

# **TAX CRIMES HANDBOOK**

**Office of Chief Counsel  
Criminal Tax Division**

**2009**

## PREFACE

The goal in developing this handbook was to provide a resource for Criminal Tax Attorneys to use in the course of advising their client on criminal tax matters, and in evaluating recommendations for prosecution.

This handbook is not intended to create or confer any rights, privileges, or benefits on any person. It is not intended to have the force of law, or of a statement of Internal Revenue Service policy. See, United States v. Caceres, 440 U.S. 741 (1979).

A handwritten signature in cursive script, reading "Edward F. Cronin". The signature is written in black ink and is positioned above a horizontal line.

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## 1-1.01 Statutory Language

I.R.C. § 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.**

*\* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 92-596) enacted as 18 U.S.C. § 3571, increased the maximum permissible fines for felony offenses set forth in section 7201. The maximum permissible fine is \$250,000 for individuals and \$500,000 for corporations.*

## 1-1.02 Generally

[1] *Two kinds of tax evasion.* Section 7201 creates 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). See also, United States v. Shoppert, 362 F.3d 451, 454 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Mal, 942 F. 2d 682, 687-88 (9th Cir. 1991) (if a defendant transfers assets to prevent the I.R.S. from determining his true tax liability, he has attempted to evade assessment; if he does so after a tax liability has become due and owing, he has attempted to evade payment).

[a] *Evasion of assessment.* The most common attempt to evade or defeat a tax is the affirmative act of filing a false return that omits income and/or claims deductions to which the taxpayer is not entitled. The tax reported on the return is falsely understated and creates a deficiency. Consequently, such willful under reporting constitutes an attempt to evade or defeat tax by evading the correct assessment of the tax.

[b] *Evasion of payment.* This offense generally occurs after the existence of a tax due and owing has been established (either by the taxpayer reporting the amount of tax or by the I.R.S. assessing the amount of tax deemed to be due and owing) and almost always involves an affirmative act of concealment of money or assets from which the tax could be paid. As discussed in Section 1-1.04 below, it is not essential that the I.R.S. have made a formal assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. Tax deficiency can arise by operation of law when there is a failure to file and the government later determines the tax liability. United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992).

Note: These two offenses share the same basic elements necessary to prove a violation of I.R.C. § 7201. For purposes of clarity and practicality when using this Handbook as a resource, these offenses are discussed separately.

[2] *Persons* Liable for Title 26 Violations.

[a] *Statutory definition of "person."*

1. The term "person," as defined by I.R.C. § 7343, includes an officer or employee of a corporation, or a member or employee of a partnership, who is under a duty to perform the act in respect of which the violation occurs. See also, United States v. Miller, 545 F.2d 1204, 1216 (9th Cir. 1976); Lumetta v. United States, 362 F.2d 644, 647 (8th Cir. 1966); Locke v. United States, 166 F.2d 449, 450-51 (5th Cir. 1948); Currier v. United States, 166 F.2d 346, 348 (1st Cir. 1948); United States v. Berger, 325 F. Supp. 1297, 1303-05 (S.D. N.Y. 1971), aff'd, 456 F.2d 1349 (2d Cir. 1972), cert. denied, 409 U.S. 892 (1972).

2. *Guardians and Executors.* A Section 7203 case interpreted the term "person" to include a guardian or executor of estate. United States v. Jennings, 31 A.F.T.R.2d 73-782 (9th Cir. 1973).

[b] *Individuals.* United States v. Sloan, 939 F.2d 499, 500-01 (7th Cir. 1991); United States v. Condo, 741 F.2d 238, 239 (9th Cir. 1984); United States v. Rice, 659 F.2d 524, 528 (5th Cir. 1981).

[c] *Return preparers.* United States v. Donovan, 250 F. Supp. 463, 465-66 (W.D. Tex. 1966); United States v. Mesheski, 169 F. Supp. 372 (E.D. Wis. 1959), rev'd, 286 F.2d 345 (7th Cir. 1961).

[d] *Corporations.* United States v. Knox Coal Co., 347 F.2d 33 (3d Cir.), cert. denied, 382 U.S. 904 (1965); United States v. American Stevedores, Inc., 310 F.2d 47, 48 (2d Cir. 1962), cert. denied, 371 U.S. 969 (1963); United States v. Lustig, 163 F.2d 85 (2d Cir. 1947), cert. denied, 332 U.S. 775 (1947); Pankratz Lumber Co. v. United States, 50 F.2d 174 (9th Cir. 1931).

[3] *Scope - Evasion of another's tax.* A person may be prosecuted under this statute for willful evasion of another's tax. The offense of tax evasion is very broadly defined to include a person's attempt "*in any manner* to evade or defeat *any tax* imposed by [Title 26] or payment thereof." Thus, the statute permits prosecution of one party for the evasion of another party's tax liability. See, United States v. Wilson, 118 F.3d 228, 236 (4th Cir. 1997); see also, United States v. Troy, 293 U.S. 58 (1934); United States v. Frazier, 365 F.2d 316, 318 (6th Cir. 1966), cert. denied, 386 U.S. 971 (1967); Tinkoff v. United States, 86 F.2d 868, 876 (7th Cir. 1937).

### 1-1.03 Evasion of Assessment

#### [1] *Elements of the Offense:*

[a] An attempt to evade or defeat a tax or the payment of a tax;

[b] An additional tax due and owing; and,

[c] Willfulness.

Sansone v. United States, 380 U.S. 343, 351 (1965); Spies v. United States, 317 U.S. 492 (1943); United States v. Lavoie, 433 F.3d 95, 97-99 (1st Cir. 2005); United States v. Farnsworth, 456 F.3d 394, 401-03 (3d Cir. 2006); United States v. Nolen, 472 F.3d 362, 376-77 (5th Cir. 2006); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 579 (6th Cir.), cert. denied, 537 U.S. 880 (2002); United States v. Daniels, 387 F.3d 636, 639 (7th Cir.), cert. denied, 544 U.S. 911 (2004); United States v. Shoppert, 362 F.3d 451, 454 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Kayser, 488 F.3d 1070, 1073 (9th Cir. 2007); United States v. Anderson, 319 F.3d 1218, 1219-20 (10th Cir. 2003); United States v. Mounkes, 204 F.3d 1024, 1028 (10th Cir.), cert. denied, 530 U.S. 1230 (2000); United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992); United States v. Masat, 896 F.2d 88, 97-99 (5th Cir. 1990).

Each element must be proved beyond a reasonable doubt. United States v. Marashi, 913 F.2d 724, 735-36 (9th Cir. 1990); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989).

#### [2] *The Attempt*

[a] *Attempt to evade assessment.* The taxpayer must undertake some action, that is, engage in an *affirmative act* for the purpose of attempting to evade or defeat the assessment of a tax. This element requires more than passive neglect of a statutory duty. A mere act of willful omission does not satisfy the affirmative act requirement of I.R.C. § 7201. United States v. Masat, 896 F.2d 88, 97-99 (5th Cir. 1990).

[b] *Examples of affirmative acts include:*

1. *Filing of a false return.* United States v. Habig, 390 U.S. 222, 223 (1968); Sansone v. United States, 380 U.S. 343, 351-52 (1965); United States v. Coppola, 425 F.2d 660 (2d Cir. 1969); United States v. Gricco, 277 F.3d 339, 351-52 (3d Cir. 2002); United States v. Boulware, 384 F.3d 794 (2004), 470 F.3d 931, 934 (9th Cir. 2006), reversed on other grounds, 128 S. Ct. 1168, 1182 (2008).

2. *Filing of a false amended return.* United States v. Samara, 643 F.2d 701, 704 (10th Cir. 1981); Norwitt v. United States, 195 F.2d 127, 133-34 (9th Cir. 1952), cert. denied, 344 U.S. 817 (1952).

3. Failure to file return coupled with an affirmative act of evasion is commonly referred to as a "Spies evasion." Passive failure to file tax returns is not tax evasion. If the taxpayer failed to file a return, an evasion case can be maintained only if the taxpayer engaged in an affirmative act to conceal or mislead. Spies v. United States, 317 U.S. 492, 498-99 (1943). By way of illustration, and not by way of limitation, the Supreme Court in Spies set out examples of conduct which can constitute affirmative acts of evasion:

- (A) Keeping a double set of books.
- (B) Making false or altered entries.
- (C) Making false invoices.
- (D) Destruction of records.
- (E) Concealing sources of income.
- (F) Handling transactions to avoid usual records.
- (G) Any other conduct likely to conceal or mislead.

See also, United States v. Brooks, 174 F.3d 950, 954-56 (8th Cir. 1999); United States v. Meek, 998 F.2d 776, 779 (10th Cir. 1993).

4. *Filing False W-4's plus Failure to file a Return Equals Evasion.* Filing false and fraudulent Forms W-4 claiming to be exempt from federal taxation in combination with failure to file tax returns for each year can constitute an affirmative act of evasion. See, United States v. Brooks, 174 F.3d 950, 954-56 (8th Cir. 1999); United States v. King, 126 F.3d 987, 991-94 (7th Cir. 1997) (filing false forms W-4 is an affirmative act despite the fact that those forms had expired); United States v. Williams, 928 F.2d 145, 147-49 (5th Cir.), cert. denied, 502 U.S. 811 (1991); United States v. Connor, 898 F.2d 942, 944-45 (3d Cir.), cert. denied, 497 U.S. 1029 (1990); United States v. Copeland, 786 F.2d 768, 770-71 (7th Cir. 1985); United States v. Willis, 277 F.3d 1026, 1031 (8th Cir. 2002).

5. *False statements to Treasury agents relating to the fraud.* United States v. Beacon Brass Company, Inc., 344 U.S. 43, 45-46 (1952); United States v. Wilson, 118 F.3d 228, 236 (4th Cir. 1997); United States v. Winfield, 960 F.2d 970, 973-74 (11th Cir. 1992). But see, United States v. Romano, 938 F.2d 1569, 1573 (2d Cir. 1991)(equivocal statements to officials do not constitute an affirmative act).

6. *Corporate officer's diversion of corporate funds to pay personal expenses.* United States v. Boone, 951 F.2d 1526, 1540-41 (9th Cir. 1991); Katz v. United States, 321 F.2d 7, 10 (1st Cir.), cert. denied, 375 U.S. 903 (1963); United States v. American Stevedores, Inc., 310 F.2d 47, 48 (2d Cir. 1962), cert. denied, 371 U.S. 969 (1963); United States v. Brill, 270 F.2d 525, 526 (3d Cir. 1959).

7. *Sluicing off corporate income to principal shareholders in the guise of commissions or salaries out of proportion to the value of service rendered to the corporate taxpayer.* United States v. Ragen, 314 U.S. 513, 525-26 (1942); United States v. Keenan, 267 F.2d 118, 123 (7th Cir.), cert. denied, 361 U.S. 863 (1959).

8. *Consistent pattern of overstating deductions.* Zacher v. United States, 227 F.2d 219, 224 (8th Cir. 1955), cert. denied, 350 U.S. 993 (1956); United States v. Trevino, 394 F.3d 771, 777-78 (9th Cir. 2005), cert. denied, 547 U.S. 1022 (2006).

9. *Concealment of bank accounts.* United States v. Wilson, 118 F.3d 228, 236 (4th Cir. 1997); Paschen v. United States, 70 F.2d 491 (7th Cir. 1934). *Using a false SSN on bank accounts.* United States v. Carlson, 235 F.3d 466, 469 (9th Cir. 2000), cert. denied, 121 S.Ct. 1627 (2001).

10. *Holding property in nominee names.* United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Wilson, 118 F.3d 228, 236 (4th Cir. 1997); United States v. Peterson, 338 F.2d 595, 597 (7th Cir. 1964), cert. denied, 380 U.S. 911 (1965).

11. *Representing political gratuities as gifts.* Murray v. United States, 117 F.2d 40, 43-45 (8th Cir. 1941).

12. *Doing business in diverse names and keeping large sums of cash in safe deposit boxes in numerous banks.* United States v. Zimmerman, 108 F.2d 370, 379 (7th Cir. 1939).

13. *Failure to file declaration of estimated tax, concealing or attempting to conceal true income, failure to pay income tax due, and filing frivolous returns --a purported income tax return (tax of \$10.75) and an amended return (tax of \$312.67).* United States v. Afflerbach, 547 F.2d 522 (10th Cir. 1976).

14. *Structuring cash transactions to evade the filing of Bank Secrecy Act reports.* United States v. Mounkes, 204 F.3d 1024, 1030 (10th Cir.), cert. denied, 530 U.S. 1230 (2000).

[c] *Affirmative acts pre-dating the date of deficiency.* If the indictment mentions only the date of deficiency as the date of the crime and fails to mention the predeficiency period, then the government is precluded from relying on evidence of acts occurring in the predeficiency period as evidence of affirmative acts of evasion. United States v. Voight, 89 F.3d 1050, 1089-90 (3d Cir.), cert. denied, 519 U.S. 1047 (1996).

[d] *Affirmative acts serving purposes other than tax evasion.* If tax evasion motive plays any part in defendant's conduct, the offense of tax evasion may be made out even though the conduct may also serve purposes other than tax evasion. United States v. Voight, 89 F.3d 1050, 1090 (3d Cir.), cert. denied, 519 U.S. 1047 (1996).

[a] *Generally*. The government must demonstrate the existence of a tax due and owing, *i.e.*, a tax deficiency, to prove tax evasion. The government must prove the criminal tax adjustments include evidence of criminal intent. Defense counsel will attack this element of the case if at all possible. Therefore, it is important to verify that the income from which the tax deficiency resulted was in fact taxable income. See, I.R.C. §§ 61, 62 and 63.

[b] Examples of taxable income not expressly specified in the Code, include:

1. *Gambling*. Garner v. United States, 501 F.2d 228 (9th Cir. 1974), aff'd on other grounds, 424 U.S. 648 (1976); McClanahan v. United States, 292 F.2d 630, 631-32 (5th Cir.), cert. denied, 368 U.S. 913 (1961).

2. *Campaign contributions used for personal purposes*. United States v. Scott, 660 F.2d 1145, 1152 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

3. *Embezzlement*. James v. United States, 366 U.S. 213, 221-22 (1961); United States v. Eaken, 17 F.3d 203 (7th Cir. 1994); United States v. Kleifgen, 557 F.2d 1293, 1298-99 (9th Cir. 1977).

4. *Extortion Proceeds*. Rutkin v. United States, 343 U.S. 130, 136-39 (1952); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

5. *Fraud Income*. United States v. Dixon, 698 F.2d 445, 446 (11th Cir. 1983) (gross income includes proceeds from investment fraud scheme); Moore v. United States, 412 F.2d 974, 978 (5th Cir. 1969)(income includes gains from illegal activities).

6. *Loans received with no intent to repay*. United States v. Curtis, 782 F.2d 593, 596 (6th Cir. 1986); United States v. Swallow, 511 F.2d 514, 519 (10th Cir.), cert. denied, 423 U.S. 845 (1975); 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, 751-52 (5th Cir. 1967), cert. denied, 390 U.S. 946 (1968).

7. *Kickbacks*. United States v. Sallee, 984 F.2d 643 (5th Cir. 1993); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983); United States v. Fogg, 652 F.2d 551, 555 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); United States v. Swallow, 511 F.2d 514, 519 (10th Cir.), cert. denied, 423 U.S. 845 (1975); United States v. Wyss, 239 F.2d 658, 660 (7th Cir. 1957).

[c] *Tax deficiency does not include interest and penalties if the violation is evasion of assessment*. United States v. Mal, 942 F. 2d 682, 687 (9th Cir. 1991).

[d] *Evading another's tax liability*. A tax deficiency may be predicated on taxable income that was taxable either to the person charged or another person or entity. United States v. Troy, 293 U.S. 58 (1934); United States v. Aracri, 968 F.2d 1512, 1523 (2d Cir. 1992); United States v. Frazier, 365 F.2d 316, 318 (6th Cir. 1966), cert. denied, 386 U.S. 971 (1967); Tinkoff v. United States, 86 F.2d 868, 876 (7th Cir. 1937).



[e] *Assessment and demand not required.* If the prosecution theory is *evasion of assessment*, there need not be a prior formal tax assessment or demand for payment. Tax deficiency can arise by operation of law when there is a failure to file and the government later determines the tax liability. United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992); United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984).

[f] *Amount of tax to be proven.* The government need not prove a precise amount of tax due and owing or prove its case to a mathematical certainty. United States v. Johnson, 319 U.S. 503, 517-18 (1943); United States v. Mounkes, 204 F.3d 1024, 1028 (10th Cir.), cert. denied, 530 U.S. 1230 (2000); United States v. Bender, 606 F.2d 897, 898 (9th Cir. 1979); United States v. Keller, 523 F.2d 1009, 1012 (9th Cir. 1975).

1. Most circuits require the government to show that a *substantial* tax deficiency existed with respect to the years involved in the charge. United States v. Burkhardt, 501 F.2d 993, 995 (6th Cir. 1974), cert. denied, 420 U.S. 946 (1975); 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); United States v. Alker, 260 F.2d 135, 140 (3d Cir. 1958), cert. denied, 59 U.S. 906 (1959).

2. In the Seventh and Ninth Circuits there is no statutory requirement of substantiality, so showing *some* tax deficiency suffices. United States v. Daniels, 387 F.3d 636, 641 (7th Cir.), cert. denied, 544 U.S. 911 (2004); United States v. Marashi, 913 F.2d 724, 735-736 (9th Cir. 1990); United States v. Bender, 606 F.2d 897, 898 (9th Cir. 1979).

[g] *Technical defenses.*

1. *Loss carryback or "Lucky Loser Argument" is no defense.* Net operating losses which occur after tax returns are required to be filed cannot be carried back to eliminate a tax liability. Such carryback losses cannot be used to reduce or eliminate misstatements of tax liability when *fraudulently* made. Willingham v. United States, 289 F.2d 283, 287-88 (5th Cir. 1961), cert. denied, 368 U.S. 826 (1961).

2. *Insufficient Earnings and Profits (E&P).* Many tax schemes involve shareholders of closely held C corporations (corporations that pay tax) diverting corporate receipts to themselves or their family members, having the corporation pay their personal expenses, and other schemes where the corporate funds are distributed to the shareholders without the shareholders reporting any gross income and the corporation's taxable income being understated. In United States v. Boulware, 128 S.Ct. 1168, 1182 (2008), the Supreme Court held that in determining the taxable amount of any such corporate distributions to the shareholder the distribution rules of I.R.C. §§ 301 and 316 apply.

In general, the distribution rules of sections 301 and 316 provide that corporate distributions to shareholders are paid first out of current E&P, second out of accumulated E&P, and third out of capital (if the distribution exceeds current and accumulated E&P and the shareholder's basis in the stock of the corporation, then such excess is taxed as a capital gain). The defense is that the corporation lacked current or accumulated E&P; therefore, any distributions by the corporation to the shareholder are a non-taxable return of capital.

To overcome this defense, the government must prove the corporation had current or accumulated E&P. To compute E&P, start with the taxable income of the corporation as corrected. A number of technical adjustments are made to the taxable income, most of which would not be at issue in a criminal tax case, so the amounts of these adjustments from the corporation's records could be used. Reduce the adjusted taxable income, by the tax due on the corrected taxable income to arrive at E&P. Any distributions paid out of E&P are taxable (constructive) dividends to the shareholder.

In deciding Boulware, the Supreme Court adopted the holding of the Second Circuit Court of Appeals in United States v. D'Agostino, 145 F.3d 69 (2d Cir. 1998), and rejected the following circuit court decisions: United States v. Williams, 875 F.2d 846 (11th Cir. 1989); United States v. Thetford, 676 F.2d 170 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983); United States v. Miller, 545 F.2d 1204 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977); and Davis v. United States, 226 F.2d 331 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956).

3. *Reclassify business expenses.* In United States v. Kayser, 488 F.3d 1070, 1073 (9th Cir. 2007), a divided panel of the 9th Circuit overturned defendant's conviction by allowing him to reclassify previously claimed corporate business expenses as personal business expenses which offset unreported income and resulted in no tax due and owing. The court did not overrule United States v. Miller, 545 F. 2d 1204 (9th Cir. 1976), *cert. denied*, 430 U. S. 930 (1977), which had held otherwise, but interpreted Miller's holding as being consistent with the court's decision.

4. *Different method of reporting or accounting.* As a general rule, the Government must use the taxpayer's method of accounting in computing the income. Fowler v. United States, 352 F.2d 100, 103 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); United States v. Vardine, 305 F.2d 60, 64 (2d Cir. 1962); United States v. Hestnes, 492 F. Supp. 999, 1000-01 (W.D. Wis. 1980). If the taxpayer used a particular method of reporting income, then the taxpayer is bound by that choice at trial. The taxpayer cannot report his income on the cash method and then at trial, allege that on an accrual basis unreported income would be a 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. Helmsly, 941 F.2d 71, 86-87 (2d Cir. 1991)(defendant not free to re-calculate taxes resorting to one of four depreciation methods to defend the charge by showing that another depreciation method would have resulted in no tax liability); United States v. Hecht, 705 F. 2d 976, 977-78 (8th Cir. 1983).

5. *A legitimate claim to a foreign tax credit is a defense.* United States v. Cruz, 698 F.2d 1148, 1152 (11th Cir. 1983); United States v. Campbell, 351 F.2d 336, 338-39 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Liability for the foreign tax credit must be fully established as an amount owed to the foreign government.

#### [4] *Willfulness*

[a] Willfulness is defined as the "voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 192, 200-01 (1991); United States v. Pomponio, 429 U.S. 10, 12 (1976); United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Pensyl, 387 F.3d 456, 458-59 (6th Cir. 2004); United States v. George, 420 F.3d 991, 999 (9th Cir. 2005).

[b] *Subjective Test.* A defendant's good faith belief that he is not violating the tax laws, no matter how objectively unreasonable that belief may be, is a defense in a tax prosecution. Cheek v. United States, 498 U.S. 192, 199-201 (1991). See also, United States v. Grunewald, 987 F.2d 531, 535-36 (8th Cir. 1993); United States v. Pensyl, 387 F.3d 456, 459 (6th Cir. 2004).

1. *Erroneous beliefs.* A defendant's erroneous belief that tax laws are unconstitutional is no defense to tax evasion. Cheek v. United States, 498 U.S. 192, 205-06 (1991).

2. *Law is vague or unsettled.*

(A) Where the law is vague or unsettled as to whether a transaction has generated taxable income, courts have found the defendant lacked willfulness. For instance:

(i) Payments given by wealthy widower to mistresses where civil tax cases had held such payments were gifts. United States v. Harris, 942 F.2d 1125, 1131 (7th Cir. 1991).

(ii) Prior Tax Court case accepting income reporting method made it inappropriate to impose criminal liability for using that method. United States v. Heller, 830 F. 2d 150, 154-55 (11th Cir. 1987).

(iii) Novel issue of tax treatment of money received from sale of rare blood. United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979).

(iv) Business income on Indian reservation in light of conflict among government branches on the issue. United States v. Critzer, 498 F.2d 1160, 1162 (4th Cir. 1974).

(B) The fact that an appellate court has not decided an issue does not mean that the law is vague or unsettled if established principles of tax law clearly delineate the scheme's illegality. See, e.g., United States v. Tranakos, 911 F.2d 1422, 1430-31 (10th Cir. 1990)(addressing use of sham transactions to avoid taxation); United States v. Krall, 835 F.2d 711, 714 (8th Cir. 1987)(regarding use of sham trusts to avoid taxation); United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986) (concerning principle favoring tax treatment of substance over form); United States v. George, 420 F. 3d 991, 995-96 (9th Cir. 2005)(concerning allocation of receiver fees by a cash basis taxpayer).

(C) The fact that the law is vague or unsettled does not negate willfulness if the defendant is not also subjectively uncertain of the law or if bad faith can be inferred from the defendant's conduct. Factual evidence of the defendant's state of mind is required to negate willfulness. United States v. Harris, 942 F.2d 1125, 1128-29 (7th Cir. 1991); United States v. Curtis, 782 F.2d 593, 598-600 (6th Cir. 1986)(rejecting defense because it allows a finding that there was no willfulness even if defendant was unaware of the legal uncertainty and because it distorts the roles of experts, judges, and juries with respect to questions of law); United States v. MacKenzie, 777 F.2d 811, 816-17 (2d

Cir. 1985); United States v. Mallas, 762 F.2d 361, 363 (4th Cir. 1985); United States v. Ingredient Technology, 698 F.2d 88, 96-97 (2d Cir.), cert. denied, 462 U.S. 1131 (1983).

3. Where the defendant concealed assets or covered up sources of income, willfulness is present and good faith may not be used as a defense. United States v. Brooks, 174 F.3d 950, 954-55 (8th Cir. 1999).

4. A willful blindness or deliberate indifference jury instruction permits a jury to infer knowledge if it finds the defendant closed his eyes to what was obvious to him. United States v. Willis, 277 F.3d 1026, 1031-32 (8th Cir. 2002); United States v. Dean, 487 F.3d 840, 851 (11th Cir. 2007).

[c] Absent an admission, confession or accomplice testimony, willfulness is rarely subject to direct proof and generally must be inferred from the circumstances of the case. United States v. Wilson, 118 F.3d 228, 236 (4th Cir. 1997); United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), cert. denied, 469 U.S. 858 (1984); United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971); United States v. Magnus, 365 F.2d 1007, 1011-12 (2d Cir. 1966); Paschen v. United States, 70 F.2d 491 (7th Cir. 1934).

[d] Willfulness may be inferred from "any conduct, the likely effect of which would be to mislead or to conceal." Spies v. United States, 317 U.S. 492, 499 (1943). The following are examples of conduct from which willfulness has been inferred:

1. *Signing return knowing that the contents of that return understated income.* United States v. Olbres, 61 F.3d 967, 970-71 (1st Cir.), cert. denied, 516 U.S. 991 (1995).

2. *Substantial understatement of income in successive years.* United States v. Lavoie, 433 F.3d 95, 98-99 (1st Cir. 2005); United States v. Kim, 884 F.2d 189, 192-93 (5th Cir. 1989); United States v. Krzyske, 836 F.2d 1013, 1019-20 (6th Cir. 1988); United States v. Skalicky, 615 F.2d 1117, 1120 (5th Cir.), cert. denied, 449 U.S. 832 (1980); United States v. Larson, 612 F.2d 1301, 1305 (8th Cir.), cert. denied, 446 U.S. 936 (1980); United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980).

3. *Prior and subsequent similar acts reasonably close to the prosecution years.* United States v. Johnson, 386 F.2d 630, 631 (3d Cir. 1967); United States v. Magnus, 365 F.2d 1007, 1011-12 (2d Cir. 1966); United States v. Alker, 260 F.2d 135, 156-57 (3d Cir. 1958), cert. denied, 359 U.S. 906 (1959).

4. *Failure to supply an accountant with accurate and complete information.* United States v. Lavoie, 433 F.3d 95, 99 (1st Cir. 2005); United States v. Bishop, 291 F.3d 1100, 1106-08 (9th Cir. 2002), United States v. Olbres, 61 F.3d 967, 970-71 (1st Cir.), cert. denied, 516 U.S. 991 (1995); United States v. Brimberry, 961 F.2d 1286, 1290-91 (7th Cir. 1992); United States v. Chesson, 933 F.2d 298, 304-05 (5th Cir. 1991); United States v. Michaud, 860 F.2d 495, 500 (1st Cir. 1988); United States v. Meyer, 808 F.2d 1304, 1306 (8th Cir. 1987); United States v. Ashfield, 735 F.2d 101, 106-07 (3d Cir.), cert. denied, 469 U.S. 858 (1984); United States v. Samara, 643 F.2d 701, 703-04 (10th Cir.), cert. denied, 454 U.S. 829 (1981).

5. *Making false exculpatory statements to agents or causing them to be made.* United States v. Chesson, 933 F.2d 298, 304-05 (5th Cir. 1991); United States v. Frederickson, 846 F.2d 517, 520-21 (8th Cir. 1988); United States v. Walsh, 627 F.2d 88, 92 (7th Cir. 1980).

6. *Destroying, throwing away, or "losing" books and records.* United States v. Chesson, 933 F. 2d 298, 304-05 (5th Cir. 1991); United States v. Walker, 896 F.2d 295 (8th Cir. 1990); United States v. Conforte, 624 F.2d 869, 875-76 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); United States v. Garavaglia, 566 F.2d 1056, 1059-60 (6th Cir. 1977).

7. *Making or using false documents, entries in books and records, or invoices.* United States v. Chesson, 933 F.2d 298, 304 (5th Cir. 1991); United States v. Walker, 896 F.2d 295, 297-300 (8th Cir. 1990). This includes backdating documents such as receipts and contracts to gain a tax advantage. United States v. O'Keefe, 825 F.2d 314, 318 (11th Cir. 1987); United States v. Drape, 668 F.2d 22, 25-26 (1st Cir. 1982).

8. *Keeping a double set of books.* Spies v. United States, 317 U.S. 492, 499 (1943); United States v. Daniels, 617 F.2d 146, 148 (5th Cir. 1980).

9. *Placing property or business in the name of another.* United States v. Brooks, 174 F.3d 950, 954-55 (8th Cir. 1999); United States v. Daniel, 956 F.2d 540, 543 (6th Cir. 1992); United States v. Peterson, 338 F.2d 595, 597 (7th Cir. 1964), cert. denied, 380 U.S. 911 (1965); United States v. Woodner, 317 F.2d 649, 650 (2d Cir.), cert. denied, 375 U. S. 903 (1963).

10. *Extensively using currency and cashier's checks.* United States v. Daniel, 956 F.2d 540, 543 (6th Cir. 1992); United States v. Holovachka, 314 F.2d 345, 357-58 (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).

11. *Spending large amounts of cash which could not be reconciled with reported income or engaging in surreptitious transactions using cash, money orders, or cashier's checks.* United States v. Kim, 884 F.2d 189, 192-93 (5th Cir. 1989); United States v. Skalicky, 615 F.2d 1117, 1120 (5th Cir.), cert. denied, 449 U.S. 832 (1980); United States v. Holladay, 566 F.2d 1018, 1020 (5th Cir.), cert. denied, 439 U.S. 831 (1978); United States v. Mortiner, 343 F.2d 500 (7th Cir.), cert. denied, 382 U.S. 842 (1965).

12. *Holding bank accounts under fictitious names.* United States v. Ratner, 464 F.2d 101, 105 (9th Cir. 1972); Elwert v. United States, 231 F.2d 928, 936 (9th Cir. 1956).

13. *Handling one's affairs to avoid making the usual records required for such transactions.* United States v. Dowell, 446 F.2d 145, 147-48 (10th Cir.), cert. denied, 404 U. S. 984 (1971); Garipey v. United States, 189 F.2d 459, 461-63 (6th Cir. 1951).

14. *General educational background and experience may be considered as bearing on a taxpayer's ability to form a willful intent.* United States v. Smith, 890 F.2d 711, 715 (5th Cir. 1989)(entrepreneurial experience); United States v. Segal, 867 F.2d

1173, 1179 (8th Cir. 1989)(successful and sophisticated businessman). See also, United States v. Tarwater, 308 F.3d 494, 506-07 (6th Cir. 2002); United States v. Coblentz, 453 F.2d 503, 505 (2d Cir. 1972); United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir.), cert. denied, 386 U.S. 982 (1967).

15. *The defendant's attitude toward the reporting and payment of taxes generally.* United States v. Hogan, 861 F.2d 312, 316 (1st Cir. 1988); United States v. Stein, 437 F.2d 775 (7th Cir.), cert. denied, 403 U.S. 905 (1971); United States v. O'Connor, 433 F.2d 752, 754-755 (1st Cir. 1970), cert. denied, 401 U.S. 911 (1971).

16. *Ignorance of law and claims that tax laws are not constitutional.* Cheek v. United States, 498 U.S. 192, 199-201 (1991); United States v. Pensyl, 387 F. 3d 456, 458-60 (6th Cir. 2004), and United States v. Hancock, 231 F. 3d 557, 561-62 (9th Cir. 2000).

[5] *Venue*

[a] Under the Constitution, venue lies in the judicial district where the crime has been committed. U.S. Const. art. II, § 2, cl. 3; U.S. Const. amend. VI.

[b] Unless otherwise permitted by statute or rule, criminal prosecution must take place "in a district in which the offense was committed." Fed. R. Crim. P. 18.

[c] Venue is appropriate in any judicial district where the return was:

1. *made*;
2. *subscribed*; or
3. *filed*.

See, e.g., United States v. Marchant, 774 F.2d 888, 891-92 (8th Cir. 1985), cert. denied, 475 U.S. 1012 (1986)(venue appropriate where accountant prepared return); United States v. King, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978)(prepared and signed); United States v. Gross, 276 F.2d 816, 819 (2d Cir.), cert. denied, 363 U.S. 831 (1960) (prepared); United States v. Albanese, 224 F.2d 879, 882 (2d Cir.), cert. denied, 350 U.S. 845 (1955)(prepared and mailed).

[d] Venue is also appropriate in any district where any act of the offense was begun, continued, or completed. United States v. Rooney, 866 F.2d 28, 31-32 (2d Cir. 1989).

[e] For offenses begun in one district and completed in another, or committed in more than one district, venue lies in each district in which such offense was begun, continued, or completed. 18 U.S.C. § 3237(a).

[f] General considerations in recommending venue:

1. The underlying basis for venue is the taxpayer's Sixth Amendment right to trial in the judicial district where the crime was committed.

2. Bringing prosecution in taxpayer's home judicial district obviates motion by defendant to change venue. Publicity more likely in defendant's home district.

3. Proof of venue is by a preponderance of the evidence. United States v. Maldonado-Rivera, 922 F.2d 934, 968 (2d Cir. 1990), cert. denied, 501 U.S. 1210 (1991); United States v. Griley, 814 F.2d 967, 973 (4th Cir. 1987). It is enough if the testimony justifies the reasonable inference that the violation occurred at the place alleged in the indictment. United States v. Mendell, 447 F.2d 639, 641 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

4. Improper venue may be waived by a defendant. United States v. Netz, 758 F.2d 1308, 1311 (8th Cir. 1985); United States v. Powell, 498 F.2d 890, 891 (9th Cir. 1974). See also, Fed R. Crim. P. 58(c)(2).

#### [6] *Statute of Limitations*

[a] There is a six (6) year limitation period for the offense of willfully attempting to evade or defeat any tax. I.R.C. § 6531(2).

[b] The general rule is that the limitation period begins to run 6 years from the date of the last affirmative act that took place or the statutory due date of the return, whichever is later. Specific applications of the rule are:

1. Statutory due date where no return is filed or where the return is filed early. United States v. Butler, 297 F.3d 505, 511 (6th Cir. 2002), cert. denied, 123 S.Ct. 2074 (2003); United States v. Williams, 928 F.2d 145, 149 (5th Cir.), cert. denied, 502 U.S. 811 (1991); United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966), cert. denied, 386 U.S. 991 (1967).

2. Actual filing date where the tax return is filed *late*. United States v. Habig, 390 U.S. 222, 225-27 (1968); United States v. Daniels, 387 F.3d 636, 641-42 (7th Cir.), cert. denied, 544 U.S. 911 (2004).

3. Date of the last affirmative act of evasion where acts of evasion occur after the due date. United States v. Beacon Brass, 344 U.S. 43, 45-46 (1952); United States v. Anderson, 319 F.3d 1218, 1219-20 (10th Cir. 2003); United States v. Carlson, 235 F.3d 466, 470-71 (9th Cir. 2000), cert. denied, 532 U.S. 983 (2001); United States v. Winfield, 960 F.2d 970, 973 (11th Cir. 1992); United States v. DiPetto, 936 F.2d 96, 98 (2d Cir.), cert. denied, 502 U.S. 866 (1991); United States v. Ferris, 807 F.2d 269, 271-72 (1st Cir. 1986). Contra, United States v. Uscinski, 369 F.3d 1243, 1247 (11th Cir. 2004)(the filing of a false income tax return completes the offense of tax evasion).

Note: This can be problematic if act does not relate to evasion but, rather may be viewed as a separate coverup.

[c] *Tolling, Suspension, and Extension of Statute*

1. *Tolling.* Under I.R.C. § 6531, the statute of limitations is tolled while a person who has committed tax code violations is outside the United States or is a fugitive from justice.

(A) "Outside the United States" has been interpreted to mean "whenever [such persons] cannot be served criminal process within the jurisdiction of the United States under Fed. R. Crim. P. 4(d)(2)." United States v. Marchant, 774 F.2d 888, 891-92 (8th Cir. 1985), cert. denied, 475 U.S. 1012 (1986).

(B) This includes ordinary business or pleasure trips outside U.S. jurisdiction. United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966), cert. denied, 386 U.S. 991 (1967).

2. *Suspension.* Under I.R.C. § 7609(e)(1), the statute of limitations is suspended in certain types of summons enforcement proceedings. Generally, where an intervener in a summons enforcement proceeding is the person with respect to whose liability the summons is issued, 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 such a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

3. *Time Extension.* Under I.R.C. § 6531, the statute of limitations may be extended. When an adequate complaint is instituted before a commissioner of the United States within the prescribed limitation period, the period is extended 9 months from the date of the complaint. This extension of time is not meant to allow the government additional time to develop its case, but rather is designed for use when the grand jury would not be able to return an indictment within the statutory time because of its schedule. See, Jaben v. United States, 381 U.S. 214, 219-20 (1964).

#### **1-1.04 Evasion of Payment**

[1] *Elements of the Offense:*

[a] An attempt to evade or defeat the payment of a tax;

[b] An additional tax due and owing; and,

[c] Willfulness.

Sansone v. United States, 380 U.S. 343, 351 (1965); Spies v. United States, 317 U.S. 492, 493-94 (1943); United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992); United States v. Masat, 948 F.2d 923, 931 (5th Cir. 1991).



[2] *The Attempt*

[a] *Attempt to evade payment.* Affirmative acts of evasion of payment almost always involve some form of concealment of money or assets with which the tax could be paid or the removal of assets from the reach of the I.R.S. Merely failing to pay assessed taxes, without more, does not constitute evasion of payment (though it may constitute willful failure to pay taxes under § 7203). Thus, in the absence of an affirmative act, obstinate refusal to pay taxes due and the possession of the funds needed to pay the taxes is insufficient for an evasion charge.

[b] Affirmative acts of evasion of payment generally involve schemes to deal in currency, place assets in the names of others, transfer assets abroad or omit assets on a Form 433-A, Collection Information Statement. Examples include:

1. Concealing assets by using bank accounts of family members and coworkers. United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. McGill, 964 F.2d 222, 233 (3d Cir. 1992).

2. Making expenditures extensively by cash and through the use of third parties' credit cards and placing assets in the names of third parties. United States v. Shoppert, 362 F.3d 451 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Daniel, 956 F.2d 540, 543 (6th Cir. 1992).

3. Taxpayer's false statement to I.R.S. agent that she owned no real estate and had no other assets with which to pay tax. United States v. Shoppert, 362 F.3d 451, 460 (8th Cir.), cert. denied, 543 U.S. 911 (2004); United States v. Brimberry, 961 F.2d 1286, 1290-91 (7th Cir. 1992).

4. Maintaining a cash lifestyle by conducting all personal and professional business in cash, possessing no credit cards, bank accounts, or accounting records and never acquiring any attachable assets. United States v. Shorter, 809 F.2d 54, 56-57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987).

5. *Bankruptcy fraud.* A legitimate goal of a bankruptcy petitioner may be immediate protection from I.R.S. collection activities (stay of collection and removal of levies). While the act of voluntarily filing a petition for bankruptcy may not constitute an affirmative act in and of itself, if it can be shown through other affirmative acts (e.g., predicated the petition on false or fraudulent obligations) that the petitioner's purpose in filing the bankruptcy petition was to prevent or delay I.R.S. collection efforts, the act of filing may constitute an affirmative act of evasion. See, e.g., United States v. Huebner, 48 F.3d 376, 379-80 (9th Cir. 1994)(the defendant, having created false loan documents and then filed for bankruptcy, was successfully prosecuted for evasion of payment.).

6. See also, United States v. Hook, 781 F.2d 1166, 1169 (6th Cir.), cert. denied, 479 U.S. 882 (1986); United States v. Lamp, 779 F.2d 1088, 1092-93 (5th Cir. 1986); United States v. Swallow, 511 F.2d 514, 521 (10th Cir.), cert. denied, 423 U.S. 845 (1975); United States v. Trowsell, 367 F.2d 815, 816 (7th Cir. 1966); Cohen v. United

States, 297 F.2d 760, 762 (9th Cir.), cert. denied, 369 U.S. 865 (1962); United States v. Mollet, 290 F. 2d 273, 274-75 (2d Cir. 1961), for additional examples of acts to evade payment.

[c] Evasion of payment may involve a single affirmative act intended to evade the payment of several years of tax due. In this situation, it is 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)(upholding use of a single count of tax evasion covering twelve years of evasion of payment where the underlying basis of the count is an allegedly consistent, long-term pattern of conduct directed at the evasion of payment of taxes for those years). See also, United States v. Hook, 781 F.2d 1166, 1169 (6th Cir.), cert. denied, 479 U. S. 882 (1986).

### [3] *Additional Tax Due and Owing*

[a] *Generally*. The government must demonstrate the existence of a tax due and owing, *i.e.*, a tax deficiency, to prove tax evasion. For further information see discussion of this element in the evasion of assessment section above.

[b] It is not essential that the I.R.S. have made a formal assessment of taxes owed and a demand for payment in order to bring tax evasion charges on an *evasion of payment* theory. Tax deficiency can arise by operation of law when there is a failure to file and the government later determines the tax liability. See, United States v. Daniel, 956 F.2d 540, 542 (6th Cir. 1992); United States v. Hogan, 861 F.2d 312, 315-16 (1st Cir. 1988).

The law is not so clear in the Third Circuit. See the discussion in United States v. Farnsworth, 456 F.3d 394, 402-03 (3d Cir. 2006), where the court stated that no assessment is required but noted that United States v. McGill, 964 F.2d 222, 233 (3d Cir. 1992), suggested otherwise.

[c] *Right of defendant to dispute assessment*. Although an assessment is prima facie proof of a tax deficiency, the defendant has a constitutional right to present rebuttal evidence and have the jury decide his guilt on each element of the crime. United States v. Silkman, 156 F.3d 833, 835 (8th Cir. 1998).

### [4] *Willfulness*

[a] Willfulness is defined as 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). See discussion of this element in the evasion of assessment section above.

[b] Willfulness is subjectively measured. A defendant's good faith belief that he is not violating the tax laws, no matter how objectively unreasonable that belief may be, is a defense in a tax prosecution. Cheek v. United States, 498 U.S. 192, 199-201 (1991). See also, United States v. Grunewald, 987 F.2d 531, 535-36 (8th Cir. 1993).

[c] Indirect proof of willfulness is the typical means of establishing the element. Willfulness may be inferred from "any conduct the likely effect of which would be to mislead or to conceal." Spies v. United States, 317 U.S. 492, 499 (1943).

[d] Conduct from which the willful evasion of payment can be inferred includes conduct designed to place assets beyond the government's reach after a tax liability has been assessed. United States v. Mal, 942 F. 2d 682, 687 (9th Cir. 1991); United States v. Dunkel, 900 F.2d 105, 107 (7th Cir. 1990); United States v. Masat, 896 F.2d 88, 97-99 (5th Cir. 1990).

[e] Paying taxes due after the criminal investigation commenced does not negate willfulness. United States v. Pang, 362 F.3d 1187, 1194 (9th Cir.), cert. denied, 543 U.S. 943 (2004).

#### [5] *Venue*

[a] Venue is appropriate in any judicial district where the return was:

1. *made*;
2. *subscribed*; or
3. *filed*.

See, e.g., United States v. Marchant, 774 F.2d 888, 891-92 (8th Cir. 1985), cert. denied, 475 U.S. 1012 (1986) (venue appropriate where accountant prepared return); United States v. King, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978) (prepared and signed); United States v. Gross, 276 F.2d 816, 819-20 (2d Cir.), cert. denied, 363 U.S. 831 (1960) (prepared); United States v. Albanese, 224 F.2d 879, 882 (2d Cir.), cert. denied, 350 U.S. 845 (1955)(prepared and mailed).

[b] Venue is also appropriate in any district where any act of the offense was begun, continued, or completed. United States v. Rooney, 866 F.2d 28, 31-32 (2d Cir. 1989).

[c] For offenses begun in one district and completed in another, or committed in more than one district, venue lies in each district in which such offense was begun, continued, or completed. 18 U.S.C. § 3237(a).

#### [6] *Statute of Limitations*

To determine whether the statute of limitations is open for evasion of payment cases, begin with the present date, and inquire whether affirmative acts in furtherance of the crime were committed in the preceding 6 years. United States v. Shorter, 809 F.2d 54 (D.C. Cir.), aff'g 608 F. Supp. 871, 873-74, and cert. denied, 484 U.S. 817 (1987); United States v. Hook, 781 F.2d 1166, 1171-73 (6th Cir. 1986). For example, in United States v. Voorhies, 658 F. 2d 710 (9th Cir. 1981), the defendant committed five affirmative acts of evading payment within six years prior to the date he was indicted.

### 1-1.05 Collateral Estoppel

I.R.C. § 7201 is a broad provision and carries the most severe penalty of the criminal tax offenses. Since criminal convictions are founded on the beyond a reasonable doubt standard, a conviction for tax evasion will collaterally estop denial of the civil fraud penalty under I.R.C. § 6663 for the same taxpayer, tax year, and type of tax. See Wright v. Commissioner, 84 T.C. 636 (1985); Amos v. Commissioner, 43 T.C. 50 (1964).

### 1-1.06 Lesser Included Offenses

[1] Lesser included offenses are offenses whose statutory elements comprise part of the elements needed to prove another offense, *i.e.*, they are a subset of a "greater" or "major" offense. For example, filing a false return or failing to file a return are each substantive tax offenses which under certain circumstances could be a lesser included offense of tax evasion. Filing a false return may constitute an affirmative act of tax evasion, and when coupled with a tax deficiency, could form the basis for an evasion charge. Similarly, failing to file a return, when coupled with the requisite affirmative act(s) of evasion and a tax deficiency, also may support an evasion charge. Accordingly, such offenses are considered lesser included offenses of the major offense of tax evasion.

[2] Congress, in fixing varying penalties for offenses of attempting to evade federal income tax and for willfully making and subscribing a tax return not believed to be correct, did not intend to pyramid penalties and authorize a separate penalty for a lesser included offense, which arose out of the same transaction and which would be established by proof of guilt of the greater offense of attempting to evade income tax. United States v. Lodwick, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). See also, United States v. Dale, 991 F.2d 819, 858-59 (D.C. Cir. 1993); United States v. Kaiser, 893 F.2d 1300, 1307 (11th Cir. 1990); United States v. Citron, 783 F.2d 307, 312-14 (2d Cir. 1986). Thus, in cases where a § 7203 or § 7206(1) violation is a predicate offense to a § 7201 violation, the § 7203 or § 7206(1) violation would be considered a lesser included offense in the § 7201 offense.

[3] The Department of Justice, Tax Division, has adopted the so-called "elements" test for lesser included offenses from Schmuck v. United States, 489 U.S. 705, 709-10 (1989). The standard is whether the statutory elements of the lesser offense are a subset of the elements of the greater offense. Schmuck, 489 U.S. at 709-10.

[4] One result of this policy is that an instruction of failure to file is not automatic in a Spies evasion case involving failure to file, failure to pay, and an affirmative act of evasion. If there is any doubt as to the strength of evidence on any section 7201 element, charging a section 7203 violation should also be considered.

[5] Similarly, charging both sections 7201 and 7206(1) should be considered in evasion cases where filing a false return can be established, but the evidence supporting a tax deficiency may not be strong enough for an evasion conviction.

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**CHAPTER 1**

**TITLE 26 TAX VIOLATIONS**

**SECTION 2 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX  
I.R.C. § 7202**

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## 1-2.01 Statutory Language

### I.R.C. § 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.**

*\* For 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<sup>1</sup> 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.*

## 1-2.02 Generally

[1] This statute describes two offenses: (1) a willful failure to collect; and (2) a willful failure to truthfully account for and pay over tax. 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, 242-249 (1978); United States v. Simkanin, 420 F.3d 397, 404-08 (5th Cir. 2005), cert. denied, 547 U.S. 1111 (2006); United States v. H.J.K. Theatre Corporation, 236 F.2d 502, 504-06 (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, 847-48 (9th Cir.), cert. denied, 429 U.S. 977 (1976).

## 1-2.03 § 7202 - Elements of the Offense

*To establish a violation of I.R.C. § 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.

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<sup>1</sup> Changed to 18 U.S.C. 3571, commencing November 1, 1986.

[1] *Duty to collect, and/or to truthfully account for and pay over taxes.* The duty of employers to truthfully account for and pay over is created by I.R.C. §§ 3102(s), 3111(a), and 3402 (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, 656 (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.

[2] *Failure to collect, or truthfully account for and pay over.* The Department of Justice Tax Division's position historically has been that a willful failure to truthfully to account for and pay over is a "breach of an inseparable dual obligation." 2008 Criminal Tax Manual, United States Department of Justice, Tax Division, Criminal Section, p. 9-4. 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."

Some defendants have argued § 7202 is a conjunctive statute requiring the government to prove both a failure to account for and a failure to pay withholding tax to establish a violation of the statute. See also United States v. Thayer, 201 F.3d 214, 219-22 (3d Cir. 1999), cert. denied, 530 U.S. 1244 (2000); United States v. Evangelista, 122 F.3d 112, 120-22 (2d Cir. 1997); United States v. Brennick, 908 F. Supp. 1004, 1011 (D. Mass. 1995). In Evangelista, the Second Circuit held a violation of § 7202 can result from either a failure to account for withholding taxes and FICA contributions **or** a failure to pay over such taxes, but the statute does not require both to sustain a conviction. See United States v. Thayer, 201 F.3d 214, 219-22 (3d Cir. 1999), cert. denied, 530 U.S. 1244 (2000); United States v. Brennick, 908 F. Supp. 1004, 1007 (D. Mass. 1995). In Thayer, the defendant argued the statute was conjunctive; therefore, if both requirements of § 7202 were not met, he could not be convicted. The Third Circuit disagreed and relied on the decision in Brennick: "A conjunctive interpretation of § 7202 would result in a greater penalty for one who simply failed to collect trust fund taxes than for one who collected them. . . [t]hat Congress intended to make such a distinction is simply inconceivable." United States v. Brennick, 908 F. Supp. 1004, 1017 (D. Mass. 1995). The Third Circuit affirmed Thayer's conviction, stating the defendant's argument did not convincingly answer the Brennick court's Congressional intent analysis. In United States v. Gilbert, 266 F.3d 1180, 1183-85 (9th Cir. 2001), the Ninth Circuit relied on the decisions in Evangelista and Thayer in arriving at the same holding.

[3] *Willfulness.* The requisite element of willfulness under section 7202 is the same as in other offenses under Title 26. 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, 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. Simkanin, 420 F.3d 397, 404 (5th Cir. 2005), cert. denied, 547 U.S. 1111 (2006).



The question of proving available funds to pay the taxes is found in United States v. Poll, 521 F.2d 329, 332-33 (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, 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.<sup>2</sup>

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.<sup>3</sup>

In United States v. Gilbert, 266 F.3d 1180, 1185 (9th Cir. 2001), without overruling Poll, the Ninth Circuit held that paying employees while not remitting employment taxes to the government was a willful act despite a claim of lack of funds. For a successful conviction under section 7202, see United States v. Scharf, 558 F.2d 498, 501 (8th Cir. 1977), where the court held that evidence the defendant had altered records was admissible for the purpose of showing,

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<sup>2</sup> 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.

<sup>3</sup> It should be noted that Poll did not go free. Following the reversal of Poll's 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, 848 (9th Cir.), cert. denied, 429 U.S. 977 (1976).

“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).

#### **1-2.04 § 7202 - Motor Fuel Excise Tax Prosecutions**

Care must be exercised to ensure that section 7202 is 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.

#### **1-2.05 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.

#### **1-2.06 Statute of Limitations**

In § 7202 prosecutions, the statute of limitations is six years. See United States v. Adam, 296 F.3d 327, 330-31 (5th Cir. 2002); United States v. Gilbert, 266 F.3d 1180, 1185-86 (9th Cir. 2001); 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, 501 U.S. 1250 (1991); United States v. Porth, 426 F.2d 519, 522 (10th Cir.), cert. denied, 400 U.S. 824 (1970); United States v. Anglin, 999 F. Supp. 1378, 1379-80 (D. Haw. 1998). Be aware, however, that two district courts have concluded that the statute of limitations for section 7202 prosecutions is three years. United States v. Brennick, 908 F. Supp. 1004, 1018-19 (D. Mass. 1995); United States v. Block, 497 F. Supp. 629, 630-32 (N.D. Ga.), 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 631-32. The Block court also noted 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, Block, at 632; thus, the exception contained in section 6531(4) was found not to apply to the failure to pay over third-party taxes. See United States v. Brennick, 908 F. Supp. 1004, 1018-19 (D. Mass. 1995)(§ 6531(4) providing a six-year statute of limitations for the offense of willfully

failing to pay and tax or make any return . . . refers only to the offense described under § 7203 and not to that under § 7202). But see Wilson v. United States, 250 F.2d 312, 320 (9th Cir. 1958).

The Second Circuit, in Musacchia, considered the Block decision but concluded that the Block “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 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 court in United States v. Gollapudi, 130 F. 3d 66, 68-71 (3d Cir. 1997) concluded the court’s rationale in Musacchia was more persuasive than the court in Block, and held that violations of 26 U.S.C. § 7202 are subject to a six-year statute of limitations. Since no court in the Third Circuit had yet addressed the issue, the Gollapudi court reviewed the Second and Tenth Circuits which had applied § 6531(4) to § 7202 offenses, as well as the opposite holdings of two district courts, and agreed with the Musacchia court. See also United States v. Anglin, 999 F. Supp. 1378, 1379-80 (D. Haw. 1998) (despite the disagreement among courts as to whether the three-year or six-year statute of limitations applies to § 7202 offenses, the failure to pay third-party taxes as covered by § 7202 constitutes failure to pay ‘any tax,’ and thus is subject to the six-year statute of limitations under § 6531(4)).

The other question is does the statute of limitations begin to run (1) on the due date of the return and payment (30 days after the end of the quarter for Forms 941) or (2) on April 15 of the year following the year for which the employment taxes are due? The more conservative view of the due date of the Form 941 (for filing and paying) was adopted by the Northern District of Illinois since the payment due date was the date on which the crime of not paying over the withheld taxes was committed. United States v. Creamer, 370 F. Supp. 2d 715, 727-28 (N.D. Ill. 2005), reversed in an uncontested motion for reconsideration, 2006 WL 2037326 (N.D. Ill.).

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CHAPTER 1

TITLE 26 TAX VIOLATIONS

SECTION 3

FAILURE TO FILE, SUPPLY INFORMATION OR PAY TAX  
- I.R.C. § 7203

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### 1-3.01 Statutory Language

#### I.R.C. § 7203 - 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 "5 years" for "1 year."* (Emphasis added.)**

\* *Added by section 7601(a)(2)(B), 1988 Anti-Drug Abuse Act (P.L. 100-690) 11-18-88.*

\* *For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 (changed to 18 U.S.C. § 3571, commencing Nov. 1, 1986) increased the maximum permissible fines for both misdemeanors and felonies.*

Note: For the *misdemeanor offenses* set forth in § 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. 18 U.S.C. § 3571(b).

For *felony offenses* of § 7203 involving willful violations of § 6050I, the maximum permissible fine is at least \$250,000 for individuals and \$500,000 for corporations. 18 U.S.C. § 3571(c). 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. 18 U.S.C. § 3571(e).

### 1-3.02 Generally

[1] There are four separate offenses described in I.R.C. § 7203:

[a] Failure to *pay an estimated tax or tax*;

[b] Failure to *make (file) a return*;

[c] Failure to *keep records*; and,

[d] Failure to *supply information*.

### 1-3.03 Failure to Pay a Tax - Offense #1

[1] *Elements of the offense*:

[a] Person required by law to pay a tax;

[b] A failure to pay a tax at the time required by law; and,

[c] Willfulness.

United States v. Tucker, 686 F.2d 230, 232 (5th Cir.), cert. denied, 459 U.S. 1071 (1982).

[2] *Required by law to pay*

[a] This element is predicated on the requirement imposed on taxpayers under I.R.C. § 6151(a) that:

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).

[b] While most failure to pay cases involve a factual situation in which the taxpayer filed a return but did not pay the self-assessed tax declared thereon, one circuit has apparently upheld a conviction for both failure to file a tax return and failure to pay for the same year. United States v. Lewis, 651 F.2d 1163, 1165 (6th Cir. 1981).

[c] The difference between an attempted evasion of payment in violation of I.R.C. § 7201 and a failure to pay a tax in violation of I.R.C. § 7203 is the existence of an affirmative act required to make out the evasion of payment offense, e.g., the concealment of assets or use of nominees.



1. Obstinate refusing to pay taxes due, failure to file a tax return, or possession of the funds needed to pay the taxes, without more, merely constitute a willful failure to file returns or pay taxes and does not constitute tax evasion even though done willfully.

2. If the taxpayer failed to file a tax return, an evasion case can be maintained only if the taxpayer also willfully engaged in affirmative acts to conceal or mislead. United States v. McGill, 964 F.2d 222, 231 (3d Cir. 1992).

[3] *Failure to pay a tax*

Proof of a taxpayer's failure to pay is established with a certified transcript of account or a certificate of assessments and payments. Such documents routinely withstand hearsay and Confrontation Clause challenges because the documents are admissible under a hearsay exception and because the documents are not the inherently unreliable out-of-court statements at which the Confrontation Clause was directed. See, Federal Rules of Evidence, Rule 803(10); United States v. Neff, 615 F.2d 1235, 1241-42 (9th Cir. 1980). It is important to note, however, that where the Service has granted the taxpayer an extension of time, the tax due would not have to be paid until the extended date. See, United States v. Voorhies, 658 F.2d 710, 713 (9th Cir. 1981).

[4] *Willfulness* (See generally, discussion in Section 1-1.03[4])

[a] Willfulness in misdemeanor failure to pay cases is the same as in the felony hierarchy of tax offenses. Willfulness in this context simply means a voluntary, intentional violation of a known legal duty. Cheek v. United States, 498 U.S. 192, 201 (1991); United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992).

[b] There is a strict necessity as a part of showing willfulness to establish an ability to pay, thereby avoiding imprisonment for debt. Spies v. United States, 317 U.S. 492, 498 (1943). A claim that the taxpayer lacks liquid assets to pay the tax where the taxpayer has been living high and spending freely will not prevent a showing of willfulness. United States v. Tucker, 686 F.2d 230, 233-34 (5th Cir.), cert. denied, 459 U.S. 1071 (1982).

[c] The mere fact that the defendant lives in luxury, while of some probative value, is not enough, in and of itself, to establish that the taxpayer willfully failed to pay. Palermo v. United States, 259 F.2d 872, 880-82 (3d Cir. 1958). Taxpayer's professional success, financial security, ability to raise three children, and habit of always paying other obligations on time was probative. United States v. McCaffrey, 181 F.3d 854, 856 (7th Cir. 1999).

### **1-3.04 Failure to File a Return - Offense #2**

[1] *Elements of the offense:*

[a] Person required by law to file a return for the taxable period [I.R.C. § 6012];

[b] A failure to file a return at the time required by law [I.R.C. § 6072]; and,

[c] Willfulness.

See, United States v. Vroman, 975 F.2d 669, 671 (9th Cir. 1992), cert. denied, 507 U.S. 996 (1993); United States v. Harting, 879 F.2d 765, 766-67 (10th Cir. 1989); United States v. Williams, 875 F.2d 846, 849 (11th Cir. 1989); United States v. Gleason, 726 F.2d 385, 388 (8th Cir. 1984); United States v. Matosky, 421 F.2d 410, 412-13 (7th Cir. 1970), cert. denied, 398 U.S. 904 (1970); United States v. Ostendorff, 371 F.2d 729, 730 (4th Cir.), cert. denied, 386 U.S. 982 (1967); United States v. McCormick, 67 F.2d 867, 868 (2d Cir. 1933), cert. denied, 291 U.S. 662 (1934).

[2] *Required by law to file a return*

[a] Various Code provisions (and regulations thereunder) specify the events which trigger the obligation to file a return. I.R.C. § 6012 lists the persons and entities required to make returns with respect to income taxes.

[b] The government need not prove that any taxes are due, but only that gross income requirements have been met so as to trigger the filing requirement. United States v. Bell, 734 F.2d 1315, 1316 (8th Cir. 1984); United States v. Wade, 585 F.2d 573, 574 (5th Cir. 1978), cert. denied, 440 U.S. 928 (1979). But proof of taxes due will help to establish willfulness.

[c] *Individuals*. Filing requirements for individuals are governed by (1) filing status, (2) age, and (3) gross income.

1. Generally, the filing requirement imposed on taxpayers is based on the receipt of a pecified amount of gross income. The term "gross income" is broadly defined as income from "whatever source derived." I.R.C. § 61(a).

2. Periodically, legislation changes the specified amount of gross income which triggers the duty to file a return. Therefore, whether a taxpayer is required to file a return must be determined for each year under consideration.

[d] *Corporations* are required to file a Form 1120 regardless of the amount of gross income involved.

1. The corporate officer responsible for filing may be prosecuted for a willful failure to file. United States v. Neal, 93 F.3d 219, 223 (6th Cir. 1996), cert. denied, 519 U.S. 1115 (1997); Heligman v. United States, 407 F.2d 448, 451 (8th Cir. 1969), cert. denied, 395 U.S. 977 (1969); Lumetta v. United States, 362 F.2d 644, 647 (8th Cir. 1966); Bloom v. United States, 272 F.2d 215, 222-23 (9th Cir. 1959), cert. denied, 363 U.S. 803 (1960).

2. If more than one corporate officer shared the responsibility of filing the corporate return, it may be impossible to convict any officer under I.R.C. § 7203. United States v. Fago, 162 F. Supp. 125, 129 (W.D. N.Y. 1958).

3. 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. Treasury Regulations on Income Tax (1986 Code), Sec. 1.61-3 (26 C.F.R.); United States v. Ballard, 535 F.2d 400, 404 (8th Cir.), cert. denied, 429 U.S. 918 (1976). 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. United States v. Francisco, 614 F.2d 617, 618 (8th Cir.), cert. denied, 446 U.S. 922 (1980); Siravo v. United States, 377 F.2d 469, 473 (1st Cir. 1967). This rule applies even if the business is illegal.

[e] *Partnerships* are required to file Form 1065. The gross income of a partner includes his or her share of the partnership's gross income. Treas. Reg. § 1.61-13(a).

[f] *Employers* are required to file Forms 940 and 941.

[g] *Fiduciaries* of an estate or trust are required to file Form 1041.

[h] *Person engaged in a trade or business* who in the course of such trade or business receives more than \$10,000 in cash in one transaction (or two or more related transactions) must file a Form 8300. I.R.C. § 6050I.

[3] *Failure to file a return at time required by law*

[a] What constitutes a return.

1. Generally, a Form 1040 does not constitute a return unless it discloses sufficient information about the taxpayer's income to allow computation of the tax. United States v. Porth, 426 F.2d 519, 522-23 (10th Cir.), cert. denied, 400 U.S. 824 (1970).

2. Several circuits have held that a tax return which contains blanks, zeros throughout the return, or only a bottom-line figure does not constitute a return and therefore, a failure to file charge is appropriate. United States v. Mosel, 738 F.2d 157, 158-59 (6th Cir. 1984); United States v. Farber, 630 F.2d 569, 571 (8th Cir. 1980), cert. denied, 449 U.S. 1127 (1981); United States v. Moore, 627 F.2d 830, 834-35 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981); United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980); United States v. Smith, 618 F.2d 280, 281 (5th Cir. 1980), cert. denied, 449 U.S. 868 (1980); United States v. Edelson, 604 F.2d 232, 234 (3d Cir. 1979).

3. Ninth Circuit recognizes a distinction between a return that contains any numerical entries, even if they are all zeros, and returns left blank or containing other non-numeric entries, *e.g.*, asterisks. The former constitutes a return under United States v. Long, 618 F.2d 74, 75-76 (9th Cir. 1980) (because a tax could be computed from the information contained on the form), and the latter does not. United States v. Kimball, 896 F.2d 1218 (9th Cir.), reh'g granted, 914 F.2d 1386 (9th Cir. 1990), rev'd in part, remanded in part, 925 F.2d 356 (9th Cir. 1991)(per curiam).

4. Also, a blank return with a Form W-2 attached showing the salary and tax withheld has been held to constitute a return because the information necessary to allow computation of the tax was present. United States v. Crowhurst, 629 F.2d 1297, 1300 (9th Cir.), cert. denied, 449 U.S. 1021 (1980).

[b] The time prescribed for filing an income tax return is generally governed by I.R.C. § 6072.

1. Individuals are required to file on or before the 15th day of the fourth month following the close of their taxable year.

2. Corporations are required to file on or before the 15th day of the third month following the close of their tax year. Time for filing will obviously differ depending on whether the corporation is on calendar year or fiscal year. Caution: A new corporation has election of adopting taxable year filing period. Treas. Reg. § 1.4411(b)(3). See also, United States v. Bourque, 541 F.2d 290, 293-94 (1st Cir. 1976).

3. Partnerships are required to file on or before the 15th day of the fourth month following the close of their tax year.

4. I.R.C. § 6071 fixes the time for filing all other returns for which a time for filing is not otherwise enumerated in the Code, and I.R.C. § 6075 fixes the time for filing estate and gift tax returns.

5. Although taxpayers legitimately may seek and obtain an extension of time to file a return under the I.R.C. § 6081 (extension of time for filing returns), abuse of this provision can support a § 7203 conviction. See, United States v. Goldstein, 502 F.2d 526, 528 (3d Cir. 1974) (filing extension request was not intended as an attempt to comply with the legal requirement to file an income tax return, but solely in an attempt to postpone any possible day of reckoning).

6. Proof of a taxpayer's failure to file is established with a certified transcript of account or a certificate of assessments and payments. Such documents routinely withstand hearsay and Confrontation Clause challenges because the documents are admissible under a hearsay exception and because the documents are not the inherently unreliable out-of-court statements at which the Confrontation Clause was directed. See, Federal Rules of Evidence, Rule 803(10); United States v. Neff, 615 F.2d 1235, 1241-42 (9th Cir. 1980).

[c] Willfulness. (See generally, discussion in Section 1-1.03[4])

1. Willfulness in misdemeanor failure to file cases is the same as in the felony hierarchy of tax offenses. Willfulness in this context simply means a voluntary, intentional violation of a known legal duty. United States v. Murphy, 469 F.3d 1130, 1137 (7th Cir. 2006); United States v. Powell, 955 F.2d 1206, 1210 (9th Cir. 1992). Similarly, the Cheek defense applies in failure to file cases. United States v. Gaumer, 972 F.2d 723, 724-25 (6th Cir. 1992); United States v. Willie, 941 F.2d 1384, 1394-95 (10th Cir. 1991), cert. denied, 502 U.S. 1106 (1992).

2. *Examples from which willfulness may be inferred include:*

(A) The failure to file returns in successive years suggests willfulness. United States v. McCaffrey, 181 F.3d 854, 857 (7th Cir. 1999) (admission of evidence of failure to file income tax returns for nine previous uncharged years was not unduly prejudicial); United States v. Crawford, 1997 WL 532495 \* 2 (4th Cir. Aug. 29, 1997) (unpublished), cert. denied, 522 U.S. 1117 (1998) (taxpayer's earlier delinquent filing or non-filing could be evidence of willfulness); United States v. Greenlee, 517 F.2d 899, 903 (3d Cir.), cert. denied, 423 U.S. 985 (1975); United States v. Ostendorff, 371 F.2d 729, 731(4th Cir.), cert. denied, 386 U.S. 982 (1967). Both prior and subsequent failures to file may be presented on the issue of willfulness. United States v. Farris, 517 F.2d 226, 229 (7th Cir. 1975); United States v. Thompson, 513 F.2d 577, 578-79 (8th Cir. 1975).

(B) The taxpayer's filing of timely returns in prior years is evidence which permits the inference that he knew the law required him to file returns and that he willfully failed to do so. United States v. Poschwatta, 829 F.2d 1477, 1481 (9th Cir. 1987); United States v. Shivers, 788 F.2d 1046, 1049-50 (5th Cir. 1986); United States v. McCabe, 416 F.2d 957, 957-58 (7th Cir. 1969), cert. denied, 396 U.S. 1058 (1970).

(C) The taxpayer's failure to file state income tax returns may be probative of his willful failure to file federal returns. United States v. Magnus, 365 F.2d 1007, 1011-12 (2d Cir. 1966), cert. denied, 386 U.S. 909 (1967); United States v. Taylor, 305 F.2d 183, 185-86 (4th Cir.), cert. denied, 371 U.S. 894 (1962).

(D) The taxpayer's receipt of Forms W-2 received before or during the period within which filing is required, as reminders of his duty to file, United States v. Cirillo, 251 F.2d 638, 639 (3d Cir. 1957), cert. denied, 356 U.S. 949 (1958), or letters from the Service Center, United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984).

3. *Defenses which have been accepted or rejected by the courts include the following:*

(A) Although it is a common defense contention to argue that the Government has not proven tax liability, actually this defense contention has been rejected since tax liability is not an element of failure to file. Spies v. United States, 317 U.S. 492, 496 (1943). Intent to defraud is also not an element of failure to file. United States v. McCorkle, 511 F.2d 482, 485 (7th Cir. 1975); United States v. Klee, 494 F.2d 394, 395 (9th Cir. 1954).

(B) Both the defense of good faith *misunderstanding of the law* and the defense of *belief that the tax laws are unconstitutional* are acceptable defenses without regard to the objective reasonableness of the misunderstanding or belief. However, proof that the defendant possessed knowledge that the law imposes a duty on him will negate these defenses and imply that the defendant merely disagreed with the law. Cheek v. United States, 498 U.S. 192, 201-02 (1991); United States v. Willie, 941 F.2d 1384, 1395 (10th Cir. 1991), cert. denied, 502 U.S. 1106 (1992); United States v. Gaumer, 972 F.2d 723, 724 (6th Cir. 1992). Also, affirmative acts of concealment of assets or sources of income

will negate a defense of good faith misunderstanding and prove willfulness. United States v. Brooks, 174 F.3d 950, 955 (8th Cir. 1999) (defendant relied on good faith misunderstanding defense although he had placed ownership of his home and bank account in the names of trusts, used a post office box in the name of these trusts to receive mail related to his home and bank account, prepared and signed inaccurate Forms W-4, and filed a Form W-8 falsely claiming exempt status as a non-resident alien).

(C) While a taxpayer may contend that his filing of delinquent returns evinces a lack of willfulness, the Government can counter that delinquent filing constitutes an effort by the taxpayer to put himself in a better position after he knew his defalcations were about to be discovered. United States v. Crawford, 1997 WL 532495 \*2 (4th Cir. Aug. 29, 1997) (unpublished), cert. denied, 522 U.S. 1117 (1998); United States v. McCormick, 67 F.2d 867, 868 (2d Cir. 1933), cert. denied, 291 U.S. 662 (1934). Figures on delinquent returns may also be used as admissions as to income and expenses.

(D) An intent to file in the future does not constitute a defense to a I.R.C. § 7203 charge. Sansone v. United States, 380 U.S. 343, 354-55 (1965).

(E) Preoccupation with personal and business affairs has been rejected as a defense. Eustis v. United States, 409 F.2d 228 (9th Cir. 1969); United States v. Ostendorff, 371 F.2d 729, 731 (4th Cir.), cert. denied, 386 U.S. 982 (1967); Haskell v. United States, 241 F.2d 790, 793-94 (10th Cir.), cert. denied, 354 U.S. 921 (1957).

(F) Chronic depression and a neurological disorder causing taxpayer to sleep twenty hours per day does not constitute a defense where taxpayer was a successful professional and managed to raise three children. United States v. McCaffrey, 181 F.3d 854, 856-57 (7th Cir. 1999). But see, United States v. Cohen, 510 F.3d 1114, 1123-24 (9th Cir. 2007). (District Court erred in not allowing psychiatrist to testify about defendant's claimed mental disorder).

(G) Lack of funds is not a legal excuse for failure to file returns. Ripperger v. United States, 248 F.2d 944 (4th Cir. 1957), cert. denied, 355 U.S. 940 (1958). But, lack of funds, coupled with the belief that returns may not be filed without payment, may negate willfulness. United States v. Lewis, 671 F.2d 1025, 1027-28 (7th Cir. 1982).

(H) Procrastination as a defense in a failure to file case has been rejected. United States v. Browney, 421 F.2d 48, 50-51 (4th Cir. 1970).

(I) Fear that a prior history of non-filing would be discovered is no defense. United States v. Matosky, 421 F.2d 410, 412-13 (7th Cir.), cert. denied, 398 U.S. 904 (1970).

(J) It is no defense that the Government had contemporaneous knowledge of the taxpayer's failure to file. United States v. Hayes, 60-2 U.S.T.C. 9783, 6 A.F.T.R.2d (RIA) 5924 (E.D. Wis. 1960).

(K) I.R.S. failure to comply with the Paperwork Reduction Act by failing to display OMB control numbers on filing regulations, tax forms or instructions is no defense. United States v. Dawes, 951 F.2d 1189, 1190-92 (10th Cir. 1991); United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991); United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991).

4. The Fifth Amendment does not justify a taxpayer's complete refusal to file any sort of return document. See e.g., United States v. Turk, 722 F.2d 1439, 1440-41 (9th Cir. 1983); United States v. Moore, 692 F.2d 95, 97 (10th Cir. 1982).

(A) The Fifth Amendment privilege must be claimed on a filed return and only in response to specific questions on the return. United States v. Sullivan, 274 U.S. 259, 263-64 (1927); United States v. Leindendeker, 779 F.2d 1417, 1418 (9th Cir. 1986); United States v. Bulkley, 56 A.F.T.R.2d 85-6205 (10th Cir. 1984). A valid exercise of the privilege is a defense to a I.R.C. § 7203 charge. Garner v. United States, 424 U.S. 648, 661-63 (1976). A good faith claim of Fifth Amendment privilege, although unfounded, can negate willfulness in a failure to file case. United States v. Callery, 774 F.2d 1456, 1458 (9th Cir. 1985); United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982).

(B) Garner dealt with a claim of privilege as to the *source* of income. Problems arise in cases where a return is filed and the taxpayer claims the Fifth Amendment with respect to the *amount* of income. The traditional view is that the filed document does not constitute a return. United States v. Daly, 481 F.2d 28, 29 (8th Cir. 1973); United States v. Porth, 426 F.2d 519, 522-23 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970). Self-incrimination must be real and not unsubstantial. United States v. Barnes, 604 F.2d 121, 148 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980).

5. The filing of partnership returns does not excuse the non-filing of individual returns. United States v. Harrison, 72-2 U.S.T.C. 9573, 30 A.F.T.R.2d (RIA) 72-5367 (E.D. N.Y.), *aff'd without opinion*, 486 F.2d 1397 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

6. Other taxpayer considerations:

- (A) Cooperation.
- (B) Education and intellect.
- (C) Business acumen.
- (D) Background and character.

(E) Age.

(F) Health.

See United States v. McCaffrey, 181 F.3d 854, 856 (7th Cir.1999).

7. Willful failure to file a return, in violation of I.R.C. § 7203, may be elevated to willfully attempting to evade or defeat tax, in violation of I.R.C. § 7201, by showing an affirmative act, such as filing a false W-4 form.

[4] Failure to File Forms 8300

[a] I.R.C. § 6050I requires that any person who is engaged in a trade or business and who in the course of such trade or business receives more than \$10,000 in cash in one transaction (or two or more related transactions) must file a Form 8300.

[b] Failure to file a Form 8300 is prosecuted as an I.R.C. § 7203 failure to file violation. See, United States v. Rogers, 18 F.3d 265, 267 (4th Cir. 1994).

[c] *Felony Offense*. While a failure to file other I.R.S. forms is a misdemeanor, a failure to file Form 8300 prosecuted under I.R.C. § 7203 is a felony (i.e., maximum punishment is 5 years imprisonment and/or \$25,000 fine (\$100,000 for corporations).

[d] Knowledge of the law is a key criterion in cases involving a failure to file Form 8300. See, United States v. Loe, 262 F.3d 427, 435-36 (5th Cir. 2001) (prior cash transactions over \$10,000, false statements to IRS agents, and refusal to turn over records to IRS sufficient evidence for jury to find defendant knew about the reporting requirements); Rogers, 18 F.3d 265, 267 (4th Cir. 1994) (holding that the government must prove that a defendant was aware of the return obligations of a trade or business and acted to evade them).

### **1-3.05 Failure to Keep Records - Offense #3**

[1] *Elements of the offense:*

[a] Person required by law to maintain books and records; and,

[b] The willful failure to maintain books and records.

United States v. Kafes, 214 F.2d 887, 890 (3d Cir.), cert. denied, 348 U.S. 887 (1954).

[2] As a general rule, invocation of this criminal sanction entails the practical difficulty of defining what books and records were required to be maintained. By regulation the Secretary requires taxpayers to "keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters



required to be shown by such person in any return of such tax or information." Treas. Reg. 1.6001-1(a). The regulation does not mandate any form of record keeping but simply requires that such records be accurate and sufficient to enable the district director to ascertain whether liability for tax is incurred and, if so, the amount thereof. District Directors are empowered to require any person (by notice served upon him) to keep specific records which will enable the District Director to ascertain if such person is liable for tax. Treas. Reg. 1.6001-1(d).<sup>4</sup>

### **1-3.06 Failure to Supply Information - Offense #4**

[1] *Elements of the offense:*

- [a] Person required by law to supply information;
- [b] Failure to supply information at the time required by law; and,
- [c] Willfulness.

Pappas v. United States, 216 F.2d 515, 517 (10th Cir. 1954).

[2] Examples of prosecutions under this criminal sanction include:

- [a] Form 1099. United States v. Haimowitz, 404 F.2d 38 (2d Cir. 1968).
- [b] Form 1065. Pappas v. United States, 216 F.2d 515, 517-18 (10th Cir. 1954).
- [c] Frivolous returns. United States v. Quimby, 636 F.2d 86, 88 (5th Cir. 1981).

### **1-3.07 Venue**

[1] General rule: venue lies in any judicial district in which the taxpayer is required to file a tax return.

[2] I.R.C. § 6091 sets forth the places for filing returns.

[3] In general, an individual return is to be filed either in the internal revenue district where the taxpayer resides or has his/her principal place of business; or at the Service Center serving the internal revenue district where the taxpayer resides or has his/her principal place of business. In those instances where the Internal Revenue Code does not provide for the place of filing, the Secretary "shall by regulations" prescribe the place for filing.

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<sup>4</sup> Following the reorganization of the IRS, the District Director position was abolished. An Area Director holds his authority now.

### **1-3.08 Statute of Limitations**

[1] For willful failure to file a return or pay a tax - six (6) years. I.R.C. § 6531(4).

[2] For information returns required by the Code or for willful failure to either keep records or supply information, the statute of limitations is three (3) years. I.R.C. § 6531(4).

[3] For willful failure to file a Form 8300 - three (3) years. I.R.C. § 6531(4).

[4] The statute of limitations is computed from the due date of the return. Phillips v. United States, 843 F.2d 438, 443 (11th Cir. 1988).

[a] For individuals, this due date will usually be April 15th, unless an extension of time in which to file is granted, in which case, the statute is computed from the extended compliance date. Phillips, 843 F.2d at 442-43.

[b] Corporate returns are due by March 15th, unless a timely extension was made and granted, in which case, the statute is computed from the extended compliance date.

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**CHAPTER 1**

**TITLE 26 TAX VIOLATIONS**

SECTION 4

**FRAUDULENT WITHHOLDING EXEMPTION OR  
FAILURE TO SUPPLY INFORMATION - I.R.C. § 7205**

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## 1-4.01 Statutory Language

I.R.C. § 7205 - FRAUDULENT WITHHOLDING EXEMPTION 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.**

**(b) Backup Withholding on Interest and Dividends.-- If any individual willfully makes any false certification under paragraph (1) or (2)(c) of section 3406(d), then such individual 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.**

*\* As to offenses committed after December 31, 1984, the maximum permissible fine is increased to \$100,000 for individuals and corporations.*

## 1-4.02 Generally

[1] Of the two offenses contained in this section, those committed in violation of § 7205(a) are far more common.

[a] Section 7205(a) applies to Form W-4 and Form W-4E.

[b] Some common fact patterns:

1. An employee falsely claims exemption from withholding, certifying no tax liability incurred for preceding year and none anticipated for current year. This charge, when coupled with failure to file charges under Section 7203, may give rise to what is commonly referred to as a Spies evasion. See discussion in Section 1-1.03[2]. The section 7205 charge is based on the falsity of the employee's certification regarding the preceding year. United States v. Echols, 677 F.2d 498, 499 (5th Cir. 1982).

2. An employee falsely inflates the number of "allowances" claimed, thereby reducing or eliminating taxes withheld. United States v. Herzog, 632 F.2d 469, 472 (5th Cir. 1980). Because the allowances for credits and itemized deductions are difficult to compute, prosecution on this fact pattern will probably be confined to overstated allowances for dependents. The problem is that allowances for dependents were lumped together with other allowances on the face of the old W-4, so it was difficult to prove which allowances were falsely stated unless the employee provided agents with his worksheet or made admissions.



### **1-4.03 Section 7205(a) Offense**

#### *[1] Elements of the Offense*

[a] The individual had a duty to supply information to employer under I.R.C. § 3402.

[b] The individual supplied false or fraudulent information or failed to supply information which would require increase in tax withheld.

[c] The act or failure to act was willful.

United States v. Herzog, 632 F.2d 469, 471-72 (5th Cir. 1980); United States v. Olson, 576 F.2d 1267 (8th Cir.), cert. denied, 439 U.S. 896 (1978).

#### *[2] Duty to supply information*

[a] The employee's duty to supply an employer with information relating to the number of withholding exemptions claimed is contained in I.R.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.

[b] The taxpayer'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).

#### *[3] False or fraudulent information*

[a] Most courts have rejected the argument that the information provided must be either deceptive or provided with the intent to deceive. United States v. Lawson, 670 F.2d 923, 928 (10th Cir. 1982); United States v. Hinderman, 528 F.2d 100, 102 (8th Cir. 1976); United States v. Malinowski, 347 F. Supp. 347 (E.D. Pa. 1972), aff'd, 472 F.2d 850, 852-853 (3d Cir.), cert. denied, 411 U.S. 1970 (1973).

[b] The Fourth Circuit has refused to equate "false" with "untrue" and has required, for a Section 7205 conviction, that the information be either provided with the intent to deceive or deceptive enough to possibly change the amount withheld. United States v. Snider, 502 F.2d 645 (4th Cir. 1974). The W-4 involved claimed, in protest of the Vietnam conflict, three billion dependents.

[4] *Willfulness* (See generally, discussion in Section 1-1.03[4])

[a] 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).

[b] *Examples*:

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. Grumka, 728 F.2d 794, 797 (6th Cir. 1984); United States v. Arlt, 567 F.2d 1295, 1298 (5th Cir.), cert. denied, 436 U.S. 911 (1978).

2. The filing of frivolous returns and notice by the Service that the frivolous returns were invalid. United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984).

3. Defendant's filing of "Affidavits of Revocation" stating that she was not required to file returns or pay taxes, and letters to I.R.S. stating that wages are not income is evidence of willfulness. United States v. Ferguson, 793 F.2d 828, 831 (7th Cir. 1986), cert. denied, 479 U.S. 933 (1987).

4. 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. Rifon, 577 F.2d 1111, 1113 (8th Cir. 1978).

#### **1-4.04 Section 7205(b) Offense**

[1] *Elements of the Offense*

[a] Making false certification or affirmation on any statement required by a payor who is attempting to satisfy certain dividend or interest information reporting requirements; or

[b] Making a false certification about not being subject to backup withholding; and

[c] Willfulness.

[2] *Summary*

[a] This criminal provision applies to interest and dividend income which generally are not subject to a withholding tax.

[b] The Code imposes a system of backup withholding which applies when:

1. The payee fails to provide a taxpayer identification number (TIN);
2. The I.R.S. notifies the payor that the payee's TIN is incorrect;
3. The I.R.S. notifies the payor that the payee is underreporting interest and dividend; or
4. The payee fails to certify to the payor, when opening a new account after 1983, that he/she is not subject to backup withholding.

#### **1-4.05 Venue**

[1] In Section 7205 prosecutions, venue is proper in the judicial district where the false certification or statement was made (e.g., where the false Form W-4 was submitted to the employer).

[2] 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).

#### **1-4.06 Statute of Limitations**

[1] The statute of limitations for I.R.C. § 7205 offenses is three years from the time the false or fraudulent Form W-4 is filed. I.R.C. § 6531.

[2] 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., I.R.C. §§ 7201, 7203).

[3] 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 I.R.C. §§ 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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## 1-5.01 Statutory Language

### I.R.C. § 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; or

**(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;

**(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 or any tax imposed by this title;

**(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, related to the estate or financial condition of the taxpayer or other person liable in respect of 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.**

*\* For offenses committed after December 31, 1984, the maximum permissible fine is increased to \$250,000 for individuals and \$500,000 for corporations. 18 U.S.C. § 3571. For the felony offenses set forth in sections 7206(4) and (5), 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.*

## 1-5.02 Generally

[1] The most commonly committed offenses under this section are those committed in violation of I.R.C. §§ 7206(1) and (2). These subsections address false or fraudulent statements made by a taxpayer to the I.R.S. and those who aid or assist the taxpayer in making such statements. These violations typically result from a taxpayer falsely inflating deductions or under reporting income on federal income tax returns to reduce or avoid his or her tax burden.

[a] This section does not require the existence or proof of a tax deficiency. United States v. Pree, 408 F.3d 855, 867 (7th Cir. 2005); United States v. Scholl, 166 F.3d 964, 980 (9th Cir.) cert. denied 528 U. S. 873 (1999); United States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990). See also, United States v. Wilson, 887 F.2d 69, 75 (5th Cir. 1989). While it is irrelevant whether there was an actual tax deficiency, some measurable tax harm is important for gauging the probability of conviction and for purposes of sentencing.

[b] There is no collateral estoppel as to civil fraud penalties under this section. The section 7206 (1) charge is keyed into a false item, not a tax deficiency. Collateral estoppel arises only with a conviction or guilty plea to tax evasion.

[2] These cases should be distinguished from those involving false claims for tax refund which generally are prosecuted as violations under Title 18, i.e., 18 U.S.C. § 286 (conspiracy to defraud the government by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim) and 18 U.S.C. § 287 (making or presenting false, fictitious, or fraudulent claims upon or against the government). See Chapter 2 of this handbook for further discussion of these Title 18 offenses.

[3] Section 7206(4) prosecutions are rarely brought because in the usual 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.

[a] Section 7206(4) and its predecessor<sup>5</sup> have been used from an early date in cases involving the sale of untaxed liquor. E.g., United States v. Davis, 369 F.2d 775, 778 (4th Cir. 1966), cert. denied, 386 U.S. 909 (1967); United States v. Goss, 353 F.2d 671, 672 (4th Cir. 1965); Hyché v. United States, 286 F.2d 248 (5th Cir. 1961); Ingram v. United States, 241 F.2d 708, 709 (5th Cir.), cert. denied, 353 U.S. 984 (1957); Price v. United States, 150 F.2d 283, 284 (5th Cir.), cert. denied, 326 U.S. 789 (1945)(citing the predecessor statute). Cases involving the sale of untaxed liquor are beyond the scope of this handbook, but some of those cases are helpful in interpreting the statute.

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<sup>5</sup> Internal Revenue Code of 1939, Sec. 3321(a) (26 U.S.C. 1952 ed.)



[4] 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).

[5] 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, 244 (1st Cir.), cert. denied, 377 U.S. 916 (1964). And even Gentsil involved the 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, 783 (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 infra of section 7206(1) in 1-5.03.

### **1-5.03 § 7206(1) - Declaration under the Penalties of Perjury**

#### *[1] Elements of the Offense*

[a] Making and subscribing a return, statement, or other document which was false as to a material matter;

[b] The return, statement, or other document contained a written declaration that it was made under the penalties of perjury;

[c] The maker did not believe the return, statement, or other document to be true and correct as to every material matter; and,

[d] The maker falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

For authority by Circuit Court of Appeals, see:

- United States v. Bishop, 412 U.S. 346, 350 (1973)
- First Circuit: United States v. Pesaturo, 476 F.3d 60, 71 (1st Cir. 2007); United States v. Boulerice, 325 F.3d 75, 79-80 (1st Cir. 2003).
- Second Circuit: United States v. LaSpina, 299 F.3d 165, 179 (2d Cir. 2002); United States v. Pirro, 212 F.3d 85, 89 (2d Cir. 2000).
- Third Circuit: United States v. Gricco, 277 F.3d 339, 350-351 (3d Cir. 2002), United States v. Gollapudi, 130 F.3d 66, 71-72 (3d Cir. 1997), cert. denied, 523 U.S. 1006 (1998).

- Fourth Circuit: United States v. Hayes, 322 F.3d 792, 797 (4th Cir. 2003), United States v. Nicolaou, 180 F.3d 565, 572 (4th Cir. 1999), United States v. Aramony, 88 F.3d 1369, 1382 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997).
- Fifth Circuit: United States v. Loe, 262 F.3d 427, 435 (5th Cir. 2001), United States v. Mann, 161 F.3d 840, 848 (5th Cir. 1998).
- Sixth Circuit: United States v. Anderson, 353 F.3d 490, 499 (6th Cir. 2003), United States v. Tarwater, 308 F.3d 494, 504 (6th Cir. 2002).
- Seventh Circuit: United States v. Pree, 408 F.3d 855, 865-866 (7th Cir. 2005).
- Ninth Circuit: United States v. Scholl, 166 F.3d 964, 979-980 (9th Cir. 1999), cert. denied, 528 U.S. 873 (1999).
- Tenth Circuit: United States v. Scarberry, 2000 WL 235270, \*1 (10th Cir. 2000) (unpublished), United States v. Winchell, 129 F.3d 1093, 1095-1096 (10th Cir. 1997).
- Eleventh Circuit: United States v. Jabbour, 2006 WL 3369524, \*2 (11th Cir. 2006) (unpublished), United States v. Kasier, 893 F.2d 1300, 1305 (11th Cir. 1990).

[2] *"Makes" (Files) any Return, Statement or Document*

[a] Although the statute does not require that the return, statement or other document be filed with the I.R.S., some courts have held that a completed Form 1040 does not become a "return," and a taxpayer does not "make a return," until the form is filed with the I.R.S. 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) (conviction under I.R.C. § 7206(2) reversed because the return in question was never filed).

[b] The maker of the return does not have to be the actual preparer of the return. United States v. Fletcher, 322 F.3d 508, 515 (8th Cir. 2003), United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); United States v. Wilson, 887 F.2d 69, 73 (5th Cir. 1989); United States v. Badwan, 624 F.2d 1228, 1232 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

[3] *Return, Statement or Document*

[a] I.R.C. § 7206(1) expressly applies to "any return, statement, or other document" signed under penalties of perjury. The most common prosecutions under this section involve income tax returns.

[b] Examples of prosecutions based on false statements contained in "other documents" include:

1. *I.R.S. Collection Information Statements, Form 433-AB and Form 433-A.* Courts have split on whether these forms are encompassed within the statute. Compare, *United States v. Levy*, 533 F.2d 969, 974-975 (5th Cir. 1976) (forms not cognizable under § 7206(1)) with *United States v. Holroyd*, 732 F.2d 1122, 1127-1128 (2d Cir. 1984) (rejecting *Levy*, forms cognizable under section).

2. *Financial information statement submitted to the I.R.S. for settlement purposes.* *United States v. Droms*, 566 F.2d 361, 362-363 (2d Cir. 1977).

3. *Offer-in-compromise form (Form 656).* *United States v. Cohen*, 544 F.2d 781, 783 (5th Cir.), cert. denied, 431 U.S. 914 (1977).

4. *Application for extension of time to file a return.* *United States v. King*, 563 F.2d 559, 561 fn. 2 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978); *Jaben v. United States*, 349 F.2d 913, 915-916 (8th Cir. 1965).

5. *Schedule C.* *United States v. Ladum*, 141 F.3d 1328, 1335 (9th Cir.), cert. denied, 525 U.S. 1021 (1998).

6. *Schedule B.* Questions concerning foreign bank accounts. Courts have held that providing false answers to the questions at the bottom of Form 1040, Schedule B concerning interest in foreign financial accounts or foreign trusts violates section 7206(1). *United States v. Clines*, 958 F.2d 578, 581-582 (4th Cir. 1992); *United States v. Franks*, 723 F.2d 1482, 1486 (10th Cir. 1983); *United States v. King*, 2000 WL 362026, \*14 (W.D. N.Y. 2000) (unpublished). Defendants' arguments that no Title 26 statute requiring these questions be answered precluded their false statements from violating a Title 26 statute (*Franks*) or from being a material false statement (*King*) were rejected by the courts. Set forth on Schedule B is the additional requirement of filing form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR), for individuals or business entities holding funds in excess of \$10,000 in foreign financial accounts. See 31 U.S.C. § 5314. While violating this Title 31 statute is a non-tax crime, the requirements under Titles 26 and 31 can be related in criminal prosecutions. See *United States v. Clines*, 958 F.2d 578, 581 (4th Cir. 1992); *United States v. Sturman*, 951 F.2d 1466, 1476-1477 (6th Cir. 1991), cert. denied, 504 U.S. 985 (1992).

7. *Form W-2.* *United States v. Gollapudi*, 130 F.3d 66, 72 (3d Cir. 1997), cert. denied, 523 U.S. 1006 (1998), where defendant withheld federal income and FICA taxes from his employees and filed a Form 1040 stating the amount of federal income tax withheld but did not submit payment, his contention that his responses on his Form 1040 were literally true was rejected since the Forms W-2 he filed were false.

#### [4] *Signed Under Penalties of Perjury*

[a] *Rebuttable Presumption.* While the government is required to authenticate the taxpayer's signature on the return, statement, or other document in question, I.R.C. § 6064 creates a rebuttable presumption that the taxpayer actually signed the document, *i.e.*, the fact that an individual's name is signed to a return is prima facie evidence that the return was actually signed by him. *United States v. Kim*, 884 F.2d 189, 195 (5th Cir. 1989); *United States v. Cashio*,

420 F.2d 1132, 1135 (5th Cir. 1969), cert. denied, 397 U.S. 1007 (1970).

[b] It is not essential that the taxpayer personally subscribe the return as long as the person who did subscribe his name was authorized by the taxpayer to do so. United States v. Ponder, 444 F.2d 816, 822 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972).

[c] A corporation may be charged under I.R.C. § 7206(1) based on the subscription of a corporate officer. United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1454 (9th Cir.), cert. denied, 478 U.S. 1007 (1986); United States v. Ingredient Technology, 698 F.2d 88, 99 (2d Cir.), cert. denied, 462 U.S. 1131 (1983).

[5] *Did Not Believe the Document to be True and Correct*

[a] This element is proven by evidence of willfulness, *i.e.*, evidence that the maker of the return acted with knowledge that his conduct was unlawful and with the intent to do something the law forbids. Nicolaou v. United States, 180 F.3d 565, 572-73 (4th Cir. 1999). This element is not met if the maker's conduct was due to negligence, inadvertence, or mistake or if it was a result of good faith misunderstanding of the requirements of the law. Id. If there is an instruction on willfulness, or any other instruction relating to the defendant's *mens rea*, a separate jury instruction regarding the defendant's belief is not necessary. Id.

[6] *Materiality*

[a] *Courts have derived a number of tests to determine whether the falsely reported item was material:*

1. Some courts have stated that the test of whether the falsely reported item was material is whether that item must be reported correctly in order that the taxpayer can estimate and compute his tax correctly. United States v. Scarberry, 2000 WL 235270, \*2, (10th Cir.) (unpublished), cert. denied, 531 U.S. 847 (2000)(filing status falsified); United States v. Clifton, 127 F.3d 969, 970 (10th Cir. 1997); United States v. Uchimura, 125 F.3d 1282, 1285 (9th Cir. 1997) cert. denied, 525 U.S. 863 (1998); United States v. Aramony, 88 F.3d 1369, 1384 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997); United States v. Klausner, 80 F.3d 55, 60 n.4 (2d Cir. 1996); United States v. Strand, 617 F.2d 571, 574 (10th Cir.), cert. denied, 449 U.S. 841 (1980); United States v. Taylor, 574 F.2d 232, 235 fn.6 (5th Cir.), cert. denied, 493 U.S. 893 (1978); United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976); United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969).

2. Other courts have stated that the test of whether the falsely reported item was material is whether that item would have a tendency to influence the Internal Revenue Service in its processing of the return. United States v. Gaudin, 515 U.S. 506, 509 (1995); United States v. Boulterice, 325 F.3d 75, 82 (1st Cir. 2003); United States v. Pirro, 212 F.3d 86, 89 (2d Cir. 2000); United States v. Corrigan, 2000 WL 991699, \*2 (4th Cir. 2000)(unpublished); United States v. Madison, 2007 WL 1120382, \*7 (6th Cir. 2007)(unpublished); United States v. Anderson, 353 F.3d 490, 499 (6th Cir. 2003), United States v. Tarwater, 308 F.3d 494, 505 (6th Cir. 2002), Scholl v. United States, 166 F.3d 964, 979 (9th Cir. 1999), United States v. Gregg, 179 F.3d 1312, 1315 (11th Cir.

1999), cert. denied, 528 U.S. 1176 (2000) (a false statement is material if it is capable of influencing, it need not have been relied upon, as long as it was capable of exerting influence); United States v. DiRico, 78 F.3d 732, 735-36 (1st Cir. 1996); United States v. Rosnow, 977 F.2d 399, 409 (8th Cir. 1992), cert. denied, 507 U.S. 990 (1993); United States v. Fawaz, 881 F.2d 259, 409 (6th Cir. 1989); United States v. DiVarco, 484 F.2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

3. Other courts have stated that an *omitted* item may be material if it should have been reported on the return. United States v. Scholl, 166 F.3d 964, 980 (9th Cir.), cert. denied, 528 U.S. 873 (1999)(even though taxpayer believed his gambling losses were greater than his winnings, the numbers should have been reported in order to determine whether income tax is owed); United States v. Peters, 153 F.3d 445, 461 (7th Cir. 1998), cert. denied, 525 U.S. 1070 (1999); United States v. Bok, 156 F.3d 157, 164-65 (2d Cir. 1998); United States v. DiRico, 78 F.3d 732, 736 (1st Cir. 1996); Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967).

4. Other courts have stated that the test of whether the falsely reported items were material is whether those items constitute *affirmative false entries* which have a direct bearing on income figures, United States v. Fawaz, 881 F.2d 259, 263 (6th Cir. 1989); United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969), or false entries mislabeling a source of income without any bearing on the amount of tax. United States v. DiVarco, 484 F.2d 670, 673 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974). Defendant's argument that his filing of numerous Forms 1096 falsely reporting payments of several billion dollars was not material because it was patently absurd was rejected by the court in United States v. Winchell, 129 F.3d 1093, 1098 (10th Cir. 1997).

5. *Literal Truth Doctrine*. Other courts have stated the falsely reported item must be found in a statement called for by the tax form itself to be a violation of § 7206. The literal truth doctrine originated as a defense to perjury. The literal truth doctrine also provides a defense to § 7206 if the statement at issue is literally true, or, if the omission at issue occurred because the information omitted was not called for by the tax form. United States v. Borman, 992 F.2d 124, 126 (7th Cir. 1993); United States v. Reynolds, 919 F.2d 435, 437 (7th Cir. 1990), cert. denied, 499 U.S. 942 (1991). But see, United States v. Gollapudi, 130 F.3d 66, 77 (3d Cir. 1997), cert. denied, 523 U.S. 1006 (1998), where defendant withheld federal income and FICA taxes from his employees and filed a Form 1040 stating the amount of federal income tax withheld but did not submit payment, his contention that his responses on his Form 1040 were literally true was rejected since he had also filed false Forms W-2.

#### [b] *Jury Decision*

1. Although there is long-standing precedent holding that the question of materiality in prosecutions under I.R.C. §§ 7206 (1) and (2) is a question of law for the court to decide, this precedent was reversed on June 19, 1995 when the Supreme Court decided United States v. Gaudin, 515 U.S. 506 (1995). Although Gaudin actually involved a prosecution under 18 U.S.C. § 1001, not I.R.C. § 7206, for making false statements in a matter within the jurisdiction of a federal agency, the Federal Housing Administration in this case, the Gaudin decision has been applied to I.R.C. § 7206 cases. United States v. DiRico, 78 F.3d 732, 735 (1st Cir. 1996). Gaudin held, all elements of a crime must be submitted to

the jury, therefore materiality, as an element of 18 U.S.C. § 1001, must be submitted to the jury. Gaudin, 515 U.S. at 506. Gaudin has generally been applied to I.R.C. § 7206 prosecutions with the result that materiality under I.R.C. § 7206 is now considered a mixed question of law and fact for the jury, not the judge, to decide. Neder v. United States, 527 U.S. 1, 16 (1999); United States v. Randazzo, 80 F.3d 623, 631 (1st Cir. 1996); United States v. DiRico, 78 F.3d 732, 736 (1st Cir. 1996); United States v. Jackson, 196 F.3d 383, 384 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000); United States v. Aramony, 88 F.3d 1369, 1383 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997); United States v. McGuire, 99 F.3d 671, 672 (5th Cir. 1996), cert. denied, 520 U.S. 1251 (1997); United States v. Tandon, 111 F.3d 482, 488-489 (6th Cir. 1997); United States v. Uchimura, 125 F.3d 1282, 1284-85 (9th Cir. 1997), cert. denied, 525 U.S. 863 (1998); and United States v. Clifton, 127 F.3d 969, 970 (10th Cir. 1997).

[c] *Exceptions to Gaudin*

1. *Non-Factual Determinations.* The Second Circuit, in United States v. Klausner, 80 F.3d 55, 58-61 (2d Cir. 1996), held, the Gaudin rule that materiality is a question for the jury applies generally, except when the question of materiality involves non-factual determinations. In Klausner, whether itemized deductions and charitable contributions were false as to a material matter, was held to be a question which has been legislatively established and therefore was a nonfactual determination to be decided by the court.

Note: The Second Circuit is the only circuit to have adopted a non-factual determination exception to Gaudin. The Second Circuit's holding in Klausner was criticized by the Ninth Circuit in United States v. Uchimura, 125 F. 3d 1282, 1285 (9th Cir. 1997), cert. denied, 525 U.S. 863 (1998). The Ninth Circuit stated, a false deduction, though legislatively established, may still be immaterial depending on the facts of the case, and thus is a question of fact for the jury. But the Ninth Circuit noted, the Second Circuit's non-factual determination analysis in Klausner is still relevant to analysis under the Plain Error Standard of Review.

2. *Plain Error Standard of Review.* In some circuits, the plain error standard of review has become a sort of exception to Gaudin. The plain error standard of review regards errors, such as failure to submit the materiality decision to the jury, as harmless and therefore not grounds for reversal of judgement as long as the error did not prejudice substantial rights of the complaining party, the complaining party was not entitled to prevail despite the error, or as long as the error did not seriously affect the fairness, integrity or public perception of judicial proceedings.

(A) Where evidence of materiality is overwhelming, or where the evidence shows that the defendant grossly understated his income, failure to submit the materiality decision to the jury does not call into question the fairness, integrity, or reputation of the judicial proceedings. Neder v. United States, 527 U.S. 1, 18-19 (1999); United States v. Scholl, 166 F.3d 964, 980-81 (9th Cir.), cert. denied, 528 U.S. 873 (1999); United States v. Clifton, 127 F.3d 969, 971 (10th Cir. 1997); United States v. Knapp, 120 F.3d 928, 933 (9th Cir.), cert. denied, 522 U.S. 968 (1997); United States v. Uchimura, 125 F. 3d 1282, 1287 (9th Cir. 1997), cert. denied, 525 U.S. 863 (1998).

(B) It is the defendant's burden to persuade the court that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Clifton, 127 F.3d 969, 972 (10th Cir. 1997).

(C) Where defendant requested the jury instruction that materiality is a question for the judge to decide, the defendant's request precludes review for plain error. United States v. Tandon, 111 F.3d 482, 489 (6th Cir. 1997).

(D) *Exception*. In the First Circuit, a jury instruction taking the decision on materiality away from the jury is a "structural defect" not subject to plain error review. Taking the decision on materiality away from the jury is tantamount to absence of a jury verdict beyond a reasonable doubt and is a constitutional error of such a fundamental nature that it will always invalidate a conviction. United States v. DiRico, 78 F.3d 732, 736-737 (1st Cir. 1996).

[7] *Willfulness* (See generally, discussion in Section 1-1.03[4])

[a] I.R.C. § 7206(1) is a specific intent crime requiring a showing of willfulness. "Willfulness" is "a voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 192, 200-201 (1991). See also United States v. Boulerice, 325 F.3d 75, 80 (1st Cir. 2005); United States v. Madison, 2008 WL 1120382, \*8, (6th Cir. 2007)(unpublished); United States v. Abboud, 438 F.3d 554, 581 (6th Cir. 2006); United States v. Murphy, 469 F.3d 1130, 1137 (7th Cir. 2006); United States v. Ervasti, 201 F.3d 1029,1041 (8th Cir. 2000); United States v. George, 420 F.3d 991, 999 (9th Cir. 2005); United States v. Doyle, 956 F.2d 73, 75 (5th Cir. 1992); United States v. Bussey, 942 F.2d 1241, 1246 (8th Cir. 1991), *cert. denied*, 504 U.S. 908 (1992); United States v. Lankford, 955 F.2d 1545, 1550 (11th Cir. 1992).

[b] 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).

[c] *Reliance*. If knowingly false statements are made for the purpose of inducing the Government's reliance thereon, it is not necessary that there be actual reliance. Gentsil v. United States, 326 F.2d 243, 245 (1st Cir.), *cert. denied*, 377 U.S. 916 (1964).

[d] *Presumption of Willfulness*. In Helmes v. United States, 340 F.2d 15, 18 (5th Cir. 1964), *cert. denied*, 382 U.S. 814 (1965), it was held that a taxpayer presumptively intended the return to be false if he intentionally reported his income incorrectly. A "natural consequence" presumption, however, cannot foreclose defendant from establishing lack of willfulness, even in face of having done the act. United States v. Berzinski, 529 F.2d 590, 593 (8th Cir. 1976).

[e] *Inference of Willfulness*.

1. A taxpayer's knowledge of the contents of the return may be inferred from circumstantial evidence. United States v. Lavoie, 433 F.3d 95, 98 (1st Cir. 2005); United States v. Boulerice, 325 F.3d 75, 80 (1st Cir. 2003); United States v. Ytem, 255 F.3d 394, 396-397 (7th Cir. 2001); United States v. Christensen, 1999 WL 47391, \*2 (9th Cir. Feb. 22, 1999)(unpublished) (willfulness could be inferred from defendant's instruction of

secretaries to divert checks to him and from defendant's listing in company books of personal expenses as deductible business expenses and charitable contributions); United States v. Bilbrey, 1998 WL 879591, \*4, (6th Cir. Nov. 25, 1998) (unpublished) (willfulness can be inferred from proof of defendant's control over her bank accounts whose deposits and withdrawals were significantly higher than the amounts claimed as income on her jointly filed returns); United States v. Tucker, 133 F.3d 1208, 1219 (9th Cir. 1998) (willfulness could be inferred from the fact that defendant's unreported income was greater than his reported income); United States v. Winchell, 129 F.3d 1093, 1098 (10th Cir. 1997) (willfulness may be inferred from tax protester-defendant's sending of "Notices of Bills Due" to government employees involved in his case and from his filing of Forms 1096 falsely reporting payment of several billion dollars).

2. A taxpayer's signature at the bottom of the return is prima facie evidence that the signer knows the contents thereof. United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991), United States v. White, 879 F.2d 1509, 1511 (7th Cir. 1989)(Bankruptcy petition signed under penalty of perjury), United States v. Gaines, 690 F.2d 849, 854 (11th Cir. 1982); United States v. Harper, 458 F.2d 891, 894 (7th Cir. 1971), cert. denied, 406 U.S. 930 (1972); United States v. Bass, 425 F.2d 161, 163 (7th Cir. 1970); Paschen v. United States, 70 F.2d 491, 499 (7th Cir. 1934).

3. 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).

[f] Reliance 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. George, 420 F.3d 991, 999 (9th Cir. 2005); United States v. Chavin, 316 F.3d 666, 671 (7th Cir. 2002); United States v. Ford, 184 F.3d 566, 579-580 (6th Cir. 1999); United States v. Brimberry, 961 F.2d 1286, 1290-91 (7th Cir. 1992); United States v. Duncan, 850 F.2d 1104, 1117 (6th Cir. 1988), cert. denied, 493 U.S. 1025 (1990); United States v. Wilson, 887 F.2d 69, 73 (5th Cir. 1989); United States v. Claiborne, 765 F.2d 784, 798 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

#### **1-5.04 § 7206(2) - Aiding or Assisting the Preparation of a False or Fraudulent Document**

##### *[1] Elements of the Offense:*

[a] The defendant aided or assisted in, or procured, counseled, or advised the preparation or presentation of a return, affidavit, claim, or other document which involved a matter arising under the Internal Revenue laws.

[b] The return, affidavit, claim, or other document was fraudulent or false as to a material matter.



[c] *Willfulness*

Note: There is no requirement that the document be signed under penalty of perjury. Also, a tax deficiency is not a legal prerequisite under I.R.C. § 7206(2). United States v. Smith, 424 F.3d 992, 1009 (9th Cir. 2005); United States v. Ambort, 405 F.3d 1109, 1117 (10th Cir. 2005), United States v. Gambone, 314 F.3d 163, 170 (3d Cir. 2003), United States v. Hayes, 322 F.3d 792, 796 (4th Cir. 2003), United States v. Searan, 259 F.3d 434, 441, 443-44 (6th Cir. 2001), United States v. Abbas, 504 F.2d 123, 126 (9th Cir. 1974), cert. denied, 421 U.S. 988 (1975); Hull v. United States, 324 F.2d 817, 823 (5th Cir. 1963).

[2] *Aiding and Assisting*

[a] *Person Liable:*

1. I.R.C. § 7206(2) is frequently used to prosecute the aider or advisor of the preparation or presentation of a false document, e.g., tax return preparers. United States v. Crockett, 330 F.3d 706, 712 (6th Cir. 2003); United States v. Ervasti, 201 F.3d 1029, 1040-41 (8th Cir. 2000), United States v. Perez, 565 F.2d 1227, 1234 (2d Cir. 1977). However, there are also a range of civil sanctions applicable to return preparers which provide an alternative to criminal prosecution and may be more appropriate in some cases. These sanctions include:

(A) I.R.C. § 6694 penalties - \$100 per return for negligence, \$500 per return for willful understatement of tax liability.

(B) I.R.C. § 6701 - \$1,000 (\$10,000 in the case of a corporate return) penalty for aiding and abetting in the understatement of tax liability.

(C) I.R.C. § 7407 - injunctive relief.

2. This subsection applies not only to preparers but also to anyone who causes a false return to be filed. United States v. Smith, 424 F.3d 992, 1009 (9th Cir. 2005); United States v. Fletcher, 322 F.3d 508, 514 (8th Cir. 2003); United States v. Searan, 259 F.3d 434, 443-44 (6th Cir. 2001), United States v. Coveney, 995 F.2d 578, 588 (5th Cir. 1993); United States v. Hooks, 848 F.2d 785, 791 (7th Cir. 1988); United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976); United States v. Jackson, 452 F.2d 144, 147 (7th Cir. 1971). For example:

(A) Corporate officers. United States v. Thetford, 676 F.2d 170, 177 (5th Cir. 1982).

(B) Corporate tax form preparers. United States v. Damon, 676 F.2d 1060, 1063-64 (5th Cir. 1982). For a review of some of the problems which may be encountered in a return preparer case, see United States v. Brown, 548 F.2d 1194, 1199 (5th Cir. 1977).

(C) Tax shelter promoters and those who provide document/advice knowing it will be used for tax return preparation. United States v. Bryan, 896 F.2d 68, 74 (5th Cir. 1990); United States v. Flomenhoft, 714 F.2d 708, 713 (7th Cir. 1983); United States v. Dahlstrom, 713 F.2d 1423, 1426-1427 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984); United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976).

(D) Promoters of not filing tax returns. United States v. Ambort, 405 F.3d 1109, 1114 (10th Cir. 2003); United States v. Rowlee II, 899 F.2d 1275, 1279 (2d Cir. 1990); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979); United States v. Buttorff, 572 F.2d 619, 623-624 (8th Cir.), cert. denied, 437 U.S. 906 (1978).

3. Actual preparation of the false return is not necessary to sustain a conviction; supplying false information may be sufficient. United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978), rev'd on other grounds. See also, United States v. Lefkowitz, 125 F.3d 608, 618 (8th Cir. 1997), cert. denied, 523 U.S. 1079 (1998) (defendant, manager of several real estate limited partnerships, lied to his accountants that the projects were pre-leased to qualified low-income tenants and, therefore, the limited partnerships could begin taking tax credits when the units were placed in service); United States v. Foley, 73 F.3d 484, 493 (2d Cir. 1996) (defendant, a state legislator, accepted payments in exchange for agreeing to influence certain legislation and provided his political contributors with fraudulent receipts which they could use to deduct their payments as business expenses).

[3] *Return, Affidavit, Claim, or Other Document*

[a] Documents upon which prosecution has been sustained under I.R.C. § 7206(2) include:

1. Income tax returns and partnership information returns. United States v. Borgi, 182 F.2d 274, 277 (7th Cir. 1950); United States v. Kelley, 105 F.2d 912, 917 (2d Cir. 1939).

2. Form 1099 information returns. United States v. Cantone, 426 F.2d 902, 904 (2d Cir.), cert. denied, 400 U.S. 827 (1970).

[b] Note: I.R.C. § 7204 is the exclusive remedy for offenses based on providing false W-2 forms to employees and submitting a false W-3 form to the Service. Hughes v. United States, 899 F.2d 1495, 1500 (6th Cir. 1990).

[c] While the offense generally is predicated on the filing of a tax return or other document, courts have reached different conclusions as to whether an actual filing is a required element of the offense. See, United States v. Feaster, 1998 WL 33814, \*2 (6th Cir.) (unpublished), cert. denied, 488 U.S. 898 (1988) (rejecting Dahlstrom as contrary to the plain language of § 7206(2)); United States v. Dahlstrom, 713 F.2d 1423, 1429 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984) (filing of a return is an element of the offense under § 7206(2)).

[d] The filing requirement would not apply where the taxpayer is required to provide information to an intermediary, who in turn, is required to file a form with the I.R.S. In such cases the offense is completed when the document or information has been presented to the entity required by law to transmit the information to the Service. United States v. Cutler, 948 F.2d 691, 694 (10th Cir. 1991) (defendant provided false information to a stock brokerage firm which caused the firm to file Forms 1099-B containing false statements.).

[e] *Racetrack Ten Percenter Cases*. These are cases where winning race track bettors pay a third party a percentage of their winnings (customarily 10 percent) in exchange for having the third party cash the winning ticket. The third party receives the winnings in his or her own name so that the real winner's name will not appear on the Form 1099 that the race track files with the Service. See e.g. United States v. Monteiro, 871 F.2d 204, 210-11 (1st Cir. 1989); United States v. McGee, 572 F.2d 1097, 1099 (5th Cir. 1978).

#### [4] *Materiality*

[a] The same principles applied to "materiality" under I.R.C. § 7206(1), also apply to the issue under I.R.C. § 7206(2). See discussion in Section 1-5.03[6].

#### [5] *Willfulness* (See generally, discussion in Section 1-1.03[4])

[a] Willfulness has the same meaning in I.R.C. § 7206(2) as it does in other criminal tax violations, *i.e.*, a voluntary, intentional violation of a known legal duty. Cheek v. United States, 498 U.S. 192, 200 (1991); United States v. Bishop, 412 U.S. 346, 360 (1973). See also, United States v. Anderson, 353 F.3d 490, 499 (6th Cir. 2003), United States v. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990) and United States v. Iles, 906 F.2d 1122, 1127 (6th Cir. 1990).

[b] Proof of a pattern of falsity supports inference of willfulness. United States v. Conlin, 551 F.2d 534, 536 (2d Cir. 1977).

#### [c] *Accomplice Considerations*

1. You should be alert to the question of whether or not the defendant might be entitled to an accomplice instruction. For example, if the taxpayers who testify against the defendant are shown to have had knowledge that their returns were false, resulting in fraud penalties or successful prosecutions for evasion, the defendant is entitled to have the Court caution the jury to weigh accomplice testimony carefully.

2. For example, whether the person required or authorized to file a document was an accomplice is a question for the jury. Hull v. United States, 324 F.2d 817, 823 (5th Cir. 1963).

[d] A return preparer may rely in good faith without verification upon information provided by his client. The return preparer must, however, make reasonable inquiries if the furnished information appears to be incorrect. United States v. Akaoula, 1999 WL 61393, \*1 (10th Cir. Feb. 10, 1999) (unpublished).

## 1-5.05 § 7206(4) - Removal or Concealment with Intent to Defraud

### [1] *Elements of the Offense*

[a] The defendant removes deposits, or conceals or is concerned with removing, depositing, or concealing;

[b] Goods or commodities where a tax is or shall be imposed, or any property upon which levy is authorized by I.R.C. § 6331; and

[c] Intent to evade or defeat the assessment or collection of any tax imposed by Title 26.

### [2] *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. I.R.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, 654-655 (3d Cir. 1962), cert. denied, 372 U.S. 906 (1963).

In Bregman, the one-count indictment charged the defendants as follows:

The on or about October 30, 1954, at Philadelphia, in the Eastern District of Pennsylvania, Rudolph R. Bregman and Milton H.L. Schwartz, with the 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 Rudolph Motor Services, 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); Hyché 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).

### [3] *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)<sup>6</sup>.

### [4] *Willfulness* (See generally, discussion in Section 1-1.03[4])

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

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<sup>6</sup> 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, 504 U.S. 985 (1992); United States v. Mohnhey, 949 F.2d 899, 902-03 (6th Cir. 1991), and other circuits have shown no inclination to follow it, see 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).

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 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.

### **1-5.06 § 7206(5) - Compromises and Closing Agreements**

#### *[1] 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)<sup>7</sup>; and (2) compromises of any civil or criminal case, as provided for in section 7122 of the Internal Revenue Code (Title 26)<sup>8</sup>.

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.

#### *[2] Willfulness*

The word “wilfully” 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, 200 (1991); United States v. Bishop, 412 U.S. 346, 359-60 (1973).

### **1-5.07 Venue**

*[1] Section 7206(1) cases.* Venue lies in the judicial district where the false or fraudulent return was presented or filed, United States v. Hirschfeld, 964 F.2d 318, 321 (4th Cir. 1992); United States v. Bryan, 896 F.2d 68, 72 (5th Cir. 1990); United States v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990); United States v. Marrinson, 832 F.2d 1465, 1475 (7th Cir. 1987); United States v. Lawhon, 499 F.2d 352, 355 (5th Cir. 1974), cert. denied, 419 U.S. 1121 (1975); United States v. Gilkey, 362 F. Supp. 1069, 1070 (E.D. Pa. 1973), as well as the district where the false statement was prepared and signed. United States v. Rooney, 866 F.2d 28, 31 (2d Cir. 1989); United States v. Marrinson, 832 F.2d 1465, 1475 (7th Cir. 1987); United States v. King, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978).

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<sup>7</sup> “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).

<sup>8</sup> 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 “compromised” 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 of Justice, Tax Division, not to settle civil liability while the criminal case is pending. See United States Attorneys' Manual (USAM), Title 6, Sec. 6.200.

[2] *Section 7206(2) cases.* Venue lies in the judicial district where the acts of aiding and assisting took place or where the false or fraudulent return is presented or filed. United States v. Hirshfield, 964 F.2d 318, 321 (4th Cir. 1992), cert. denied, 506 US 1087 (1993). See also, Newton v. United States, 162 F.2d 795, 796-797 (4th Cir. 1947), cert. denied, 333 U.S. 848 (1948); United States v. Kelley, 105 F.2d 912, 916 (2d Cir. 1939).

[3] *Section 7206(4) cases.* Venue is proper in the judicial district in which the act of concealment took place. Venue may also be laid where the return was filed if the charge is an attempt to evade and defeat the assessment of a tax.

[4] *Section 7206(5) cases.* Venue is proper in any district in which any of the acts prohibited by section 7206(5) occur.

### **1-5.08 Statute of Limitations**

[1] In § 7206(1) cases, the six-year statute of limitations, prescribed by I.R.C. § 6531, begins to run from the signature date or the filing date, whichever is later. United States v. Mittelstaedt, 31 F.3d 1208, 1220 (2d Cir. 1994), United States v. Marrinson, 832 F.2d 1465, 1475-76 (7th Cir. 1987); United States v. Samara, 643 F.2d 701, 704 (10th Cir.), cert. denied, 454 U.S. 829 (1981).

[2] In § 7206(2) cases, the six-year statute of limitation, prescribed by I.R.C. § 6531, begins to run from the date of submission or filing of the return or other document, United States v. Habig, 390 U.S. 222, 223 (1968), but not earlier than the statutory due date of the return or other document.

[a] Note that where the act of aiding a false filing precedes the filing of a return, the significant event is the filing of the false document, not the act that aided or caused the filing.

[b] Thus, once false information is provided to the filer, 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).

[3] In a § 7206(4) case, the statute of limitations, prescribed by I.R.C. § 6531, is three years.

[4] In a § 7206(5) case, the statute of limitations, prescribed by I.R.C. § 6531, is three years.

### **1-5.09 Duplicity Considerations for Lesser Included Offenses**

[1] *No separate penalty for lesser included offenses.* Congress, in fixing varying penalties for offenses of attempting to evade federal income tax and for wilfully making and subscribing to a tax return not believed to be correct, did not intend to pyramid penalties and authorize a separate

penalty for a lesser included offense, which arose out of the same transaction and which would be established by proof of guilt of the greater offense of attempting to evade income tax. United States v. Lodwick, 410 F.2d 1202, 1206 (8th Cir. 1969), cert. denied, 396 U.S. 841 (1969). See also, United States v. Dale, 991 F.2d 819, 858-859 (D.C. Cir. 1993); United States v. Kaiser, 893 F.2d 1300, 1306 (11th Cir. 1990); United States v. Citron, 783 F.2d 307, 312-313 (2d Cir. 1986). Thus, in cases where a § 7206(1) violation is a predicate offense to a § 7201 violation, the § 7206(1) violation would be considered a lesser included offense in the § 7201 offense. With one exception (see [3] below), it may not be appropriate to charge both offenses in this situation.

[2] The Department of Justice, Tax Division, has adopted the “elements” test for lesser included offenses from Schmuck v. United States, 489 U.S. 705, 709-710 (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). Accordingly, the standard is whether the statutory elements of the lesser offense are a subset of the elements of the greater offense. Schmuck, 489 U.S. at 709-710.

[3] In Spies-evasion cases consideration should be given to charging both offenses if there is a 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 § 7206(1). See, e.g., United States v. White, 671 F.2d 1126, 1132 (8th Cir. 1982).



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**CHAPTER 1**

**TITLE 26 TAX VIOLATIONS**

**SECTION 6      FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS  
I.R.C. § 7207**

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### 1-6.01 Statutory Language

#### I.R.C. § 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. Any person required pursuant to section 6047(b), section 6104(d) or subsection (i) or (j) of section 527 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information 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.**

*\* As to offenses committed after December 31, 1984, the maximum permissible fine is increased to \$100,000 in the case of individuals and corporations.*

### 1-6.02 Elements of the Offense

[1] The delivery or disclosure to any officer or employee of the Internal Revenue Service of any list, return, account, statement, or other document;

[2] The return, statement, or other document is false or fraudulent as to a material matter; and,

[3] Willfulness or knowledge by the individual that the return, statement, or other document is false or fraudulent as to a material matter.

### 1-6.03 Summary

[1] These cases typically involve false, altered or fictitious documents presented by taxpayers under audit in response to requests for substantiation of claimed itemized deductions or other deductions or credits on the return.

[2] The "exculpatory no" doctrine is no defense to § 7207 prosecution. United States v. Galaniuk, 738 F. Supp. 225, 226 (E.D. Mich. 1990) (holding that such defense must be limited to prosecutions under 18 U.S.C. § 1001). The doctrine states that it is not an offense to say "no" to specific law enforcement inquiries, if the positive truth would be an admission of guilt.

[3] Lesser included offense problems. I.R.C. § 7207 is, arguably, a lesser included offense of § 7206(1) and could require special jury instructions. United States v. Bishop, 412 U.S. 346, 357-358 (1973); Sansone v. United States, 380 U.S. 343, 347-349 (1965); United States v.

Humphreys, 982 F.2d 254, 262 (8th Cir. 1992); United States v. Tsanas, 572 F.2d 340, 344 (2d Cir.), cert. denied, 435 U.S. 999 (1978); Escobar v. United States, 388 F.2d 661, 665-666 (5th Cir. 1967), cert. denied, 390 U.S. 1024 (1968).

#### **1-6.04 Venue**

Venue in I.R.C. § 7207 cases lies where the false or fraudulent document is delivered or disclosed to the Internal Revenue Service.

#### **1-6.05 Statute of Limitations**

The statute of limitations in I.R.C. § 7207 cases is six years from the date the false document is delivered or disclosed to the Internal Revenue Service. I.R.C. § 6531(5).

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## CHAPTER 1

## TITLE 26 TAX CRIMES

### SECTION 7            ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS - I.R.C. § 7212

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## 1-7.01 Statutory Language

### I.R.C. § 7212 - ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF 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 threats 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 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than \$3,000, or imprisoned not more than 1 year, or both. The term "threats of force," as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.**

**(b) Forcible Rescue of Seized Property.--Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do shall, excepting in cases otherwise provided for, for every such offense, be fined\* not more than \$500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.**

*\* As to offenses committed after December 31, 1984, the maximum permissible fine is increased to \$250,000 for individuals and \$500,000 for corporations. 18 U.S.C. § 3571.*

## 1-7.02 Corrupt or Forcible Interference - I.R.C. § 7212(a)

[1] *Generally*

[a] I.R.C. § 7212(a) contains two clauses which describe two separate offenses.

[b] *Corrupt or forcible interference.* The first clause prohibits threats or forcible endeavors to interfere with any officer or employee of the United States who is acting in an official capacity pursuant to Title 26. See United States v. Dean, 487 F.3d 840, 853 (11th Cir. 2007), United States v. Bowman, 173 F.3d 595, 598 (6th Cir. 1999); United States v. Przybyła, 737 F.2d 828, 829 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

[c] *Corrupt endeavors to impede.* The second clause is generally known as the "omnibus clause" and prohibits any act which obstructs or impedes, or endeavors to obstruct or impede, the due administration of the tax laws. See, United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992); United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981) (superseded by statute on other grounds), cert. denied, 454 U.S. 841 (1981).

[2] *Corrupt or Forcible Interference -Offense No. 1*

[a] *Elements of the Offense:*

1. Use of force or threats of force;
2. To intimidate, impede or obstruct; and
3. Officer/employee of U.S. acting in official capacity under Title 26.

See United States v. Lovern, 293 F.3d 695, 700 (4th Cir. 2003), United States v. Przybyla, 737 F.2d 828, 830 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

[b] *Summary*

1. These cases typically involve attempts to disrupt, intimidate or impede I.R.S. employees (Special Agents, Revenue Officers and Revenue Agents) while performing investigative, examination or collection activities.

2. Examples:

(A) Defendant assaulted one of the two I.R.S. special agents who were attempting to question the defendant about his tax liability. United States v. Guthrie, 385 F.2d 410 (7th Cir. 1967).

(B) Defendant startled a revenue agent who was performing an examination of defendant's company, by a flash or light when the defendant took a close-up flash photograph of the agent; the agent was told that his photo would be passed around and identified as an I.R.S. agent. Later, while involved in a conference with the same agent, defendant removed from his desk a gun box, which he placed on the desk in such a manner that this I.R.S. agent knew what the box purportedly contained. United States v. Sciolino, 505 F.2d 586 (2d Cir. 1974).

(C) Gun drawn and pointed in general direction of agents. United States v. Przybyla, 737 F.2d 828 (9th Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

(D) Landlord scuffled with I.R.S. agents attempting to remove a tenant's property from the landlord's building. United States v. Johnson, 462 F.2d 423 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973).

[3] *Corrupt Endeavors to Impede - "Omnibus Clause" - Offense No. 2*

[a] *Elements of the Offense:*

1. A corrupt effort, endeavor or attempt;
2. To impede, obstruct or interfere with; and

### 3. Due administration of Title 26.

See United States v. Wilson, 118 F. 3d 228,234, (4th Cir. 1997); United States v. Williams, 644 F. 2d 696, 699 (8th Cir. 1981) (superseded by statute on other grounds), cert. denied, 454 U. S. 841 (1981).

#### [b] *Corrupt*

1. An act is corrupt if it is performed with the intention to secure an unlawful benefit for oneself or another, and mere evidence of improper motive or bad or evil purpose is insufficient. United States v. McBride, 362 F.3d 360, 372 (6th Cir. 2004); United States v. Wells, 163 F.3d 889, 897 (4th Cir. 1998), cert. denied, 528 U.S. 841 (1999); United States v. Bostian, 59 F.3d 474 (4th Cir. 1994); United States v. Hanson, 2 F.3d 942, 946-47 (9th Cir. 1993) (but mere evidence of a bad purpose is insufficient to prove corruption); United States v. Brennick, 908 F.Supp. 1004, 1010-13 (D.C. Mass. 1995). See also 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, 503 U.S. 1004 (1992). Note that the Tenth Circuit has ruled the determination of what constitutes an unlawful benefit for the purpose of construing the statutory term “corruptly” is a question for the court, rather than the jury. United States v. Boos, Nos. 97-6329, 97-6330, 1999 U.S. App. LEXIS 454, \*25 (10th Cir. Jan. 14, 1999) (unpublished), cert. denied, 119 S.Ct. 1795 (1999).

2. As defined in United States v. Reeves, 752 F. 2d 995, 1001 (5th Cir. 1985), the term “corruptly” prohibits those acts done with the intent to secure an unlawful benefit either for oneself or for another. See also United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005), United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) (holding that the term, “corruptly” prohibits all activities that seek to thwart the efforts of government officers and employees in executing the laws enacted by Congress).

3. “*Willfulness*” is not a necessary element of § 7212. United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998).

#### [c] *Impedes, obstructs, or interferes with due administration of Title 26*

1. An act impedes, obstructs, or interferes with due administration of Title 26 if the I.R.S. expended a large amount of time discovering and remedying the problems caused by the defendant’s actions. United States v. Hanson, 2 F.3d 942, 946 (9th Cir. 1993).

#### [d] *Summary*

1. *Use of force against government employees.* The government’s original position that § 7212(a) only applied to conduct involving force or threats of force against Service employees was characterized by the government as “timid” in United States v. Williams, 644 F.2d 696, 699 n.12 (8th Cir. 1981) (superseded by statute on other grounds), cert. denied, 454 U. S. 841 (1981). Williams and subsequent cases clarified that § 7212(a) should be read

broadly to give full scope to its language. See, e.g., United States v. Mitchell, 985 F.2d 1275, 1278-79 (4th Cir. 1993). Other courts have similarly allowed prosecution of taxpayers for a broader range of conduct that does not involve force or violence and is not directed against government employees.

(A) *Use of force*. The "omnibus clause" does not require force or threat of force. United States v. Popkin, 943 F.2d 1535, 1539 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992). See United States v. Wells, 163 F.3d 889, 897 (4th Cir. 1999), cert. denied, 528 U.S. 841 (1999). However, the government may prove "corruption" with evidence of threats and violence, even if the government did not charge threats and violence in the indictment. United States v. Valenti, 121 F.3d 327, 332 (7th Cir. 1997).

(B) *Against Service employees*. The "omnibus clause" includes acts against victims who are not government officials or employees involved in the administration of Internal Revenue laws. United States v. Bowman, 173 F.3d 595, 598 (6th Cir. 1999), United States v. Valenti, 121 F.3d 327, 331-32 (7th Cir. 1997); United States v. Dykstra, 991 F.2d 450, 452 (8th Cir. 1993); United States v. Popkin, 943 F.2d 1535, 1541 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992).

2. Courts that applied § 7212(a) to conduct not involving the use of force or violence initially limited their application of § 7212(a) to bribery, solicitation, or subordination.

3. Subsequently, the application of § 7212(a) was extended to actions involving fraud and misrepresentation. United States v. Mitchell, 985 F.2d 1275, 1279 (4th Cir. 1993).

4. The omnibus clause generally does not require that the defendant's activities were done with the intent to impede a pending I.R.S. audit or investigation of which he was aware. As long as defendant deliberately engages in an illegal activity that is designed to cause a particular, non-routine action on the part of the I.R.S., proof of awareness of a pending I.R.S. investigation is not necessary. United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005), United States v. Bowman, 173 F.3d 595, 599-600 (6th Cir. 1999) (defendant filed false forms with the I.R.S. for the purpose of causing the I.R.S. to initiate an investigation of his creditors with the aim of harassing the creditors). See also United States v. Pullman, 187 F.3d 816, 823 (6th Cir. 1999), cert. denied, 528 U.S. 1081 (2000). The only exception to this is the situation where the defendant's activities consist of actions which are legal, such as failure to maintain records. United States v. Kassouf, 144 F.3d 952, 957-58 (6th Cir. 1998). Kassouf, however, has been limited to its facts.

5. It is uncertain whether filing false returns and other acts relating solely to the preparation and filing of one's own personal income tax returns are subject to prosecution under the omnibus clause.

6. It is not a defense to a charge under the omnibus clause that the defendant's actions were so outrageous they could not reasonably be taken seriously. United States v. Wells, 163 F.3d 889, 897 (4th Cir. 1998), cert. denied, 528 U.S. 841 (1999) (defendant



sent “Non-Statutory Abatements,” “Claims and Releases of Levy and Lien” threatening \$1 million liability in pure silver if the agents did not release the I.R.S. tax liens, and “True Bills” directing agents to sign the bills acknowledging their liability for placing illegal restraints on defendant’s property and return the bills within 10 days or they would be held personally liable for \$100 million in “silver coins” for 99 years to I.R.S. agents involved in placing tax liens on his property).

[e] *Examples of corrupt endeavors to impede can be divided into four categories:*

1. Action intended to harass an I.R.S. employee or to harass the I.R.S. in general. See United States v. McBride, 362 F.3d 360, 372-73 (6th Cir. 2004) (filing of a fraudulent petition to place IRS agent into bankruptcy was intended to intimidate the agent) United States v. Boos, Nos. 97-6329, 97-6330, 1999 U.S. App. LEXIS 454, \*27-28 (10th Cir. Jan. 14, 1999) (unpublished), cert. denied, 119 S. Ct. 1795 (1999) (defendant filed a frivolous common law lien against an agent); United States v. Winchell, 129 F.3d 1093, 1099 (10th Cir. 1997) (defendant sent “Notices of Bills Due” to agents and other non-Service employees); United States v. Dykstra, 991 F.2d 450, 453 (8th Cir. 1993); United States v. Hanson, 2 F.3d 942, 946 (9th Cir. 1993); United States v. Reeves, 782 F.2d 1323, 1326 (5th Cir. 1986); United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984) (defendant filed a false complaint against an agent).

2. Causing administrative action by the I.R.S. with the intent to harass a third party. See United States v. Saldana, 427 F.3d 298, 304-05 (5th Cir. 2005) (filing of a false Form 8300.), United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999) (defendant filed false Forms 1099 with the I.R.S. for the purpose of causing the I.R.S. to initiate an investigation of his creditors in order to harass the creditors); United States v. Yagow, 953 F. 2d 423, 424 (8th Cir. 1992).

3. Attempts to impede an I.R.S. investigation and to prevent discovery of a scheme to avoid taxes. See United States v. Dean, 487 F.3d 840, 853 (11th Cir. 2007) (Taxpayer attempted to impede a third party from responding to a lawful summons issue by the revenue agent.), United States v. Kelly, 147 F.3d 172, 176 (2d Cir. 1998) (defendant delivered an assignment agreement to an agent with the intent to impede that agent’s investigation of defendant for failure to report income by showing that income earned had actually been assigned away to a third party).

4. Establishing a scheme to avoid payment of taxes. United States v. Mitchell, 985 F.2d 1275, 1279 (4th Cir. 1993) (defendant carried out scheme of soliciting contributions from big game hunters on pretense that donations were tax deductible contributions to exempt organizations); United States v. Popkin, 943 F.2d 1535, 1541 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992) (defendant attorney created a corporation to enable client to disguise character of income earned on drug deals and repatriate it, while avoiding reporting income in taxable year earned); United States v. Williams, 644 F.2d 696, 701 (8th Cir. 1981) (superseded by statute on other grounds), cert. denied, 454 U.S. 841 (1981) (defendant assisted another person in filing a false Form W-4).

### **1-7.03 Forcible Rescue of Seized Property - I.R.C. § 7212(b)**

[1] *Elements of the Offense:*

[a] The seizure of property by person authorized to do so under the Internal Revenue Code;

[b] Defendant has knowledge that property has been so seized; and

[c] A forcible retaking of the property by the defendant.

United States v. Hardaway, 731 F.2d 1138, 1140 (5th Cir.), cert. denied, 469 U.S. 865 (1984); United States v. Main, 598 F.2d 1086, 1090 (7th Cir. 1979), cert. denied, 444 U.S. 943 (1980).

[2] *Summary*

[a] Government need only show that the seizure was performed by an official with general authority to do so under Internal Revenue Code. Any "disputes over other aspects of the legality of the seizure are irrelevant to the elements of crime of forcible rescue." United States v. Main, 598 F.2d 1086, 1090 (7th Cir. 1979), cert. denied, 444 U.S. 943 (1980).

[b] The knowledge requirement does not require that the defendant have specific intent to permanently defeat the seizure of property. Rather, the government need only show that defendant purposely, as opposed to mistakenly, retook the property knowing it had been seized by the I.R.S. United States v. Roccio, 981 F.2d 587, 591 (1st Cir. 1992); United States v. Harris, 521 F.2d 1089, 1091 (7th Cir. 1975).

[c] If any type of force is used, there is a forcible rescue. The removal or destruction of seizure stickers placed on the seized property is sufficient to support a finding of forcible rescue. See United States v. Roccio, 981 F.2d 587, 591 (1st Cir. 1992); United States v. Pilla, 550 F.2d 1085, 1091 (8th Cir. 1977); United States v. Harris, 521 F.2d 1089, 1093 (7th Cir. 1975).

[d] Proof of force exerted against person is not an essential element of I.R.C. § 7212(b). See United States v. Spicer, 547 F.2d 1228, 1231 (5th Cir. 1977) and the analysis of United States v. Owens, 511 F.2d 1205 (4th Cir. 1975) contained therein. See also United States v. Scolnick, 392 F. 2d 320, 327 (3d Cir. 1968), cert. denied, 392 U.S. 931 (1968).

#### **1-7.04 Venue**

Venue for a § 7212 prosecution lies in any judicial district where the defendant committed the corrupt act(s) or where the defendant made forcible rescue of the seized property. See 18 U.S.C. § 3237.

#### **1-7.05 Statute of Limitations**

[1] For § 7212(a) offenses there is a six-year limitation period, which begins to run from the date of the offense. I.R.C. § 6531(6). United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998); United States v. Brennick, 908 F. Supp. 1004, 1018 (1995); United States v. Workinger, 90 F.3d 1409, 1414 (9th Cir. 1996).

I.R.C. § 6531(6) provides an exception to the general three-year statute of limitations under § 6531. Specifically, subsection (6) provides for a six-year limitation period "for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States)." The Brennick court disagreed with the defendant's use of United States v. Connell, No. CR-F-94-5052 REC (E.D. Cal. Feb. 6, 1995) (unpublished), where it was successfully argued that the parenthetical language contained in this subsection effectively limits the application of this exception to § 7212(a) offenses involving intimidation of officers and employees of the United States and does not apply to offenses encompassed by the "omnibus clause." Brennick, 908 F. Supp. At 1017.

[2] For § 7212(b) offenses, the limitation period is three years from the date of the offense. I.R.C. § 6531.

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## **CHAPTER 2**

## **RELATED TITLE 18 OFFENSES**

### SECTION 1

### AIDING AND ABETTING - 18 U.S.C. § 2

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## 2-1.01 Statutory Language

18 U.S.C. § 2 - AIDING AND ABETTING

**(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.\***

*\* Section 2 is a 'derivative' offense; and, the sanctions for its violation will depend upon the sanctions imposed for the underlying offense.*

## 2-1.02 Elements of the Offense

- [1] The commission of the crime charged by another person, known or unknown.
- [2] The defendant assisted or participated in the crime.
- [3] The crime was completed.
- [4] Specific intent to cause another to commit a crime.
- [5] Guilty knowledge by the defendant.

## 2-1.03 Summary

- [1] 18 U.S.C. Section 2 is not a separate offense.

[a] Section 2 is an accomplice statute which establishes vicarious liability for any criminal violation cognizable under the United States Code, including Title 26.

[b] Section 2 does not establish a separate, distinct crime. United States v. Pepe, 747 F. 2d 632, 665 (11th Cir. 1984).

- [2] Section 2(a) punishes "aiders and abettors"

[a] It must be proven that somebody committed a crime and that the defendant affirmatively acted to aid in the commission of that crime. United States v. Perry, 643 F.2d. 38, 40 (2d Cir. 1981); Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir. 1970).

[b] Section 2 punishes as a principal, one who aids or assists another. United States v. Cowart, 595 F.2d 1023, 1031 n. 10 (5th Cir. 1979).

[c] An individual charged under § 2, must also be charged under the substantive offense. United States v. Southard, 700 F.2d 1, 19 (1st Cir. 1983) (subsequent history omitted); Londono-

Gomez v. I.N.S., 699 F.2d 475, 477 (9th Cir. 1983); United States v. Cowart, 595 F.2d 1023, 1031 n. 10 (5th Cir. 1979).

[3] Section 2(b) applies to defendants who cause another person to commit a crime.

[a] The defendant must have taken some action, without which, the crime would not have been committed by another. United States v. Gleason, 616 F.2d 2, 20-21 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980); United States v. Kelner, 534 F.2d 1020, 1022-23 (2d Cir.), cert. denied, 429 U.S. 1022 (1976).

[b] Unlike § 2(a), under § 2(b), the guilt of the person who commits the underlying crime is not relevant. United States v. Causey, 835 F.2d 1289, 1292 (9th Cir. 1987); United States v. Ordner, 554 F.2d 24, 29 (2d Cir. 1977), cert. denied, 434 U.S. 824 (1978); see also, United States v. Rapport, 545 F.2d 802, 806 (2d Cir. 1976); United States v. Kelner, 534 F.2d 1020, 1022-23 (2d Cir.), cert. denied, 429 U.S. 1022 (1976).

[4] Distinguishing § 2(a) from § 2(b).

[a] The failure to distinguish the two subsections may result in judicial confusion. See, e.g., United States v. Ruffin, 613 F.2d 408, 417-18 (2d Cir. 1979) (Wyatt, J., dissenting).

[b] The rule:

1. If the defendant acted through a guilty party, then the defendant may be charged under either § 2(a) (aids, abets, counsels) or under § 2(b) (willfully causes an act to be done). Ruffin, 613 F.2d 408.

2. If the defendant acted through an innocent third-party, § 2(b) is the correct charge. Ruffin, 613 F.2d 408. See, e.g., United States v. Ordner, 554 F.2d 24 (2d Cir. 1977), cert. denied, 434 U.S. 824 (1978) (defendant properly convicted under § 2(b) for causing a government agent to possess a weapon, when it was not illegal for the agent to possess a weapon). In United States v. Causey, 835 F.2d 1289 (9th Cir. 1987), the Ninth Circuit upheld the conviction of the defendant for aiding and assisting other taxpayers in filing false tax returns even though the government did not prove the other taxpayers knew their returns were false. Thus, in certain cases involving false refund claims, the Tax Division recommends charging section 2 with section 287.

[5] It is not necessary for the principal to be identified or convicted.

[a] The Supreme Court has held that § 2 permits conviction of an individual despite the acquittal of the actual perpetrator of the offense. Standefer v. United States, 447 U.S. 10, 15 (1980).

[b] Identification of the principal is not required. United States v. Perry, 643 F.2d 38, 45 (2d Cir. 1981); Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir. 1970).



[6] A conviction may lie even if the accessory lacked the capacity to commit the substantive offense, so long as the substantive offense was committed by a principal. United States v. Giordano, 409 F.2d 327, 330 (2d Cir. 1973); Giragosian v. United States, 349 F.2d 166, 167 (1st Cir. 1965).

[7] A conviction may lie under § 2(b) even if the agent who is caused to commit the criminal act is not guilty of any offense. United States v. Lester, 363 F.2d 68, 73 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[8] It is not necessary that the individual committing the offense have any criminal intent. A crime may be committed by a "dupe" with the requisite intent being in another. United States v. Causey, 835 F.2d 1289, 1292 (9th Cir. 1987); United States v. Bryan, 483 F.2d 88, 92 (3d Cir. 1973).

[9] The government must prove that the defendant was associated with a crime which he wished to bring about and which he sought to make succeed by his actions. United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978). Mere presence at the scene of a crime, coupled with knowledge or acquiescence, is not enough to establish aiding and abetting. United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977).

[10] A defendant can be found criminally culpable as an aider and abettor to the commission of a tax crime. United States v. Murph, 707 F.2d 895, 897 (6th Cir.), cert. denied, 464 U.S. 844 (1983) (preparation of a fraudulent tax return for another); United States v. Frazier, 365 F.2d 316 (6th Cir. 1966) (aiding and abetting in the commission of § 7201). Generally, it is preferable to charge the substantive tax offense under I.R.C. § 7206(2) instead of this Title 18 offense.

Note: In Frazier, 365 F.2d 316, the court found that one could be criminally culpable as an aider and abettor to the evasion of income taxes under § 7201 and 18 U.S.C. § 2, where the defendant participated in assisting another in the concealment of assets. It was held that the defendant did not have to be involved with the actual preparation and/or filing of returns. See also, United States v. Doughty, 460 F.2d 1360, 1362-1363 (7th Cir. 1972) (similar result).

[11] Under § 2, a defendant can be convicted for his/her role in causing omissions. United States v. Merriwether, 329 F. Supp. 1156, 1159-1160 (S.D. Ala. 1971), aff'd, 469 F. 2d 1406 (5th Cir. 1972) (defendant convicted for causing a corporation to fail to make deposits of employment taxes).

[12] 18 U.S.C. § 2 has application to anti-tax cases and other tax crimes.

[a] Filing false Forms W-4. United States v. Moss, 604 F. 2d 569 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980) (I.R.C. § 7205 and 18 U.S.C. § 2).

[b] Filing of false or fraudulent income tax returns. United States v. Causey, 835 F.2d 1289 (9th Cir. 1987); United States v. Buttorff, 572 F.2d 619, 627 (8th Cir.), cert. denied, 437 U.S. 906 (1978). Compare to I.R.C. § 7206(2).

[c] Concealment of assets. United States v. Johnson, 319 U.S. 503, 518 (1943); United States v. Frazier, 365 F.2d 316, 318 (6th Cir. 1966), cert. denied, 386 U.S. 971 (1967).

#### **2-1.04 Venue**

Venue in an aiding and abetting charge is proper not only in the district which the underlying offense took place, but also in the district where the accessorial acts took place. United States v. Delia, 944 F.2d 1010, 1013 (2d Cir. 1991); United States v. Griffen, 814 F.2d 806, 810 (1st Cir. 1987); 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).

#### **2-1.05 Statute of Limitations**

The statute of limitations for the offense of aiding and abetting is the statute of limitation applicable to the substantive offense.

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**CHAPTER 2**

**RELATED TITLE 18 OFFENSES**

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## 2-2.01 Statutory Language

18 U.S.C. § 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 under this title or imprisoned not more than ten years, or both.\***

*\* The applicability of Title 18 U.S.C. § 286 to false claim for income tax refund scenarios is established by the existing case law. See, United States v. Orr, 864 F.2d 1505 (10th Cir. 1988) and United States v. Austin, 774 F.2d 99 (5th Cir. 1985).*

## 2-2.02 Elements of the Offense

[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.

Note: The Okoronkwo case states the elements of § 286 as follows: An agreement, combination or conspiracy to defraud the United States; the defendant knew of the conspiracy and intended to join it; and, the defendant's participation was voluntary. United States v. Okoronkwo, 46 F.3d 426, 430 (5th Cir.), cert. denied, 516 U.S. 833 (1995).

## 2-2.03 Summary

[1] The crime proscribed by § 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.

[a] A conspirator's knowledge and intent can be shown by circumstantial evidence. In United States v. Okoronkwo, 46 F.3d 426, 431 (5th Cir.), cert. denied, 516 U.S. 833 (1995), knowledge and intent to join were demonstrated by witness testimony regarding the defendants' presence during filling out and filing of the returns, activities such as filing, helping others to file, and recruiting filers, and creation of cover stories misrepresenting the nature of the scheme. See also, United States v. Franklin, 168 F. 3d 490 (6th Cir. 1998) (unpublished). Both of these cases involved conspiracies to file returns seeking refunds on behalf of large numbers of low income people.

[2] The government need not establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of § 286 because, unlike § 371, an overt act is not an element of a § 286

conspiracy. United States v. Lanier, 920 F.2d 887, 892 (11th Cir. 1991).

[3] 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 coconspirator 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.

[a] As a practical matter, the elements of proof in § 286 cases generally do not differ from proof in § 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.

[b] There is no need, however, to charge an overt act in the indictment.

#### **2-2.04 Venue**

[1] 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). Thus, venue is proper in the district where the conspirators meet and formed the conspiracy.

[2] Venue has been found proper where an overt act in furtherance of the conspiracy occurred. This could be where the claim was made or prepared or in the district where the claim was presented to the government, United States v. Massa, 686 F.2d 526, 528 (7th Cir. 1982); United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981); Fuller v. United States, 110 F.2d 815, 817 (9th Cir. 1940).

[3] In cases involving tax returns transmitted electronically to the I.R.S., 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.

#### **2-2.05 Statute of Limitations**

[1] 18 U.S.C. § 3282 provides a five-year state of limitations for crimes for which a period of limitations is not otherwise specified.

[2] § 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.

[3] That six-year limitations period may well apply to § 286, but there is no case law on point. The safer course is to bring false claims cases within five years of the commission of the offense.

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**CHAPTER 2**

**RELATED TITLE 18 OFFENSES**

**SECTION 3**

**FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS 18  
U.S.C. § 287**

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## 2-3.01 Statutory Language

18 U.S.C. § 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 imprisoned for not more than five years and shall be subject to a fine in the amount provided in this title.\***

*\* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984, P. L. 98-596, codified at 18 U.S.C. § 3623, increased the maximum fines for offenses.*

*For felonies the new fine amounts are increased to \$250,000 for individuals and to \$500,000 for corporations, with additional provisions allowing for fines in the amount of two times the gain/loss caused by the offense.*

Note: 18 U.S.C. § 3623 was repealed and replaced by 18 U.S.C. § 3571 as of November 1, 1986.

## 2-3.02 Elements of the Offense

[1] The defendant knowingly made or presented, or caused another to make or present, a claim to an agency or department of the United States.

[2] The claim was false, or fictitious, or fraudulent.

[3] The defendant knew the claim was false, fictitious or fraudulent at the time it was presented.

United States v. McBride, 362 F.3d 360, 369 (6th Cir. 2004); United States v. Syme, 276 F.3d 131, 142 n.3 (3d Cir.), cert. denied, 537 U.S. 1050 (2002); United States v. Thayer, 201 F.3d 214, 222-23 (3d Cir. 1999), cert. denied, 530 U.S. 1244 (2000); United States v. Okoronkwo, 46 F.3d 426, 430 (5th Cir.), cert. denied, 516 U.S. 833 (1995); United States v. Ewing, 957 F.2d 115, 119 (4th Cir.), cert. denied, 505 U.S. 1210 (1995); 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); Johnson v. United States, 410 F.2d 38, 46 (8th Cir. 1969) cert. denied, 396 U.S. 822 (1969); United States v. Computer Sciences 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).

## 2-3.03 Summary

### [1] *Submission of a claim*

#### [a] *Presentation*

1. The government must show that the defendant presented a claim for money or property. United States v. Tieger, 234 F.2d 589, 590-91 (3d Cir.), cert. denied, 352 U.S. 941 (1958).

2. It has been held that a presentation is made when a fraudulent tax return is signed and filed. United States v. McBride, 362 F.3d 360, 369 (6th Cir. 2004); United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982). An electronically transmitted tax return seeking a refund is a claim against the United States. United States v. Williams, 164 F.3d 627 (Table) (4th Cir. 1998).

3. A presentation can also be made by depositing or cashing a tax refund check which was obtained through a fraudulent return. United States v. Miller, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977).

4. The presentation of false and fraudulent invoices submitted for payment may also be prosecuted under this section. United States v. John Bernard Industries, Inc., 589 F.2d 1353, 1360 (8th Cir. 1979); United States v. Cook, 586 F.2d 572, 576 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979).

5. The primary charges that have been used in Electronic Filing (ELF) cases are the conspiracy to file false claims and false claims statutes (18 U.S.C. §§ 286 and 287).

(A) Although an ELF return is not a complete "return" until both the electronic portion and the paper Form 8453 are filed with the I.R.S., the offense under § 287 is complete when the electronic portion of the ELF return is received by the I.R.S. Thus, there is no need to prove that a tax "return" has been filed (*i.e.*, that both the Form 8453 and the electronic portion of the return have been received by the I.R.S.). This is usually the easiest charge to prove, since little more is required than the testimony of the preparer who submitted the ELF return for the defendant and proof that the I.R.S. received the electronic portion of the return. Several changes have been made to the requirements for electronic signatures and Personal Identification Numbers (PIN). The rules in place for the tax years of the offenses should be included in the investigation and the referral.

(B) Similarly, where more than one individual is involved in an ELF scheme, the Tax Division has been successful in charging the principal(s) with conspiracy under 18 U.S.C. § 286 and/or with aiding and abetting the filing of the false claim under 18 U.S.C. § 2.

[b] *A claim*

1. A "claim" is a demand for money or property. United States v. Tieger, 234 F.2d 589, 593 (3d Cir.), cert. denied, 352 U.S. 941 (1958).

2. The "claim" need not be one for immediate payment of money. United States v. Gilliland, 312 U.S. 86 (1941).

[c] *Directly or indirectly*

1. The defendant may have directly submitted the bogus claim to the government. United States v. Catena, 500 F.2d 1319, 1322-23 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); United States v. Tieger, 234 F.2d 589, 590 (3d Cir.), cert. denied, 352 U.S. 941 (1956).

2. The defendant may have caused an intermediary to submit the claim. It is not necessary for the intermediary to have been aware of the falsity of the claim. United States v. Precision Medical Laboratories, Inc., 593 F.2d 434, 442 (2d Cir. 1978); United States v. Catena, 500 F.2d 1319, 1322-23 (3d Cir.), cert. denied, 419 U.S. 1047 (1974). See also, 18 U.S.C. § 2(b).

[2] *Against the United States*

[a] The claim must have been presented against the United States, or one of its departments or agencies.

[b] The claim received by the agency or department was one which it pays. United States v. McNinch, 356 U.S. 595, 596-98 (1958); United States v. John Bernard Industries, Inc., 589 F.2d 1353 (8th Cir. 1979); United States v. Wertheimer, 434 F.2d 1004, 1006 (2d Cir. 1970).

[c] Presentation of a false claim for a refund to an intermediary authorized to accept the claim for the government (e.g., electronic return originator or "ERO") satisfies the "presentation" requirement. United States v. Blecker, 657 F.2d 629, 634 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982).

[3] *The claim was false, fictitious or fraudulent*

[a] The three terms, "false," "fictitious," and "fraudulent" are used in the disjunctive; and, § 287 has been held to prohibit three distinct types of behavior. United States v. Foster, 229 F.3d 1196 (5th Cir. 2000), cert. denied, 531 U.S. 1197 (2001); United States v. Irwin, 654 F.2d 671, 682 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979); United States v. Maher, 582 F.2d 842, 847 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Sinder, 502 F.2d 645, 652 (4th Cir. 1974).

[b] A false claim is one which was untrue when made and known to be untrue when made. United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979).

[c] A fictitious claim is one known not to be real when made, or one which does not coincide with what actually occurred. Id.

[d] A fraudulent claim is one which was falsely made with a specific intent to deceive. Id.

#### [4] *Materiality*

[a] The circuits are split regarding the issue of whether the false, fictitious, or fraudulent fact(s) must be of a "material" nature. Section 287 is facially silent regarding materiality, as is the legislative history. Cf. 18 U.S.C. § 1001 (specific reference to a "material" fact).

1. Some courts have implied the materiality requirement into the provision. See, e.g., United States v. Durenberger, 48 F.3d 1239, 1243 n.2 (D.C. Cir. 1995); United States v. Wells, 63 F.3d 745, 750-51(8th Cir. 1995); United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) (pre Gaudin); United States v. Adler, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (pre Gaudin); United States v. Sinder, 502 F.2d 645, 652 n.12 (4th Cir. 1974) (pre-Gaudin).

2. Other decisions have held that materiality is not an element of § 287 and need not be alleged in the indictment or proven beyond a reasonable doubt. United States v. Nash, 175 F.3d 429, 433-34 (6th Cir. 1999); United States v. Upton, 91 F.3d 677, 684-686 (5th Cir. 1996); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995); United States v. Parsons, 967 F.2d 452 (10th Cir. 1992) (pre-Gaudin); United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.), cert. denied, 469 U.S. 822 (1984) (pre Gaudin); United States v. Irwin, 654 F. 2d 671, 682 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) (pre Gaudin). But see United States v. Foster, 229 F.3d 1196 (5th Cir. 2000), cert. denied, 531 U.S. 1197 (2001), citing Neder v. United States, 527 U.S. 1 (1999).

#### [5] *Knowledge*

[a] The government must be able to prove that the defendant was aware of the claim's falsity, fictitiousness or fraudulent nature. Willfulness, however, is not an element of the offense, as it is not a term used in § 287. Cf. 18 U.S.C. § 1001 (willfulness is an element of the offense).

[b] The key element to a § 287 charge is that of "knowledge" by the defendant, i.e., the defendant must have made the claim knowing it to be false, fictitious or fraudulent. United States v. Irwin, 654 F.2d 671, 682 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) (citations omitted).

[c] It has been held that knowledge may be inferred if a defendant's excuse is extremely unreasonable and impermissible. United States v. Rifin, 577 F.2d 1111, 1113 (8th Cir. 1978); United States v. Johnson, 410 F.2d 38, 44 (8th Cir.), cert. denied, 396 U.S. 822 (1969).

[d] The defendant may not use the defense of "blind ignorance" and knowledge may be inferred upon proof that the defendant deliberately ignored the obvious. United States v.

Holloway, 731 F.2d 378, 380-81 (6th Cir. 1984).

[6] *Actual loss to the government is not an element.*

[a] It is not necessary that the government have incurred an actual loss. United States v. Gottfried, 165 F.2d 360, 367-68 (2d Cir.), cert. denied, 333 U.S. 860 (1948).

[7] *Scope of § 287*

[a] *Purpose.* The purpose of § 287 is to protect the government from false and fraudulent claims made against it for money and/or property, regardless of the form of the claim or the government agency/department involved. It was the intent of Congress to prevent deceptions which would impair, defeat, or obstruct the functions of the government's agencies. Rainwater v. United States, 356 U.S. 590, 592 (1958); United States v. Gilliland, 312 U.S. 86, 92-93 (1941); United States v. Maher, 582 F.2d 842, 847-848 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

[b] *Relation to other crimes.*

1. *18 U.S.C. § 286.* Section 286 makes it a crime to conspire to defraud the United States by obtaining the "payment or allowance" of any false claim. All that is required under 18 U.S.C. § 286 is agreement to defraud and knowledge that the objective is illegal—overt act and payment of the claim are not required.

2. *18 U.S.C. § 371.* Section 371 makes it a crime to conspire to commit any federal offense or to conspire to defraud the United States. In addition to the agreement and knowledge elements, an overt act is also required.

3. *18 U.S.C. § 1001.* Section 1001, discussed infra, makes it a crime to knowingly and willfully, materially falsify material facts, make false statements or representations, or make or use false documents or writings in a matter within the jurisdiction of a United States agency.

4. *I.R.C. § 7206(1) and (2).* Section 7206(1) makes it a crime to subscribe to a materially false return under penalties of perjury which the maker does not believe to be true and with the intent to violate the law. Section 7206(2) makes it a crime to willfully aid or assist in the preparation or presentation of a return which is false as to a material matter.

[c] *§ 287 and tax crimes.* Section 287 is applicable to acts committed in violation of other tax crimes, including: filing false income tax claims; negotiating fraudulent tax refund checks; and filing multiple false refund claims.

1. A tax return which seeks a refund is a claim against the government. United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982).

2. The falsity of the item may be established, in part, by the Service's transcript of account.

3. The defendant does not have to be the person who filed for the refund. United States v. Holloway, 731 F.2d 378, 380-381 (6th Cir. 1984) (prisoners filed false refund claims and the defendant collected the refund checks and negotiated them, returning the proceeds, less a commission to the inmates). See also, United States v. Branker, 395 F.2d 881, 889-890 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969).

[d] *False Income Tax Returns.*

1. The filing of a false tax return pursuant to a scheme to obtain unjustified tax refunds has been held to establish a § 287 violation. United States v. Miller, 545 F.2d 1210, 1212 n.10 (9th Cir.), cert. denied, 430 U.S. 930 (1977). See also, United States v. Haynie, 568 F.2d 1091, 1092 (5th Cir. 1978) (defendant filed two returns, one real one and one false, claiming refunds on both - the defendant was not entitled to any refund); Kercher v. United States, 409 F.2d 814, 817-818 (8th Cir. 1969) (multiple filing of false tax returns for actual individuals with refund checks mailed to an address controlled by the defendant who thereafter negotiated the checks).

2. The claim can involve the filing of false claims in the names of fictitious persons, or the actual names of real third-parties. Kercher v. United States, 409 F.2d 814, 817 (8th Cir. 1969).

3. It has also been held that the filing of a false amended tax return requesting the refund of taxes previously withheld is within the scope of § 287. United States v. Rifin, 577 F.2d 1111 (8th Cir. 1978).

4. While most cases involving false claims for a tax refund can be prosecuted under I.R.C. §§ 7206(1) and/or (2), violations of §§ 286 and 287 are the preferred charges for such acts, particularly where there are multiple claims for refunds based on false or fraudulent income tax returns. Generally, I.R.C. § 7206(1) (false or fraudulent statements made by a taxpayer to the I.R.S.) and § 7206(2) (aiding or assisting the taxpayer in making such statements) are used to prosecute cases which result from a taxpayer falsely inflating deductions or underreporting income on federal income tax returns to reduce or avoid his or her tax burden.

[e] *Negotiation of Refund Checks.* The endorsement and presentation of an income tax refund check for payment or deposit, the proceeds of which are not properly the property of the person presenting the check has been held to violate § 287. United States v. Branker, 395 F.2d 881 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969). Note: Cases which involve lost or stolen income tax refund checks are generally within the jurisdiction of the Secret Service.

## **2-3.04 Venue**

Violations of § 287 may be brought and prosecuted in the district where the claim was prepared, mailed from, filed, presented, or acted upon. 18 U.S.C. § 3237; United States v. Blecker, 657 F.2d 629, 632,633 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982); United

States v. Massa, 686 F.2d 526, 527-528 (7th Cir. 1982); Imperial Meat Co. v. United States, 316 F.2d 435, 440 (10th Cir.), cert. denied, 375 U.S. 820 (1963).

### **2-3.05 Statute of Limitations**

[1] The applicable limitations period for a § 287 violation is five (5) years. 18 U.S.C. § 3282.

[2] By comparison there is a six year statute of limitations for violations charged under I.R.C. § 7206(1) (false or fraudulent statements made by a taxpayer to the I.R.S.) and § 7206(2) (aiding or assisting the taxpayer in making such statements) are six years. See, I.R.C. § 6531.



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## CHAPTER 2

## RELATED TITLE 18 OFFENSES

### SECTION 4

### CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES - 18 U.S.C. § 371

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## 2-4.01 Statutory Language

18 U.S.C. § 371 - CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE 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 under this title 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, codified at 18 U.S.C. § 3623, increased the maximum fines for offenses.*

*For felonies the new fine amounts are increased to \$250,000 for individuals and to \$500,000 for corporations, with additional provisions allowing for fines in the amount of two times the gain/loss caused by the offense.*

Note: 18 U.S.C. § 3623 was repealed and replaced by 18 U.S.C. § 3571 as of November 1, 1986.

## 2-4.02 Generally

[1] *Purpose of the statute.* The essence of the crime of conspiracy is the "agreement." Congress deemed it desirable to make conspiracy a separate and distinct offense, even in cases where the conspiracy is not successful. Congress felt collective criminal activity was more dangerous than individual criminality; and, collective activity was viewed as being more likely to succeed. United States v. Jimenez Recio, 537 U.S. 270, 274 (2005), Callahan v. United States, 364 U.S. 587, 593-94 (1961); Pereira v. United States, 347 U.S. 1, 11-12 (1954). United States v. Bicaksiz, 194 F.3d 390, 398 (2d Cir. 1999).

[2] The crime of conspiracy is a separate and distinct offense.

[a] A defendant may be convicted of the crime of conspiracy even if the underlying substantive offense was not committed. Pereira, 347 U.S. at 11-12. See also, Salinas v. United States, 522 U.S. 52, 66 (1997).

[b] The gist of conspiracy is the unlawful agreement and as such the crime of conspiracy does not merge with the underlying offense. See, Pinkerton v. United States, 328 U. S. 640, 642-

643 (1946); United States v. Chandler, 388 F. 3d 796, 806 (11th Cir. 2004); United States v. Nims, 524 F. 2d 123, 126 (5th Cir. 1975).

[c] A defendant may be convicted of conspiracy even if he/she was incapable of committing the underlying substantive crime.

[3] Section 371 is the general conspiracy statute. Other conspiracy statutes also exist. See, e.g., 21 U.S.C. § 846 (conspiracy to distribute controlled dangerous substances), 18 U.S.C. § 1951 (conspiracy to interfere with interstate commerce), 18 U.S.C. § 1962(d) (conspiracy to violate RICO). Conspiracies involving tax matters are subject to prosecution under both prongs of § 371, i.e., commission of a substantive offense such as I.R.C. § 7201, or conspiracy to defraud the government (commonly referred to as a Klein conspiracy discussed infra).

### **2-4.03 Elements of the Offense**

[1] The general conspiracy statute, 18 U.S.C. § 371, encompasses two distinct types of conspiracies.

[a] A conspiracy to commit *any* federal offense.

[b] A conspiracy to defraud the United States, or *any* agency thereof, which includes the Service.

[2] The essential elements of a § 371 offense are:

[a] An *agreement* by two or more parties.

[b] To *commit an offense* against the United States; or, *to defraud* the United States or one of its agencies.

[c] An *overt act* by one or more of the parties in furtherance of the agreement.

[d] The *requisite intent* to defraud or to commit the substantive offense.

Cases from Courts of Appeal citing these elements are:

- First Circuit: United States v. Tobin, 480 F.3d 53, 58 (1st Cir. 2007); United States v. Munoz-Franco, 487 F.3d 25, 45-46 (1st Cir. 2007).
- Second Circuit: United States v. Snype, 441 F.3d 119, 142 (2d Cir. 2006).
- Fourth Circuit: United States v. Cardwell, 433 F.3d 378, 390 (4th Cir. 2005).
- Fifth Circuit: United States v. Mann, 493 F.3d 484, 492-493 (5th Cir. 2007).
- Sixth Circuit: United States v. White, 492 F.3d 380, 395 (6th Cir. 2007).

- Seventh Circuit: United States v. Soy, 454 F.3d 766, 768 (7th Cir. 2006).
- Eighth Circuit: United States v. Pierce, 479 F.3d 546, 549 (8th Cir. 2007).
- Tenth Circuit: United States v. Pursley, 474 F.3d 757, 767 (10th Cir. 2007).
- Eleventh Circuit: United States v. Tampas, 493 F.3d 1291, 1298 (11th Cir. 2007); United States v. Ndiaye, 434 F.3d 1270, 1294 (11th Cir. 2006).

## 2-4.04 Summary

[1] *The agreement.*

[a] Without an agreement, there is no conspiracy. United States v. Rabinowich, 238 U.S. 78, 88 (1915); United States v. Tobin, 480 F.3d 53, 58 (1st Cir. 2007); United States v. Woodward, 459 F.3d 1078, 1083 (11th Cir. 2006); United States v. Weidner, 437 F.3d 1023, 1031 (10th Cir. 2006); United States v. Perez, 489 F.2d 51, 60 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974) ("To conspire is to agree--the presence of an agreement is the primary requirement for the establishment of a conspiracy.")

[b] In order to establish the existence of an agreement, it is necessary to show that the conspirators tacitly reached a mutual understanding to accomplish an unlawful act by means of a common plan, with one or more acts committed to implement the agreement. United States v. Falcone, 311 U.S. 205, 210 (1940); United States v. White, 492 F.3d 380, 395 (6th Cir. 2007), United States v. Williams, 469 F.3d 963, 967 (11th Cir. 2006), United States v. Williams, 340 F.3d 563, 568 (8th Cir. 2003); United States v. Fletcher, 322 F.3d 508, 513-514 (8th Cir. 2003); United States v. Monroe, 552 F.2d 860, 864 (9th Cir.), cert. denied, 431 U.S. 972 (1977).

[c] It is not necessary to prove a formal or an express agreement. United States v. Freeman, 434 F.3d 369, 376 (5th Cir. 2005); United States v. Fletcher, 322 F.3d 508, 513-514 (8th Cir. 2003), United States v. Searan, 259 F.3d 434, 441-442 (6th Cir. 2001); United States v. Harris, 733 F.2d 994, 1004 (2d Cir. 1984) (a firm agreement is not required); United States v. Duff, 332 F.2d 702, 705-706 (6th Cir. 1964).

[d] Generally, it will be necessary to prove the existence of the requisite agreement other than by direct evidence as it is usually impossible to obtain direct evidence of the agreement. Iannelli v. United States, 420 U.S. 770, 777 n.10 (1975); United States v. Winkle, 477 F.3d 407, 415 (6th Cir. 2007), United States v. Pursley, 474 F.3d 757, 767-768 (10th Cir. 2007), United States v. Martinez-Medina, 279 F.3d 105, 113-114 (1st Cir. 2002), United States v. Ervasti, 201 F.3d 1029, 1038 (8th Cir. 2000); United States v. Hartley, 678 F.2d 961, 969 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Ballard, 663 F.2d 534, 543 (9th Cir. 1981); United States v. Caplan, 633 F.2d 534, 544 (9th Cir. 1980).

[e] It is sufficient if the proof establishes a mutual understanding to accomplish an unlawful act; or, to accomplish a lawful act by unlawful means. American Tobacco Co. v. United

States, 328 U.S. 781, 809-10 (1946); United States v. Heck, 499 F.2d 778, 787 (9th Cir.), cert. denied, 419 U.S. 1088 (1974).

1. A tacit agreement is enough. United States v. Pesaturo, 476 F.3d 60, 72 (1st Cir. 2007), United States v. Wintermute, 443 F.3d 993, 1003 (8th Cir. 2006), United States v. Martinez, 430 F.3d 317, 330 (6th Cir. 2005); United States v. Brown, 739 F.2d 1136, 1142 (7th Cir.), cert. denied, 469 U.S. 933 (1984); United States v. Pintar, 630 F.2d 1270, 1275 (8th Cir. 1980); see also, Nilva v. United States, 212 F.2d 115, 121 (8th Cir.), cert. denied, 348 U.S. 825 (1954).

2. An express verbal agreement is not required; all that is necessary is that the conspirators have arrived at a mutual understanding by some means. United States v. Weidner, 437 F.3d 1023, 1033 (10th Cir. 2006); United States v. Albert, 675 F.2d 712, 716 (5th Cir. 1982); United States v. Duff, 332 F.2d 702, 705 (6th Cir. 1964).

3. Proof of the essential nature of the scheme is required. Blumenthal v. United States, 332 U.S. 539, 557 (1947).

[f] It has been held that where the government proves that the defendant and at least one other party agreed to engage in an unlawful act that it is not necessary that the other party to the agreement be identified or convicted. Rogers v. United States, 340 U.S. 367, 375 (1951). See discussion regarding co-conspirators, infra.

[2] *Parties to the conspiracy.*

[a] *At least two parties required.* The essential element of conspiracy is an agreement between two or more parties. The offense requires at least two parties, since an individual can not conspire with himself. United States v. Falcone, 311 U.S. 205, 210 (1940); Morrison v. California, 291 U.S. 82, 92 (1934); cf. Rogers v. United States, 340 U.S. 367, 375 (1951) (upon proof of the agreement, it is not necessary that the other parties be identified or convicted). See United States v. Vega-Figueroa, 234 F.3d 744 (1st Cir. 2000); United States v. Bicaksiz, 194 F.3d 390, 398-399 (2d Cir 1999).

1. Consequently, courts have held that a defendant cannot be convicted for conspiracy where the only "conspirator" in addition to the defendant is an undercover agent. United States v. Reyes, 239 F.3d 722, 738 (5th Cir. 2001); United States v. Duff, 76 F.3d 122, 127 (7th Cir. 1996); United States v. Escobar de Bright, 742 F.2d 1196, 1199 (9th Cir. 1984); United States v. Moss, 591 F.2d 428, 434 n.8 (8th Cir. 1979); United States v. Chase, 372 F.2d 453, 459 (4th Cir. 1967); Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965).

2. Of course, an indictment will lie if there are at least two other parties in addition to the undercover agent.

3. *Overt act distinguished.* Although conspiracies require agreement between at least two parties, the requisite overt act only requires the participation of one conspirator for commission in furtherance of the conspiracy. United States v. Enstam, 622 F.2d 857, 867 (5th Cir. 1980). See also, United States v. Girard, 744 F.2d 1170, 1174 (5th Cir.

1984); United States v. Everett, 692 F.2d 596, 599 (9th Cir. 1982).

[b] *Unindicted coconspirators*. There is a split among the circuits as to whether it is proper or necessary to name unindicted coconspirators. Compare, United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977), with United States v. Booty, 621 F.2d 1291, 1300 n.27 (5th Cir. 1980).

[c] *Compare unknown defendants*. As long as the evidence indicates the defendant entered into an agreement with someone other than a government agent, the indictment will lie even if the identity of the other conspirator(s) is not known.

[d] *Potential defendants*.

1. An individual can conspire with a corporate entity. See, United States v. Lowder, 492 F.2d 953 (4th Cir.), cert. denied, 419 U.S. 1092 (1974) (individual prosecuted for conspiring with six corporations which he controlled). But, there is a question as to whether an individual can conspire with a wholly owned corporation. See, Nelson Radio Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

2. Conversely, a corporation is viewed as a person and the corporation may be indicted as a coconspirator. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166 (1940).

3. There is an open issue as to whether a corporation can be found guilty for conspiring with its own officers and employees.

(A) Under traditional agency law, the acts of the agents become the acts of the corporation and, therefore, only a single entity/party is involved. Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

(B) Some courts have retreated from the traditional rule and have not allowed the fiction of corporate entity to be used as a shield against criminal prosecution and have allowed convictions where the conspiracy is between a corporation and its agents. United States v. S & Vee Cartage Co., 704 F.2d 914, 920 (6th Cir.), cert. denied, 464 U.S. 935 (1983). See also, United States v. Hartley, 678 F.2d 961, 972 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983).

4. The common law fiction that a husband and wife are a single unit is not recognized. Thus, a husband and wife may conspire with each other. United States v. Dege, 364 U.S. 51 (1960); Pegram v. United States, 361 F.2d 820, 821-22 (8th Cir. 1966).

5. *Acquittal of other coconspirators*. The courts have held that the acquittal of one conspirator, in a two co-conspirator case, will preclude the conviction of the other. United States v. Peterson, 488 F.2d 645, 651 (5th Cir.), cert. denied, 419 U.S. 828 (1974).



[3] *Nexus required: parties and the agreement.*

[a] Circumstantial as well as direct evidence may be used to establish a party's connection to a conspiracy. United States v. Boesen, 491 F.3d 852, 857 (8th Cir. 2007); United States v. Tobin, 480 F.3d 53, 58 (10th Cir. 2007); United States v. Escobar-Figueroa, 454 F.3d 40, 48-49 (1st Cir. 2006); United States v. Svoboda, 347 F.3d 471, 477 (2d Cir. 2003); United States v. Reynolds, 511 F.2d 603, 606 (5th Cir. 1975).

[b] Once the existence of a conspiracy has been established, it has been held that only slight additional evidence is required to support the finding that a defendant was connected to the conspiracy. United States v. Harris, 542 F.2d 1283, 1305-06 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977). But, while the fact that the "slight evidence" standard is sufficient for appellate review of the sufficiency of the evidence to support a conviction, a trial court's jury instruction to that effect would constitute reversible error. United States v. Partin, 552 F.2d 621, 628 (5th Cir.), cert. denied, 434 U.S. 903 (1977); United States v. Harris, 542 F.2d at 1305. See, United States v. Cardwell, 433 F.3d 378, 390-391 (4th Cir. 2005); United States v. Toler, 144 F.3d 1423, 1426-1428 (11th Cir. 1998).

[c] The mere presence of an individual at the scene of a crime or the mere association with coconspirators are not in and of themselves enough to establish that person is a member of the conspiracy. See, United States v. Binkley, 903 F.2d 1130, 1134 (7th Cir. 1990); United States v. Soto, 716 F.2d 989, 991 (2d Cir. 1983); United States v. Graham, 548 F.2d 1302, 1312 (8th Cir. 1977); United States v. James, 528 F.2d 999, 1013 (5th Cir. 1976); United States v. Johnson, 513 F.2d 819, 824 (2d Cir. 1975); United States v. Noah, 475 F.2d 688, 697 (9th Cir.), cert. denied, 414 U.S. 821 (1973).

[d] An individual who has no knowledge of the conspiracy, but who simply acts to further the conspiracy does not, without more, also become a coconspirator. United States v. Provenzano, 615 F.2d 37, 44-45 (2d Cir.), cert. denied, 446 U.S. 953 (1980).

[4] *Overt act.*

[a] *The government must prove that at least one overt act in furtherance of the conspiracy was knowingly committed by one of the conspirators.* Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Adamo, 534 F.2d 31 (3d Cir. 1976); United States v. Soto, 436 F.2d 780 (2d Cir.), cert. denied, 404 U.S. 834 (1971).

1. A mere agreement is not enough; the crime of conspiracy requires at least one overt act, by one or more of the parties to the conspiracy, in furtherance of the conspiracy. United States v. Bayer, 331 U.S. 532, 542 (1947); United States v. Tobin, 480 F.3d 53, 58 (1st Cir. 2007); United States v. Weidner, 437 F.3d 1023, 1033 (10th Cir. 2006); Woodring v. United States, 376 F.2d 619, 621 (10th Cir.), cert. denied, 389 U.S. 885 (1967).

2. The commission of an overt act is an essential element of the crime of conspiracy. United States v. Small, 472 F.2d 818, 819 (3d Cir. 1972); Hansen v. United States, 326 F.2d 152, 156 (9th Cir. 1963).

3. The overt act must have been committed by one of the members of the conspiracy; or, done at their direction or with their assistance. United States v. Dago, 441 F.3d 1238 (10th Cir. 2006); United States v. Carbo, 314 F.2d 718, 747 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).

4. There must be substantial evidence of the overt act. Slight evidence is not enough. United States v. Malatesta, 590 F.2d 1379, 1382 (5th Cir. 1979).

[b] *In furtherance of the conspiracy.* The government must prove that the commission of the overt act was in furtherance of the conspiracy. Grunewald v. United States, 353 U.S. 391, 396-397 (1957); Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Provenzano, 615 F.2d 37, 45-46 (2d Cir.), cert. denied, 446 U.S. 953 (1980); Castro v. United States, 296 F.2d 540, 542-543 (5th Cir. 1961). The overt act must have been calculated to achieve some goal or objective of the conspiracy. Grunewald, 353 U.S. at 414-15.

[c] *There is no requirement that the overt act be itself a crime.* As an element of the crime, proof of the overt act serves to establish the fact that the conspiracy was in operation. Yates v. United States, 354 U.S. 298, 334 (1957). See, United States v. Soy, 454 F.3d 766, 768 (7th Cir. 2006); United States v. Buckner, 610 F.2d 570, 573 (9th Cir.), cert. denied, 445 U.S. 961 (1980); United States v. Walls, 577 F. Supp. 772, 773 (N.D. Ga. 1984).

1. If the overt act is itself a substantive crime, e.g., violations of § 7201 or § 7206, then the proof used to prove the elements of the underlying crime also furnishes proof of the overt act. (Examples include false book entries and laundered proceeds of checks through bank accounts of surrogate check cashers.) United States v. Sanzo, 673 F.2d 64, 69 (2d Cir. 1982).

2. The overt act can be a wholly legal act. Yates v. United States, 354 U.S. 298 (1957). See, e.g., Melia v. United States, 667 F.2d 300, 304 n.4 (2d Cir. 1981) (telephone call); United States v. Winter, 509 F.2d 975, 982 (5th Cir.), cert. denied, 423 U.S. 825 (1975) (boarding a boat).

[d] *Direct contact with a federal agency is not required.* As long as overt act and the other elements of § 371 are proven, direct contact with the government need not be proven. In United States v. Ballistrea, 101 F.3d 827, 831-832 (2d Cir. 1996), the defendant was convicted of conspiracy to defraud the FDA in violation of § 371 for warning the distributors of an unapproved medical device he was marketing to conceal from the FDA the fact that they were making claims of curative effects to customers. The Second Circuit rejected the defendant's arguments that his conduct was not covered by § 371 because he made no submissions to the FDA or misrepresentations to government agents.

[e] *It is not necessary that the defendant charged with conspiracy have committed the overt act.* See, Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Chandler, 586 F.2d 593, 599 (5th Cir. 1978), cert. denied, 440 U.S. 927 (1979); United States v. Kelly, 569 F.2d 928, 936 (5th Cir.), cert. denied, 439 U.S. 829 (1978).

1. The crime of conspiracy only requires that one member of the conspiracy commit one overt. The act(s) of one of the members is viewed as an act by all of the members of the conspiracy. See, Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Cardwell, 433 F.3d 378, 391 (4th Cir. 2005); United States v. Maceo, 947 F.2d 1191, 1198 (5th Cir. 1991); United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1985); United States v. Ocha-Torres, 626 F.2d 689, 692 (9th Cir. 1980); United States v. Chandler, 586 F.2d 593, 605 (5th Cir. 1978), cert. denied, 440 U.S. 927 (1979); United States v. Adamo, 534 F.2d 31, 38-39 (3d Cir.), cert. denied, 429 U.S. 841 (1976). See also, United States v. Rabinowich, 238 U.S. 78, 86 (1915). It is not necessary that all of the conspirators join in the overt act.

2. It is not necessary that each conspirator have knowledge of the acts committed by the other members; nor, is it necessary that a conspirator participate in all of the activities in furtherance of the conspiracy. United States v. Brunette, 615 F.2d 899, 903 (10th Cir. 1980). See also, United States v. Searan, 259 F.3d 434, 441-442 (6th Cir. 2001); United States v. Sanchez, 917 F.2d 607, 610 (1990); United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981).

[f] *The Second Circuit has held that the overt act must have been committed while the conspiracy was in existence.* United States v. Sacco, 436 F.2d 780, 783 (2d Cir.), cert. denied, 404 U.S. 834 (1971).

[5] *Intent.*

[a] The government must establish that the defendant knowingly, willfully, and voluntarily became a member of, or a participant in, the conspiracy. Blumenthal v. United States, 332 U.S. 539, 557 (1947); United States v. Brown, 31 F.3d 484, 490 (7th Cir. 1994); United States v. Gomberg, 715 F.2d 843, 847 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Graves, 669 F.2d 964, 969 (5th Cir. 1982); United States v. McPartlin, 595 F.2d 1321, 1361 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Graham, 548 F.2d 1302, 1312 (8th Cir. 1977).

[b] It must be shown that the defendant knew of the conspiracy and that with such knowledge he elected to become a participant in the conspiracy. See, e.g., Graves, 669 F.2d at 969; United States v. Nguyen, 493 F.3d 613, 624-625 (5th Cir. 2007); United States v. Morales-Rodriguez, 467 F.3d 1, 8-9 (1st Cir. 2006).

[c] The defendant's willfulness is a critical element. See, e.g., United States v. Ortiz, 447 F.3d 28, 32-34 (1st Cir. 2006); United States v. Velez, 652 F.2d 258, 261 (2d Cir. 1981); United States v. De la Torre, 605 F.2d 154, 156 (5th Cir. 1979).

[d] The courts have held that the intent to commit the substantive offense is a necessary element to the crime of conspiracy. See, e.g., Ingram v. United States, 360 U.S. 672, 678 (1959);

United States v. Munzo-Franco, 487 F.3d 25, 45-46 (1st Cir. 2007), United States v. Soy, 454 F.3d 766, 768 (7th Cir. 2006); United States v. Ortiz, 447 F.3d 28, 1033 (1st Cir. 2006); United States v. Weidner, 437 F.3d 1023, 1033 (10th Cir. 2006); United States v. Ceballos, 340 F.3d 115, 123-124 (2d Cir. 2003); United States v. Carter, 333 F.2d 354, 356 (10th Cir. 1964); United States v. Danielson, 321 F.2d 441, 445 (9th Cir. 1963).

[e] More recent decisions have held that the specific intent required to convict a defendant of conspiracy is the intent to advance or further the unlawful object of the conspiracy. United States v. Woodward, 459 F.3d 1078, 1084 (11th Cir. 2006); United States v. De Biasi, 712 F.2d 785, 792-93 (2d Cir.), cert. denied, 464 U.S. 962 (1983) (defendant must have acted deliberately and intentionally to further the business of the conspiracy); United States v. Provenzano, 615 F.2d 37, 45 (2d Cir.), cert. denied, 446 U.S. 953 (1980).

[f] The evidence needed to show intent will vary slightly depending on which type of conspiracy is charged.

1. Where the conspiracy charged is a conspiracy to commit an offense against the United States, there must be evidence of criminal intent necessary to establish the commission of the underlying substantive offense. United States v. Feola, 420 U.S. 671, 686-687 (1975).

2. Similarly, where the conspiracy charged is a conspiracy to defraud the United States (e.g., a Klein conspiracy - where the object of the conspiracy is to impede, obstruct or impair the functions of the I.R.S.), there must be evidence of intent to so impede, obstruct or impair. In United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958) the evidence consisted of false returns and false statements made to Treasury officials. Compare, the situation in which transactions are omitted from business records but there is no evidence that the returns were inaccurate or that income was omitted. United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1975). See, United States v. Romer, 148 F.3d 359 (4th Cir. 1998); United States v. Alston, 77 F.3d 713 (3d Cir. 1996).

[6] *Conspiracy to commit an offense against the United States.*

[a] One of the two activities proscribed by § 371 is conspiracy to commit any offense against the United States.

1. The crime of conspiracy to commit a substantive offense is simply an agreement to engage in the prohibited conduct. United States v. Feola, 420 U.S. 671, 678 (1975).

(A) The crime is the "agreement" and a conviction for conspiracy can lie whether or not the substantive offense is committed. See, United States v. Lake, 472 F.3d 1247, 1263 (10th Cir. 2007).

(B) An indictment can charge a conspiracy to evade income taxes and to defraud the government in a single count. Proof of guilt regarding either objective of the conspiracy is sufficient. United States v. Mackey, 571 F.2d 376, 379 (7th Cir. 1978).

[b] A conspiracy to commit a substantive offense and the substantive offense are two, separate and distinct crimes. Pinkerton v. United States, 328 U.S. 640, 643 (1946).

1. The Double Jeopardy Clause is not violated by a prosecution of both the conspiracy and the substantive offense. Pereira v. United States, 347 U.S. 1, 11 (1954); United States v. Pursley, 474 F.3d 757, 769-770 (10th Cir. 2007).

2. Thus, it is possible to convict an individual of both the conspiracy to commit a substantive tax crime as well as the substantive tax crime. United States v. Nealy, 729 F.2d 961, 962 (4th Cir. 1984) (defendant convicted of both § 371 and § 7206(2)); United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) (conspiracy and §§ 7201 and 7206); United States v. DeNiro, 392 F.2d 753, 754 (6th Cir.), cert. denied, 393 U.S. 826 (1968) (conspiracy and evasion of estate taxes under § 7201).

[c] As conspiracy is a separate crime, it is permissible to allege one conspiracy to violate numerous substantive laws, so long as the evidence establishes but one conspiracy. Braverman v. United States, 317 U.S. 49, 54 (1942).

[d] Each conspirator is liable for any and all substantive acts which were committed in furtherance of the conspiracy during the time in which the defendant was a member of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 645-47 (1946). See, United States v. Lake, 472 F.3d 1247, 1265 (10th Cir. 2007); United States v. Navarrete-Barron, 192 F.3d 786, 792 (8th Cir. 1999).

[7] *Conspiracy to defraud the United States.*

[a] The second prong of § 371 prohibits conspiracies to defraud the United States.

[b] Conspiracy to defraud the government is a very broad concept.

1. Conspiracy to defraud the government is not limited to efforts to obtain money or property, but includes conspiracies where the object of the conspiracy is to obstruct, impair, interfere, impede or defeat the legitimate functioning of the government through fraudulent or dishonest means. United States v. Goldberg, 105 F.3d 770, 773 (1st Cir. 1997), United States v. Collins, 78 F.3d 1021, 1037 (6th Cir. 1996); United States v. Liccardi, 30 F.3d 1127, 1131 (9th Cir. 1994); United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980); United States v. Anderson, 579 F.2d 455, 458 (8th Cir. 1978); United States v. Del Toro, 513 F.2d 656, 663-664 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Jacobs, 475 F.2d 270, 282-283 (2d Cir.), cert. denied, 421 U.S. 821 (1973).

2. Thus, conspiracy to defraud is not confined by reference to common law definitions of fraud. Dennis v. United States, 384 U.S. 855, 859-64 (1966) (subsequent history omitted).

3. It is a separate crime to interfere with the lawful functions of the government

without regard to the monetary consequences. Thus, § 371 involves both efforts to defraud the government of funds as well as interference with the lawful function of the government. United States v. Johnson, 383 U.S. 169, 172 (1965) (subsequent history omitted).

[8] *Conspiracy to impede, obstruct or impair the I.R.S. - a/k/a Klein Conspiracy*

[a] The conspiracy to defraud prong of § 371 includes conspiracies to impede, impair, obstruct or defeat the lawful functions of the Treasury Department in the collection of income taxes. United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). See, United States v. Fletcher, 322 F.3d 508, 513 (8th Cir. 2003).

[b] *Applicability of § 371 to tax conspiracies.* Arguments have been presented that § 371 was not intended to encompass conspiracies to violate the internal revenue laws or conspiracies to defraud the Service but these arguments have been rejected.

1 Section 371 applies to tax conspiracies. In United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980); the Sixth Circuit upheld the application of § 371 to tax conspiracies citing cases from the Second, Third, Fourth, Fifth, Sixth and Ninth Circuits. The Shermetaro opinion also notes that evidence of intent to include conspiracies to defraud the Service can be discerned from the fact that § 6531 of the Code expressly provides for a limitations period for conspiracies to defraud the government. Id. at 110; I.R.C. § 6531(8).

2 *Necessity of charging or proving a violation of the underlying substantive statute.* United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989). In Minarik, the Sixth Circuit held that where § 371 was charged in lieu of another equally applicable substantive tax offense, § 371 could only be applied where the underlying substantive tax offense could be proven. Additionally Minarik held that prosecutors must charge the offense clause, rather than the defraud clause, in order to properly alert the defendant of which underlying substantive tax offense the § 371 charge is based upon. The Sixth Circuit later limited Minarik to its facts. United States v. Khalife, 106 F.3d 1300, 1303-1305 (6th Cir. 1997); United States v. Kraig, 99 F.3d 1361, 1366-1368 (6th Cir. 1996); United States v. Sturman, 951 F.2d 1466, 1473-74 (6th Cir. 1991). Other circuits have rejected the holding in Minarik or limited it to its facts and allowed the government to charge the defraud clause where the fraud constitutes a separate federal criminal offense. United States v. Arch Trading Co., 987 F.2d 1087, 1092 (4th Cir. 1993); United States v. Hurley, 957 F.2d 1, 3 (1st Cir. 1992); United States v. Bilzerian, 926 F.2d 1285, 1301-02 (2d Cir. 1991); United States v. Notch, 939 F.2d 895, 901 (10th Cir. 1991); United States v. Reynolds, 919 F.2d 435, 438-39 (7th Cir. 1990).

[c] *The Klein case.*

1. Although decided in 1957, Klein is the leading case regarding conspiracies to impede and impair the Service and such conspiracies are commonly referred to as "Klein conspiracies." In Klein the defendants were acquitted of the tax evasion charges but were convicted on the conspiracy count. The wording of the conspiracy count read, in part, as follows: "... to defraud

the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes." In part, it was alleged in Klein that as "part of said conspiracy that the defendants would conceal and continue to conceal the nature of their business activities and the source and nature of their income." Klein, 247 F.2d at 916. The defendants concealed the source and nature of their income by altering and making false entries in their books, filing false income tax returns, and providing false answers to interrogatories.

[d] *Requirements of Klein conspiracies.*

1. *Intent to defraud or impede the Service.*

(A) *Testimony of co-conspirators.* In United States v. Aubin, 87 F.3d 141, 145 (5th Cir. 1996), cert. denied, 519 U.S. 1119 (1997), the Fifth Circuit found that testimony of co-conspirators that one of the purposes of a conspiracy encompassing bank and wire fraud was to impede the Service was sufficient to meet the intent and agreement elements of § 371.

(B) *Circumstantial Evidence of intent to defraud or impede.*

(i) In United States v. Tarnopol, 561 F.2d 466, 474-475 (3d Cir. 1977), the court held that conspiracy to defraud the United States by impeding the functions of the I.R.S. was not shown by mere proof that defendants failed to record certain sales for cash or merchandise on sales journal and accounts receivable ledger, without any showing that inaccurate income tax returns were filed or gross income was omitted therefrom. Although Tarnopol may be an unusual case, it stands for the proposition that the defendant's acts must lead to the inference that one of the objects of the conspiracy was tax related.

(ii) In United States v. Ingredient Technology Corp., 698 F.2d 88, 98 (2d Cir.), cert. denied, 462 U.S. 1131 (1983), Tarnopol was distinguished. The Second Circuit found that in Tarnopol the government had failed to prove the conspirators had intended to defraud the Service by keeping inaccurate records while in the case before it the whole purpose of the keeping false books and records was to defraud the Service.

In Ingredient Technology, raw sugar, purchased by the taxpayer, was not properly includeable in the taxpayer's "last-in-first-out" inventory for purposes of calculating its taxable income where there was absolutely no beneficial interest on the part of the taxpayer except to inflate the inventory for a few days solely for tax purposes. In the prosecution of the corporation and its former president for tax fraud by means of LIFO inventory manipulation, evidence that auditors and attorneys were lied to was sufficient to sustain finding of willful intent on the part of the defendants.

See also, United States v. Ladum, 141 F.3d 1328, 1341-1342 (9th Cir. 1998) (intent to defraud or impede may be proven by circumstantial evidence and

the coordinated actions of the codefendants are strong circumstantial evidence of intent); United States v. Goldberg, 105 F.3d 770, 774-75 (1st Cir. 1997).

(C) *Intent to defraud or impede inferred from defendant's accounting knowledge.* In United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980), the Sixth Circuit affirmed the district court's conviction of defendant for conspiring to defraud the United States by obstructing and hindering the I.R.S. in its lawful duty to ascertain, compute, assess and collect federal income taxes. Substantial evidence, including evidence of the defendant's knowledge of the tax effects of sham bookkeeping entries and his corresponding deductions on the books of a fictitious company, established specific intent of the defendant to defraud the government. See also, United States v. Goldberg, 105 F.3d 770, 774 (1st Cir. 1997).

(D) *Intent to defraud in conspiracies embracing non-tax purposes.*

(i) If tax evasion plays any part in a scheme, the conspiracy charge will lie, even if the scheme had other purposes such as concealing non-tax crimes. See, Spies v. United States, 317 U.S. 492, 499 (1943); See also, United States v. Furkin, 119 F.3d 1276, 1280-1281 (7th Cir. 1997); United States v. Shermetaro, 625 F.2d 104, 109 (6th Cir. 1980); United States v. DeNiro, 392 F.2d 753, 757-758 (6th Cir.), cert. denied, 393 U.S. 826 (1968).

(ii) In United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998) (Adkinson I) and United States v. Adkinson, 158 F.3d 1147, 1158-1159 (11th Cir. 1998) (Adkinson II), the defendant's convictions for conspiring to defraud by impeding the I.R.S. were vacated and reversed because the conspiracy consisted only of a conspiracy to commit bank fraud and the agreement did not encompass a conspiracy to evade taxes. The court found the defendants' tax-related activities (filing false returns in which diverted income was reported as loans) occurred only in concealing the diversion of the bank fraud proceeds.

2. *Knowledge of the tax consequences.* Although a tax motive must be shown, it is not necessary to prove by direct evidence that the conspirators knew of the tax consequences of their scheme.

(A) Thus, a money laundering plan may result in a conspiracy to obstruct the Treasury. United States v. Sanzo, 673 F.2d 64, 69 (2d Cir.), cert. denied, 459 U.S. 858 (1982). See also, United States v. Alston, 77 F.3d 713 (3d Cir. 1996) ( Structuring may be an object of a Klein conspiracy.); United States v. Hurley, 957 F.2d 1, 3-4 (1st Cir. 1992); United States v. Cambara, 902 F.2d 144, 146-147 (1st Cir. 1990); and United States v. Tarvers, 833 F.2d 1068, 1075 (1st Cir. 1987). In Sanzo, one defendant argued that there was no direct evidence that the other party to the plan would not report the laundered money or claim deductions. The court felt there was enough circumstantial evidence from which the jury could find that the defendant knew his accomplice would not report large sums of laundered money as income and that he would have to falsify business records to hide the laundering activities. Sanzo, 673 F.2d at 69.



(B) Likewise the Klein conspiracy theory has been applied in drug cases in which the profits were laundered as purported loans. United States v. Browning, 723 F.2d 1544 (11th Cir. 1984).

3. *Harm to the Service*. Note, it is not necessary to prove that the Service was *actually* impeded in its efforts to assess and collect the revenue. United States v. Olgin, 745 F.2d 263, 273 (3d Cir. 1984), cert. denied, 471 U.S. 1099 (1985).

[9] *Duration of the conspiracy*. The duration of the conspiracy is important for several reasons.

[a] It determines when the statute of limitations begins to run.

1. In United States v. Fletcher, 928 F.2d 495, 498-501 (2d Cir. 1991), the defendant was involved in a conspiracy to defraud the United States through the use of creative bookkeeping and offshore bank accounts to hide the existence of profits from a legitimate enterprise. The profits were not to be reported as such to the Internal Revenue Service. The agreement between the coconspirator included the distribution of the untaxed profits among the parties involved. The defendant was convicted of violating 18 U.S.C. § 371.

On appeal, the defendant argued that the six-year statute of limitations had run before the indictment against him was filed. The Second Circuit held that the acts to cover up the existence of the conspiracy were not part of the main objective of the conspiratorial agreement, and were not acts which would extend the period of limitations. The acts which involved the distribution of the profits from the conspiracy were overt acts which were one of the conspiracy's main objectives, however, and the statute of limitations would be triggered by such acts.

[b] It determines whether statements of coconspirator were made during the life of the conspiracy, which is an admissibility requirement under Federal Rule of Evidence 801(d)(2).

[c] An agreement to conceal a conspiracy has been held to not extend the statute of limitations. Grunewald v. United States, 353 U.S. 391, 397-99 (1957). But, one of the objects of the conspiracy may be the concealment of a crime and thus overt acts and statements to conceal the conspiracy would also occur during and in furtherance of the conspiracy. United States v. Mackey, 571 F.2d 376, 382-384 (7th Cir. 1978) (a conspiracy to evade the payment of taxes and to impede the Service). See also, United States v. Mann, 161 F.3d 840, 858-859 (5th Cir. 1998) (acts of concealment are in furtherance of the conspiracy for limitations purposes where the nature of the conspiracy is such that concealment is part of or in furtherance of the main objectives of the conspiracy); United States v. Aubin, 87 F.3d 141, 145-146 (5th Cir. 1996), cert. denied, 519 U.S. 1119 (1997) (where conspirator filed a false bankruptcy petition falsely reporting bank fraud profit as a loan to himself, the petition constituted an overt act extending the statute of limitations since its purpose was to conceal from the Service the conspirator's unreported bank fraud profit).

## 2-4.05 Venue

The venue for a conspiracy case may be had in the district where the conspiracy was formed, as well as any district where an overt act in furtherance of the conspiracy occurred. United States v. Strickland, 493 F.2d 182, 187 (5th Cir.), cert. denied, 419 U.S. 801 (1974).

## 2-4.06 Statute of Limitations

[1] *Six years*

[a] 18 U.S.C. § 3282 provides a five (5) year limitations period for conspiracies in general.

[b] However, a six (6) year limitations period applies to tax crime conspiracies.

1. § 6531(1) of the Code provides for a six year limitations period for offenses which involve the defrauding or attempting to defraud the government, whether by conspiracy or not, and in any manner.

2. § 6531(8) of the Code provides for a six year limitations period for offenses arising under § 371 of Title 18 where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or payment thereof.

[c] Klein conspiracies.

1. Several early cases suggest that the applicable limitations period is five years. See, Grunewald v. United States, 353 U.S. 391, 396 and note 8 (1957); United States v. Klein, 247 F.2d 908, 912 (2d Cir.1957), cert. denied, 355 U.S. 924 (1958). But, the failure of the early cases to refer to I.R.C. § 6531 has subsequently been described as an oversight. United States v. Ingredient Technology Corp., 698 F.2d 88, 99 (2d Cir.), cert. denied, 462 U.S. 1131 (1983).

2. Subsequent cases have applied the six year period. United States v. Waldman, 941 F.2d 1544, 1549 (11th Cir. 1991); United States v. Vogt, 910 F.2d 1184, 1201 (4th Cir. 1990); United States v. White, 671 F.2d 1126, 1133-34 (8th Cir. 1982); United States v. Lowder, 492 F.2d 953, 956 (4th Cir.), cert. denied, 419 U.S. 1092 (1974).

[2] General principles.

[a] The limitations period will run from the last overt act in furtherance of the conspiracy which is alleged and proven. Grunewald v. United States, 353 U.S. 391, 396-97 (1957); United States v. Qayyum, 451 F.3d 1214, 1218-1219 (10th Cir. 2006); United States v. Davis, 533 F.2d 921, 929 (5th Cir. 1976).

1. Note, the last overt act may be that of any of the coconspirators and is not limited by the acts of the defendant on trial.

2. Of course, if a defendant withdraws from the conspiracy then the limitations period starts running upon a withdrawal as to that defendant. United States v. Read, 658 F.2d 1225, 1232-36 (7th Cir. 1981). See, United States v. Arias, 431 F.3d 1327, 1340 (11th Cir. 2005).

[b] Multipurpose conspiracies may have a different limitations period for each purpose of the conspiracy. Although several of the purposes of the conspiracy may be barred by the statute of limitations, as long as any single purpose of the conspiracy is not barred the § 371 charges need not be dismissed. United States v. Mann, 161 F.3d 840, 857-859 (5th Cir. 1998) (objectives of the conspiracy included: defrauding the government by impairing the functions of the FHLBB-5 year statute, misapplication of bank funds and false entry in bank records-10 year statute, and defrauding the government by impeding the Service and filing false tax returns-6 year statute).

#### **2-4.07 Use of § 371: Evidentiary Considerations**

[1] *Statements by a coconspirator are not hearsay.*

[a] Federal Rules of Evidence, Rule 801 (d)(2)(E), allows for the use of statements by a co-conspirator during the course of, and in furtherance of the conspiracy, and provides such statements are not hearsay. United States v. Moran, 493 F.3d 1002, 1010 (9th Cir. 2007); United States v. Dupre, 462 F.3d 131, 137 (2d Cir. 2006); United States v. Mahasin, 362 F.3d 1071, 1084-1085 (8th Cir. 2004).

[b] To utilize this hearsay exception, the government must first establish the conspiracy by a *preponderance of the evidence*, and the court must specifically find: the existence of the conspiracy; that the declarant and the defendant were members of the conspiracy; and, that the statement was in furtherance of same. See, United States v. Jennings, 487 F.3d 564, 583 (8th Cir. 2007) United States v. Bently, 706 F.2d 1498, 1506 (8th Cir.), *cert. denied*, 464 U.S. 830 (1983); United States v. Petersen, 611 F.2d 1313, 1327-29 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

[2] *The Bruton rule - Confession of nontestifying coconspirator which inculcates another conspirator is inadmissible against that conspirator.* In United States v. Bruton, 391 U.S. 123 (1969), the Supreme Court set aside the petitioner's conviction for armed postal robbery after a joint trial. The Court held "the introduction of the co-defendant's confession posed a substantial threat to the petitioner's right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard the co-defendant's inadmissible hearsay evidence inculcating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."

The Bruton Court recognized a very narrow exception to the almost invariable assumption of the law that jurors follow their instructions in the situation when the facially incriminating confession of a nontestifying codefendant is introduced at a joint trial and the jury is instructed to consider the confession only against the codefendant. In that situation, Bruton explained, the risk

that the jury will not follow its instructions is so great and the consequences of that failure so vital to the defendant that jurors will be assumed incapable of obeying their instructions.

[a] Subsequently, the Supreme Court has held that the admission of inter-locking codefendant confessions was permissible when proper limiting instructions are given. Parker v. Randolph, 442 U.S. 62, 74-76 (1979). In Parker, the Supreme Court held there is no violation of the Confrontation Clause where the confessions of the defendant and codefendant were so similar as to “interlock.” Although the interlocking confessions exception to Bruton was subsequently invalidated by Cruz v. New York, 481 U.S. 186, 193-194 (1987), the existence of the defendant’s own confession and its interlocking nature are still relevant to harmless error analysis when a codefendant’s confession is admitted.

[b] More recently, the Supreme Court has held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction *when the confession is redacted to eliminate not only the defendant's name, but any reference to her existence*. Richardson v. Marsh, 481 U.S. 200, 211 (1987). *See also*, Gray v. Maryland, 523 U.S. 185, 197 (1998) (reversed a conviction where codefendant’s confession had been admitted and obviously redacted by substituting a blank or the word “deleted” for the defendant’s name in four separate places); United States v. Logan, 210 F.3d 820 (8th Cir.), *cert. denied*, 531 U.S. 1053 (2000) (affirmed a conviction where codefendant’s confession had been admitted and redacted by referring to “another individual”).

[3] *No requirement of proof of additional taxes due and owing*. § 7201 of the Code requires the government prove additional taxes are due from the defendant; but, § 371 has no similar requirement. Thus, in cases where the deficiency cannot be established, consideration should be given to the application of § 371, as it is not necessary to prove a monetary loss under the latter. United States v. Buckner, 610 F.2d 570, 573-74 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

[4] *Multiple vs. single conspiracies*.

[a] A single conspiracy may have multiple objectives which involve a number of subagreements to commit each of the specified objectives. Braverman v. United States, 317 U.S. 49, 53 (1942); *see* United States v. Capozzi, 486 F.3d 711, 717-718 (1st Cir. 2007); United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990); United States v. Warner, 690 F.2d 545, 550 (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.

[b] The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. United States v. Radtke, 415 F.3d 826, 838-839 (8th Cir. 2005); United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988).

[c] A single conspiracy does not become a multiple conspiracy simply because of personnel changes or because its members are cast in different roles. United States v. Richerson, 833 F.2d 1147, 1153-54 (5th Cir. 1987); United States v. Cambindo-Valencia, 609 F.2d 603, 625 (2d Cir. 1979).

[d] 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. David, 940 F.2d 722, 724 (10th Cir. 1991); United States v. Smith, 789 F.2d 196, 201-2 (3d Cir. 1986).

[e] Where there is a multipurpose conspiracy and evidence of some of the objectives of the conspiracy is *factually insufficient*, a verdict of conviction of violation of § 371 should stand as long as there is sufficient evidence on at least one of the objectives of the conspiracy. United States v. Mann, 493 F.3d 484 (5th Cir. 2007), however, where one of the objectives of the conspiracy is *legally defective*, reversal is required since it is impossible to tell on which ground the jury selected. Griffin v. United States, 502 U.S. 46 (1991). See also, United States v. Munoz-Franco, 487 F.3d 25, 45-46 (1st Cir. 2007); United States v. Medina, 485 F.3d 1291 (11th Cir. 2007), United States v. Pierce, 479 F.3d 546 (8th Cir. 2007).

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**CHAPTER 2**

**RELATED TITLE 18 OFFENSES**

SECTION 5

FICTIOUS OBLIGATIONS - 18 U.S.C. § 514

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## 2-5.01 Statutory Language

18 U.S.C. § 514 – FICTITIOUS OBLIGATIONS

**(a) Whoever, with the intent to defraud:**

- (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same within the United States;**
- (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or**
- (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States, any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony.**

**(b) For purposes of this section, any term used in this section that is defined in section 513(c) has the same meaning given such term in section 513(c).**

**(c) The United States Secret Service, in addition to any other agency having such authority shall have authority to investigate offenses under this section.**

## 2-5.02 Elements of the Offense

[1] To prove a violation of this statute, the government must prove:

[a] The defendant presented or offered a false or fictitious instrument, document, or other item;

[b] The document appeared or purported to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State, or other political subdivision of the United States or an organization; and

[c] The defendant did so with the intent to defraud.

## 2-5.03 Summary

[1] *Presenting or offering a false or fictitious instrument, document, or other item.*

[a] Congress enacted this criminal statute in 1996 in response to schemes being perpetrated by individuals and groups around the United States who attempt to obtain benefits from the United States and private businesses without paying for them. Such individuals or groups attempt fraudulent payment by using fictitious checks, money orders, warrants, or sight drafts, some of which are made to appear



to be drawn on the U.S. Treasury. The purported checks, money orders, sight drafts, etc. used have no monetary value.

1. Prior to Congress enacting section 514, defendants committing similar crimes were prosecuted under other federal statutes. In United States v. Stockheimer, 157 F.3d 1082, 1086 (7th Cir. 1998), cert. denied, 525 U.S. 1184 (1999); and United States v. Mikolajczyk, 137 F.3d 237, 239 (5th Cir.), cert. denied, 525 U.S. 909 (1998), the defendants were prosecuted under bank fraud and mail fraud statutes for using false money orders in financial transactions. In United States v. Hanzlicek, 187 F.3d 1228, 1230 (10th Cir. 1999), defendants were prosecuted for bank fraud and mail fraud for issuing fraudulent checks.
2. In United States v. Anderson, 353 F.3d 490, 496 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004), defendant was convicted of violating section 514 for using fictitious sight drafts.

[b] Section 514 is an attempt crime. In United States v. Howick, 263 F.3d 1056, 1063 (9th Cir. 2001), cert. denied, 535 U.S. 946 (2002), the court stated an attempt to pass, utter, or present such a fictitious document can violate section 514.

[2] *Document appears to be an actual security or financial instrument.*

[a] The sight draft or bogus financial instrument can be of very high print quality and may include a reference to HJR 192, which is House Joint Resolution 192 which took the United States off the gold standard in 1933.

[b] While many of the sight drafts or other bogus financial instruments used in cases that have been prosecuted claim to be drawn on the U.S. Treasury, the statute provides also that they could be drawn on a foreign government or State, or even on a corporation, such as a money order or traveler's check. Many of the financial instruments covered by section 514 are defined in 18 U.S.C. § 513(c). Examples of these instruments are found in United States v. Heath, 525 F.3d 451, 459 (6th Cir. 2008)(bills of exchange); United States v. Anderson, 353 F.3d 490, 500 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004)(sight drafts); United States v. Finley, 301 F.3d 1000, 1004 (9th Cir. 2002)(comptroller warrants); United States v. Pullman, 187 F.3d 816, 823 (8th Cir. 1999), cert. denied, 528 U.S. 1081 (2000)(money orders). Finley and Pullman are pre-section 514 crimes prosecuted under other federal statutes.

[c] The fact that a fictitious bill of exchange contained in fine print "Void where prohibited by law" was not a disqualifying mark to remove it from section 514 coverage, while the bold words "Non-Negotiable" were such disqualifying marks. See United States v. Heath, 525 F.3d 451, 455-459 (6th Cir. 2008).

[d] Actual bank checks drawn on a shell company's bank account that lacked sufficient funds to cover the checks were held not to constitute fictitious obligations under section 514. United States v. Morganfield, 501 F.3d 453, 461 (5th Cir. 2007), cert. denied, 128

S.Ct. 2500 (2008).

[3] *The defendant had the intent to defraud.*

[a] A typical scheme the IRS will investigate as a tax related matter will involve a taxpayer who sends a fictitious obligation to the IRS as a claimed tax payment, after having sent the IRS correspondence containing anti-tax language. United States v. Anderson, 353 F.3d 490, 495 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004). This will involve tax administration and make the case tax related.

[b] In some instances the defendant may send the IRS a fictitious obligation in an amount that far exceeds his/her tax liability and seek a refund of the overpayment. Falsely claiming a refund helps prove the defendant's intent to defraud. United States v. Finley, 301 F.3d 1000, 1002 (9th Cir. 2002); United States v. Pullman, 187 F.3d 816, 818 (8th Cir. 1999); cert. denied, 528 U.S. 1081 (2000)(pre-section 514 prosecutions). In such instances, charges of 18 U.S.C. §§ 287 and 514 should be considered.

#### **2-5.04 Venue**

Venue will lie in any judicial district where an affirmative acts occurs that commences, continues, or completes the crime.

#### **2-5.05 Statute of Limitations**

The statute of limitations is five years and runs from the date the defendant committed any act in furtherance of the crime.

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**CHAPTER 2**

**RELATED TITLE 18 OFFENSES**

**SECTION 6            IDENTITY THEFT - 18 U.S.C. § 1028(a)(7)**

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## **2-6.01 Statutory Language**

18 U.S.C. § 1028(a)(7) – IDENTITY THEFT

**(a) Whoever, in a circumstance described in subsection (c) of this section-**

**(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; shall be punished as provided in subsection (b). (The prison sentence can range from 5 years to 30 years depending on the criminal acts.)**

**(c) The circumstance referred to in subsection (a) is that-**

**(3) either-**

**(A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce, including the transfer of a document by electronic means; or**

**(B) the means of identification, identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section.**

## **2-6.02 Elements of the Offense**

[1] To prove a violation of this statute, the government must prove:

[a] The production, transfer, possession or use without legal authority;

[b] of a means of identification of another person;

[c] with the intent to commit, or aid or abet, or in connection;

[d] with any unlawful activity that constitutes a violation of Federal law, or that; constitutes a felony under any applicable State or local law.

## **2-6.03 Summary**

**Congress revamped Title 18 U.S. Code, § 1028 and criminalized the production, possession, and use of false identification documents and document-making equipment. In 1998 Congress enacted the Identity Theft and Assumption Deterrence Act, which**

created 18 U.S.C. § 1028 (a)(7). This section criminalized the use and transfer of a “means of identification.”

The circumstances described in subsection (c) requires that the production, transfer, possession, or use of the means of identification be in or affect interstate or foreign commerce, including the transfer of a document by electronic means, or that the means of identification is transported in the mail in the course of the production, transfer, possession, or use.

[1] *Means of Identification and Identification Documents.*

This term is broadly defined to include a wide range of personal identifying information. The definition includes any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, Social Security number, date of birth, official state or government issued driver’s license or identification number, alien registration number, government passport number, or employer or taxpayer identification number. See, 18 U.S.C. § 1028(d)(4).

An identification document is one that is commonly accepted for the purpose of identification of individuals and is not restricted to identification documents, such as driver’s licenses, which are widely accepted for a variety of identification purposes. The Committee intends that “identification document” also include those which are “commonly accepted” in certain circles for identification purposes, such as identification cards issued by state universities and Federal government identification cards. Finally, an identification card normally will include such identifying elements as an individual’s name, address, date or place of birth, physical characteristics, photograph, fingerprints, employer, or any unique number assigned to an individual by any Federal or State government entity. H.R. Rep. No. 802, 97th Cong. 2d. Sess. 9, *reprinted* in 1982 U.S. Code Cong. & Ad. News 3519, 3527; United States v. Abbocuh, 502 F. 3d 850, 856-857 (9th Cir. 2007); United States v. Quinteros, 769 F.2d 968, 970-971 (4th Cir. 1985).

[2] *Intent.*

An act is done “knowingly” if it is done voluntarily and intentionally rather than by mistake, accident or other innocent reason. A defendant’s intent can be inferred from his conduct and all the surrounding circumstances, United States v. Rohn, 964 F.2d 310, 314 n.3 (4th Cir. 1992).

[3] *Interstate or Foreign Commerce.*

The government must only prove a minimal nexus with interstate commerce in a § 1028 prosecution to satisfy the “in or affects interstate or Foreign Commerce” requirement of § 1028(c)(3)(A). The defendant need have had only the intent to accomplish acts, which, if successful, would have affected interstate or foreign commerce. The government is not required to prove that the defendant had knowledge of the interstate nexus when he committed an act in violation of § 1028. United States v. Klopff, 423 F.3d 1228, 1239 (11th Cir. 2005); United States v. Villarreal, 253 F.3d 831, 834-836 (5th Cir. 2001); United States v. Pearce, 65 F.3d 22, 2 (4th Cir. 1995).

#### **2-6.04 Venue**

Venue will lie in any judicial district where an affirmative acts occur that commences, continues, or completes the crime.

#### **2-6.05 Statute of Limitations**

The statute of limitations is five years and runs from the date the defendant committed any act that gives rise to the crime.

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