   - -What is the case really about?
   - -What are the weaknesses in the case? -- they are there
   - -Are there serious proof problems?
   - -What is the likely defense?

FOURTEEN PREPARATION STEPS

1. Arrange for assistance of IRS agents -- including summary expert
2. Set up pleadings, opening statement, and argument folders
3. Set up witness folder for each witness - place statements, affidavits, etc. of witness in folder
4. Set up exhibit folders - place each exhibit in numbered folder
5. Pre-mark exhibits - make up exhibit list as you go
6. Prepare witness outlines
7. Prepare tentative order of proof as you go
8. Issue subpoenas
9. Interview witnesses
10. Prepare trial brief (earlier, if possible)
11. Prepare jury instructions
12. Turn over discovery material
13. Prepare opening statement
14. Pray for more time

PLEADINGS, OPENING STATEMENT, LEGAL AND ARGUMENT FOLDERS

1. Set up folders at the onset
2. Use designated color in labels and stick to same color, *e.g.*, Pleadings - brown, Legal - blue, Opening and Argument Folders - green
3. Make notes in opening and argument folders from day one

WITNESS FOLDERS -- GENERALLY

1. Trials proceed through witnesses
2. No T.V. flashbacks so entire story must be told
3. Make a separate trial folder for each witness -- material for use at trial - including witnesses you may not call
4. Some witnesses will require several folders

5. Make a second set of folders for each witness -- backup material only
6. Make third set of folders for each witness -- material to give defense, eg. ***Jencks Act*** statements, ***Brady*** material
7. Use colors to distinguish different sets of witness folders

WITNESS FOLDERS -- MECHANICS

1. Be fussy on style of folders
2. Choose a style and then make sure every folder is the same
3. Name of witness on each folder -- last, first name, middle initial
4. Block print with marking pen or typed labels
5. Always print every name in same color and at same position on folder - left, right or center of folder
6. Use institutional name not witness name when the entity is the real witness

   Example: John Smith, trust officer, will introduce bank records of First National Bank

   Folder will be: FIRST NATIONAL BANK

   If you want witness name -- then

   Folder will be: FIRST NATIONAL BANK
   (John Smith, Trust Officer)
7. List Exhibits for each witness on flap of witness' folder, *e.g.*

   SMITH, JAMES A.
   (18) (26) (48)
8. Defendant -- separate trial folder for each defendant
9. Place each witness folder in accordion-type folder can then have separate folders for a witness grouped in one place -- *Example*:

   Accordion folder can contain separate witness folders with outline, etc. separate folder for statements of witness where voluminous, etc.
10. Arrange witness folders in alphabetical order -- including folder for defendant -- and keep them that way

WITNESS FOLDERS -- CONTENTS

1. Outline of anticipated testimony for use in examination
2. Original of all statements made by witness, arranged chronologically -- earliest date on top
3. Copies of exhibits for witnesses:

   A. Can place *extra* copy of exhibit in witness folder

   B. Better procedure is to cut up extra copy of exhibit and include in witness outline any portion of exhibit important to testimony

   C. Reference to the numbers of the exhibits in witness outline

   D. Rely on your copy of exhibit when examining the witness at trial
4. Cross reference sheet in each witness folder to related witnesses, documents, etc.
5. Reference to pertinent legal memo or copy of memo
6. Anything you will need to examine witness, but limit file to needed material
7. Basic witness folder used to examine the witness should be clean and easy to manage

WITNESS FOLDER -- DEFENDANT

1. Original of all statements made by defendant arranged chronologically -- earliest date on top
2. Backup material considered significant
3. Reference to key exhibits
4. Notes made before and during trial for cross examination
5. Cross reference sheet to exhibits, witnesses, legal memoranda, etc.

WITNESS FOLDER -- AGENT

1. Generally -- same material as any witness -- *see* above
2. Original of Special Agent's Report (SAR)
3. *Copy* (not original) of any statements of defendant taken or witnessed by agent; original goes in defendant's folder
4. Schedules prepared by agent -- separate folder for schedules may be necessaary; file in accordion folder for witness

DOCUMENTS -- ALWAYS IN A TAX CASE

1. Stipulated -- Authenticity, Admissibility, Factual
2. Private documents
3. Business records
4. Public -- official documents
5. Self-authenticating documents
6. Summaries and schedules

CLASSIFICATION OF DOCUMENTS

1. Originals
2. Duplicates
3. Certified copies
4. Copies

ORIGINAL -- DEFINITION

Rule 1001(3), Fed. R. Evid.

1. What you have always known as an original.
2. Any counterpart intended as an original -- *Examples*:

   A. Contract executed in duplicate, triplicate, or any number of times -- all are originals

   B. Carbon copies of Master Charge sales slips properly admitted as originals

   United States v. Rangel 585 F.2d 344, 346 (8th Cir. 1978)

3. *Accurate printout of data stored in a computer* ***is an original*** --

   Rule 1001(3)

4. If you have an original, you can forget about rules as to the use of duplicates, or copies, or secondary evidence.

BEST EVIDENCE RULE --
REQUIREMENT OF ORIGINAL
ORIGINAL WRITING RULE
Rule 1002, Fed. R. Evid.

1. *To prove the content of a writing*, recording or photograph, the original writing, recording or photograph is required, *except as otherwise provided in these rules or by Act of Congress*.

2. Original only required where event is to be proved via a document -- contents or terms of a writing are sought to be proved.

   United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

3. An event may be proved by non-documentary evidence even though a written record was made where contents are not sought to be proved.

   A. *Example*: prove payment made for furniture by testimony of witness who bought furniture -- not necessary to produce receipt or books and records

   B. Point -- transaction exists independent of any document

   C. *See* Adv. Comm. Note to Rule 1002

4. BUT when transaction necessarily involves a document such as a deed or contract then must produce original document *or its equivalent*.

5. Practical matter -- under the rules duplicates are used more often than original.

DUPLICATE -- DEFINITION
Rule 1001(4), Fed. R. Evid.

1. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction or by other equivalent techniques which accurately reproduces the original.

2. *BUT* does not include handwritten or other manual copies such as typed copies.

3. A handwritten or typed copy would be just that -- a copy, not a duplicate.

4. *Example*: A typed copy of a letter is a copy; a xerox copy or a photostat is a duplicate.

5. Important because duplicates are given the same status as originals under the rules -- except in some instances. Copies are not.

ADMISSIBILITY OF DUPLICATES -- PRIVATE DOCUMENTS
Rule 1003, Fed. R. Evid.

1. A duplicate is *admissible to the same extent as an original* unless (1) a *genuine question* is raised as to the authenticity of the original or (2) in the circumstances it would be *unfair to admit* the duplicate in lieu of the original.

2. A key rule that recognizes a xerox world and the practical fact that in most situations a duplicate is as good as an original.

3. Simply stated a xerox copy, photostat, microfilm, etc. print of a document is admissible the same as an original *unless there is a genuine question as to the authenticity of the original*; or *it is unfair to admit a copy.*

4. That a duplicate is presumptively admissible is the approach unless a real question is raised as to the authenticity of the original or the fairness of using a copy.

   United States v. Bakhtiar, 994 F.2d 970, 979 (2d Cir. 1993) (failure to produce original counterfeit bank checks did not deprive defendants of a fair trial)

   United States v. Rodriguez, 524 F.2d 485, 487 (5th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976) -- xerox copy of vehicle certificate of title made by agent admitted but note defendant never denied ownership of vehicle

   CTS Corp. v. Piher Intern. Corp., 527 F.2d 95, 104 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976) -- carbon copies admitted

   United States v. Gerhart, 538 F.2d 807, 810 n.4 (8th Cir. 1976) -- photocopy of a photocopy of a bank check admitted as a duplicate

   United States v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977) -- xerox copy of insurance certification admitted as a duplicate

5. Without proper foundation to authenticate, however, a duplicate may be inadmissible.

   Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182, 1187 (N.D. Cal. 1973).

6. BUT -- if no stipulation -- must present testimony that the copy is an accurate reproduction of the original, Rule 1001(4), Fed. R. Evid.

7. Burden is on party challenging use of duplicate.

   United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980) -- burden on party opposing duplicate

   United States v. Garmany, 762 F.2d 929, 938 (11th Cir. 1985) -- photocopy of a check in lieu of original introduced by government, burden of challenging photocopy rested on defendant

8. Best evidence rule not applicable, not necessary to explain absence of original to come under Rule 1003; absence of original's coloring in duplicate is no bar to admissibility; *i.e.*, xerox copy:

   United States v. Enstam, 622 F.2d 857, 866 (5th Cir. 1980, *cert. denied*, 450 U.S. 912 (1981)

   United States v. Wagoner, 713 F.2d 1371, 1377 (8th Cir. 1983)

9. Original should sometimes be used even if a duplicate is technically admissible.
   Key points:

   -- Obtain and put original in evidence, *e.g.* an original check for $100,000 is far more real than a xerox copy

   -- Originals generally have more jury appeal -- copies do not pick up colors, do not look "real"

   -- Criminal Tax Cases: original returns should always be in the courtroom even if a certified copy or a testified to copy is put in evidence

   -- Original returns -- if admitted, move to substitute copies

10. Admissibility of "duplicates" of public records is governed by Rule 1005 and *not* Rule 1003, Fed. R. Evid.

PUBLIC DOCUMENTS
Rule 1005, Fed. R. Evid.

1. Public records -- the contents of official records and recorded documents authorized to be recorded and actually recorded or filed, *e.g.*, government records, deeds, mortgages, and other documents filed in a county recorder's office, may be proved by copy, certified in accordance with Rule 902 or testified to as correct by a witness who has compared it with the original.

2. A document authorized to be recorded or filed is required to be filed by statute or is customarily recorded in practice.

   Amoco Production Co. v. United States, 619 F.2d 1383, 1390 (10th Cir. 1980) (original deed returned to parties after recording is not a public record)

3. Duplicates of private records come under Rule 1003 and are subject to challenge as being unfair to use instead of originals.

4. Public records come under Rule 1005 and issue is *not* available as to whether it is fair to use a certified copy of a public record.

5. Public records are also *not* subject to secondary evidence requirements (Rule 1004) --

makes no difference whether the original is available or not.

STIPULATIONS

1. Can apply to any document, *e.g.*, letters, schedules, affidavits, etc.
2. Authenticity stipulation - no foundation required, copies can be used -- does not say they are admissible.
3. Admissibility -- agreement that document can go in to evidence.
4. Factual -- go to ultimate fact, *e.g.*, item in net worth, bank account balance, cost of stock, etc.
5. Consider: Discovery inevitable so volunteer stipulations on an exchange basis or at least in exchange for authenticity.
6. *Government discovery*: Rule 16(b)(1), Fed R. Crim. P. Government gets discovery if defense is given discovery under Rule 16(a)(1)(C) or (D). As of December 1, 1993, the government is entitled to discovery if defense is given discovery under Rule 16(a)(1)(E).

STIPULATIONS -- CONDITIONS

1. Affidavits, letters, etc. - same as if witness called.
2. Reserve right to call witness, explain background.
3. No stipulation as to willfulness.
4. Have *both* defense counsel and defendant sign stipulation.

ORGANIZING EXHIBITS

1. Foregoing principles determine form of exhibit that can be used.
2. Review exhibits - do you have foundation for rule on which you rely?

PRE-MARK EXHIBITS

1. Voluminous exhibits -- *always pre-mark.*
2. See Judge's courtroom clerk -- first place to go.
3. Explain system to be used -- obtain exhibit stickers.
4. Mount exhibits -- effective and simple to do.

EXHIBIT LIST -- ESSENTIAL

1. Many ways to pre-mark -- depends on case, court and your style.
2. Exhibit list -- should always have one.
3. Suggest exhibit list in chart form containing the following columns:

   -Exhibit No.

   -Description of Exhibit

   -Identified

   -Admitted/Stipulated *

   -Witness (optional on copies to court and to defense)

4. *Example*:

Ex. No.	***Description***	***Id.***	***Adm/Stip****	***Witness***
1.	Adams, 1990 Income Tax Return	4/8/93	4/8/93	Certified
2.	Deed: Brown to Smith		4/6/93*	Brown
3.	$10,000 check from Carter to Jones dated 4/6/90	4/7/93	4/12/93	Carter

5. Witness column will lead you to source.
6. Agent or associate counsel maintains exhibit book at trial.
7. Copy of Exhibit list to court, courtroom clerk, probably defense, and reporter.

PRE-MARKING PROCEDURE

1. Visualize presentation as chronological or logical -- usually chronological with logical subdivisions.
2. Step No. 1 is not essential but is preferred if time permits - not fixed in concrete order of proof.
3. Review witness statements, exhibits and other material and place sticker with a number on each exhibit for the witness.
4. Make exhibit list out as you go, *i.e.* list number, description of exhibit and witness to introduce.

5. Place each numbered exhibit in a separate exhibit folder:

   Separate Folder: EXHIBIT 1

   Separate Folder: EXHIBIT 2

   Separate Folder: EXHIBIT 3

6. Helpful to number in expected order of offering exhibits, but not necessary -- waste of time to agonize over which exhibit will be first, second, etc.
7. Use a color code and stick with it - if folder for EXHIBIT 1 is labeled in green, then all exhibit folders should be labeled in green.
8. Recommended: *Keep sets of exhibits in numerical order*

   A. Arranging and keeping exhibits in numerical order gives flexibility and control

   B. Numbers control and exhibit is easy to locate

   C. Extra copy can always be made and placed in appropriate witness folder

9. *Make at least five sets of numbered exhibits*:

   1 set for admission into evidence

   1 set for use by you at trial

   1 work set to cut up and incorporate in witness outlines, or to use as needed

   1 set for each defendant -- probably required

   1 set for the Judge -- check with local practice

10. *Procedure*: first number court set of exhibits with stickers and then xerox this set for additional copies needed -- in this way all sets will reflect the number assigned to an exhibit.

WITNESS OUTLINES

1. After numbering exhibits -- prepare witness outlines.
2. Tools -- all pertinent statements and exhibits, scissors and scotch tape.
3. Style that gives you the most comfort is the one to use.
4. Writing out questions and answers:

   A. Not recommended for the long run

   B. *Exception* -- may want to do this for a hypothetical question or important big

questions

5. Topical outline form:

   A. Advantage of flexibility and control of examination

   B. Can be as detailed as you wish -- but key detail to each topic you are covering

   C. Cut and scotch tape in outline appropriate portions of statements obtained from witness

6. Outline goes in witness folder.

ABBREVIATED SAMPLE OUTLINE

Dr. JOHN SMITH
Boston, Massachusetts
Investor

SUMMARY: 1990 "Invested" $30,000 (cash), $120,000 nonrecourse note in defendant's tax shelter; note backdated to 1989

EXHIBITS: 33, 18, 43, 275

BACKGROUND: Doctor -- internist, 10 years, practices in Philadelphia

INVESTOR: Invests in stocks, real estate, shelters

No investor-advisor -- handles it himself

KNOWS DEFENDANT: Met defendant in 1985; bought several shelters from defendant -- movies, records, oil and gas

MOVIE SHELTER PURCHASED:
DEFENDANT CALLED 4/5/90: First contact with defendant, re: movie shelter

Took call at office -- April 5, 1990

Defendant told him about movie shelter for 1989

DEF. DESCRIBED SHELTER TERMS: [Detail conversation -- scotch-tape portion of defendant's statement that describes terms]

DEF. SAID ON 4/5/90 --
COULD TAKE DEDUCTION ON
1989 RETURN: Defendant: "makes no difference that it is 1990"

"Note can be dated in 1989 -- no one will know."

SIGNED BACKDATED NOTE:
EX. 18 Gave $250,000 note to defendant

Signed note at defendant's office, 4/14/90

ORDER OF PROOF

1. Try to arrange case in chronological order - mix strong and weak witnesses.
2. ***Start strong***, ***finish strong***.
3. Devise form so you have tentative order of proof as you go.
4. Use separate form (*e.g.*, file cards) for each witness -- this way you can shuffle order of witnesses until you have final order of proof.

SUBPOENAS

1. Witness trial folders and applicable exhibits can be used to draft subpoenas.
2. Issue subpoenas three to four weeks before return date.
3. List your name and telephone number on subpoena.
4. Have I.R.S. agents serve subpoenas -- they are authorized to do so -- 26 U.S.C. § 7608.
5. Use catch-all phrases but also list specific documents wanted when you can.
6. State on subpoenas -- original documents are to be produced, if you do *not* have the original but do have a copy, then the copy is to be produced.

SUBPOENAS -- LARGE CASE

1. Draft stock phrases for use in numerous subpoenas.
2. Stagger return dates -- can't have 200 witnesses appearing at the same time.
3. Suggested Procedure:

   A. Do not know precise date witness is going on stand

   B. Use first day of trial as return date on all subpoenas -- *BUT*

   C. Attach letter to subpoena with a telephone notice card. If witness signs and returns card then no appearance is required until called

   D. Telephone card is to be signed by witness and attached to copy of subpoena returned by

process server

E. If telephone card is not signed and returned -- must appear on first day of trial and wait until called to the stand

F. Telephone card should contain, name of witness, home and business address and telephone numbers

G. Telephone cards -- some for one-day telephone notice, two days, three days, etc.

4. Make up telephone card file and have an agent in charge of witness traffic.

5. Arrange for de-briefing session with witness.

JURY MATTERS

1. *Voir dire*, peremptory challenges and alternate jurors, Rule 24, Fed.R.Crim.P.

2. Qualifications, exemptions, manner of drawing, inspection of records, excuses, etc. -- 28 U.S.C. §§ 1861, *et seq*.

3. Jury of less than twelve -- only if both parties stipulate in writing *any time* before verdict and court approves, Rule 23(b), Fed. R. Crim. P.

4. No stipulation - if court finds it necessary to excuse a juror for cause *after the jury has retired*, valid verdict may be returned by the remaining eleven jurors. Rule 23(b), Fed. R. Crim. P.

GOVERNMENT RIGHT TO JURY TRIAL
Rule 23(a), Fed. R. Crim. P.

1. Trial is by jury "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."
Rule 23(a), Fed. R. Crim. P.

2. Rule 23(a), Fed. R. Crim. P. is constitutional -- defendant can have a bench trial with "the consent of the prosecuting attorney and the trial judge."

Singer v. United States, 380 U.S. 24, 36 (1965)

3. Dicta in ***Singer***, 380 U.S. at 37, leaves door open for unique case:

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the government's insistence on trial by jury would

result in the denial to a defendant of an impartial trial

4. At least two district courts have used the ***Singer*** dicta to deny the government's insistence on trial by a jury:

   United States v. Braustein, 474 F. Supp. 1 (N.J. 1979) -- criminal tax case; government petition for mandamus on jury point became moot when all defendants entered guilty pleas

   United States v. Panteleakis, 422 F. Supp. 247, 250 (R.I. 1976) -- bench trial ordered -- "the Court finds the government's refusal to grant consent unreasonable and arbitrary."

5. Jury or Not -- considerations -- *see*:

   United States v. Moon, 718 F.2d 1210, 1217 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984)
   United States v. Morlang, 531 F.2d 183, 186 (4th Cir. 1975)
   United States v. Martin, 704 F.2d 267, 271 (6th Cir. 1983)

SELECTION OF JURORS

1. Secure jury panel list as soon as possible.
2. Check with other assistants, neighbors, friends, etc.
3. I.R.S. is authorized to tell you whether a prospective juror has or has not been the subject of any audit or other tax investigation by the Service, 26 U.S.C. § 6103(h)(5):

   A. Request *must* be made in writing by an attorney for the Department of Justice or any person who is a party to such proceeding;

   B. IRS reply must be limited to "yes" or "no" -- no details

4. Draft chart to use during jury selection.
5. Suggested *voir dire* questions include:

   A. Have you, a close friend, or a relative, had any dealings with the I.R.S.? If yes -- were you satisfied with those dealings?

   B. Have you studied accounting or law?

   C. Will those of you who prepare your own tax returns please raise your hand?

OPENING STATEMENT -- LAW

1. Purpose "is to state what evidence will be presented to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole;

it is not an occasion for argument."

United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991).

"To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct."

United States v. Dinitz, 424 U.S. 600, 612, (1976) (Burger, C.J. concurring)

2. Scope and extent of an opening is within the control of the trial court

3. Defense counsel can obtain permission to reserve opening until the government has rested:

   Karikas v. United States, 296 F.2d 434, 438 (D.C. Cir. 1961), *cert. denied*, 372 U.S. 919 (1963)

4. BUT timing and making of opening statements is within the discretion of the trial judge.

   United States v. Zielie, 734 F.2d 1447, 1455 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

OPENING STATEMENT -- Pointers

1. "What I say, or defense attorney says, is not evidence" - preview of case
2. Never say -- "I believe", or "the government believes"
3. Can say -- "I suggest that" or "I submit"
4. Explain elements of crime -- briefly
5. Explain method of proof - don't use technical language
6. Point out necessity of documents
7. Paper may seem confusing - probably boring
8. See some exhibits during trial - all in jury room
9. Summary expert will put documents together for you
10. TELL JURY A STORY
11. Never -- Witness Jones or Smith will tell you . . .

    Rather -- Jones paid the defendant $10,000 for lumber; Smith gave the bar receipts to the defendant

12. Chronological approach -- as much as possible
13. Be strong and definite but conservative -- otherwise you'll be sorry later

14. *Never, never, never* go beyond the evidence *you have*:

    United States v. Dinitz, 424 U.S. 600, 612 (1976) (Burger, C.J. concurring)

15. Hit highlights, eliminate details
16. Get pre-trial, pre-opening ruling on any "hot" evidence that you want to cover
17. Conclusion: "will ask you for a verdict of guilty"

DOCUMENTS AT TRIAL GENERALLY

1. Many documents -- necessary for case but *no great persuasion weight*.
2. General rule -- no testimony or reference to contents of a document until it is admitted.
3. Lay foundation and move admission quickly is normally best.
4. Routine documents - get it over with, lead where possible.
5. Documents with color - slow down, labor foundation somewhat.

VOIR DIRE

1. Challenge to admissibility of document.
2. Discretionary with court to permit.
3. Preliminary examination of witness on apparent foundation.
4. *Voir dire* prior to ruling on admissibility.
5. Document is not what it appears to be, incompetent witness, etc.
6. No proper foundation for admission of document.
7. Note: *Only goes to matters that relate to foundation*.
8. *Should not be used to cross-examine witness on other matters*.

   BUT defense will often seek to cross-examine under the guise of voir dire

9. *Do not* ask for voir dire unless there is a good chance the exhibit will be excluded

OBJECTIONS -- RULINGS ON EVIDENCE
Rule 103, Fed. R. Evid.

1. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

2. A timely objection or motion to strike appears of record, "stating the specific ground of objection, if the specific ground was not apparent from the context." Rule 103(a)(1), Fed. R. Evid.

3. "[I]n the absence of a specific objection on foundation grounds reversal is not required."

   United States v. Wagoner, 713 F.2d 1371, 1377 (8th Cir. 1983)

INADMISSIBLE EVIDENCE
SUGGESTED TO JURY
Rule 103(c), Fed. R. Evid.

1. Jury case -- conduct trial so as to "prevent inadmissible evidence from being suggested to jury by any means." Rule 103(c), Fed. R. Evid.

2. Inadmissible evidence suggested by "any means such as *making statements* or offers of proof or *asking questions in the hearing of the jury*." Rule 103(c), Fed. R. Evid. (Emphasis supplied).

   See ***United States v. Birges***, 723 F.2d 666, 673 (9th Cir.), *cert. denied*, 104 S. Ct. 1926 (1984).

3. A rule that is often overlooked that can be most helpful when a party (or even the court) steps out of line.

INCOME TAX RETURNS

1. Usually first exhibit offered.

2. Can offer later but should be a good reason for delay in offer.

3. Return can be offered via witness or by offering certified copy.

4. Original returns should always be in the courtroom.

5. If original return is admitted, make motion to substitute a copy for original.

INCOME TAX RETURNS -- WITNESS

1. Witness - Representative of Internal Revenue Service Center.

2. Arrange for witness well in advance of trial.

3. Absolutely vital to review proposed testimony with witness.

4. *Foundation*: *essential to establish that witness is a "reader" and not a tax expert.*

5. Can make return live -- Example:

Q. How much did the defendant report as Capital gains on Schedule D of his 1990 return?

A. There are none reported.

Q. How much did the defendant report as interest income?

A. She reported $300 in interest from the First National Bank.

INCOME TAX RETURNS -- CERTIFICATION

1. Not necessary to use a witness.

2. Use of reproductions -- 26 U.S.C. § 6103(p)(2)(C):

> (C) Use of reproductions.--Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, *if properly authenticated, be admissible in evidence* in any judicial or administrative proceeding *as if it were the original*, whether or not the original is in existence. (Emphasis supplied)

3. Note -- takes care of authenticity -- *not* admissibility.

4. Certification -- District Directors and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required.

   A. "Judicial notice shall be taken of any seal prescribed in accordance with this authority ... ." 26 U.S.C. § 7514 (authority to prescribe or modify seals)

   B. Treas. Reg. § 301.7514-1(c) (26 C.F.R.) (seal for authenticity)

5. Officer who had custody and transferred returns to Records Center can still certify, *e.g.*, return filed with District Director in pre-service center days and transferred to Federal Records Center.

   A. 44 U.S.C. § 3104 -- Certifications and determinations on transferred documents

6. *Case examples*: prior to Federal Rules of Evidence but principles are still applicable.

   United States v. Merrick, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023 (1972)

   Holland v. United States, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)

AUTHENTICITY VIA WITNESS ROUTE

1. *Repeat*: certification is not exclusive -- can call witness.
2. *Income tax return -- witness*: representative of Service Center or District Director.
3. Witness -- Advantages:
   A. Can't get live mileage out of document
   B. Provides explanations, *e.g.*, marks on return made during processing
   C. Negative questions -- highlight failure to report item on the return
   D. Return needed quickly in court -- bring in witness, no time to certify
4. Disadvantages:
   A. Cross-examination problems
   B. Takes up time in the courtroom
   C. *Must* prepare witness -- time may be a problem
5. Certify return or other document even if witness used -- insurance.
6. Arrange for substitution of copies -- use copies if possible with originals available.
7. *BUT . . . always have the originals in the courtroom*

INCOME TAX RETURNS -- SIGNATURE -- TRIAL MILEAGE

1. *Self-authenticating* -- "Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic" does not require extrinsic evidence of authenticity.
   A. Rule 902(10), Fed. R. Evid.
2. "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."
   A. 26 U.S.C. § 6064
   B. ***United States v. Parsons***, 967 F.2d 452, 455 (10th Cir. 1992).
   C. Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.15
   D. Note that section 6064 is not limited to returns, but also applies to a "statement or other document."
3. Not conclusive -- still a jury question:

United States v. Cashio, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)

United States v. Wainwright, 413 F.2d 796, 802 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

4. *Signature on return* -- inference proper that defendant had knowledge of contents of return:

   United States v. Romanow, 509 F.2d 26, 27 (lst Cir. 1975)

   United States v. Ruffin, 575 F.2d 346, 354-55 (2d Cir. 1978)

   United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991)

   United States v. Gaines, 690 F.2d 849, 853-54 (11th Cir. 1982)

5. *Partnership return* -- signed by a partner, then "prima facie evidence that partner is authorized to sign the return on behalf of the partnership."

   A. 26 U.S.C. § 6063 -- signing of partnership returns

6. *Corporate return* -- person's signature on return is prima facie evidence that individual was authorized to sign on behalf of the corporation:

   A. 26 U.S.C. § 6062 -- signing of corporate returns

7. *Unsigned return* -- can still be a section 7201 charge:

   A. ***Moore v. United States***, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)

   B. No section 7206(1) charge -- subscribing is an element of offense

BUSINESS RECORDS
"RECORDS OF REGULARLY CONDUCTED ACTIVITY"
Rule 803(6), Fed. R. Evid.

1. "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum . . . all as shown by the testimony of the custodian or other qualified witness," unless the circumstances indicate lack of trustworthiness.

2. Basic statute for admission of business records -- derived from 28 U.S.C. § 1732:

   A. Advisory Comm. Note to Rule 803(6), 51 F.R.D. 315, 426 (1971)

B. Section 1732 now deals with the admissibility of *copies* of business records or government records made in the regular course of business where the original has been destroyed in the regular course of business

C. Note that section 1732 provides for use of an enlargement of a copy

3. If record admitted as a business record, then test on appeal is limited to a review for abuse of discretion:

Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980)

4. Eliminates need of calling a witness to the transaction even if witness is available.

TERM BUSINESS -- "CALLING OF EVERY KIND"
Rule 803(b), Fed. R. Evid.

1. Expressly defined to include "business, institution, association, profession, occupation, and calling of every kind, *whether or not conducted for profit*."

2. Running accounts of illicit enterprises are business records:

United States v. Cooper, 868 F.2d 1505 (6th Cir.), *cert. denied*, 490 U.S. 1094 (1989) (log book of forged prescriptions kept in "regular course" of business was admissible)

United States v. Foster, 711 F.2d 871 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (ledger containing running accounts of illegal drug dealing is admissible if kept in "regular course" of the business activity)

3. *See* ***United States v. Diez***, 515 F.2d 892, 899 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976):

A. Diez and Palori convicted of conspiracy and Palori convicted of four counts of evasion

B. Both arranged for income from real estate transactions to be improperly reported

C. Case has good examples of business records, accountant's records, lawyer's records, and a title company's records

5. *Foreign business records*: Rule 803(6) applies: ***United States v. Sand***, 541 F.2d 1370, 1376-77 (9th Cir. 1976), *cert. denied sub nom.* ***Scully v. United States***, 429 U.S. 1103 (1977) (Swiss bank records)

"A MEMORANDUM, REPORT, RECORD,
OR DATA COMPILATION, IN ANY FORM"
Rule 803(6), Fed. R. Evid.

1. Not limited to books of account:

   United States v. McPartlin, 595 F.2d 1321, 1347 (7th Cir.), (Sprecher, J., concurring), *cert. denied*, 444 U.S. 833 (1979) (desk calendar and appointment diaries)

2. Note that reports are included -- but must meet all tests same as any other document, *i.e.*, prepared in regular course of business activity, etc.

3. *Data compilation* is used to include any means of storing information such as computer storage of information, *i.e.*, "computer language" used.

4. *Record can be in any form* -- as long as made in the regular course of the business activity.

   A. Pen, pencil, printed, written, on record paper, notebook paper -- makes no difference

   B. *See* ***United States v. Prevatt***, 526 F.2d 400, 403 (5th Cir. 1976) (secretary's notebook)

5. Letter from one party to another in the regular course of business can qualify as a business record

COMPUTER PRINTOUTS
Rule 803(6), Fed. R. Evid.

1. *Computer printouts* are admissible -- but must lay foundation that standard equipment properly operated was used:

   United States v. Sanders, 749 F.2d 195, 198 (5th Cir. 1984) -- BUT must meet requirements of Rule 803(6)

   United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974), also a case under former 28 U.S.C. § 1732

   United States v. Croft, 750 F.2d 1354, 1364 (7th Cir. 1984)

   United States v. DeGeorgia, 420 F.2d 889, 893 (9th Cir. 1969)

2. BUT NOT necessary for computer programmer to testify to authenticate computer generated records -- nor is it necessary to call the person who actually prepared the record -- one who has knowledge of record system is sufficient:

   United States v. Moore, 923 F.2d 910 (1st Cir. 1991) (computer-generated loan histories in bank fraud case -- not necessary that computers be tested for programming errors before admitting computer records)

   United States v. Miller, 771 F.2d 1219, 1237 (9th Cir. 1985)

3. Accurate printout of data stored in a computer is an original -- Rule 1001(3), Fed.R.Evid.

BANK MICROFILM ADMISSIBLE

1. ***United States v. Kelly***, 349 F.2d 720, 771 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)
2. ***Williams v. United States***, 404 F.2d 1372, 1373 (5th Cir. 1968), *cert. denied*, 394 U.S. 992 (1969)
3. ***United States v. Keane***, 522 F.2d 534, 557 (7th Cir. 1975)
4. ***United States v. Saputski***, 496 F.2d 140, 142 (9th Cir. 1974) -- 28 U.S.C. § 1732(b), now 28 U.S.C. § 1732
5. ***Grummons v. Zollinger***, 240 F. Supp 63, 69 (N.D. Ind. 1964), *aff'd*, 341 F.2d 464 (7th Cir. 1965)
6. Records that can come in under Rule 803(6), IF other tests met:

   -Business records -- payroll records, invoices, ledgers
   -Bank records -- bank statements, loan records, checks, etc.
   -School records, *e.g.*, attendance records
   -Church records, *e.g.*, pledge fund records
   -Prison -- deemed a business, ***Stone v. Morris***, 546 F.2d 730, 738 (7th Cir. 1976)
   -Hospitals
   -Civic associations
   -Parent-Teachers associations
   -Little league sports associations
   -Sunday school records of attendance
   -Neighborhood cooperative

7. *See* P.L. 93-595 Conference Report No. 93-1597, 93rd Cong., 2d Sess. United States Code Congressional & Administrative News (1974), p. 7104

"MADE AT OR NEAR THE TIME"
Rule 803(6), Fed. R. Evid.

1. This is the old requirement that record be made *contemporaneously* or reasonable time thereafter.
2. Not determined by arbitrary or artificial time limits measured by hours or days or even weeks -- depends on nature of information, reliability of source, etc.

   Seattle-First National Bank v. Randall, 532 F.2d 1291, 1296 (9th Cir. 1976) --

timeliness requirement is satisfied if record is made at "a reasonable time thereafter"

3. Computer printout prepared 11 months after close of year held contemporaneous:

   United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973) (case under former 28 U.S.C. § 1732(a))

4. *Issue is*: was data put in computer or recorded contemporaneously?

"MADE . . . BY, OR FROM INFORMATION TRANSMITTED BY, A PERSON WITH KNOWLEDGE"
Rule 803(6), Fed. R. Evid.

1. This refers to source of information, NOT to custodian or sponsor witness.
2. Note that *person making record need not have personal knowledge, i.e.*, information can be transmitted to him by one who has knowledge.
3. Person with knowledge *does not mean that person with knowledge has to be produced*

   A. Do not even have to identify person with knowledge -- may be unknown

      White v. Cessna Aircraft Co., 611 F. Supp. 1049, 1059 (W.D. Mo. 1985)

   B. Advisory Comm. Note to Rule 803

   C. Merely have to show regular practice of activity to *base record upon information received from a person with knowledge*

4. Person with knowledge -- AN INFORMANT WITH KNOWLEDGE ACTING IN THE COURSE OF A REGULARLY CONDUCTED ACTIVITY -- someone responsible to the organization on whom reliance is placed:

   A. S. Report No. 93-1227, 93rd Cong., 2d Sess.

   B. United States Code Congressional & Administrative News (1974), pp. 7051, 7063

"MADE" -- CAN ADOPT RECORD OF ANOTHER
Rule 803(6), Fed. R. Evid.

1. *Invoices* received by company that were prepared by sending Company -- held admissible on testimony of receiving company -- no testimony by company that prepared invoices, ***United States v. Flom***, 558 F.2d 1179, 1182 (5th Cir. 1977):

   A. Trustworthiness demonstrated -- then may not be necessary for one who kept record or had supervision over the preparation to testify

   B. Important concept -- often records received and made record of company in regular

course of business but not prepared by receiving company

2. Freight bill admitted upon testimony of receiving company in possession of stolen goods conviction -- freight bill adopted and relied on by receiving company:

   United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977)

3. Note information is received from person with knowledge, *i.e.*, sending company doing business with receiving company and both companies check each other

4. Inventory schedule and manufacturer's statement of origin prepared by Ford Motor Company introduced by general manager of Lincoln Mercury Agency to establish car was stolen by the defendant:

   United States v. Ullrich, 580 F.2d 765, 771-72 (5th Cir. 1978)

EXAMPLES -- PERSON
WITH KNOWLEDGE
Rule 803(6), Fed. R. Evid.

1. Police report of information obtained by bystander -- officer is acting in regular course of activity, BUT the informant is not.

2. Compare, ***United States v. Smith***, 521 F.2d 957, 962 (C.A. D.C. 1975) -- police report held to be a business record and policeman's account of what complaining witness said to him held admissible (by defense not government) when offered to impeach testimony of complaining witness

3. Statements in complaints filed with Post Office by private citizens held admissible:

   United States v. Lange, 466 F.2d 1021, 1024 (9th Cir. 1972) (case under former 28 U.S.C. §1732)

4. Envelopes in administrative file admissible to show mailing and date sent to addressees.

   United States v. Pent-R Books, Inc., 538 F.2d 519, 528 (2d Cir. 1976), *cert. denied,* 430 U.S. 906 (1977)

"IF KEPT IN THE COURSE OF A REGULARLY CONDUCTED
BUSINESS ACTIVITY, AND
IF IT WAS THE REGULAR PRACTICE OF THAT BUSINESS
ACTIVITY TO MAKE THE MEMORANDUM, REPORT, RECORD,
OR DATA COMPILATION"
Rule 803(6), Fed. R. Evid.

1. Standard -- *KEPT* in course of regular business activity and,

2. Standard -- regular practice of business to *make* record

3. Note foundation must be laid on two points:

   A. Record of a regularly conducted activity

   B. Regular practice to make record in issue

      United States v. Pelullo, 964 F.2d 193, 200 (3d Cir. 1992)

      United States v. Lawrence, 934 F.2d 868, 870 (7th Cir. 1991)

   C. *Example*: Bank loan money -- "regular activity"

4. Accident report by deceased railroad engineer offered by railroad trustees in collision case held *NOT* admissible

   Palmer v. Hoffman, 318 U.S. 109 (1943)

   A. Business was railroading -- not making accident report, *i.e.*, not regular course of business to make accident reports

   B. Report was prepared for litigation, NOT railroading

   C. *Motivation*: Not record of routine operations -- goes to motivation of engineer

5. Verified statement by supervisor of market value of stolen trailer made three years after trailer was stolen was not made in course of regularly conducted business practice, but for use at trial and was not a business record for purposes of Rule 803(6)

   United States v. Williams, 661 F.2d 528, 530 (5th Cir. 1981)

EXAMPLES - REGULAR PRACTICE
TO MAKE RECORD OR REPORT

1. *Notation on records* such as "did not report for work," or initials of teller on bank record, is qualified if made in course of business activity -- otherwise not.

2. *Notation in Selective Service file* -- admissible, ordinary course of business to write "did not report" on Selective Service form:

   LaPorte v. United States, 300 F.2d 878, 880 (9th Cir. 1962) (decided under 28 U.S.C. § 1732, but same principles apply)

3. *Tax conviction*: admitted, corporate reports filed with state corporation commission:

   United States v. Ragano, 520 F.2d 1191, 1200 (5th Cir. 1975), *cert. denied*, 427 U.S. 905 (1976) (decided under former 28 U.S.C. § 1732(a), but principles are applicable under Federal Rules of Evidence)

4. *Statutory notice of deficiency* -- sent by certified mail and Post Office Form 3877 stating statutory notices for 1959-1961 and 1962 had been sent to defendant and attorney held admissible. ***United States v. Ahrens***, 530 F.2d 781, 784 (8th Cir. 1976) (28 U.S.C. § 1732(a) case, but would now be admissible under Rule 803(6), Fed. R. Evid.).

5. Regular practice -- occasionally *not* followed or errors occasionally made, not enough to take documents out of Rule 803(6):

   United States v. McGill, 953 F.2d 10, 15 (1st Cir. 1992)

   United States v. Patterson, 644 F.2d 890, 900-01 (1st Cir. 1981)

6. Incomplete record -- Fact ledger was an incomplete record of drug dealings and contained several blank pages and unrelated entries did not render the ledger inadmissible:

   United States v. Foster, 711 F.2d 871, 882 (9th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984)

7. *Notation in police report* -- NOT admissible -- "police records are business records" BUT a note on letter of resignation in file *not identified* and not shown to be in regular course of business or contemporaneously made:

   United States v. Halperin, 441 F.2d 612, 618 (5th Cir. 1971)

THIRD PARTY DOCUMENTS

1. *Third-party documents* collected in file not enough -- must show that document *made* in regular course of business, *e.g.*, letters received from third parties routinely kept in file not enough:

   United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973)

   United States v. Yates, 553 F.2d 518, 521 (6th Cir. 1977) -- postscript to letter not admissible, statement outside the scope of the business

   Phillips v. United States, 356 F.2d 297, 307 (9th Cir. 1965), *cert. denied sub nom.* ***Walker v. United States***, 384 U.S. 952 (1966) -- BUT admissible for limited purpose of showing defendant knew statements had been made

2. BUT letters can be admissible as business records:

   United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966)

   See also ***United States v. Flom***, 558 F.2d 1179, 1182 (5th Cir. 1977)

   United States v. Keane, 522 F.2d 534, 557 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976)

"ALL AS SHOWN BY THE TESTIMONY OF THE CUSTODIAN OR OTHER QUALIFIED WITNESS"
Rule 803(6), Fed. R. Evid.

1. Witness must be able to testify:

   A. Record of regularly conducted activity

   B. Kept in regular course of business activity

   C. Regular practice of business to make record

   D. Record made at or near time of event -- by person with knowledge or information from person with knowledge

2. Can compel custodian of records to identify and authenticate the documents produced for admission into evidence:

   In re Custodian of Records of Variety Distributing, 927 F.2d 244, 249 (6th Cir. 1991)

3. *Sponsor with knowledge* would seem to be enough, *i.e.*, not necessarily custodian as such -- "qualified witness" -- *someone in the activity* because of her position or activities has reason to know about the records and business practice of the firm:

   United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986) (government agent properly laid the foundation for admitting records -- all that is required is that the witness be familiar with the record keeping system)

4. Business records admitted upon testimony that records "kept under his direction by his assistant in the usual course of business":

   United States v. Beathune, 527 F.2d 696, 700 (10th Cir. 1975), *cert. denied*, 425 U.S. 996 (1976)

5. Company records admitted as business records: (1) Transcript of SEC testimony of deceased bookkeeper identifying records and manner of keeping records admissible under Rule 801(d)(2)(D); (2) testimony of two former employees that deceased accountant maintained records; (3) admission of defendant that deceased bookkeeper maintained books; and (4) testimony of CPA that records checked out as accurate

   United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931 (1983)

PREPARER NOT NECESSARY

1. Witness does *not* have to be preparer; *DOES NOT EVEN HAVE TO HAVE BEEN AN EMPLOYEE OF COMPANY WHEN RECORD MADE* as long as witness can testify to the

nature of the records:

United States v. McGill, 953 F.2d 10, 14-15 (1st Cir. 1992)

United States v. Lieberman, 637 F.2d 95, 100 (2d Cir. 1980)

United States v. Pellulo, 964 F.2d 193, 201 (3d Cir. 1992) (government agent may provide the foundation where the agent is familiar with the record-keeping system)

United States v. Scallion, 533 F.2d 903, 914-15 (5th Cir. 1976), *cert. denied sub nom.* ***Jenkins v. United States***, 429 U.S. 1079 (1977)

United States v. Fendley, 522 F.2d 181, 185 (5th Cir. 1975)

United States v. Lawrence, 934 F.2d 868, 870-71 (7th Cir. 1991)

United States v. Pfeiffer, 539 F.2d 668, 670-71 (8th Cir. 1976)

United States v. Woods, 518 F.2d 696, 698 (8th Cir. 1975) (Texaco credit card investigator testified as to Texaco invoice allegedly signed by defendant)

United States v. Bowers, 593 F.2d 376, 380 (10th Cir.), *cert. denied*, 444 U.S. 852 (1979)

2. Not necessary for witness to identify maker of entries as long as foundation is laid as in No. 1 above:

   Matador Drilling Co., Inc. v. Post, 662 F.2d 1190, 1199 (5th Cir. 1981)

3. *BUT* -- records inadmissible because witness did not know of own personal knowledge records were kept in office, no testimony that it was practice of business to keep such records, etc.

   United States v. Rosenstein, 474 F.2d 705, 709 (2d Cir. 1973) (28 U.S.C. § 1732)

"UNLESS THE SOURCE OF INFORMATION OR THE METHOD OF CIRCUMSTANCES OR PREPARATION INDICATE LACK OF TRUSTWORTHINESS"
Rule 803(6), Fed. R. Evid.

1. *Approach*: Records made in course of regular activity are admissible -- *BUT* subject to exclusion if not trustworthy.
2. Escape clause for excluding records where *motive or accuracy of informant* is subject to question.
3. Court can exclude records, IF source of information or other circumstances make the record suspect.

4. *Example* -- records prepared in anticipation of litigation are suspect and not within Rule 803(6):

   Palmer v. Hoffman, 318 U.S. 109, 111 (1943)

   United States v. Williams, 661 F.2d 528, 531 (5th Cir. 1981)

   Paddack v. Christensen, 745 F.2d 1254, 1258 (9th Cir. 1984)

5. Type of record, how made, motivation in making record, and which party is offering the record all bear on question of trustworthiness and hence admissibility.

6. *However*, once the defendant voluntarily produces business records (*i.e.*, in response to government summonses and subpoenas) and implicitly represents the records to be company records, defendant cannot later complain that documents did not originate from the company:

   United States v. Lawrence, 934 F.2d 868, 871 (7th Cir. 1991)

DEFENDANT'S BOOKS AND RECORDS
ACCOUNTANT'S WORKPAPERS

1. Prepared by defendant's accountant or bookkeeper.

2. Could be admissible under Rule 803(6) as a business record.

3. Could be admissible as an admission -- statement by an authorized person, under Rule 801(d)(2)(C).

4. *Example* -- Defendant says, talk to my accountant, he can show you the books -- accountant's statements are admissions as to defendant:

   United States v. Diez, 515 F.2d 892, 896 n.4 (5th Cir. 1975), *cert. denied*, 423 U..S. 1052 (1976)

5. Could be admissible as an admission -- statement by agent (bookkeeper) concerning matter within scope of his employment made while still working for defendant -- Rule 801(d)(2)(D):

   A. Must be matter concerning bookkeeper's duties *and* bookkeeper must still be working for defendant

   B. Makes no difference that bookkeeper is not authorized to make disclosures.

   C. Transcript of SEC testimony of deceased bookkeeper, re: keeping company's books and records admissible as an admission under Rule 801(d)(2)(D), Fed.R.Evid.

      United States v. Chappell, 698 F.2d 308, 311 (7th Cir.), *cert. denied*, 461 U.S. 931

(1983) (admission through an agent, *i.e.*, bookkeeper for the company)

6. If the accountant-bookkeeper is *NOT* authorized to make a disclosure the statement is *still admissible* as long as the statement is one made within the scope of the witness employment while the witness is still "working" for the defendant, Rule 801(d)(2)(D), Fed. R. Evid.

7. Authorization to speak is *not* a requirement of Rule 801(d)(2)(D):

   A. Rule 801(d)(2)(C), unlike 801(d)(2)(D), requires that a statement be "by a person authorized by the party to make a statement concerning the subject."

   B. Rule 801(d)(2)(D), however, says nothing about an agent having authority to make a statement on a particular subject. After an agency is established, Rule 801(d)(2)(D) requires only that the statement concern "a matter within the scope of the agency or employment, made during the existence of the relationship."

   Nekolny v. Painter, 653 F.2d 1164, 1171 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982)

8. *Example*: Bookkeeper who works for the defendant gives an IRS agent a copy of the defendant's records and explains which are personal and which are business expenditures -- both books and statements made to agent are admissible even though not authorized by the defendant

   Cf. ***United States v. Ojala***, 544 F.2d 940, 945-46 (8th Cir. 1976)

FOREIGN BUSINESS RECORDS
18 U.S.C. § 3505

1. Criminal case -- foreign business record or copy authenticated and admissible if foreign certification attests that:

   A. Record was made at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters

   B. Record kept in course of a regularly conducted business activity

   C. Regular practice to make such record

   D. If record is not the original, such record is a duplicate of the original

   United States v. Sturman, 951 F.2d 1466, 1489-90 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

2. Admissible unless source of information or preparation is untrustworthy.

3. Must give notice to other party.

4. Terms defined, 18 U.S.C. § 3505(c) -- "foreign record of regularly conducted activity," "foreign certification," and "business."

5. Applies only to foreign records, no certification as to domestic records.

PROOF OF NEGATIVE
"BUSINESS RECORDS"
Rule 803(7), Fed R. Evid.

1. Rule 803(7) is limited to records that qualify as records of regularly conducted activity under Rule 803(6).

2. Must lay foundation that entry not appearing in records is the kind that would be recorded, *i.e.* same foundation you lay for the admission of a business record under Rule 803(6).

3. Foundation laid then absence of entry is evidence of the non-occurrence or non-existence of the matter, act, or event:

   See ***United States v. Zeidman***, 540 F.2d 314 (7th Cir. 1976) (manager testified that his supervisor made search)

4. *Note*: Rule applies to report, record, or data compilations -- same as Rule 803(6).

5. *Escape clause*: unless sources of information or other circumstances indicate a lack of trustworthiness.

PROOF OF NEGATIVE
PUBLIC RECORD OR ENTRY
Rule 803(10), Fed. R. Evid.

1. Rule 803(10) applies to absence of an entry in a public record, report, statement or data compilation; OR to the nonexistence of a matter of which a record would have been made.

2. Proof of negative -- two ways available:

   A. *Certification* of absence of entry under Rule 902

   OR

   B. *Testimony* that "*diligent search*" did not disclose the record, entry, report, etc.

3. Neither procedure is given priority under Rule 803(10) -- can certify or produce witness, or do both.

CERTIFICATION PROCEDURE
Rule 803(10), Fed. R. Evid.

1. Examples:

   United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991) (certificate that no tax return was filed by taxpayer)

   United States v. Yakobov, 712 F.2d 20, 23-24 (2d Cir. 1983) (certificate that no firearm license was issued to defendant)

2. Certification procedure is *only available* in case of public records; *not* available as to private records

3. Certification procedure is handy and often sufficient unless:

   A. Explanatory testimony is needed

   B. Witness can add color

WITNESS PROCEDURE
Rule 803(10), Fed. R. Evid.

1. Witness route -- must testify that a diligent search was made:

   United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978)

   United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

   United States v. Rich, 580 F.2d 929, 938 (9th Cir. 1978)

   Cf. ***United States v. Martinez***, 700 F.2d 1358, 1365 (11th Cir. 1983)

2. No testimony required as to the nature of the record keeping, *i.e.* not necessary to lay any business records foundation under Rule 803(10) as you must when proceeding under Rule 803(6) and Rule 803(7):

   United States v. Regner, 677 F.2d 754, 757-58 (9th Cir. 1982) (dissent)

   United States v. Farris, 517 F.2d 226, 229, n. 2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (case under former 28 U.S.C. § 1733(a), BUT same principles apply to Rule 803(10) -- Court pointed out what is now Rule 803(6) foundation is superfluous)

3. BUT must establish no entry in record "regularly made and preserved by a public office or agency." Rule 803(10), Fed. R. Evid.

CASE EXAMPLES

1. Criminal failure to file case -- certified statement that search of master files indicated no returns filed:

   United States v. Cepeoa Penes, 577 F.2d 754, 760 (lst Cir. 1978) (testimony and certification that no return filed)

   United States v. Liebert, 519 F.2d 542 (3d Cir.), *cert denied*, 423 U.S. 985 (1975)

   United States v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990)

   United States v. Johnson, 577 F.2d 1304, 1312 (5th Cir. 1978) (testimony by IRS employee that there was no record of filing a return)

   United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991)

   United States v. Farris, 517 F.2d 226, 227, (7th Cir.), *cert. denied*, 423 U.S. 892 (1975) (certification of failure to file)

2. Certificate of non-registration of firearms.

   United States v. Cruz, 492 F.2d 217, 220 (2d Cir.), *cert. denied*, 417 U.S. 935 (1974)

3. Rejected -- testimony failed to show records were complete and a *casual or partial search* does not justify a conclusion of no records:

   United States v. Robinson, 544 F.2d 110, 113-114 (2d Cir. 1976), *cert. denied*, 434 F.2d 1050 (1978) (witness should testify that agency regularly made and preserved records of unemployment payments and that a diligent search of those records failed to disclose any record of a payment to alibi witness)

4. *Bank robbery case*: FBI agent testified to examination of police records, sheriff's records, etc., disclosed to Dale Anderson who allegedly borrowed defendant's car -- testimony proper as to business records; harmless error as to public records because no objection by defense, BUT agent should have testified record search was conducted in a *diligent manner*):

   United States v. Rich, 580 F.2d 929, 937 (9th Cir. 1978)

IRS CERTIFICATE OF ASSESSMENTS AND PAYMENTS
Rule 803(10) -- To Prove Failure to File

1. ***United States v. Neff***, 615 F.2d 1235, 1241 (9th Cir.), *cerr. denied*, 447 U.S. 925 (1980) (tax protestor failure-to-file case; great discussion of the law in this area)

2. Can obtain from Service Center an IRS Certificate of Assessments and Payments, Form

4340, that will "report" whether returns filed or not.

3. Government introduced certificate in ***Neff*** case -- BUT government also had custodial witness testify that search made of National Computer Center where all tax information is recorded "for every individual in the nation."

4. *Held*: Certificate admissible under Rule 803(10) -- no violation of confrontation clause

   See also ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990)
   United States v. Spine, 945 F.2d 143, 148-49 (6th Cir. 1991);

NOTARIZED AFFIDAVIT ADMITTED
Rules 803(10), 902(8)

1. ***United States v. M'Biye***, 655 F.2d 1240, 1241-42 (D.C. Cir. 1981) (Per Curiam) -- excellent example of what you can do beyond a simple "No".

2. Charged 18 U.S.C. § 1014 -- making false statement on bank loan application -- defendant said he worked for the United Nations.

3. Affidavit by personnel officer of United Nations Secretariat that defendant did not work for United Nations

4. *TAKE A LOOK AT AFFIDAVIT* -- ***M'Biye***, 655 F.2d at 1242 -- it will make you think.

5. *Note*: affidavit sworn to before a notary therefore self-authenticating under Rule 902(8)

EXAMPLES -- PROOF OF
NEGATIVE IN CRIMINAL TAX CASES
Rules 803(7), 803(10)

1. No record of incorporation or filing of corporate report.

2. No record of property owned or of property taxes paid.

3. No probate record.

4. No record of savings bonds.

5. No record of birth, marriage, death, *see* Rule 803(12).

6. No record of earnings -- government worker (Rule 803(10)); private employee (Rule 803(7)).

7. No record of insurance policy.

8. No record of stock purchased or sold.

9. No record of fire, theft, or police complaint.

10. No record of earnings -- Social Security.
11. No record of purchase, sale, or cancellation of an order.
12. No record of car being rented, or purchased, or repaired.
13. No record of bank account, deposit, check issued, or loan.
14. No record of staying at hotel, being on a plane, church pledge, membership in union and similar items.
15. No record of filing an income tax return, an S.E.C. registration statement, an oil and gas report

PUBLIC RECORDS AND REPORTS
RECORDED DOCUMENTS

APPLICABLE RULES

1.	Admissibility of public records	Rule 803(8)
2.	Proof of negative - discussed previously	Rule 803(10)
3.	Admissibility of records of documents affecting property	Rule 803(14)
4.	Authenticity -- recorded, filed or from a public office	Rule 901(7)
5.	Self-authenticated copies	Rule 902(1)-(5)
6.	Authenticity -- statutory methods	Rule 901(10)
7.	Evidence of contents -- original not required	Rule 1005

ADMISSIBILITY AND CERTIFICATION OF PUBLIC -- OFFICIAL RECORDS

1. The Federal Rules of Evidence and numerous statutes provide for the *admission of public records as an exception to the hearsay rule.*
2. Custody establishes authenticity.
3. Public records must still meet tests of admissibility, *e.g.*, relevancy, hearsay, privilege, etc.
4. Rules provide for certification of copies of public records by the appropriate officer.

5. *Point*: certification "establishes" authenticity without calling a witness; it does not confer *admissibility upon a public record*.

PUBLIC -- RECORDED RECORDS -- MEANING

1. Governmental documents -- federal and state.
2. Activities of public office -- documents containing factual matter to which public official could testify if called as a witness:

   A. Rule 803(8), Fed. R. Evid.

   B. Cases:

   United States v. Ream, 491 F.2d 1243, 1246-47 (5th Cir. 1974)

   Yaich v. United States, 283 F.2d 613, 618 (9th Cir. 1960)

   Johnson v. United States, 285 F.2d 700, 701-02 (9th Cir. 1961)

   Williamson v. Union Oil Co., 125 F. Supp 570, 572 (D. Colo, 1954)

3. Records of vital statistics, IF public record made under requirements of law -- Rule 803(9), Fed. R. Evid.:

   A. Can establish birth, death, marriage, etc.

   B. Easy way to establish -- certify document

4. *Recorded documents* -- documents customarily recorded or authorized by law to be kept in a public office or agency of the United States and any state, territory or possession:

   A. Rule 803(14), Fed. R. Evid. -- documents affecting an interest in property

   B. Rule 1005, Fed. R. Evid. -- contents of public records

5. *Official records*:

   A. Often used interchangeably with "public document"

   B. Entitled to presumptions of regularity and validity:

   United States v. Rogers, 454 F.2d 601, 604 (7th Cir. 1971)

   C. An official document is one executed by a government employee in the course of performing his duties:

   United States v. Aluminum Co. of America 1 F.R.D. 71 (1939)

6. *Official publications* -- books, pamphlets, or other publications *purporting* to be issued by public authority -- Rule 902(5), Fed. R. Evid.

7. *Foreign records* can be public records and come under public records exception rules:

   A. *See* ***United States v. Regner***, 677 F.2d 754, 762 (9th Cir. 1982) (dissent), "courts regularly admit foreign documents pursuant to these exceptions [Rules 803(6), 803(7), 803(8) and 803(10)]", and cases cited

   B. United Nations Secretariat -- United Nations is a "public office or agency" within the meaning of Rule 803(10)

      United States v. M'Biye, 655 F.2d 1240, 1242 (D.C. Cir. 1981) (Per Curiam)

EXAMPLES
PUBLIC/OFFICIAL RECORDS

-Recorded deeds and mortgages -- ownership and liability

-Books, pamphlets, etc., published by government printing office

-Probate records -- ownership, financial position

-Bankruptcy records -- financial position

-Income tax returns -- state and federal

-Water and light payments -- IF maintained by public entity

-Motor vehicle titles and personal property -- ownership (liens)

-Records of convictions

-Birth, marriage, and death records

-Articles of incorporation filed in recorder's office

HEARSAY EXCEPTION --
ADMISSIBLE -- PUBLIC RECORDS
IN ANY FORM REFLECTING
Rule 803(8), Fed. R. Evid.

1. Records, reports, statements, or data compilations, in any form, of public offices or agencies, are *not excluded by the hearsay rule* which set forth:

   A. the activities of the office or agency, or

   B. a matter observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding*, however, *in criminal cases* matters observed by police officers and other law enforcement personnel, or

C. in civil actions and proceedings and *against the government in criminal cases*, factual findings resulting from an investigation made pursuant to authority granted by law, *unless* the sources of information or other circumstances indicate lack of trustworthiness

GENERAL COMMENT
Rule 803(8), Fed. R. Evid.

1. *Exception to hearsay rule* -- admits records of public offices and agencies; equivalent for private business records is Rule 803(6).
2. Not necessary to lay business records foundation -- merely establish document is a public record, *e.g.*, from public office or agency and reflects the activities of the office or agency:

   United States v. Farris, 517 F.2d 226, 229, n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

   United States v. Regner, 677 F.2d 754, 761 (9th Cir. 1982) (dissent)

3. But must still show document is authentic, relevant, etc., and otherwise admissible:

   United States v. Jones, 958 F.2d 520, 521 (2d Cir. 1992)

ACTIVITIES OF OFFICE OR AGENCY
Rule 803(8)(A), Fed. R. Evid.

1. "Admissibility" of records of activities of office or agency.
2. *Examples*:

   A. Treasury records of receipts and disbursements:

      Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123 (1919)

   B. Selective Service records:

      United States v. Ream, 491 F.2d 1243, 1246-47 (5th Cir. 1974)

      United States v. Hudson, 479 F.2d 251, 253 (9th Cir. 1972)

   C. *Checks* issued by Ohio Bureau of Workmen's Compensation in tax evasion case -- - admissible under either Rule 803(6) or 803(8):

      United States v. Hans, 684 F.2d 343, 346 (6th Cir. 1982)

   D. *Judgement and commitment order* relating to criminal conviction and *receipt for a prisoner* from the marshal:

United States v. Wilson, 666 F.2d 1241, 1248 n.2 (9th Cir. 1982)

3. Records of public schools and hospitals also included -- fall under Rule 803(6):

   A. Conference Report No. 93-1597, 93d Cong., 2d Sess., United States Code Congressional and Administrative News (1974), p. 7104

4. *Criminal failure to file case*: Service Center records, technically not necessary to lay a business records foundation -- they are government public records and admissible under Rules 803(8) and 803(10):

   United States v. Farris, 517 F.2d 226, 229 n.2 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975)

PUBLIC RECORDS AND REPORTS
OF FOREIGN GOVERNMENTS
Rule 803(8)(a), Fed. R. Evid.

1. Rule 803(8)(a) is not limited to domestic records -- applies to foreign records also.

2. *See* for example:

   United States v. Grady, 544 F.2d 598, 604 (2d Cir. 1976) (records of Royal Ulster Constabulary)

   United States v. Rodriguez Serrate, 534 F.2d 7, 10 (1st Cir. 1976) (Dominican identification card, birth certificate, military records, death certificate, passport records and demographic registry)

MATTERS OBSERVED -- DUTY TO REPORT
Rule 803(8)(b), Fed. R. Evid.

1. Does *not* include random observations of public official; relates to matters observed pursuant to general duties of official.

2. *Examples* of matters included:

   A. Weather Bureau records of rainfall

      Minnehaha County v. Kelley, 150 F.2d 356, 360 (8th Cir. 1945)

      Flythe v. United States, 405 F.2d 1324, 1325-26 (C.A. D.C., 1968)

   B. Letter from induction officer to District Attorney pursuant to regulations
      United States v. Van Hook, 284 F.2d 489, 491 (7th Cir. 1960), *remanded for resentencing*, 365 U.S. 609 (1961)

BUT NOT ADMISSIBLE IN CRIMINAL CASES:
Rule 803(8)(b), Fed. R. Evid.

1. "*Matters observed by police officers and other law enforcement personnel.*"
2. FBI reports, special agent's report in tax cases, and the like, NOT admissible -- usually at the instance of the government.
3. *Adversarial nature of criminal cases* -- police observations at scene of crime not as reliable as observations by public officials in other cases because of adversarial nature of confrontation between the police and defendant in criminal case:

   S.Rep. No. 93-1277 on HR 5463, United States Code Congressional and Administrative News (1974), p. 7064
4. *Point*: reports are deemed partisan, lack inherent trustworthiness.
5. Report of government chemist -- *see* ***United States v. Oates***, 560 F.2d 45, 66 (2d Cir. 1977) (case contains an interesting discussion of Rule 803(8) and congressional intent, BUT reaches a strained result; report of government chemist excluded) -- compare to cases ahead

RECORDS OF
NON-ADVERSARIAL MATTERS -- NOT EXCLUDED
Rule 803(8)(b), Fed. R. Evid.

1. Marshal's return of service admissible under Rule 803(8)(b):

   United States v. Union National de Trabajadores, 576 F.2d 388, 391 (1st Cir. 1978)
2. Irish police records reflecting serial numbers and receipt of weapons found in Northern Ireland not excluded by Rule 803(8)(b) -- these were not observations by police of commission of crimes

   United States v. Grady, 544 F.2d 598, 604 (2nd Cir. 1976)
3. Serial number report of Bureau of Alcohol, Tobacco and Firearms to establish that firearm travelled in interstate commerce was admissible -- kept in a ministerial fashion, pursuant to legal authority and not in anticipation of trial

   United States v. Johnson, 722 F.2d 407, 410 (8th Cir. 1983)
4. "Congress did not intend to exclude records of routine, non-adversarial matters" -- customs records of license plates of cars crossing border made by law enforcement personnel, admissible

   United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979)

FACTUAL FINDINGS OF INVESTIGATION MADE PURSUANT TO LAW Rule 803 (8)(c), Fed. R. Evid.

1. *ADMISSIBLE*: *IN CIVIL CASES AND ONLY AGAINST THE GOVERNMENT IN CRIMINAL CASES.*
2. Refers to so-called investigative or evaluative reports -- a controversial section.
3. Rule only applies to investigations made *pursuant to authority granted by law*:

   A. Private investigations are not included

   B. Official state investigations could be admissible

4. *ADMISSIBILITY LIMITED TO FACTUAL FINDINGS* -- Rule 803(8)(c):

   A. *House*: "The Committee intends that the phrase, 'factual findings,' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule."

   House Rep. No. 93-650 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7088

   B. *Senate*: The Committee takes strong exception to the House limiting the application of the rule. Types of reports recognized by Congress (*e.g.*, 7 USC 78, Finding of Sec. of Agriculture prima facie evidence of true grade of grain) indicates type of reports intended to be admissible -- can always exclude if found not trustworthy

   Senate Rep. No. 93-1277 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7064

   C. *Conference Report* -- Silent on this point:

   Conference Rep. No. 93-1597 on H.R. 5463, U.S.C. Congressional and Administrative News (1974), p. 7098

5. IRS computer printout with coded notation that defendant told unidentified IRS official he was not required to file a corporate return -- error to admit against the defendant. *See* ***United States v. Ruffin***, 575 F.2d 346, 355 (2d Cir. 1978):

   A. Rule 1005, Fed. R. Evid. admits copies, BUT only if the contents of the original record are otherwise admissible

   B. *Hearsay* -- not admissible under Rule 803(8) -- matter observed by law enforcement personnel

   C. *Note*: better reason would seem to be lack of identity of person who took report, *i.e.*,

how can it be said it was the defendant who spoke, etc.

6. Admissible on behalf of defense -- police report and transcript of police broadcast"

United States v. Smith, 521 F.2d 957, 963-64 (D.C. Cir. 1975)

FACTUAL FINDINGS --
UNLESS CIRCUMSTANCES
INDICATE LACK OF
TRUSTWORTHINESS
Rule 803(8)(c)

1. IF *sources* of information or other circumstances indicate lack of trustworthiness, then factual finding is *NOT* admissible against government.
2. This is the escape clause -- always consider in criminal case whether a factual finding in a report is "trustworthy."
3. Trustworthiness is tested by factors such as:

   A. Timeliness of investigation
   B. Special skill or experience of official
   C. Whether a hearing was held and level at which conducted
   D. Possible problem of motive or bias
      Adv. Comm. Note to Rule 803(8), 51 F.R.D. 315, 431
   E. Finding not supported by sufficient data

4. Judge "must" exclude report unless she can find sources of information and other circumstances indicate report is trustworthy.
5. S.E.C. release concerning stock controlled by one of defendants excluded as hearsay -- "not a determination of facts obtained after administrative proceedings":

   United States v. Corr, 543 F.2d 1042, 1050-51 (2d Cir. 1976)

RECORDED DOCUMENTS
AFFECTING AN INTEREST
IN PROPERTY
Rule 803(14), Fed. R. Evid.

1. Authorized recorded document affecting an interest in property is "admissible" as:

   A. Proof of contents of original document

   B. Proof of execution and delivery by each person executing the document

2. Covers records such as deeds, mortgages, leases, land contracts.

3. Eliminates objections such as: signature not proved; delivery of instrument not established, etc.

4. *Confined to recorded documents* from public office authorized for recording.

5. Mortgage recorded in land office falls within Rule 803(14), Fed. R. Evid.

   United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978)

6. *Proof of marriage*: evidence included recitals in two warranty deeds executed as husband and wife, ***Compton v. Davis Oil Co.***, 607 F. Supp. 1221, 1228 (D. Wyo. 1985):

   > Recitals contained in ancient documents, and in documents and records affecting interests in property are admissible as proof of the matters asserted, and constitute strong evidence concerning such matters. *See* Fed. R. Evid. 803(14), (15), and (16)

7. *Tax evasion case*: Government expert's testimony as to what various records in county clerk's office said held improper -- documents were not introduced:

   United States v. Ruffin, 575 F.2d 346, 357 (2d Cir. 1978) (can't merely have a witness testify (hearsay) as to contents of document -- Rule 803(14) applies to recorded documents)

8. DISTINGUISH: Witness can testify that copy is a true copy of an official record or recorded document -- But document "testifies" as to contents, *not* witness -- Rule 1005, Fed. R. Evid.

STATEMENTS IN DOCUMENTS
AFFECTING AN INTEREST IN PROPERTY
Rule 803(15), Fed. R. Evid.

1. Statements in documents affecting an interest in property if relevant to purpose of documents and subsequent dealings with property are not inconsistent with documents:

   Compton v. Davis Oil Co., 607 F. Supp. 1221, 1229 (D. Wyo. 1985) (acted as if title in heirs for thirty-seven years)

2. Rule applies to document itself.

3. Not necessary that document be recorded.

4. Do not have to produce witnesses to transaction -- merely authenticate document.

RESIDUAL HEARSAY EXCEPTION
Rule 803(24), Fed. R. Evid.

1. Creates a general exception to the inadmissibility of hearsay when there are adequate "circumstantial guarantees of trustworthiness."
2. Requires that the proponent give notice of its intention to specifically rely on 803(24) as grounds for admissibility.
3. *Examples*:

   Bank Records -- provides circumstantial guarantees of trustworthiness because the banks and their customers rely on their accuracy in the course of their business
4. ***United States v. Pelullo***, 964 F.2d 193, 202 (3d Cir. 1992)

AUTHENTICITY

REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION
Rule 901(a), Fed. R. Evid.

1. Must establish that evidence is genuine and it is what you claim it is, *i.e.*, that it is authentic.
2. Authentication is "(a) . . . satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims":

   A. Rule 901(a), Fed. R. Evid.

   B. Rule 104(b), Fed. R. Evid.
3. Sufficiency of the authentication of a document rests in the sound discretion of the trial court and will not be revised absent an abuse of discretion

   United States v. Spetz, 721 F.2d 1457, 1476 (9th Cir. 1983)
4. Judge makes preliminary determination as to whether jury could find evidence authentic.
5. IF "yes," then evidence goes to jury and jury ultimately decides authenticity -- not the court:

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

METHODS OF AUTHENTICATING
Rule 901(b), Fed. R. Evid.

1. Rule 901(b) sets forth ten (10) ways to authenticate, including:

   Rule 901(b)(1) -- Testimony of witness with knowledge

   Rule 901(b)(2) -- Nonexpert opinion on handwriting -- layperson can give opinion on handwriting if proper foundation laid

Rule 901(b)(4) --	Distinctive characteristics and the like
Rule 901(b)(7) --	Public records or reports
Rule 901(b)(10) --	Methods provided by statute or rule

PRIMA FACIE SHOWING
Rule 901(b), Fed. R. Evid.

1. Not limited to ten methods listed in Rule 901.
2. Point -- any admissible evidence that will prove a document, a voice, a writing, etc. is what you claim it is -- prima facie showing of authenticity.
3. *Repeat*: once prima facie showing of a document's authenticity is made then it goes to jury, not the court, for a factual determination of whether the documentis authentic:

   United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976)

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

CHAIN OF CUSTODY

1. Documentary evidence -- general rule, not necessary to show chain of custody.
2. *Example*: makes no difference whether contract held or transferred to A, B, or C -- question is whether signatures are genuine or not.
3. *Example -- exceptions*: Place from where search warrant material taken, or whether records obtained from defendant or his bookkeeper, or where counterfeit bills obtained -- chain of custody or location of evidence can be helpful in establishing authenticity.
4. "[P]roof of private custody together with other circumstances is frequently strong circumstantial evidence of authenticity."

   United States v. Bruner, 657 F.2d 1278, 1284 (D.C. Cir. 1981) (testimony of D.E.A. agent as to prescriptions obtained from office of doctor via subpoena plus other testimony as to nature of records)
5. *Tax case*: records often obtained from office of defendant.

AUTHENTICATION:
DISTINCTIVE CHARACTERISTICS AND THE LIKE
Rule 901(b)(4)

1. This section says you can use circumstances to show an item is genuine.

2. The it-walks-like-a-duck, quacks-like-a-duck, looks-like-a-duck, then-it is-a-duck approach.

3. Two notebooks detailing heroin transactions -- contents and circumstances used to support inference that apartment was scene of drug sales:

   A. Not hearsay -- not offered for truth of contents but only to show apartment was scene of drug operation

      United States v. Wilson, 532 F.2d 641, 646 (8th Cir. 1976)

   B. *Contents* -- only person familiar with deals could have written entries

   C. Notebooks found in apartment frequented by two alleged conspirators

   D. Unusual hole in door of apartment described by informant

   E. Known co-conspirator in apartment during drug raid

   F. Notebooks in code and informant testified defendant's drug transactions recorded in code in notebooks

   G. Writer obviously familiar with the procedures used in drug operation

4. Income tax returns used as exemplars of handwriting and as basis for expert testimony on handwriting:

   United States v. Mangan, 575 F.2d 32, 37, 41-42 (2d. Cir. 1978)

5. Ledger seized in defendant's residence and writer of entries unknown held authenticated on basis of contents, use of gambling terms, found in defendant's home, had fingerprints of two codefendants on it and names in ledger corresponded to the participants in the enterprise:

   United States v. Helmel, 769 F.2d 1306, 1312 (8th Cir. 1985)

6. Writing on letterhead paper sufficient to authenticate under Rule 901(4) absent suspicious circumstances or counterproof:

   California Ass'n of Bioanalysts v. Rank, 577 F. Supp. 1342, 1355 n.23 (C.D. Cal. 1983)

7. *Point*: Look to appearance, contents, and surrounding circumstances.

8. *Mail fraud case*: no chain of custody as to letters in exclusive possession of government for five years does not raise issues as to authenticity; original and copies held authentic on basis of appearance, contents and circumstances:

   United States v. Georgalis, 631 F.2d 1199, 1205 (5th Cir. 1980)

AUTHENTICATION
PUBLIC RECORDS OR REPORTS
Rule 901(b)(7). Fed. R. Evid.

1. Evidence that a writing authorized by law to be recorded is in fact recorded; or that a purported public record is from a public office.
2. *One procedure*: call witness, *e.g.* recorder of deeds testifies as to nature of his office, records authorized to be filed, and that he is producing a true copy of deed, mortgage, etc.
3. *NOTE*: Usual procedure is to go via certification rather then witness -- *see ahead*.
4. BUT witness procedure is available and may be best where speed required and no time to certify; or witness can add color.

AUTHENTICITY VIA STATUTE

AUTHENTICATION MAY BE
BY STATUTORY METHODS
Rule 901(b)(10), Fed. R. Evid.

1. Any method of self-authentication provided by statute or other rules prescribed by Supreme Court pursuant to statutory authority.
2. *Example*: procedure for authenticating under Rule 44(a), Fed. R. Civ. P., made applicable to criminal cases by Rule 27, F. R. Crim. P., remains in effect.
3. Numerous statutes provide for authenticating procedures.

STATUTORY AUTHENTICATION
Rule 901(b)(10)

1. Type and procedure is set forth in statutes:

26 U.S.C. § 6103(p):	Internal Revenue Service documents
28 U.S.C. § 753(b):	Proceedings by official court reporter -- transcript certified by official reporter deemed *prima facie* correct
28 U.S.C. § 1733:	Government records
28 U.S.C. § 1734:	Court records -- lost or destroyed
28 U.S.C. § 1735:	Court records lost or destroyed where United States is a party

28 U.S.C. § 1738:	State statutes and judicial proceedings, *i.e.*, records and judicial proceedings of any court of any state
28 U.S.C. § 1739:	State -- non-judicial records or books kept in any public office of a state, territory or possession
42 U.S.C. § 3505:	Social Security record
44 U.S.C. § 3104:	Certification of transferred documents
47 U.S.C. § 412:	Records and reports of F.C.C.

2. Statutes remain in effect and public records properly certified are self-authenticating:

   Rule 902(4), Fed. R. Evid.

3. Number of departments and agencies have specific statutes for use of records and documents in litigation.

4. Each department and agency will usually have forms and a certification procedure.

5. *Example*: Certified Social Security record:

   42 U.S.C § 3505 -- authenticated by seal, copies admissible

6. For a list of over fifty statutes authorizing judicial notice of the seals of various United States Departments and agencies, *see* ***Weinstein's Evidence***, ¶ 90l(b)(10)[01] n.6

7. *Example* -- Tax Division, Department of Justice: Administrative officer of division will furnish certified copies of documents in Tax Division files:

   28 U.S.C. § 502 -- seal of Department of Justice

   Rule 902(1) -- seal purporting to be seal of United States, no extrinsic evidence required

8. *Allow plenty of time -- stress certification needed for litigation purposes.*

INCOME TAX RETURNS -- CERTIFICATION

1. Reproductions of returns and return information properly authenticated are admissible same as original -- 26 U.S.C. § 6103(p)(2)(C).

2. Authentication by certification -- District Director and Directors of Service Centers have seals of office and can certify returns and other documents in their custody for any purpose where certification is required:

   A. 26 U.S.C. § 7514 -- seal of office

   B. Treas. Reg. § 301.7514(c) (26 C.F.R.)

3. *See* prior discussion re introduction of tax returns at trial and statutory presumption re

signature on return.

SELF-AUTHENTICATION
Rule 902, Fed. R. Evid.

1. Document is accepted as prima facie genuine -- witness is not needed.
2. No further evidence of authenticity is needed.
3. Document proves itself.
4. But still up to jury to decide if document is genuine:

   United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984)

TEN TYPES OF DOCUMENTS
MADE SELF-AUTHENTICATING
Rule 902, Fed. R. Evid.

Rule 902(1)	Domestic public documents under seal
Rule 902(2)	Domestic public documents not under seal
Rule 902(3)	Foreign public documents
Rule 902(4)	Certified copies of public records
Rule 902(5)	Official publication
Rule 902(6)	Newspapers and periodicals
Rule 902(7)	Trade inscriptions and the like
Rule 902(8)	Acknowledged documents
Rule 902(9)	Commercial paper and related documents
Rule 902(10)	Presumptions under Acts of Congress

AUTHENTICATION OF PUBLIC RECORDS
BY CERTIFICATION

1. CANNOT BE USED *FOR PRIVATE DOCUMENTS* -- only available for governmental records, *i.e.*, public records, official records, and recorded instruments.
2. Provides method for certifying as to authenticity.
3. *Self-authenticating*: document treated as prima facie genuine.

4. *certified*: self-authenticating, not necessary to produce a witness -- the certificate is the witness.
5. Eliminates need for a witness where document speaks for itself, *e.g.*, deed, mortgage, judgment.
6. Moves trial faster.
7. Can move admission when logically, chronologically, or tactically appropriate.
8. *CERTIFICATION -- VOLUNTARY PROCEDURE -- CAN ALWAYS CALL A WITNESS*

DISTINGUISH:
AUTHENTICITY vs. ADMISSIBILITY

1. Authentication of a document does not mean it is admissible -- may be barred by hearsay rule, privileges, prejudice outweighs probative value, irrelevant, etc.
2. Rules only provide a method of authenticating a document, a telephone conversation, etc.

   See ***United States v. Verville***, 355 F.2d 527, 530 n.5 (7th Cir. 1965) (Rule 27 Fed. R. Crim. P., BUT principle applies to authentication versus admissibility)
3. Must still lay a foundation for admissibility.
4. Certification is merely evidence that document is genuine.

SELF-AUTHENTICATING
CERTIFIED PUBLIC DOCUMENTS AND RECORDS
Rules 902(1) thru 902(4), Fed. R. Evid.

1. No further evidence of authenticity required.
2. *Domestic public documents bearing a public seal and signature*
   Rule 902(1):

   A. Includes seals of United States, states and public offices having a seal, *i.e.*, political subdivisions, departments, officers and agencies

   B. Numerous sections of United States Code provide for judicial notice of official seals

   C. Signature with seal of office is enough

      United States v. Moore, 555 F.2d 658, 661 (8th Cir. 1977)

      United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied*, 429 U.S. 943 (1976) (motor vehicle registration record)

3. *Domestic public documents not under seal* -- Rule 902(2):

   A. Applies to documents signed in person's official capacity where public officer or employee has no seal of office

   B. Public officer with seal and duties in district must then certify under seal that signer has official capacity (is custodian) and that the signature is genuine

      Hunt v. Liberty Lobby, 720 F.2d 631, 651 (11th Cir. 1983) (CIA affidavits by custodian of records and certification of general counsel with CIA seal that affiants occupied the position stated in the affidavits)

4. *Foreign public documents* -- Rule 902(3):

   A. Procedure set forth for certifying foreign documents

   B. Procedure is time-consuming and cumbersome

   C. Procedure modeled on Rule 44(a)(2) of Federal Rules of Civil Procedure

   D. *Conviction reversed*: Record of convictions in Israel not properly certified -- aura of authenticity is not enough -- testimony of INS Agent did not establish that certificate was signed by one acting in official capacity who was authorized to sign

      United States v. Perlmuter, 693 F.2d 1290, 1292 (9th Cir. 1982)

      Compare, ***United States v. Regner***, 677 F.2d 754, 757-59 (9th Cir. 1982)

5. *Certified copies of public records* -- Rule 902(4):

   A. Provides for authentication of copies of public records when properly certified

   B. Applies to documents authorized to be recorded and filed and actually recorded or filed in public offices, *e.g.*, deeds, mortgages, etc.

   C. Certification may be via Rule 902(1), (2) or (3); OR BY ANY ACT OF CONGRESS or rule adopted by the Supreme Court

   D. *If custodian has a seal of office*, then her certification under seal that she has custody and the copy is correct is enough -- BUT

   E. *If custodian has no seal*, then in addition to certification of custodian, a public officer must certify under her seal that the signor is the custodian and the signature of the custodian is genuine

   F. This is basically the procedure of Rule 44(a) of the Federal Rules of Civil Procedure made applicable to criminal cases by Rule 27, Fed. R. Crim. P.

CASE EXAMPLES
Rule 902, Fed. R. Evid.

1. Registration record of stolen vehicle admitted to show it was not registered in the name of the defendant:

   United States v. Trotter, 538 F.2d 217, 218 (8th Cir.), *cert. denied,* 429 U.S. 943 (1976) (Rule 902(1) and 28 U.S.C. § 1739)

2. Federal Deposit Insurance Corporation certificate admitted in bank robbery case -- F.D.I.C. is an agency of the United States and testimony that F.D.I.C. certificate bearing purported seal of F.D.I.C. was hanging on the wall of the bank was enough:

   United States v. Wingard, 522 F.2d 796, 797 (4th Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976)

3. Certified transcript of testimony of one of defendants at a prior hearing -- certified court transcript read at trial:

   Anderson v. United States, 417 U.S. 211, 220 n.11 (1974)

4. IRS Certificate of Assessments and Payments -- no tax returns filed:

   United States v. Neff, 615 F.2d 1235, 1241 (9th Cir. 1980), *cert. denied,* 447 U.S. 925 (1980) (document showing no filing was made and preserved by the IRS, "a public office or agency," and was evidence in the form of a certification in accordance with Rule 902(4) and (1))

SELF-AUTHENTICATING
ACKNOWLEDGED -- NOTARIZED DOCUMENTS
Rule 902(8), Fed. R. Evid.

1. In almost every state, acknowledged title documents are receivable in evidence *without further proof*:

   See 5 Wigmore 1676

2. Self-authenticating -- any document with a certificate of acknowledgement executed by a notary or other officer as provided by law.

3. *Note*: not limited to title documents.

4. *A very important rule*: means you may not need a witness if document speaks for itself.

EXAMPLE
NOTARIZED DOCUMENT ADMITTED
Rules 803(10) and 902(8), Fed. R. Evid.

1. Criminal charge of making false statements to a Federally insured bank, *i.e.*, defendant said he worked for United Nations.
2. Affidavit of U.N. official stating defendant did not work for United Nations was admissible as public record -- proof of a negative under Rule 803(10).
3. BUT problem was how could affidavit be authenticated -- Rules 902(1) and 901(2) are limited to *domestic* entities.
4. *Solution By Court*: affidavit was notarized in New York by a notary public and was self-authenticating:

   See ***United States v. M'Biye***, 655 F.2d 1240, 1241-42 (C.A. D.C., 1981)

SELF-AUTHENTICATING
COMMERCIAL PAPER AND RELATED DOCUMENTS
Rule 902(9), Fed. R. Evid.

1. Self-authentication, Rule 902(9): Commercial paper and related documents. -- Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.
2. A very important rule.
3. Makes promissory notes, checks, bills of exchange and other commercial documents self-authenticating.
4. *Note* rule also applies to signatures on commercial documents.
5. No witness needed to establish authenticity.

GENERAL COMMERCIAL LAW
UNIFORM COMMERCIAL CODE
Rule 902(9), Fed. R. Evid.

1. "General commercial law" -- Committee intends that the Uniform Commercial Code (UCC) will be followed generally:

   A. House Report No. 93-650, Rule 902(a), 28 U.S.C.A. Fed. R. Evid., Legislative History, p. 652

   B. Advisory Committee Note to Rule 902(9)

2. Uniform Commercial Code has been adopted by all states except Louisiana, which has adopted only Articles 1, 3, 4 and 5:

   See ***Weinstein's Evidence*** ¶ 902(9)[01] n.1

PERTINENT PROVISIONS OF
UNIFORM COMMERCIAL CODE (UCC)
Rule 902(9), Fed. R. Evid.

1. *Section 1-202. Prima Facie Evidence by Third Documents*

   A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

2. *Section 3-307. Burden of Establishing Signatures Defenses and Due Course.*

   (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue,

   (a) the burden of establishing it is on the party claiming under the signature; but

   (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

3. *Section 3-510. Evidence of Dishonor and Notice of Dishonor*

   The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

   (a) a document regular in form as provided in the preceding section which purports to be a protest;

   (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

   (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

4. *Section 8-105. Securities Negotiable; Presumptions*

   (2) In any action on a security

(a) Unless specifically denied in the pleadings, each signature on the security or in a necessary endorsement is admitted;

(b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under signature but the signature is presumed to be genuine or authorized; . . . .

CASE EXAMPLE -- Rule 902(9)
PROMISSORY NOTE
Rule 902(9), Fed. R. Evid.

1. ***United States v. Carriger***, 592 F.2d 312, 316 (6th Cir. 1979):

   A. *Tax evasion case* -- net worth method proof and defendant attacked opening net worth on grounds it was error to exclude promissory note to show defendant made loans and thus had non-income funds in prosecution year

   B. *Held*: Conviction reversed, notes were self-authenticating, and relevant and signatures on notes are presumed genuine

2. Relevant because the government's opening net worth contained no indebtedness from Vernon Carriger to the defendant and "the notes at least had a tendency to make more probable the fact so claimed by the defendant that the defendant's opening net worth was inaccurate." Rule 402, Fed. R. Evid.

3. Authentic because "the notes were sufficiently identified as promissory notes by their production and no further authentication was required by reason of an applicable provision for self-authentication in Rule 902(9), Fed. R. Evid.":

   United States v. Carriger, 592 F.2d at 316

4. "No testimony required to establish genuineness of the signatures on the notes. . . UCC § 3-307 creates a presumption that commercial paper offered in evidence is authentic ...."

   United States v. Carriger, 592 F.2d at 316

CASE EXAMPLE -- Rule 902(9)
CHECKS SELF-AUTHENTICATING

1. ***United States v. Little***, 567 F.2d 346, 349 n.1 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978):

   A. Mail fraud conviction - check kiting scheme

   B. Checks drawn on corporate accounts admitted into evidence

C. "The court also did not err in admitting the corporate checks into evidence. The checks were relevant, admissible under Federal Rule of Evidence 902(9) as commercial paper or as an exception to the hearsay rule under Rule 803, and did not unfairly prejudice the defendant (567 F.2d at 349 n.l)

2. ***Matter of Richter & Phillips Jewelers & Dist.***, 31 B.R. 512, 514 n.l (Bkrtcy., S.D. Ohio 1983):

A. Federal Rules of Evidence apply to bankruptcy proceedings

B. Check is self-authenticating under Rule 902(9) -- extrinsic evidence not necessary

CASE EXAMPLE -- Rule 902(9)
COLLEGE TRANSCRIPTS SELF-AUTHENTICATING

1. ***United States v. Hitsman***, 604 F.2d 443, 447 (5th Cir. 1979):

A. Drug case and court extended itself

B. College transcript not admissible as a business record since no foundation witness testified

C. Court admitted transcript under Rule 803(24)

D. Found transcript to be self-authenticating under Rules 901 and 902:

i. Took judicial notice of existence of college
ii. Found it was normal for college to make such a record in the course of its operations
iii. Transcript had indicia of being an authentic copy since it bore seal of registrar and signature
iv. Personal information in transcript was corroborated by a witness

ALSO SELF-AUTHENTICATING
Rules 902(5) and 902(6), Fed. R. Evid.

1. "*Official publications. -- Books, pamphlets, or other publications purporting to be issued by public authority.*"
Rule 902(5)

A. *Example*: Book issued by Government Printing office, State Agency, etc.

B. *Reminder*: Does not provide for admissibility; merely for authenticity

C. Bureau of Labor statistics would come under this rule

2. *Newspapers and periodicals*: printed materials *purporting* to be newspapers or periodicals -

- Rule 902(6):

A. Magazine article was self-authenticating, ***Application of Consumers Union of U.S., Inc.***, 495 F. Supp. 582, 587 n.2 (S.D.N.Y. 1980)

B. *Example*: Copy of Washington *Post* is self-authenticating

WITNESS NEEDED -- EXAMPLE
IRS CERTIFICATE OF ASSESSMENT AND PAYMENTS -- FORM 4340
COMPUTER TRANSCRIPT -- FORM 4303

1. IRS maintains a bookkeeping record of each taxpayer.
2. Transcript or Certificate of Assessments and Payments reflects information as to a given taxpayer such as date returns filed, absence of filing, payment made, penalties paid, estimated tax payments, and the like.
3. Transcript can be useful at trial -- *examples*:

   A. Net worth case -- reflects taxes paid, a non-deductible item

   B. Tax history -- delinquent returns, penalties paid, audit results, date return filed

   C. Returns destroyed -- can still establish tax history

4. Certificate of Assessment used to prove contents of return when fire destroyed file copy and only copy available was penciled retained copy of taxpayer

   A. ***Moore v. United States***, 254 F.2d 213, 215 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)

5. Transcript can be certified under statutory procedure, Rule 44 procedure, or Rule 902(1), (4), Fed. R. Evid.; also admissible under Rule 803(8) and Rule 1005, Fed. R. Evid.
6. Admissibility of certified transcript:

   A. Fed. R. Evid. 803(8), 1005

   B. ***Vloutis v. United States*** 219 F.2d 782, 789 (5th Cir. 1955)

   C. ***Holland v. United States***, 209 F.2d 516, 520 (10th Cir.), *aff'd*, 348 U.S. 121 (1954)

   D. ***Moore v. United States***, 254 F.2d 213, 216 (5th Cir.), *cert. denied*, 357 U.S. 926 (1958)

7. Witness needed:

   A. Documents does not speak for itself -- explanation needed

   B. BUT -- have Certificate of Assessments and Payments certified under Rule 902(1) and have witness explain terms, codes, etc.

8. Contact Service Center well in advance of trial -- takes time to obtain certified documents.

9. Obtain proper witness and arrange for interview.

MISCELLANEOUS RULES

RULE OF COMPLETENESS
Rule 106, Fed. R. Evid.

1. "When a writing or recorded statement or part thereof is introduced by a party, an *ADVERSE PARTY* may require the introduction at that time of any *other part* or any other writing or recorded statement *which ought in fairness to be considered contemporaneously with it*." (emphasis supplied)

2. *Scope of Rule 106*:

   A. *LIMITED TO WRITING OR RECORDED STATEMENTS*

   B. Testimony as to conversations is not covered by Rule 106

   C. *Practical matter*: case law applies the rule of completeness to conversations -- *see below*

   D. *Rule provides for*:

      i. Admission of any other part of offered document, or

      ii. any other document,

      iii. which ought in fairness to be considered contemporaneously with document to be admitted

APPLICABLE PRINCIPLES -- PRE-RULES

1. *Part of a document, a correspondence, or a conversation* admitted -- then opponent may put in balance to rebut adverse inferences of incomplete evidence:

   United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948)

   United States v. Paquet, 484 F.2d 208, 212 (5th Cir. 1973)

2. BUT, *only relevant parts* of document or conversation may be admitted on rule of completeness theory:

   United States v. Dennis, 183 F.2d 201, 229-30 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951)

United States v. Littwin, 338 F.2d 141, 145 (6th Cir. 1964)

United States v. Smith, 328 F.2d 848, 850 (6th Cir. 1964)

3. *NO RULE THAT ONCE PART OF A DOCUMENT OR CONVERSATION IS ADMITTED, THE ENTIRE DOCUMENT MUST BE RECEIVED*:

   Dennis, 183 F.2d 201, 229-30 (2d Cir. 1950)

   Camps v. New York City Transit Authority, 261 F.2d 320, 322 (2d Cir. 1958)

   Littwin, 338 F.2d 141, 145 (6th Cir. 1964)

   United States v. McCorkle, 511 F.2d 482, 486 (7th Cir. 1975)

4. Rule 106 deviates from the common law only in respect to time of admission:

   United States v. Walker, 652 F.2d 708, 710 n.2 (7th Cir. 1981)

5. BUT note that case law applies to conversations, doctrine of verbal completeness -- Rule 106 applies only to writing or recorded statement.

ADMISSIBLE AT THAT TIME
Rule 106, Fed. R. Evid.

1. *Portion of document admitted* then adverse party can insist on admission *AT THAT TIME* of any other part of document or any other document that "ought in fairness" be considered at the same time.

2. Party seeking admission of evidence under Rule 106 is "entitled to compel the admission at the time the opposing party offers the partial evidence or waiting until a later stage of trial":

   United States v. Walker, 652 F.2d 708, 710 n.2 (7th Cir. 1981) (conviction reversed, defendant entitled to have contemporaneous admission when government introduced portion of transcript)

3. Rule 106 requires "that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact":

   United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

   United States v. Rubin, 609 F.2d 51, 63-64 (2d Cir. 1979)

4. Rule is to prevent admission in evidence of truncated statements giving an out of context picture to the jury -- judge makes a "determination of fairness":

   United States v. Jones, 663 F.2d 567, 571 (5th Cir. 1981)

LIMITATIONS OF RULE

Rule 106, Fed. R. Evid.

1. Rule 106 does *not* require [authorize] introduction of portions of a statement that are neither explanatory of nor relevant to the admitted passages:

   United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)

   United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)

   United States v. McCorkle, 511 F.2d 482 (7th Cir.), *cert. denied*, 423 U.S. 826 (1975)

2. "This rule is circumscribed by two qualifications. The portions sought to be admitted (1) must be relevant to the issues and (2) only those parts which qualify or explain the subject matter of the portion offered by the opponent need be admitted":

   United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981)

   United States v. Crosby, 713 F.2d 1066, 1074 (5th Cir.), *cert. denied*, 104 S. Ct. 506 (1983)

EXAMPLES
Rule 106, Fed. R. Evid.

1. *Depositions*: can insist on admission of "related" portions of deposition at same time party offers a different portion.
2. *Letter Introduced*: admission at same time of reply to letter, or letter causing reply, if "ought in fairness," etc.
3. *Document with attachments and only document offered*: can require admission of attachments.
4. *NOTE*: Not limited to document offered -- may be "any other document" if it should in fairness be considered contemporaneously with the admitted document.

TIME OF ADMISSION
ADVERSE PARTY CHOICE
Rule 106 Fed. R. Evid.

1. Adverse party can develop matter on cross-examination or as part of the case if he so chooses.

2. Tactics and nature of document offered will determine course to follow.
3. *Consider*: Delay until cross-exam -- make witness and opponent look bad -- Immediate correction -- friendly witness being badgered.

REFRESHING MEMORY
Rule 612, Fed. R. Evid.

WRITING USED TO REFRESH MEMORY

1. Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code:

   A. If a witness uses a writing to refresh his memory for the purpose of testifying, either --

      i. while testifying, or

      ii. *before testifying*, if the court in its *discretion* determines it is necessary in the interests of justice,

   B. an adverse party is entitled to have the writing produced at the hearing, to *inspect* it, to *cross-examine* the witness thereon, and to *introduce in evidence* those portions which relate to the testimony of the witness . . . ."

STEPS IN REFRESHING RECOLLECTION
Rule 612, Fed. R. Evid.

1. Exhaust memory of witness -- can't recall fact or event.
2. Leading questions to a limited extent only -- to revive memory (if Court permits).
3. Have document marked for identification (not required in all courts).
4. Show document to witness.
5. Witness silently reads document and then puts it aside.
6. Testifies as to recollection revived -- not from document.

CAN USE ANYTHING TO REFRESH RECOLLECTION?

1. Can refresh recollection with "a song, a scent, a photograph, an allusion, even a past statement known to be false":

   United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 67 S. Ct. 591 (1947)

2. BUT compare -- agents memorandum of interview can be used to refresh recollection of witness only if foundation laid that memorandum on its face reflects the witness's

statement, or acknowledged that it does by the witness, and *court is satisfied it may be of help in refreshing recollection.*

United States v. Shoupe, 548 F.2d 636, 640 (6th Cir. 1977)

3. "When there is careful supervision by the court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witnesses' memory is inadmissible."

   United States v. Scott, 701 F.2d 1340, 1346 (11th Cir. 1983) (credit card applications held inadmissible because government had failed to disclose them to defense counsel pursuant to Rule 16, Fed. R. Crim. P., but applications could be used by government to refresh recollection of witness)

4. "The fact that a government agent instead of the witness prepared the statement is inconsequential." BUT: the trial judge has a duty to prevent a witness from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection:

   Thompson v. United States, 342 F.2d 137, 140 (5th Cir.), *cert. denied*, 85 S. Ct. 1560 (1965)

5. Use discretion in selecting material used to refresh recollection.

MECHANICS -- REFRESHING RECOLLECTION
Rule 612, Fed. R. Evid.

Q. How much did you pay for the boat?
A. I can't remember, at this time.
Q. Do you know of anything that will help refresh your recollection?
A. Yes, I made some notes when I bought the boat.
Q. Do you have the notes with you.
A. Yes.

[Obtain notes and mark for Identification as Gov. Ex. ____]

Q. Let me show you Gov. Ex. ____. Read it to yourself and then put the document aside . . .
Q. Do you now remember what you paid for the boat?
A. Yes.
Q. How much did you pay?

PARTY REFRESHING RECOLLECTION
CAN'T READ STATEMENT TO JURY
Rule 612, Fed. R. Evid.

1. Can't read statement to witness under guise of refreshing recollection.
2. Witness must testify from revived memory, not from statement.
3. Witness *must* read document to herself:

   Goings v. United States, 377 F.2d 753, 761 (8th Cir. 1967) ("but to read the statement aloud for refreshing recollection to the witness, hostile or not, is patent error")

   United States v. Hicks, 420 F.2d 814, 816 (5th Cir. 1970)

   Gaines v. United States, 349 F.2d 190, 192 (D.C. Cir. 1965)

4. Lengthy matter, accounting matters, etc., then court has discretion to permit witness to consult the writing as she testifies:

   Goings v. United States, 377 F.2d 753, 761 n. 11 (8th Cir. 1967), appeal after remand, 393 F.2d 884 (1968) -- "The trial court in many instances should liberally allow a witness to refer to records, accounting sheets, and reports in testifying. Generally, doctors, lawyers, accountants and other lay witnesses testifying should be allowed continuously to refer to data on their reports, etc."

OBJECTION TO IMPROPER PROCEDURE
Rule 103(c), Fed. R. Evid.

1. Procedure used in refreshing recollection should be conducted as provided in Rule 103(c), Fed. R. Evid.:

   > (c) Hearing of Jury. -- In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

2. Use Rule 103(c) any time opponent seeks to suggest inadmissible evidence to jury via improper remarks, questions, etc.
3. BUT note: leading questions can be used on preliminary or unsupported matters.

ADVERSE PARTY CAN EXAMINE
AND INTRODUCE MEMORY AID
Rule 612, Fed. R. Evid.

1. Absolute right to *examine document*.
2. Right to *cross-examine witness* on document.
3. *INTRODUCE in evidence* "those portions which relate to the testimony of the witness."
4. ONLY opposing party can put document in evidence:

   Markel Service, Inc. v. National Farm Lines, 426 F.2d 1123, 1128 (10th Cir. 1970)

5. *Mechanics*: IF opposing party offers document, it should be marked as an exhibit of the opposing party.

6. NOTE: *COURT IN DISCRETION* can order material produced that was used to refresh recollection *BEFORE TESTIFYING*.

CAVEAT -- JURY INSTRUCTION
Rule 612, Fed. R. Evid.

1. Should have limiting instruction that memory aid can be used by jury only to judge credibility of witness -- to see what witness relied on.

HEARSAY EXCEPTIONS
Past Recollection Recorded
Rule 803(5), Fed. R. Evid.

1. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

   803(5) *Recorded recollection* -- A memorandum or record concerning a matter about which a witness once had knowledge but now has ***INSUFFICIENT RECOLLECTION TO ENABLE HIM TO TESTIFY FULLY AND ACCURATELY***, shown to have been made or adopted by the witness when the *matter was fresh in his memory* and to reflect that knowledge correctly. If admitted, the memorandum or record *may be read into evidence* but may not itself be received as an exhibit unless offered by an adverse party. [Emphasis supplied]

DISTINGUISH

1. *REFRESHING COLLECTION* -- Rule 612 -- *Witness testifies*.

2. *PAST RECOLLECTION RECORDED* -- Rule 803(5) -- *Document Testifies.*

WITNESS FORGETS ON STAND -- "INSUFFICIENT RECOLLECTION"
Rule 803(5), Fed. R. Evid.

1. Previously had to pretty much show a complete failure of memory.
2. Now it is enough to show: "*INSUFFICIENT [PRESENT] RECOLLECTION TO ENABLE THE WITNESS TO TESTIFY FULLY AND ACCURATELY*."
3. More liberal but foundation must still be laid that witness is unable to remember essential matter -- *that he knew at the time*:

   United States v. Edwards, 539 F.2d 689, 691-92 (9th Cir.), *cert. denied*, 429 U.S. 984 (1976)

4. *Note*: witness might remember part but not all of a matter, then would seem only forgotten part of memorandum could be read to jury.
5. Refreshing recollection can be preliminary step to reaching past recollection doctrine -- BUT subject to Rule 103(c) limitations.

MEMORANDUM OR RECORD OF MATTER
Rule 803(5), Fed. R. Evid.

1. Must lay foundation that witness had knowledge of matter at one time -- personal firsthand knowledge.
2. Memorandum is a *substitute for present memory*.
3. Memorandum or record must be *made* or *adopted* by the witness -- one with personal firsthand knowledge:

   A. *Made by witness* -- no problem

   B. *Adopted memo* -- must show that witness examined memo and found it to be accurate:

      United States v. Williams, 571 F.2d 344, 348 (6th Cir. 1978) (statement written by agent and signed by witness)

   C. *Multiple participants* -- employer dictating to secretary or secretary making memorandum at direction of employer -- covered by rule

      S. Report 93-1277, 12 U.S. Code Congressional & Administrative News, p. 63

      H. Report 93-650, 12 U.S. Code Congressional & Administrative News, p. 77

4. *Contemporaneous memo* -- made when matter was fresh in memory:

   A. Requirement that memorandum be contemporaneous in the sense that it was made or *adopted* while matter was fresh in memory of witness

   B. Less strict than requirement that memo be made "at or near the time of the recorded event"

   C. But necessary part of foundation is to show that memo was made when witness would still have reason to remember

5. *Reflects knowledge correctly*:

   A. Rule does not change case law

   B. Witness must recognize memo as being true and accurate

   C. Sufficient if witness testifies he remembers correctly recording the facts, or

   D. Belief that witness would not have signed or written memo if it was not true

   E. Habit and practice to record event as part of a business duty -- but not necessary to lay shop book rule foundation.

      Ettelson v. Metropolitan Life Ins. Co., 164 F.2d 660, 667 (3d Cir. 1947)

6. *Grand jury testimony* -- proper foundation then pertinent portions of grand jury testimony can be read to jury as a past-recorded recollection exception to the hearsay rule:

   United States v. Patterson, 678 F.2d 774, 777 (9th Cir. 1982)

MEMORANDUM -- AS EVIDENCE
Rule 803(5), Fed. R. Evid.

1. Proponent -- memorandum can be read to the jury.

2. *BUT ONLY ADVERSE PARTY CAN MOVE ADMISSION OF MEMORANDUM INTO EVIDENCE*:

   See confusing and incomplete discussion in ***United States v. Civella***, 666 F.2d 1122 (6th Cir. 1981) -- seems to overlook admission only by adverse party or else court relied on wrong rule

3. Practical point -- jury does not see memorandum unless adverse party wants it in evidence

4. Case law is to the contrary so this is a change:

   Papalia v. United States, 243 F.2d 437 (5th Cir. 1957)

SUMMARIES AND SCHEDULES

SUMMARIES -- GENERALLY

1. Summaries constantly used in tax cases.
2. Distinguish -- although courts sometimes do not:

   A. Summary based on documents in evidence

   B. Summary of documents *NOT* produced in court -- Rule 1006, Fed. R. Evid.:

      United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

      United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

SUMMARY OF EVIDENCE

1. Situation -- numerous deposit slips, checks, invoices, receipts *admitted into evidence*.
2. Summaries of evidence already admitted into evidence are merely pedagogical devices, which should be used only as a testimonial aid, and should not be admitted into evidence:

   United States v. Wood, 943 F.2d 1048, 1053 (9th Cir. 1991)

3. However, several circuits allow a summary of evidence to be put before the jury with proper limiting instructions:

   United States v. Mohney, 949 F.2d 1397, 1405 (6th Cir. 1991)

4. Case law -- extensive records in evidence can be summarized in a chart, schedule, etc., based on the evidence:

   United States v. Prevatt, 526 F.2d 400, 404 (5th Cir.), *reh. denied*, 531 F.2d 575 (1976)

   United States v. Pollack, 417 F.2d 240, 241 (5th Cir. 1969), *cert. denied*, 397 U.S. 917 (1970) (summaries prepared by an accountant of various complex transactions were admissible)

   United States v. Bartone, 400 F.2d 459, 461 (6th Cir.), *cert. denied*, 393 U.S. 1027 (1969) (Court should examine proposed summaries and charts prior to admission and advise jury that a summary is not evidence)

   United States v. Cooper, 464 F.2d 648, 656 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (summary of extensive bank records, accounting machine tapes, debt and audit slips and loan papers by F.B.I. agent)

   United States v. Kaatz, 705 F.2d 1237, 1245 (10th Cir. 1983) (specific items case and

charts introduced summarizing 2,300 governmental exhibits; "summaries may properly be put before a jury with limiting instructions")

United States v. Evans, 910 F.2d 790, 801 (11th Cir. 1990) (admitted chart summarizing sixty $100 payments per month that defendant received over a five year period)

BUT compare, ***United States v. Collins***, 596 F.2d 166, 169 (6th Cir. 1979) (summaries straightforward and clearly based on evidence then not required that judge conduct a hearing outside presence of jury before admitting summaries)

5. Summary charts must be based on evidence and fairly represent and summarize the evidence upon which they are based:

United States v. Sorrentino, 726 F.2d 876, 884 (1st Cir. 1984) ("well established that summary exhibits such as net worth schedules" are admissible for the convenience of the jury but purported summaries not supported by the evidence are not admissible)

United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

United States v. O'Connor, 237 F.2d 466, 475 (2d Cir. 1956)

United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

United States v. Keltner, 675 F.2d 602, 606 (4th Cir.), *cert. denied*, 459 U.S. 832 (1982)

United States v. Price, 722 F.2d 88, 91 (5th Cir. 1983)

Gordon v. United States, 438 F.2d 858, 876-77 (5th Cir.), *cert. denied*, 404 U.S. 828 (1971)

United States v. Wood, 943 F.2d 1048, 1054 (9th Cir. 1991)

Oertle v. United States, 370 F.2d 719, 727-28 (10th Cir. 1966), *cert. denied*, 387 U.S. 943 (1967)

6. *Principle*: Aids jury in understanding, *e.g.*, summary of deposits reflecting monthly total of bank deposits, summary of loans made, properties sold, etc.

SUMMARY TESTIMONY

1. The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions:

United States v. Moore, 923 F.2d 910 (1st Cir. 1991)

United States v. Sutherland, 929 F.2d 765 (1st Cir. 1991)

United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct.

2964 (1992)

2. Summary testimony in criminal trials is allowed when:

   A. The Court charges the jury as to all the elements necessary for conviction

   B. The summary is intended to aid the jury in organizing proof

   C. The summary is not inflammatory or prejudicially worded

   United States v. Sturman, 951 F.2d 1466, 1480 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992)

   United States v. Benson, 941 F.2d 598, 605 (7th Cir. 1991)

NET WORTH/EXPENDITURE CASES
GOVERNMENT CONTENTIONS

1. Distinguish net worth and expenditure computations -- must be based on evidence BUT computation reflects only government contentions -- a summary of evidence tending to prove guilt; a summary of government contentions:

   United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976)

   United States v. Lawhon, 499 F.2d 352, 357 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975)

   Barsky v. United States, 339 F.2d 180, 181 (9th Cir. 1964)

2. "The nature of a summary witness' testimony requires that he draw conclusions from the evidence presented at trial":

   United States v. Esser, 520 F.2d 213, 218 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

SUMMARY OF RECORDS
NOT IN EVIDENCE
Rule 1006, Fed. R. Evid.

1. *Case law*: voluminous records, summary admissible, not always necessary to produce records where available to defense:

   Hecht v. United States, 393 U.S. 1082 (1969)

   United States v. Oshatz, 912 F.2d 534, 543 (2d Cir. 1990)

   United States v. Paxton, 403 F.2d 631, 632 (3d Cir. 1968), *cert. denied sub nom.* ***Hecht***

v. United States, 393 U.S. 1052 (1969)

United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991)

Stevens v. United States, 206 F.2d 64, 67 (6th Cir. 1953)

United States v. Cummings, 468 F.2d 274, 279 (9th Cir. 1972)

2. Now expressly provided for in Rule 1006.

3. ***Rule 1006 Summaries, Fed. R. Evid.***:

   A. "[V]oluminous writings, recordings or photographs which cannot conveniently be examined in Court."

   B. "[M]ay be presented in the form of a chart, summary or calculation."

   C. "*The originals or duplicates shall be available* for examination or copying, or both, by other parties at reasonable time and place."

   D. Court "*may* order" production in court of documents summarized

   E. *Practical point*: may be necessary *for government* to obtain agreement or court order providing for examination of records by defense

4. *Rule of reason* -- cannot use rule as an excuse for not producing records where records are not voluminous and could be conveniently examined in court:

   Javelin Investment, S.A. v. Municipality of Ponce, 645 F.2d 92, 96 (1st Cir. 1981) (ten pages of records not the type of voluminous writings which cannot be conveniently examined in court)

   United States v. Scales, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979) (BUT note that court at one point confuses rule that summaries of voluminous documents in evidence are admissible with Rule 1006 pertaining to documents not in evidence)

SUMMARY OF DOCUMENTS ONLY --
NOT TESTIMONY
Rule 1006, Fed. R. Evid.

1. Rule 1006 applies only to admission of summaries of voluminous documentary evidence.

2. Rule 1006 does *not* provide for the admission of summaries of the testimony of out-of-court witnesses:

   United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

   United States v. Goss, 650 F.2d 1336, 1344 n.4 (5th Cir. 1981) (agent's testimony that

checks mailed based on out-of-court interviews, prior testimony of witnesses, and information on face of checks, was hearsay)

ADMISSIBLE EVIDENCE ONLY
Rule 1006, Fed. R. Evid.

1. Summary must be based on evidence; or on evidence that is otherwise admissible -- must lay foundation for authenticity and admissibility of records being summarized that are not produced:

   United States v. Pelullo, 964 F.2d 193, 205 (3d Cir. 1992)

   Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171, 1175 (8th Cir. 1981) (summary drawn from inadmissible data is not admissible)

   United States v. Johnson, 594 F.2d 1253 (9th Cir. 1979) (mail fraud conviction reversed -- no showing that underlying records were admissible -- not enough that defense given notice that records would be used)

2. *Recording of telephone calls* -- Government expert's calculations of gross revenue of a gambling operation admitted in lieu of playing to jury tapes of 3,000 phone calls:

   United States v. Clements, 588 F.2d 1030, 1038 (5th Cir. 1979) (unnecessarily time - consuming to play the tapes of all 3000 calls, calculation admissible under Rule 1006)

PREPARATION OF SUMMARY
Rule 1006, Fed. R. Evid.

1. Summary prepared under direction and control of witness is enough, not necessary for everyone who worked on summary to testify:

   United States v. Mortimer, 118 F.2d 266, 269 (2d Cir.), *cert. denied*, 314 U.S. 616 (1941)

   United States v. Scales, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979)

   Diamond Shamrock Corp. v. Lumbermans Mutual Casualty Co., 466 F.2d 722, 727 (7th Cir. 1972) (not necessary that every person who assisted in the preparation of the original records or the summaries be brought to the witness stand)

2. Agent will testify that summary prepared under his/her direction and control; that agent reviewed and adopted the work

RULE 1006 SUMMARIES
ARE EVIDENCE

1. Summaries of evidence introduced in court then judge will instruct jury that the underlying exhibits are the evidence -- *not* the summary.

2. BUT under Rule 1006 there are no exhibits in evidence and the summary itself is evidence:

   United States v. Bakker, 925 F.2d 728, 737 (4th Cir. 1991)

   United States v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977)

   Federal Judicial Center Committee to Study Criminal Jury Instructions, ***Pattern Criminal Jury Instructions*** (Federal Judicial Center 1982), 8. Summaries of Records as Evidence, p. 13

POINTS TO NOTE

PRIOR INCONSISTENT
STATEMENT AT PRIOR PROCEEDING
Rule 801(d)(1)(A)

1. Witness on stand subject to cross-examination then prior inconsistent statement under oath at a trial hearing or other proceeding, or in a deposition, is NOT HEARSAY and is substantive evidence of guilt:

   A. Rule 801(d)(1)(A)

   B. ***United States v. Woods***, 613 F.2d 629, 637 (6th Cir. 1980), and cases cited

2. N.B. Substantive evidence -- *not* merely impeaching:

   United States v. Plum, 558 F.2d 568, 575-76 (10th Cir. 1977)

GRAND JURY TESTIMONY
Rule 801(d)(1)(A)

1. "It is well established that testimony before a grand jury constitutes 'other proceedings' within the rule [801(d)(l)(A)]":

   A. ***United States v. Long Soldier***, 562 F.2d 601, 605 (8th Cir. 1977)

   B. Conference Report No. 93-1597, 1974 U.S. Code & Admin. News, p. 7104

2. Testimony at trial inconsistent with grand jury testimony -- grand jury testimony can be introduced as substantive evidence:

   United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

   United States v. Blitz, 533 F.2d 1329, 1344-45 (2d Cir. 1976)

United States v. Gerry, 515 F.2d 130, 141 (2d Cir. 1975)

United States v. Dennis, 625 F.2d 782 (8th Cir. 1980) -- that statements elicited by means of leading questions does not affect eligibility under Rule 801(d)(1)(A)

United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977) (statement before a grand jury is a statement given at a trial, hearing or other proceeding within the meaning of Rule 801(d)(1)(A))

United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977)

3. Extracts of grand jury transcript itself can be made an exhibit and introduced into evidence -- discretionary with trial judge:

   United States v. Coran, 589 F.2d 70, 76 (1st Cir. 1978)

PRIOR INCONSISTENT STATEMENT
NOT IN PRIOR PROCEEDING/UNDER OATH
Rules 607 and 613, Fed. R. Evid.

1. Does not come under Rule 801(d)(1)(A).
2. Prior inconsistent statement not at a prior proceeding and not under oath still can be admissible to attack credibility -- Rules 607, 613.
3. BUT impeaching only -- *not substantive evidence*:

   United States v. Harris, 523 F.2d 172, 175 (6th Cir. 1975)

   United States v. Ragghianti, 560 F.2d 1376, 1379-81 (9th Cir. 1977) (failure to instruct jury that testimony was impeaching only was reversible error)

IMPEACHING YOUR OWN WITNESS
Rule 607, Fed. R. Evid.

1. "The credibility of a witness may be attacked by any party, including the party calling him." Rule 607, Fed. R. Evid.
2. Eliminates the old voucher rule.
3. No showing of surprise necessary:

   United States v. Palacios, 556 F.2d 1359, 1363 (5th Cir. 1977) (under Rule 607 impeachment is proper without a showing of surprise)

   United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977)

4. BUT surprise can still be a factor in supporting introduction of impeaching evidence.

5. You can't call a witness just so you can impeach him and then call impeaching witness so as to get in testimony otherwise inadmissible.

6. *See* discussion in ***United States v. Morlang***, 531 F.2d 183, 188 (4th Cir. 1975) ("never been the rule that a party may call a witness where his testimony is known to be adverse for the purpose of impeaching him.")

EVIDENCE THAT A WITNESS
IS NOT TO BE BELIEVED
Rule 608(a), Fed. R. Evid.

1. Credibility of a witness may be attacked by evidence in the form of either: (1) opinion or (2) reputation -- Rule 608(a), Fed. R. Evid.

2. Defense calls witness who testifies that he loaned defendant money, or he gave the defendant money as a gift, or that the defendant was not a partner, or any testimony to exculpate the defendant.

3. You have a witness who knows the defense witness well and/or knows her reputation for truth and veracity. Your witness tells you that the defense witness is a liar.

4. You can call your witness and develop testimony that:

   A. In her *opinion* the defense witness (the defendant if he was the witness) is not truthful and she would not believe him under oath, or

   B. The *reputation* of the defense witness (or the defendant if he has introduced character evidence) for truthfulness or untruthfulness is bad

5. *See* the following cases:

   United States v. Lollar, 606 F.2d 587, 588-89 (5th Cir. 1979) (defendant testified and his employer testified that he would not believe him under oath)

   United States v. Walker, 313 F.2d 236, 239 (6th Cir. 1963) (defendant testified, government called two police officers on rebuttal who testified that the defendant's reputation for truth and veracity was bad)

   United States v. Bambulas, 471 F.2d 501, 504 (7th Cir. 1972) (Would you believe the witness under oath? is a proper question)

   Hodge v. United States, 414 F.2d 1040, 1044 (9th Cir. 1969) (testimony as to defendant's veracity is admissible once the defendant takes the stand)

   United States v. Thomas, 676 F.2d 531, 535 (11th Cir. 1982) (impeachment is "not dependent upon the defendant's introduction of good character evidence")

6. *See* discussion in ***United States v. Watson***, 669 F.2d 1374, 1381 (11th Cir. 1982) -- note

difference in foundation depending on whether reputation or opinion testimony is to be offered.

7. *Caution*: general rule is prosecution may *not* introduce evidence of the bad character of the defendant unless and until the defendant presents evidence of good character, Rule 404(a), Fed. R. Evid.

   United States v. Hewitt, 634 F.2d 277, 278 (5th Cir. 1981)

8. *Conversely*: defendant may always present evidence of pertinent traits of character but the door is then open to cross-examination and rebuttal on those traits whether the defendant takes the stand or not, ***Hewitt***, 634 F.2d at 278

BAD ACTS -- NO CONVICTION
Rule 608(b), Fed. R. Evid.

1. Can attack credibility of a witness (or defendant) by cross-examining as to specific instances of misconduct going to truthfulness or untruthfulness.

2. Not necessary that conduct led to a conviction -- only requirement is that conduct be probative of truthfulness, *i.e.*, that conduct involved dishonesty or false statement, Rules 608(b), 609(a)(2), Fed. R. Evid.:

   United States v. Sperling, 726 F.2d 69, 75 (2d Cir. 1984) (proper for government to cross-examine defendant regarding his false credit card applications to show a general lack of credibility)

   United States v. Reed, 700 F.2d 638, 643-44 (11th Cir. 1983) (embezzlement and unlawful possession and obstruction of mails conviction reversed, question and testimony as to use and possession of marijuana not admissible and highly prejudicial, does not shed any light on character for untruthfulness)

GOOD FAITH BASIS

1. Must have good basis for question -- may be required to disclose good faith basis to the court outside the jury's presence:

   Michelson v. United States, 335 U.S. 469, 472, 481 (1948)

   United States v. Bright, 588 F.2d 504, 511 (5th Cir. 1979) (must have good faith factual basis for incidents inquired about and incidents must be relevant to the character tracts involved at the trial)

2. This is true of any question asked -- may explore area without full knowledge of answer but

on demand must provide good faith basis for question alleging adverse facts:

United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 704 (1984)

COLLATERAL MATTER

1. STUCK with answer of witness on a collateral matter -- extrinsic evidence is not admissible -- Rule 608(b).
2. *Collateral*: Matter generally is collateral if matter is relevant *only* to contradict the in-court testimony of the witness, a matter far afield from the main controversy.
3. *Not Collateral*: Matters that directly concern the general credibility of the witness such as bias, corruption, coercion, etc., and may be contradicted by other evidence.

DEFENDANT'S STATEMENTS
Rule 801(d)(2)(A), Fed. R. Evid.

1. *Admission*: statement of the defendant offered by the government to prove the truth of the matter asserted is *not* hearsay:

   Rule 801(d)(2)(A), Fed. R. Evid.

2. Statement of the defendant offered by the government to show it was made and not to prove the truth of what the defendant said is *not* hearsay, *e.g.*, offered to show defendant made false statement to special agent from which jury could infer consciousness of guilt:

   Anderson v. United States, 417 U.S. 211, 219-20 (1974) (point of prosecution in introducing statements was simply to prove they were made so as to establish a foundation for later showing that they were false)

   Rule 801(c), Fed. R. Evid.

3. If defendant offers his own statement for the truth of the matter asserted, it is hearsay and it is not admissible:

   United States v. Marin, 669 F.2d 73, 84 (2nd Cir. 1982)

4. BUT if defendant offers his own statement simply to show it was made rather than to establish the truth of the matter asserted, then it is not hearsay -- but the fact that the statement was made must be relevant to an issue in the case or else it is not admissible, ***United States v. Marin***, 669 F.2d at 84.
5. *Note*: always consider the application of Rule 106 (Rule of Completeness) before you offer a defendant's statement.

IMMUNITY AGREEMENT
BROUGHT OUT ON DIRECT
Rule 607, Fed. R. Evid.

1. Chicago building inspection supervisors convicted of extortion through use of official positions and filing false income tax returns -- section 7206(1) -- extortion income not reported.
2. Government brought out on direct examination of three witnesses that the witnesses had been granted immunity.
3. Defendants objected that testimony was inadmissible because it was used to enhance the credibility of these witnesses rather than to impeach it.
4. *Held*: procedure approved -- Government introduced testimony for purposes of impeachment because it anticipated defense counsel would cross-examine on issue of immunity:

   United States v. Hedman, 630 F.2d 1184, 1198 (7th Cir.), *cert. denied*, 450 U.S. 965 (1978)

5. "Nothing improper" if government questions witness about his understanding of the terms of the immunity order

   United States v. Hedman, 630 F.2d at 1198

   United States v. Winter, 663 F.2d 1120, 1133 (1st Cir. 1981) (non-statutory immunity, witness asked to describe immunity agreement)

   United States v. Craig, 573 F.2d 513, 519 (7th Cir. 1978), *cert. denied*, 439 U.S. 820 (1981)

6. *Compare*: agreement by witness to cooperate with government is not admissible on direct; only admissible on re-direct following cross-examination attacking credibility of witness:

   United States v. Barnes, 604 F.2d 121, 150 (2d Cir. 1979)

IMPEACHMENT BY
CONVICTION ON NOLO PLEA
Rule 609(a), Fed. R. Evid.

1. Conviction complying with provisions of Rule 609(a) can be used for impeachment.
2. Conviction on nolo plea of crime that comes within Rule 609 is admissible as impeachment:

   United States v. Williams, 642 F.2d 136, 138 (5th Cir. 1981) -- "admitting a nolo

conviction under Rule 609 is well founded"

3. BUT you cannot prove that defendant admitted his guilt by a *nolo* plea even if there is a judgment of conviction -- plea is not admissible, Rule 410, Fed. R. Evid.

> "Rule 609(a) permits proof of the conviction. Were it pertinent, however, the prosecutor could *not* prove that appellant had admitted his guilt by his plea. He did for the purpose of the case in which it was entered, but for all other purposes he preserved his denial." ***Williams***, 642 F.2d at 139 (underscoring supplied)

ARGUMENT

ARGUMENT -- GENERALLY

1. Argument folder:

   A. Set up at outset of trial

   B. During trial collect notes for argument -- yours, agents, audience, reporter, anyone who has an idea

2. Advise jury that what you say or what defense counsel says is not evidence.

3. *Never*, *never*, *never* say "I believe." Most you can say is: "I submit that the evidence is clear that" or "I suggest that . . . ."

4. Tell jury a story -- chronologically where possible.

5. Avoid or eliminate entirely -- Smith testified, Jones testified, etc.

6. Blend documents and testimony into your story.

   A. Prepare chart of key documents and testimony in chronological order for your use

   B. Will highlight the defendant's financial life

   C. List will suggest approach to take

   D. Often will show up dramatic contrasts

   E. Points up "real life of defendant" for the jury

EXAMPLE
CHART FOR PREPARING
ARGUMENT

DATE	***DOCUMENT***	***EXHIBIT***
12/22/89	Suit for Husband - $800	6
12/24/89	Deposit on 1990 Cadillac -- $16,000	19
1/10/90	Monthly Payment on Swimming Pool -- $1,125	27
2/15/90	Country Club Birthday Party - $2,500 - 25 Guests	8
3/17/90	9:45 a.m. - $9,500 Deposited in Bank - cash	14
3/31/90	Trip to Disneyland - $3,000	32, 44
4/15/90	Trip to Switzerland - Passport	42
4/15/90	1989 Tax Return - Tax Due $900	1

STYLE

1. Personalize argument, *e.g.*, instructions referred to in argument:

   Suggest: His Honor will tell you

   NOT: You will be instructed by the Court

2. Charts:

   A. Useful in final argument

   B. Keep as simple as possible -- less detail the better

   C. Clear use of charts with judge ahead of time

3. Round off figures and use totals rather than figures for individual years whenever possible:

   A. *Case*: Defendant did not report $20,512.00 in 1988, $28,752.00 in 1989 and $15,300 in 1990

   B. *Convert to*: Defendant did not report over $64,000; or for three years in a row the defendant signed her name to false returns -- false by over $64,000

4. Ask for a guilty verdict

CONCLUSION

WE DO WIN WHEN JUSTICE IS DONE

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GOVERNMENT PROPOSED JURY INST. NO.

Statutory Language

Section 2 of Title 18 of the United States Code provides, in part, as follows:

Section 2. ***Principals***

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2

GOVERNMENT PROPOSED JURY INST. NO.

Principal -- To Aid, Abet, Cause, etc.
(Single Defendant)

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

18 U.S.C. § 2
Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 12.01
Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)
Cheek v. United States, 498 U.S. 192, 196 (1991)
United States v. Horton, 847 F.2d 313, 321-22 (6th Cir. 1988)
United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO.

Principal -- To Aid, Abet, Cause, etc.
(Multiple Defendants)

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

18 U.S.C. § 2
Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 12.02
Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)
Cheek v. United States, 498 U.S. 192, 196 (1991)
United States v. Horton, 847 F.2d 313, 321-22 (6th Cir. 1988)
United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO.

"Aid and Abet" -- Explained

A person may violate the law even though he or she does not personally do each and every act constituting the offense if that person "aided and abetted" the commission of the offense.

Section 2(a) of Title 18 of the United States Code provides:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated [***himself***] [***herself***] in some way with the crime charged and participated in it with the intent to commit the crime.

In order to be found guilty of aiding and abetting the commission of the crime charged in [***Count*** _____ ***of***] the indictment, the government must prove beyond a reasonable doubt that the Defendant _____:

One, knew that the crime charged was to be committed or was being committed,

Two, knowingly did some act for the purpose of [***aiding***] [***commanding***] [***encouraging***] the commission of that crime, and

Three, acted with the intention of causing the crime charged to be committed.

Before Defendant _____ may be found guilty as an aider or an abettor to the crime, the government must also prove, beyond a reasonable doubt, that someone committed each of the essential elements of the offense charged as detailed for you [***in Instruction No.*** _____].

Merely being present at the scene of the crime or merely

knowing that a crime is being committed or is about to be committed is not sufficient conduct for the jury to find that the defendant aided and abetted the commission of that crime.

The government must prove that the Defendant knowingly [***and deliberately***] associated [***himself***] [***herself***] with the crime in some way as a participant-- someone who wanted the crime to be committed-- not as a mere spectator.

18 U.S.C. § 2

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 18.01

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

GOVERNMENT PROPOSED JURY INST. NO.

Aiding and Abetting

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate himself [herself] with the criminal venture, participate in it, and try to make it succeed.

18 U.S.C. § 2
Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 5.08 (modified)
United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), 490 U.S. 1028 (1989)

GOVERNMENT PROPOSED JURY INST. NO.

Aiding and Abetting

A defendant may be found guilty of [***name principal offense***], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the [***principal offense***] was committed;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured _____ to commit __ _____ and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with _____, or was present at the scene of the crime, or unknowingly or unintentionally did things that were helpful to the principal.

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping _____ commit _____.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

18 U.S.C. § 2
Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.01
Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)
United States v. Abreu, 962 F.2d 1425, 1429 (1st Cir. 1992)
United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)

United States v. Singh, 922 F.2d 1169, 1173 (5th Cir.), *cert. denied*, 112 S. Ct. 260 (1991)
United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987)
United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988)
United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)

GOVERNMENT PROPOSED JURY INST. NO.

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the

law.

18 U.S.C. § 2

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Section 2.06

United States v. Walker, 621 F.2d 163 (5th Cir. 1980)

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)

United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

GOVERNMENT PROPOSED JURY INST. NO.

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by the defendant, or if the defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the defendant responsible for the conduct of that other person just as though the defendant had engaged in such conduct himself.

Notice, however, that before any defendant can be held criminally responsible for the conduct of others it is necessary that the defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator.

18 U.S.C. § 2

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 6, p. 42

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989),

cert. denied, 496 U.S. 926 (1990)
United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)
United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)
United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)
United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)
United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

COMMENT

United States v. Walker, 621 F.2d 163 (5th Cir. 1980), approved this instruction.

GOVERNMENT PROPOSED JURY INST. NO.

Willfully to Cause Criminal Act -- Defined

In order to cause another person to commit a criminal act, it is necessary that the accused willfully do, or willfully fail to do, something which, in the ordinary performance of official duty, or in the ordinary course of the business or employment of such other person, or by reason of the ordinary course of nature or the ordinary habits of life, results in the other person's either doing something the law forbids, or failing to do something the law requires to be done.

An act or a failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

18 U.S.C. § 2
Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 12.04
Cheek v. United States, 498 U.S. 192, 196 (1991)

GOVERNMENT PROPOSED JURY INST. NO.

"Mere Presence" -- Defined

Merely being present at the scene of a crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct to find that Defendant _____ committed that crime.

In order to find the defendant guilty of the crime, the government must prove, beyond a reasonable doubt, that in addition to being present or knowing about the crime, Defendant _____ knowingly [***and deliberately***] associated [***himself***] [***herself***] with the crime in some way as a participant -- someone who wanted the crime to be committed -- not as a mere spectator.

18 U.S.C. § 2
Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 16.09
United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)
United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)
United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)
United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)
United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

GOVERNMENT PROPOSED JURY INST. NO.

Conspiracy to Defraud the Government
With Respect to Claims (Elements)

To sustain the charge of conspiracy to defraud the government with respect to claims, the government must prove the following propositions:

First, the defendant entered into a conspiracy to [***obtain payment; allowance; aid in obtaining payment; aid in obtaining allowance***] **1** of a claim against [***the United States; a department or agency of the United States***]; **2**

Second, the claim was false, fictitious, or fraudulent; and,

Third, the defendant knew at the time that the claim was false, fictitious, or fraudulent.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Federal Criminal Jury Instructions of the Seventh Circuit (1986), Vol. III, p.23.

NOTES

1 Insert language to reflect the charges in the case.

2 Insert language to reflect the charges in the case.

COMMENT

1 Section 286 does not require the allegation or proof of an

overt act. *See* ***United States v. Umentum***, 547 F.2d 987, 989-991 (7th Cir. 1976)(21 U.S.C. § 846); ***United States v. Cortwright***, 528 F.2d 168, 172 n.1 (7th Cir. 1975) (21 U.S.C. § 846).

GOVERNMENT PROPOSED JURY INST. NO.

False Claim -- Offense Charged

The indictment sets forth _____ counts or charges.

Count _____ charges that on or about the _____ day of _____, 19__, in the _____ District of _____, the defendant, _____, a resident of _____, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she] knew to be false, fictitious, or fraudulent, by [***e.g., preparing and causing to be prepared, and filing and causing to be filed, what purported to be a federal income tax return***], **1** which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed [***e.g., a refund of taxes***] **2** in the amount of $_____, knowing such claim to be false, fictitious, or fraudulent.

Count II charges that * * *.

All in violation of Title 18, United States Code, Section 287.

NOTES

1 The instruction should be drafted so as to reflect the charge and basis for venue as set forth in the indictment.

2 The instruction should be drafted so as to reflect the charge as set forth in the indictment.

COMMENT

1 When the false claim charged was filed electronically, the prosecutor should insure that the indictment and instructions do not charge either the signing or the filing of a federal income tax return unless the paper Form 8453 relating to each false

claim has been retrieved from the

IRS and can be introduced into evidence along with the electronic portion of the return. The Form 8453 is a necessary part of the "tax return," and without it the government cannot prove that a "tax return" was filed. For further information, see "Prosecuting Electronic Fraud" (distributed to all U.S. Attorneys on February 6, 1993, and available from the Tax Division).

GOVERNMENT PROPOSED JURY INST. NO.

Statutory Language -- Section 287

Section 287 of Title 18 of the United States Code provides, in part, as follows:

> Section 287. False, fictitious or fraudulent claims.
>
> Whoever makes or presents to any person . . . in the civil . . . service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be . . . [***guilty of an offense against the laws of the United States***].

18 U.S.C. § 287

GOVERNMENT PROPOSED JURY INST. NO.

18 U.S.C. 287 -- Purpose of the Statute

The objective of Congress in enacting section 287 was to assure the integrity of claims and vouchers submitted to the government, and thereby protect the funds and property of the government from fraudulent claims, regardless of the particular form of the claim or the particular function of the government department or agency against which the claim is made. Congress intended to prevent any deception that would impair, obstruct or defeat the lawful, authorized functions of government departments or agencies.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-2, p. 18-3

Rainwater v. United States, 356 U.S. 590 (1958)

United States v. Maher, 582 F.2d 842 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

GOVERNMENT PROPOSED JURY INST. NO.

Elements of the Offense

In order to prove the crime of making a false claim, the government must establish beyond a reasonable doubt each of the following facts:

First, that on or about [***insert date***], the defendant knowingly made or presented a claim to [***insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States***].

Second, that the claim which was presented was a claim against the United States or a department or agency of the United States.

Third, that the claim was false, fictitious, or fraudulent.

Fourth, that the defendant knew that the claim was false, fictitious, or fraudulent.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-3, p. 18-4 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

First Element--Submission of Claim

The first element which the government must establish beyond a reasonable doubt is that the defendant knowingly made or presented a claim to [***insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States***]. In this regard, I instruct you that [***insert name of person***] is a person (or officer) in the [***name of department or agency***].

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-4, p. 18-6 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Second Element -- Claim Against the United States

The second element the government must prove beyond a reasonable doubt is that the claim was made or presented upon or against the United States or a department or agency of the United States.

If you find that the claim received by an agency or department of the United States was one which the agency or department was expected to pay, then this element of the offense is satisfied.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-6, p. 18-11 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Third Element -- Claim was False, Fictitious or Fraudulent

The third element you must find beyond a reasonable doubt is that the claim was false, fictitious, or fraudulent.

A claim is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

A claim is fictitious if it is not real or if it does not correspond to what actually happened.

A claim is fraudulent if it was falsely made or caused to be made with the specific intent to deceive.

The question you must focus on is whether the claim in question contained any entry which you find from the evidence was false, fictitious, or fraudulent. You need not find that all of the entries on the claim were false, fictitious, or fraudulent, so long as you find that there was one entry which was false, fictitious, or fraudulent.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-8, p. 18-8 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Fourth Element -- Knowledge that Claim Was False

The fourth element the government must prove beyond a reasonable doubt is that the defendant had knowledge that the claim was false or fictitious or fraudulent.

An act is not done unlawfully or with knowledge of its false or fictitious or fraudulent character if it is done by mistake, carelessness, or other innocent reason.

It is not necessary, however, that the government prove that the defendant had exact knowledge of the relevant criminal provisions governing his conduct. You need only find that the defendant acted with knowledge that the claim was false or fictitious or fraudulent. **1**

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 18-9, p. 18-16 (modified)

NOTE

1 ***CAUTION***: The courts have debated whether the government must prove that the defendant acted "willfully" (i.e., that the defendant knew he was violating the law) or that there was an intent to cause the government a loss. You should check the law of your circuit.

GOVERNMENT PROPOSED JURY INST. NO.

False Claims Against the Government

Title 18, United States Code, Section 287, makes it a crime knowingly to make a false claim against any department or agency of the United States. You are instructed that the [***insert name of agency***] is a department or agency of the United States within the meaning of that law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt;

First: That the defendant knowingly presented to an agency of the United States a false or fraudulent claim against the United States; and

Second: That the defendant knew that the claim was false or fraudulent.

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

If you find that the government has proved these things, you do not need to consider whether the false claim was material, although that term is used in the indictment. This is not a question for the jury to decide.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990

Ed.), Section 2.20, p.89

GOVERNMENT PROPOSED JURY INST. NO.

False, Fictitious, Or Fraudulent Claims (Elements)

To sustain the charge of making a false claim, the government must prove the following propositions:

First, that the defendant (made or presented) a claim upon or against (the United States or a department or agency of the United States);

Second, that the claim was (false, fictitious, or fraudulent);

Third, that the defendant knew the claim was (false, fictitious, or fraudulent); and

Fourth, that the defendant submitted the claim with intent to defraud. **1**

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Federal Criminal Jury Instructions of the Seventh Circuit (1983 Ed.), Vol. II, p. 40.

NOTE

1 The Fourth and the Ninth Circuits have held that it is not necessary to prove an intent to defraud when the charge is that the defendant filed a *false* claim for a refund. ***United States v. Blecker***, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); ***United States v. Milton***, 602 F.2d 231, 233 (9th Cir. 1979). *See also* Section 22.06(1), *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

False, Fictitious, Or Fraudulent Claims
(Claims Submitted to Third Parties)

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

Federal Criminal Jury Instructions of the Seventh Circuit (1983 Ed.), Vol. II, p. 42.

GOVERNMENT PROPOSED JURY INST. NO.

Making a False Claim Against the United States

The crime of making a (false, fictitious, or fraudulent) claim against the United States, as charged in Count [***insert number of count***] of the indictment, has three essential elements, which are:

One, the defendant (made or presented) to [***insert name of U.S. officer or agency***] a claim against (the United States or name of department or agency of the United States);

Two, the claim was (false, fictitious, or fraudulent) in that [***describe how the claim was false, etc.***]; and

Three, the defendant knew the claim was (false, fictitious, or fraudulent).

[***Insert name of agency***] is an agency of the United States and [***describe the claim charged in the indictment***] is a claim against the United States.

(A claim is "false" or "fictitious" if any part of it is untrue when made, and then known to be untrue by the person making it or causing it to be made.) (A claim is "fraudulent" if any part of it is known to be untrue, and made or caused to be made with the intent to deceive the Government agency to which submitted.)

(The materiality of the matters set forth in Element Two is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, (1992 Ed.), p. 166 (modified).

GOVERNMENT PROPOSED JURY INST. NO.

Definition of Knowingly

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. [***Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.***]

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Vol. I, Sec. 6.03, p. 86 (modified).

GOVERNMENT PROPOSED JURY INST. NO.

False Claims Against the Government

Title 18, United States Code, Section 287, makes it a Federal crime or offense for anyone to knowingly make a false claim against any department or agency of the United States.

You are instructed that the [***insert name of department or agency, e.g., Internal Revenue Service***] is a department or agency of the United States within the meaning of that law.

The defendant can be found guilty of the offense of making a false claim against the government only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States, as charged in the indictment; and

Second: That the defendant acted willfully and with knowledge of the false and fraudulent nature of his claim

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 3, p. 68 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7201 of the Internal Revenue Code provides, in part, that:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title * * * shall * * * be guilty (of an offense against the laws of the United States)

26 U.S.C. § 7201

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.02

GOVERNMENT PROPOSED JURY INST. NO.

Elements Of Attempt
To Evade Or Defeat A Tax

To establish the offense of attempting to evade and defeat a tax, the government is required to prove beyond a reasonable doubt the following three elements:

First, a substantial income tax was due and owing from the defendant in addition to that declared in his [her] income tax return;

Second, an affirmative attempt, in any manner, to evade or defeat an income tax, and

Third, the defendant willfully attempted to evade and defeat the tax.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7201
Spies v. United States, 317 U.S. 492 (1943)
Lawn v. United States, 355 U.S. 339, 361 (1958)
Sansone v. United States, 380 U.S. 343, 351 (1965)
United States v. Pomponio, 429 U.S. 10, 12 (1976)
Cheek v. United States, 498 U.S. 192, 195 (1991)

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements of Offense

In order to sustain its burden of proof for the crime of willfully attempting to evade and defeat a tax as charged in Count ___ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: A substantial income tax was due from the defendant [***in addition to that declared in the defendant's income tax return***][***in addition to that paid by the defendant***];

Two: The defendant attempted to evade or defeat this [***additional***] tax as described in the indictment; and

Three: In attempting to evade or defeat such [***additional***] tax, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.03

GOVERNMENT PROPOSED JURY INST. NO.

Tax Evasion
(26 U.S.C. § 7201)

Title 26, United States Code, Section 7201, makes it a crime for anyone to willfully attempt to evade or defeat the payment of federal income tax. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant owed substantially more tax than he reported on his 19 income tax return because he [***e.g. failed to report income***];

Second: That when the defendant filed that income tax return he knew that he owed substantially more taxes to the government than he reported on that return; and

Third: That when the defendant filed his 19__ income tax return, he did so with the purpose of evading payment of taxes to the government.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the accused knowingly attempted to evade or defeat some substantial portion of such additional tax.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, § 2.88, p. 201

GOVERNMENT PROPOSED JURY INST. NO.

Income Tax Evasion
(26 U.S.C. § 7201)

The defendant is charged in [***Count __ of***] the indictment with income tax evasion in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: The defendant owed more federal income tax for the calendar year 19__ than was declared due on the defendant's income tax return;

Second: the defendant knew that more federal income tax than was declared due on the defendant's income tax return; and

Third: The defendant [***insert what the defendant did as indicated by the evidence***] with the intention of defrauding the government of taxes owed.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 9.06A

GOVERNMENT PROPOSED JURY INST. NO.

Tax Evasion (General Charge)
(26 U.S.C. § 7201)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant owed substantial income tax in addition to that declared in his tax return; and

Second: That the defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the defendant had knowledge and an understanding that, during the particular tax year involved, he had income which was taxable, and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which he knew he had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business,

regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common nontaxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1, p. 229

GOVERNMENT PROPOSED JURY INST. NO.

Tax Deficiency

One element of attempted tax evasion is a substantial tax deficiency or, in other words, a substantial amount of Federal income tax due and owing by the defendant over and above the amount of tax reported in the defendant's return(s). Each year must be considered separately. In other words, the defendant's tax obligation in any one year must be determined separately from his tax obligations in any other year.

The defendant is charged with failing to pay a specific amount of tax due for each of the calendar years alleged in the indictment. The proof need not show, however, the precise amount or all of the additional tax due as alleged. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, **1** whether greater or less than the income tax charged as due in the indictment.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, Instruction No. 2.88, p. 201 (modified)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Sections 56.08 and 56.23 (modified)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1 (portion)

United States v. Johnson, 319 U.S. 503, 517-518 (1943)

NOTE

1 The tax deficiency need not be "substantial" in the Ninth Circuit. ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990); ***Manual of Model Jury Instructions for the Ninth Circuit*** (1990 Ed.), Section 9.06A Comment

GOVERNMENT PROPOSED JURY INST. NO.

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.24.

GOVERNMENT PROPOSED JURY INST. NO.

To "Attempt to Evade or Defeat" a Tax -- Explained

The phrase "attempts in any manner to evade or defeat any tax" involves two things: first, the formation of an intent to evade or defeat a tax; and second, willfully performing some act to accomplish the intent to evade or defeat that tax.

The phrase "attempts in any manner to evade or defeat any tax" contemplates and charges that the defendant _____ knew and understood that during the calendar year 19__, he [she] owed [***a substantial federal income tax***] [***substantially more federal income tax than was declared on the defendant's federal income tax for that year***][***substantially more federal income tax than had been paid for that year***] and then tried in some way to avoid that [***additional***] tax.

In order to show an "attempt[s] in any manner to evade or defeat any tax", therefore, the government must prove beyond a reasonable doubt that defendant _____ intended to evade or defeat the tax due, and that the defendant _____ also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.04

Manual of Model Criminal Jury Instructions, Eighth Circuit (1992 Ed.), Section 6.26.7201 (portion)

Spies v. United States, 317 U.S. 492, 500 (1943)

Sansone v. United States, 380 U.S. 343 (1965)

26 U.S.C. 7201 INSTRUCTION NO. 64
(Devitt & Blackmar)

GOVERNMENT PROPOSED JURY INST. NO. "Willfully" -- To Act or to Omit An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent, mistaken, or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.20 (modified).

COMMENTS1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive". United States v. Pomponio, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. United States v. Pomponio, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, see Section 8.06[3], supra.

26 U.S.C. 7201 INSTRUCTION NO. 65 GOVERNMENT PROPOSED JURY INST. NO.

Knowledge of Falsehood
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

The element of knowledge may be satisfied by inferences drawn from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you to as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of wilfullness or knowledge.

See United States v. MacKenzie, 777 F.2d 811, 818 n.2 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1976)

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. See, e.g., United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992); United States v. Ojebode, 957 F.2d 1218, 1229 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993); United States v.

deFranciso-Lopez, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent
cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. See, e.g., United States v. Mapelli, 971 F.2d at 287; United States v. Barnhart, 979 F.2d 647, 652-53 (8th Cir. 1992). But see United States v. Stone, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in Cheek v. United States, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in United States v. Fingado, 934 F.2d 1163, 1166 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. When the Offense May Be Complete If you find beyond a reasonable doubt from the evidence in the case that [a fraudulent return was filed][the defendant failed to file a return] and that this was done willfully as charged in Count of the indictment [information], then you may find that the offense charged was complete [when the fraudulent return was filed][on the date the return was due.]

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.23

This begins 26 U.S.C. 7202

GOVERNMENT PROPOSED JURY INST. NO. Failure to Collect or Pay Over Tax -- Offense Charged The indictment sets forth counts or charges.

Count I charges that on or about the day of , 19 , in the District of , the defendant, , a resident of , who conducted a business as a sole proprietorship 1 under the name and style of , with its principal place of business in , and who, during the quarter 2 of the year 19 , ending , 19 , deducted and collected from the total taxable wages of his [her] employees federal income taxes and Federal Insurance Contributions Act taxes in the sum of $, did willfully fail to truthfully account for and pay over to the Internal Revenue Service said federal income taxes withheld and Federal Insurance Contributions Act taxes due and owing to the United States of America for the said quarter ending , 19 .

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7202.

NOTES1 Where the taxpayer is a corporation, the instruction should be modified to follow the wording of the indictment.

2 Designate appropriate quarter.

GOVERNMENT PROPOSED JURY INST. NO. Statute Defining Offense -- 26 U.S.C. 7202 Section 7202 of the Internal Revenue Code provides, in part, as follows:

Any person required * * * to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall * * * be guilty [of an offense against the laws of the United States.]

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. Elements of the Offense In order to establish the offense charged in the indictment, the government must prove the following three elements beyond a reasonable doubt:

First, the defendant was a person who had a duty to collect, truthfully account for, and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending ;

Second, the defendant failed to collect or truthfully account for and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending ; and

Third, the defendant acted willfully.

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO.

Obligation to File The government must prove that the business in question had employees to whom it paid wages.

The law requires every employer of labor to deduct and withhold income taxes from the wages paid to employees.

The law also imposes on the income of every individual a tax equal to a specified percentage of his or her wages received with respect to employment as a contribution to his or her insurance under Social Security and related programs. The employer is required under the law to collect this tax by deducting the amount of the taxes from the wages as and when paid.

Every employer therefore must deduct withholding taxes and Social Security taxes from the wages of its employees and is required to file for each calendar quarter a Form 941, Employer's Federal Quarterly Tax Return, reflecting such withholding of income and Social Security taxes and said return must be filed on or before the last day of the first calendar month following the period for which it is made. For example, a return for the first calendar quarter of a year would cover the period from January 1 through March 31 and must be filed before April 30.

26 U.S.C. §§ 3101, 3102(a) -- F.I.C.A. taxes; 3402(a) -- Withholding; 3403 -- Employer liable for tax
26 C.F.R. §§ 31.6071(a)- 1, 31.6011(a)-1 (1993)
Slodov v. United States, 436 U.S. 238, 242 (1978)

COMMENT1 See United States v. Porth, 426 F.2d 519, 522 (10th Cir.), cert. denied, 400 U.S. 824 (1970), for an explanation of an employer's duty and specifically the meaning of "collect."

GOVERNMENT PROPOSED JURY INST. NO. Person Required To Collect,

Account For, And Pay Over Tax In order to be found guilty of the offenses charged in the information, the defendant must have been a person required to collect, truthfully account for, and pay over withheld federal income and Social Security (FICA) taxes.

An individual is such a person if he [she] was [an officer or employee of a corporation] or [a member or employee of a partnership] or [connected or associated with a business entity] in a manner such that he [she] was in a decision-making role and had the authority and duty to assure that withholding taxes and social security taxes are paid and when. The test as to who is responsible and who is not ultimately becomes one of who on behalf of the employing entity had significant control over the financial decision-making process within the employment entity as would give him [her] the power and responsibility to determine who would get paid and who would not. An individual may be a responsible person regardless of whether he [she] does the actual mechanical work of keeping records, preparing returns, or

writing checks.

26 U.S.C. § 7343 -- Definition of Term "Person"
Slodov v. United States, 436 U.S. 238, 245 (1978)
Caterino v. United States, 794 F.2d 1, 6 n.1 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987)
Godfrey v. United States, 748 F.2d 1568, 1574-75 (Fed. Cir. 1984)
Commonwealth Nat. Bank of Dallas v. United States, 665 F.2d 743, 750-51 (5th Cir. 1982)
United States v. McMullen, 516 F.2d 917, 920 (7th Cir.), cert. denied, 423 U.S. 915 (1975)
Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), cert. denied, 400 U.S. 821 (1970)
Pacific National Insurance v. United States, 422 F.2d 26, 30, 31 (9th Cir.), cert. denied, 398 U.S. 937 (1970)
D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

COMMENT

1 In Datlof v. United States, 252 F. Supp. 11 (E.D. Pa.), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967), the court cites cases for the use of the following criteria in determining whether an individual is a responsible person, (a) contents of corporate by-laws; (b) ability to sign checks on the company's bank account; (c) identity of the individual who signed returns of the firm; (d) the payment of other creditors instead of the United States; (e) the identity of the officers, directors, and principal stockholders in the firm; (f) the identity of the individuals who hired and discharged employees, and (g) in general, the identity of the individual who was in control of the financial officers of the firm in question.

GOVERNMENT PROPOSED JURY INST. NO. More Than One Responsible Person There may be more than one person connected with a [specify, corporation, partnership, or business entity] who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his responsibility.

Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984)
Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), cert. denied, 400 U.S. 821 (1970)
White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)
D'Orazi v. United States, 71-1 U.S.T.C. para. 9270, p. 86,048; 27 A.F.T.R.2d

865, 868 (N.D. Cal. Nov. 5, 1970)
INSTRUCTION NO. 73 26 U.S.C. 7202 GOVERNMENT PROPOSED JURY INST. NO.

Willfulness The word "willfully" means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited; that is to say, with intent either to disobey or to disregard the law.

An omission or failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to fail to do something the defendant knows the law requires to be done; that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.20 (modified)
Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)
Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)
Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)
Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)
Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1 (modified)
Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Pomponio, 429 U.S. 10, 12 (1976)
United States v. Bishop, 412 U.S. 346, 360 (1973)

COMMENTS1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." United States v. Pomponio, 429 U.S. 10, 12 (1976).
2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. United States v. Pomponio, 429 U.S. 10, 12 (1976).
3 See also instructions on willfulness set forth as part of the instructions on 26 U.S.C. § 7201, supra.
This begins 26 U.S.C. 2703. GOVERNMENT PROPOSED JURY INST. NO. The Nature of the Offense Charged Count ____ of the indictment [information] charges that the defendant _____ was required by law to file a tax return for the tax year 19__, on or before the ____ day of _____, 19__, and that the defendant willfully failed to file such a return.

If failure to file is being presented to the jury as a lesser included offense, the following may be helpful: 1

[The law permits the jury to determine whether the government has proven

the defendant _____ guilty of any offense that is necessarily included in the crime of willfully attempting to evade or defeat a substantial tax charged in Count ___ of the indictment.

So, if the jury should unanimously find the defendant "not guilty" of the crime of willfully attempting to evade or defeat a substantial tax as charged in Count ____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to the offense of willful failure to file a tax return which is necessarily included in the charge of willfully attempting to evade or defeat any tax.

The nature of the included offense of willful failure to file a tax return is that the defendant _____, was required by law to file an income tax return for the tax year 19__, on or before the ____ day of _____, and that the defendant willfully failed to file such a return.]

Devitt, Blackmar, and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.09

NOTE

1 This segment of the instruction conflicts with Tax Division Policy on lesser included offenses which is that neither party is entitled to an instruction that a willful failure to file (26 U.S.C. 7203) is a lesser-included offense of a Spies-evasion offense. This position reflects the Government's adoption of the "strict elements" test of Schmuck v. United States, 489 U.S. 704 (1989). See Tax Division Memoranda dated February 15, and March 15, 1993, respectively, on "Lesser Included Offenses in Tax Cases," published in Chapter 3 of this Manual, supra.

GOVERNMENT PROPOSED JURY INST. NO. Failure to File -- Statute

Section 7203 of Title 26 of the United States Code provides, in part, that:

> Any person required * * * (by law or regulation) * * * to make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, * * * shall be guilty [of an offense against the laws of the United States].

26 U.S.C. § 7203.

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.10 (modified)

GOVERNMENT PROPOSED JURY INST. NO. Failure To File -- The Essential Elements of the Offense Charged

In order to sustain its burden of proof for the crime of willful failure to file a tax return as charged in Count ____ of the indictment [information] [as the

included offense of wilfully attempting to evade or defeat a tax as charged in Count _____ of the indictment], 1 the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: The defendant _____ was required by law or regulation to file a tax return concerning his [her] income for the taxable year ended December 31, 19__;

Two: The defendant failed to file such a return at the time required by law; 2 and

Three: In failing to file the tax return, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.11

NOTES

1 This segment of the instruction conflicts with Tax Division Policy on lesser included offenses which is that neither party is entitled to an instruction that a willful failure to file (26 U.S.C. 7203) is a lesser-included offense of a Spies-evasion offense. This position reflects the Government's adoption of the "strict elements" test of Schmuck v. United States, 489 U.S. 704 (1989). See Tax Division Memoranda dated February 15, and March 15, 1993, respectively, on "Lesser Included Offenses in Tax Cases," published in Chapter 3 of this Manual, supra.

2 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C. § 7503.

GOVERNMENT PROPOSED JURY INST. NO. Failure to File -- Offense Charged The defendant, _____, is accused of failing to file an income tax return for the year _____.

It is against federal law to fail to file a required income tax return. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ received income of [state applicable dollar amount] or more between January 1 and December 31 of [year].

Second, that _____ failed to file an income tax return as required by [April 15, 19__].

Third, that _____ knew he was required to file a return.

Fourth, that _____ failed to file on purpose, and not as a result of carelessness.

Devitt, Blackmar and O'Malley, Federal Jury Practice and

Instructions (4th Ed. 1991 Supp.), Section FJC 115 (modified)

GOVERNMENT PROPOSED JURY INST. NO. Failure to Pay Tax or File Tax Return -- Offense Charged Title 26, United States Code, Section 7203, makes it a crime for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant received income of [state applicable dollar amount] or more between January 1 and December 31 of 19__;

Second: That the defendant failed to file an income tax return as required by [state applicable deadline date, e.g., April 15, 19__];

Third: That the defendant knew he was required to file a return; and

Fourth: That the defendant's failure to file was on purpose, and not as a result of accident, negligence or inadvertence.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, No. 2.89

GOVERNMENT PROPOSED JURY INST. NO. Failure to Pay Tax or File Tax Return -- Offense Charged The defendant is charged in Count _____ of the indictment with failure [to pay tax] [to file a tax return] _____ in violation of Section 7203 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [owed income tax] [had gross income of more than $_____] for the calendar year ending December 31, 19__.

Second, the defendant failed to [pay the tax] [file an income tax return] _____ by April 15, 19__; and

Third, the defendant acted for the purpose of evading his [her] _____ duty under the tax laws and not as a result of accident or negligence.

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1991 Supp.), Section 9-183

GOVERNMENT PROPOSED JURY INST. NO. Failure to File Tax Return -- Offense Charged Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was required by law or regulation to make a return of his income for the taxable year charged;

Second: That the Defendant failed to make a return at the time required by law; and

Third: That the Defendant's failure to make the return was willful.

A person is required to make a federal income tax return for any tax year in which he has gross income in excess of _____.

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1991 Supp.), Section 11-147

GOVERNMENT PROPOSED JURY INST. NO. The Requirement to File a Return--Explained A person is required to file a federal income tax return for any calendar year in which he [she] has gross income in excess of $_____. Gross income means the total of all income received before making any deductions allowed by law.

Gross income includes the following: (1) Compensation for services, including fees, commission and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

For the crime of willful failure to file a tax return, the government is not required to show that a tax is due and owing from the defendant. Nor is the government required to prove an intent to evade or defeat any taxes.

A person is required to file a return if his [her] gross income for calendar year 19__ exceeded $_____, even though that person may be entitled to deductions from that income so that no tax is due.

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.12

GOVERNMENT PROPOSED JURY INST. NO. The Requirement to File a Tax Return A single person [under] [over] sixty-five years old was required to file a federal income tax return for the year(s) [insert years charged] if he [she] had gross income in excess of [insert amount].

A married individual was required to file a federal income tax return for the year(s) _____, if he [she] had a separate gross income in excess of $_____, and a total gross income, when combined with that of his or her spouse, in excess of $_____ where [either] [both] [is] [are] [over] [under] sixty-five years old. 1

Gross income includes the following: [Compensation for services, including fees, commissions and similar items] [Gross income derived from business] [Gains derived from dealings in property] [Interest] [Rents] [Royalties] [Dividends] [Alimony and separate maintenance payments] [Annuities] [Income from life insurance and endowment contracts] [Pensions] [Income from discharge of indebtedness] [Distributive share of partnership gross income] [Income in respect of a decedent] and [Income from an interest in an estate or

trust]. 2

The fact that a person may be entitled to deductions from income in sufficient amount so that no tax is due does not affect that person's obligation to file.

The government is not required to show that a tax was due and owing or that the defendant intended to evade or defeat the payment of taxes, only that he [she] willfully failed to file a return.

If you find beyond a reasonable doubt that the defendant had the required gross income in [insert year], then the defendant was required to file a tax return on or before [insert date, e.g. April 15, 19__].

Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.12 NOTES.

NOTES

1 Where more than one year is charged and the gross income amount requiring that a return be filed differs in amount, it will be necessary to set forth the appropriate gross income for each of the years in issue. Note also that gross income requirements may vary from year to year depending on the amount allowed as an exemption, the age of the defendant, and, in the case of a married defendant, the age of the spouse. 26 U.S.C. § 6012

2 The instruction should be simplified by eliminating sources of income not shown by the evidence.

GOVERNMENT PROPOSED JURY INST. NO. Time Required by Law The second element of the offense of failure to file is that the defendant failed to file a timely income tax return for each of the years charged in the indictment [information].

The law provides that a return made on the basis of the calendar year shall be made on or before the 15th day of April, following the close of the calendar year, except that when April 15th falls on a Saturday, Sunday, or legal holiday, returns are due on the first day following April 15th which is not a Saturday, Sunday, or legal holiday. 1

If you find beyond a reasonable doubt that the defendant had the required gross income in [Year, e.g., 1993], then, as a matter of law, the defendant was required to file a tax return on or before [Date, e.g., April 15, 1994].

26 U.S.C. §§ 6072, 6081, 7503

NOTE1 For the calendar years 1987 and 1990 through 1993, individual income tax returns had to be filed on, or before, April 15th of the next year; for the calendar years 1988 and 1989, returns had to be filed on, or before, April 17, 1989 and April 16, 1990, respectively.

Returns made on the basis of a fiscal year are generally required to be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C., § 6072(a). Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C., § 6072(b)

Note that the statutory due dates should be adjusted so as to account for any extensions of time for filing a return.

26 U.S.C. 7203 INSTRUCTION NO. 85 GOVERNMENT PROPOSED JURY INST. NO.

Willfulness The third and final element that the government must prove beyond a reasonable doubt in order to establish the offense of willful failure to file income tax returns is that the defendant's failure to file returns was "willful."

The word "willful" means a voluntary, intentional violation of a known legal duty. Willfulness, in the context of a failure to file an income tax return, simply means a voluntary, intentional violation of a known legal duty to make and file a return.

Cheek v. United States, 498 U.S. 192, 201-202 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

COMMENTS1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." United States v. Pomponio, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. United States v. Pomponio, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, supra.

INSTRUCTION No. 86 26 U.S.C. 7203 GOVERNMENT PROPOSED JURY INST. NO.

Failure To Pay -- Willfulness Defined The specific intent of willfulness is an essential element of the offense of willful failure to pay one's income taxes. The term willfully used in connection with this offense means a voluntary, intentional violation of a known legal duty.

The failure to pay income taxes is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what he [she] knew the law requires to be done; that is to say, with intent to disobey or disregard the law that requires him [her] to pay federal income taxes.

On the other hand, the defendant's conduct is not willful if you find that he [she] failed to pay his [her] income taxes because of negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or due to his [her] good faith misunderstanding of the requirements of the law. 1

Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Pomponio, 429 U.S. 10, 12 (1976)
United States v. Ausmus, 774 F.2d 722, 725-726 (6th Cir. 1985)

NOTE1 In light of the decision in Cheek v. United States, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with Cheek. See, e.g., United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993).

26 U.S.C. 7203 INSTRUCTION NO. 87 GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Belief Defense -- Failure to File In the context of Section 7203, the element of willfulness is established by proving that the defendant had knowledge of his [her] legal obligation to file a tax return but, nevertheless, voluntarily and intentionally chose not to do what the law required. Defendant's conduct is not "willful" if his [her] failure to file a tax return was due to negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or was the result of a good faith misunderstanding of the requirement of the law that he [she] file a return.

In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he [she] sincerely misunderstood the requirements of the law -- or whether the defendant knew that he [she] was required to file a return and did not do so. 1 This issue of intent, as to whether the defendant willfully failed to file an income tax return, is one which you must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] own belief that such law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.26 (modified)
Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Murdock, 290 U.S. 389, 396 (1933)
United States v. Mueller, 778 F.2d 539, 541 (9th Cir. 1985)
United States v. Aitken, 755 F.2d 188 (1st Cir. 1985)
United States v. Burton, 737 F.2d 439, 442 (5th Cir. 1984)
United States v. Koliboski, 732 F.2d 1328, 1331 (7th Cir. 1984)
United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984)
United States v. Ness, 652 F.2d 890, 893 (9th Cir. 1981)
United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980)
United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979)
United States v. Edelson, 604 F.2d 232, 235 (3d Cir. 1979)

NOTE1 In light of the decision in Cheek v. United States, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with Cheek. See, e.g., United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993).

26 U.S.C. 7203 INSTRUCTION NO. 88 GOVERNMENT PROPOSED JURY INST. NO.

Willfulness -- Good Faith Belief Defense The third element which the government must prove beyond a reasonable doubt is that the defendant's failure to make the return in question was willfully committed.

The term willfully for purposes of these instructions means a voluntary, intentional violation of a known legal duty.

The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do that which he [she] knew the law required, that is to say, with the intent to disobey or disregard the law that requires him [her] to make a timely return.

The willfulness which the government must prove beyond a reasonable doubt does not require the government to prove that the defendant had a purpose to evade a tax or to defraud the government.

The failure of a taxpayer to have or keep records adequate to permit him [her] or his [her] agents or employees to prepare accurate tax returns is no legal justification for not filing a timely income tax return.

The only justification for not filing a tax return when the same is required by law to be filed is a good faith misunderstanding by the taxpayer as to his [her] legal obligation to file the return 1 or an accidental, inadvertent, careless, negligent, or even grossly negligent failure to file such return.

United States v. Wilson, 550 F.2d 259, 260 (5th Cir. 1977)

NOTE1 In light of the decision in Cheek v. United States, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with Cheek. See, e.g., United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993).

26 U.S.C. 7203 INSTRUCTION NO. 89 GOVERNMENT PROPOSED JURY INST. NO.

Willfulness -- Failure to File/Good Faith Belief Defense Willfulness is an essential element of the crime of failure to file an income tax return. The term "willfully" used in connection with this offense means a voluntary, intentional violation of a known legal duty .

Defendant's conduct is not "willful" if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law. 1 However, mere disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Also, a person's belief that the tax laws violate his [her] constitutional rights does not constitute a good faith misunderstanding of the requirements of the law. Furthermore, a person's disagreement with the government's monetary system and policies does not constitute a good faith misunderstanding of the requirements of the law.

[Where appropriate, an explanation of the evidence introduced by the defendant and its place in the jury's deliberations may be included here. For example . . . The defendant has introduced evidence of advice he [she] heard given by speakers at meetings, tape recorded lectures, essays, pamphlets, court opinions, and other material that he [she] testified he [she] relied on in concluding that he [she] was not a person required to file income tax returns for the years _____ and _____.]

This evidence has been admitted solely for the purpose of aiding you in determining whether or not the defendant's failure to timely file tax returns for _____ and _____ was willful and you should not consider it for any other purpose. You are not to consider this evidence as containing any law that you are to apply in reaching your verdicts, because all of the law applicable to this case is set forth in these instructions.

Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980)

NOTE1 In light of the decision in Cheek v. United States, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with Cheek. See, e.g., United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993).

26 U.S.C. 7203 INSTRUCTION NO. 90 GOVERNMENT PROPOSED JURY INST. NO.

Willfulness -- Failure to File/Good Faith Belief Defense Willfulness is an essential element of the crime of willful failure to file an income tax return. The word "willfully," used in connection with this offense, means a voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful intent not to file a return that defendant was required by law to file and knew he [she] should have filed. There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

Defendant's conduct is not "willful" if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law. 1 It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] belief that such law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Ware, 608 F.2d 400, 404-405 (10th Cir. 1979)

NOTE1 In light of the decision in Cheek v. United States, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with Cheek. See, e.g., United States v. Grunewald, 987 F.2d 531, 536 (8th Cir. 1993).

GOVERNMENT PROPOSED JURY INSTRUCTION NO. ____

Fifth Amendment Defense The defendant has claimed that he [failed to file a tax return] [failed to provide information on his tax return] because of his Fifth Amendment right against self-incrimination. A valid exercise of the Fifth Amendment privilege against self-incrimination is a complete defense to a section 7203 charge. 1 A taxpayer is not justified in [failing to file a tax return] [failing to answer questions contained on a tax return] unless the taxpayer shows substantial hazards of self-incrimination that are real and appreciable, and has cause to perceive such
danger. 2

To support a claim of privilege against self-incrimination, the taxpayer cannot make a blanket Fifth Amendment claim concerning a generalized fear of criminal prosecution. 3 Rather, the taxpayer must assert the privilege specifically in response to particular questions and demonstrate real dangers of incrimination. 4 Thus, the Fifth Amendment privilege does not give a person the right to withhold required information when the information sought does not tend to incriminate him [her].

NOTES1 Garner v. United States, 424 U.S. 648, 662-62 (1976); United States v. Malquist, 791 F.2d 1399, 1401-02 (9th Cir.), cert. denied, 479 U.S. 954 (1986)

2 Boday v. United States, 759 F.2d 1472, 1474 (9th Cir. 1985)

3 Boday v. United States, 759 F.2d 1472, 1474-75 (9th Cir. 1985)

4 Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478 (1972); accord, Heitman v. United States, 753 F.2d 33, 34-35 (6th Cir. 1984); United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982) (taxpayer needed to show that his invocation of the privilege was based upon a colorable claim that he was involved in activities for which he could be criminally prosecuted and that such activities would be revealed if he supplied data on his [tax] form); United States v. Leidendeker, 779 F.2d 1417, 1418 (9th Cir. 1986); Stubbs v. United States, 797 F.2d 936,983 n. 2, (11th Cir. 1986) (Fifth Amendment does not protect against remote and speculative possibilities). See also Saussy, 802 F.2d 849, 855 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987) (citing United States v. Albertson v. SACB, 382 U.S. 70 (1965))

GOVERNMENT REQUESTED JURY INSTRUCTION NO. _____

Tax Return Must Contain Sufficient Information A taxpayer's return which does not disclose sufficient information from which tax liability can be calculated is not a tax return within the meaning of the Internal Revenue Code or the regulations adopted by the Secretary of the Treasury. 1 Therefore, a tax form that contains no information about the defendant's tax status is not a return. 2

NOTES1 United States v. Porth, 426 F.2d 519, 523 (10th Cir.), cert. denied, 400 U.S. 824 (1970); United States v. Vance, 730 F.2d 736, 738 (11th Cir. 1984); United States v. Schiff, 612 F.2d 73, 77 (2d Cir. 1979); United States v. Edelson, 604 F.2d 232, 234 (3d 1979); United States v. Reed, 670 F.2d 622, 623-624 (5th Cir.), cert. denied, 457 U.S. 1125 (1982); United States v. Mosel, 738 F.2d 157, 158 (6th Cir. 1984); United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982); United States v. Green, 757 F.2d 116, 121 (7th Cir. 1985); United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986); United States v. Grabinski, 727 F.2d 681, 686-87 (8th Cir. 1984); United States v. Kimball, 925 F.2d 356, 357 (9th Cir. 1991) (en banc); United States v. Malquist, 791 F.2d 1399, 1401 (9th Cir.), cert. denied, 479 F.2d 954 (1986); United States v. Crowhurst, 629 F.2d 1297, 1300 (9th Cir.), cert. denied, 449 U.S. 1021 (1980); United States v. Stillhammer, 706 F.2d 1072, 1075 (10th Cir. 1983); United States v. Brown, 600 F.2d 248, 251-252 (10th Cir.), cert. denied, 444 U.S. 917 (1979)

2 United States v. Klee, 494 F.2d 394, 397 (9th Cir.), cert. denied, 419 U.S. 835 (1974). See also United States v. Saussy, 802 F.2d 849, 854-55 (6th Cir. 1986), cert. denied, 480 U.S. 907 (1987)

GOVERNMENT PROPOSED JURY INST. NO. False Withholding Allowance Certificate (Form W-4)

Offense Charged -- False No. of Allowances The [information] or [indictment] sets forth counts or charges.

Count I charges that the defendant, [Defendant's Name], a resident of [City], [State], who during the calendar year 19 was employed by [Name of Employer], a resident of [City], [State], and who was required under the Internal Revenue laws to furnish [Name of Employer] with a signed Employee's Withholding Allowance Certificate, Form W-4, setting forth the number of withholding allowances claimed on or about the date of the commencement of employment by [Name of Employer], did willfully supply a false and fraudulent Employee's Withholding Allowance Certificate, Form W-4, to [Name of Employer], on which he [she] claimed withholding allowances, whereas, as the defendant then and there well knew and believed, he [she] [was not entitled to claim withholding allowances] 1 or [was entitled to claim only withholding allowances]. 1

Count II charges that * * * .

All in violation of Title 26, United States Code, Section 7205.

26 U.S.C. § 7205

NOTE1 The government does not have to prove the number of [allowances] [exemptions] to which the defendant was entitled. United States v. McDonough, 603 F.2d 19, 24 (7th Cir. 1979).

GOVERNMENT PROPOSED JURY INST. NO. Statute Defining Offense

The Internal Revenue Code provides, in part, as follows:

> On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

26 U.S.C. § 3402(f)(2)(A)

Section 7205 of the Internal Revenue Code provides, in part, as follows:

> Any individual required to supply information to his employer under Section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under Section 3402, shall * * * [be guilty of an offense against the laws of the United States].

26 U.S.C. § 7205

GOVERNMENT PROPOSED JURY INST. NO. Elements of Offense To establish a violation of Section 7205 of the Internal Revenue Code, the government must prove beyond a reasonable doubt that:

1. The defendant was required to furnish an employer with a signed withholding exemption certificate, Form W-4, certifying information as to the defendant's tax liability and withholding tax allowances;

2. The defendant did furnish his [her] employer with a signed withholding exemption certificate, Form W-4 [or failed to supply the employer with a signed withholding exemption certificate];

3. The information supplied by the defendant was false or fraudulent; and

4. The defendant acted willfully.

26 U.S.C. § 7205
United States v. Bass, 784 F.2d 1282, 1284 (5th Cir. 1986)
United States v. Herzog, 632 F.2d 469, 471-472 (5th Cir. 1980)
United States v. Olson, 576 F.2d 1267, 1271 (8th Cir.), cert. denied, 439 U.S. 896 (1978)

GOVERNMENT PROPOSED JURY INST. NO. Withholding Allowances The law requires an employee to complete an Employee's Withholding Allowance Certificate, Form W-4, so that an employer can withhold Federal income tax from an employee's pay.

Employee's Withholding Allowance Certificate, Form W-4, requires an employee to certify the total number of allowances claimed. For purposes of this case you are instructed that if you find that the defendant was an employee, then the defendant was entitled to claim [set forth applicable allowances based on the evidence, e.g., one allowance for himself [herself], one allowance for his [her] spouse, one allowance for each dependent, etc.] 1

26 U.S.C. § 3402(f)
26 C.F.R. § 31.3402(f)(1)-1 (1993)

NOTE1 Reference should be made to 26 C.F.R. § 3402(f)(1) and a determination made as to which withholding allowances are applicable based on the evidence in the case.

GOVERNMENT PROPOSED JURY INST. NO. Exempt Status An exemption from withholding may be claimed by an employee on his [her] Employee's Withholding Allowance Certificate, Form W-4, only if the employee:

(1) incurred no liability for income tax for the preceding taxable year; and

(2) anticipates that he will incur no liability for income tax for the current taxable year.

26 U.S.C. § 3402(n)
26 C.F.R. § 31.3402(n)-1

GOVERNMENT PROPOSED JURY INST. NO. Withholding Allowances (Exempt Status) Withholding Allowances. The indictment charges that the defendant submitted false and fraudulent Employee's Withholding Allowance Certificates, Forms W-4, to his [her] employer. In this regard, I charge you that all employees are required by law and regulations to furnish their employer with a signed Employee's Withholding Allowance Certificate, Form W-4, on or before the date of commencement of employment with that employer, indicating the number of withholding allowances which the employee claims. The number of allowances claimed on the Form W-4 may not exceed the number to which the individual is entitled.

A Form W-4 is false and fraudulent if it was used to supply false or fraudulent information regarding the appropriate number of allowances. Thus, if you find that the defendant submitted a Form W-4 to his [her] employer, claiming more allowances than those to which the defendant was entitled by law, then the defendant has filed a false and fraudulent Form W-4.

Exempt Status. Under some circumstances, an individual is entitled to claim total exemption from the withholding of Federal taxes.

To properly claim exempt status, however, the individual must certify in a Form W-4 that no Federal income tax was owed for the tax year prior to the filing of the Form W-4, and that the individual does not expect to owe any Federal income tax for the year of the filing the Form W-4. Thus, if you find that the defendant did owe income tax for the calendar year preceding the year in which the defendant filed a Form W-4 claiming exempt status, or that the defendant did expect to owe an income tax for the calendar year in which the defendant filed the Form W-4, then you may find that the Form W-4 on which the defendant claimed exempt status was false and fraudulent.

26 U.S.C. §§ 3402, 7205
United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984)
United States v. Annunziato, 643 F.2d 676, 677 (9th Cir. 1981)
United States v. Shields, 642 F.2d 230, 231 (8th Cir. 1981)
United States v. Herzog, 632 F.2d 469, 473 (5th Cir. 1980)

GOVERNMENT PROPOSED JURY INST. NO. False or Fraudulent The government charges that the information supplied by the defendant in the Form W-4, filed with his [her] employer was false and fraudulent in that the defendant reported that he [she] was entitled to [exempt status] or [number claimed allowances].

Information is false if it was untrue when made and was then known to be untrue by the person then supplying the information or causing such information to be supplied. Information is fraudulent if it is supplied or caused to be supplied with the intent to deceive.

It is sufficient if the evidence establishes beyond a reasonable doubt that the information supplied by the defendant in the Form W-4 furnished to his [her] employer was either false or fraudulent. The evidence need not establish that it was both false and fraudulent.

Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1992), Sections 16.06 (False -- Defined); 16.08 (Fraudulent -- Defined); 28.04 (modified)

United States v. Buttorff, 572 F.2d 619, 625 (8th Cir.), cert. denied, 437 U.S. 906 (1978)

United States v. Peterson, 548 F.2d 279, 280 (9th Cir. 1977)

United States v. Smith, 484 F.2d 8, 10 (10th Cir. 1973), cert. denied, 415 U.S. 978 (1974)

GOVERNMENT PROPOSED JURY INST. NO. Willfulness -- Section 7205

To find the defendant guilty of violating Section 7205, you must not only find that the defendant did the acts of which the defendant stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.20 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Bishop, 412 U.S. 346, 360 (1973)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

COMMENTS1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." United States v. Pomponio, 429 U.S. 10, 12 (1976). See also Section 8.06[1], supra.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. United States v. Pomponio, 429 U.S. 10, 12 (1976).
3 See also instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, supra.

GOVERNMENT PROPOSED JURY INST. NO. Knowledge Of Contents Of Form W-4 If you find beyond a reasonable doubt from the evidence in the case that the defendant signed and submitted a Form W-4, then you may draw the inference and find that the defendant had knowledge of the contents of the Form W-4.

Devitt and Blackmar, Federal Jury Practice and Instructions (3d Ed. 1977), Section 35.14 (modified)
United States v. Ruffin, 575 F.2d 346, 354 (2d Cir. 1978)
26 U.S.C. 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. Offense Charged The indictment sets forth counts or charges.

Count I charges that on or about the day of , 19 , in the District of , the defendant, , a resident of , did willfully make and subscribe [Describe Document] , which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at [City], [State], which said [Describe Document] he [she] did not believe to be true and correct as to every material matter in that the said [Describe Document and False Fact(s)], whereas, he [she] then and there well knew and believed, [Describe Correct Fact(s)].

Count II charges that * * *.

All in violation of Title 26, United States Code, Section 7206(1).

26 U.S.C. § 7206(1)
Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.13

GOVERNMENT PROPOSED JURY INST. NO. False Return -- Statute Involved

Section 7206(1) of the Internal Revenue Code provides, in part, as follows:

> Any person who -- * * * [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty [of an offense against the laws of the United States].

26 U.S.C. § 7206(1)
Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th Ed. 1990), Section 56.14

GOVERNMENT PROPOSED JURY INST. NO. Elements of Section 7206(1) (False Income Tax Return)

The gist of the offenses charged in Counts and of the indictment is the willful making and subscribing by the defendant of his [her] [joint] individual income tax return[s] for the years and , which contains [contain] a written declaration that it [they] was [were] made under the penalties of perjury, and which the defendant did not believe to be true and correct as to every material matter. Each year, that is and , is to be considered separately by you.

To prove a violation, the government must establish each of the following four (4) elements beyond a reasonable doubt;

1. The defendant made, or caused to be made, and signed (subscribed) an income tax return for the year in question that was false as to a material matter.

2. The return contained a written declaration that it was made under the penalties of perjury.

3. The defendant did not believe the return to be true and correct as to the material matter(s) charged in the indictment; 1 and

4. The defendant made, or caused to be made, and signed (subscribed) the return willfully.

26 U.S.C. § 7206(1)
United States v. Bishop, 412 U.S. 346, 350, 359 (1973)
United States v. Pomponio, 429 U.S. 10 (1976)
United States v. Monteiro, 871 F.2d 204, 208 (1st Cir. 1989)
United States v. Drape, 668 F.2d 22, 25 (1st Cir. 1982)
Hoover v. United States, 358 F.2d 87, 88 (5th Cir. 1966), cert. denied, 385 U.S. 822 (1966)
United States v. Sassak, 881 F.2d 276, 278 (6th Cir. 1989)
United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988)
United States v. Gurtunca, 836 F.2d 283, 287 (7th Cir. 1987)
United States v. Whyte, 699 F.2d 375, 381 (7th Cir. 1983)
United States v. Oggoian, 678 F.2d 671, 673 (7th Cir. 1982), cert. denied, 459 U.S. 1018 (1982)
United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980)
United States v. Holland, 880 F.2d 1091, 1096 (9th Cir. 1989)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)
United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982)

NOTE1 It has been held that an instruction can specify the material matters charged in the indictment. Thus, in United States v. Oggoian, 678 F.2d 671, 673 (7th Cir.), cert. denied, 459 U.S. 1018 (1982), the court upheld the following instruction given by the trial court:

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

GOVERNMENT PROPOSED JURY INST. NO. False Return -- Essential Elements

(False Income Tax Return)

Now, to prove the charge that is contained in each of these (three) counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.

The first one is that the defendant made, or caused to be made, and that the defendant signed the federal tax return for the year in question, an income tax return.

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

Third, that when the defendant made, or caused to be made, and when the defendant signed the return he did so willfully and knowingly.

Fourth, that the return contained a written declaration that it was made under the penalty of perjury.

It is not enough for the government to prove simply that the tax return is erroneous. If you find from your consideration of all the evidence, that each of the four numbered propositions has been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count.

The above instruction is quoted with approval in United States v. Oggoian, 678 F.2d 671, 673 (7th Cir.), cert. denied, 459 U.S. 1018 (1982), with the court "finding that the charge as a whole covered the essential elements of the offense (Sec. 7206(1)), including knowledge of the appellant that the returns were false as to material matters." Oggoian, 678 F.2d at 674.

See also Sansone v. United States, 380 U.S. 343, 352 (1965)

GOVERNMENT PROPOSED JURY INST. NO. False Return - Essential Elements

(False Income Tax Return)

The defendant is charged in [Count ___ of] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant filed a tax return knowing that it contained false information; and

Second, that the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.06D (1989)(modified)

GOVERNMENT PROPOSED JURY INST. NO. False Return - Essential Elements

(False Income Tax Return)

Title 26, United States Code, Section 7206(1), makes it a federal crime or offense for anyone to willfully file a Federal income tax return knowing it to be false in some material way.

The Defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt:

First: That the Defendant filed an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully, as charged.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 75 (1985)

GOVERNMENT PROPOSED JURY INST. NO. False Return -- Essential Elements

(False Income Tax Return)

To convict a defendant, the government must prove each of the following three elements beyond a reasonable doubt:

1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;

2. that the return contained a written declaration that it was made under the penalty of perjury; and

3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.

The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The court instructs you that a statement of total income on a tax return is material as a matter of law.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.07D (1989)

The above instruction is quoted in United States v. Hedman, 630 F.2d 1184, 1196 n.6 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981), with the court commenting: "We therefore conclude that the trial court properly instructed the jury with respect to the tax counts (Sec. 7206(1)) alleged in the indictment." Hedman, 450 U.S. at 1196.

COMMENT

1 The opinion in Hedman is confusing. In the body of the opinion, the court states that false statements relating to gross income, irrespective of the amount, constitute a material misstatement. But the jury instruction approved by the court requires the government to prove that the understatement was substantial. Hedman, 630 F.2d at 1196 & n.6.

GOVERNMENT PROPOSED JURY INST. NO. Documents Within Section 7206(1)

(Income Tax Returns)

I instruct you that the United States Individual Income Tax Returns, Forms 1040, involved in this case are returns or other documents as contemplated by Section 7206(1) of the Internal Revenue Code of 1986. 1

26 U.S.C. § 7206(1)

NOTE1 This instruction should not be given in a case where there is a factual issue as to whether the document in question is an income tax return.

GOVERNMENT PROPOSED JURY INST. NO. Subscribed -- Defined

Proof of Signing of Return The word "subscribe" simply means the signing of one's name to a document.

"The fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him," which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

26 U.S.C. § 6064
Devitt, Blackmar and O'Malley, Federal Jury Practice and Instructions (4th. Ed. 1990), Section 56.22
Cashio v. United States, 420 F.2d 1132, 1135 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970)
United States v. Wainwright, 413 F.2d 796, 802 n.3 (10th Cir. 1969), cert. denied, 396 U.S. 1009 (1970)
United States v. Carrodeguas, 747 F.2d 1390, 1396 (11th Cir. 1982), cert. denied, 474 U.S. 816 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Subscribed-Defined The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 and 6.26.7206 (1989)

GOVERNMENT PROPOSED JURY INST. NO. Material Matter If you find that the government has proved these things [elements of (i.e., 26 U.S.C. § 7206(1)], you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Instruction No. 2.90 (1990)
Materiality of the alleged false statement is a question for the court. United States v. Taylor, 574 F.2d 232 (5th Cir.), cert. denied, 439 U.S. 893 (1978).

GOVERNMENT PROPOSED JURY INST. NO. Material Matter The question of the materiality of the allegedly false statements made in connection with the subscribing or signing of a tax return is a question of law for the court.

The court instructs you that if you find that the defendant [set forth false item charged in indictment, e.g., understated the gross income reported on his [her] return], then I instruct you that [e.g., the understatement of gross income] is a material matter as contemplated by Section 7206(1).

As the Sixth Circuit has written,

"We note that the materiality of a perjured statement on a tax return is a question of law, and is for the judge, not the jury, to decide. Though this rule has not been announced before today in this Circuit, it is the prevailing rule elsewhere. United States v. Rogers, 853 F.2d 249, 251 (4th Cir.), cert. denied, 488 U.S. 946 (1988); United States v. Flake, 746 F.2d 535, 537-38 (9th Cir. 1984), cert. denied, 469 U.S. 1225, (1985); United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984); United States v. Whyte, 699 F.2d 375, 379 (7th Cir. 1983); United States v. Gaines, 690 F.2d 849, 858 (11th Cir. 1982); United States v. Strand, 617 F.2d 571, 574 (10th Cir.), cert. denied, 449 U.S. 841, (1978); United States v. Romanow, 509 F.2d 26, 28-29 (1st. Cir.1975). A ruling apparently to the contrary, United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969), has since been rejected by the Fourth Circuit. Rogers, 853 F.2d at 251. And the rule is not only widespread: we believe it is also sound."

United States v. Fawaz, 881 F.2d 259, 261-262 (6th Cir. 1989).

See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7206 (1989)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter

The ***materiality*** of the alleged false statements is not a matter for you to determine, but is a question for the Court to decide. You are instructed that the false statements charged in the indictment, if they were made, were ***material*** statements.

Pattern Jury Instruction of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Omission of Material Matter

An income tax return may be materially false not only because of a misstatement of a material matter, but also because of an omission of a material matter.

Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967)
United States v. Taylor, 574 F.2d 232, 235-236 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978)
United States v. Cohen, 544 F.2d 781, 783 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter -- Gross Income

If you find that the defendant made a false statement on his tax return relating to gross income, irrespective of the amount, that is to say, if you find that the defendant received additional income in addition to that reported on his [her] return, regardless of the amount, then you are instructed that such omission of income is a material matter, as required under Section 7206(1).

United States v. Wilson, 887 F.2d 69, 75 (5th Cir. 1989)
United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)
United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987)
United States v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983)
United States v. Gaines, 690 F.2d 849, 857-858 (11th Cir. 1982)
See also, ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter -- Deductions

I instruct you that personal deductions are material matters as required under Section 7206(1). The evidence need not establish beyond a reasonable doubt that the deductions totalled the exact amount alleged in the indictment, or that the deductions were overstated in the exact amount alleged, but only that the defendant willfully overstated or caused to be overstated in some substantial amount the deductions as charged in the indictment.

United States v. Damon, 676 F.2d 1060, 1064 (5th Cir. 1982) -- business loss deductions, Sec. 7206(2), but applicable to Sec. 7206(1)

United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976)

GOVERNMENT PROPOSED JURY INST. NO.

Proof Of One False Material Item Enough

The indictment charges in Count _____ that the defendant's income tax return for the year _____ was false in (e.g., three) material respects, i.e., [***state false material matters, e.g., understatement of potential fees, understatement of interest income, and understatement of capital gains***].

You are instructed that these items are material items and that it is sufficient if you find that the government has established beyond a reasonable doubt that any one of these items was falsely reported on the defendant's return. In other words, the government does not have to prove that all of the items are false: proof of the falsity of a single item is sufficient. On the other hand, if you find that none of these items was falsely reported on the defendant's return, then you should acquit the defendant.

Silverstein v. United States, 377 F.2d 269, 270 n.3 (1st Cir. 1967)
United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969)
United States v. Rayor, 204 F. Supp. 486, 491 (S.D. Cal. 1962)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Tax Deficiency Not Required

You are instructed that in proving that the defendant violated Section 7206(1), the government does not have to prove that there was a tax due and owing for the year(s) in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of Section 7206(1).

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1990), Section 56.19

Silverstein v. United States, 377 F.2d 269, 270 (1st Cir. 1967)

United States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)

United States v. Johnson, 558 F.2d 744, 747 (5th Cir. 1977)

United States v. Ballard, 535 F.2d 400, 404 (8th Cir.) *cert. denied*, 429 U.S. 918 (1976)

United States v. Marashi, 913 F.2d 724 (9th Cir. 1990)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

United States v. Carter, 721 F.2d 1514, 1539 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984)

See ***Sansone v. United States***, 380 U.S. 343, 352 (1965) -- re Sec. 7207 but materiality language of Secs. 7207 and 7206(1) is identical.

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Tax Deficiency Not Required

It is not necessary that the Government be deprived of any tax by reasons of the filing of the return, or that it even be shown that additional tax is due to the Government, only that the Defendant wilfully filed a false return.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness -- Section 7206(1)

To find the defendant guilty of violating Section 7206(1), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [***set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or***

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Willfully -- Good Faith Defense

The word "willfully," as that term has been used from time to time in these instructions, means a voluntary, intentional violation of a known legal duty. Mere negligence, even gross negligence, accident, or inadvertence is not sufficient to establish willfulness.

[***If a person in good faith believes that an income tax return, as prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he cannot be guilty of "willfully" making or subscribing a false or fraudulent return.***] **1**

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985)

NOTE

1 The second paragraph of this instruction is not appropriate unless there is evidence of a good faith belief defense. In light of the decision in ***Cheek v. United States***, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with ***Cheek***. *See, e.g.*, ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993).

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive" in a tax case. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Preparing False Return -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, in the District of _____, the defendant, ____, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service of a false and fraudulent income tax return **1** [***of one [Taxpayer's Name]***] **2** for the calendar year ____; in which said return **1** it was represented that the said taxpayer **2** was entitled under the provisions of the internal revenue laws [***to claim deductions 3 in the total sum of $ ___ ;***] whereas, as the defendant then and there well knew and believed, the [***total deductions***] **3** which the said taxpayer **2** was lawfully entitled to claim for said calendar year were [***in the total sum of not more than $_____.***]

Count II charges * * *.

All in violation of Title 26, United States Code, Section 7206(2).

26 U.S.C. § 7206(2)

NOTES

1 Section 7206(2) is not limited to returns but can apply to an "affidavit, claim of other document". 26 U.S.C. § 7206(2). In such instances, the instruction should be modified accordingly.

2 The above instruction encompasses a situation when the defendant is *not* the taxpayer, *e.g.*, a return preparer. If the defendant is the taxpayer, then the instruction should be modified by deleting the phrase "of one _____" and by substituting the "defendant" in those portions of the instruction which refer to the "taxpayer."

3 The above instruction is framed in terms of false deductions. If income, or other items, are charged as false, the instruction should be modified, *e.g.*, in which said return it was represented that the said taxpayer had a gross income of $_____; whereas, as the defendant then and there well knew and believed * * *.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(2) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * (w)illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws, of a return, **1** * * * which is fraudulent or is false as to any material matter * * * shall be guilty (of an offense against the laws of the United States).

26 U.S.C. § 7206(2)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO.

Elements of Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment:

First: The act or acts of aiding, or assisting in, or procuring, or counseling, or advising, the preparation, or the presentation, of a false or fraudulent income tax return, **1** as charged;

Second: Doing such act or acts with knowledge that the income tax return in question was false or fraudulent, as charged; and

Third: Doing such act or acts willfully.

A "false" tax return is a return that was untrue when made, and was then known to be untrue by the person making it, or causing it to be made.

A "fraudulent" tax return is a return made or caused to be made with the intent to deceive.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7206(2)

United States v. Perez , 565 F.2d 1227, 1233-34 (2d Cir. 1977)

United States v. Sassak , 881 F.2d 276, 278 (6th Cir. 1989)

United States v. Hooks, 848 F.2d 785, 788-89 (7th Cir. 1988)

United States v. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990)

United States v. Crum, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO.

Knowledge or Consent of Taxpayer

Section 7206(2) of the Internal Revenue Code (26 U.S.C. § 7206(2)) further provides that a person may be guilty of the offense of aiding or assisting in, or procuring the preparation or presentation of a false or fraudulent return, regardless of "whether or not such falsity or fraud is with the knowledge or consent of the (taxpayer) * * *."

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984)

Accord ***United States v. Wolfson***, 573 F.2d 216, 225 (5th Cir. 1978)

See also ***United States v. Dunn***, 961 F.2d 648, 651 (7th Cir. 1992); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991); ***United States v. Zimmerman***, 832 F.2d 454, 457 (8th Cir. 1987); ***United States v. Greger***, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); ***United States v. Crum***, 529 F.2d 1380, 1382 (9th Cir. 1976); ***United States v. Kopituk***, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983)

cf. ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be be necessary to instruct the jury on the requirements for accomplice testimony. ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO.

Signing of Returns
Knowledge of Taxpayer Irrelevant

In making a determination as to whether the defendant aided or assisted in or counseled, advised, or generated or set in motion certain acts or the preparation of documents resulting in the preparation or presentation of fraudulent or false tax returns, the fact that the defendant did not sign and did not prepare the income tax returns in question is not material to your consideration.

Nor is it necessary for the government to prove that any taxpayer whose returns were fraudulent or false had knowledge of the falsity of the returns. In this respect, I instruct you as a matter of law that if you find beyond a reasonable doubt that the defendant knowingly and willfully furnished, prepared, or caused to be prepared, false and fraudulent documents (and offered false advice), which the defendant knew would be relied on in the preparation of income tax returns and would result in [***understated income***] or [***false or overstated deductions***] on the returns named in Counts ____, _____ and _____ of the Indictment, then the government has met its burden of proof under this element of the offense.

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984).

Accord ***United States v. Wolfson***, 573 F.2d 216, 225 (5th Cir. 1978);

See also ***United States v. Dunn***, 961 F.2d 648, 651 (7th Cir. 1992); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991); ***United States v. Zimmerman***, 832 F.2d 454, 457 (8th Cir. 1987); ***United States v. Greger***, 716 F. 2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); ***United States v. Crum***, 529 F.2d 1380, 1382 (9th Cir. 1976); ***United States v. Kopituk***, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983);

cf. ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be necessary to instruct the jury on the requirements for accomplice testimony. ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(2), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [***set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or***

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

"Willfully" -- To Act or to Omit

In order to sustain its burden of proof for the crime of violating Section 7206(2), as charged in Count[s] _____ of the indictment, the Government must prove beyond a reasonable doubt not only that the defendant committed the acts alleged in the charge[s], but also that the defendant acted willfully.

An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

COMMENT

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

In the context of Section 7206(2), willfulness connotes a voluntary, intentional violation of a known legal duty. Proof of evil motive or bad intent is ***not*** required. This showing of willfulness will most often be made by circumstantial evidence, because direct proof of willfulness may not be readily available.

[***At this point, consistent with the evidence in the case, the jury may be given an illustration of the type of evidence from which willfulness may be inferred, as follows:***] For example, you may find that the defendant acted willfully from the evidence of the witnesses showing cumulatively a repetitious overstatement of deductions by the defendant.

See ***United States v. Brown***, 548 F.2d 1194, 1199 (5th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Belief of Defendant

If a person in good faith believes that an income tax return, as prepared by him [her], truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he [she] cannot be guilty of willfully preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

United States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989)

United States v. Kouba, 822 F.2d 768, 771 (8th Cir. 1987)

United States v. Holecek, 739 F.2d 331, 336 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985)

COMMENT

1 *See also* instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Concealing Property -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, 19__, in the _____ District of _____, the defendant, _____, willfully concealed goods and commodities, to wit, [***Describe goods and commodities concealed***] for and in respect of which a tax of the United States is imposed, **1** with the intent to evade or defeat the assessment or collection of said tax.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 38.01 (modified)

NOTE

1 Section 7206(4) also provides "or any property upon which levy is authorized by Section 6331." Where appropriate, the instruction should be modified to follow the wording of the indictment.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(4) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [r]emoves, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title * * * shall be guilty [***of an offense against the laws of the United States***].

26 U.S.C. § 7206(4)

GOVERNMENT PROPOSED JURY INST. NO.

Concealment of Property -- Elements

In order to sustain its burden of proof for the crime of willfully concealing various properties as described in the indictment, the government must prove the following four elements beyond a reasonable doubt:

One: There was an outstanding assessment for income taxes against the defendant;

Two: The defendant owned or had an interest in the property in question upon which levy was authorized;

Three: The defendant removed, deposited or concealed, or was concerned in removing, depositing or concealing the property in question; and

Four: With the intention to evade and defeat the collection of the assessed taxes.

26 U.S.C. § 7206(4)

See also Section 14.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

Concealing Property -- Levy Authorized

Section 6331 of the Internal Revenue Code provides, in part, that:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful * * * to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt * * *) belonging to such person or on which there is a lien * * * for the payment of such tax. * * *

Certain property, however, is exempt from levy for taxes. So far as you are concerned, the following is exempt: [***refer to Section 6334 to determine the appropriate exemptions with respect to the issues and evidence in a given case.***]

26 U.S.C. §§ 6331 and 6334

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(4), you must not only find that the defendant did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with a purpose either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence which may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters which you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [***set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment***

of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct which you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination, as to whether the defendant did or did not.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88, pp. 201-202 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

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Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), *cert. denied* 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about the _____ day of _____, 19 __, in the _____ District of _____, in connection with [***an offer of compromise, or a compromise, or a closing statement***] relating to his [her] liability for [***type of tax***] taxes due and owing by him [her] to the United States of America for the calendar year(s) _____, did willfully ***conceal from*** [***Specify particular officer, with job title***] and all other proper officers and employees of the United States, [***Describe property belonging to taxpayer or other person liable for the tax***] or did willfully [***"receive" "withhold" "destroy" "mutilate" or "falsify," Describe book, document or record involved***].

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(5) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [i]n connection with any compromise * * *, or offer of such compromise, or in connection with any closing agreement * * *, or offer to enter into any such agreement, willfully * * * conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or * * * [r]eceives, withholds, destroys, mutilates, or falsifies any book, document, or record, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax; shall be guilty [***of an offense against the laws of the United States***].

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements

To establish the offense charged in the indictment, the government must prove the following elements beyond a reasonable doubt:

First: in connection with a closing agreement, or offer to enter into a closing agreement, in respect of an internal revenue tax, as provided for in 26 U.S.C. § 7121; or in connection with a compromise, or an offer of compromise, of a civil or criminal case arising under the internal revenue laws, as provided for in 26 U.S.C. § 7122;

Second: the defendant concealed from an employee of the United States any property belonging to the estate of a taxpayer or other person liable for the tax, or the defendant withheld, falsified, or destroyed records, or made a false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax; and

Third: the defendant acted willfully.

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(5), you must not only find that he [she] did the acts complained of and of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [***set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment***

of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Offense Charged

The information or indictment sets forth _____ counts or charges.

Count I charges that on or about the _____ day of _____, 19__, in the _____ District of _____, the defendant, _____, a resident of _____ did willfully file a document with the Internal Revenue Service, United States Treasury Department, at _____, which the defendant knew to be false as to an important matter.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.16 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7207 of the Internal Revenue Code provides, in part, as follows:

Any person who willfully delivers or discloses, to the Secretary [***of the Treasury***] any list, return, account, statement or other document, known by him to be false as to any material matter, shall be [***guilty of an offense against the United States***].

26 U.S.C. § 7207

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

In order to sustain its burden of proof for the crime of filing a false document as charged in Count __ of the indictment [***information***], the government must prove the following three elements beyond a reasonable doubt:

One: The defendant _____ filed a document with the Internal Revenue Service that contained false information as, detailed in the indictment [***information***], as to a material matter;

Two: The defendant knew that this information contained in this document was false; and

Three: In filing this false document, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.18

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

Title 26, United States Code, Section 7207, provides in part that:

"Any person who willfully delivers or discloses to the Secretary [***of the Treasury***] any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter [***shall be guilty of an offense against the United States.***]"

In order to establish the offense of filing a [***false return***] **1** there are two essential elements which the Government must prove beyond a reasonable doubt.

First: That the defendant filed an [***income tax return***] **1** which was false in the respects charged in the indictment; and

Second: That the defendant did so willfully, as charged.

It is not necessary, however, that the government be deprived of any tax by reason of the filing of [***the return***] **1** or that it be shown that additional tax is due to the government.

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within the document is "false" if it was untrue when used and was then known to be untrue by the person using it.

The "materiality" of the allegedly false statements is not a matter with which you are concerned, but rather is a question for the court to decide. You are instructed that the false statements charged, if they were made, were material statements.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1983 Ed.), Offenses in Other Titles, Instruction No. 50, p. 158

NOTE

1 This instruction refers to an "income tax return" as the false document in issue. It is important to note that Section 7207 prosecutions are ***not*** authorized by the Tax Division, except in very limited circumstances, where the false document is a federal income tax return. *See* Section 16.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

The defendant is charged in [***Count _____ of***] the indictment [***information***] with filing a false [***document***] in violation of Section 7207 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant filed a [***document***] knowing that it contained false information; and

Second, that the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 9.06D (1992)

GOVERNMENT PROPOSED JURY INST. NO.

False Tax Return **1**

Title 26, United States Code, Section 7207, makes it a Federal crime or offense for anyone to willfully file a [***federal income tax return***] **1** knowing it to be false in some material way.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant filed an [***income tax return***] **1** which was false in a material way as charged in the indictment; and

Second: That the defendant did so knowingly and willfully, as charged.

It is not necessary that the government be deprived of any tax by reason of the filing of the [***return***] **1**, or that it even be shown that additional tax is due to the government, only that the defendant willfully filed a false [***return***]. **1**

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is "false" if it was untrue when the document was used and was then known to be untrue by the person using it.

The "materiality" of the alleged false statements is not a matter for you to determine, but is a question for the court to decide. You are instructed that the false statements charged in the indictment, if they were made, were "material" statements.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, Instruction No. 75 (1985)

NOTE

1 This instruction refers to an "income tax return" as the false document in issue. It is important to note that Section 7207 prosecutions are ***not*** authorized by the Tax Division, except in very limited circumstances, where the false document is a federal income tax return. *See* Section 16.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

Not Necessary to Show Any Additional Tax Due

Although the government is required to prove beyond a reasonable doubt that the defendant willfully filed a false document as charged in Count ___ of the indictment [***information***], the government is not required to prove that any additional tax was due to the government or that the government was deprived of any tax revenues by reason of any filing of any false return.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7207, you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [***set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or***

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

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United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

motive." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. ***United States v. Pomponio***, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Count ____ of the indictment charges the defendant with violating Section 7212(a) of the Internal Revenue Code. Section 7212(a) of the Internal Revenue Code provides, in pertinent part, as follows:

> Whoever * * * in any * * * way corruptly * * * obstructs or impedes, or endeavors to obstruct or impede the due administration of this title, [***shall be guilty of an offense against the United States***].

26 U.S.C. § 7212(a)

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements of Section 7212(a)

The government must establish the following three essential elements beyond a reasonable doubt to establish a violation of the offense charged in Count ___ of the Indictment:

First: The defendant in any way corruptly;

Second: Endeavored to;

Third: Obstruct or impede the due administration of the Internal Revenue Laws.

United States v. Williams, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981) ("Laws" substituted for "Code" for ease of understanding.)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Endeavor"

To "endeavor" is to undertake an act or to attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue Laws.

Instruction used in ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993), relying on definition of endeavor used in an obstruction case, ***United States v. Silverman***, 745 F.2d 1386, 1393, 1396 n. 12 (11th Cir. 1984)

GOVERNMENT PROPOSED JURY INST. NO.

Endeavor - Defined

The term "endeavors" as used in these instructions means to knowingly and deliberately act or to knowingly and deliberately make any effort which has a reasonable tendency to bring about the desired result.

It is not necessary for the government to prove that the "endeavor" was successful or, in fact, achieved the desired result.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 41.05

United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984)

United States v. Williams, 644 F.2d 696, 699 n.14 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Corruptly"

To act "corruptly" is to act with the intent to secure an unlawful advantage or benefit either for oneself or for another.

United States v. Reeves, 752 F.2d 995, 1001 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985)

United States v. Dykstra, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993)

United States v. Yagow, 953 F.2d 423, 427 (8th Cir. 1992)

United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991); *cert. denied*, 112 S. Ct. 1760 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Obstruct or Impede"

To "obstruct or impede" is to hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment difficult and slow.

Black's Law Dictionary pg. 972 (5th Ed. 1979)

GOVERNMENT PROPOSED JURY INST. NO.

Failure to Deposit Withholding Taxes -- Offense Charged

The [***information or indictment***] sets forth _____ counts or charges.

It is charged in the [***information or indictment***] as follows:

1. That during the period _____, 19__, to _____, 19__, in the _____ District of _____, the defendant, _____, was an employer of labor required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. That the defendant did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending _____, 19__, _____, 19__, _____, 19__, and _____, 19__.

3. That on _____, 19__, the defendant was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512, which notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after the delivery of such notice, and, not later than at the end of the second banking day after such collection, to deposit said taxes in a separate bank account established by him [her] in trust for the United States to be kept therein until paid over to the United States.

4. That within the _____ District of _____, the defendant unlawfully failed to comply with the provisions of Title 26, United States Code, Section 7512, in that, after receiving delivery of the notice referred to in paragraph 3, he [she] paid wages and was required to collect and deposit the said taxes, but failed to deposit said taxes in a separate bank account in trust for the United States, by the dates and in the amounts hereinafter specified:

COUNT	DATE WAGES PAID	DATE DEPOSIT REQUIRED	AMOUNT OF DEPOSIT REQUIRED
I.			
II.			
III.			
IV.			

All in violation of Title 26, United States Code, Section 7215.

26 U.S.C. § 7215

GOVERNMENT PROPOSED JURY INST. NO.

Statutes Defining Offense

The [***information or indictment***] charges a failure to comply with the requirements of Section 7512(b) of the Internal Revenue Code, which are as follows:

> Any person who is required to collect, account for, and pay over any [***withholding taxes***], * * * if notice has been delivered to such person [***for failure to comply***], * * * shall collect the [***withholding***] taxes * * * which became collectible after delivery of such notice **1**, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank * * *, and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.
>
> 26 U.S.C. § 7512(b)

Section 7512 of the Internal Revenue Code provides, in part, as follows:

> (a) ***Penalty***. -- Any person who fails to comply with any provision of section 7512(b) shall * * * be guilty [***of an offense against the laws of the United States***].
>
> (b) ***Exceptions***. -- This section shall not apply --
>
> (1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and
>
> (2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.
>
> For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

NOTE

1 Section 7512(a) provides that, in the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements of Offense

The essential elements of the offense charged in Count _____of the information, each of which must be proved beyond a reasonable doubt, are as follows:

First, that during the period from _____, 19___, to _____, 19___, the defendant, ___, was an employer of labor and, as such, was required to collect, account for, and pay over to the United States federal income and F.I.C.A. taxes withheld from the wages of his [her] employees;

[***First, that during the period from _____ , 19___, to _____, 19___, the defendant, ___, was a person in such a relationship to the corporation that he [she] was a person required to collect, account for, and pay over the federal income and F.I.C.A. taxes withheld from the wages of the employees of _____;***]

Second, that prior to _____, 19___, the defendant failed to collect, truthfully account for, or pay over such taxes, or failed to make deposits, payments, or returns of such taxes at the time and in the manner prescribed by law or regulations;

Third, that on _____, 19___, the defendant was notified by a notice delivered in hand of the failure to do so;

Fourth, that said notice directed the defendant to establish a separate bank account in trust for the United States, to deposit such taxes in the separate bank account not later than two banking days after the taxes were collected or withheld, and to keep such taxes deposited in the bank account until payment to the United States; and

Fifth, that on _____, 19___, two banking days after the collection of the taxes, the defendant failed to deposit the amount of $_____ in federal income and F.I.C.A. taxes collected from the wages of his [her] employees in a separate bank account in trust for the United States.

Now, the essential elements of Counts ___, ___, and ___ of the information [***indictment***] are the same as in Count ___, except they differ as to the date of the alleged failure to make the bank deposit and the amount of the taxes withheld from [***indictment***] the employee's wages. The date and amount as to each count appear in the information, which you will take with you to the jury room, and the court will not repeat them at this time.

United States v. Hemphill, 544 F.2d 341, 343-344 (8th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977)

United States v. Erne, 576 F.2d 212, 213 (9th Cir. 1978)

United States v. Polk, 550 F.2d 566, 567 (9th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO.

Withholding Taxes

This case involves federal withholding taxes. Under the law, an employer is required to withhold certain amounts from the wages paid to its employees. The amounts withheld are for federal income taxes and for F.I.C.A. taxes, which are also known as social security taxes. When the employees file their personal income tax returns, they compute what they owe and credit against this the amount of income tax withheld by their employer from their wages during the year. I am sure you are all aware of the standard W-2 form prepared by employers showing how much was withheld from wages during the year, which is then attached by the employee to his or her personal income tax return.

When an employer pays wages to an employee, the employer must set aside the amounts to be withheld in a trust fund for the government since these amounts are to be credited, in whole or in part, to the income tax and social security accounts of the employee. By trust fund, it is meant that such withheld amounts do not belong to the employer but are merely held by the employer for the benefit of the government until paid over to the government and then credited to the accounts of the employees for income tax and social security purposes.

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, pp. 86,046-86,048; 27 A.F.T.R.2d 865, 866-868 (N.D. Cal. Nov. 5, 1970)

Neale, Sr. v. United States, 13 A.F.T.R.2d 1721, 1722 (Kan. April 29, 1964)
26 U.S.C. §§ 3101, 3102, 3401, 3402, 3403 6302(c), & 7501

GOVERNMENT PROPOSED JURY INST. NO.

Person Required to Collect, Account For, and Pay Over Tax

In order to be found guilty of the offenses charged in the information [***indictment***], the defendant must have been a person required to collect, account for, and pay over withheld federal income and F.I.C.A. taxes. An individual is such a person if he [she] is connected or associated with a corporate employer in such a manner that he [she] has the ultimate authority over the corporation, or the power to assure that the withholding taxes are paid, or the power to determine which bills will be paid and when, or significant control over the financial decision-making process within the corporation. Such a person may be either an officer, employee, member of the board of directors, or shareholder of the corporation. He [she] may be a person required to collect, account for, and pay over withheld taxes whether or not he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 7343

United States v. McMullen, 516 F.2d 917, 920-921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975)

Pacific National Insurance v. United States, 422 F.2d 26 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

United States v. Graham, 309 F.2d 210 (9th Cir. 1962)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO.

Defendant Cannot Delegate Responsibility

If the defendant was a person required to collect, account for, and pay over withholding taxes at the time the notice directing him [her] to make deposits of the taxes to a special bank account in trust for the United States was served upon him [her], then he [she] was under a duty to make such deposits and could not relieve himself [herself] of that duty by attempting to delegate it to another corporate officer or employee.

Mazo v. United States, 591 F.2d 1151, 1155 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)

United States v. Leuschner, 336 F.2d 246, 248 (9th Cir. 1964)

Levy v. Tomlinson, 249 F. Supp. 659, 661 (S.D. Fla. 1965)

Jackson v. United States, 19 A.F.T.R.2d 1579, 1582 (S.D. Ind. Feb. 16, 1965)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO.

More Than One Responsible Person

There may be more than one person connected with a corporation who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his [her] responsibility.

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,047; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Exact Amounts Not Required

The government need not prove, as to each count of the information, a failure to deposit the exact amount of taxes alleged in that count. It is sufficient for the government to prove beyond a reasonable doubt as to each count of the information [***indictment***] that there was a failure to deposit any amount of taxes collected and withheld from employee's wages which should have been deposited in a separate bank account in trust for the United States by the defendant.

United States v. Gay, 576 F.2d 1134, 1138 (5th Cir. 1978)

GOVERNMENT PROPOSED JURY INST. NO.

Exception -- Circumstances Beyond Control

The law provides an exception to the statute where the defendant can show that the failure to collect, deposit, and keep the taxes in the separate bank account was due to circumstances beyond his [her] control. For this purpose, however, a lack of funds existing immediately after the payment of wages, whether or not resulting from the payment of the wages, is not to be considered circumstances beyond a person's control. This can be illustrated by an employer who has gross payroll requirements of $1,000, with respect to which he [she] is required to withhold $100 of income taxes. If such an employer had on hand only $900 and paid out this entire amount in wages, withholding and depositing nothing, the fact that the net wages due equaled this amount would not constitute circumstances beyond a person's control.

A lack of funds occurring after the payment of wages, so long as it was not immediately after, would, however, qualify under this exception if it were due to circumstances beyond the person's control. Examples of factors which might result in a lack of funds constituting circumstances beyond the control of the person after, but not immediately after, the payment of wages and within the period before the time the person was required to deposit the funds are theft, embezzlement, destruction of the business from fire, flood, or other casualty, or the failure of a bank in which the person had deposited the funds prior to transferring them to the trust account for the government. However, a lack of funds immediately after the payment of wages resulting, for example, from the payment of creditors would not be considered circumstances beyond the person's control.

This does not, however, impose upon the defendant the burden of producing proof of a circumstance beyond his [her] control, or any other evidence. The burden is always upon the government to prove guilt beyond a reasonable doubt.

26 U.S.C. § 7215(b)

United States v. Randolph, 588 F.2d 931, 932-933 (5th Cir. 1979)

United States v. Plotkin, 239 F. Supp. 129, 131-132 (E.D. Wis. 1965)

S. Rep. No. 1182, 85th Cong., 2d Sess. ((1958) 2 U.S. Code Cong. & Ad. News 2187, 2191-2192)

GOVERNMENT PROPOSED JURY INST. NO.

Specific Items Method of Proof
(Unreported Income)

To establish the first element of the offense charged, namely, the receipt by the defendant of unreported income upon which a substantial amount of tax was due and owing, the government has presented evidence under the "specific item" method of proof. The "specific item" method simply consists of offering evidence of particular or specific amounts of taxable income received by the defendant during a particular tax period, with evidence that the defendant did not include such amounts in his [her] tax return for such period, together with evidence concerning the defendant's knowledge of the omission and his [her] intent and willfulness in attempting to evade payment of tax by the omission.

United States v. Beck, 59-2 U.S.T.C., para. 9486, p. 73,115 (W.D. Wash. Feb. 19, 1959), *aff'd in part and rev'd in part on other grounds*, 298 F.2d 622 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962)

GOVERNMENT PROPOSED JURY INST. NO.

Specific Items Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he reported on his income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income omitted from his tax return, the government in this case has introduced evidence of [***describe the specific items of income or other evidence which is the basis for the allegation of evasion***].

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial income in addition to what he reported on his income tax return for the year in question, then you must decide whether there was tax due in addition to what was shown to be due on the return, as a result of the defendant's additional, unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional tax liability, when the alleged additional income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial additional income, and that there was tax due in addition to what was shown to be due on his income tax return, as a result of this additional income, then this first element has been satisfied.

2 L. Sand, *et al.*, ***Modern Federal Jury Instructions***, (1993 Ed.), Instruction 59-5

GOVERNMENT PROPOSED JURY INST. NO.

Net Worth Method of Proof

Theory

To establish the understatement of tax for the evasion counts for the years ____, ____, and _____, the government relies upon proof by the so-called net worth method. I should explain that a person's "net worth" is the difference between his assets and his liabilities at any given date. It is the difference between what he [she] owns and what he [she] owes at that time. If a person has more assets at the end of the year than at the beginning of the year and if that person's liabilities remain the same, or decrease, then his [her] net worth has obviously increased. However, only the cost price of the assets is to be considered. Mere increases in market value, which have not been realized, must not be taken into account.

[***In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint net worth and expenditures.***] **1**

The theory of the net worth method of proof is that if the government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it, has increased during the taxable year, then it may be inferred that the defendant had receipts of either money or property during the year; and if the government satisfies you beyond a reasonable doubt that the defendant had a source of taxable income and that the receipts did not come from nontaxable sources, then you may find that the receipts constituted taxable income to the defendant.

If you also find that the government proved that the defendant spent money on items which did not add to the defendant's net worth at the end of the year (items such as living expenses and taxes), then it may be inferred that those expenditures also came from funds received during the year. Consequently, such expenditures also may be taken into account in determining the amount of the defendant's taxable income for the year, provided they were not deductible expenditures which the defendant was entitled to claim as deductions in computing taxable income on his [her]

return.

In this case the government has undertaken to prove what the defendant was worth at the beginning of each year involved and what he [she] was worth at the end of that year, so as to show that his [her] net worth increased during the year. The government also has introduced other evidence, which, if you believe it, would tend to establish money paid out by the defendant for such non-deductible items as federal income taxes, living expenses, and other personal expenditures.

The government claims that the sum of the defendant's net worth increases and non-deductible expenditures for each year, less adjustments, as shown by the government's evidence, represents the defendant's correct taxable income for that year. The resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return.

As I have already told you, an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. So you must consider the evidence as to each year separately in arriving at your verdict.

Opening Net Worth

Now, I want to point out to you that, because the net worth method of proving unreported income involves a comparison of the beginning and ending net worth of the defendant in each prosecution year, the result cannot be correct unless the beginning point, or the opening net worth, is reasonably accurate. You will readily appreciate that if the defendant actually owned substantial assets at the beginning point, which the government has failed to include in its computations, apparent increases in net worth during the indictment years may be no more than the disclosure of money previously saved, or the result of a change in the form of other assets, which the defendant owned at the beginning of the year, and which the government did not take into account. For example, a taxpayer might have had a substantial amount of cash on hand (not in a bank) which he [she] **1** had saved up in prior years and which he [she] used to acquire assets or make purchases or other expenditures during a prosecution year. In that case an apparent increase in the defendant's net worth might be only the result of a conversion of prior accumulated cash into tangible property. Similarly, cash on hand accumulated from prior years may have been used to make non-deductible expenditures. You must, therefore, in order to convict, be satisfied that the government's evidence

establishes an opening net worth with reasonable certainty as of the beginning of the year.

On the other hand, the government is not required to refute all possible speculation that the defendant might have had assets at the beginning of the year, which the investigation failed to disclose; nor is it necessary for the government to prove the exact cost of the assets owned by the defendant at the starting point, or the precise amount of his [her] undeposited cash on hand. It is enough if the government, although unable to determine the exact cost of the assets owned by the defendant at the beginning of the year, can show beyond a reasonable doubt that such assets were insufficient to account for the subsequent increases in the defendant's net worth.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case the government has endeavored to prove that the defendant (and his [her] spouse) **1** did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by [***e.g., tracing the financial and income tax return filing history of the defendant (and his spouse) and by introducing in evidence the defendant's own statements.***] The evidence introduced by the government of the defendant's [***income tax returns and***] financial history in years prior to those named in the indictment may be considered by you only for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down all "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his [her] representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth included all of the defendant's assets. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, then such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will return a verdict of not guilty as to any such count of the indictment.

If you find as to any year that the funds reflected in increased net worth and expenditures are not substantially in excess of the income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of the reported income, then you will return a verdict of not guilty as to any such count of the indictment.

If you find, on the other hand, that the government has established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you also are convinced beyond a reasonable doubt that the funds reflected in increased net worth and expenditures during such year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented taxable income on which the defendant willfully attempted to evade or defeat the tax.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's increased net worth and non-deductible expenditures arose from taxable, rather than nontaxable sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, legal or illegal, carried on for gain or profit, or gains or profits and income derived from

any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources or that the funds did not come from nontaxable sources. In other words, the government must establish either a likely source of income from which you believe the net worth increases and expenditures sprang, or that nontaxable sources of income have been negated as a source of the net worth increases and expenditures.

If you find that the defendant offered timely explanations of the source of his funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations to prove the source of his net worth, for, as I have said, the burden is on the government to prove that the increases arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Koskerides, 877 F.2d 1129, 1137 (2d Cir. 1989)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 Where the defendant was married and filed joint returns and the net worth computation reflects a joint net worth, then appropriate language should be used in the instruction. This would also apply where both a husband and wife are charged.

GOVERNMENT PROPOSED JURY INST. NO.

The "Net Worth Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of the defendant _____ for the year[s] ___, the government has relied upon proof by the so-called "net worth method" of determining income for that particular period. This "net worth method," if used correctly, is an indirect or circumstantial way to reliably determine income.

A person's "net worth" is the difference between that person's total assets and total liabilities on any given day. Said another way, a person's net worth is the difference between what a person owns and what that person owes at any particular time. If a person had more assets at the end of the year than at the beginning of that year, and if that person's liabilities remained the same during that same year, then that person's net worth has increased.

In determining net worth, however, only the cost price of the defendant's assets is to be considered. Mere increases in market value, which have not been actually realized through sale or conversion into cash, must not be taken into account in computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in this manner, has increased during the year[s] in question, then the jury may find that the defendant _____ had receipts of either money or property during that year. If the evidence in the case also establishes beyond a reasonable doubt that the defendant had one or more sources of taxable income, and that the receipts just referred to did not come from taxable income, then the jury may find that such receipts constituted taxable income to the defendant during that period.

To show that the defendant's net worth increased in this case, the government has undertaken to prove the defendant's net worth at the beginning of the year 19__, and also attempted to prove the defendant's net worth at the end of that same year. The government also has introduced evidence in an effort to prove that the defendant paid out various amounts of money during the taxable year for such non-deductible items as personal and living expenses.

Because the "net worth method" of determining income involves a comparison of the net

worth of the defendant at the beginning and again at the end of the year in question, the result cannot be accepted as correct unless this starting net worth figure, the beginning point, is reasonably accurate. Although the government is not required to prove the exact value of each and every asset owned by the defendant at the starting point, the evidence must establish beyond a reasonable doubt that all assets owned by the defendant at the starting point were not sufficient to account for any subsequent increase in the defendant's net worth. Said another way, the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus the defendant's reported income for that same taxable year, do not add up to an amount sufficient to account for the increases in net worth, plus non-deductible expenditures during that same year.

The government contends that any increases in the net worth of the defendant _____during the taxable year 19__, plus any non-deductible expenditures by the defendant for that year as shown by the evidence in the case, represent the defendant's true and correct net income for that year. These resulting figures are alleged by the government to be a reasonable approximation of what the defendant _____ should have reported on his [her] income tax return for the calendar year 19__.

The burden is always upon the government to establish beyond a reasonable doubt that any amounts reflected in defendant's increased net worth, plus non-deductible expenditures, were from taxable, rather than non-taxable sources. In this regard, you are instructed that federal income tax is levied on income derived from compensation for personal services of every kind, and in whatever form paid, as well as on income from interest, dividends, gains, profits, and certain other items not pertinent to this case.

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no federal income is levied on such funds or property, such funds or property do not need to be reported as income. Non-taxable funds or non-taxable property include such items as gifts, inheritances, the proceeds of life insurance policies, and certain other items not pertinent to this case.

If it appears from the evidence in the case that during the course of the investigation of his [her] income tax return and before the trial of this case, the defendant _____ offered to Treasury agents certain explanations of the sources of certain funds or property and these sources of funds or property were reasonably capable of being checked and verified by Treasury agents, the government

may not unreasonably disregard such explanations. In evaluating the evidence in this case you may take into consideration any failure of the government to reasonably investigate the truth of any such explanations as well as the trustworthiness of the explanations provided.

On the other hand, the government is not required, without suggestion or explanation from the defendant _____, to investigate every conceivable source of non-taxable funds. If it appears from the evidence in the case that the defendant did not provide an explanation as to the source or sources of any increase in his [her] net worth, then the jury may consider such failure as one of the circumstances in evidence in the case, bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty to offer or produce any evidence. The burden is always upon the government to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including the claim that any increase in the defendant's net worth was from taxable sources.

If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable degree of certainty at the beginning of the year 19_, then the jury should find the defendant _____ not guilty. If the jury should find that any increase in net worth is not substantially in excess of the income reported by the defendant _____ on his [her] return for 19_, then the jury should find the defendant not guilty.

On the other hand, if the evidence in the case establishes beyond a reasonable doubt the amount of the net worth of the defendant _____ as of the beginning of the calendar year 19_, and further establishes beyond a reasonable doubt that funds reflected in any increased net worth, plus the defendant's expenditures, during the same year substantially exceed the income reported on the defendant's tax return, the jury should then proceed to determine whether the evidence in the case also establishes beyond a reasonable doubt that such additional funds represented taxable income, and then proceed to determine whether the government has proven that the defendant acted willfully in attempting to evade or defeat the additional tax, as charged in Count ___ of the indictment.

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions - Criminal*** (4th Ed. 1990), § 56.05, pp. 987-990.

GOVERNMENT PROPOSED JURY INST. NO.

Income Tax Evasion - Net Worth Method
(26 U.S.C. § 7201)

To prove that additional tax was due, the government must prove beyond a reasonable doubt that:

(a) defendant received income in addition to what was reported, and

(b) that tax was due in addition to what was shown to be due on the income tax return.

In this case, the government has used the so-called net worth method of proof. By using this method the government attempts to prove that the amount the defendant was worth increased during the year by more than the income shown on the defendant's tax return and by the defendant's other nontaxable receipts. I will now explain this to you in more detail.

Net worth is the value of everything the defendant owns -- the defendant's assets -- less the amounts the defendant owes -- the defendant's liabilities. **1** To determine whether the government has proved by the net worth method that the defendant had additional unreported income, you must answer the following five questions:

1. Determine the defendant's net worth on January 1, 19__, that is, when the tax year began, and on December 31, 19__ , when the year ended. How much did the defendant's net worth increase during that year?

2. How much did the defendant spend during that year for personal use and for other things that could not be deducted from defendant's income for tax purposes?

3. Next add the increase in the defendant's net worth and the amount the defendant spent on himself [herself] and for nondeductible purposes. Was the total of these amounts greater than the amount of income reported on the defendant's tax return?

4. Did the defendant have any nontaxable income during the year that would explain the difference, that is, income which the defendant did not have to report on his [her] return, such as gifts or inheritance?

[***5. Did the defendant have business losses or expenses or bad debts that the defendant could have deducted from the defendant's income to reduce the defendant's tax but did not deduct?***] **2**

[***The government has the burden of proving beyond a reasonable doubt that the defendant's net worth increased during the tax year by more than is explained by the defendant's reported income less the defendant's personal, nondeductible spending plus the defendant's other nontaxable sources of income.***] **3** The government does not have to prove exact amounts; it need only prove the amounts with reasonable accuracy. The government also has an obligation to have its revenue agents follow up reasonable leads during their investigation that might explain an apparent increase in net worth, such as sources of other nontaxable income. [***The government must give the defendant credit for amounts that the law entitled the defendant to deduct from the defendant's income to reduce the defendant's tax, but that the defendant failed to deduct.***] **4**

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), § 9.06B

NOTES

1 This sentence should be modified to reflect that the assets are valued *at cost* and that mere unrealized increases in market value are not taken into consideration.

2 This paragraph is not correct, at least in the context in which it appears above. Business losses or expenses or bad debts are all accounted for, and the defendant would be given full credit in a proper net worth computation for all deductions and expenses, whether claimed or not on the defendant's return. In point of fact, if a defendant failed to claim all of his [her] expenses and deductions, then this would result in the reporting of a higher taxable income than would otherwise be reported. Thus, under these circumstances, computed unreported income would be less when reported income is compared with corrected taxable income as computed by the net worth method. It may be that No. 5 in the instruction is meant to explain

"below the line" reductions in the total of the net worth increase and non-deductible expenditures but the paragraph is still incorrect -- the reductions, as noted above, do not pertain to reported items. Moreover, business expenses are not a "below the line" adjustment but are automatically accounted for in computing the net worth increase.

3 The first sentence of this paragraph is confusing. It does not conform to the mechanics of a net worth computation which seeks to establish unreported income by demonstrating that the defendant's net worth increase, plus nondeductible expenditures, less reductions (such as nontaxable sources of income) and other adjustments, exceeds reported income.

4 This statement is not correct in the context of a net worth case which automatically accounts for all of the deductible expenses paid for by the defendant. Whether the defendant has or has not claimed all available deductions on his [her] return may have a bearing on willfulness but does not affect the computation of correct taxable income. Note that the defendant's failure to claim all available deductions of this nature results in a smaller understatement, ***i.e.***, his [her] reported income is higher than it would otherwise be.

GOVERNMENT PROPOSED JURY INST. NO.

Net Worth Method

In this case the government relies upon the so-called "net worth method" of proving unreported income.

A person's "net worth" at any given date is the difference between his total assets and his total liabilities on that date. It is the difference between what he owns and what he owes (measuring the value of what he owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to his net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and his net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the defendant at that time were insufficient by themselves to account for the subsequent increases in his net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's net worth was at the beginning of the year, you should find the defendant not guilty.

NET WORTH METHOD **July 1994**

In determining whether or not the claimed net worth of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the defendant or which otherwise arose during the investigation concerning other assets the defendant had at the beginning of the year (or other nontaxable sources of income he had during the year), then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the defendant's net worth at the beginning of the tax year, and further establishes that any increase in his net worth at the end of that year, together with this [***sic, his***] nondeductible expenditures made during the year, did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.2, pp. 231-233.

GOVERNMENT PROPOSED JURY INST. NO.

Net Worth Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he reported on his income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income omitted from his tax return, the government in this case has used the so-called net worth method of proof. By using this method the government attempts to prove that the amount the defendant was worth increased during the year by more than the income shown on the his tax return and by his other nontaxable receipts. Let me explain this in more detail.

Net worth is the value of everything the defendant owns -- his assets -- less the amounts he owes -- his liabilities. **1** To determine whether the government has proved by the net worth method that the defendant had additional unreported income, you must answer the following five questions:

1. Determine the defendant's net worth on January 1, 19_, that is, when the tax year you are considering began, and on December 31, 19_, when the year ended. How much did the defendant's net worth increase during that year?

2. How much did the defendant spend during that year for personal use and for other things that could not be deducted from his income for tax purposes?

3. Next add the increase in his net worth and the amount the he spent on himself and for nondeductible purposes. Was the total of these amounts greater than the amount of income reported on his tax return? If the answer to this question is "yes," you must then consider the following questions.

4. Did the defendant have any nontaxable income during the year that would explain the difference, that is, income which he did not have to report on his return, such as gifts or inheritances?

[***5. Did the defendant have business losses or expenses or bad debts that he could have deducted from his income to reduce his tax but did not deduct?***] **2**

[***The government has the burden of proving beyond a reasonable doubt that the defendant's net worth increased during the tax year by more than is explained by his reported income less his personal, nondeductible spending plus his other nontaxable sources of income.***] **3** The government does not have to prove exact amounts; it need only prove the amounts with reasonable accuracy. The government also has an obligation to have its revenue agents follow up reasonable leads during their investigation that might explain an apparent increase in net worth, such as sources of other nontaxable income. [***And the government must give the defendant credit for amounts that the law entitled the defendant to deduct from his income to reduce his tax, but that he failed to deduct.***] **4**

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial income in addition to what he reported on his income tax return for the year in question, you must decide whether there was tax due in addition to what was shown to be due on the return, as a result of defendant's additional, unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional tax liability, when the alleged additional income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial additional income, and that there was tax due in addition to what was shown to be due on his income tax return, as a result of this additional income, then this first element has been satisfied.

2 L. Sand, *et al.*, ***Modern Federal Jury Instructions***, (1993 Ed.), Instruction 59-6

NOTES

1 This sentence should be modified to reflect that the assets are valued ***at cost*** and that mere

unrealized increases in market value are not taken into consideration.

2 This paragraph is not correct, at least in the context in which it appears above. Business losses or expenses or bad debts are all accounted for, and the defendant would be given full credit in a proper net worth computation for all deductions and expenses, whether claimed or not on the defendant's return. In point of fact, if a defendant failed to claim all of his [her] expenses and deductions, then this would result in the reporting of a higher taxable income than would otherwise be reported. Thus, under these circumstances, computed unreported income would be less when reported income is compared with corrected taxable income as computed by the net worth method. It may be that No. 5 in the instruction is meant to explain "below the line" reductions in the total of the net worth increase and non-deductible expenditures but the paragraph is still incorrect -- the reductions, as noted above, do not pertain to reported items. Moreover, business expenses are not a "below the line" adjustment but are automatically accounted for in computing the net worth increase.

3 The first sentence of this paragraph is confusing. It does not conform to the mechanics of a net worth computation which seeks to establish unreported income by demonstrating that the defendant's net worth increase, plus nondeductible expenditures, less reductions (such as nontaxable sources of income) and other adjustments, exceeds reported income.

4 This statement is not correct in the context of a net worth case which automatically accounts for all of the deductible expenses paid for by the defendant. Whether the defendant has or has not claimed all available deductions on his [her] return may have a bearing on willfulness but does not affect the computation of correct taxable income. Note that the defendant's failure to claim all available deductions of this nature results in a smaller understatement, ***i.e.***, his [her] reported income is higher than it would otherwise be.

GOVERNMENT PROPOSED JURY INST. NO.

Expenditures Method of Proof

Theory

The government has introduced evidence of the expenditures method of proof to establish that the taxable income reported by the defendant on his [her] income tax returns is not true and correct. By this method, the government seeks to establish that the defendant **1** spent an amount greater than the amount reported on his [her] income tax returns as being available for spending. In other words, the government claims that the defendant could not have spent the amount that he [she] did in a given year unless he [she] had more income than the defendant reported on his [her] return for that year.

[***In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint expenditures.***] **1**

Under this method, the first step is to add up and total the amounts that the defendant spent during a given year. The next step is to subtract from the total amount spent: (1) any funds that the defendant had on hand at the beginning of the year which were spent during the year; (2) any monies received by a conversion into cash of assets that were on hand at the beginning of the year; and (3) any nontaxable funds received during the year.

The government claims that a reasonable approximation of the taxable income the defendant should have reported is the amount remaining after personal deductions, exemptions, and adjustments are subtracted from the defendant's income computed on the basis I have just explained to you.

Opening Net Worth

Now, I want to go over some of the points I have just mentioned. As I previously said, under the expenditures method you subtract from the total amount spent any funds the defendant had on hand at the beginning of the year and any monies received by converting into cash assets

that were on hand at the beginning of the year. Another way of saying this is that a starting point or opening net worth must be established so that the defendant is not improperly charged with spending which only reflects what he [she] earned or had from prior years.

You will readily appreciate that if the defendant actually owned substantial assets at the beginning point which the government has failed to consider in its computations, apparent spending of income during the indictment years may be no more than the disclosure of money previously saved, or the result of a conversion into cash of assets which the defendant owned at the beginning of the year.

For example, a taxpayer might have had a substantial amount of cash on hand which he [she] had saved up in prior years and used to make purchases or other expenditures during a prosecution year. In that case an apparent spending out of income during the year might be only the result of spending money earned in a prior year. You must, therefore, be satisfied that the government's evidence establishes that the defendant has been given credit for any cash on hand that he [she] had as well as for any cash realized from the conversion into cash of assets that he [she] had on hand.

On the other hand, the government is not required to refute all possible speculation that the defendant might have converted into cash assets that he [she] had at the beginning of the year which the investigation failed to disclose; nor is it necessary for the government to prove the precise amount of cash on hand that the defendant had at the beginning of the year. It is enough if the government can show beyond a reasonable doubt that cash on hand and the conversion of assets into cash do not account for the expenditures of the defendant during the taxable year.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case, the government has endeavored to prove that the defendant did not have any cash on hand or assets at the beginning of the year which he [she] later converted into cash, other than those disclosed as a result of its investigation by, among other things, tracing the financial history of the defendant. The evidence introduced by the government of the defendant's [***income tax return(s) and***] financial history in years prior to those named in the indictment may be considered by you for such light as it may shed on the innocence or guilt of the defendant during the

years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth relied on by the government is reasonably accurate. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will find that the defendant is not guilty for any such year of reporting a taxable income that is not true and correct.

If you find as to any year that the funds spent by the defendant are not substantially in excess of the taxable income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of reported taxable income, then you will find that the defendant is not guilty for any such year of reporting a taxable income that is not true and correct.

If you find, on the other hand, that the government has established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you are also convinced beyond a reasonable doubt that the expenditures established by the government during such year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented income.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from taxable, rather than nontaxable sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, [***legal or illegal***], carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from a taxable source or sources, or that the funds did not come from nontaxable sources. In other words, expenditures alone do not establish the receipt of taxable income unless the evidence shows either: (1) a likely source of income from which you believe they sprang; or (2) that the government has established that the defendant did not have a nontaxable source of income which accounts for the expenditures.

If you find that the defendant offered timely explanations of the source of his [her] funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations or to prove the source of his [her] funds, for, as I have said, the burden is on the government to prove that the funds used for expenditures arose from

taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*., 394 U.S. 315 (1969)

United States v. Citron, 783 F.2d 307, 315 (2d Cir. 1986)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Marshall, 557 F.2d 527, 529 (5th Cir. 1977)

United States v. Newman, 468 F.2d 791, 793 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973)

United States v. Penosi, 452 F.2d 217, 219 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972)

United States v. Caswell, 825 F.2d 1228, 1231-32 (8th Cir. 1987)

United States v. Pinto, 838 F.2d 426, 431-32 (10th Cir. 1988)

The instruction is also based on the rationale of the following decisions involving the net worth method which is essentially the same as the expenditures method, ***Taglianetti v. United States***, 398 F.2d at 562:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 The instruction should be modified in those instances where a joint return is involved and also

where the net worth computation reflects the joint net worth of a husband and wife, or, in rare instances, the joint net worth of a defendant and a third party.

GOVERNMENT PROPOSED JURY INST. NO.

Cash Expenditures Method

In this case the government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of his reported income together with nontaxable receipts and available cash at the beginning of the year, then the taxpayer has understated his income.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year, but also an examination of his "net worth" at the beginning and at the end of that year.

[***The remainder of this instruction should consist of the text of Offense Instruction No. 69.2, the "Net Worth Method," from the second paragraph to the end of that instruction.***] **1**

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.4, p. 236

NOTE

1 Instruction No. 69.2 referred to above in the bracketed material is reproduced, *supra*, in the jury instructions on the net worth method.

GOVERNMENT PROPOSED JURY INST. NO.

Cash Expenditures Method

To establish a substantial understatement of the tax on the income tax return of defendant _____ for the year[s] _____, the government has relied upon proof by the so-called "cash expenditures method" of determining income for that particular period. This "cash expenditures method", if done correctly, is an indirect or circumstantial way to reliably determine income.

In this method of proof, if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth, exceed the total of reported income together with non-taxable receipts for that same year and available cash at the beginning of the year, then the taxpayer has unreported income.

A person's net worth is the difference between a person's total assets and that person's total liabilities on any given date. Said another way, net worth is the difference between what a person owns and what that person owes at any particular time.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year in question, but also an examination of the defendant's net worth at the beginning and again at the end of that year. **1**

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1990), § 56.06, pp. 999-1000.

NOTE

1 Notes following this jury instruction in Devitt, Blackmar, & O'Malley state that "The pertinent portions of the instruction on the "Net Worth Method", Section 56.05, should be given to the jury in conjunction with this instruction." Thus, the prosecutor should consult with the above net worth instructions, *supra*, for appropriate language to include. While the expenditures method is a "variant of the net worth method," there are certain different elements involved in their presentation, including the showing of net worth required. Under the expenditures method, "net worth need not be established by a formal net worth statement. Rather, accurate inclusion of diminution of resources serves the function of enabling the jurors to determine if expenditures were

financed by liquidation of assets, depletion of a cash hoard, or unreported income." ***United States v. Citron***, 783 F.2d 307, 315 (2d Cir. 1986); *See* ***Taglianetti v. United States***, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); ***United States v. Caswell***, 825 F.2d 1228, 1232 (8th Cir. 1987); ***United States v. Pinto***, 838 F.2d 426, 432 (10th Cir. 1988).

GOVERNMENT PROPOSED JURY INST. NO.

Bank Deposits (Plus Cash Expenditures) Method **1**

To prove the alleged understatements of taxable income, the government relies upon the bank deposits [***plus cash expenditures***] method of proof. **2**

To use this method of proof, the government must establish that the defendant was engaged in an income-producing activity during the tax years in issue and that, during the course of such activity, regular and periodic deposits having the inherent appearance of current income were made into bank accounts in the defendant's name or under his [her] dominion and control.

Deposits into such accounts are totalled. Non-income transactions, such as transfers between bank accounts, redeposits, and deposits of nontaxable amounts, such as loans, gifts, inheritances, or prior accumulations, are subtracted from the total deposits. [***To this total is added any additional undeposited income that the defendant received during the tax year in issue, and any cash or currency expenditures made with undeposited funds not derived from a nontaxable source.***] **3**

The appropriate deductions, exclusions, exemptions, and credits to which the defendant is entitled then are subtracted, leaving an amount the government contends to be the corrected taxable income for the tax year in issue. This amount is then used to compute the corrected tax due and owing for the year, which is then compared with the actual tax paid in order to establish the alleged understatement of taxes.

If you find that such bank deposits [***plus undeposited income and cash expenditures***] **3** establishes a taxable income figure for each tax return in issue, which exceeds the taxable income reported on the tax returns for the years involved, you will proceed to inquire whether the government has established that those excess deposits [***and other funds received or spent but not deposited***] **3** represent additional taxable income on which the defendant willfully attempted to evade or defeat the tax. In this connection, if the government has established that the defendant was engaged in an income-producing business or activity, that he [she] was making regular and periodic deposits of money to bank accounts in his [her] name or under his control, that the deposits and

other funds received and available for deposit have the appearance of income, then you may, but are not required to, draw the inference that these deposits [***and other funds available for deposit***] represented income during the year in question.

Explanations or "leads" may be offered to the government by or on behalf of the defendant as to the source of the funds used or available for deposits during the prosecution years, such as cash-on-hand, **1** gifts, loans, or inheritances. If such leads are relevant, reasonably plausible, and are reasonably susceptible of being checked, then the government must investigate into the truth of the explanations. Additionally, leads must be furnished well in advance of trial for the government to be obligated to investigate them or to include them in the government's computations. However, if no such leads are provided, the government is not required to negate every conceivable source of nontaxable funds.

The government claims that it has correctly taken into account all of the factors which I have mentioned and that the bank deposits plus undeposited income and cash expenditures results in a figure which fairly approximates the defendant's true individual taxable income for the calendar years 19_ and 19_.

This instruction is based on the rationale, and not the actual language, of the opinions below:

United States v. Morse, 491 F.2d 149, 151 (1st Cir. 1974)

United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974)

United States v. Nunan, 236 F.2d 576, 587 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957)

United States v. Venuto, 182 F.2d 519, 521 (3d Cir. 1950)

Morrison v. United States, 270 F.2d 1, 2 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959)

Skinnett v. United States, 173 F.2d 129 (4th Cir. 1949)

United States v. Conaway, 11 F.3d 40, 43-44 (5th Cir. 1993)

United States v. Tafoya, 757 F.2d 1522, 1528 (5th Cir. 1985)

United States v. Normile, 587 F.2d 784, 785 (5th Cir. 1979)

United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114

(1979)

United States v. Horton, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976)

United States v. Parks, 489 F.2d 89, 90 (5th Cir. 1974)

United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964), *cert. denied*, 386 U.S. 1003 (1967)

United States v. Ludwig, 897 F.2d 875, 878-882 (7th Cir. 1990)

United States v. Esser, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

United States v. Stein, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971)

United States v. Lacob, 416 F.2d 756, 759 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Mansfield, 381 F.2d 961, 965 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967)

United States v. Abodeely, 801 F.2d 1020, 1024-1025 (8th Cir. 1986)

United States v. Vannelli, 595 F.2d 402, 404 (8th Cir. 1979)

United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)

United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)

United States v. Hall, 650 F.2d 994, 999 (9th Cir. 1981)

United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977)

Percifield v. United States, 241 F.2d 225, 229 & n.7 (9th Cir. 1957)

United States v. Bray, 546 F.2d 851, 853 (10th Cir. 1976).

NOTES

1 ***CAUTION***: The above instruction does not include an instruction on cash on hand. In those instances where the bank deposits computation includes cash expenditures or currency deposits the cases indicate that the government must establish a beginning cash on hand figure. *See* Section 33.08, *supra*, CASH ON HAND. In such a case, the above instruction should be supplemented with a cash on hand instruction. For an example of a cash on hand instruction, *see* ***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, para. 3, p. 234, reproduced *infra*.

2 The material in brackets applies to cases which include cash or currency expenditures.

3 The material in brackets applies to cases which include both cash or currency expenditures and undeposited income. Where either, but not both, are included in a case, the bracketed language

should be modified accordingly.

GOVERNMENT PROPOSED JURY INST. NO.

Bank Deposits Method

In this case the government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in his name or under his control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented redeposits or transfers of funds between accounts, or that the deposits came from nontaxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the defendant of cash or currency from funds not deposited in any bank and not derived from a nontaxable source, similarly raises an inference that such cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the defendant's deposits and cash expenditures which came from taxable sources, the government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the cash-on-hand so long as it is established that the government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's cash-on-hand was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed cash-on-hand of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation concerning the existence of other funds at that time. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the defendant, or which otherwise arose during the investigation, concerning the defendant's cash-on-hand at the beginning of the year, then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate

applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable source of nontaxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt that the defendant's bank deposits together with his non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, p. 234

GOVERNMENT PROPOSED JURY INST. NO.

The "Bank Deposits Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of defendant _____ for the year[s] ____, the government has relied upon proof by the so-called "bank deposits method" of determining income during a particular period. This "bank deposits method", if done correctly, is an indirect or circumstantial way to reliably determine income.

The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any "non-income" deposits are excluded from this total and income which has not been deposited is included in the total. This procedure produces a gross income figure.

Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on his [her] tax return for that year, then that taxpayer has unreported income in that amount.

Because the "bank deposits method" of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a

reasonable degree of certainty an accurate "cash on hand" figure for the beginning of the tax year in question. The government is not required to prove an exact "cash on hand" figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of the defendant _____substantially exceeded the amount reported on his [her] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant willfully attempted to evade or defeat the additional tax as charged in Count __ of the indictment.

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions - Criminal*** (4th Ed. 1990), § 56.07, pp. 1002-1004.

GOVERNMENT PROPOSED JURY INST. NO.

Consider Each Count Separately

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find [***the***] accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions, Civil and Criminal*** (4th Ed. 1992), Section 12.12

GOVERNMENT PROPOSED JURY INST. NO.

Separate Consideration Of Multiple Counts

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.09

GOVERNMENT PROPOSED JURY INST. NO.

Consider Each Count And Each Defendant Separately

A separate crime is alleged against [***each***][***one or more***] of the defendants in each count of the indictment. Each alleged offense, and any evidence pertaining to it, should be considered separately by the jury. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that defendant or any other defendant.

You must give separate and individual consideration to each charge against each defendant.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions, Civil and Criminal*** (4th Ed. 1992), Section 12.13

GOVERNMENT PROPOSED JURY INST. NO.

Separate Consideration Of
Each Count And Each Defendant

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All of the instructions apply to each defendant and to each count (unless a specific instruction states that it applies only to [***a specific defendant***][***or***][***a specific count***]).

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO.

Give Each Defendant Separate Consideration

It is your duty to give separate and personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual defendant leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants.

Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts, statements, and conduct and any other evidence in the case which may be applicable to him [her].

The fact that you return a verdict of guilty or not guilty to one defendant should not, in any way, affect your verdict regarding any other defendant.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions, Civil and Criminal*** (4th Ed. 1992), Section 12.14.

GOVERNMENT PROPOSED JURY INST. NO.

Separate Consideration For Each Defendant

Although the defendants are being tried jointly, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case decided on the evidence and the law applicable to him.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO.

Separate Consideration For Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so you must determine what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 2.14

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Single Defendant -- Single Count)

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.20, p. 31

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Single Defendant -- Single Count)

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not be a part of your consideration or discussions.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.21, p. 32

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Single Defendant -- Single Count)

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.1, p. 25

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.22, p. 33

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.2, p. 26

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.23, p. 34

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find any one of the defendants guilty or not guilty should not affect your verdict as to any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.3, p. 27

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant. You must give separate consideration as to each defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.24, p. 35

GOVERNMENT PROPOSED JURY INST. NO.

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.4, p. 28

July 1994 **ON OR ABOUT**

GOVERNMENT PROPOSED JURY INST. NO.

"On Or About" -- Explained

The indictment charges that the offense alleged [***in Count*** _____] was committed "on or about" a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in [***Count*** ___ ***of***] the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 13.05

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Basic Instructions, Instruction No. 119, p. 30.

ON OR ABOUT **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Date Of Crime Charged

The indictment charges that the offense was committed "on or about" _____. Although the evidence need not establish with certainty the exact date of the alleged offense, it must establish that the offense was committed on a date reasonably near the date charged.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.01

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 13.05, Notes, p. 394.

GOVERNMENT PROPOSED JURY INST. NO.

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.24

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Precise Amount of Tax Owed Not Necessary

The government must prove beyond a reasonable doubt that the defendant _____ willfully attempted to evade or defeat a substantial portion of the tax owed.

Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of [***additional***] tax owed.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.08

GOVERNMENT PROPOSED JURY INST. NO.

Not Necessary to Show Any Additional Tax Due

Although the government is required to prove beyond a reasonable doubt that the defendant willfully filed a false document as charged in Count ____ of the indictment [***information***], the government is not required to prove that any additional tax was due to the government or that the government was deprived of any tax revenues by reason of any filing of any false return.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO.

Funds or Property From Unlawful Sources

There has been evidence in this case that the defendant received funds or property from unlawful sources.

In determining the issue of the taxable income of the defendant no distinction is made between income derived from lawful or unlawful sources. Funds or property received from unlawful or illegal sources, therefore, are treated in the same manner as funds or property from lawful or legal sources.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.21

26 U.S.C. § 61

James v. United States, 366 U.S. 213 (1961)

Rutkin v. United States, 343 U.S. 130 (1952)

GOVERNMENT PROPOSED JURY INST. NO.

Computation of Tax Deficiency

The first step in arriving at an individual's taxable income is to determine the gross income of that individual. Gross income generally means all income from whatever source derived. Gross income includes, but is not limited to, compensation for services, such as wages, salaries, fees, or commissions, income derived from a trade or business, gains from dealings in property, interest, royalties, and dividends. Gross income includes both lawful and unlawful earnings.

After having determined an individual's gross income, the next step in arriving at the income upon which the tax is imposed is to subtract from the gross income such deductions and losses as the law provides. In this connection, an individual is permitted to deduct from gross income all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business or other profit-seeking endeavors, to the extent those expenses are not reimbursed by the business.

The amount remaining after subtracting the allowable deductions and losses from gross income is termed "adjusted gross income." In arriving at income upon which the tax is imposed, the individual is permitted to deduct from adjusted gross income either the zero bracket amount allowed by law, or, in the alternative, amounts paid during the year for itemized deductions, which are limited by law, such as, medical expenses, state income and property taxes, interest, charitable contributions, and other miscellaneous items. An individual is then allowed a deduction for each qualified exemption. The resulting figure is termed "taxable income", that is to say, the sum on which the income tax is normally imposed.

26 U.S.C. §§ 61 through 223 (Corporations, 26 U.S.C. §§ 61 through 281)

GOVERNMENT PROPOSED JURY INST. NO.

Accrual Method of Accounting

Taxable income is computed by using the same method of accounting that the taxpayer used to compute his [her] income, as long as such accounting method clearly reflects income. In this case, the defendant reported taxable income and deductible expenses on the accrual method of accounting.

Under the accrual method of accounting, income is to be included in the taxable year when all events have occurred which fix the right to receive such income and the amount of the income can be determined with reasonable accuracy. Similarly, deductions are allowable for the taxable year in which all the events have occurred which establish the fact of liability giving rise to such deduction and the amount of the deduction can be determined with reasonable accuracy. When income is actually received or an expense is actually paid is irrelevant in the accrual method of accounting.

26 U.S.C. §§ 446, 461(a)
Treasury Regulations on Income Tax (1986 Code), Sec. 1.461-1(a)(2) (26 C.F.R.)

GOVERNMENT PROPOSED JURY INST. NO.

Corporate Diversions **1**

Gains or profits and income derived from any source whatever are included in gross income for the purpose of taxation of income. This includes both lawful and unlawful gains.

You have heard evidence that the defendant was a stockholder in and received cash or other property from the [***insert name of corporation***], a corporation.

If you find that the defendant was a stockholder in the [***insert name of corporation***] and obtained cash or other property from the corporation, then you should proceed to determine whether this was income to the defendant.

In this connection, the question for you to determine is whether the defendant had complete control over the cash or other property he [she] obtained from the corporation, took it as his [her] own, and treated it as his [her] own, so that as a practical matter he [she] derived economic value from the money or property received. If you find this to be the case, then the money or property received by the defendant would be income; if you do not find this to be the case, then the money or property obtained by the defendant would not be income to the defendant.

United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978)

United States v. Miller, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977)

United States v. Leonard, 524 F.2d 1076, 1082-1084 (2d Cir. 1975)

DiZenzo v. Commissioner Of Internal Revenue, 348 F.2d 122, 125-127 (2d Cir. 1965)

United States v. Goldberg, 330 F.2d 30, 38 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964)

Hartman v. United States, 245 F.2d 349, 352-353 (8th Cir. 1957)

Davis v. United States, 226 F.2d 331, 334-335 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956)

Cf. ***United States v. Cruz***, 698 F.2d 1148 (11th Cir. 1983)

NOTE

1 In the Second, Third, Sixth, Eighth, and Eleventh Circuits, this instruction should be adequate in those situations where the defendant has not introduced evidence to the effect that there were no corporate earnings or profits from which a dividend could have been paid. If the defense does introduce such evidence, an instruction should be given that explains the part that earnings and profits and capital gains treatment plays in determining whether, and to what extent, currency or property obtained from a corporation constitutes taxable income. For such an instruction, *see infra*. In the Ninth Circuit, this instruction may be adequate even in the face of evidence by the defense that there were no corporate earnings or profits from which a dividend could have been paid. *See* ***United States v. Miller***, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977).

In circuits other than the Second, Third, Sixth, Eighth, Ninth, and Eleventh, the law should be researched and a determination made as to whether the above instruction is adequate or whether it is necessary to give an instruction on earnings and profits even though no evidence is introduced by the defendant as to an absence of earnings or profits.

COMMENT

1 Depending on the evidence, an instruction regarding loans may be appropriate. *See infra* for an example of such an instruction.

GOVERNMENT PROPOSED JURY INST. NO.

Constructive Dividends **1**

The government has introduced evidence to establish that the defendant was a stockholder in [***insert name of corporation***], a corporation, and [***e.g., obtained money or property from the corporation***] and/or [***caused the corporation to spend money for personal purposes of the defendant***] **2** which represented a [***dividend***] [***and/or capital gain income***] **3** that should have been reported on the defendant's return.

The defendant has introduced evidence to establish that [***describe defense, e.g., money (or property) obtained by the defendant from the corporation and expenditures made by the corporation for personal purposes of the defendant***] was not income to the defendant but [***e.g., a loan from the corporation or a nontaxable return of the defendant's investment in the corporation***]. **4**

In determining whether the defendant received any income from his [her] corporation, you are instructed as follows:

1. ***Dividend***. A distribution by a corporation to or for the benefit of a stockholder that is not a loan is reportable as a dividend to the extent that the distribution (or any part thereof) could have been paid out of the accumulated earnings and profits of the corporation; or out of the earnings and profits of the corporation for the taxable year in issue.

2. ***Return of Capital***. If the accumulated and current earnings and profits of the corporation are not great enough in amount to account for all, or a part of, the distribution to the defendant, then that portion of the distribution which could not be paid out of earnings and profits would be a nontaxable return of capital up to the amount of money invested in the corporation by the defendant.

3. ***Capital Gain Income***. Finally, any portion of the distribution which exceeds both the accumulated earnings and profits of the corporation and the amount the defendant had invested in the corporation, would be capital gain income to the defendant.

[***4. Loan. If you find that a distribution received by the defendant (or any part thereof) was a loan from the corporation, which was to be repaid, then to the extent that the distribution***

was a loan, it would not be income to the defendant.] **5**

United States v. Thetford, 676 F.2d 170, 175 n.5 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983)

Bernstein v. United States, 234 F.2d 475, 480-482 (5th Cir.), *cert. denied*, 352 U.S. 915 (1956)

NOTES

1 This instruction should be given in those situations where the defendant has introduced evidence to the effect that there were corporate earnings or profits from which a dividend could have been paid. Where the defendant has not introduced such evidence, the instruction on corporate diversions, *supra*, may be given.

2 Select language and alternatives that reflect the evidence introduced by the government.

3 Select language and alternatives that reflect the evidence introduced by the government.

4 If the defense evidence is to the effect that the defendant received no money or property from the corporation and no expenditures were made for personal purposes of the defendant, this portion of the instruction should be modified accordingly.

5 This portion of the instruction is to cover those situations where evidence has been introduced of a loan defense. Another instruction concerning loans is set forth, *infra*.

GOVERNMENT PROPOSED JURY INST. NO.

Loan -- Explained

A loan which the parties to the loan agree is to be repaid does not constitute gross income as that term is defined by the Internal Revenue Code. However, merely calling a transaction a loan is not sufficient to make it such. When money is acquired and there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.

United States v. Swallow, 511 F.2d 514, 522 n.7 (10th Cir.), *cert. denied*, 423 U.S. 845 (1975)

See also ***United States v. Rosenthal***, 454 F.2d 1252 (2d Cir. 1972), *cert. denied*, 406 U.S. 931 (1972)

United States v. Rosenthal, 470 F.2d 837, 841-842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973)

United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968)

GOVERNMENT PROPOSED JURY INST. NO.

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

If a payment in funds or in property from one person to another proceeds primarily from a duty, either moral or legal, that payment is not a gift. Likewise, if the payment acts as an incentive for an anticipated benefit of an economic nature, then such payment is not a gift. Similarly, where the payment is in return for services rendered, it is not a gift. It does not matter whether the donor derives economic benefit from the payment.

Moreover, the donor's characterization of his [her] action is not conclusive. It is for you, the jury, to determine objectively whether what is called a gift is in reality a gift. Additionally, the parties' expectations or hopes as to the tax treatment of their conduct have nothing to do with the matter.

The decision as to whether individual payments are gifts or income [***or political contributions***] is a question of fact for you to determine in the light of practical human experience. If you find that a payment was a gift, as I have defined it, then that payment does not constitute income and need not be reported on an income tax return.

Commissioner v. Duberstein, 363 U.S. 278, 285-286 (1960)

GOVERNMENT PROPOSED JURY INST. NO.

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather, you the members of the jury must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the defendant for the funds. In addition, you may take into account the following factors:

1. A payment is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

4. A payment is not a gift if the person making the payment did so out of fear or intimidation.

[***5. A payment is not a gift to the defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the defendant.***] **1**

This is not a complete listing of all the factors you should consider. You should take into

account all the facts and circumstances of this case in determining whether any payment was a gift.

United States v. Terrell, 754 F.2d 1139, 1149 n.3 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

NOTE

1 This sentence is reproduced as it appears in the opinion but would appear to be incomplete. In its opinion, the court correctly states the law on this point as follows, ***Terrell***, 754 F.2d at 1149:

> If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

GOVERNMENT PROPOSED JURY INST. NO.

Partnership Income

A partnership as such is not subject to income tax. Instead, each partner is individually taxed on and must report his [her] share of the partnership income, even if the income is not actually distributed to the partners.

If the partnership incurs a loss, each partner can deduct his [her] share of the loss on that partner's individual return.

26 U.S.C. §§ 701, 702

GOVERNMENT PROPOSED JURY INST. NO.

Partnership Losses

A partnership does not pay taxes. Its income or loss flows through to the individual partners. The loss which a partner is entitled to claim on his [her] tax return with respect to a partnership loss is limited to the amount of his [her] contribution to the partnership. A partner's contribution to the partnership includes the amount of money he [she] contributed to the partnership as well as his [her] proportionate share of the partnership's liabilities or debts.

In the present case, if you find that certain asserted partnership liabilities do not exist or are of lesser value than that asserted on the partnership tax return, then such claimed liability, or portion thereof, may not be included in determining a partner's contribution to the partnership.

On the other hand, if you find that liabilities in the amounts asserted by [***Name of partnership***] were in fact incurred, then each partner's contribution to the partnership would include his [her] proportionate share of such partnership liabilities in determining the amount of loss which each partner is entitled to claim on his [her] individual income tax return.

26 U.S.C. §§ 704(d), 722, & 752(a)

GOVERNMENT PROPOSED JURY INST. NO.

Deductions

Generally, there is an inference that a taxpayer will claim all deductions allowed on his [her] return, and the deductions stated on the return are prima facie proof of the maximum deductible amounts to which the defendant is entitled. Accordingly, if the defendant asserts additional deductions other than those shown on the return, it is incumbent upon the defendant to introduce evidence with respect to such additional deductions. The government has no burden of proving deductions beyond those claimed on the return.

This instruction is based on Fed. R. Evid. Rule 801(d) and the rationale of the opinions below:

United States v. Link, 202 F.2d 592, 593-594 (3d Cir. 1953)

United States v. Lacob, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Bender, 218 F.2d 869, 871-872 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955)

Clark v. United States, 211 F.2d 100, 103 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955)

United States v. Marabelles, 724 F.2d 1374, 1383 (9th Cir. 1984)

Elwert v. United States, 231 F.2d 928, 933 (9th Cir. 1956)

GOVERNMENT PROPOSED JURY INST. NO.

Overstatement of Lawful Deductions

An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions.

The term "deduction" means any item allowed by the internal revenue laws to be subtracted from gross income, in computing the amount of net or taxable income for income tax purposes.

In this case, it is charged that the income tax return was false because of an alleged willful overstatement of the amount of the deductions allowed by the internal revenue laws.

A deduction from gross income is allowed by the internal revenue laws, within limits not pertinent here, for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar non-profit organizations.

A deduction from gross income is also allowed by the internal revenue laws for certain taxes, including State, County, and City taxes.

The internal revenue laws also permit, within limits not pertinent here, a deduction from gross income for expenses actually paid during the taxable year, not compensated for by insurance or otherwise, for medical and dental care regardless of when the incident or event which occasioned the expense occurred.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.07
See ***United States v. Helmsley***, 941 F2d 71, 92 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 1162 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Lawful Deductions

The evidence in the case need not establish beyond a reasonable doubt that the deductions, as allowed by the revenue laws, totalled the exact amount alleged in the indictment, or that the allowable deductions were overstated in the exact amounts alleged. The evidence must establish beyond a reasonable doubt only that the accused willfully overstated, or caused to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the internal revenue laws, as charged in the indictment.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.08

GOVERNMENT PROPOSED JURY INST. NO.

Economic Substance **1**

A transaction without economic substance, which is entered into solely for the purpose of tax avoidance, cannot properly be used to compute taxes. That is to say, the law does not allow a deduction that arises out of a transaction which has no purpose, substance, or utility apart from the anticipated tax consequences. On the other hand, a deduction is proper, in this context, if there is some economic substance to the transaction giving rise to the deduction beyond the taxpayer's desire to secure a deduction.

A taxpayer may of course try to pay as little tax as possible so long as he [she] uses legal means. Transactions may be arranged in an attempt to minimize taxes if the transactions have economic substance.

The government contends that [***describe the transaction***] has no economic substance. The defendant contends that this transaction did have economic substance.

In determining whether a particular transaction had economic substance or not, you are instructed to consider the overall circumstances surrounding the asserted transaction.

If, after reviewing the evidence regarding a transaction, you find that the reduction of taxes was the sole purpose for entering into the transaction, and that the transaction had no other substance or utility, then you may disregard the intended tax effects of such transaction.

If, on the other hand, you find that the defendant's desire to reduce taxes was not the only motive for entering into the transaction but that the transaction had substance or utility apart from the taxpayer's desire to reduce taxes, then you are to consider the tax aspects and impact of such transaction, as I have instructed you previously.

United States v. Ingredient Technology Corporation, 698 F.2d 88, 97 n.9 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983)

Goldstein v. Commissioner, 364 F.2d 734, 740-41 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967)

NOTE

1 This is an extremely complex area. Consequently, great care should be exercised in framing an instruction on economic substance. The law of your circuit should be carefully checked to insure that the instruction is consistent with the latest law on the question.

GOVERNMENT PROPOSED JURY INST. NO.

Income Tax on Ministers

The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Voluntary contributions, when received by the minister, are income to him. **1** Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such nontaxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

United States v. Terrell, 754 F.2d 1139, 1148-1149 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

NOTE

1 The reference here seems to be to a situation where a minister receives a contribution and uses it for personal purposes as contrasted with turning the contribution over to the church.

GOVERNMENT PROPOSED JURY INST. NO.

Deductions -- Tax Exempt Organizations

The government contends in Counts _____, _____ and _____, that the defendant, _____, falsely claimed, on his [her] income tax return, a deduction for charitable contributions [***made to*** _____]. The defendant contends that the deduction was properly claimed as a charitable contribution made to a tax-exempt organization.

For a contribution to be deductible, it must have been made as a gift to a tax-exempt organization. For an organization to be tax exempt it must have been organized and operated exclusively for religious, charitable, or educational purposes, and no part of the net earnings of such organization may inure to the benefit of any private individual.

An organization is regarded as operated exclusively for religious, charitable, or educational purposes, ***only*** if all of the following criteria are met:

1. The organization must have been organized and operated exclusively for exempt purposes, ***i.e.***, religious, charitable, or educational purposes, and not, except to an insubstantial degree, for a non-exempt purpose. That is to say, an organization is not tax exempt if its activities involve a single non-exempt purpose that is substantial in nature, regardless of the number or importance of truly exempt purposes.

2. No part of the net earnings of the organization may inure in whole, or in part, to the benefit of any private stockholder or individual. A private individual for these purposes is a person having a personal and private interest in the activities of the organization. The phrase, net earnings inure to the benefit of a private individual, means that funds of the organization are used by a private individual for personal purposes.

3. The organization cannot have been organized or operated for the benefit of the personal or private interests of an individual but only for a public purpose. In other words, the

organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, the creator of the organization or his family, or for persons controlled by such private interests.

26 U.S.C. § 170(c)(2)(B)&(C)
26 U.S.C. § 501(a)&(c)(3)
26 C.F.R. § 1.170A-1 (1993)
26 C.F.R. § 1.501(c)(3)-1(c)(2) (1993)
26 C.F.R. § 1.501(a)-1(c) (1993)
26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii) (1993)
United States v. Daly, 756 F.2d 1076, 1082-1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985)
McGahen v. Commissioner, 76 T.C. 468, 481-483 (1981), *aff'd*, 720 F.2d 664 (3d Cir. 1983)
Ecclesiastical Order of Ism of Am v. Commissioner, 80 T.C. 833, 839-841 (1983)
Better Business Bureau v. United States, 326 U.S. 279, 283 (1945)
Stephenson v. Commissioner, 79 T.C. 995, 1002 (1982), *aff'd*, 748 F.2d 331 (6th Cir. 1984)
Hall v. Commissioner, 729 F.2d 632, 634 (9th Cir. 1984)
Davis v. Commissioner, 81 T.C. 806, 818 (1983), *aff'd*, 767 F.2d 931 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Charitable Contribution -- Defined

For income tax purposes, a charitable contribution is defined as a contribution or gift to an organization, corporation, trust, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to or is used for the benefit of any private shareholder or individual.

26 U.S.C. § 170(c)

GOVERNMENT PROPOSED JURY INST. NO.

Charitable Contributions And Gifts -- Year Deductible

If you find that a charitable contribution or gift, as previously defined, was made by the defendant to a tax-exempt organization, then you are instructed that any such charitable contribution or gift can only be claimed as a deduction (by the individual who made the contribution or gift) for the tax year in which the contribution was made, ***i.e.***, the year in which it was paid to a tax-exempt organization. For example, if a contribution to a tax-exempt organization is made in the year 1994, then it would only be deductible on the taxpayer's 1994 return.

26 U.S.C. § 170(a)(1)

GOVERNMENT PROPOSED JURY INST. NO.

Vow of Poverty

The government contends that the defendant falsely claimed that he [she] was "exempt" from income taxes and that as a result of such false claim of exemption, he [she] had substantial additional taxes due and owing. The defendant contends that he [she] was correct in claiming that he [she] was exempt from income taxes.

In order to be exempt from income taxes, an individual must have taken a vow of poverty and must contribute all of his [her] assets and income to an organization which meets certain tests. That is to say, the organization must be both organized and operated exclusively for religious, charitable, or educational purposes, and no part of its net earnings may inure to the benefit of any private individual. An organization is regarded as operated exclusively for religious, charitable, or educational purposes only if it engages primarily in activities which accomplish one or more of these exempt purposes. An organization is not so regarded if more than an insubstantial part of its activities is not in furtherance of a religious, charitable, or educational purpose.

26 U.S.C. Section 501(c)(3)

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1 (26 C.F.R.)

An organization is not organized exclusively for religious, charitable, or educational purposes unless its assets upon dissolution would be distributed for an exempt purpose and not to its members or private individuals.

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(b)(4) (26 C.F.R.)

An organization is not operated exclusively for religious charitable, or educational purposes of its net earnings inure in whole, or in part, to the benefit of "private individuals.".

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(c)(2) (26 C.F.R.)

A "private individual" for these purposes is a person having a personal and private interest in the activities of the organization.

Treasury Regulations on Income Tax (1986 Code), Secs. 1.501(c)(3)-1(c)(2) &

1.501(a)-1(c) (26 C.F.R.)

An organization is not organized or operated exclusively for religious, charitable, or educational purposes if it meets a private, as opposed to a public, interest. The organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, or the creator of the organization or his family, or for persons controlled by such private interests.

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(d)(1)(ii) (26 C.F.R.)

Therefore, if you find, beyond a reasonable doubt, that:

1. The organization through which the defendant claimed exemption was not organized or not operated exclusively for religious, charitable, or educational purposes; or
2. Any part of the organization's net earnings inured to the benefit of private individuals; or
3. The charter of such organization permitted the return of the organization's assets to any of its members or to private individuals if the organization were dissolved; or
4. The organization met or served a private, as opposed to a public, interest,

if you find that the government has proved any one of these tests beyond a reasonable doubt -- then I instruct you, as a matter of law, that the defendant was not exempt from income taxes.

On the other hand, if you find that the government has failed to prove beyond a reasonable doubt at least one of the four factors or tests I have described above, then I instruct you that the defendant was exempt from income taxes.

GOVERNMENT PROPOSED JURY INST. NO.

Civil Tax Irrelevant

There is a distinction between the civil liability of a defendant and a defendant's criminal liability. This is a criminal case.

The defendant is charged under the law with the commission of a crime, and the fact that the defendant has or has not settled his [her] civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Spies v. United States, 317 U.S. 492, 495 (1943)
United States v. Dack, 747 F.2d 1172, 1174-1175 (7th Cir. 1984)
United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1984)
United States v. Voorhies, 658 F.2d 710, 714 (9th Cir. 1981)
United States v. Buras, 633 F.2d 1356, 1360 (9th Cir. 1980)
Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Settlement of Civil Liability is Immaterial

There is a distinction between civil liability for the payment of taxes, and criminal liability. This is a criminal case. The defendant is here charged with the commission of a crime, and the fact that he may or may not have settled his civil liability for the payment of taxes claimed to be due from him to the United States is not to be considered by the jury in determining the issues in this case, except as such evidence in the case may throw some light on the question of intent.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17

GOVERNMENT PROPOSED JURY INST. NO.

"Guilty Knowledge"

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed her [his] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of her [his] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992); ***United States v. Ojebode***, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d at 287; ***United States v. Barnhart***, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see* ***United States v. Stone***, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in ***Cheek v. United States***, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO.

Willful Blindness **1**

The defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] willful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of either willfulness or knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

NOTE

1 The only difference between this instruction and the preceding one is at the end of the first paragraph. That instruction uses the words "deliberate blindness," whereas this instruction uses the words "willful blindness." Traditionally, this type of an instruction has been referred to as a "willful blindness" instruction. Consequently, use of this terminology seems appropriate. Nevertheless, use of the word "deliberate" in place of the word "willful" may be less confusing to a jury in a criminal tax case which will also be instructed on the special meaning of the word "willfully."

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992); ***United States v. Ojebode***, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d at 287; ***United States v. Barnhart***, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see* ***United States v. Stone***, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in ***Cheek v. United States***, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO.

Knowledge of Contents of Return

Section 6064 of Title 26 of the United States Code provides, in part, that:

> The fact that an individual's name is signed to a return * * * shall be ***prima facie*** evidence for all purposes that the return * * * was actually signed by him.

In other words, you may infer and find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to accept any such inference or to make any such finding.

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed the return in question, then you may also draw the inference and may also find, but are not required to find, that the defendant knew of the contents of the return that the defendant signed.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

SIGNATURE - CONTENTS OF RETURN **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 and 6.26.7206 (1989)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

Now, whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

United States v. Wainwright, 448 F.2d, 984, 986 (10th Cir. 1971), *cert. denied*, 407 U.S. 911 (1972)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

Now, whenever the fact appears beyond a reasonable doubt from the evidence in the case that the defendant signed his income tax return, the jury may draw the inference and find that the defendant had knowledge of the contents of the return. Whether or not the jury draws such as inference is left entirely to the jury.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22
United States v. Gaines, 690 F.2d 849, 853 (11th Cir. 1982)

GOVERNMENT PROPOSED JURY INST. NO.

Exculpatory Statements - Later Proved False

Statements knowingly and voluntarily made by Defendant ____ upon being informed that a crime had been committed or upon being accused of a criminal charge, may be considered by the jury.

When a defendant voluntarily offers an explanation or voluntarily makes some statement tending to show his [her] innocence and it is later shown that the defendant knew that the statement or explanation was false, the jury may consider this as showing a consciousness of guilt on the part of Defendant _____ since it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his [her] innocence.

Whether or not evidence as to a Defendant's explanation or statement points to a consciousness of guilt on his [her] part and the significance, if any, to be attached to any such evidence, are matters exclusively within the province of the jury as the sole judges of the facts of this case.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons--fully consistent with innocence--that could cause a person to give a false statement showing their innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

[***Any testimony concerning a false exculpatory statement by Defendant _____ is in no way attributable to any other defendant on trial in this case and may not be considered by you in determining whether the government has proven the charge[s] against any other defendant beyond a reasonable doubt.***]

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1992), § 14.06

COMMENT

1 The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instruction be given. See the Committee Comments to the Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions after the Crime". See Federal Jury Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

GOVERNMENT PROPOSED JURY INST. NO.

Exculpatory Statements - Later Proved False

Now, during the course of the trial of this matter you heard witnesses testify about statements made by the defendant _____ after he been confronted with some suggestion that he might have been guilty of the commission of a crime ***and I am expressing no opinion now about the evidence in the case, about what the facts are, but once in awhile I have to refer to some of the evidence which has been heard so that you understand the principle of law that I am referring to***. I charge you that the conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the Jury in the light of other evidence in the case in determining the guilt or innocence of the accused. When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence or her innocence, and such explanation or statement is later shown to be false in whole or in part, the Jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance, if any to be attached to any such evidence, are matters for determination by the Jury. I am not suggesting to you that either of the defendants made any contradictory statements. I am not suggesting that at all. I express no opinion about it, but I give you that principle of law in charge because, if you conclude that such contradictory statements were made either in whole or in part then that is the principle of law for your consideration but, as I say, I express no opinion about the matter whatsoever (Emphasis in original).

This instruction was approved in ***United States v. Pringle***, 576 F.2d 1114, 1120 (5th Cir. 1979), but see Comment to prior instruction.

GOVERNMENT PROPOSED JURY INST. NO.

False Exculpatory Statements - Later Proved False

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____, _____.

(2) If you believe that the defendant _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ to avoid being arrested, or for some other innocent reason.

Pattern Criminal Jury Instruction of the District Judges Association of the Sixth Circuit, Instruction No. 7.14 (1991)

COMMENT

1 The language in paragraph (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

FALSE EXCULPATORY STATEMENTS **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

False Exculpatory Statements

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No.4.15 (1992)

See also ***United States v. Hudson***, 717 F.2d 1211, 1215 (8th Cir. 1983) and cases cited therein.

COMMENTS

1 If the defendant denies making the statement, or denies that it is exculpatory, this language should be changed to allow the jury to decide whether or not the statement was made or whether or not it was exculpatory. ***United States v. Holbert***, 578 F.2d 128, 130 (8th Cir. 1978).

2 If the falsity of the exculpatory statement is controverted, this language should be changed to allow the jury to find whether or not the statement was false. *See*, ***United States v. Pringle***, 576 F.2d 1114, 1120 n.6 (5th Cir. 1978).

GOVERNMENT PROPOSED JURY INST. NO.

Similar Acts

During this trial, you have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purpose for which any evidence of other similar acts may be considered.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 1.30 (1990)

COMMENT

United States v. Practi, 861 F.2d 82 (5th Cir. 1988) discusses the use of a limiting instruction when extraneous offenses are introduced. Ordinarily, defendant must request this instruction. Under some circumstances, the failure to give a limiting instruction, even in the absence of a request, may constitute plain error. *Id*.

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

(1) You have heard testimony that the defendant committed some acts other than the ones charged in the indictment.

(2) You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now. Instead, you can only consider it in deciding whether _____. Do not consider it for any other purpose.

(3) Remember that the defendant is on trial here for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

Pattern Jury Instructions for the Sixth Circuit, Criminal 1991, § 7.13

COMMENT

This instruction should be used when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid 404(b)

PRIOR SIMILAR ACTS **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

You [***are about to hear***] [***have heard***] evidence that the defendant previously committed [***an act***] [***acts***] similar to [***the one***] [***those***] charged in this case. You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged here, then you may use this evidence concerning [***a***] previous [***act***] [***acts***] to decide [***describe purpose under 404(b) for which evidence has been admitted.***]

[***Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that he [she] committed such an act in this case. You may not convict a person simply because you believe he [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence or prior acts only on the issue of (state proper purpose under 404(b), e.g., intent, knowledge, motive.)***]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 2.08 (1992).

See also, Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 17.08

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [***e.g. intent***] and for no other purpose.

Model Criminal Jury Instructions for the Ninth Circuit, 1992, § 4.04

COMMENTS

This comports with Fed. R. Evid. 404(b)

See also ***United States v. Herrell***, 588 F.2d 711, 714 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979).

PRIOR SIMILAR OFFENSE **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Offense

You are about to hear testimony that the defendant previously committed a crime similar to the one charged here. I instruct you that testimony is being admitted only for the limited purpose of being considered by you on the question of [***e.g. defendant's intent***].

Manual of Model Criminal Jury Instructions for the Ninth Circuit, (1992 Edition). Instruction No. 210

This instruction comports with Fed. R. Evid. 404(b). Such a limiting instruction must be given, if requested (Fed. R. Evid. 105) and must be given *sua sponte* when appropriate. For an instruction to be given at the end of the case use the following:

> You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [***e.g. intent***] and for no other purpose.

COMMENT

1 Other circuits suggest that when using prior similar offense evidence as evidence of intent, motive, etc. (not for impeachment) instructions re prior similar acts should be used. *See* related instructions, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Cautionary Instruction During Trial - Similar Acts

Evidence that an act was done or that an offense was committed by Defendant _____ at some other time is not, of course, any evidence or proof whatever that, at another time, the defendant performed a similar act or committed a similar offense, including the offense charged in [***Count ____ of***] this indictment.

Evidence of a similar act of offense may not be considered by the jury in determining whether the Defendant _____ actually performed the physical acts charged in this indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds beyond a reasonable doubt from other evidence in the case, standing alone, that the defendant physically did the act charged in [***Count _____ of***] this indictment.

If the jury should find beyond a reasonable doubt from other evidence in the case that the Defendant _____ did the act or acts alleged in the particular count under consideration, the jury may then consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which the Defendant _____ actually did the act or acts charged in the particular count.

The defendant is not on trial for any acts or crimes not alleged in the indictment. Nor may a defendant be convicted of the crime[s] charged even if you were to find that he [she] committed other crimes--even crimes similar to the one charged in this indictment.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th. Ed. 1992), § 17.08

COMMENTS

1 While Federal Rule of Evidence 404(b) prohibits evidence or prior acts of offenses "to show action in conformity therewith," the United States Supreme Court has held that such evidence is admissible for other purposes, including proof of knowledge or intent. ***Anderson v. Maryland***, 427 U.S. 463, 483 (1976).

2 A limiting instruction must be given, if requested. Fed. R. Evid. Rule 105.

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about issues in the case. An exception to this rule exists as to those witnesses who are described as "expert witnesses." An "expert witness" is someone who, by education or by experience, may have become knowledgeable in some technical, scientific, or very specialized area. If such knowledge or experience may be of assistance to you in fact, an "expert witness" in that area may state an opinion as to relevant and material matter in which he or she claims to be an expert.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider other evidence in this case. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion is outweighed by other evidence [***including that of other "expert witnesses"***], you may disregard the opinion in part or in its entirety.

As I have told you several times, you -- the jury -- are the sole judges of the facts of this case.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.01

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

During the trial you heard the testimony of _____, who was described to us as an expert in _____.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because an expert has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit, Instruction No. 1.18 (1990)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

(1) You have heard the testimony of _____, an expert witness. An expert witness has special knowledge or experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.03 (1991)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved required knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given the expert opinion in the light of all the evidence in this case.

Federal Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.27 (1980)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all other evidence in the case.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.10 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by education and experience, have become expert in some field may state their opinion on matters in that field and may also state their reasons for the opinion.

Expert opinion testimony should be judged just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons for the opinion, and all the other evidence in the case.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.16 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field -- one who is called an expert witness -- is permitted to state his or her opinion concerning those technical matters.

Merely because an expert has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, (1985 Ed.) Basic Instruction No. 7. p. 20

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Charts or summaries have been prepared by _____ and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard the charts or summaries.

In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.02

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

You have seen some charts and summaries that may help explain the evidence. That is their only purpose, to help explain the evidence. They are not themselves evidence or proof of any facts.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.12 (1991)

CHARTS AND SUMMARIES **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.11 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.17 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

Charts or summaries have been prepared by _____, have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give it such weight or importance, if any, as you feel it deserves.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 14.02

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

There have been admitted in evidence certain schedules or summaries. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case. **1**

and/or

There have been admitted in evidence certain schedules or summaries. Their accuracy has been challenged by [***the government***] [***the defendant***]. Thus the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the schedules or summaries are accurate. **2**

Pattern Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.29 and 3.30 (1980)

NOTES

1 This instruction should only be given when the accuracy and authenticity of the exhibits are not in question.

2 This instruction is not intended to cover the situation where some or all of the underlying materials are unavailable.

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

You will remember that certain [***schedules***] [***summaries***] [***charts***] were admitted in evidence. You may use those [***schedules***] [***summaries***] [***charts***] as evidence, even though the underlying documents and records are not here. [***However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.***]

Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.12 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.18 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for an [***less serious***] [***other***] offense which is, by its very nature, necessarily included in the crime of [***insert name of charged offense***] that is charged in Count _____ of the indictment.

If the jury should unanimously find that the government has proven each of the essential elements of the offense of [***insert name of charged offense***] that is charged in Count _____ of the indictment beyond a reasonable doubt, the foreperson should write "guilty" in the space provided and the jury's consideration of that count [***for that defendant***] is concluded.

If the jury should determine unanimously **2** that the government has not proven each element of the offense of [***insert name of charged offense***] that is charged in Count _____ of the indictment beyond a reasonable doubt, then the foreperson should write "not guilty" in the space provided and the jury should then consider the guilt or innocence of the defendant for the [***less serious***] [***other***] offense necessarily included in the offense of [***insert name of charged offense***] charged in Count _____ of the indictment.

The crime of [***insert name of charged offense***] charged in Count _____ of the indictment necessarily includes the [***less serious***] [***other***] offense of [***insert name of lesser included offense***]. In order to find the defendant guilty of the [***less serious***] [***other***] included offense, the government must prove the following essential elements beyond a reasonable doubt: [***list elements of lesser included offense***].

The difference between the crime charged in Count _____ of the indictment and the [***less serious***] [***other***] included offense is [***list additional elements necessary to prove charged offense***].

The jury will bear in mind that the burden is always upon the government to prove, beyond a reasonable doubt, each and every essential element of any [***less serious***] [***other***] offense which is necessarily included in any crime charged in Count _____ of the indictment. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 20.05 (modified)

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.,* ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

> If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense charged in Count _____ of the indictment beyond a reasonable doubt, the jury should then consider whether the defendant is guilty or not guilty of the [***less serious***] [***other***] crime of [***insert name of lesser included offense***] which is necessarily included in the offense of [***insert name of charged offense***] charged in Count _____ of the indictment.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense
~~(Attempted Evasion of Payment/Failure to Pay)~~ **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for any offense that is necessarily included in any crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously **2** find the accused "Not Guilty" of the crime of willfully attempting to evade or defeat payment of tax as charged in Count _____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

The crime of willfully attempting to evade or defeat payment of taxes, which is the crime charged in Count _____ of the indictment, necessarily includes the lesser offense of willful failure to pay the tax. This lesser offense is defined in Section 7203 of the Internal Revenue Code [***26 U.S.C. § 7203***], which provides in part that:

> "Any person required . . . to pay any . . . tax, . . ., who willfully fails
> to pay such . . . tax . . . at the time or times required by law

shall be guilty of an offense against the laws of the United States.

In order for the defendant to be found guilty of the lesser included offense of willful failure to pay the tax, the government must prove each of the following elements beyond a reasonable doubt:

1. That there was a tax due and owing by the defendant;
2. That the defendant failed to pay the tax when due; and,
3. That the failure was willful.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt each essential element of the crime charged; the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.09 (modified)

Schmuck v. United States, 489 U.S. 705 (1989)

Sansone v. United States, 380 U.S. 343, 351-352 (1965)

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.*, ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

> So, if, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense of willfully attempting to evade or defeat payment of a tax as charged in Count _____ of the indictment beyond a reasonable doubt, then the jury must proceed to determine whether the government has proven beyond a reasonable doubt the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

We have just talked about what the government has to prove for you to convict the defendant of [***insert name of greater crime***]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime, If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of [***insert name of lesser included crime***]. You should find the defendant guilty of [***insert name of lesser included crime***] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it did not prove that the defendant [***describe missing element***].

To put it another way, the defendant is guilty of [***insert name of lesser included crime***] if the following things are proved beyond a reasonable doubt: [***list elements of lesser included crime***]. The defendant is guilty of [***insert name of greater crime***] if it is proved beyond a reasonable doubt that the defendant did all those things and, in addition, [***describe missing element***]. If your verdict is that the defendant is guilty of [***insert name of greater crime***], you need go no further. But if your verdict on that crime is not guilty, or if you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [***insert name of lesser included crime***].

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed [***insert name of lesser included crime***], your verdict must be not guilty of all of the charges.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General & Preliminary Instructions, Instruction No. 1.32, p.45 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The crime of [***insert name of greater offense***] with which the defendant is charged in the indictment includes the lesser offense of [***insert name of lesser included offense***].

If you find the defendant not guilty of the crime of [***insert name of greater offense***] charged in the indictment [***or if you cannot unanimously agree that the defendant is guilty of that crime***], then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of [***insert name of lesser included offense***].

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), § 2.03, p.12 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The crime of [***insert name of greater offense***] includes the lesser crime of [***insert name of lesser included offense***]. If (1) [***any***] [***all***] **2** of you are not convinced beyond a reasonable doubt that the defendant is guilty of [***insert name of greater offense***] and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of [***insert name of lesser included offense***], you may find the defendant guilty of [***insert name of lesser included offense***].

In order for the defendant to be found guilty of the lesser crime of [***insert name of lesser included offense***], the government must prove each of the following elements beyond a reasonable doubt: [***list elements of lesser included offense***].

Manual of Model Criminal Jury Instructions For The Ninth Circuit (1992 Ed.). § 3.13, p.43.

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Although, if the defendant expresses no choice, the trial court may employ either a jury instruction requiring the jury to unanimously acquit on the greater charge before considering the lesser included offense or an instruction advising the jury that it can consider the lesser included offense if it is unable after a reasonable effort to reach a verdict on the greater offense, it is error to reject the form of instruction that is timely requested by the defendant. ***United States v. Jackson***, 726 F.2d 1466, 1469-1470 (9th Cir. 1984).

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

In some cases the law which a defendant is charged with breaking actually covers two separate crimes -- one is more serious than the second, and the second is generally called a "lesser included offense."

So, in this case, with regard to the offense charged in Count _____, if you should find the defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the defendant is guilty or not guilty of the lesser included offense of [***insert name of lesser included offense***]. The lesser included offense would consist of proof beyond a reasonable doubt of the following element[s]: [***list elements of lesser included offense***], as defined above, but not the element[s] of: [***insert additional elements required for conviction of greater offense***].

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 5, p.41 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Action on Advice of Counsel

Defendant claims that he [she] is not guilty of willful wrongdoing as charged in Count _____ of the indictment because he [she] acted on the basis of advice from his [her] attorney.

If before taking any action [failing to take any action], the defendant, while acting in good faith and for the purpose of securing advice on the lawfulness of his [her] future conduct, sought and obtained the advice of an attorney he [she] considered to be competent, and made a full and accurate report or disclosure to his [her] attorney of all important and material facts of which he [she] had knowledge or the means of knowing, and acted strictly in accordance with the advice his [her] attorney gave following this full report or disclosure, then the defendant would not be willfully doing wrong in performing [***omitting***] some act the law forbids [***requires***], as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of truly seeking guidance as to questions about which he [she] was in doubt, and whether he [she] acted strictly in accordance with the advice received, are all questions for the jury to determine.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 19.08 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Defenses -- Reliance on Preparer

The defendant has introduced evidence showing that he [she] did not prepare the tax return in question and that it was prepared for him by [***insert name of person who prepared return***], a person who held himself [herself] out as one qualified to prepare federal income tax returns for others.

If the defendant, while acting in good faith and believing [***insert name of person who prepared return***] to be competent to prepare federal income tax returns, provided [***insert name of person who prepared return***] with full information with relation to his [her] taxable income and expenses during the year, and the defendant then, in good faith, adopted, signed, and filed the tax return as prepared by [***insert name of person who prepared return***] without having reason to believe that it was not correct, then you will find the defendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant did not provide full and complete information to [***insert name of person who prepared return***], or that he [she] knew that the return as prepared by [***insert name of person who prepared return***] was not correct and substantially understated the tax liability of defendant [***and his wife***] [***and her husband***], then you are not required to find the defendant not guilty simply because he [she] did not prepare the return himself [herself] but rather had it prepared for him [her] by another.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 8-4 (Comment), pp. 8-20 -- 8-22.

See ***United States v. Vannelli***, 595 F.2d 402, 404-405 (8th Cir. 1979)

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Reliance Upon Advice of Counsel

Good faith is a complete defense to the charge in the indictment if good faith on the part of the defendant is inconsistent with the existence of willfulness, which is an essential part of the charge. The burden of proof is not on the defendant to prove his good faith, of course, since he [she] has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully as charged in the indictment.

So, a defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he [she] consulted in good faith an attorney whom he [she] considered competent, made a full and accurate report to her [his] attorney of all material facts of which he [she] had the means of knowledge, and then acted strictly in accordance with the advice given to him [her] by his [her] attorney.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he [she] was in doubt, and whether he [she] made a full and complete report to her [his] attorney, and whether he [she] acted strictly in accordance with the advice he [she] received, are all questions for you to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 14, p. 51

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Belief of Accused

If a person, in good faith, believes that he [she] has paid all the taxes he [she] owes, he [she] cannot be guilty of criminal intent to evade the tax. But if a person acts without reasonable ground for belief that his [her] conduct is lawful, it is for the jury to decide whether he [she] acted in good faith, or whether he [she] willfully intended to evade the tax. This issue of intent, as to whether the defendant willfully attempted to evade or defeat the tax, is one which the jury must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.26 (modified)

COMMENTS

1 See also the instructions concerning a good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

2 In light of the decision in ***Cheek v. United States***, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with ***Cheek***. *See, e.g.*, ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993).

GOVERNMENT PROPOSED JURY INST. NO.

First Amendment

The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Speech which "incites imminent lawless activity" is not protected speech under the First Amendment. Speech which "merely advocates law violation" is protected by the First Amendment.

If you find that the defendant's speech was limited to the advocacy of violations of the income tax laws or remote action, then his speech is protected by the First Amendment and cannot be a basis for a guilty verdict. If, however, you find that the defendant's speech both was intended by him and, in fact, tended to produce or incite a likely imminent filing of a false income tax return, then such speech is not protected by the First Amendment.

Brandenburg v. Ohio, 395 U.S. 444 (1969)

United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985)

United States v. Damon, 676 F.2d 1060, 1062-63 (5th Cir. 1982)

United States v. Holecek, 739 F.2d 331, 334-35 (8th Cir. 1984)

United States v. Buttorff, 572 F.2d 619, 622-24 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978)

United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985)

COMMENT

1 An instruction such as this is appropriate, if at all (*see* ***United States v. Daly***, 756 F.2d 1076, 1082 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) ("the speech Daly claims is protected was not itself the wrong for which he was convicted, but it was merely the means by which he committed the crimes of which he was convicted")), only when the government's case is predicated solely on what

the defendant said. If the defendant engaged in an illegal course of

conduct, his activities are not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action. *See* ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir.), *cert. denied*, 110 S. Ct. 55 (1989); ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988); ***United States v. Gilbert***, 813 F.2d 1523, 1529 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).

COMMENT

This instruction is reproduced in the United States Attorneys' Manual. USAM, Sec. 9-23.350, pp. 11-12 (Oct. 1, 1990).
INST. NO. 285
REL. NO. 255IMMUNITY INSTRUCTION NO. 255
(Devitt and Blackmar)

GOVERNMENT PROPOSED JURY INST. NO.

Credibility of Witnesses -- Immunized Witness

The testimony of an immunized witness, someone who has been told either that his [her] crimes will go unpunished in return for testimony or that his [her] testimony will not be used against him [her] in return for that cooperation, 1 must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.

[Insert name of witness] may be considered to be an immunized witness in this case.

The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement he [she] has with the government, or by his [her] own interest in the outcome of this case, or by prejudice against the defendant.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1992), Vol. 1, Sec. 15.03 (modified)

NOTE

1 Only the clause which fits the facts of the case should be chosen for use in the instruction.

IMMUNITY INSTRUCTION NO. 256
(Seventh Circuit)INST. NO. 286
REL. NO. 256

GOVERNMENT PROPOSED JURY INST. NO.

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness] who received immunity; that is, a promise from the government that any testimony or other information he [she] provided would not be used against him [her] in a criminal case. You may give her [his] testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Vol. I, Sec. 3.19 (modified)

INST. NO. 287
REL. NO. 257IMMUNITY INSTRUCTION NO. 257
(Ninth Circuit)

GOVERNMENT PROPOSED JURY INST. NO.

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness], a witness who has received immunity. That testimony was given in exchange for a promise by the government that [insert either "the witness will not be prosecuted" or "the witness' testimony will not be used in any case against him [her]"].

In evaluating [insert name of witness]'s testimony, you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of ordinary witnesses.

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Sec. 4.09 (modified)

July 1994

CRIMINAL TAX MANUAL

INDICTMENT AND INFORMATION FORMS

26 U.S.C., § 7203 - Information

26 U.S.C., § 7204 - Information

26 U.S.C., § 7205 - Information

26 U.S.C., § 7206(1) - Indictment

Complaint to Toll Statute of Limitations
Under 26 U.S.C. § 6531

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)		
)		
v.	)	COMPLAINT
)		
_____)		

COMPLAINT FOR VIOLATION OF SECTION 7201 **1**
INTERNAL REVENUE CODE OF 1986 (26 U.S.C.)

Before [***Magistrate Judge's Name***], United States Magistrate Judge,
[***Judicial District***].

The undersigned complainant, being duly sworn, states:

That he [she] is a Special Agent [***or Revenue Agent***] of the Internal Revenue Service and, in the performance of the duties imposed on him [her] by, he [she] has conducted an investigation of the Federal income tax liability of [***Defendant's Name***] of [***City***], [***State***], for the calendar year **2** 19 _, by examining the said taxpayer's tax return for the calendar year **2** 19__, and other years; [***e.g., by examination and audit of the said taxpayer's business and financial books and records; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and/or by interviewing third persons having knowledge of the said taxpayer's financial condition.***] **3**

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the ____ day of _____, 19__, at [***City***], [***State***] in the _____ District of _____, [***Defendant's Name***] did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him [her] **1** to the United States of America for the calendar year **2** 19__, by preparing and causing to be prepared, and by signing and causing to be signed in the _____ District of _____, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service, wherein he [she] stated that his [her] taxable **4** [***or adjusted gross***] income for the calendar year **2** 19__ was $____, and that the amount of tax due and owing thereon was the sum of $____, when in fact his [her] taxable **4** [***or adjusted gross***] income for the said calendar year **2** was the sum of $____, upon which said taxable **4** [***or adjusted gross***] income he [she] owed to the United States of America an income tax of $____.

_____ **5**

Title of Subscribing Internal
Revenue Service Officer

Sworn to before me and subscribed in my presence, this ____day of _____, 19__.

United States Magistrate

NOTES

1 When drafting complaints for violation of other Sections of the Internal Revenue Code, refer to the appropriate indictment form as a guide.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

3 The bracketed descriptions of the kinds of investigation conducted by the subscribing agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts. *See* ***Jaben v. United States***, 381 U.S. 214 (1965).

4 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

5 To be sworn to by an Internal Revenue Service Officer having knowledge of the facts.

26 U.S.C. § 7201
Individual - Separate Return
Attempt to Evade and Defeat Tax
Venue in District of Filing

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] to the United States of America for the calendar year **1** 19__, by filing and causing to be filed with the Director, Internal Revenue Service Center, at [***City***], [***State***], **2** a false and fraudulent U.S. Individual Income Tax Return, Form 1040, wherein he [she] stated that his [her] taxable income **3** for the calendar year **1** 19__, was the sum of $____, and that the amount of tax due and owing thereon was the sum of $____, whereas, as he [she] then and there well knew and believed, his [her] taxable income **3** for the said calendar year **1** was the sum of $_____, upon which said taxable income **3** there was owing to the United States of America an income tax of $____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 When appropriate, substitute "by filing and causing to be filed with the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____"; or "by filing and causing to be filed with the Representative of the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, his [her] taxable income for the said calendar year was substantially in excess of that heretofore stated and that upon said additional taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Separate Return
Attempt to Evade and Defeat Tax
Venue in District of Preparation

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] to the United States of America for the calendar year **1** 19__, by preparing and causing to be prepared, and by signing and causing to be signed, **2** a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service, wherein he [she] stated that his [her] taxable income **3** for said calendar year **1** was the sum of $_____, and that the amount of tax due and owing thereon was the sum of $_____, whereas, as he [she] then and there well knew and believed, his [her] taxable income **3** for the said calendar year **1** was the sum of $_____, upon which said taxable income **3** there was owing to the United States of America an income tax of $____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 Where venue is based on mailing, substitute "by mailing and causing to be mailed".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, his [her] taxable income for the said calendar year was substantially in excess of that heretofore stated and that upon said additional taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Joint Return
Attempt to Evade and Defeat Tax
Venue in District of Filing

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____ [***Defendant's Name***], a resident of [***City]***, [***State***], who during the calendar year **1** 19 was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] and his [her] spouse to the United States of America for the calendar year **1** 19__, by filing and causing to be filed with the Director, Internal Revenue Service Center, at [***City***], [***State***], **2** a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on behalf of himself [herself] and his [her] spouse, wherein it was stated that their joint taxable income **3** for said calendar year **1** was the sum of $_____, and that the amount of tax due and owing thereon was the sum of $_____, whereas, as he [she] then and there well knew and believed, their joint taxable income **3** for the said calendar year **1** was the sum of $_____, upon which said joint taxable income **3** there was owing to the United States of America an income tax of $_____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 When appropriate, substitute "with the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____"; or "with the Representative of the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of that heretofore stated and that upon said additional joint taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Joint Return
Attempt to Evade and Defeat Tax
Venue in District of Preparation

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19_, in the _____ District of _____, [***Defendant's Name***], a resident of [***City]***, [***State***], who during the calendar year **1** 19_ was married, did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] and his [her] spouse to the United States of America for the calendar year **1** 19_, by preparing and causing to be prepared, and by signing and causing to be signed, **2** a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, on behalf of himself [herself] and his [her] spouse, which was filed with the Internal Revenue Service, wherein it was stated that their joint taxable income **3** for said calendar year **1** was the sum of $____, and that the amount of tax due and owing thereon was the sum of $_____, whereas, as he [she] then and there well knew and believed, their joint taxable income **3** for the said calendar year **1** was the sum of $_____, upon which said joint taxable income **3** there was owing to the United States of America an income tax of $____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 If venue is based on mailing, substitute "by mailing and causing to be mailed".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, their joint taxable income for the said calendar year was substantially in excess of that heretofore stated and that upon said additional joint taxable income a substantial additional tax was due and owing to the United States of America." *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Community Property Return
Attempt to Evade and Defeat Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] to the United States of America for the calendar year **1** 19__, by preparing and causing to be prepared, and by signing and causing to be signed, **2** a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service, wherein he [she] stated that his [her] taxable income **3** for said calendar year, **1** computed on the community property basis, was the sum of $_____, and that the amount of tax due and owing thereon was the sum of $____, whereas, as he [she] then and there well knew and believed, his [her] taxable income **3** for the said calendar year **1**, computed on the community property basis, was the sum of $_____, upon which said taxable income **3** there was owing to the United States of America an income tax of $____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19_".

2 If venue is to be placed in the judicial district in which the return was filed, modify this form in accordance with language at Forms - 3 and related footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, his [her] taxable income for the said calendar year, computed on the community property basis, was substantially in excess of that heretofore stated and that upon said additional taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Community Property Return of Spouse
Attempt to Evade and Defeat Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the _____ day of _____, 19_, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], who during the calendar year **1** 19_, was married to [***Name of Spouse***], did willfully attempt to evade and defeat a large part of the income tax due and owing by the said [***Name of Spouse***] to the United States of America for the calendar year **1** 19_, by preparing and causing to be prepared, and by signing and causing to be signed, **2** a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service for and on behalf of the said [***Name of Spouse***], in which it was stated that his [her] taxable income **3** for said calendar year **1**, computed on the community property basis, was the sum of $_____, and that the amount of tax due and owing thereon was the sum of $ ___, whereas, as [***Defendant's Name***] then and there well knew and believed, the taxable income **3** of [***Name of Spouse***] for the said calendar year **1**, computed on the community property basis, was the sum of $_____, upon which said taxable income **3** there was owing to the United States of America an income tax of $_____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____ , 19_".

2 If venue is to be placed in the judicial district in which the return was filed, modify this form in accordance with language at Forms - 3 and related Footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

3 Forms 1040 for some years do not use the phrase "taxable income" or "tax table income". However, what constitutes taxable income, as defined in 26 U.S.C., § 63, is actually computed on the appropriate line of the return. That line may vary and the line on the return showing the amount on which the actual tax was computed should be used.

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] then and there well knew and believed, the taxable income of [***Name of Spouse***] for the said calendar year, computed on the community property basis, was substantially in excess of that heretofore stated and that upon said additional taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Attempt to Evade and Defeat Tax
Acts Subsequent to Filing
United States v. Beacon Brass Co., Inc., 344 U.S. 43 (1952)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully attempt to evade and defeat a large part of the income tax due and owing by him [her] to the United States of America for the calendar year **1** 19__, by [***Describe Act or Acts, e.g., Filing False Financial Statement, or Making False Statements or Representations to Employees of the Internal Revenue Service, etc. See Spies v. United States, 317 U.S. 492 (1943)***], for the purpose of concealing additional unreported taxable income received by [***Defendant's Name***] during the said calendar year **1**, on which said unreported taxable income, as he [she] then and there well knew and believed, there was due and owing to the United States of America an income tax of $____ [***Insert Amount of Tax Deficiency, Not Total Tax***]. **2**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 If it is determined that unreported tax is not to be numerically alleged in the indictment, then delete "an income tax of $_____." and substitute "a substantial additional tax". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Individual - Spies Evasion, No Return Filed
Attempt to Evade and Defeat Tax, Affirmative Acts,
Spies v. United States, 317 U.S. 492 (1943)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
	)	
_____	)	

The grand jury charges:

That during the calendar year **1** 19__, [***Defendant's Name***], a resident of [***City***], [***State***], had and received taxable income **2** in the sum of $_____; that upon said taxable income **2** there was owing to the United States of America an income tax of $___; that well-knowing and believing the foregoing facts, [***Defendant's Name***] , on or about April 15, 19__, **3** in the_____ District of ___, did willfully attempt to evade and defeat the said income tax due and owing by him [*her*] to the United States of America for said calendar year **1** by failing to make an income tax return on or before April 15, 19__, **3** as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income tax, and by [***set forth the affirmative act(s) of evasion, such as concealing and attempting to conceal from all proper officers of the United States of America his [her] true and correct income***]. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__." Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

2 For definition of taxable income, *see* 26 U.S.C., § 63. Note also 26 U.S.C. § 61, *et seq.*

3 Note that if April 15th fell on a Saturday, Sunday, or legal holiday, the filing date to charge in the indictment would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note also that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

4 *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943).

26 U.S.C. § 7201
Individual - Spies Evasion (No Return Filed)
Attempt to Evade and Defeat Tax
Husband and Wife Codefendants - Community Property

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
	)	
_____	)	

The grand jury charges:

That during the calendar year **1** 19_, the defendants [***Husband's Name***] and [***Wife's Name***], who were husband and wife, and who were residents of [***City***], [***State***], had and received taxable income, **2** computed on the community property basis, in the sum of $_____ and $_____, respectively; that upon said taxable income **2** there was owing to the United States of America by each defendant an income tax of $_____ and $____, **3** respectively; that well-knowing and believing the foregoing facts, [***Husband's Name***] and [***Wife's Name***], on or about April 15, 19_, **4** in the _____ District of _____, did willfully attempt to evade and defeat the said income tax due and owing **5** by each of them to the United States of America for said calendar year **1** by failing to make separate individual income tax returns or a joint individual income tax return on or before April 15, 19_, **4** as required by law, to any proper officer of the Internal Revenue Service, by failing to pay to the Internal Revenue Service said income taxes, and by [***Set Forth the Affirmative Act(s) of Evasion Done by or on Behalf of Each Defendant, Such as Concealing and Attempting to Conceal from all Proper Officers of the United States of America his [her] [their] True and Correct Income; See Spies v. United States, 317 U.S. 492, 499 (1943)***].

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

2 For definition of taxable income, *see* 26 U.S.C., § 63. Note also 26 U.S.C., Secs. 61, *et seq*.

3 Include total tax liability, without regard to wage withholding.

4 Note that if April 15th fell on a Saturday, Sunday, or legal holiday, the filing date to charge in the indictment would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note also that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

5 If there has been income tax withholding, add before "said income tax", either "a substantial part of", or "a large part of", or "a part of" or "a portion of."

6 This form, with bracketed wording "concealing and attempting to conceal", was approved in ***United States v. Edwards***, 777 F.2d 644, 650 (11th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986); *See also*, ***United States v. Nelson***, 791 F.2d 336, 338 n.3 (5th Cir. 1986) for list of cases approving underlined language of concealment.

26 U.S.C. § 7201
Individual - Attempt to Evade
and Defeat the Payment of Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, **1** in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully attempt to evade and defeat the payment of a large part of the income tax due and owing by him [her] to the United States of America for the calendar year **2** 19__, in the amount of $_____, by [***Set Forth the Affirmative Acts Constituting the Willful Attempt, Such as the Following: Concealing and Attempting to Conceal From the Internal Revenue Service the Nature and Extent of His [her] Assets and the Location Thereof; Making False Statements to Agents of the Internal Revenue Service; Placing Funds and Property in the Names of Nominees; Placing Funds and Property Beyond the Reach of Service of Process; etc.***].

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 The Seventh Circuit has held that an indictment may use the April 15 return due date, even though not all the acts of evasion of payment occurred on that date. *See* ***United States v. Conley***, 826 F.2d 551, 558-559 (7th Cir. 1987). Moreover, the "attempt" may consist of a course of conduct. If so, substitute "on or about the ____ day of _____, 19__, and continuing to ".

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__"; if more than one year's tax is involved, substitute "for the years _____ through _____".

26 U.S.C. § 7201
Corporation, Officer, or Employee - Corporate Return
Attempt to Evade and Defeat Corporate Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7201
_____)

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], **1** who was the [***Position Held in Corp.***] of [***Name of Corporation***], a corporation, did willfully attempt to evade and defeat a large part of the income tax due and owing by the said corporation to the United States of America for the calendar year **2** 19__, by preparing and causing to be prepared, and by signing and causing to be signed, **3** a false and fraudulent U.S. Corporation Income Tax Return, Form 1120, which was filed with the Internal Revenue Service on behalf of said corporation, wherein it was reported that the taxable income of said corporation for the said calendar year **2** was the sum of $____, and that the total amount of tax due and owing thereon was the sum of $_____, whereas, as he [she] [it] then and there well knew and believed, the taxable income of [***Name of Corporation***] for the calendar year **2** 19__, was the sum of $_____, upon which taxable income there was due and owing to the United States of America a total tax of $_____. **4**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If the corporation is named as the defendant, substitute the name of the corporation.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

3 If venue is to be placed in the judicial district in which the return was filed, modify this form in accordance with language at Forms - 3 and related Footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

4 If it is determined that unreported income and tax are not to be numerically alleged in the indictment, then substitute "whereas, as he [she] [it] then and there well knew and believed, the taxable income of the said corporation for the said calendar year was substantially in excess of that heretofore stated and that upon said additional taxable income a substantial additional tax was due and owing to the United States of America". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Corporation - Attempt to Evade and Defeat Corporate Tax
Acts Subsequent to Filing
United States v. Beacon Brass Co., 344 U.S. 43 (1952)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7201
_____)

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***] **1** who was the [***Position Held in Corp.***] of [***Name of Corporation***], a corporation, did willfully attempt to evade and defeat a large part of the income tax due and owing by the said corporation to the United States of America for the calendar year **2** 19__, by [***Describe Act or Acts; e.g., Filing False Financial Statement, Making False Statements and Representations to Employees of the Internal Revenue Service, etc. See Spies v. United States, 317 U.S. 492 (1943)***], for the purpose of concealing additional unreported taxable income received by said corporation during the said calendar year **2**, on which said unreported taxable income, as he [she] [it] then and there well knew and believed, there was due and owing to the United States of America an income tax of $_____. [***Insert Amount of Corporation's Tax Deficiency, Not Total Tax***]. **3**

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If the corporation is named as the defendant, substitute the name of the corporation.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

3 If it is determined that unreported tax is not to be numerically alleged in the indictment, then delete "an income tax of $_____", and substitute "a substantial additional tax". *See* ***United States v. Citron***, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Note, however, that the Ninth Circuit has ruled that a "substantial" additional tax is not required; all that is required in that circuit is some additional tax. ***United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990).

26 U.S.C. § 7201
Sole Proprietorship or Partnership
Employer's Quarterly Return
Attempt to Evade and Defeat
Federal Withholding and F.I.C.A. (Social Security Taxes)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7201
_____)

The grand jury charges:

That on or about the ____ day of _____, 19_, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], who conducted a business **1** as a [***Sole Proprietorship or Partnership***] under the name and style of _____, with its principal place of business in [***City***], [***State***], did willfully attempt to evade and defeat a large part of the federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending _____, 19_, by preparing and causing to be prepared, and by signing and causing to be signed, **2** a false and fraudulent Employer's Quarterly Federal Tax Return, Form 941, which was filed with the Internal Revenue Service, wherein it was stated that the total wages subject to withholding paid to employees by [***Name of Business***] for the said quarter was the sum of $_____, and that the total amount of federal income tax withheld and social security taxes due and owing thereon was the sum of $_____, whereas, as he [she] [it] then and there well knew and believed, the total wages subject to withholding paid to employees for said quarter was the sum of $_____, upon which wages there were due and owing to the United States of America federal income taxes withheld from wages and social security taxes in the total amount of $____.

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If employer is a corporation, refer to Forms - 25 as a guide in charging appropriate corporate officials with attempting to evade and defeat taxes due from corporation.

2 If venue is to be placed in judicial district in which the return was filed, modify this form in accordance with language at Forms - 3 and related Footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

26 U.S.C. § 7201
Sole Proprietorship or Partnership - Excise Tax Return
Attempt to Evade and Defeat Excise Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7201
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], **1** a resident of [***City***], [***State***], who conducted a retail **2** business as a [***Sole Proprietorship or Partnership***] under the name and style of _____, with its principal place of business in [***City***], [***State***], did willfully attempt to evade and defeat a large part of the retail dealer's **3** excise tax on [***Article***], imposed by Section _____ of the Internal Revenue Code (Title 26), due and owing to the United States of America for the quarter ending **4** _____, 19__, by preparing and causing to be prepared, and by signing and causing to be signed, **5** a false and fraudulent Quarterly Federal Excise Tax Return, **6** which was filed with the Internal Revenue Service on behalf of said retail **2** business, wherein it was stated that the excise tax due and owing to the United States of America by reason of the retail **2** sale of [***Article***] for said quarter **4** was the sum of $_____, whereas, as he [she] [it] then and there well knew and believed, there was due and owing to the United States of America for the said quarter, **4** retail dealer's **3** excise tax in the sum of $____.

In violation of Title 26, United States Code, Section 7201.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If a corporation is named as the defendant, substitute the name of the corporation.

2 Designate appropriate business, *e.g.*, manufacturing.

3 For other excise taxes, *see* 26 U.S.C., § 4041, *et seq*.

4 Designate appropriate period.

5 If venue is to be placed in judicial district in which the return was filed, modify this form in accordance with language at Forms - 3 and related Footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

6 Designate appropriate IRS form.

26 U.S.C. § 7202
Failure to Account for and Pay Over
Withholding and F.I.C.A. (Social Security) Taxes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7202
_____	)	

The grand jury charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], who conducted a business as a sole proprietorship **1** under the name and style of _____, with its principal place of business in [***City***], [***State***], and who, during the first quarter **2** of the year 19__, ending _____, 19__, deducted and collected from the total taxable wages of his [her] employees federal income taxes and Federal Insurance Contributions Act taxes in the sum of $____, did willfully fail to truthfully account for and pay over to the Internal Revenue Service said federal income taxes withheld and Federal Insurance Contributions Act taxes due and owing to the United States of America for the said quarter ending _____, 19__.

In violation of Title 26, United States Code, Section 7202.

A True Bill.

Foreperson

United States Attorney

NOTES

1 If taxpayer is a corporation, refer to Forms - 25 as a guide in charging appropriate corporate officials with failure to account for and pay over withholding and F.I.C.A. (Social Security) taxes due from the corporation.

2 Designate appropriate quarter.

26 U.S.C. § 7203
Individual Return - Failure to File
Venue in District of District Director
Hand-Carried Return

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7203
_____)

The United States Attorney charges:

That during the calendar year **1** 19__, [***Defendant's Name***], who was a resident of [***City***], [***State***], **2** had and received gross income of $_____; **3** that by reason of such gross income he [she] was required by law, following the close of the calendar year **1** 19__, and on or before April 15, 19__, **4** to make an income tax return to **5** the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, in the _____ District of _____, or to the Director, Internal Revenue Service Center, at [***City***], [***State***], or other proper officer of the United States, stating specifically the items of his [her] gross income and any deductions and credits to which he [she] was entitled; that well-knowing and believing all of the foregoing, he [she] did willfully fail to make an income tax return to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

2 If venue is based on defendant's principal place of business, substitute for residence, "whose principal place of business was in [***City***], [***State***]".

3 If the amount of gross income is not to be alleged, substitute "had and received gross income in excess of $_____ (minimum filing requirement)." For definition of gross income, *see* 26 U.S.C., § 61.

4 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

5 If the District Director is located in a judicial district other than the judicial district of the defendant's residence or place of business, and venue is to be placed in the judicial district of the defendant's residence or place of business, then insert "the Representative of" and be sure that the location specified in the information, *i.e.*, "at _____", is the location of the representative -- the field office, and not the main office of the District Director.

26 U.S.C. § 7203
Individual Return - Failure to File
Venue in District of Service Center

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **1** 19__, [***Defendant's Name***], who was a resident of [***City***], [***State***], **2** had and received gross income of $_____; **3** that by reason of such gross income he [she] was required by law, following the close of the calendar year **1** 19__, and on or before April 15, 19__, **4** to make an income tax return to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, or other proper officer of the United States, stating specifically the items of his [her] gross income and any deductions and credits to which he [she] was entitled; that well-knowing and believing all of the foregoing, he [she] did willfully fail to make an income tax return to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

2 If venue is based on defendant's principal place of business, substitute for residence, "whose principal place of business was in [***City***], [***State***]".

3 If the amount of gross income is not to be alleged, substitute "had and received gross income in excess of $_____ (minimum filing requirement)." For definition of gross income, *see* 26 U.S.C., § 61.

4 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

26 U.S.C. § 7203
Individual Return - Failure to File
Husband or Wife - Joint or Separate Returns

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **1** 19__, the defendants [***Husband's Name***] and [***Wife's Name***], who were husband and wife, and were residents of [***City***], [***State***], **2** had and received gross income of $_____ and $_____, respectively; **3** that by reason of such income, the law required each defendant to file a tax return with respect to income, or both defendants, as husband and wife, to file a single return jointly of income, following the close of the calendar year 19__ and on or before April __, 19__, **4** to make such return or returns to **5** the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, or to the Director, Internal Revenue Service Center, at [***City***], [***State***], or other proper officer of the United States, stating specifically the items of his [her] gross income and any deductions and credits to which he [she] was entitled; that well-knowing and believing all the foregoing, the defendants individually and jointly did willfully fail to make said income tax return or returns to the said Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper office of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19_". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

2 If venue is based on defendant's principal place of business, substitute for residence, "whose principal place of business was in [***City***], [***State***]".

3 If the amount of gross income is not to be alleged, substitute "had and received gross income in excess of $____ [***minimum filing requirement***]." For definition of gross income, *see* 26 U.S.C., § 61.

4 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

5 If the District Director is located in a judicial district other than the judicial district of the defendant's residence or place of business, and venue is to be placed in the judicial district of the defendant's residence or place of business, then insert "the Representative of" and be sure that the location specified in the information, *i.e.*, "at _____", is the location of the representative -- the field office, and not the main office of the District Director.

26 U.S.C. § 7203
Individual Return - Failure to File
Husband or Wife - Joint or Separate Returns
Community Property State Alternative

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **1** 19__, the defendants [***Husband's Name***] and [***Wife's Name***], who were husband and wife, and were residents of [***City***], [***State***], **2** which is a community property state, had and received gross income computed on the community property basis of $_____ and $_____, respectively; **3** that by reason of such income, the law required each defendant to file a tax return with respect to income, or both defendants, as husband and wife, to file a single return jointly of income, following the close of the calendar year 19__ and on or before April __, 19__, **4** to make such return or returns to **5** the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at

_____, or to the Director, Internal Revenue Service Center, at [***City***], [***State***], or other proper officer of the United States, stating specifically the items of his [her] gross income and any deductions and credits to which he [she] was entitled; that well-knowing and believing all the foregoing, the defendants individually and jointly did willfully fail to make said income tax return or returns to the said Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper office of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

2 If venue is based on defendant's principal place of business, substitute for residence, "whose principal place of business was in [***City***], [***State***]".

3 If the amount of gross income is not to be alleged, substitute "had and received gross income in excess of $_____ [***minimum filing requirement***]." For definition of gross income, *see* 26 U.S.C., § 61.

4 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

5 If the District Director is located in a judicial district other than the judicial district of the defendant's residence or place of business, and venue is to be placed in the judicial district of the defendant's residence or place of business, then insert "the Representative of" and be sure that the location specified in the information, *i.e.*, "at _____", is the location of the representative -- the field office, and not the main office of the District Director.

26 U.S.C. § 7203
Partnership Return - Failure to File
Venue in District of Service Center 1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **2** 19__, [***Defendant's Name***] conducted a business as a partnership under the name and style of _____, with its principal place of business at [***City***], [***State***], and by reason of such facts he [she] was required by law, following the close of the calendar year **2** 19__, and on or before April 15, 19__, **3** for and on behalf of said partnership, to make a partnership return of income to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____ **1**, or other proper officer of the United States, stating specifically the items of said partnership's gross income and the deductions and credits allowed by law; that well-knowing and believing all of the foregoing, he [she] did willfully fail to make a partnership return to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

3 Fiscal year partnership returns must be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C., Secs. 6031, 6072(a). Note that if the fifteenth day fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note also that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

26 U.S.C. § 7203
Corporation Return - Failure to File
***Venue in District of Service Center* 1**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **2** 19__, the defendant, [***Defendant's Name***], **3** was the [***Position Held in Corporation***] of [***Name of Corporation***], a corporation not expressly exempt from tax, with its principal place of business at [***City***], [***State***], and by reason of such facts he [she] [it] was required by law, after the close of the calendar year **2** 19__, and on or before March 15, 19__, **4** for and on behalf of said corporation, to make an income tax return to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, **1** or other proper officer of the United States, stating specifically the items of said corporation's gross income and the deductions and credits allowed by law; that well-knowing and believing all of the foregoing, he [she] [it] did willfully fail to make an income tax return to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19_".

3 If the corporation is named as the defendant, substitute the name of the corporation.

4 Fiscal year corporation income tax returns must be filed on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C., § 6072(b). Note that if the fifteenth day fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note also that the date of the return was due should include any authorized extensions of time for filing. 26 U.S.C., § 7503.

26 U.S.C. § 7203
Individual - Information Return
Failure to File

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year 19__, the defendant, [***Defendant's Name***], made payments of [***E.g., Rent, Salaries, Wages, Premiums, Annuities, Compensations, Remunerations, Gains, Profits, or Income***], to the persons and in the amounts following:

NAME	ADDRESS	AMOUNT
_____	_____	
_____	_____	
_____	_____	

That by reason of such payments, [***Defendant's Name***] was required by law to make a return on United States Treasury Department Internal Revenue Service Form 1096 on or before the 28th day of February, 19__, to the Director, Internal Revenue Service Center, at [***City***], [***State***], **1** in the _____ District of _____, setting forth the number of returns on United States Treasury Department Internal Revenue Service Form(s) 1099 attached thereto; that well-knowing and believing all of the foregoing, [***Defendant's Name***] did willfully fail to make said return to said Director of the Internal Revenue Service Center at said time and place, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 Use Internal Revenue Service Center where Form 1096 was required to be filed. *See* Instructions for Forms 1096. Treas. Reg. 1.6041-6 (26 C.F.R.).

26 U.S.C. § 7203
Individual - 26 U.S.C. § 6050I
Returns Relating to Cash Received in Trade or Business
Failure to File

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7203
_____)

The grand jury charges:

During the calendar year 19__, in the [***Judicial District***], the defendant [***Defendant's Name***], was the [***Position Held in Business***] of a business located in [***City***], [***State***], under the name and style of [***Name of Business***], and was engaged in trade and business as [***Type of Business***].

On or about [***Date of Cash Transaction***], defendant [***Defendant's Name***], in connection with a transaction relating to [***Trade or Business - Insert Description of Transaction (e.g., the sale of an automobile to an undercover agent of the Internal Revenue Service)***], did receive [***Amount involved in cash transaction***] in cash from [***Name of Person Conducting Transaction***] as [***Reason for Receipt (e.g., payment for automobile)***].

By virtue of his receipt of [***Amount of Cash***] on [***Date of Cash Transaction***], defendant [***Defendant's Name***] was required by law, pursuant to Title 26, United States Code, Section 6050I, and Treas. Reg. §1.6050I-1T (26 C.F.R.), to file with the Director, Internal Revenue Service, __ Division, at [***City***], [***State***], in the _____ District of _____, or to the Director, Internal Revenue Service Center, at [***City***], [***State***], or other proper officer of the United States, a return within 15 days of his [her] receipt of the [***Amount of Cash***], on IRS Form 8300 in the manner and form stated thereon, stating, among other things, the name, address, and taxpayer identification number of the person from who he [she] received the cash, the amount of cash received, and the

date and nature of the transaction;

Well knowing all of the foregoing facts, defendant [***Defendant's Name***] did willfully fail to file the required return with the Internal Revenue Service or with any proper officer of the United States;

In violation of Title 26, United States Code, Section 7203.

A True Bill.

Foreperson

United States Attorney

26 U.S.C. § 7203
Individual - 26 U.S.C. § 6050I
Returns Relating to Cash Received in Trade or Business
Failure to File

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7203
_____)

The grand jury charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], whose principal place of business was in [***City***], [***State***], received a payment in a trade or business, to wit, [***identify trade or business***], in excess of $10,000 United States currency, to wit, [***amount of currency***].

That by reason of such payment, [***Defendant's Name***], was required by law to make a return on United States Treasury Department Internal Revenue Service Form 8300 on or before the __day of _____, 19__, to the Director, Internal Revenue Service, _____ Division, at [***City***], [***State***], in the _____ District of _____, or to the Director, Internal Revenue Service Center, at [***City***], [***State***], or other proper officer of the United States, stating specifically the items of identify of the individual from whom the cash was received, the person on whose behalf this transaction was conducted, the description of transaction and method of payment, and the business reporting this transaction on United States Treasury Department Internal Revenue Service Form 8300; that well-knowing and believing all of the foregoing, [***Defendant's Name***] did willfully fail to make said return to said Director of the Internal Revenue Service at said time and place, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Sections 6050I and 7203, and Treas. Reg. §1.6050I-1 (26 C.F.R.)

A True Bill.

Foreperson

United States Attorney

26 U.S.C. § 7203
Individual - Failure to Pay Tax
Venue in District of Service Center 1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the calendar year **2** 19__, [***Defendant's Name***], who was a resident of [***City***], [***State***], had and received taxable income of $_____, on which taxable income there was owing to the United States of America an income tax of $_____; that he [she] was required by law on or before April 15, 19__, **3** to pay said income tax to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, **1** or other proper officer of the United States; and that well-knowing and believing all of the foregoing, he [she] did willfully fail to pay the said income tax to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

3 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. 26 U.S.C., § 7503. Note that fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C., § 6072(a).

26 U.S.C. § 7203
Sole Proprietorship or Partnership
Employer's Quarterly Return - Failure to File
Venue in District of Service Center **1**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the period from [***Date***] to [***Date***], inclusive, [***Defendant's Name***], a resident of [***City***], [***State***], was an employer of labor **1** and a person required under the provisions of the Internal Revenue Code to make a return of federal income taxes withheld from wages and Federal Insurance Contributions Act (F.I.C.A.) taxes; that during said period he [she] paid wages to his [her] employees which were subject to withholding of federal income taxes and Federal Insurance Contributions Act taxes in the sum of $_____ and $_____, respectively; that by reason of such facts he [she] was required by law, after [***Last Day of Period***], and on or before [***Return Due Date***], to make an Employer's Quarterly Federal Tax Return, Form 941, to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____, **2** or other proper officer of the United States; and that well-knowing and believing all of the foregoing, he [she] did willfully fail to make said return to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If employer is a corporation, refer to Forms - 25 as a guide in charging appropriate corporate officials with failure to file return on behalf of corporation.

2 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

26 U.S.C. § 7203
Sole Proprietorship or Partnership
Employer's Quarterly Return
Failure to File - Tabular Form Information
***Venue in District of Service Center* 1**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7203
_____)

The United States Attorney charges:

1. That during the period from [***Date***] to [***Date***], inclusive, [***Defendant's Name***], a resident of [***City***], [***State***], was an employer of labor **2** and a person required under the provisions of the Internal Revenue Code to make a return of federal income taxes withheld from wages and Federal Insurance Contributions Act (F.I.C.A.) taxes; that during said period he [she] paid wages to his [her] employees which were subject to withholding of federal income taxes and Federal Insurance Contributions Act taxes; that by reason of such facts he [she] was required by law, after the close of each calendar quarter and on or before each due date, to make an Employer's Quarterly Federal Tax Return, Form 941, to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at __, **1** or other proper officer of the United States; and that well-knowing and believing all of the foregoing, he [she] did willfully fail to make to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the U
nited States, said Employer's Quarterly Federal Tax Return, Form 941, for each of the calendar quarters hereinafter set forth during the period from [***Date***] to [***Date***].

2. The allegations of paragraph "1." herein are repeated and realleged for Counts I through ___, inclusive, of this Information, as though fully set forth therein:

COUNT	QUARTER ENDED	DUE DATE	TOTAL WAGES	FICA TAXES (EMPLOYER'S & EMPLOYEE'S)	INCOME TAXES WITHHELD	TOTAL(FICA AND INCOME) TAX LIABILITY
I.	_____	_____	_____	_____	_____	
II.	_____	_____	_____	_____	_____	
III.	_____	_____	_____	_____	_____	

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If employer is a corporation, refer to Forms - 25 as a guide in charging appropriate corporate officials with failure to file returns on behalf of corporation.

2 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

26 U.S.C. § 7203
Sole Proprietorship or Partnership
Excise Tax Return - Failure to File
***Venue in District of Service Center* 1**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7203
_____	)	

The United States Attorney charges:

That during the period from [***Date***] to [***Date***], [***Defendant's Name***] **2** conducted a business as a [***Sole Proprietorship or Partnership***] under the name and style of _____, with its principal place of business in [***City***], [***State***], and sold at retail **3** [***Article***], upon which sales there were due and owing to the United States of America retail dealer's **4** excise taxes in the amount of $_____; that by reason of such fact he [she] was required by law, after [***Last Day Of Period***], and on or before [***Return Due Date***], to make a Quarterly Federal Excise Tax Return **5** to the Director, Internal Revenue Service Center, at [***City***], [***State***], in the _____ District of _____, or to the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at , **1** or other proper officer of the United States; that well-knowing and believing all of the foregoing, he [she] did willfully fail to make said return to said Director of the Internal Revenue Service Center, to said District Director of the Internal Revenue Service, or to any other proper officer of the United States.

In violation of Title 26, United States Code, Section 7203.

United States Attorney

NOTES

1 If venue is to be placed in the judicial district of the District Director, modify this form in accordance with language at Forms - 33.

2 If taxpayer is a corporation, refer to Forms - 25 as a guide in charging appropriate corporate officials with failure to file return on behalf of corporation.

3 Designate appropriate business, *e.g.*, manufacturing.

4 For other excise taxes, *see* 26 U.S.C., § 4041, *et seq*.

5 Designate appropriate IRS form.

26 U.S.C. § 7204
Employee's Withholding Statement, Form W-2
Failure to Furnish

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7204
_____	)	

The United States Attorney charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], **1** a resident of [***City***], [***State***], who during the calendar year 19__ employed [***Name of Employee***], a resident of [***City***], [***State***], and who was required under the Internal Revenue laws to deduct and withhold federal income taxes and Federal Insurance Contributions Act taxes with respect to the wages of [***Name of Employee***] and to furnish him [her] on or before January 31, 19__, with a written statement showing the amount of wages paid and taxes deducted and withheld during the calendar year 19__, did willfully fail to furnish said statement to said employee in the manner and at the time required by law.

In violation of Title 26, United States Code, Section 7204.

United States Attorney

NOTES

1 If employer is a corporation, refer to language at Forms - 25 as a guide in charging appropriate corporate officials with failure to furnish a withholding statement on behalf of the corporation.

26 U.S.C. § 7204
Employee's Withholding Statement, Form W-2
Furnishing False and Fraudulent Statement

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7204
_____	)	

The United States Attorney charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], **1** a resident of [***City***], [***State***], who during the calendar year 19__ employed [***Name of Employee***], a resident of [***City***], [***State***], and who was required under the Internal Revenue laws to deduct and withhold federal income taxes and Federal Insurance Contributions Act taxes with respect to the wages of [***Name of Employee***] and to furnish him [her] on or before January 31, 19__, with a written statement showing the amount of wages paid and taxes deducted and withheld during the calendar year 19__, did willfully furnish a false and fraudulent statement to said employee showing that the total wages paid were $_____ and that the income taxes deducted and withheld were $_____ and that the Federal Insurance Contributions Act taxes deducted and withheld were $_____, whereas, as [***Defendant's Name***] then and there well knew and believed, the total wages paid were $_____, and the income taxes deducted and withheld were $_____ and the Federal Insurance Contributions Act taxes deducted and withheld were $_____.

In violation of Title 26, United States Code, Section 7204.

United States Attorney

NOTES

1 If the employer is a corporation, refer to language at Forms - 25 as a guide in charging appropriate corporate officers with furnishing a false and fraudulent withholding statement on behalf of the corporation.

26 U.S.C. § 7205
False Withholding Allowance Certificate, Form W-4

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7205
_____	)	

The United States Attorney charges:

That on or about the ___ day of _____, 19_, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], who during the calendar year 19__ was employed by [***Name of Employer***], a resident of [***City***], [***State***], and who was required under the Internal Revenue laws to furnish [***Name of Employer***] with a signed Employee's Withholding Allowance Certificate, Form W-4, setting forth the number of withholding allowances claimed on or about the date of the commencement of employment by [***Name of Employer***], did willfully supply a false and fraudulent Employee's Withholding Allowance Certificate, Form W-4, to [***Name of Employer***], on which he [she] claimed withholding allowances, **1** whereas, as [***Defendant's Name***] then and there well knew and believed, he [she] was entitled to claim only ____ withholding allowances. **2**

In violation of Title 26, United States Code, Section 7205.

United States Attorney

COMMENTS

1 The Government does *not* have to prove the number of allowances that the defendant could claim. *See* ***United States v. McDonough***, 603 F.2d 19, 23-24 (7th Cir. 1979).

2 The Fifth Circuit has ruled that "withholding exemptions" and "withholding allowances" are the same in the context of the sufficiency of a Section 7205 indictment. ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978).

NOTES

1 Where appropriate, the following language should be substituted: "he [she] claimed exemption from withholding."

2 Where appropriate, the following language should be substituted: "he [she] was not exempt from withholding."

26 U.S.C. § 7206(1)
Making and Subscribing a False
Return, Statement, or Other Document
Venue in District of Filing

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7206(1)
_____	)	

The grand jury charges:

That on or about the ___ day of _____, 19_, in the _____ District of ___, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully make and subscribe **1** a [***Describe Document***], which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at [***City***], [***State***], **2** which said [***Describe Document***] he [she] did not believe to be true and correct as to every material matter in that the said [***Describe Document and the False Fact(s)***], whereas, as he [she] then and there well knew and believed, [***Describe Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7206(1).

A True Bill.

Foreperson

United States Attorney

COMMENT

1 The Seventh Circuit has approved this type of form as sufficiently charging a 7206(1) offense. ***United States v. Marrinson***, 832 F.2d 1465, 1476 (7th Cir. 1987).

NOTES

1 An aider and abettor may be jointly charged with the principal under 18 U.S.C., § 2. If this is done, the language "and did willfully aid, abet, assist, and cause to be so made and subscribed" should be inserted after the word "subscribe" and appropriate reference made to 18 U.S.C., § 2, as well as to 26 U.S.C., § 7206(1).

2 If the Service Center was not the place of filing, substitute "with the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at ____"; or "with the Representative of the District Director of the Internal Revenue Service for the Internal Revenue District of _____, at _____".

26 U.S.C. § 7206(1)
Making and Subscribing a False
Return, Statement, or Other Document
Venue in District of Preparation and Signing

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7206(1)
_____)

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully make and subscribe **1** a [***Describe Document***], which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said [***Describe Document***] he [she] did not believe to be true and correct as to every material matter in that the said [***Describe Document and the False Fact(s)***], whereas, as he [she] then and there well knew and believed, [***Describe Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7206(1).

A True Bill.

Foreperson

United States Attorney

COMMENT

1 The Seventh Circuit has approved this type of form as sufficiently charging a 7206(1) offense. ***United States v. Marrinson***, 832 F.2d 1465, 1476 (7th Cir. 1987).

NOTES

1 An aider and abettor may be jointly charged with the principal under 18 U.S.C., § 2. If this is done, the language "and did willfully aid, abet, assist, and cause to be so made and subscribed" should be inserted after the word "subscribe" and appropriate reference made to 18 U.S.C., § 2, as well as to 26 U.S.C., § 7206(1).

26 U.S.C. § 7206(1)
Making and Subscribing a False Return
False Amount Not Specified - Open Ended Indictment

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7206(1)
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully make and subscribe **1** a [***joint***] U.S. Individual Income Tax Return, **2** for the calendar year **3** 19__, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, **4** which said income tax return he [she] did not believe to be true and correct as to every material matter in that the said return reported [***State Each False Item of Income Reported, e.g., Dividend Income in the Amount of $____, Interest Income in the Amount of $____,***] whereas, as he [she] then and there well knew and believed, he [she] received [***State Each False Item But Not Amount, e.g., Interest Income and Dividend Income***] in addition to that heretofore stated.

In violation of Title 26, United States Code, Section 7206(1).

A True Bill.

Foreperson

United States Attorney

NOTES

1 An aider and abettor may be jointly charged with the principal under 18 U.S.C., § 2. If this is done, the language "and did willfully aid, abet, assist, and cause to be so made and subscribed" should be inserted after the word "subscribe" and appropriate reference made to 18 U.S.C. (§ 2, as well as to 26 U.S.C.) § 7206(1).

2 Where appropriate, substitute correct tax return, *e.g.*, U.S. Corporation Income Tax Return.

3 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

4 If venue is to be placed in the district of filing, modify this form in accordance with language at Forms - 63.

26 U.S.C. § 7206(1)
Making and Subscribing a False Return
Failure to Disclose a Business

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7206(1)
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully make and subscribe a [***joint***] U.S. Individual Income Tax Return, for the calendar year 19__, **1** which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, **2** which said income tax return he [she] did not believe to be true and correct as to every material matter in that the said return failed to disclose that he [she] was engaged in the operation of a business activity from which he [she] derived gross receipts or sales and incurred deductions, whereas, as he [she] then and there well knew and believed, he [she] was required by law and regulation to disclose the operation of this business activity, the gross receipts or sales he [she] derived therefrom, and the deductions he [she] incurred.

In violation of Title 26, United States Code, Section 7206(1).

A True Bill.

Foreperson

United States Attorney

NOTES

1 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

2 If venue is to be placed in the district of filing, modify this form in accordance with language at Forms - 63.

26 U.S.C. § 7206(1)
Individual - 26 U.S.C. 6050I
Returns Relating to Cash Received in Trade or Business
Failing False Return

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7206(1)
_____)

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully make and subscribe a return on United States Treasury Department Internal Revenue Service Form 8300, for a cash payment in excess of $10,000 received on [***Date***], which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said return on United States Treasury Department Internal Revenue Service Form 8300 he [she] did not believe to be true and correct as to every material matter in that the said return [***State Each False Item Reported, e.g., Name of Payor, Cash Received in the Amount of $_____***], whereas, as he [she] then and there well knew and believed, he [she] received [***State Each False Item But Not Amount, e.g., Name of Payor, Cash Received in Excess of Amount Reported***], in addition to that heretofore stated.

In violation of Title 26, United States Code, Sections 6050I and 7206(1), and 26 Code of Federal Regulations, Section 1.6050I-1.

A True Bill.

Foreperson

United States Attorney

26 U.S.C. § 7206(2)
Aiding and Assisting in the Preparation and Presentation
of a False and Fraudulent Return, Statement, or Other Document

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7206(2)
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, the defendant, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Individual Income Tax Return, Form 1040, **1** of [***Taxpayer's Name***] for the calendar year **2** 19__, which was false and fraudulent as to a material matter, in that [***Describe False Fact(s), e.g., it represented that the said (Taxpayer's Name) was entitled under the provisions of the Internal Revenue laws to claim deductions in the total sum of $_____***], whereas, as the defendant then and there well knew and believed, [***Describe Correct Fact(s), e.g., the total deductions which the said (Taxpayer's Name) was entitled to claim for said calendar year were in the total sum of $ ___***].

In violation of Title 26, United States Code, Section 7206(2).

A True Bill.

Foreperson

United States Attorney

NOTES

1 Designate appropriate document if not a tax return, *e.g.*, a financial statement.

2 If fiscal year is involved, substitute "fiscal year ended _____, 19__".

26 U.S.C. § 7206(2)
Aiding and Assisting in the Preparation and Presentation of False and Fraudulent Individual Income Tax Returns Containing False Deductions - Tabular Form Indictment

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7206(2)
_____)

The grand jury charges:

1. That on or about the dates hereinafter set forth, in the _____ District of _____, the defendant, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of U.S. Individual Income Tax Returns, Forms 1040, either individual or joint, for the taxpayers and calendar years hereinafter specified, which were false and fraudulent as to material matters, in that they represented that the said taxpayers were entitled under the provisions of the Internal Revenue laws to claim deductions for items and in amounts hereinafter specified, whereas, as the defendant then and there well knew and believed, the said taxpayers were not entitled to claim deductions in said amounts, but of lesser amounts.

2. The allegations of paragraph "1." are repeated and realleged in Counts I through ___, inclusive, of this Indictment, as though fully set forth therein:

COUNT	DATE OF OFFENSE	TAXPAYER	CALENDAR TAX YEAR	FALSELY CLAIMED ITEM **1**	AMOUNT CLAIMED
I.	_____	_____	_____		_____
II.	_____	_____	_____		_____
III.	_____	_____	_____		_____

In violation of Title 26, United States Code, Section 7206(2).

A True Bill.

Foreperson

United States Attorney

NOTES

1 Where the fraudulent deductions (generally itemized deductions) consist of alleged payments to individuals or organizations, list each fraudulent payment, rather than totalling such payments in the deduction category under which they were claimed on the return. For example, list "Medical Expenses Dr. Jones-$500; Dr. Smith-$500," not, "Medical Expenses $1,000." This will prevent a defense that additional, unclaimed deductions in the same deduction category are available to offset the false items.

26 U.S.C. § 7206(4)
Removal or Concealment of Goods or Commodities
With Intent to Evade or Defeat
The Assessment or Collection of a Tax

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7206(4)
_____)

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], with intent to evade and defeat the collection of income taxes assessed against him [her] on or about _____, 19__, by the Internal Revenue Service, **1** did knowingly and unlawfully remove and conceal [***Describe Property***], upon which levy was authorized by Section 6331 of the Internal Revenue Code.

In violation of Title 26, United States Code, Section 7206(4).

A True Bill.

Foreperson

United States Attorney

NOTES

1 Where appropriate, substitute "evade and defeat the assessment of income taxes against him [her] by the Internal Revenue Service."

26 U.S.C. § 7206(5)(A)
Concealment of Assets in Connection
with a Compromise or Closing Agreement

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7206(5)(A)
_____	)	

The grand jury charges:

That on or about the ___ day of _____, 19_, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], in connection with an offer of compromise **1** relating to his [her] liability for [***Type of Tax***] taxes due and owing by him [her] to the United States of America for the calendar year(s) _____, **2** did willfully conceal from [***Specify Particular Officer, with Job Title***] and all other proper officers and employees of the United States, [***Describe Property Belonging to Taxpayer or Other Person Liable for the Tax***].

In violation of Title 26, United States Code, Section 7206(5)(A).

A True Bill.

Foreperson

United States Attorney

NOTES

1 Where appropriate, substitute "a compromise"; or "a closing agreement"; or "an offer to enter into a closing agreement".

2 If fiscal year is involved, substitute "fiscal year(s) ended _____, 19_".

26 U.S.C. § 7206(5)(B)
Withholding, Falsifying, or Destroying Records
or Making a False Statement in Connection with
a Compromise or Closing Agreement

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7206(5)(B)
_____)

The grand jury charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], in connection with an offer of compromise **1** relating to his [her] liability for [***Type of Tax***] taxes due and owing by him [her] to the United States of America for the calendar year(s) _____, **2** did willfully [***(receive) (withhold) (destroy) (mutilate) or (falsify), Describe Book, Document, or Record Involved***] **3**.

In violation of Title 26, United States Code, Section 7206(5)(B).

A True Bill.

Foreperson

United States Attorney

NOTES

1 Where appropriate, substitute "a compromise"; or "a closing agreement"; or "an offer to enter into a closing agreement".

2 If fiscal year is involved, substitute "fiscal year(s) ended _____, 19__".

3 Where false statement is the crime, substitute "make a false statement to [***Name Appropriate Official, with Job Title***], at [***Place***], [***Location***], wherein [***Defendant's Name***] stated that [***Describe False Statement Relating to the Estate or Financial Condition of Taxpayer***], whereas, as he [she] then and there well knew and believed, [***Describe Correct Fact(s) Relating to False Statement***]".

26 U.S.C. § 7207
False Document Submitted to I.R.S.
Venue in District Where Document Submitted

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7207 **1**
_____	)	

The United States Attorney charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by submitting to an Officer(s) of the Internal Revenue Service, United States Treasury Department, at [***Place***], [***Location***], a [***Describe Document, e.g., List, Account, Statement, or Other Document***], **2** which was known by the defendant to be fraudulent and false as to a material matter in that [***Describe the False Fact(s)***], whereas, as he [she] then and there well knew and believed, [***Describe the Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7207.

United States Attorney

NOTES

1 Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns. In some very limited instances, however, the Tax Division will authorize 7207 charges where a false tax return is involved. *See* Tax Division Directive No. 75 in Section 3.00, *supra* and Section 16.03, Policy Limiting The Use Of § 7207, *supra*.

2 A separate count should be charged for each false document.

26 U.S.C. § 7207
False Document Submitted to I.R.S.
Venue in District of Mailing

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7207 **1**
_____)

The United States Attorney charges:

That on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by mailing and causing to be mailed, to an Officer(s) of the Internal Revenue Service, United States Treasury Department, a [***Describe Document, e.g., List, Account, Statement, or Other Document***], **2** which was known by the defendant to be fraudulent and false as to a material matter in that [***Describe the False Fact(s)***], whereas, as he [she] then and there well knew and believed, [***Describe the Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7207.

United States Attorney

NOTES

1 Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns. In some very limited instances, however, the Tax Division will authorize 7207 charges where a false tax return is involved. *See* Tax Division Directive No. 75 in Section 3.00, *supra* and Section 16.03, Policy Limiting The Use Of § 7207, *supra*.

2 A separate count should be charged for each false document.

26 U.S.C. § 7207
False Documents Submitted to I.R.S.
Venue in District Where Documents Submitted
Tabular Form Information

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7207 **1**
_____)

The United States Attorney charges:

1. That on or about the dates hereinafter specified, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by submitting to an Officer(s) of the Internal Revenue Service, United States Treasury Department, at [***Place***], [***Location***], documents hereinafter specified, **2** known by the defendant to be fraudulent and false as to a material matter, as hereinafter specified.

2. The allegations of paragraph "1." are repeated and realleged in Counts I through ___, inclusive, of this Information, as though fully set forth therein.

COUNT	DATE OF OFFENSE	DESCRIPTION OF DOCUMENT	FALSITY
I.	_____	_____	
II.	_____	_____	
III.	_____	_____	

In violation of Title 26, United States Code, Section 7207.

United States Attorney

NOTES

1 Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns. In some very limited instances, however, the Tax Division will authorize 7207 charges where a false tax return is involved. *See* Tax Division Directive No. 75 in § 3.00, *supra* and § 16.03, Policy Limiting The Use Of § 7207, *supra*.

2 A separate count should be charged for each false document.

26 U.S.C. § 7207
False Documents Submitted to I.R.S.
Venue in District of Mailing
Tabular Form Information

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7207 **1**
_____	)	

The United States Attorney charges:

1. That on or about the dates hereinafter specified, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by mailing and causing to be mailed, to an Officer(s) of the Internal Revenue Service, United States Treasury Department, documents hereinafter specified, **2** known by the defendant to be fraudulent and false as to a material matter, as hereinafter specified.

2. The allegations of paragraph "1." are repeated and realleged in Counts I through ___, inclusive, of this Information, as though fully set forth therein.

COUNT	DATE OF OFFENSE	DESCRIPTION OF DOCUMENT	FALSITY
I.	_____	_____	
II.	_____	_____	
III.	_____	_____	

In violation of Title 26, United States Code, Section 7207.

United States Attorney

NOTES

1 Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns. In some very limited instances, however, the Tax Division will authorize 7207 charges where a false tax return is involved. *See* Tax Division Directive No. 75 in Section 3.00, *supra* and Section 16.03, Policy Limiting The Use Of § 7207, *supra*.

2 A separate count should be charged for each false document.

26 U.S.C. § 7210
Failure to Appear in Response to Summons

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7210
_____)

The United States Attorney charges:

That on or about the ____ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], was required under the Internal Revenue laws, by reason of being duly summoned, to appear to testify **1** at _____ on the aforesaid date at the office of _____; that well-knowing and believing all of the foregoing, he [she] willfully failed to appear to testify **1** at the time and place required by the summons.

In violation of Title 26, United States Code, Section 7210.

United States Attorney

NOTES

1 Where appropriate, add or substitute "and produce [***Describe Documents Summoned***]".

26 U.S.C. § 7212(a) "Omnibus" Clause
Corrupt Endeavor to Obstruct or Impede
the Due Administration of the Internal Revenue Laws

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	26 U.S.C., § 7212(a)
_____	)	

The grand jury charges:

That beginning on or about [***Date***], and continuing thereafter up to and including [***Date***], in the _____ District of _____, [***Defendant's Name***] did corruptly endeavor to obstruct or impede the due administration of the internal revenue laws by:

[***Describe manner and means of defendant's corrupt obstruction of internal revenue laws, e.g., [FRAUDULENT FORM 1099 SCHEME] (1) sending to employees of the Internal Revenue Service and others [hereinafter "these individuals"], a request for their Social Security Numbers, Form W-9; (2) sending to these individuals a "Notice of Bill due and payable" demanding them to make payment of a substantial sum of money to [Defendant's Name] whereas these individuals never owed [Defendant's Name] any sum of money; (3) sending to these individuals a Form 1099-MISC reflecting "Nonemployee compensation" allegedly paid to them from [Defendant's Name] whereas these individuals never received compensation of any kind from [Defendant's Name]; (4) sending to the Internal Revenue Service copies of the Forms 1099-MISC representing [Defendant's Name] paid "Nonemployee compensation" to the named recipients of the Forms 1099-MISC, whereas he never paid these individuals compensation of any kind; (5) sending to these individuals a "Past Due Statement," advising them to report on their tax returns the amount stated in the "Notice of Bill due and payable;" (6) sending to the Internal Revenue Service Applications for Reward for Original Information, Form 211, on which [Defendant's Name] claimed money rewards for the reporting of alleged violations of the tax laws allegedly committed by these individuals; and (7) filing with the Internal Revenue Service a false and fraudulent U.S. Individual Income Tax Return, Form 1040, for the calendar year 1989, which claimed a tax refund due of $_____, whereas [Defendant's Name] was not entitled to a tax refund in this amount.***]

In violation of Title 26, United States Code, Section 7212(a).

A True Bill.

Foreperson

United States Attorney

26 U.S.C. § 7215
Failure to Make Trust Fund
Deposit After Notice

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 26 U.S.C., § 7215
_____)

The United States Attorney charges:

1. That during the period _____, 19__, to _____, 19__, in the _____ District of _____, [***Defendant's Name***] was an employer of labor **1** required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. That [***Defendant's Name***] did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending _____, 19__, _____, 19__, _____, 19__, and _____, 19__. **2**

3. That on _____, 19__, [***Defendant's Name***] was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512, which said notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after delivery of such notice, and, not later than the end of the second banking day after such collection, to deposit said taxes in a separate bank account established by him [her] in trust for the United States to be kept therein until paid over to the United States.

4. That within the _____ District of _____, [***Defendant's Name***] unlawfully failed to comply with the provisions of Title 26, United States Code, Section 7512, in that, after receiving delivery of the notice referred to in paragraph "3.", he [she] paid wages and was required to collect and deposit the said taxes, but failed to deposit said taxes in a separate bank account in trust for the United States, by the dates and in the amounts hereinafter specified:

COUNT	DATE WAGES PAID	DATE DEPOSIT REQUIRED	AMOUNT OF DEPOSIT REQUIRED
I.	_____	_____	$
II.	_____	_____	$
III.	_____	_____	$
IV.	_____	_____	$

In violation of Title 26, United States Code, Section 7215.

United States Attorney

NOTES

1 If the employer is other than a sole proprietorship (*e.g.*, a corporation, partnership, or joint venture), the relationship of the defendant to the employer-entity, which makes him the responsible person, should be alleged in paragraphs 1, 2, and 3, by substituting "[***Defendant's Name***], who was the [***Position Held in Company***] of [***Name of Company***], a [***Type of Company, e.g., Corporation, Partnership, etc.***], and an employer of labor".

2 Quarters prior to notice for which there was a failure to collect, account for, and pay over federal income and F.I.C.A. taxes withheld from wages.

18 U.S.C. § 287
***False Claim for Refund* 1**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., § 287
_____	)	

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____, [***insert Defendant's Name***], a resident of _____, _____, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she] knew to be false, fictitious, or fraudulent, by preparing and causing to be prepared, **2** a U.S. Individual Income Tax Return, Form 1040, **3** which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed a refund of taxes in the amount of $ _____, knowing such claim to be false, fictitious, or fraudulent.

In violation of Title 18, United States Code, Section 287.

A True Bill.

Foreperson

United States Attorney

NOTES

1 This form is for use with false paper returns.

2 If venue is to be placed in the district of filing, modify this form in accordance with language at Forms - 3 and related footnote **2**. If venue is based on mailing, substitute "by mailing and causing to be mailed".

3 The appropriate IRS form should be designated here -- *e.g.*, U.S. Corporation Income Tax Return, Form 1120.

18 U.S.C. § 286/287
Conspiracy to File False Claims for Refund/False Claims for Refund **1**

NOTE: This indictment provides sample language to charge violations of 18 U.S.C. 286 and 287 in the most commonly encountered type of ELF scheme. Modification of the language will be necessary in cases involving different fact patterns. Modification of the format used may be desirable to conform to local practice.

Upon request, the Tax Division will provide this sample indictment (and the following sample plea agreement) on diskette in either WordPerfect or ASCII format.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., § 286;
	)	Conspiracy, 18 U.S.C.,
_____,	)	287: False Claim to
_____,	)	a Government Agency
_____,	)	

The grand jury charges:

COUNT ONE

[18 U.S.C., § 286]

Beginning in or about [***insert month***], 19__, and continuing until on or about [***insert month***], 19__, within the _____ District of _____, defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***], and others, both known and unknown to the grand jury, unlawfully, willfully and knowingly agreed, combined and conspired with others and each other to defraud the United States by obtaining or aiding to obtain the payment or allowance of false, fictitious or fraudulent claims.

Manner and Means

Defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] agreed to participate in, and participated in, a scheme to obtain or help others to obtain payment of false claims for refunds from the Internal Revenue Service ("IRS") by filing in their own names, and by causing others to file, false 19__ federal income tax returns claiming refunds to which they knew they were not entitled. Defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] solicited, instructed and assisted others in falsely claiming federal income tax refunds through the preparation and submission of false federal income tax returns.

To accomplish the objects of this scheme, defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] recruited individuals to file fraudulent federal income tax returns under their own names and social security numbers. Defendant [***insert name of defendant***] created false Forms W-2 in the names and social security numbers of each recruited individual that contained fabricated names of employers and names of employers who did not employ the employees listed on the Forms, and that contained fabricated amounts of tax withholdings. Defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] also fabricated receipts for child-care expenses for the purpose of claiming false deductions and credits for child care on the electronically filed tax returns. Knowing that the false information contained in these Forms W-2 would be used to create tax returns claiming refunds for the individuals involved in this scheme, defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] caused the false Forms W-2 and false receipts to be submitted to commercial tax return preparers authorized by the IRS to file tax returns electronically and to be represented to such preparers to be legitimate. The false Forms W-2 and false receipts defendants created were used by the commercial tax return preparers to prepare false 19__ federal income tax returns, which were electronically filed with the IRS by the tax return preparers, on behalf of the individuals recruited to participate in the scheme by defendants. As a result of the submission to the commercial tax return preparers of the false Forms W-2 and the false receipts, these electronically filed returns claimed tax refunds to which the individuals recruited by the defendants were not entitled.

On some occasions, one or more of defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] accompanied the recruited individual to the office of a legitimate tax return preparer where the individual had a tax return prepared and filed electronically. The recruited individuals, acting on instructions from defendants, applied for refund anticipation loans ("RAL") through the tax return preparer. This allowed the recruited individuals to receive a cash advance on their false tax refunds from financial institutions within three to five days after the returns were electronically filed. One or more of defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] accompanied the recruited individuals to pick up the refund anticipation

loan checks and to a check cashing service to cash those checks. Defendants then took and kept all or part of the loan proceeds from the recruited individuals. Defendants in this manner caused approximately _____ false returns to be filed, falsely claiming approximately $___ from the United States government.

It was part of the conspiracy that each of the defendants would and did agree to participate in a scheme to falsely claim income tax refunds from the government using electronically filed tax returns.

It was further part of the conspiracy that in _____, 19__, defendant [***insert name of defendant***] instructed defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] on procedures for falsely claiming income tax refunds on their own returns through the use of electronically filed income tax returns. Defendant [***insert name of defendant***] told the other defendants there was no chance of getting caught. Defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] paid defendant [***insert name of defendant***] approximately one half of their proceeds, $____, from their refund checks when they received them.

It was further part of the conspiracy that defendant [***insert name of defendant***] provided defendant [***insert name of defendant***] with blank W-2 forms, and that defendant [***insert name of defendant***] prepared and typed false Forms W-2 using the names and social security numbers of individuals recruited by other defendants to participate in the scheme, and assisted in preparing documents necessary to claim false child care deductions.

It was further part of the conspiracy that defendant [***insert name of defendant***] created the name of [***insert name of company***] Company and used that name as the employer on the false W-2 forms prepared by defendant [***insert name of defendant***]. In [***insert month***], 19__, defendant [***insert name of defendant***] paid for a commercial telephone answering service using the fabricated name of [***insert name of company***] Company and inserted that telephone number on the false W-2 forms prepared by defendant [***insert name of defendant***], [***or, obtained telephone numbers for individuals who would falsely represent that they were agents of the employers shown on the false Forms W-2***] for the purpose of deceiving any income tax preparer or IRS representative who might call to verify the employment of and wages paid to a recruited individual attempting to file a false tax return.

It was further part of the conspiracy that the defendants offered to pay a cash "referral fee" to anyone who would refer to them other individuals who would be willing to participate in the scheme and file false returns in their own names.

It was further part of the conspiracy that in or about [***insert month***], 19__, defendant [***insert name of defendant***] introduced [***insert name of recruited individual***] to defendant [***insert name of defendant***] for the purpose of facilitating the preparation of a false 19__ federal income tax return in [***insert name of recruited individual's name***]. Defendant [***insert name of defendant***] supplied [***insert name of recruited individual]*** with a file containing false Forms W-2 and false receipts, and instructed [***insert name of recruited individual***] on procedures for electronically filing federal income tax returns falsely claiming refunds and applying for a refund anticipation loan.

It was further part of the conspiracy that on or about [***insert month and day***] 19__, [***insert name of recruited***

individual] submitted, as instructed by defendant [***insert name of defendant***], a false Form W-2 and false receipts created by defendants to [***insert name of return preparer***], in [***insert name of city and state***], and requested that a return be prepared and filed electronically. [***Or, On or about [insert month and day] 19__, defendant [insert name of defendant] drove [insert name of recruited individual] to the [insert name of return preparer]'s office in [insert name of city and state], where defendant [insert name of defendant] presented a false Form W-2 and false receipts for child-care expenses in [insert name of recruited individual]'s name for the preparation of a federal income tax refund to be electronically filed for [insert name of recruited individual].***] Those false documents were used by [***insert name of return preparer***] to prepare a 19__ federal income tax return falsely claiming a tax refund of $_____. [***Insert name of recruited individual***] signed the declaration on the Form 8453, which stated under penalty of perjury that the information shown on that form and on the electronic return were true and correct, and completed an application to obtain a refund anticipation loan for the amount of the refund, less fees.

It was further part of the conspiracy that on or about [***insert month and day***], 19__, defendant [***insert name of defendant***] drove [***insert name of recruited individual***] to the [***insert name of return preparer***]'s office in [***insert name of city and state***], where [***insert name of recruited individual***] obtained a check drawn on the [***insert name of bank***] bank of [***insert name of city and state***], which represented the proceeds of the refund anticipation loan based on the amount of the false claim for refund. Defendant [***insert name of defendant***] then drove [***insert name of recruited individual***] to a check-cashing establishment and waited while [***insert name of recruited individual***] cashed that check. Defendant [***insert name of recruited individual***] allowed [***insert name of recruited individual***] to retain $_____ of the proceeds of that check and took the remainder, which he then divided with defendant [***insert name of defendant***].

In violation of Title 18, United States Code, Section 286.

COUNTS TWO THROUGH TEN

[18 U.S.C., Secs. 287, 2]

On or about the dates listed below, within the _____ District of _____, defendants [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], [***insert name of defendant***], and [***insert name of defendant***] knowingly made and presented, and caused to be made and presented, to the Internal Revenue Service, an agency of the Department of the Treasury, claims against the United States for payment, which they knew to be false, fictitious or fraudulent, by preparing and causing to be prepared, and filing and causing to be filed, what purported to be federal income tax returns, for the individuals named below, wherein claims for income tax refunds for the amounts listed below were made, knowing such claims to be false, fictitious or fraudulent.

COUNT	NAME	DATE	TAX YEAR	REFUND CLAIMED	AMOUNT
TWO	_____	__/__/__	_____	$ _____	
THREE	_____	__/__/__	_____		$ _____
FOUR	_____	__/__/__	_____	$ _____	
FIVE	_____	__/__/__	_____	$ _____	
SIX	_____	__/__/__	_____	$ _____	
SEVEN	_____	__/__/__	_____	$ _____	
EIGHT	_____	__/__/__	_____	$ _____	
NINE	_____	__/__/__	_____	$ _____	
TEN	_____	__/__/__	_____	$ _____	

In violation of Title 18, United States Code, Section 287.

COUNT ELEVEN

[18 U.S.C., § 287]

On or about [***insert month and day***], 19__, within the _____ District of _____, defendant [***insert name of defendant***] knowingly made and presented to the Internal Revenue Service, an agency of the Department of the Treasury, a claim against the United States for payment, which he knew to be false, fictitious or fraudulent, by preparing and causing to be prepared, and filing and causing to be filed, what purported to be a 19__ federal income tax return, wherein he claimed an income tax refund in the amount of $____, knowing such claim to be false, fictitious or fraudulent.

In violation of Title 18, United States Code, Section 287.

A True Bill.

Foreperson

United States Attorney

NOTE

1 For use with electronically filed false claims for refund.

18 U.S.C. § 286/287
***False Claim for Refund* 1**
Plea Agreement

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	
_____	)	

PLEA AGREEMENT

[***Insert name of United States Attorney***], United States Attorney for the _____ District of _____, [***insert name of Assistant United States Attorney***], Assistant United States Attorney, defendant [***insert name of defendant***], and counsel for the defendant, [***insert name of defense counsel***], pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, have entered into an agreement, the terms and conditions of which are as follows:

EXISTING INDICTMENT

The defendant agrees to plead guilty to counts _____, _____, and _____ of the existing indictment in the case of [***insert case caption***]. These counts charge defendant with conspiracy to file false claims with an agency of the United States and with knowingly presenting false claims to an agency of the United States, in violation of 18 U.S.C., Secs. 286 and 287. These counts charge that defendant conspired to file and caused to be filed false claims for refund of income taxes by filing or attempting to file 19__ federal income tax returns falsely claiming refunds from the Internal Revenue Service.

By signing this agreement, defendant admits that he [she] is, in fact, guilty of these offenses and will enter his [her] plea before the court.

If defendant complies with all the terms of this agreement, the government will move to dismiss all remaining counts in the indictment against defendant. It is further understood that the United States will not further criminally prosecute defendant in the _____ District of _____ for offenses arising from conduct charged in the indictment, except crimes of violence presently unknown to the United States. This plea agreement binds only the United States Attorney's office for the _____ District of _____ and the defendant. It does not bind any other prosecutor in any other jurisdiction. It will be binding upon the Tax Division of the Department of Justice when approved in writing by the Assistant Attorney General of the Tax Division.

WAIVER OF RIGHTS

Defendant understands that by pleading guilty, he [she] will be waiving the following constitutional rights: the right to plead not guilty and the right to be tried by a jury or before a judge. Defendant also understands that, if tried, he

[she] would have the right to an attorney and if he [she] could not afford an attorney, the court would appoint one to represent him [her]; he [she] would be presumed innocent and the burden of proof would be on the government to prove him [her] guilty beyond a reasonable doubt; he [she] would have the right to confront and cross-examine witnesses against him [her]; he [she] could testify on his [her] own behalf and present witnesses in his [her] defense; if he [she] did not wish to testify, that fact could not be used against him [her] and a jury would be so instructed; and, if he [she] were found guilty after a trial, he [she] would have the right to appeal that verdict. By pleading guilty, defendant understands that he [she] is giving up all of these rights, including the right to appeal his [her] conviction. In addition, defendant hereby expressly waives any right he [she] might have to appeal any sentence imposed, except the right to appeal an illegal sentence. By pleading guilty, defendant understands that he [she] may have to answer questions posed to him [her] by the court both about the rights that he [she] will be giving up and about the facts of this case. Any statements made by him [her] in this respect would not be admissible during a trial, except in a criminal proceeding for perjury or false statements.

Defendant understands and agrees that each and every disclosure made by him [her] pursuant to this agreement will constitute a waiver of his [her] Fifth Amendment privilege against self-incrimination. In addition, defendant understands and agrees that, in the event of a breach by him [her] of this agreement, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this agreement may be commenced against him [her] notwithstanding the expiration of the statute of limitations between the time of the signing of this agreement and any breach thereof by the defendant. Defendant hereby waives any and all defenses based on the statute of limitations with respect to any prosecution that becomes time-barred during the period of time between the signing of this agreement and any breach thereof by the defendant.

MAXIMUM SENTENCE AND RESTITUTION

The maximum sentence which the court can impose on Count One (the conspiracy count) is ten years' incarceration, a fine of $250,000, and a special assessment of $50 when defendant is sentenced. The maximum sentence for each of the remaining counts is five years' incarceration, a fine of $250,000 and a special assessment of $50 when defendant is sentenced. By signing this agreement, defendant also agrees that the court can order him [her] to pay restitution for the full loss resulting from activities for which he [she] is responsible relating to the filing of false claims for refund. Defendant also agrees that the restitution order is not restricted to the amounts alleged in the counts to which he [she] is pleading guilty, but may extend to all losses resulting from activities for which he [she] is responsible relating to the filing of false claims for refund of taxes.

SENTENCING GUIDELINES

Defendant understands that a sentencing guideline range will be determined by the court pursuant to the Sentencing Reform Act of 1984 at 18 U.S.C., Secs. 3551 through 3742 and 28 U.S.C., Secs. 991 through 998. Defendant further understands that the court will impose a sentence within that guideline range, unless the court finds there is a basis for departure because there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

adequately taken into consideration by the Sentencing Commission in formulating the guidelines.

Defendant and the United States agree and stipulate to the Statement of Facts attached hereto and incorporated herein, and to the following applicable sentencing guideline factors.

The parties agree that as of the date of this agreement, the government is able to establish losses in the amount of $_____ for which the defendant is responsible. Defendant understands that the government makes no representation as to the amount of the total loss to the government with which he [she] may ultimately be charged at the time of sentencing, that the court will be informed of the total loss computed on the basis of all information in the government's possession at the time of sentencing, and that the total loss will include all returns falsely claiming refunds that are linked to the conspiracy. The defendant also understands that at the time of sentencing the government will inform the court of the extent of his [her] cooperation. Any information regarding federal income tax returns falsely claiming refunds that is provided to the government by the defendant (or is discovered as a result of the defendant's cooperation) which implicates others as well as the defendant that is not already in the government's possession as of the date of this agreement shall not be used against the defendant or charged to the defendant in determining the total amount of the loss for which he [she] is responsible.

The parties also agree that, if defendant pleads guilty and fully cooperates with the government pursuant to all the terms of this agreement, defendant will have fully accepted responsibility for the offenses to which defendant will be pleading guilty and will be entitled to a two point reduction in the applicable offense level pursuant to sentencing guideline 3E1.1.

Defendant understands that neither the court nor the United States Probation Office is bound by any stipulations herein or attached hereto and the court will, with the aid of the presentence report, determine the facts relevant to sentencing. Defendant further understands that both defendant and the United States are free to supplement the stipulated facts by supplying relevant information to the United States Probation Office. Defendant understands that the court cannot rely exclusively upon the stipulations herein or attached hereto in ascertaining the facts relevant to the determination of the sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulations herein or attached hereto, together with the results of the presentence investigation, and any other relevant information. Defendant understands that if the court ascertains facts different from those stipulated, defendant cannot, for that reason alone, withdraw his [her] guilty plea.

Defendant understands that there is no agreement as to his [her] criminal history or criminal history category, and that his [her] criminal history could alter his [her] offense level if he [she] is a career offender or if the instant offense was part of a pattern of criminal conduct from which defendant derived a substantial portion of his [her] income.

SPECIFIC SENTENCING AGREEMENT

When defendant appears before the court for sentencing, the United States will bring to the court's attention: (a) the nature and extent of his [her] cooperation and (b) all other relevant information with respect to his [her] background, character and conduct, including the conduct that is the subject of the counts of the indictment that the government has

agreed to move to dismiss at sentencing.

COOPERATION

Defendant agrees to cooperate fully with the United States Attorney's office, agents of the Internal Revenue Service's Criminal Investigation Division, and any other federal or state law enforcement agency. As used in this agreement, "cooperation" requires that:

(a) defendant respond truthfully and completely to any and all questions and inquiries that may be put to him, whether in interviews, before a grand jury, or at any trials or other court proceedings -- including debriefing sessions;

(b) defendant attend all meetings, grand jury sessions, trials, and other proceedings at which his [her] presence is requested by this Office or compelled by court order or subpoena;

(c) defendant produce voluntarily any and all documents, records, or other tangible evidence relating to this matter that the government requests; and,

(d) defendant cooperate fully with the probation officer and the IRS in making any restitution ordered by the court.

BREACH OF AGREEMENT

If defendant commits any crimes while cooperating with the government, if any of his [her] statements or testimony proves to be false, misleading or materially incomplete, or if defendant otherwise violates this agreement in any way:

(a) the government may elect no longer to be bound by the terms of this agreement, including its representations to defendant concerning the limits on criminal prosecution or sentencing recommendations as set forth above;

(b) the defendant may be prosecuted for any federal criminal violation of which the government now has or hereafter acquires knowledge, including, but not limited to, perjury, false statements, and obstruction of justice;

(c) all statements made by defendant to the United States Attorney's office or to law enforcement agents, or any testimony given by him [her] before a grand jury or other tribunal, whether before or after the signing of this agreement, may be used against him [her] and shall be admissible in evidence in any and all criminal proceedings brought against him [her];

(d) defendant shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule or statute, that statements made by defendant before or after this agreement, or any leads derived therefrom, should be suppressed; and,

(e) if, despite a breach by defendant, the government elects not to invalidate this agreement, the government will be entitled to bring to the court's attention, and the court will be entitled to consider, defendant's failure to fulfill any of his [her] obligations under this agreement.

COURT NOT A PARTY TO THIS AGREEMENT

Defendant understands that the court is not a party to this agreement. In the federal system, sentencing is a matter solely within the discretion of the court, the court is under no obligation to accept the government's recommendations and the court may, in its discretion, impose any sentence it deems appropriate, up to and including the statutory maximum explained in this agreement. If the court should impose any sentence up to the maximum established by statute, defendant cannot, for that reason alone, withdraw his [her] plea of guilty, and will remain bound to fulfill all of his [her] obligations under this agreement. Defendant understands that neither the prosecutor, defendant's counsel, nor the court can make a binding prediction or promise regarding his [her] sentence.

Except as expressly set forth herein, there are no additional promises, understandings or agreements between the government and defendant or his [her] counsel concerning his [her] liability for any criminal prosecution on any other federal, state or local charges that may now be pending or hereafter be brought against defendant, or the sentence that might be imposed as a result of his [her] guilty plea pursuant to this agreement. Nor may any additional agreement, understanding or condition be entered into unless in writing and signed by all parties.

AGREEMENT NOT TO AFFECT OTHER PROCEEDINGS

This agreement is not contingent in any way upon the outcome of any investigation, proceeding, or subsequent

trial.

Nothing in this agreement shall limit the Internal Revenue Service in its collection of any taxes, interest, or penalties from the defendant, including tax refunds falsely claimed by defendant from the U.S. Government.

COMPLETE AGREEMENT BETWEEN THE PARTIES

This written agreement constitutes the complete plea agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

_____
United States Attorney

By: _____
Assistant United States Attorney

I have read this agreement, consisting of ___ pages, and carefully reviewed every part of it with my attorney. I understand it and voluntarily agree to it. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the sentencing guidelines which may apply to my case. No other promises or inducements have been made to me, other than those contained in this agreement. In addition, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this case.

_____
Defendant

_____
Dated

I am _____'s attorney and have carefully reviewed every part of this agreement with him [her]. Further, I have reviewed with Mr. [Ms.] _____ the provisions of the sentencing guidelines which may apply in this case. To my knowledge, his [her] decision to enter into this agreement is an informed and voluntary one.

_____, Esq.
Attorney for Defendant

_____
Dated

18 U.S.C. § 371
Conspiracy To Defraud United States
Impede And Impair I.R.S. -- Klein Conspiracy

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., Sec 371
_____	)	

The grand jury charges:

***THE CONSPIRACY* 1**

1. From on or about [***insert beginning date***], the exact date being unknown to the Grand Jury, and continuing thereafter up to and including the date of this indictment **2**, in the _____ District of _____,

[***insert first defendant's name***],

[***insert second defendant's name***],

[***insert third defendant's name***],

defendants herein, did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree together and with each other and with other individuals both known and unknown to the Grand Jury to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes [***or other relevant taxes, i.e., excise taxes***]. **3**

PARTIES, PERSONS AND ENTITIES

At all relevant times,

2. [***E.g., Defendants John Smith and Tom Smith were president and vice-president of Smith, Inc., a corporation, and each owned 50% of the stock of Smith, Inc.***]

3. [***E.g., Defendant Sam Jones was a certified public accountant who prepared the income tax returns of Smith, Inc., a corporation, and its officers.***]

4. [***E.g., Smith, Inc., was a Massachusetts corporation, formed in 1975 by defendant John Smith to market real estate limited partnerships.***]

5. [***Continue to describe all defendants and all persons and entities that are significant to an understanding of the conspiracy.***]

MANNER AND MEANS BY WHICH THE

CONSPIRACY WAS CARRIED OUT

The manner and means by which the conspiracy was sought to be accomplished included, among others, the following:

6. [***Describe manner or means, e.g., To divert corporate receipts to their own use, defendant John Smith presented false books and records to the corporate accountant for use in preparing the corporate income tax returns of Smith, Inc., for the calendar years 1988, 1989, and 1990.***]

7. [***E.g., By backdating documents so as to conceal from the Internal Revenue Service defendant John Smith's ownership and interest in real property.***]

8. [***E.g., By making false statements and representations to agents of the Internal Revenue Service for the purpose of concealing the interest of defendant John Smith in property, stock, etc.***]

9. [***Continue to describe general manner and means used to carry out the conspiracy.***] **4**

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the following overt acts were committed in the _____ District of _____, and elsewhere:

10. [***E.g., On or about July 20, 1988, defendant Tom Smith and Jane Smith met in the offices of Smith Realty Co. at 33 Main Street, Boston, Massachusetts, and discussed how to backdate real estate contracts.***]

11. [***E.g., In or about the week of July 20, 1988, defendants John Smith and Tom Smith went to the A & B Bank in Boston, Massachusetts, and removed cash from the safe deposit box of defendant John Smith.***]

In violation of Title 18, United States Code, Section 371.

A True Bill.

_____
Foreperson

United States Attorney

NOTES

1 It is suggested that the paragraphs of the indictment be numbered sequentially from beginning to end even though the indictment will have different sections. This will eliminate confusion when reference is made to a particular portion or paragraph of the indictment.

2 Substitute appropriate date if the conspiracy ended before the date of the indictment.

3 Strike the remaining portion of this paragraph beginning with the phrase "to defraud the United States" and substitute appropriate language if conspiracy is to commit a substantive offense. *E.g.*, "to commit offenses against the United States: to wit, to violate Title 26, United States Code, Sections 7201 and 7206(1)."

4 When charging a *Klein* conspiracy (and not a conspiracy to commit a substantive offense), the means must include deceit, craft, and/or trickery, or at least means that are dishonest. ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924).

18 U.S.C. § 1001
False Statement or Representation
Made to Department/Agency of U.S.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., § 1001
_____	)	

The grand jury charges:

That on or about the ____ day of _____, 19__, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly make and cause to be made a false, fictitious, and fraudulent statement(s) and representation(s) in a matter within the jurisdiction of a department or agency of the United States by [***Describe False Statement or Representation and Describe Official to Whom False Statement Was Made***], at [***Place***], [***Location***], in the District of _____, whereas, as [***Defendant's Name***] then and there well knew and believed, [***Describe Correct Fact(s) Regarding the False Statement or Representation***].

In violation of Title 18, United States Code, Section 1001.

A True Bill.

Foreperson

United States Attorney

18 U.S.C. § 1001
False Document Submitted
to Department/Agency of U.S.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., § 1001
_____	)	

The grand jury charges:

That on or about the ___ day of _____, 19__, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly make and cause to be made, and use and cause to be used, a false writing or document, knowing the same to contain a false, fictitious, and fraudulent statement, in a matter within the jurisdiction of a department or agency of the United States, by submitting [***Describe False Document and False Statement(s) Within Document and Describe Official to Whom the False Document Was Submitted***], at [***Place***], [***Location***], in the _____ District of _____, whereas, as [***Defendant's Name***] then and there well knew and believed, [***Describe Correct Fact(s) Regarding False Document***].

In violation of Title 18, United States Code, Section 1001.

A True Bill.

Foreperson

United States Attorney

18 U.S.C. § 1001
Falsify, Conceal, or Cover Up
by Trick, Scheme, or Device a Material Fact

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA)
)
v.) No.
) 18 U.S.C., § 1001
_____)

The grand jury charges:

From on or about the ____ day of _____, 19__, to on or about the ___ day of _____, 19__, in the _____ District of _____, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly falsify, conceal, and cover up, by trick, scheme, or device, in a matter within the jurisdiction of a department or agency of the United States, by [***Describe Nature of Scheme or Device to Conceal, Including Name and Title of any IRS Employee to Whom False Statement(s) or Representation(s) Were Made; Nature of False Statement(s) or Representation(s); Place and Location Where False Statement(s) or Representation(s) Were Made; and/or Specific False Document(s) Submitted*** **1**], whereas, as [***Defendant's Name***] then and there well knew and believed, [***Describe Correct Facts Relating to False Statement(s), Representation(s), and/or Document(s)*** **2**].

In violation of Title 18, United States Code, Section 1001.

A True Bill.

Foreperson

United States Attorney

NOTES

1 *E.g.*, "by representing to John Smith, Revenue Officer, Internal Revenue Service, at 33 Main Street, Boston, Massachusetts, that the deductions claimed for contributions were in the amount of $_____, and that eight checks drawn on account number _____, at _____ Bank, were issued to make the contributions in the amounts represented on said checks".

2 *E.g.*, "the said eight checks had been altered and were false as to _____ (amounts, payees, dates, etc.)".

18 U.S.C. § 1956(a)(1)(A)(ii)
Laundering of Monetary Instruments

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE _____ DISTRICT OF

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.
	)	18 U.S.C., Secs. 1956(a)(1)(A)(ii)
_____	)	and 2
		)

The grand jury charges:

On or about [***Date***], in the _____ District of _____, [***Defendant(s) Name(s)***] did knowingly and willfully conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, to wit, [***Description of Financial Transaction***], which involved the proceeds of a specified unlawful activity, that is [***Describe Specified Unlawful Activity***], with the intent to engage in conduct constituting a violation of [26 U.S.C. § 7201] [26 U.S.C. § 7206] **1** to wit, [***Describe Conduct***] and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is [***Funds***] **2** [***Monetary Instruments***] **3** in the amount of $_____, represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(ii) and 2.

A True Bill.

Foreperson

United States Attorney

NOTES

1 Choose one or both. If both are used, set forth in the conjunctive.

2 Select one. Remember monetary instrument is a defined term in 1956(c)(5) whereas "funds" is undefined.

3 If the activity described in this paragraph is intended to cover more than one count this last phrase can be redrafted in tabular form as follows: "That is, [***Funds***], [***Monetary Instruments***] in the amounts set forth below:

Count	Approximate Dollar Amounts
I.	$
II.	$
III.	$_____