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

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

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

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

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

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6-1.000 *POLICY*

6-1.100 *DEPARTMENT OF JUSTICE POLICY AND RESPONSIBILITIES*

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

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

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

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

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

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

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

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

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

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

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

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6-4.000 *CRIMINAL TAX CASE PROCEDURES*

6-4.010 *The Federal Tax Enforcement Program*

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

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

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

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

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

6-4.030 *Criminal Tax Materials on JURIS*

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

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

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

6-4.100 *INVESTIGATIVE AUTHORITY AND PROCEDURE*

6-4.110 *IRS Administrative Investigations*

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

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

6-4.111 *Origin of IRS Administrative Investigations*

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

A. Fraud referrals from other divisions within IRS;

B. Information provided by other government agencies;

C. Information provided by private parties;

D. Matters or projects developed within CID.

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

resources permit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. IRS Direct Referrals

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

B. Tax Division Referrals for Prosecution

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

C. Tax Division Referrals for Grand Jury Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Expand nontax grand jury proceedings to include inquiry

into possible federal criminal tax violations;

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

3. Terminate such proceedings.

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

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

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

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

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

See USAM 6-4.122, *supra*.

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

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

indistinguishable from other tax matters.

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

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

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

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

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

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

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

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

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

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

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

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

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

6-4.130 ***Search Warrants***

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

A. An accountant;

B. A lawyer;

C. A physician;

D. A public official/political candidate;

E. A member of the clergy;

F. A news media representative;

G. A labor union official; or

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

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

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

6-4.200 *PROSECUTORIAL AUTHORITY AND PROCEDURES*

6-4.210 *Tax Division Responsibility*

6-4.211 *Tax Division Jurisdiction*

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

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

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

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

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

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

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

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

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

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

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

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

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

6-4.213 ***Review***

A. ***Standards for Review***

1. ***Prosecution***

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

2. ***Grand Jury Investigation***

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

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

1. ***IRS Referrals***

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

a. ***Complex Matters***

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

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

b. ***Noncomplex Matters***

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

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

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

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

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

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

6-4.214 ***Conferences***

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

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

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

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

6-4.215 ***Expedited Review***

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

6-4.216 ***Priority Review***

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

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

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

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

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

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

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

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

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

B. Lacks sufficient resources or personnel; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Request by U.S. Attorney

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

B. Grand Jury No Bill

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

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

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

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

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

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

6-4.248 ***Status Reports***

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

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

B. Date of arraignment and kind of plea;

C. Date of trial;

D. Verdict and date verdict returned;

E. Date and terms of sentence; and

F. Date of appeal and appellate decision.

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

6-4.249 *Return of Reports and Exhibits*

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

6-4.270 *Criminal Division Responsibility*

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

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

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

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

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

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

A. Felony counts take priority over misdemeanor counts.

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

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

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

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

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

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

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

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

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

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

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

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

6-4.330 ***Alford Pleas***

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

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

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

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

6-4.340 ***Sentencing***

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

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

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

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

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

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

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

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

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

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

DECEMBER 17, 1990

TO: Holders of United States Attorneys' Manual Title 6

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

Shirley D. Peterson
Assistant Attorney General
Tax Division

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

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

AFFECTS: USAM 6-4.310

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

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

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

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

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

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

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

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

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

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

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

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

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

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