



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

9.6.4

SEPTEMBER 14, 2021

## EFFECTIVE DATE

(09-14-2021)

## PURPOSE

- (1) This transmits revised IRM 9.6.4, Trial.

## MATERIAL CHANGES

- (1) To conform to the Internal Controls standards:
  - a. Former subsection 9.6.4.1, Overview, is retitled to Program Scope and Objectives to properly reflect the information communicated in the subsection. The subsection clearly delineates the program manual's: mission, objectives, and goals. The subsection provides special agents assistance in conducting criminal investigations and associated litigation activities.
  - b. New subsection 9.6.4.1.1 is added to provide the legal authorities for the program manual 9.6.4, Trial and Court Related Activities.
  - c. New subsection 9.6.4.1.1.1 is added as a compiled list to the terms and acronyms used within the program manual 9.6.4, Trial and Court Related Activities.
- (2) IRM 9.6.4 is revised in its entirety. It includes changes to subsections that cover the Federal court procedures and related matters (i.e., responsibility and conduct of the special agent at trial; Tax Division authority; types of evidence; admissibility of evidence at trial and competence; etc.).
- (3) Additional revisions, deletions, and grammatical changes were made throughout the section.

## EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 9.6.4, Trial, dated May 04, 2012.

## AUDIENCE

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9.6.4

Trial

## Table of Contents

- 9.6.4.1 Program Scope and Objectives
  - 9.6.4.1.1 Authority
    - 9.6.4.1.1.1 Acronyms
  - 9.6.4.1.2 Overview of Federal Criminal Trials
- 9.6.4.2 Responsibility and Conduct Of Special Agent at Trial
- 9.6.4.3 Tax Division Authority
- 9.6.4.4 Jurisdiction
- 9.6.4.5 Venue
- 9.6.4.6 Burden of Proof
- 9.6.4.7 Stipulations
- 9.6.4.8 Types of Evidence
- 9.6.4.9 Admissibility of Evidence at Trial
  - 9.6.4.9.1 Best Evidence Rule
    - 9.6.4.9.1.1 Secondary Evidence
    - 9.6.4.9.1.2 Hearsay
    - 9.6.4.9.1.3 Evidentiary Issues in Joint Trials
    - 9.6.4.9.1.4 Witnesses
      - 9.6.4.9.1.4.1 Expert Witness
      - 9.6.4.9.1.4.2 Special Agent as Witness
      - 9.6.4.9.1.4.3 Revenue Agent as Witness
- 9.6.4.10 Competence
- 9.6.4.11 Credibility
- 9.6.4.12 Cross-Examination
  - 9.6.4.12.1 Redirect Examination
  - 9.6.4.12.2 Demands for Production of Statements and Reports of Witness
  - 9.6.4.12.3 Rehabilitation of a Witness
- 9.6.4.13 Impeachment
  - 9.6.4.13.1 Impeachment of a Defendant
  - 9.6.4.13.2 Impeachment of One's Own Witness
- 9.6.4.14 Recall
  - 9.6.4.14.1 Refreshing Memory or Recollection
  - 9.6.4.14.2 Past Recollection Recorded
  - 9.6.4.14.3 Present Recollection Revived
- 9.6.4.15 Verdict
- 9.6.4.16 Motion for Judgment of Acquittal

- 
- 9.6.4.17 Presentence Investigation
  - 9.6.4.18 Special Agent's Duty to Communicate Information Relevant to Sentencing
    - 9.6.4.18.1 Relevant Conduct
  - 9.6.4.19 Sentencing
  - 9.6.4.20 Restitution
  - 9.6.4.21 Probation or Supervised Release
  - 9.6.4.22 Judgment
  - 9.6.4.23 Closing Procedures
  - 9.6.4.24 Right of Appeal
  - 9.6.4.25 Reduction of Sentence for Substantial Assistance
  - 9.6.4.26 Post-Trial Cost of Prosecution Memorandum
    - 9.6.4.26.1 Recoverable Costs of Prosecution
    - 9.6.4.26.2 Judicial Procedures for Recovering Costs of Prosecution
    - 9.6.4.26.3 Documenting Costs of Prosecution
  - 9.6.4.27 Role of Criminal Investigation in Civil Trials

9.6.4.1  
(09-14-2021)  
**Program Scope and Objectives**

- (1) This section covers the elements involved in a criminal trial, including topics such as jurisdiction, evidence, and testimony, that criminal investigators should be familiar with.

9.6.4.1.1  
(09-14-2021)  
**Authority**

- (1) See IRM 9.1.2, Authority for the delegated authority relating to 9.6.4, Trial.

9.6.4.1.1.1  
(09-14-2021)  
**Acronyms**

- (1) The table lists commonly used acronyms and their definitions:

Term/Acronym	Definition
AUSA	Assistant US Attorney
CI	Criminal Investigations
CIMIS	Criminal Investigation Management Information System
DOJ	Department of Justice
FRE	Federal Rules of Evidence
IRC	Internal Revenue Code
J & C	Judgment and Commitment Order
SA	Special Agent

9.6.4.1.2  
(09-14-2021)  
**Overview of Federal Criminal Trials**

- (1) The Federal Rules of Criminal Procedure govern criminal proceedings in the courts of the United States.
- (2) In criminal investigations, the government bears the burden of proving all the elements of the crime “beyond a reasonable doubt”. For further detail on the burden of proof, see subsection 9.6.4.6 below.
- (3) A criminal defendant is entitled to a trial by a jury of twelve persons but may waive that right in writing. In a jury trial, the defense and the prosecution select the jury through a question and answer process called “voir dire”, in which the court conducts the examination but permits the defense and the prosecution to make further inquiry.
- (4) Before trial, the defense and the prosecution may file motions “in limine” to request that the court admit or exclude certain evidence.
- (5) Most criminal trials begin with the prosecution and then the defense making opening statements, which provide an outline of the investigation that each side expects to prove. Following the opening statements, the prosecution presents its main investigation through direct examination of prosecution witnesses. The defense may cross-examine the prosecution witnesses, after which the prosecution may re-examine them. The prosecution then rests. At this point, the defense may file a motion to dismiss if it believes the prosecution has failed to produce enough evidence to support a guilty verdict.

- (6) If no motion to dismiss is filed, or if the court denies such a motion, the defense then presents its main investigation through direct examination of defense witnesses. The prosecutor may cross-examine the defense witnesses, and the defense may re-examine them. After the defense rests, the prosecution may offer proof to rebut the defendant's evidence.
- (7) Before making their closing statements, the prosecution and the defense file proposed jury instructions, and the court informs them of its proposed action on their requests. The parties then make their closing statements to the jury, after which the judge instructs the jury as to the law. The prosecution may rebut the defense's closing argument if it chooses to do so.
- (8) The jury then deliberates and comes to a verdict, which must be returned to the judge in open court and must be unanimous. If the jury cannot agree to a verdict on one or more counts, the court may declare a mistrial on those counts, and the government may retry the defendant on those counts.
- (9) If the jury returns a guilty verdict, the judge must impose a sentence without delay. In most investigations, the probation officer must conduct a presentence investigation and submit a report to the court before it imposes the sentence. The defendant must also be allowed to make a statement on his/her behalf before the sentence is imposed.
- (10) After the sentence is imposed, the judge must sign a judgment of conviction, which is then entered by the clerk.

9.6.4.2  
(09-14-2021)  
**Responsibility and  
Conduct Of Special  
Agent at Trial**

- (1) During trial, the SA ordinarily may be present at the counsel table with the attorney for the government for assistance. The SA may assist the government attorney by maintaining all government exhibits in proper order for ready reference and presentation, keeping a list of both government and defense exhibits as they are introduced, checking to ensure that government witnesses are present and ready to testify, and managing other members of the trial team who will be assisting.
- (2) The SA may be called upon to prepare charts or schedules showing the taxpayer's sources of income, correct taxable income, or the related tax liability. The charts or schedules may reflect summaries of specific items, net worth increases, expenditures in excess of available resources shown on tax returns, or other transactions that lend themselves to visual presentation. In some instances, such summaries have been formally introduced in evidence; in others, they have been exhibited to the jury and, at the end of the trial, used by the jury during deliberations. The need for charts, the type of charts, and the method of preparation will be affected by such considerations as the complexity of the investigation, the attitude of the court toward visual aids, the preferences of the attorney for the government, and available facilities.
- (3) The SA should listen carefully to all testimony and alert the attorney for the government as to any false, misleading, or erroneous statements. The SA agent may also assist in preparing questions to ask defense witnesses on cross-examination.
- (4) The SA should avoid any direct contact with the defendant at the trial in order to eliminate the possibility of any embarrassing or compromising situations. Likewise, association with defense counsel should be only in open court and with the knowledge and consent of the attorney for the government.

- (5) The court will usually instruct the jury against any contact with the attorneys or witnesses in the investigation. Any attempts by the SA to associate with a member or members of the jury may cause a mistrial.
- (6) During the trial and after a verdict has been rendered in the investigation, the SA should refrain from any demonstration of personal feelings in the matter.

9.6.4.3  
(09-14-2021)  
**Tax Division Authority**

- (1) The DOJ, Tax Division, authorizes prosecution of all criminal tax investigations, except those that can be directly referred to the US Attorney's Office (See IRM 9.5.12, Processing Completed Criminal Investigation Reports).
- (2) The DOJ, Tax Division, has the authority to litigate all criminal proceedings arising under the Internal Revenue laws, except for proceedings pertaining to: misconduct of IRS personnel; taxes on liquor, narcotics, firearms, coin-operated gambling and amusement machines; wagering; forcible rescue of seized property; interference with an employee acting under Internal Revenue laws; unauthorized disclosure of information; and counterfeiting, mutilation, removal or reuse of stamps.

9.6.4.4  
(09-14-2021)  
**Jurisdiction**

- (1) The Federal district courts have jurisdiction over all offenses against the laws of the United States, including criminal violations of the internal revenue laws. Therefore, most Federal criminal tax investigations are tried in district court.
- (2) When specially designated by the district court, a US magistrate judge may have jurisdiction to try persons accused of misdemeanors (see Title 18 USC 3401). However, any person charged with a misdemeanor, other than a petty offense, may elect to be tried before a district court.

9.6.4.5  
(09-14-2021)  
**Venue**

- (1) The term "venue" means the district or geographic area in which a trial must be held. In general, venue lies in the judicial district in which the crime was committed. If the crime consists of a failure to comply with a legal requirement, venue lies where the compliance should have occurred. A defendant may move to transfer venue because of prejudice or for the sake of convenience.
- (2) In tax evasion and false return investigations, venue may be proper in either the district where the return was filed or the district where it was prepared and signed. In an investigation of willful failure to file a return, venue lies in the judicial district where the return should have been filed with the IRS or where the taxpayer resides.
- (3) Title 18 USC 3237(b) provides that where an offense is described in Title 26 USC 7203, or where venue for prosecution of an offense described in Title 26 USC 7201 or 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 where the defendant resides, the defendant may move to be tried in the judicial 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.
- (4) In determining venue, courts consider the following factors:
  - a. residence address of the taxpayer at the time the alleged offense was committed
  - b. principal business address of the taxpayer at the time the alleged offense was committed

- c. place where the records were maintained, where the return was prepared, and where the return was signed
- d. location of the post office if the return was mailed
- e. location of the IRS office where the return was delivered if the return was not mailed
- f. any other pertinent evidence that may establish or assist in determining venue

- (5) When a choice of venue for trial exists, courts prefer that it be in the judicial district of the taxpayer's place of residence or business to avoid undue travel hardships on taxpayers and witnesses.

9.6.4.6  
(09-14-2021)  
**Burden of Proof**

- (1) In criminal investigations, the government bears the burden of proving the commission of all the elements of the crime charged "beyond a reasonable doubt." More than one hundred years ago, a court defined "reasonable doubt" as "such a doubt as would deter a reasonably prudent man or woman from acting or deciding in the more important matters involved in his/her own affairs."
- (2) The burden of proof remains on the government throughout the trial, although the burden of going forward with evidence may shift from one side to the other.
- (3) When the party that has the burden of proof has produced sufficient evidence for the jury to return a favorable verdict, a prima facie investigation has been made. This does not mean that the jury will render such a verdict, but rather that the evidence is sufficient for them to do so. At this point, the defendant has two choices:
- a. To offer no evidence and simply rely on the court and jury to decide whether the government has sustained its burden of proof; or
  - b. To offer evidence in his defense. If the defendant wishes to introduce new matters by way of denial, explanation, or contradiction, the burden of going forward with evidence is the defendant's. However, the prosecution still has the burden of proof with respect to the elements of the crime.
- (4) The burden of proving proper venue is an essential part of the government's investigation. The standard for proving venue is by a preponderance of the evidence, not proof beyond a reasonable doubt. In the Wissler investigation, the court defined "a preponderance of the evidence" as follows: "[W]hen it is said that the burden rests upon either party to establish any particular fact or proposition by a preponderance or greater weight of evidence, it is meant that the evidence offered and introduced in support thereof to entitle said party to a verdict, should when fully and fairly considered produce the stronger impression upon the mind and be more convincing when weighed against the evidence introduced in opposition thereto."
- (5) The IRC provides that the burden of proof is on the IRS where fraud is alleged. Title 26 USC 7454 states: "In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary." In a fraud investigation, the government need not prove fraud beyond a reasonable doubt. However, a preponderance of the evidence is not sufficient. One court has stated that "Fraud must be established by evidence, which is clear, cogent, and convincing."



9.6.4.7  
(05-04-2012)  
**Stipulations**

- (1) A stipulation is an agreement between the prosecuting attorney and defense counsel on certain facts in the investigation so as to expedite the trial by eliminating the introduction of evidence to prove undisputed facts. For example, the defense may admit the receipt of income, the acquisition of certain assets, the making of specified expenditures, or even the source and amount of income and the tax deficiency alleged. This agreement then relieves the government of the burden of producing sufficient evidence to prove such matters and would leave willfulness as the only real issue to be proved. Since willfulness is usually inferred from the manner in which transactions are handled and proven by the testimony of a number of witnesses that dramatizes the defendant's knowledge (thereof), the government exercises great care in agreeing to stipulations in investigations involving willfulness.
- (2) Stipulations are generally agreed upon and submitted to the court in writing prior to trial; however, they may be stated orally in open court and recorded by the court reporter during the trial.

9.6.4.8  
(05-04-2012)  
**Types of Evidence**

- (1) In general, evidence is the means by which any alleged fact is established or disproved. Evidence may be presented orally through witness testimony, and/or by the introduction of records or other physical objects.
- (2) Direct evidence is evidence that tends to prove a disputed fact without any inference or presumption. Evidence is direct when the principal facts in dispute are sworn to by those who have actual knowledge of them by means of their senses. Direct evidence may take the form of admissions or confessions made in or out of court.
- (3) Circumstantial evidence is evidence that tends to prove a disputed fact by inference. A jury may properly find that circumstantial evidence outweighs conflicting direct evidence if the inference is more convincing than any other explanation offered. Circumstantial evidence is the only type of evidence generally available to show those elements of a crime that exist in the mind of the perpetrator, such as intent or motive. Therefore, proof of willfulness in most Internal Revenue violations is based on circumstantial evidence.
- (4) In addition to proving willfulness, circumstantial evidence such as evidence of increases in net worth, expenditures, or bank deposits is also frequently used to prove unreported income. In this connection, it is important to remember that the agent's testimony alone is insufficient to establish the nature of a defendant's expenditures. Rather, the government must call third-party payees as witnesses or introduce other independent testimonial or documentary evidence to establish the purpose of the payments. Failure to do so would create a so-called "Greenberg problem", named after a First Circuit investigation of that name.
- (5) To save time and expense, a trial judge may accept certain facts without requiring proof, if they are commonly known or can be easily discovered. This is known as "judicial notice."

9.6.4.9  
(09-14-2021)  
**Admissibility of  
Evidence at Trial**

- (1) The admissibility of evidence in a Federal trial is governed by the FRE. In addition, rules for the admissibility of various forms of documentary evidence in Federal courts are provided in 28 USC 1731–1745.
- (2) The admissibility of evidence must be considered during the investigative stage, long before the investigation reaches the courtroom. A detailed discuss-

sion of the types of evidence that should be sought, and the admissibility of such evidence may be found in IRM 9.5.1, Administrative Investigations and General Investigation Procedures.

9.6.4.9.1  
(09-14-2021)

**Best Evidence Rule**

- (1) The best evidence rule applies only to documentary evidence. It states the best proof of the contents of a document is the document itself. The best evidence rule generally requires that the original document, if available, be produced at trial. For further detail on Best Evidence, see FRE 1002 and IRM 9.5.1.21, Best Evidence Rule.

9.6.4.9.1.1  
(09-14-2021)

**Secondary Evidence**

- (1) When an original document is not produced, secondary evidence, such as testimony of witnesses or a copy of the writing, may be admissible to prove the document's contents if the absence of the original is satisfactorily explained. Unavailability of the original document is a question to be decided by the trial judge.
- (2) Before secondary evidence may be admitted, there must be satisfactory proof of the original document's present or prior existence, as well as proof that the original was destroyed, lost, stolen, or is otherwise unavailable. A document offered as secondary evidence must be shown to be a correct copy of the original. For further detail on Secondary Evidence, see IRM 9.5.1.22, Secondary Evidence.

9.6.4.9.1.2  
(09-14-2021)

**Hearsay**

- (1) Hearsay is a statement, other than one made by a person while testifying at the trial, which is offered in evidence to prove the truth of the matter asserted (FRE 801(c)).
- (2) Hearsay is inadmissible at trial unless an exception applies (FRE 802).
- (3) For example, if a SA testifies at trial that a third party told him/her that checks written by the defendant were for personal expenses, the third party's statement is hearsay and is inadmissible.
- (4) For further detail on hearsay, see FRE 801-807 and IRM 9.5.1.20.

9.6.4.9.1.3  
(05-04-2012)

**Evidentiary Issues in Joint Trials**

- (1) In a trial of multiple defendants, evidence may be admissible against one defendant, but not against another. In that event, courts tend to admit the evidence with an instruction, if requested, that the jurors are to consider it only as to the defendant against whom it is properly admissible.
- (2) The out-of-court confessions or admissions of a codefendant who does not take the stand are admissible against that codefendant as a personal admission. However, if the confession or admission implicates another defendant, it may be inadmissible against that defendant. Otherwise, a violation of the Sixth Amendment right to confront witnesses would result.

9.6.4.9.1.4  
(05-04-2012)

**Witnesses**

- (1) A witness is a person who can testify as to what he/she knows from having heard, seen, or otherwise observed.
- (2) For evidentiary issues relating to witnesses, see IRM 9.5.1, Administrative Investigations and General Investigative Issues.

9.6.4.9.1.4.1  
(05-04-2012)  
**Expert Witness**

- (1) An expert witness is one who is qualified to make deductions from hypothetical facts or from facts involving scientific or technical subjects. Expert witnesses may be selected by the parties or by the court, and the court determines whether the expert witness's qualifications are sufficient. The expert advises the parties of his/her findings, may be called to testify by the court or by either party, and may also be cross-examined. The expert witness's testimony must be based upon facts personally perceived by, known, or made known to him/her at the trial.
- (2) In tax investigations, expert witnesses may be used to testify concerning various matters such as handwriting comparison, accounting practices, book-keeping matters, methods of operating a lottery and computation of income tax liability.

9.6.4.9.1.4.2  
(09-14-2021)  
**Special Agent as Witness**

- (1) Testifying in court is one of the most important duties that a SA may be called upon to perform. The SA's testimony concerning the admissions of a taxpayer may be vital in establishing willfulness. The SA may also be required to testify about:
  - a. the examination of the taxpayer's books, records, and tax returns
  - b. analyses or transcripts made of various book accounts, invoices, bank deposits, and canceled checks
  - c. specific amounts of income not entered in the taxpayer's records or reported in tax returns
  - d. particular deductions of expenses for which no substantiation was offered or found during the investigation
  - e. statements made by the taxpayer explaining entries on the records or concerning unrecorded transactions
  - f. computations of unreported income established by evidence in the record
  - g. tax deficiencies based upon a hypothetical question
  - h. records maintained by the taxpayer and the extent to which he/she examined them, the procedures followed and the facts discovered
- (2) The SA as a witness must:
  - a. be thoroughly prepared and have a solid grasp of the facts
  - b. present a neat, businesslike appearance
  - c. testify in a natural, frank, and forthright manner, with a respectful attitude toward the court and jury
- (3) The SA is frequently subject to rigorous and lengthy cross-examination. The SA must then preserve an even, courteous demeanor and refrain from any display of anger, hostility, or evasiveness. Some rules of conduct for the SA or other IRS officials while testifying are:
  - a. Listen to the question carefully and answer truthfully.
  - b. Answer the question only. Do not volunteer information.
  - c. Do not answer a question you do not understand. Tell the questioner that you do not understand.
  - d. If an objection to a question is raised by either counsel, wait until the court rules to answer. Otherwise, a mistrial could result.
  - e. Wait until the question is completed before attempting to answer.
  - f. Anticipate the unexpected.
  - g. Direct your answers to the jury but do not ignore the judge.

- h. Speak clearly and loudly enough to be heard by the juror farthest removed from the witness stand.
- i. Refrain from any demonstration of personal feelings.

- (4) Special agents should be aware that the defense may make a Henthorn request during discovery, which would require the government attorney to search the SA's personnel file for possible impeachment material (i.e., material that would affect the credibility of the SA's testimony). For a more detailed discussion of Henthorn requests, see IRM 9.6.3.7.1.1, Henthorn Requests.

9.6.4.9.1.4.3  
(05-04-2012)  
**Revenue Agent as  
Witness**

- (1) In a tax trial, the examining revenue agent is often used by the government as an expert witness to establish the computations of deficiencies as set forth in the indictment or information.

9.6.4.10  
(09-14-2021)  
**Competence**

- (1) A witness is generally presumed to be competent to testify (FRE 601). There is no rule automatically excluding an insane person, a child or even a convicted perjurer from testifying. At most, a witness's competency to testify requires a minimal ability to observe, recollect and recount, as well as an understanding of the duty to tell the truth. The trial judge will determine whether a prospective witness satisfies these requirements.
- (2) In a Federal criminal investigation, a husband and wife are competent to testify in support of one another. However, there are spousal privileges that may prevent one spouse from testifying against another. For a discussion of spousal privileges, see IRM 9.5.1.34, Privileged Communications.
- (3) A defendant in a criminal trial is a competent witness and his/her testimony must be judged in the same way as that of any other witness, with due regard for his/her personal interest in the outcome of the investigation.

9.6.4.11  
(05-04-2012)  
**Credibility**

- (1) The jury (or judge if trial by jury is waived) determines the weight and credibility of a witness's testimony. The credibility of a witness may be attacked by any party, including the party calling the witness (FRE 607).
- (2) Witness credibility is judged by whether the witness had the capacity or opportunity to observe or be familiar with the subject matter of his/her testimony. Factors affecting credibility include the witness's self-interest, bias, prejudice, demeanor on the stand, prior inconsistent statements, prior mental derangement, intoxication at the time of the transaction to which he/she testifies, and prior convictions for a felony or crime involving moral turpitude.
- (3) If a witness gives contradictory testimony, the jury may accept the portion it believes and reject the remainder, or it may reject the witness's entire testimony if the witness has testified falsely as to a material point.

9.6.4.12  
(05-04-2012)  
**Cross-Examination**

- (1) After counsel finishes direct examination of a witness, opposing counsel has the right to cross-examine that witness in order to test the veracity of his/her testimony. This is done by questions designed to:
  - a. Amplify the story given on direct examination so as to place the facts in a different light.
  - b. Establish additional facts in the cross-examining party's favor.

- c. Discredit the witness's testimony by showing that his/her testimony on direct examination was contrary to circumstances, probabilities, and other evidence in the investigation.
  - d. Discredit the witness by showing bias, interest, corruption, or specific acts of misconduct.
- (2) The courts allow a wide latitude on cross-examination and generally permit the cross-examiner to:
  - a. Ask leading questions.
  - b. Question the witness in such a manner as to obtain apparently inconsistent statements by going over the same ground as was covered in the direct examination.
- (3) The general rule in Federal courts with respect to witnesses other than defendants is that questions asked on cross-examination must pertain to matters brought out on direct examination. The rule is liberally construed, and where the direct examination relates to a general subject, the cross-examiner may go into the specifics of that subject. If the cross-examiner wishes to inquire into subjects not opened on direct examination from the witness, the cross-examiner must call the witness as his/her own witness and subject the witness to direct examination on such matters.

9.6.4.12.1  
(05-04-2012)  
**Redirect Examination**

- (1) Following cross-examination, the party calling the witness may ask further questions, but only regarding matters brought out on cross-examination.
- (2) The purpose of redirect examination is to enable the party calling the witness to obtain the witness's explanation of his/her responses in the cross-examination, to clarify any apparent inconsistencies in the witness's statements, or to rehabilitate the witness in the eyes of the jury if the witness's character has been attacked.

9.6.4.12.2  
(09-14-2021)  
**Demands for Production of Statements and Reports of Witness**

- (1) Title 18 USC 3500 provides that, after a witness has testified on direct examination, the defendant may move to inspect any pre-trial statements of the witness relating to the subject matter about which he/she has testified. If the government claims that the prior statement is not relevant, it is to be inspected by the trial court in camera (in private) so that any portion not related to the subject matter of the witness's testimony can be excised before delivery to the defendant. If the government refuses to comply with the production order, the judge has discretion either to strike the testimony of the witness or to declare a mistrial.
- (2) The term "statement" is defined in 18 USC 3500 as follows:
  - a. a written statement made by said witness and signed or otherwise adopted or approved by him/her
  - b. a recording or substantially verbatim transcription of an oral statement made contemporaneously with the making of such statement; or
  - c. a statement made by the witness to a grand jury
- (3) A summary of an oral statement made to a SA which is not substantially verbatim does not have to be produced. As the Supreme Court has explained, 18 USC 3500 reflects Congress' concern that "only those statements which could properly be called the witness's own words should be made available to the defense for purposes of impeachment. ...We think it consistent with this

legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions."

- (4) Nevertheless, in light of the substantial discretionary authority of a trial judge to permit defense inspection of special agent reports, agents should avoid speculation about weaknesses of an investigation and/or expressions indicating prejudice or dislike of a taxpayer in memoranda or reports. Of course, this should not preclude complete reporting of material facts.
- (5) In addition, because pre-trial statements may be used for impeachment purposes, a statement of a prospective government witness containing information inconsistent with a prior statement by that witness should include an explanation of the inconsistencies.

9.6.4.12.3  
(05-04-2012)  
**Rehabilitation of a  
Witness**

- (1) Generally, a witness's credibility may not be bolstered prior to impeachment. Rather, after a witness's credibility is called into question, evidence may be offered to restore his/her credibility with respect to the specific methods of impeachment that were used. This process is called "rehabilitation".
- (2) The two most common rehabilitative methods are:
  - a. introduction of evidence to show the witness's good character where the witness's character for truthfulness was attacked
  - b. proof of the witness's consistent statements where prior inconsistent statements were used to impeach the witness

9.6.4.13  
(05-04-2012)  
**Impeachment**

- (1) Impeachment is an attack on a witness's credibility. The credibility of a witness may be attacked by any party, including the party calling the witness (FRE 607).
- (2) A witness may be impeached in the following ways, by:
  - a. proving that the witness on a previous occasion has made statements inconsistent with his/her present testimony (FRE 613)
  - b. showing the witness is biased because of emotional influences or motives of pecuniary interest
  - c. attacking the witness's character for truthfulness using evidence in the form of opinion or reputation (FRE 608(a))

**Note:** Specific instances of conduct are generally not admissible for the purposes of attacking character, except as to prior convictions of a felony or lesser crime involving dishonesty or false statements, or, at the discretion of the court, specific acts of misconduct that did not result in a conviction if probative of truthfulness or untruthfulness (FRE 609(a); 608(b)).

  - d. proving the witness's mental incapacity or unreliability
  - e. using other witnesses to prove the material facts are otherwise than as testified to by the witness being impeached



- 9.6.4.13.1  
(05-04-2012)  
**Impeachment of a Defendant**
- (1) If a defendant takes the stand in his/her own defense, the defendant is subject to impeachment like any other witness. In that situation, the prosecution may offer evidence of the defendant's bad character for consideration not as to the defendant's guilt or innocence but as to his/her credibility as a witness.
  - (2) As an accused, the defendant's character is not subject to attack unless the defendant puts it at issue by offering evidence of good character. In that investigation, the prosecution may introduce evidence of the defendant's bad character, and the character evidence proffered by both sides will be considered by the jury in determining the defendant's guilt or innocence.
- 9.6.4.13.2  
(05-04-2012)  
**Impeachment of One's Own Witness**
- (1) Although many jurisdictions once prohibited the impeachment of one's own witness, FRE 607 now permits impeachment of a witness by any party, including the party calling the witness.
  - (2) So long as prior inconsistent statements are otherwise admissible, they may be used to impeach a party's own witness, regardless of whether the party was surprised or prejudiced by the witness's testimony. However, it is widely held that a criminal prosecutor may not use a prior inconsistent statement to impeach a witness for the primary purpose of introducing evidence that is otherwise inadmissible.
- 9.6.4.14  
(05-04-2012)  
**Recall**
- (1) At the discretion of the trial judge, a party may be permitted to recall a witness for further testimony, to correct a mistake in testimony, for further cross-examination, or to lay a foundation for impeachment.
  - (2) The court may also recall a witness on its own motion.
- 9.6.4.14.1  
(05-04-2012)  
**Refreshing Memory or Recollection**
- (1) A witness may not be able to recall a fact about which he/she called to testify. If so, that fact may be admitted into evidence in either of two ways, i.e., as "past recollection recorded" or "present recollection revived".
- 9.6.4.14.2  
(05-04-2012)  
**Past Recollection Recorded**
- (1) Pursuant to FRE 803(5), a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately may be admissible. The memorandum or record must be shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly.
  - (2) If admitted, a "past recollection recorded" may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- 9.6.4.14.3  
(05-04-2012)  
**Present Recollection Revived**
- (1) If a witness cannot remember certain information when testifying, most jurisdictions allow the witness to review a written document in order to revive his/her memory, so long as the witness can positively assert that, after reviewing the document, he/she has an independent memory of the facts in question. Once the witness's recollection has been refreshed, he/she must testify from present recollection rather than relying on the document.
  - (2) Upon request, the written document must be shown to opposing counsel during cross-examination. However, the document may not be admitted into evidence unless it is admissible on other grounds.

9.6.4.15  
(05-04-2012)  
**Verdict**

- (1) The verdict is the formal decision or finding made by the jury. It must be returned to the judge in open court and must be unanimous. See Fed. R. Crim. P. R31.
- (2) If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. If there are multiple counts and the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed. If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.
- (3) The defendant may be found guilty of an offense necessarily included in the offense charged, an attempt to commit the offense charged, or an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right. The Supreme Court has indicated that, where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifies it, is entitled to an instruction that would permit the jury to return a guilty verdict as to the lesser offense. However, where the facts necessary to prove the crime charged are identical with those required to prove the lesser offense, the defendant is not entitled to an instruction that would permit the jury to make a choice between the two offenses in returning its verdict.
- (4) The trial court must poll the jury at the request of either party, or may do so upon its own motion, in order to be certain the verdict is unanimous. If the poll reveals a lack of unanimity, the jury may be directed to retire for further deliberations or the judge may declare a mistrial.

9.6.4.16  
(09-14-2021)  
**Motion for Judgment of Acquittal**

- (1) Before submission to the jury, but after the government closes its evidence or after the close of all evidence, the court, on the defendant's motion or on its own motion, may determine that the evidence is insufficient to sustain a conviction and order the entry of a judgment of acquittal. See Fed. R. Crim. P. R29. The motion may be made orally or in writing. In some circuits, the motion will be granted unless the trial judge determines that the evidence, taken in the light most favorable to the government, tends to show that the defendant is guilty beyond a reasonable doubt. In other circuits, the motion will be denied if the evidence would be sufficient to send the investigation to the jury in a civil action.
- (2) If the motion for acquittal is made by the defense upon the conclusion of the government's evidence and is denied, the defendant may proceed by introducing evidence in his/her own behalf. This waives any objection to the denial. The defendant may renew the motion for judgment of acquittal after both sides rest. A failure to do so may foreclose any right on appeal to question the sufficiency of the evidence to sustain the conviction.
- (3) The trial court may reserve its decision on a motion for judgment of acquittal, proceed with the trial, submit the investigation to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.
- (4) The defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. The court may then set aside the verdict and enter an



acquittal. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed on appeal.

9.6.4.17  
(09-14-2021)  
**Presentence  
Investigation**

- (1) In general, the probation officer must conduct a presentence investigation, unless a statutory exception applies, or the court finds it can meaningfully exercise its sentencing authority based on the information in the record. The presentence report must apply the Advisory Sentencing Guidelines in determining the applicable sentencing range and must identify any basis for departing from that range. The report must also describe the defendant's history and characteristics, including any prior criminal record, the defendant's financial condition, and any relevant circumstances affecting the defendant's behavior (See Fed. R. Crim. P. R32(c) and (d)).
- (2) In conducting the presentence investigation, the probation officer will usually consult with the investigation SA about the defendant's cooperation (or lack thereof) during the investigation, the defendant's mental and physical history, whether the defendant has made any payments on the tax deficiencies involved in the criminal investigation, the defendant's other outstanding tax liabilities, if any, and any other information that may be helpful in imposing sentence or granting probation.
- (3) The probation officer must give the presentence report to both parties at least 35 days before sentencing, unless the defendant waives this minimum period. Within 14 days after receiving the presentence report, the parties must state in writing any objections (See Fed. R. Crim. P. R32(e) and (f)).

9.6.4.18  
(09-14-2021)  
**Special Agent's Duty to  
Communicate  
Information Relevant to  
Sentencing**

- (1) Whenever a conviction is obtained, the SA should determine the identity of the probation officer assigned to prepare the presentence report and provide that individual with any relevant information. In addition, the SA should do the following:
  - a. Provide an account of the harm caused to the government and/or other victims to assist with the Order of Restitution.
  - b. Make him/her aware of any additional sentencing factors that may have arisen since the prosecution recommendation report was written.
  - c. Keep the AUSA apprised of CI's position on the sentencing computation, and ensure that he/she is aware of the importance that CI places on the sentence that will ultimately be imposed.
- (2) See 9.6.2, Plea Agreements and Sentencing Process for additional information.

9.6.4.18.1  
(09-14-2021)  
**Relevant Conduct**

- (1) Information furnished by the SA to the probation officer should include any evidence of relevant conduct that might be useful in making the sentencing recommendation. The inclusion of relevant conduct is especially important in tax investigations because such conduct may increase the total tax loss attributed to the defendant, which in turn may increase the severity of the sentence.
- (2) Consideration of uncharged, relevant conduct is required under the Federal Sentencing Guidelines, which are themselves advisory but must be the court's starting point when calculating the appropriate sentencing range. The Supreme

Court has held that, in order to be considered at sentencing, relevant conduct must be proven by a preponderance of the evidence (a lower standard than beyond a reasonable doubt).

- (3) In the context of tax-related offenses for which the offense level is determined largely on the basis of the total amount of loss, the Sentencing Guidelines define relevant conduct as all acts or omissions committed, aided or caused by the defendant that were part of the same course of conduct or common scheme or plan as the offense of conviction (See USSG 1B1.3(a)(2)).

9.6.4.19  
(09-14-2021)  
**Sentencing**

- (1) Before imposing the sentence, the court must provide each party with an opportunity to speak. At this time, the defendant may present any information that might mitigate the sentence.
- (2) At sentencing, the court will reference the Federal Sentencing Guidelines. Although the Guidelines themselves are no longer mandatory, the Supreme Court has held that a sentencing court must begin by correctly calculating the applicable Guidelines offense level, which includes relevant conduct, and then, if necessary, depart upward or downward from that level to determine the sentencing range.
- (3) After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere (i.e., a plea by which the defendant neither admits nor denies the charges), and the plea may be set aside only on direct appeal or collateral attack (See Fed. R. Crim. P. R11(e)).
- (4) The SA should enter sentencing information into CIMIS within five days of sentencing, including the term of imprisonment, the term of probation/supervised release, the amount of court fines and any restitution ordered to be made to the IRS.
- (5) Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error (See Fed. R. Crim. P. R35(a)).

9.6.4.20  
(09-14-2021)  
**Restitution**

- (1) In a criminal tax case, a court can require a defendant to pay the losses incurred by the government. The amount of the restitution ordered by the court is calculated from evidence submitted at trial or from information contained in the plea agreement and presented to the court at sentencing. See IRM 9.5.14 for more detailed information relating to restitution.
- (2) Title 18 USC 3663 grants sentencing courts the authority to order the payment of restitution for certain crimes, including offenses under Title 18. In addition, 18 USC 3663A makes restitution mandatory for a number of offenses. However, these statutory provisions do not authorize orders of restitution with respect to Title 26 tax crimes or Title 31 currency-reporting offenses, unless the parties have agreed to restitution in a plea agreement (See 18 USC 3663(a)(3)). Therefore, sentencing courts generally may only order restitution of the amount of the tax loss in investigations where the convictions include a covered offense such as conspiracy, money laundering, false claims or mail fraud.

**Note:** One circuit has held that a money-laundering offense comes within the ambit of 18 USC 3663A as a crime against property.

- (3) Public Law No. 111-237 amended IRC 6201 to provide that the Service shall assess and collect the amount of restitution ordered in a tax case for failure to pay any tax imposed under the Internal Revenue Code in the same manner as if such amount were such tax. The law applies to restitution orders entered after August 16, 2010.
- (4) Restitution may be ordered as a condition of probation or supervised release in tax, currency-reporting, and money-laundering offenses. See IRM 9.5.14 for more detailed information when restitution ordered as a condition of probation or supervised release in tax cases.
- (5) The amount of restitution is generally limited to the loss caused by the specific conduct that is the basis of the offense of conviction and does not include relevant conduct, unless the defendant agrees otherwise in a plea agreement. Restitution generally does not include penalties, and it must be for a sum certain.
- (6) If the law requires restitution, the presentence report must include sufficient enough information for the court to order restitution (See Fed. R. Crim. P. 32(c)(1)).
- (7) To enable the court to order restitution, the SA should calculate the amount of tax due and owing for each year of conviction and provide that information to the prosecutor and probation officer. In the absence of a plea agreement that includes relevant conduct, the special SA's post-trial tax calculation should take into consideration only the information admitted into evidence during the trial and related to the year(s) of the offense(s) for which the defendant was convicted. The SA should ensure the interest calculation for tax due and owing is calculated up to the projected sentence date.
- (8) The restitution order must be included in the J&C signed by the judge.
- (9) The IRS has designated a centralized location to receive and process all restitution payments. The address is: Internal Revenue Service - RACS, Attn: Mail Stop 6261 - Restitution, 333 W. Pershing Avenue, Kansas City, MO 64108

**Note:** The probation officer must make sure this address is included in the J&C order.

9.6.4.21  
(09-14-2021)  
**Probation or Supervised  
Release**

- (1) When sentencing a defendant, the court may suspend a portion or all of the sentence and instead place the defendant on home confinement or probation. Alternatively, the court may impose a sentence that includes both a term of imprisonment as well as a term of supervised release which occurs after imprisonment.
- (2) If probation or supervised release are imposed, the court will provide certain conditions that the defendant must abide by or face revocation of probation or supervised release (See 18 USC 3563; 3583(d)). Such conditions may include cooperation with the IRS, the timely filing of tax returns or amended returns, a prohibition against preparing tax returns for others, etc. Restitution may also be ordered as a condition of probation or supervised release.
- (3) Criminal Investigation is responsible for monitoring compliance with the J & C until the defendant is released from court supervision. For further information concerning CI's responsibilities when conditions of probation or supervised release are imposed, see IRM 9.5.14, Closing Procedures.

- (4) The terms of the J&C may create a CIMIS conditional probation expiration date. To properly calculate the conditional probation expiration date, see IRM 9.5.14, Closing Procedures.

9.6.4.22  
(05-04-2012)  
**Judgment**

- (1) The court will enter a J&C to memorialize the sentence. A judgment of conviction must set forth the plea, the jury verdict or the court's findings, the adjudication and the sentence. It must be signed by the judge and entered by the clerk.
- (2) Upon the defendant's motion or its own, the court must withhold judgment if the indictment or information did not charge the offense for which the defendant was convicted or if the court did not have jurisdiction over the offense charged. The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.
- (3) Once entered, the J&C should be obtained by the agent and compared to the CIMIS entries. The CIMIS entries should be corrected as necessary, and any errors in the order should be brought to the attention of the prosecutor.

9.6.4.23  
(09-14-2021)  
**Closing Procedures**

- (1) After sentencing, CI must prepare a closing package.
- (2) For specific information concerning the required contents of the closing package, see IRM 9.5.14 for procedures for fully adjudicated tax and tax-related administrative and grand jury investigations.

9.6.4.24  
(09-14-2021)  
**Right of Appeal**

- (1) Under Federal Rule of Appellate Procedure 4(b), in a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
  - a. the entry of either the judgment or the order being appealed; or
  - b. the filing of the government's notice of appeal
- (2) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
  - a. the entry of the judgment or order being appealed; or
  - b. the filing of a notice of appeal by any defendant
- (3) Generally, appeals from the decisions of the Federal district courts are heard in the Court of Appeals for the appropriate circuit.

9.6.4.25  
(05-04-2012)  
**Reduction of Sentence  
for Substantial  
Assistance**

- (1) Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.
- (2) In certain situations, the government may move for a reduced sentence more than one year after sentencing (See Fed. R. Crim. P. R 35(b)(2)).

9.6.4.26  
(09-14-2021)  
**Post-Trial Cost of  
Prosecution  
Memorandum**

- (1) Congress has provided that, after a jury or court convicts a defendant of any of the principal substantive criminal tax offenses (e.g., 26 U.S.C. 7201, 7203, 7206(1) and (2)), the court must order the defendant to pay the Government's costs of prosecution. Thus, the United States Attorney's Office should seek recovery of the costs of prosecution in criminal tax cases.

9.6.4.26.1  
(09-14-2021)  
**Recoverable Costs of  
Prosecution**

- (1) Generally, courts have held that recoverable costs are limited to expenses incurred in connection with the actual prosecution. Investigative costs may also be assessed so long as they directly relate to the charges on which the defendant was convicted and were necessary to the prosecution of those charges. The court has the discretion to determine which costs will be granted.
- (2) Title 28 USC 1920 lists the recoverable costs of prosecution as follows:
  - a. fees of the clerk and marshal
  - b. fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the investigation
  - c. fees and disbursements for printing and witnesses
  - d. fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case docket fees under 28 USC 1923 of this title
  - e. compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 USC 1828 of this title
- (3) In addition, the following should be included in the cost of prosecution memorandum:
  - a. Travel costs of the SAs, revenue agents, and witnesses directly related to the prosecution to the extent that they relate directly to the counts that resulted in the conviction. Costs for travel and subsistence of witnesses may be included if the testimony is relevant and material to an issue in the investigation and reasonably necessary to its disposition. If the witnesses do not testify, it is presumed that their testimony was immaterial, and there is a rebuttable presumption that the related costs are not recoverable. Allowable costs for witnesses are listed in 28 USC 1821 (for witnesses who are government employees, see 5 USC 5537, 5701-5706 and 5 USC 5751). These costs may be determined from and documented with travel vouchers, transportation requests, and, in the investigation of some witnesses, the US Marshal's records. These costs may include the following:
    - airfare
    - taxicab fees
    - mileage reimbursements for use of privately-owned vehicle
    - toll charges
    - parking fees
    - subsistence allowance
  - b. The cost of copying documents should be included in the costs of prosecution only if the copies were necessary to the prosecution and not purely investigative in nature. These would include copies used at trial, but only if the trial resulted in a conviction on the related counts. The calculation or estimation of these costs must be as accurate and reasonable as possible because copying costs can be extremely high when copies are made for defense attorneys during discovery proceedings or when Jencks Act material is copied at trial.
  - c. The statutory provision that permits the recovery of fees charged by the court reporter for stenographic transcripts has generally been construed to permit recovery of costs for the transcription of testimony, e.g., Q & A's, depositions and grand jury transcripts. Allowable costs are limited to the cost of the original and do not include the expense of duplicate copies obtained for the convenience of counsel. The underlying deposi-

tions will be considered necessary for use in the investigation if taken within the proper bounds of discovery even if the witnesses are not called to testify at trial. Such costs are not recoverable; however, if the depositions were noted only for the purposes of investigation and preparation. The government attorneys' travel expenses for the taking of depositions are not recoverable. Some courts do not allow recovery of the costs of copies of depositions because the original is on file and available to the parties.

- d. Other miscellaneous costs which might be considered, but only if directly related to the conviction of the defendant, include:
  - preparation of evidence costs (charts, diagrams, slides and courtroom aids)
  - film costs
  - equipment rental
  - mailing costs and shipping
  - fees of the court clerk
  - fees of the marshal
  - fees of the court reporter

9.6.4.26.2  
(05-04-2012)

**Judicial Procedures for  
Recovering Costs of  
Prosecution**

- (1) Prior to sentencing, the AUSA should raise the issue of prosecution costs before the court.
- (2) At the time of sentencing, the judge will normally request that the AUSA compile a bill of costs.
- (3) In some judicial districts, the standard bill of costs form normally used by the court clerk in civil investigations is used for this determination. However, the attorney for the government should be encouraged to submit his/her own memorandum of itemized costs of prosecution and label it as such.
- (4) The costs should be computed, itemized, and submitted to the court for evaluation in the form of a written statement, signed and sworn to by the AUSA.
- (5) The costs of prosecution need not be documented for the court at this time; however, the computation and documentation should be available in the event that the defense objects or the court has questions.
- (6) It is imperative that the costs be computed accurately because the government attorney must provide them directly to the court. For that reason, the costs should be determined and documented in the same manner as specific items of investigation would be documented. Estimates and conjectures should not be used to determine the costs of prosecution.

9.6.4.26.3  
(09-14-2021)

**Documenting Costs of  
Prosecution**

- (1) The expenses incurred during a criminal investigation should be documented and computed as they are incurred, rather than waiting until the investigation is decided. During the investigation, it is strongly recommended that agents maintain a separate "drop file" entitled "Costs of Prosecution", in which they file copies of travel vouchers, receipts for purchase of equipment, memoranda relating to the purchase of evidence, etc. for future reference. Agents should also keep a running computation of their expenses as they are incurred.
- (2) This procedure is recommended because the costs of prosecution must be computed within ten days of conviction. It is extremely difficult to compute the costs and compile the documentation in such a short time frame.



- (3) It is also recommended that, before trial, the SA go to the US Marshal's office and the clerk's office to advise them that documentation of costs relating to the investigation may be requested. The agent should ask that all billings and invoices include the name of the taxpayer being tried. This will save both the SA and the government attorney time after trial.
- (4) The expenses included when determining the costs of prosecution must be reasonable. If an expense is not expressly permitted within the language of Title 28 USC 1920, the defendant cannot be ordered to pay it.

9.6.4.27  
(09-14-2021)  
**Role of Criminal  
Investigation in Civil  
Trials**

- (1) Evidence from a criminal investigation may be used to prove fraud in a related civil tax investigation, even if the criminal investigation did not result in a conviction. Therefore, after the criminal proceeding has concluded, the SA often assists the government attorney in preparing for the civil trial and in presenting the civil investigation. In addition, because the SA was responsible for developing the evidence to sustain the ad valorem additions to the tax (except those concerning tax estimations) in the criminal investigation, the agent will often serve as a principal witness for the government in the civil trial.
- (2) Civil tax investigations are often tried in the US Tax Court, where the rules of evidence are similar to those that apply in civil non-jury trials in district court. In general, the IRS's determination of a deficiency is presumed to be correct (see Rule 32, Tax Court Rules of Practice). However, if a fraud penalty is asserted, the IRS has the burden of proving fraud with intent to evade tax. (26 USC 7454(a)). The evidence in that respect must be "clear and convincing", i.e., not "beyond a reasonable doubt" as in a criminal investigation, but more than a mere preponderance. If the IRS does not prevail on the fraud issue, the taxpayer still has the burden of overcoming the prima facie correctness of the determination of a deficiency so long as the assessment was made within the applicable period of limitations.
- (3) Record of the disposition of a criminal investigation against a taxpayer is admissible in the Tax Court, and a conviction for tax evasion or attempted tax evasion is conclusive proof that the taxpayer committed civil fraud. Further, a guilty plea in a criminal investigation will be received by the Tax Court as an admission, to be given weight according to the circumstances. For example, if the taxpayer pleaded guilty to tax evasion, the plea would be sufficient to establish fraud. However, if the taxpayer pleaded guilty to failure to file a return, the plea would not necessarily prove the taxpayer had the intent to evade tax.
- (4) Even if the defendant was acquitted in the criminal investigation, the evidence used in that investigation may be sufficient to prove civil fraud. Unlike criminal punishment, a civil fraud penalty may apply even if the taxpayer filed amended returns, paid additional taxes after the filing of fraudulent returns, or died before the final adjudication of the civil investigation. This is because the civil fraud penalty applies to offenses against property rights, not personal rights.

