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26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter

The *materiality* of the alleged false statements is not a matter for you to determine, but is a question for the Court to decide. You are instructed that the false statements charged in the indictment, if they were made, were *material* statements.

Pattern Jury Instruction of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Omission of Material Matter

An income tax return may be materially false not only because of a misstatement of a material matter, but also because of an omission of a material matter.

Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967)

United States v. Taylor, 574 F.2d 232, 235-236 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978)

United States v. Cohen, 544 F.2d 781, 783 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977)

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26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter -- Gross Income

If you find that the defendant made a false statement on his tax return relating to gross income, irrespective of the amount, that is to say, if you find that the defendant received additional income in addition to that reported on his [her] return, regardless of the amount, then you are instructed that such omission of income is a material matter, as required under Section 7206(1).

United States v. Wilson, 887 F.2d 69, 75 (5th Cir. 1989)

United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)

United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987)

United States v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983)

United States v. Gaines, 690 F.2d 849, 857-858 (11th Cir. 1982)

See also, United States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990)

GOVERNMENT PROPOSED JURY INST. NO.

Material Matter -- Deductions

I instruct you that personal deductions are material matters as required under Section 7206(1). The evidence need not establish beyond a reasonable doubt that the deductions totalled the exact amount alleged in the indictment, or that the deductions were overstated in the exact amount alleged, but only that the defendant willfully overstated or caused to be overstated in some substantial amount the deductions as charged in the indictment.

United States v. Damon, 676 F.2d 1060, 1064 (5th Cir. 1982) -- business loss deductions, Sec. 7206(2), but applicable to Sec. 7206(1)

United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976)

GOVERNMENT PROPOSED JURY INST. NO.

Proof Of One False Material Item Enough

The indictment charges in Count _____ that the defendant's income tax return for the year _____ was false in (e.g., three) material respects, i.e., [*state false material matters, e.g., understatement of potential fees, understatement of interest income, and understatement of capital gains*].

You are instructed that these items are material items and that it is sufficient if you find that the government has established beyond a reasonable doubt that any one of these items was falsely reported on the defendant's return. In other words, the government does not have to prove that all of the items are false: proof of the falsity of a single item is sufficient. On the other hand, if you find that none of these items was falsely reported on the defendant's return, then you should acquit the defendant.

Silverstein v. United States, 377 F.2d 269, 270 n.3 (1st Cir. 1967)

United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969)

United States v. Rayor, 204 F. Supp. 486, 491 (S.D. Cal. 1962)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Tax Deficiency Not Required

You are instructed that in proving that the defendant violated Section 7206(1), the government does not have to prove that there was a tax due and owing for the year(s) in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of Section 7206(1).

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions*, (4th Ed. 1990), Section 56.19

Silverstein v. United States, 377 F.2d 269, 270 (1st Cir. 1967)

United States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)

United States v. Johnson, 558 F.2d 744, 747 (5th Cir. 1977)

United States v. Ballard, 535 F.2d 400, 404 (8th Cir.) *cert. denied*, 429 U.S. 918 (1976)

United States v. Marashi, 913 F.2d 724 (9th Cir. 1990)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

United States v. Carter, 721 F.2d 1514, 1539 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984)

See Sansone v. United States, 380 U.S. 343, 352 (1965) -- re Sec. 7207 but materiality language of Secs. 7207 and 7206(1) is identical.

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26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Tax Deficiency Not Required

It is not necessary that the Government be deprived of any tax by reasons of the filing of the return, or that it even be shown that additional tax is due to the Government, only that the Defendant wilfully filed a false return.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness -- Section 7206(1)

To find the defendant guilty of violating Section 7206(1), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or*

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Willfully -- Good Faith Defense

The word "willfully," as that term has been used from time to time in these instructions, means a voluntary, intentional violation of a known legal duty. Mere negligence, even gross negligence, accident, or inadvertence is not sufficient to establish willfulness.

[If a person in good faith believes that an income tax return, as prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he cannot be guilty of "willfully" making or subscribing a false or fraudulent return.] ¹

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985)

NOTE

¹ The second paragraph of this instruction is not appropriate unless there is evidence of a good faith belief defense. In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

COMMENTS

¹ It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive" in a tax case. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Preparing False Return -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, in the District of _____, the defendant, _____, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service of a false and fraudulent income tax return **1** [*of one [Taxpayer's Name]*] **2** for the calendar year ____; in which said return **1** it was represented that the said taxpayer **2** was entitled under the provisions of the internal revenue laws [*to claim deductions 3 in the total sum of \$ ____*]; whereas, as the defendant then and there well knew and believed, the [*total deductions*] **3** which the said taxpayer **2** was lawfully entitled to claim for said calendar year were [*in the total sum of not more than \$_____.*]

Count II charges * * *.

All in violation of Title 26, United States Code, Section 7206(2).

26 U.S.C. § 7206(2)

NOTES

1 Section 7206(2) is not limited to returns but can apply to an "affidavit, claim of other document". 26 U.S.C. § 7206(2). In such instances, the instruction should be modified accordingly.

2 The above instruction encompasses a situation when the defendant is *not* the taxpayer, *e.g.*, a return preparer. If the defendant is the taxpayer, then the instruction should be modified by deleting the phrase "of one _____" and by substituting the "defendant" in those portions of the instruction which refer to the "taxpayer."

3 The above instruction is framed in terms of false deductions. If income, or other items, are charged as false, the instruction should be modified, *e.g.*, in which said return it was represented that the said taxpayer had a gross income of \$____; whereas, as the defendant then and there well knew and believed * * *.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(2) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * (w)illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws, of a return, **1** * * * which is fraudulent or is false as to any material matter * * * shall be guilty (of an offense against the laws of the United States).

26 U.S.C. § 7206(2)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO.

Elements of Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment:

First: The act or acts of aiding, or assisting in, or procuring, or counseling, or advising, the preparation, or the presentation, of a false or fraudulent income tax return, **1** as charged;

Second: Doing such act or acts with knowledge that the income tax return in question was false or fraudulent, as charged; and

Third: Doing such act or acts willfully.

A "false" tax return is a return that was untrue when made, and was then known to be untrue by the person making it, or causing it to be made.

A "fraudulent" tax return is a return made or caused to be made with the intent to deceive.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7206(2)

United States v. Perez , 565 F.2d 1227, 1233-34 (2d Cir. 1977)

United States v. Sassak , 881 F.2d 276, 278 (6th Cir. 1989)

United States v. Hooks , 848 F.2d 785, 788-89 (7th Cir. 1988)

United States v. Salerno , 902 F.2d 1429, 1432 (9th Cir. 1990)

United States v. Crum , 529 F.2d 1380, 1382 n.2 (9th Cir. 1976)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO.

Knowledge or Consent of Taxpayer

Section 7206(2) of the Internal Revenue Code (26 U.S.C. § 7206(2)) further provides that a person may be guilty of the offense of aiding or assisting in, or procuring the preparation or presentation of a false or fraudulent return, regardless of "whether or not such falsity or fraud is with the knowledge or consent of the (taxpayer) * * *."

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984)

Accord *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978)

See also *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983)

cf. *United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be necessary to instruct the jury on the requirements for accomplice testimony. *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO.

Signing of Returns
Knowledge of Taxpayer Irrelevant

In making a determination as to whether the defendant aided or assisted in or counseled, advised, or generated or set in motion certain acts or the preparation of documents resulting in the preparation or presentation of fraudulent or false tax returns, the fact that the defendant did not sign and did not prepare the income tax returns in question is not material to your consideration.

Nor is it necessary for the government to prove that any taxpayer whose returns were fraudulent or false had knowledge of the falsity of the returns. In this respect, I instruct you as a matter of law that if you find beyond a reasonable doubt that the defendant knowingly and willfully furnished, prepared, or caused to be prepared, false and fraudulent documents (and offered false advice), which the defendant knew would be relied on in the preparation of income tax returns and would result in [*understated income*] or [*false or overstated deductions*] on the returns named in Counts _____, _____ and _____ of the Indictment, then the government has met its burden of proof under this element of the offense.

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984).

Accord *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978);

See also *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F. 2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983);

cf. United States v. Hooks, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be necessary to instruct the jury on the requirements for accomplice testimony. *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(2), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or*

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

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26 U.S.C. § 7206(2)

motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

"Willfully" -- To Act or to Omit

In order to sustain its burden of proof for the crime of violating Section 7206(2), as charged in Count[s] _____ of the indictment, the Government must prove beyond a reasonable doubt not only that the defendant committed the acts alleged in the charge[s], but also that the defendant acted willfully.

An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

COMMENT

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

In the context of Section 7206(2), willfulness connotes a voluntary, intentional violation of a known legal duty. Proof of evil motive or bad intent is *not* required. This showing of willfulness will most often be made by circumstantial evidence, because direct proof of willfulness may not be readily available.

[At this point, consistent with the evidence in the case, the jury may be given an illustration of the type of evidence from which willfulness may be inferred, as follows:] For example, you may find that the defendant acted willfully from the evidence of the witnesses showing cumulatively a repetitious overstatement of deductions by the defendant.

See United States v. Brown, 548 F.2d 1194, 1199 (5th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Belief of Defendant

If a person in good faith believes that an income tax return, as prepared by him [her], truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he [she] cannot be guilty of willfully preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

United States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989)

United States v. Kouba, 822 F.2d 768, 771 (8th Cir. 1987)

United States v. Holecek, 739 F.2d 331, 336 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985)

COMMENT

1 See also instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

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26 U.S.C. § 7206(4)

GOVERNMENT PROPOSED JURY INST. NO.

Concealing Property -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, 19__, in the _____ District of _____, the defendant, _____, willfully concealed goods and commodities, to wit, [*Describe goods and commodities concealed*] for and in respect of which a tax of the United States is imposed, **1** with the intent to evade or defeat the assessment or collection of said tax.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 38.01 (modified)

NOTE

1 Section 7206(4) also provides "or any property upon which levy is authorized by Section 6331." Where appropriate, the instruction should be modified to follow the wording of the indictment.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(4) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [r]emoves, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title * * * shall be guilty [*of an offense against the laws of the United States*].

GOVERNMENT PROPOSED JURY INST. NO.

Concealment of Property -- Elements

In order to sustain its burden of proof for the crime of willfully concealing various properties as described in the indictment, the government must prove the following four elements beyond a reasonable doubt:

One: There was an outstanding assessment for income taxes against the defendant;

Two: The defendant owned or had an interest in the property in question upon which levy was authorized;

Three: The defendant removed, deposited or concealed, or was concerned in removing, depositing or concealing the property in question; and

Four: With the intention to evade and defeat the collection of the assessed taxes.

26 U.S.C. § 7206(4)

See also Section 14.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

Concealing Property -- Levy Authorized

Section 6331 of the Internal Revenue Code provides, in part, that:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful * * * to collect such tax * * * by levy upon all property and rights to property (except such property as is exempt * * *) belonging to such person or on which there is a lien * * * for the payment of such tax. * * *

Certain property, however, is exempt from levy for taxes. So far as you are concerned, the following is exempt: [*refer to Section 6334 to determine the appropriate exemptions with respect to the issues and evidence in a given case.*]

26 U.S.C. §§ 6331 and 6334

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(4), you must not only find that the defendant did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say, with a purpose either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence which may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters which you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment*

of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct which you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination, as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88, pp. 201-202 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom., Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), *cert. denied* 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

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26 U.S.C. § 7206(4)

motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about the _____ day of _____, 19 __, in the _____ District of _____, in connection with [*an offer of compromise, or a compromise, or a closing statement*] relating to his [her] liability for [*type of tax*] taxes due and owing by him [her] to the United States of America for the calendar year(s) _____, did willfully *conceal from* [*Specify particular officer, with job title*] and all other proper officers and employees of the United States, [*Describe property belonging to taxpayer or other person liable for the tax*] or did willfully [*"receive" "withhold" "destroy" "mutilate" or "falsify," Describe book, document or record involved*].

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7206(5) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [i]n connection with any compromise * * *, or offer of such compromise, or in connection with any closing agreement * * *, or offer to enter into any such agreement, willfully * * * conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or * * * [r]eceives, withholds, destroys, mutilates, or falsifies any book, document, or record, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax; shall be guilty [*of an offense against the laws of the United States*].

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements

To establish the offense charged in the indictment, the government must prove the following elements beyond a reasonable doubt:

First: in connection with a closing agreement, or offer to enter into a closing agreement, in respect of an internal revenue tax, as provided for in 26 U.S.C. § 7121; or in connection with a compromise, or an offer of compromise, of a civil or criminal case arising under the internal revenue laws, as provided for in 26 U.S.C. § 7122;

Second: the defendant concealed from an employee of the United States any property belonging to the estate of a taxpayer or other person liable for the tax, or the defendant withheld, falsified, or destroyed records, or made a false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax; and

Third: the defendant acted willfully.

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7206(5), you must not only find that he [she] did the acts complained of and of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment*

of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

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26 U.S.C. § 7206(5)

motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Offense Charged

The information or indictment sets forth _____ counts or charges.

Count I charges that on or about the _____ day of _____, 19____, in the _____ District of _____, the defendant, _____, a resident of _____ did willfully file a document with the Internal Revenue Service, United States Treasury Department, at _____, which the defendant knew to be false as to an important matter.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.16 (modified)

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26 U.S.C. § 7207

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Section 7207 of the Internal Revenue Code provides, in part, as follows:

Any person who willfully delivers or discloses, to the Secretary [*of the Treasury*] any list, return, account, statement or other document, known by him to be false as to any material matter, shall be [*guilty of an offense against the United States*].

26 U.S.C. § 7207

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

In order to sustain its burden of proof for the crime of filing a false document as charged in Count ___ of the indictment [*information*], the government must prove the following three elements beyond a reasonable doubt:

One: The defendant _____ filed a document with the Internal Revenue Service that contained false information as, detailed in the indictment [*information*], as to a material matter;

Two: The defendant knew that this information contained in this document was false; and

Three: In filing this false document, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.18

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

Title 26, United States Code, Section 7207, provides in part that:

"Any person who willfully delivers or discloses to the Secretary [*of the Treasury*] any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter [*shall be guilty of an offense against the United States.*]"

In order to establish the offense of filing a [*false return*] **1** there are two essential elements which the Government must prove beyond a reasonable doubt.

First: That the defendant filed an [*income tax return*] **1** which was false in the respects charged in the indictment; and

Second: That the defendant did so willfully, as charged.

It is not necessary, however, that the government be deprived of any tax by reason of the filing of [*the return*] **1** or that it be shown that additional tax is due to the government.

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within the document is "false" if it was untrue when used and was then known to be untrue by the person using it.

The "materiality" of the allegedly false statements is not a matter with which you are concerned, but rather is a question for the court to decide. You are instructed that the false statements charged, if they were made, were material statements.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1983 Ed.), Offenses in Other Titles, Instruction No. 50, p. 158

NOTE

1 This instruction refers to an "income tax return" as the false document in issue. It is important to note that Section 7207 prosecutions are ***not*** authorized by the Tax Division, except in very limited circumstances, where the false document is a federal income tax return. *See* Section 16.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

False Document -- Essential Elements

The defendant is charged in [*Count* _____ *of*] the indictment [*information*] with filing a false [*document*] in violation of Section 7207 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant filed a [*document*] knowing that it contained false information; and

Second, that the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 9.06D (1992)

GOVERNMENT PROPOSED JURY INST. NO.

False Tax Return 1

Title 26, United States Code, Section 7207, makes it a Federal crime or offense for anyone to willfully file a [*federal income tax return*] **1** knowing it to be false in some material way.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant filed an [*income tax return*] **1** which was false in a material way as charged in the indictment; and

Second: That the defendant did so knowingly and willfully, as charged.

It is not necessary that the government be deprived of any tax by reason of the filing of the [*return*] **1**, or that it even be shown that additional tax is due to the government, only that the defendant willfully filed a false [*return*]. **1**

A declaration is "false" if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is "false" if it was untrue when the document was used and was then known to be untrue by the person using it.

The "materiality" of the alleged false statements is not a matter for you to determine, but is a question for the court to decide. You are instructed that the false statements charged in the indictment, if they were made, were "material" statements.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, Instruction No. 75 (1985)

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26 U.S.C. § 7207

NOTE

1 This instruction refers to an "income tax return" as the false document in issue. It is important to note that Section 7207 prosecutions are ***not*** authorized by the Tax Division, except in very limited circumstances, where the false document is a federal income tax return. *See* Section 16.03, *supra*

GOVERNMENT PROPOSED JURY INST. NO.

Not Necessary to Show Any Additional Tax Due

Although the government is required to prove beyond a reasonable doubt that the defendant willfully filed a false document as charged in Count ___ of the indictment [*information*], the government is not required to prove that any additional tax was due to the government or that the government was deprived of any tax revenues by reason of any filing of any false return.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO.

Willfulness

To find the defendant guilty of violating Section 7207, you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or*

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil

motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Statute Defining Offense

Count ____ of the indictment charges the defendant with violating Section 7212(a) of the Internal Revenue Code. Section 7212(a) of the Internal Revenue Code provides, in pertinent part, as follows:

Whoever * * * in any * * * way corruptly * * * obstructs or impedes, or endeavors to obstruct or impede the due administration of this title, [*shall be guilty of an offense against the United States*].

26 U.S.C. § 7212(a)

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26 U.S.C. § 7212(a)

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements of Section 7212(a)

The government must establish the following three essential elements beyond a reasonable doubt to establish a violation of the offense charged in Count ___ of the Indictment:

First: The defendant in any way corruptly;

Second: Endeavored to;

Third: Obstruct or impede the due administration of the Internal Revenue Laws.

United States v. Williams, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981) ("Laws" substituted for "Code" for ease of understanding.)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Endeavor"

To "endeavor" is to undertake an act or to attempt to effectuate an arrangement or to try to do something, the natural and probable consequences of which is to obstruct or impede the due administration of the Internal Revenue Laws.

Instruction used in *United States v. Dykstra*, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993), relying on definition of endeavor used in an obstruction case, *United States v. Silverman*, 745 F.2d 1386, 1393, 1396 n. 12 (11th Cir. 1984)

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26 U.S.C. § 7212(a)

GOVERNMENT PROPOSED JURY INST. NO.

Endeavor - Defined

The term "endeavors" as used in these instructions means to knowingly and deliberately act or to knowingly and deliberately make any effort which has a reasonable tendency to bring about the desired result.

It is not necessary for the government to prove that the "endeavor" was successful or, in fact, achieved the desired result.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 41.05

United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984)

United States v. Williams, 644 F.2d 696, 699 n.14 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Corruptly"

To act "corruptly" is to act with the intent to secure an unlawful advantage or benefit either for oneself or for another.

United States v. Reeves, 752 F.2d 995, 1001 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985)

United States v. Dykstra, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993)

United States v. Yagow, 953 F.2d 423, 427 (8th Cir. 1992)

United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991); *cert. denied*, 112 S. Ct. 1760 (1992)

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26 U.S.C. § 7212(a)

GOVERNMENT PROPOSED JURY INST. NO.

Definition of "Obstruct or Impede"

To "obstruct or impede" is to hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment difficult and slow.

Black's Law Dictionary pg. 972 (5th Ed. 1979)

GOVERNMENT PROPOSED JURY INST. NO.

Failure to Deposit Withholding Taxes -- Offense Charged

The [*information or indictment*] sets forth _____ counts or charges.

It is charged in the [*information or indictment*] as follows:

1. That during the period _____, 19____, to _____, 19____, in the _____ District of _____, the defendant, _____, was an employer of labor required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. That the defendant did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending _____, 19____, _____, 19____, _____, 19____, and _____, 19____.

3. That on _____, 19____, the defendant was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512, which notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after the delivery of such notice, and, not later than at the end of the second banking day after such collection, to deposit said taxes in a separate bank account established by him [her] in trust for the United States to be kept therein until paid over to the United States.

4. That within the _____ District of _____, the defendant unlawfully failed to comply with the provisions of Title 26, United States Code, Section 7512, in that, after receiving delivery of the notice referred to in paragraph 3, he [she] paid wages and was required to collect and deposit the said taxes, but failed to deposit said taxes in a separate bank account in trust for the United States, by the dates and in the amounts hereinafter specified:

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26 U.S.C. § 7215(7512)

<u>COUNT</u>	<u>DATE WAGES PAID</u>	<u>DATE DEPOSIT REQUIRED</u>	<u>AMOUNT OF DEPOSIT REQUIRED</u>
I.	_____	_____	
II.	_____	_____	
III.	_____	_____	
IV.	_____	_____	

All in violation of Title 26, United States Code, Section 7215.

26 U.S.C. § 7215

GOVERNMENT PROPOSED JURY INST. NO.

Statutes Defining Offense

The [*information or indictment*] charges a failure to comply with the requirements of Section 7512(b) of the Internal Revenue Code, which are as follows:

Any person who is required to collect, account for, and pay over any [*withholding taxes*], * * * if notice has been delivered to such person [*for failure to comply*], * * * shall collect the [*withholding*] taxes * * * which became collectible after delivery of such notice **1**, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank * * *, and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

26 U.S.C. § 7512(b)

Section 7512 of the Internal Revenue Code provides, in part, as follows:

(a) **Penalty.** -- Any person who fails to comply with any provision of section 7512(b) shall * * * be guilty [*of an offense against the laws of the United States*].

(b) **Exceptions.** -- This section shall not apply --

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

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26 U.S.C. § 7215(7512)

NOTE

1 Section 7512(a) provides that, in the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

GOVERNMENT PROPOSED JURY INST. NO.

Essential Elements of Offense

The essential elements of the offense charged in Count _____ of the information, each of which must be proved beyond a reasonable doubt, are as follows:

First, that during the period from _____, 19____, to _____, 19____, the defendant, _____, was an employer of labor and, as such, was required to collect, account for, and pay over to the United States federal income and F.I.C.A. taxes withheld from the wages of his [her] employees;

[First, that during the period from _____, 19____, to _____, 19____, the defendant, _____, was a person in such a relationship to the corporation that he [she] was a person required to collect, account for, and pay over the federal income and F.I.C.A. taxes withheld from the wages of the employees of _____;]

Second, that prior to _____, 19____, the defendant failed to collect, truthfully account for, or pay over such taxes, or failed to make deposits, payments, or returns of such taxes at the time and in the manner prescribed by law or regulations;

Third, that on _____, 19____, the defendant was notified by a notice delivered in hand of the failure to do so;

Fourth, that said notice directed the defendant to establish a separate bank account in trust for the United States, to deposit such taxes in the separate bank account not later than two banking days after the taxes were collected or withheld, and to keep such taxes deposited in the bank account until payment to the United States; and

Fifth, that on _____, 19____, two banking days after the collection of the taxes, the defendant failed to deposit the amount of \$_____ in federal income and F.I.C.A. taxes collected from the wages of his [her] employees in a separate bank account in trust for the United States.

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26 U.S.C. § 7215(7512)

Now, the essential elements of Counts ____, ____, and ____ of the information [*indictment*] are the same as in Count ____, except they differ as to the date of the alleged failure to make the bank deposit and the amount of the taxes withheld from [*indictment*] the employee's wages. The date and amount as to each count appear in the information, which you will take with you to the jury room, and the court will not repeat them at this time.

United States v. Hemphill, 544 F.2d 341, 343-344 (8th Cir. 1976), *cert. denied*, 430 U.S. 967 (1977)

United States v. Erne, 576 F.2d 212, 213 (9th Cir. 1978)

United States v. Polk, 550 F.2d 566, 567 (9th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO.

Withholding Taxes

This case involves federal withholding taxes. Under the law, an employer is required to withhold certain amounts from the wages paid to its employees. The amounts withheld are for federal income taxes and for F.I.C.A. taxes, which are also known as social security taxes. When the employees file their personal income tax returns, they compute what they owe and credit against this the amount of income tax withheld by their employer from their wages during the year. I am sure you are all aware of the standard W-2 form prepared by employers showing how much was withheld from wages during the year, which is then attached by the employee to his or her personal income tax return.

When an employer pays wages to an employee, the employer must set aside the amounts to be withheld in a trust fund for the government since these amounts are to be credited, in whole or in part, to the income tax and social security accounts of the employee. By trust fund, it is meant that such withheld amounts do not belong to the employer but are merely held by the employer for the benefit of the government until paid over to the government and then credited to the accounts of the employees for income tax and social security purposes.

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, pp. 86,046-86,048; 27 A.F.T.R.2d 865, 866-868 (N.D. Cal. Nov. 5, 1970)

Neale, Sr. v. United States, 13 A.F.T.R.2d 1721, 1722 (Kan. April 29, 1964)
26 U.S.C. §§ 3101, 3102, 3401, 3402, 3403 6302(c), & 7501

GOVERNMENT PROPOSED JURY INST. NO.

Person Required to Collect, Account For, and Pay Over Tax

In order to be found guilty of the offenses charged in the information [*indictment*], the defendant must have been a person required to collect, account for, and pay over withheld federal income and F.I.C.A. taxes. An individual is such a person if he [she] is connected or associated with a corporate employer in such a manner that he [she] has the ultimate authority over the corporation, or the power to assure that the withholding taxes are paid, or the power to determine which bills will be paid and when, or significant control over the financial decision-making process within the corporation. Such a person may be either an officer, employee, member of the board of directors, or shareholder of the corporation. He [she] may be a person required to collect, account for, and pay over withheld taxes whether or not he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 7343

United States v. McMullen, 516 F.2d 917, 920-921 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975)

Pacific National Insurance v. United States, 422 F.2d 26 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

United States v. Graham, 309 F.2d 210 (9th Cir. 1962)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO.

Defendant Cannot Delegate Responsibility

If the defendant was a person required to collect, account for, and pay over withholding taxes at the time the notice directing him [her] to make deposits of the taxes to a special bank account in trust for the United States was served upon him [her], then he [she] was under a duty to make such deposits and could not relieve himself [herself] of that duty by attempting to delegate it to another corporate officer or employee.

Mazo v. United States, 591 F.2d 1151, 1155 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979)

United States v. Leuschner, 336 F.2d 246, 248 (9th Cir. 1964)

Levy v. Tomlinson, 249 F. Supp. 659, 661 (S.D. Fla. 1965)

Jackson v. United States, 19 A.F.T.R.2d 1579, 1582 (S.D. Ind. Feb. 16, 1965)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 869 (N.D. Cal. Nov. 5, 1970)

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26 U.S.C. § 7215(7512)

GOVERNMENT PROPOSED JURY INST. NO.

More Than One Responsible Person

There may be more than one person connected with a corporation who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his [her] responsibility.

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,047; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Exact Amounts Not Required

The government need not prove, as to each count of the information, a failure to deposit the exact amount of taxes alleged in that count. It is sufficient for the government to prove beyond a reasonable doubt as to each count of the information [*indictment*] that there was a failure to deposit any amount of taxes collected and withheld from employee's wages which should have been deposited in a separate bank account in trust for the United States by the defendant.

United States v. Gay, 576 F.2d 1134, 1138 (5th Cir. 1978)

GOVERNMENT PROPOSED JURY INST. NO.

Exception -- Circumstances Beyond Control

The law provides an exception to the statute where the defendant can show that the failure to collect, deposit, and keep the taxes in the separate bank account was due to circumstances beyond his [her] control. For this purpose, however, a lack of funds existing immediately after the payment of wages, whether or not resulting from the payment of the wages, is not to be considered circumstances beyond a person's control. This can be illustrated by an employer who has gross payroll requirements of \$1,000, with respect to which he [she] is required to withhold \$100 of income taxes. If such an employer had on hand only \$900 and paid out this entire amount in wages, withholding and depositing nothing, the fact that the net wages due equaled this amount would not constitute circumstances beyond a person's control.

A lack of funds occurring after the payment of wages, so long as it was not immediately after, would, however, qualify under this exception if it were due to circumstances beyond the person's control. Examples of factors which might result in a lack of funds constituting circumstances beyond the control of the person after, but not immediately after, the payment of wages and within the period before the time the person was required to deposit the funds are theft, embezzlement, destruction of the business from fire, flood, or other casualty, or the failure of a bank in which the person had deposited the funds prior to transferring them to the trust account for the government. However, a lack of funds immediately after the payment of wages resulting, for example, from the payment of creditors would not be considered circumstances beyond the person's control.

This does not, however, impose upon the defendant the burden of producing proof of a circumstance beyond his [her] control, or any other evidence. The burden is always upon the government to prove guilt beyond a reasonable doubt.

26 U.S.C. § 7215(b)

United States v. Randolph, 588 F.2d 931, 932-933 (5th Cir. 1979)

26 U.S.C. § 7215(7512)

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United States v. Plotkin, 239 F. Supp. 129, 131-132 (E.D. Wis. 1965)

S. Rep. No. 1182, 85th Cong., 2d Sess. ((1958) 2 U.S. Code Cong. & Ad. News 2187, 2191-2192)