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## 8.00 ATTEMPT TO EVADE OR DEFEAT TAX

### 8.01 STATUTORY LANGUAGE: 26 U.S.C. § 7201

#### §7201. *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined\* not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

\*For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623<sup>1</sup> which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7201, the maximum permissible fine for offenses committed after December 31, 1984, is at least \$250,000 for individuals and \$500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

### 8.02 GENERALLY

The Supreme Court has stated that section 7201 includes two offenses: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax. *Sansone v. United States*, 380 U.S. 343, 354 (1965). Evasion of assessment entails an attempt to prevent the government from determining a taxpayer's true tax liability. Evasion of payment entails an attempt to evade the payment of that liability. See *United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988); *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984). Although *Sansone* has been cited for the proposition that evasion of payment and evasion of assessment constitute two distinct crimes, see, e.g., *United States v. Hogan*, 861 F.2d at 315, several circuits have recently rejected duplicity challenges to indictments by holding that section 7201 proscribes only one crime, tax evasion, which can be committed either by attempting to evade assessment or by attempting to evade payment. See *United States v. Mal*, 942 F.2d 682, 686 (9th Cir. 1991); *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990), judgment vacated, 111 S. Ct. 747 (1991), ruling on duplicity issue reinstated on remand, 927 F.2d 955, 956 (7th Cir. 1991); *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990), appeal after remand, 948 F.2d 923 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992). Furthermore, although the First Circuit initially expressed some skepticism concerning whether *Masat* and *Dunkel* were consistent with *Sansone*, see *United States v. Waldeck*, 909 F.2d 555, 557-58 (1st Cir. 1990), it subsequently relied on *Dunkel* in rejecting a duplicity claim: "No matter how one resolves the semantic question,

moreover, it is beyond reasonable dispute that the indictment charged [defendant] with a single, cognizable crime, and that the jury convicted him of the same crime. See *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990)." *United States v. Huguenin*, 950 F.2d 23, 26 (1st Cir. 1991).<sup>2</sup> Cf. *United States v. Pollen*, 978 F.2d 78, 84-85 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) ("Pollen's indictment, however, raises a unique question: whether a defendant can be charged and punished separately for several distinct affirmative acts of evasion committed with regard to taxes owed for the identical set of years"). It is the position of the Tax Division that section 7201 proscribes a single crime -- attempted evasion of tax -- which can be committed by evading the assessment of tax or by evading the payment of tax.

Regardless of whether they are viewed as separate offenses or as different means of committing the same offense, both evasion of assessment of taxes and evasion of payment of taxes require the taxpayer to take some action, that is, to carry out some affirmative act for the purpose of the evasion. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and section 7201 expressly refers to "attempts in any manner." The most common attempt to evade or defeat a tax is the affirmative act of filing a false tax return that omits income and/or claims deductions to which the taxpayer is not entitled. As a result, the tax on the return is understated, and the correct amount of tax is not reported by the taxpayer. By reporting a lesser amount, there is an attempt to evade or defeat tax by evading the correct assessment of the tax.

In evasion of payment cases, evading or defeating the correct assessment of the tax is not the issue. Evasion of payment generally occurs only after the existence of a tax due and owing has been established, either by the taxpayer reporting the amount of tax due and owing, by the Internal Revenue Service examining the taxpayer and assessing the amount of tax deemed to be due and owing, or by operation of law on the date that the return is due if the taxpayer fails to file a return and the government can prove a tax deficiency. See *United States v. Daniel*, 956 F.2d 540 (6th Cir. 1992). The taxpayer then seeks to evade the payment of the taxes assessed as due and owing.<sup>1</sup> As in an attempt to evade and defeat a tax through evasion of assessment, it must be established in an evasion of payment case that the taxpayer took some affirmative action. Merely failing to pay assessed taxes, without more, does not constitute evasion of payment.<sup>2</sup> Generally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay taxes or the removal of assets from the reach of the Internal Revenue Service.

Historically, it is the crime of willfully attempting to evade and defeat a tax through evasion of assessment, as opposed to willfully attempting to evade the payment of a tax, which is the principal revenue enforcement offense. Section 7201 and its underlying concepts, which make tax cheating a serious crime, are fundamental to any criminal tax enforcement program. Although the

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<sup>1</sup> This is not to imply that an affirmative act to evade payment of a tax can never occur prior to its assessment. See *United States v. McGill*, 964 F.2d 222, 231 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992).

<sup>2</sup> Willfully failing to pay taxes, however, is a misdemeanor covered by 26 U.S.C. § 7203 of the Internal Revenue Code.

basic elements of the crime are relatively simple, the proof can be difficult.

### 8.03 *ELEMENTS OF EVASION*

To establish a violation of section 7201, the following elements must be proved:

1. An attempt to evade or defeat a tax or the payment thereof. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 498-99 (1943).
2. An additional tax due and owing. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Lawn v. United States*, 355 U.S. 339, 361 (1958);
3. Willfulness. *Cheek v. United States*, 498 U.S. 192, 195 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 359 (1973); *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Holland v. United States*, 348 U.S. 121, 139 (1954).

The government must prove each element beyond a reasonable doubt. *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990); *United States v. Williams*, 875 F.2d 846, 849 (11th Cir. 1989).

### 8.04 *ATTEMPT TO EVADE OR DEFEAT*

The means by which there can be an attempt to evade are unlimited. As noted above, section 7201 expressly provides that the attempt can be "in any manner." The only requirement is that the taxpayer take some affirmative action. Conversely, failing to act or do something does not constitute an attempt. For example, failing to file a return, standing alone, is not an attempt to evade. See *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Nelson*, 791 F.2d 336, 338 (5th Cir. 1986).

The general rule is that "any conduct, the likely effect of which would be to mislead or to conceal" for tax evasion purposes constitutes an attempt. *Spies*, 317 U.S. at 499. Even an activity that would otherwise be legal can constitute an affirmative act supporting a section 7201 conviction, so long as it is carried out with the intent to evade tax. *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of section 7201); see also *United States v. Conley*, 826 F.2d 551 (7th Cir. 1987) (use of nominees and cash done with

intent to evade payment of taxes).

Although the government must prove some affirmative act constituting an attempt to evade, it need not prove each act alleged. See *United States v. Mackey*, 571 F.2d 376 (7th Cir. 1978), where the government introduced evidence of six affirmative acts and the court pointed out that proof of one act is enough. "[T]he prosecution need not prove each affirmative act alleged." *Mackey*, 571 F.2d at 387. See also *United States v. Conley*, 826 F.2d 551, 556-57 (7th Cir. 1987). Cf. *United States v. Miller*, 471 U.S. 130 (1985) (government's proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act).

#### 8.04[1] *Attempt To Evade Assessment*

Filing a false return is the most common method of attempting to evade the assessment of a tax. See, e.g., *United States v. Habig*, 390 U.S. 222 (1968); *Sansone v. United States*, 380 U.S. 343 (1965). However, the requirement of an attempt to evade is met by any affirmative act with a tax evasion motive, regardless of whether a false return has been filed. The Supreme Court "by way of illustration, and not by way of limitation," set out examples of what can constitute an "affirmative willful attempt" to evade in *Spies*, 317 U.S. at 499:

keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Failing to file a return, coupled with an affirmative act of evasion, has come to be known as a *Spies* evasion, an example of which is found in *United States v. Goodyear*, 649 F.2d 226 (4th Cir. 1981). The Goodyears failed to file a tax return for the year in question and later falsely stated to Internal Revenue Service agents that they had earned no income in that year and were not required to file a return. The false statements to the agents were the affirmative acts of evasion supporting the Goodyears' section 7201 convictions. *Goodyear*, 649 F.2d at 228.

False statements to Internal Revenue Service agents are frequently alleged as affirmative acts of evasion. See, e.g., *United States v. Frederickson*, 846 F.2d 517, 520-21 (8th Cir. 1988) (holding that repeated false statements to IRS agents were sufficient evidence to support a jury finding of at least one affirmative act); *United States v. Ferris*, 807 F.2d 269, 270-71 (1st Cir. 1986), cert. denied, 480 U.S. 950 (1987); *United States v. Calles*, 482 F.2d 1155, 1160 (5th Cir. 1973); *United States v. Neel*, 547 F.2d 95, 96 (9th Cir. 1976). But cf. *United States v. Romano*, 938 F.2d 1569 (2d Cir. 1991) (considering defendant's overall cooperative and voluntary attitude during customs inspection, defendant who was stopped trying to transport \$359,500 to Canada did

not commit affirmative act of evasion when he initially admitted having only \$30,000 to \$35,000 in cash and only gradually acknowledged the full amount to U.S. customs officials).

It makes no difference whether the false statements are made before, simultaneously with, or after the taxpayer's failure to file a return. *United States v. Copeland*, 786 F.2d 768, 770 (7th Cir. 1985). See also *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *United States v. Dandy*, 998 F.2d 1344 (6th Cir. 1993); *United States v. Becker*, 965 F.2d 383, 386 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993) (indictment does not fail for alleging that affirmative acts occurred on or about filing due date when they in fact occurred earlier); *United States v. Mal*, 942 F.2d 682, 684 (9th Cir. 1991); *United States v. Winfield*, 960 F.2d 970, 973 (11th Cir. 1992) (allegation that defendant made false statements six years after failure to file satisfies affirmative act element).

Courts have uniformly held that the filing of a false Form W-4 constitutes an affirmative act of evasion. *United States v. Waldeck*, 909 F.2d 555 (1st Cir. 1990); *United States v. DiPetto*, 936 F.2d 96 (2nd Cir.), *cert. denied*, 112 S. Ct. 193 (1991); *United States v. Connor*, 898 F.2d 942, 944-45 (3d Cir.), *cert. denied*, 110 S. Ct. 3284 (1990); *United States v. Williams*, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); *United States v. Copeland*, 786 F.2d 768 (7th Cir. 1985). Moreover, a false W-4 filed prior to prosecution years is an affirmative act in each year that it is maintained, since the taxpayer is under a continuing obligation to correct intentional misrepresentations on the form. *Williams*, 928 F.2d at 149 (defendant properly convicted of tax evasion regarding years 1983-85 where false Form W-4 claiming 50 exemptions was filed in 1983 and remained in effect through the prosecution years); *United States v. DiPetto*, 936 F.2d at 96. For a more detailed discussion of *Spies* evasion through the filing of a false W-4, see Section 40.04, *infra*.

The Seventh Circuit has held that instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion. *United States v. Beall*, 970 F.2d 343, 346-47 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993). The court held also that the government need not prove the defendant received any of the money, so long as the defendant earned it. *Beall*, 970 F.2d at 345. See also *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990) (employee use of "independent contractor" agreement and Mid-America Commodity and Barter Association warehouse bank to evade income tax are affirmative acts).

A false return does not need to be signed to be an affirmative act of evasion as long as it is identified as the defendant's return. *United States v. Robinson*, 974 F.2d 575, 578 (5th Cir. 1992) (Fifth Circuit rejected defendant's claim of variance between indictment's allegation that she filed a false return and evidence proving she filed an unsigned Form 1040, stating, "[t]he government did not have to prove that the false Form 1040 was a 'return' in order to show an affirmative act of evasion"); *Montgomery v. United States*, 203 F.2d 887, 889 (5th Cir. 1953); *United States v. Maius*, 378 F.2d 716, 718 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); *Gariepy v. United States*, 220 F.2d 252, 259 (6th Cir.), *cert. denied*, 350 U.S. 825 (1955). Nor does the fact that the return was signed by someone other than the defendant preclude a finding that the defendant knew of its

falsity and had it filed in an attempt to evade. *United States v. Fawaz*, 881 F.2d 259, 265 (6th Cir. 1989).

A return or other tax document signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it and had knowledge of its contents. 26 U.S.C. § 6064; *United States v. Kim*, 884 F.2d 189, 195 (5th Cir. 1989); *United States v. Harper*, 458 F.2d 891, 894-95 (7th Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *United States v. Brink*, 648 F.2d 1140, 1143 (8th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *United States v. Wainwright*, 413 F.2d 796, 801-02 (10th Cir.), *cert. denied*, 396 U.S. 1009 (1970).

#### 8.04[2] *Attempt To Evade Payment*

The affirmative acts of evasion associated with evasion of payment cases almost always involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. Obstinate refusal to pay taxes due, possession of the funds needed to pay the taxes, and even the open assignment of income, *without more*, do not meet the requirement of the affirmative act necessary for an evasion charge.

Examples of affirmative acts of evasion of payment include: placing assets in the names of others; dealing in currency; causing receipts to be paid through and in the name of others; causing debts to be paid through and in the name of others; and paying creditors instead of the government. *Cohen v. United States*, 297 F.2d 760, 762, 770 (9th Cir.), *cert. denied*, 369 U.S. 865 (1962). See also *United States v. McGill*, 964 F.2d 222, 233 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); *United States v. Pollen*, 978 F.2d 78, 88 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993); *United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992) (defendant used others' credit cards, used cash extensively, placed assets in others' names); *United States v. Hook*, 781 F.2d 1166, 1169 (6th Cir.), *cert. denied*, 479 U.S. 882 (1986) (defendant did not file a false return or fail to file, but concealed assets); *United States v. Beall*, 970 F.2d 343, 346-47 (7th Cir. 1992) (defendant instructed employer to pay income to a tax protest organization); *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax); *United States v. Conley*, 826 F.2d 551, 553 (7th Cir. 1987) (defendant concealed nature, extent, and ownership of assets by placing assets, funds, and other property in names of others and by transacting business in cash to avoid creating a financial record); *United States v. Voorhies*, 658 F.2d 710, 712 (9th Cir. 1981) (defendant removed money from the United States and laundered it through Swiss banks); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987) (defendant maintained a "cash lifestyle" in that he conducted all of his personal and professional business in cash, possessed no credit cards, never acquired attachable assets, and maintained no bank accounts, ledgers, or receipts or disbursements journals). *But see McGill*, 964 F.2d at 233 (mere failure to report the opening of an account in one's own name and in one's own locale is not an affirmative act).

## 8.05 *ADDITIONAL TAX DUE AND OWING*

### 8.05[1] *Generally*

A tax deficiency is a critical element of an evasion case. The absence of a tax deficiency means that there may be a false return case, or some other kind of case, but not an evasion case.

For purposes of trial preparation and the trial itself, tax computations prepared by the Internal Revenue Service are furnished to the prosecuting attorney. In addition, a revenue agent or special agent is assigned to the case to make any additional tax computations necessitated by changes during preparation and at the trial. In any hard-fought case, it is more often the case than not that trial developments will necessitate a change in the figures set forth in the indictment.

Although a tax deficiency must be established in all section 7201 cases, the proof can often be much simpler in an evasion of payment case. Thus, if the taxpayer has filed a return and not paid the tax reported as due and owing, the reporting of the tax is a self-assessment of the tax due and owing. The tax due and owing is thus established by the introduction of the return. By the same token, if the Service has assessed the tax, then proof of the tax due and owing can consist of merely introducing the Internal Revenue Service's certificate of assessments and payments assessing the tax due and owing. Note that it has been held that unless an assessment by the Service has been challenged as invalid by the taxpayer either administratively or judicially, a certificate of assessments and payments is prima facie correct and, therefore, "adequate evidence" of the amount of the tax liability. *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981).

If the defendant has not assessed his own tax deficiency by filing a return, it is not essential that the Service has made an assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992). In *Daniel*, the defendant argued that there was no tax deficiency since no assessment or demand for payment had been made. The court rejected this reasoning, holding that a tax deficiency arises by operation of law on the date that the return is due if the taxpayer fails to file a tax return and the government can show a tax liability. *Daniel*, 956 F.2d at 542. See also *United States v. Hogan*, 861 F.2d 312, 315-16 (1st Cir. 1988) (no need to make a formal assessment of tax liability when government finds tax due and owing).

### 8.05[2] *Each Year -- Separate Offense*

Because income taxes are an annual event, an alleged evasion of assessment must relate to a specific year and it must be shown that the income upon which the tax was evaded was received in that year. *United States v. Boulet*, 577 F.2d 1165, 1167-68 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979).<sup>3</sup> Consequently, in most evasion of assessment cases, each tax year charged stands alone as a separate offense. Thus, a charge that a taxpayer attempted to evade and defeat taxes for the years 1990, 1991, and 1992 would constitute three separate counts in an indictment.

Evasion of payment, on the other hand, often involves single acts which are intended to evade the payment of several years of tax due the government. Thus, in evasion of payment cases, it is sometimes permissible to charge multiple years of evasion in one count. *United States v. Shorter*, 809 F.2d 54, 56-57 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987). In *Shorter*, the court approved the use of a single count to cover several years of tax evasion when charged "as a course of conduct in circumstances such as those . . . where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes" for those years. *Shorter*, 809 F.2d at 56. For the twelve years covered by the single count in the indictment, the defendant in *Shorter* had conducted all of his personal and professional business in cash, avoided the acquisition of attachable assets, and failed to record receipts and disbursements. These activities demonstrated a continuous course of conduct, and each affirmative act of evasion was intended to evade payment of all taxes owed, or anticipated, at the time. The court noted that the same evidence used to prove one multi-year count would be admissible to support twelve single year counts. *Shorter*, 809 F.2d at 57. See also *United States v. Pollen*, 978 F.2d 78 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) (each of four counts covered the same seven years but indictment not duplicitous when each count alleged a different affirmative act); *United States v. England*, 347 F.2d 425 (7th Cir. 1965) (defendants charged with one count of evasion of payment of taxes owed from three consecutive years).

Questions concerning the unit of prosecution often lead to challenges to the indictment. In *United States v. Pollen*, 978 F.2d 78 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993), the defendant made several international transfers of hundreds of thousands of dollars in attempts to evade payment of seven years' taxes. Some of these transfers were made in one year. The four counts of the indictment each specified all seven years, but each alleged a distinct affirmative act. The court held that "section 7201 permits a unit of prosecution based on separate significant acts of evasion." *Pollen*, 978 F.2d at 86. Therefore, separate counts of an indictment may relate to evasion of payment for the same years without raising a duplicity problem, provided each count alleges a different affirmative act.

### 8.05[3] *Substantial Tax Deficiency*

Tax evasion prosecutions are not collection cases and it is not necessary to charge or prove the exact amount of the tax that is due and owing. *United States v. Citron*, 783 F.2d 307, 314-15 (2d Cir. 1986); *United States v. Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *United States v. Thompson*, 806 F.2d 1332, 1335-36 (7th Cir. 1986); *United States v. Buckner*, 610 F.2d 570, 573-74 (9th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Harrold*, 796 F.2d 1275, 1278 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987).

It is enough to prove that the defendant attempted to evade a substantial income tax, even though the actual amount of tax that he owes may be greater than the amount charged in the criminal case. Indeed, the criminal tax figures will almost invariably be lower than the civil tax

figures since, for example, items turning on reasonably debatable interpretations of the Tax Code which increase the tax due and owing are not included in the criminal case. In other words, any doubts as to taxability are resolved in favor of the defendant in a criminal case even though they may ultimately be resolved against him or her civilly.

As noted, it is enough in a criminal case to prove that the defendant attempted to evade a substantial income tax. And as long as the amount proved as unreported is substantial, it makes no difference whether that amount is more or less than the amount charged as unreported in the indictment. *United States v. Johnson*, 319 U.S. 503, 517-18 (1943); *United States v. Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Swallow v. United States*, 307 F.2d 81, 83 (10th Cir. 1962), *cert. denied*, 371 U.S. 950 (1963). *See, e.g., United States v. Burdick*, 221 F.2d 932, 934 (3d Cir.), *cert. denied*, 350 U.S. 831 (1955), upholding a conviction where the indictment charged \$33,000 as unreported taxable income and the proof at trial established only \$14,500 as unreported. Similarly, in *United States v. Costello*, 221 F.2d 668, 675 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the court upheld a conviction where the bill of particulars alleged \$244,000 gross income as unreported and \$288,000 was proved at trial. In *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986), the court upheld an "open-ended" 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the defendant had attempted to evade "a large part" of the income tax due and that the tax due was "substantially in excess" of the amount he reported. *Citron*, 783 F.2d at 314-15.

Since the government only has to prove that a substantial tax was due and owing, any bill of particulars that is filed should note that proof of an exact amount is not required and any figures furnished in a bill of particulars represent only an approximation. Whether a tax deficiency is substantial or not is a jury question and the cases suggest that relatively small sums can be deemed substantial. *United States v. Gross*, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961) (unreported income of \$2500 deemed "substantial"); *United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957) ("A few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution."). *See also United States v. Cunningham*, 723 F.2d 217 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (additional tax of \$2,617 as compared to a total tax due of \$33,539 held to be substantial); *United States v. Siragusa*, 450 F.2d 592, 595-96 (2d Cir. 1971), *cert. denied*, 405 U.S. 974 (1972) (taxes of \$3,956, \$900 and \$2,209 in three successive years held to be substantial); *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987) (\$3,358 in taxes due sufficient to support taxpayer's conviction).

The Ninth Circuit has held that there is no substantiality requirement for a section 7201 violation. *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990). The court held that both section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade "any tax" and impose no minimum amount in their language. *Marashi*, 913 F.2d at 735. As a result, the court reasoned, the trier of fact needs to find only "some tax deficiency" to warrant a conviction. *Marashi*, 913 F.2d at 736.

#### 8.05[4] *Method of Accounting*

The general rule is that in computing income, the government must follow the same method of accounting as that used by the taxpayer. *United States v. Vardine*, 305 F.2d 60, 64 (2d Cir. 1962); *Fowler v. United States*, 352 F.2d 100, 103 (8th Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). Conversely, if the defendant has used a particular method of reporting income, then the defendant is bound by that choice at trial. Thus, a defendant cannot report his income on a cash basis and then defend at trial by showing that on an accrual basis unreported income would be far less than the government proved on a cash basis. *Clark v. United States*, 211 F.2d 100, 105 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955); *see also United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992) (defendant having used one depreciation method during the prosecution years cannot recalculate her taxes under another depreciation method during trial).

In a similar vein, if the taxpayer has used a hybrid method of accounting, then the taxpayer "is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." *Morrison v. United States*, 270 F.2d 1, 4 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959); *United States v. Lisowski*, 504 F.2d 1268, 1275 (7th Cir. 1974).

#### 8.05[5] *Loss Carryback -- Not a Defense*

A defendant will sometimes argue that there is no tax deficiency and hence no evasion because a loss carryback from a subsequent year wipes out the tax deficiency in the prosecution year. A defendant may admit not reporting certain income in 1989, but argue that he is not guilty of attempting to evade, because a 1990 loss carryback eliminates any tax deficiency for 1989. This defense is not valid; the "lucky loser argument" was expressly rejected in *Willingham v. United States*, 289 F.2d 283, 287 (5th Cir.), *cert. denied*, 368 U.S. 826 (1961). The crime was completed when, with willful intent, a false and fraudulent return was filed -- any adjustment from a loss in a subsequent year does not change in any way the fraud committed in the earlier year. Any evidence of a loss in a subsequent year is therefore irrelevant. *Willingham*, 289 F.2d at 288.

The same argument was rejected where the net operating loss in a subsequent year was for a Subchapter S corporation. *United States v. Keltner*, 675 F.2d 602, 604 (4th Cir.), *cert. denied*, 459 U.S. 832 (1982). The applicable principle is that each tax year is treated as a separate unit, and all items of gross income and deductions must be reflected as they exist at the close of the tax year. *See United States v. Cruz*, 698 F.2d 1148, 1151-52 (11th Cir.), *cert. denied*, 464 U.S. 960 (1983), for an application of this principle to a situation involving a claimed foreign tax credit. *Cf. United States v. Suskin*, 450 F.2d 596 (2d Cir. 1971) (corporate carryforward loss not available to individual).

#### 8.05[6] *Methods of Proof*

The general rule is that unreported income may be established by several methods of proof, and the government is free to use all legal methods available in determining whether the taxpayer has correctly reported his income. *Holland v. United States*, 348 U.S. 121, 132 (1954); *United States v. Baum*, 435 F.2d 1197, 1201 (7th Cir.), *cert. denied*, 402 U.S. 907 (1971); *United States v. Doyle*, 234 F.2d 788, 793 (7th Cir.), *cert. denied*, 352 U.S. 893 (1956).

The several methods of proof used in tax cases to establish unreported income are discussed in detail in the sections of this Manual treating methods of proof, Sections 30.00 - 33.00, *infra*. Briefly, the specific items method of proof consists of direct evidence of the items of income received by a taxpayer in a given year, *e.g.*, testimony by third parties as to monies paid to the taxpayer for goods or services. The net worth method of proof reflects increases in the wealth of the taxpayer as contrasted with reported income. A variation of the net worth method is the expenditures method of proof, which reflects the expenditures made by a taxpayer. The expenditures method is particularly appropriate in the case of a taxpayer who does not purchase durable assets, such as stocks and real estate, but spends monies for consumable items, such as vacations, entertainment, food, drink, and the like. Another indirect method of proof is the bank deposits method, which is essentially a reconstruction of income by an analysis of bank deposits by a taxpayer who is in an income-producing business and makes regular and periodic deposits to bank accounts.

The Seventh Circuit has approved a variation of the expenditures method which could be called the cash method of proof. *United States v. Hogan*, 886 F.2d 1497 (7th Cir. 1989). With this method, the government compares the taxpayer's cash expenditures with his known cash sources, including cash on hand, for each tax period. If such expenditures exceed sources, the excess is presumed to be unreported income.

Except for the so-called cash method, which to date is limited virtually to the *Hogan* case, each of these methods of proof is discussed in detail ahead and reference should be made to these sections for the applicable case law.

#### 8.05[7] *Income Examples*

Examples of income which may be charged in criminal tax cases, which are not expressly set out in 26 U.S.C. §§ 61, 62, and 63, are the proceeds from:

1. Campaign contributions, when used for personal purposes. *United States v. Scott*, 660 F.2d 1145, 1152 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).
2. Gambling proceeds. The taxpayer must report winnings and may deduct losses only to the extent of winnings. *McClanahan v. United States*, 292 F.2d 630, 631-32 (5th Cir.), *cert. denied*, 368 U.S. 913 (1961); *Garner v. United States*, 501 F.2d 228, 233 (9th Cir. 1974); *aff'd on other grounds*, 424 U.S. 648 (1976).

3. Embezzlement. Embezzled funds constitute taxable income to the recipient. *United States v. Harris*, 942 F.2d 1125, 1135 (7th Cir. 1991). The funds are considered to be income in the year of embezzlement. *James v. United States*, 366 U.S. 213, 219-21 (1961); *United States v. Milder*, 459 F.2d 801, 804 (8th Cir.), *cert. denied*, 409 U.S. 851 (1972); *United States v. Kleifgen*, 557 F.2d 1293, 1299 (9th Cir. 1977); *United States v. Lippincott*, 579 F.2d 551, 552 (10th Cir.), *cert. denied*, 439 U.S. 854 (1978) (alleged loan from embezzled funds).
4. Extortion. Money obtained by extortion is income taxable to the extortionist. *Rutkin v. United States*, 343 U.S. 130, 131 (1952); *United States v. Cody*, 722 F.2d 1052, 1061 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (income generated by union officials through extortion and kickbacks and acceptance of valuable services); *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) (economic extortion).
5. Fraud. *Moore v. United States*, 412 F.2d 974, 978 (5th Cir. 1969). *See also United States v. Dixon*, 698 F.2d 445, 446 (11th Cir. 1983).
6. Alleged loans, no intention to repay. *United States v. Pomponio*, 429 U.S. 10, 13 & n.4 (1976); *United States v. Rosenthal*, 470 F.2d 837, 842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States v. Rochelle*, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968); *United States v. Swallow*, 511 F.2d 514, 519 (10th Cir. 1974), *cert. denied*, 423 U.S. 845 (1975).
7. Commercial bribes and kickbacks. *United States v. Sallee*, 984 F.2d 643 (5th Cir. 1993); *United States v. Fogg*, 652 F.2d 551, 555-56 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *United States v. Wyss*, 239 F.2d 658, 660 (7th Cir. 1957).
8. Bribery. *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987); *United States v. Isaacs*, 493 F.2d 1124, 1161 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (racetrack stock "purchase" by government official for a fraction of actual value).
9. Gratuities received by government employees. *United States v. St. Pierre*, 377 F. Supp. 1063 (S.D. Fla. 1974), *aff'd*, 510 F.2d 383 (5th Cir. 1975).

10. Corporate diversions. *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992); *United States v. Wilson*, 887 F.2d 69, 73 (5th Cir. 1989); *United States v. Thetford*, 676 F.2d 170, 175 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983). The funds are taxable to the recipient once he exercises dominion and control over them; even when the defendant is the sole shareholder in the corporation, dominion and control over the funds can be sufficient to give rise to individual tax liability. *United States v. Curtis*, 782 F.2d 593, 598 (6th Cir. 1986); *United States v. Toushin*, 899 F.2d 617, 623-24 (7th Cir. 1990). *See also United States v. Knight*, 898 F.2d 436, 437 (5th Cir. 1990). Constructive distribution rules need not be automatically applied in a criminal tax case. *United States v. Miller*, 545 F.2d 1204, 1214 (9th Cir. 1976), *cert. denied*, 430 U.S. 930 (1977) ("whether diverted funds constitute constructive corporate distributions depends on the factual circumstances involved in each case under consideration").
11. Narcotics sales. *United States v. Palmer*, 809 F.2d 1504, 1505 (11th Cir. 1986) (court implicitly included narcotics sales proceeds in income by considering concealment of those proceeds to be affirmative act of evasion).

#### 8.06 WILLFULNESS

##### 8.06[1] *Definition*

Willfulness has been defined by the courts as a voluntary, intentional violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). Therefore, the taxpayer must be shown to have been aware of his or her obligations under the tax laws. *United States v. Buford*, 889 F.2d 1406, 1409 (5th Cir. 1989); *United States v. Peterson*, 338 F.2d 595, 598 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965); *United States v. Conforte*, 624 F.2d 869, 875 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). As the Seventh Circuit Court of Appeals has stated, there must be "proof that the appellant knew he was violating a 'known legal duty.'" *United States v. Fitzsimmons*, 712 F.2d 1196, 1198 (7th Cir. 1983).

Willfulness is determined by a subjective standard, thus the defendant is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Regan*, 937 F.2d 823, 826 (2d Cir. 1991), *amended by*, 946 F.2d 188 (2nd Cir.), *cert. denied sub nom. Zarzecki v. United States*, 112 S. Ct. 2273 (1992); *United States v. Whiteside*, 810 F.2d 1306, 1311 (5th Cir. 1987); *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1992). The inquiry, therefore,

must focus on the knowledge of the defendant, not on the knowledge of a reasonable person. However, the jury may "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

Although ignorance and misunderstanding of the law may be asserted to foreclose a finding of willfulness on the part of the defendant, disagreement with the constitutional validity of the law may not. Once it has been established that the defendant was aware of a legal duty and intentionally violated that duty, it is no defense that the defendant believed that the law imposing the duty was unconstitutional. *Cheek v. United States*, 498 U.S. at 205-06. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. *Cheek*, 498 U.S. at 206. See also *United States v. Bonneau*, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge's redaction of constitutionality arguments from defendant's reading materials did not unfairly prejudice the defense). But see *United States v. Gaumer*, 972 F.2d 723, 725 (6th Cir. 1992) (defendant should have been allowed to read excerpts of court opinions upon which he relied in determining whether he was required to file tax returns).

In some of its opinions prior to *United States v. Pomponio*, 429 U.S. 10 (1976), the Supreme Court spoke of willfulness in terms of "bad faith or evil intent." *United States v. Murdock*, 290 U.S. 389, 398 (1933), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies v. United States*, 317 U.S. 492, 498 (1943). This caused some confusion in the circuits, which was cleared up in *United States v. Pomponio*, 429 U.S. 10 (1976).

In *Pomponio*, the court stated that its references to bad faith or evil intent meant nothing more than that there was "an intentional violation of a known legal duty." *Id.* at 12. The clarification is important since it is the answer to defense contentions for an instruction that speaks in terms of a bad purpose or evil intent that goes beyond an intentional violation of the law. Such an instruction would impose an undue burden on the government that is counter to the teachings of the Supreme Court. Otherwise stated, "willfully" connotes a voluntary, intentional violation of a known legal duty, and "it does not require proof of any other motive." *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988) (citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976)); accord, *United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) ("to require a bad purpose would be to confuse the concept of intent with that of motive"); *United States v. Schafer*, 580 F.2d 774, 781 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978) (proof of evil motive or bad intent not required); *United States v. Patrick*, 542 F.2d 381, 389 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) ("bad" before "purpose" may be omitted from willfulness instruction).

The Ninth Circuit has said that a showing of bad motive or evil purpose can substitute for a showing of intentional violation of a known legal duty as a means of establishing willfulness. *United States v. Powell*, 955 F.2d 1206, 1211 (9th Cir. 1992). In *Powell*, the court stated that bad motive or evil purpose could be used by the government to establish that the defendants acted willfully but that such proof was not required. Rather, the government had the alternative of

showing that the defendants had voluntarily and intentionally violated a known legal duty, in which case proof of evil motive or bad purpose would not be necessary. *Powell*, 955 F.2d at 1211.

Notwithstanding the alternative methods of proving willfulness set forth in *Powell*, the fact remains that the Supreme Court has definitively and unequivocally defined willfulness as the "voluntary, intentional violation of a known legal duty." Thus, the government should never rely on any "alternative method" of proof that does not establish the defendant's voluntary and intentional violation of his known legal duty. Similarly, juries should always be instructed that it is the government's burden to prove such a violation.

Good motive is not a defense to a finding of willfulness, and the Supreme Court has upheld as proper a jury instruction that "[g]ood motive alone is never a defense where the act done or omitted is a crime," and that consequently motive was irrelevant except as it bore on intent." *United States v. Pomponio*, 429 U.S. at 11; accord, *United States v. Dillon*, 566 F.2d 702, 704 (10th Cir. 1977), cert. denied, 435 U.S. 971 (1978).

The Supreme Court in *United States v. Bishop*, 412 U.S. 346 (1973), rejected the historical view that there are different types of willfulness required in felony and misdemeanor cases, holding that the willfulness requirement in either class of offense is the same -- "a voluntary, intentional violation of a known legal duty." *Bishop*, 412 U.S. at 360-61. Thus, while some tax crimes are felonies (e.g., 26 U.S.C. § 7201, attempt to evade or defeat a tax), and others are misdemeanors (e.g., 26 U.S.C. § 7203, failure to file an income tax return), the word "willfully" has the same meaning in both types of offenses. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).8.06[2]  
***Proof of Willfulness***

The element of willfulness can be the most difficult element to prove in an evasion case. Absent an admission or confession, which is seldom available, or accomplice testimony, willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct. *United States v. Collorafi*, 876 F.2d 303, 305 (2d Cir. 1989); *United States v. Magnus*, 365 F.2d 1007 (2d Cir. 1966), cert. denied, 386 U.S. 909 (1967); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir.), cert. denied, 469 U.S. 858 (1984); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989); *Paschen v. United States*, 70 F.2d 491, 498-99 (7th Cir. 1934); *United States v. Marchini*, 797 F.2d 759 (9th Cir. 1986), cert. denied, 479 U.S. 1085 (1987); *United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984); *United States v. Ramsdell*, 450 F.2d 130, 133-34 (10th Cir. 1971). Once the evidence establishes that the tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from this conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse or creditors. *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. DeTar*, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

Inferring willfulness from the evidence, however, must be left to the trier of fact. The government may not present witnesses to testify that the circumstantial evidence proves the defendant's willfulness. *United States v. Windfelder*, 790 F.2d 576 (7th Cir. 1986). In *Windfelder*, IRS agents opined in their trial testimony as to the defendant's willfulness, based on their

impression of the relevant circumstantial evidence. Although the court of appeals found the admission of the testimony to have been harmless error, it held that it was inadmissible under Rule 704(b) of the Federal Rules of Evidence. *Windfelder*, 790 F.2d at 582-83.

There are obvious questions raised as to willfulness when the law is vague or highly debatable, such as whether a transaction has generated taxable income. While the case is unusual, and readily distinguishable from most tax cases, an example of the foregoing is *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974). In *Critzer*, the court found that there was a disputed question as to whether the "income" the defendant earned from business interests operated on the Cherokee Indian Reservation was taxable and that different branches of the government had reached directly opposite conclusions on this question. In the light of these findings, the court held that, "[i]t is settled that when the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it." *Critzer*, 498 F.2d at 1162. See also *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was novel and unsettled question); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991) (law on tax treatment of payments received by mistresses from wealthy widower provided no fair warning that failure to report such payments as income would be criminal activity, and case law favored proposition that payments be treated as gifts); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987) (existence of a prior case in which Tax Court approved "case-closed method" of reporting advance payments of costs and fees received by an attorney meant that use of the method was not proscribed in reasonably certain terms, and therefore prior case was sufficient, as a matter of law, to make it inappropriate to impose criminal liability upon defendant-attorney for using the same method).

Care should be taken to distinguish a case such as *Garber*, which is based on "unique, indeed near bizarre, facts." *United States v. Burton*, 737 F.2d 439, 444 (5th Cir. 1984); see also *United States v. Daly*, 756 F.2d 1076, 1083 (5th Cir.), cert. denied, 474 U.S. 1022 (1985). In *Burton*, the court explained and limited its opinion in *Garber*. The court stated that "apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance," explaining that "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." *Burton*, 737 F.2d at 444. And, in *United States v. Curtis*, 782 F.2d 593, 599-600 (6th Cir. 1986), the Sixth Circuit rejected *Garber* for the following reasons: (1) *Garber* allows juries to find that uncertainty in the law negates willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) requires the jury to assume the judge's "responsibility to rule on questions of law".

In those few courts which recognize uncertainty in the law as a potential defense, the court must find that the law clearly prohibited the defendant's alleged conduct. *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984); *United States*

*v. Solomon*, 825 F.2d 1292, 1297 (9th Cir.), *cert. denied*, 484 U.S. 1046 (1987). In *Dahlstrom*, the court reversed the convictions of the defendants, who had instructed investors on creating and carrying out abusive tax shelters, because the legality of the shelters was "completely unsettled." *Dahlstrom*, 713 F.2d at 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. *United States v. Krall*, 835 F.2d 711, 714 (8th Cir. 1987). Compare *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) with *Krall*, 835 F.2d at 714 (although precise foreign trust arrangement had not yet been declared illegal, the sham trusts used to avoid taxation violated well-established principles of tax law, thus defendant could not claim that his conviction violated due process), *United States v. Schulman*, 817 F.2d 1355, 1359-60 (9th Cir.), *cert. dismissed*, 483 U.S. 1042 (1987) (illegality of tax shelters based on sham transactions is a settled legal issue); *United States v. Crooks*, 804 F.2d 1441, 1449 (9th Cir. 1986) (requirement of transaction substance over form is well-ensconced in tax law); and *United States v. Tranakos*, 911 F.2d 1422 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled).

To aid in establishing willfulness at trial, items turning on reasonably debatable interpretations of the Tax Code and questionable items of income should be eliminated from the case, and, whenever possible, complicated facts should be simplified. This is advantageous both for purposes of presentation to the jury and to strengthen the government's argument that there is no doubt that this was a criminal act to evade taxes, because the taxability and tax consequences were known to the taxpayer.

The Supreme Court has furnished excellent guidance on the type of evidence from which willfulness can be inferred. In the leading case of *Spies v. United States*, 317 U.S. 492, 499 (1943), the Supreme Court, "by way of illustration and not by way of limitation," set forth the following as examples of conduct from which willfulness may be inferred:

[K]eeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Particularly noteworthy is the Court's reference to "any conduct, the likely effect of which would be to mislead or to conceal." It is apparent that the Court was intent on making it clear that there are no artificial limits on the type of conduct from which willfulness can be inferred, and that evidence is admissible of any conduct at all, as long as the "likely effect" of the conduct would be to mislead or conceal.

8.06[3] *Examples: Proof of Willfulness*

1. Willfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income. *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989) (evidence of willfulness was sufficient where taxpayer failed to report \$182,601 of income over three years); *United States v. Kryzske*, 836 F.2d 1013, 1019-20 (6th Cir. 1988), *cert. denied*, 488 U.S. 832 (1988) (willfulness found where taxpayer failed to file complete tax returns over a four-year period and underreported his income by \$940.50 for one of those years); *see also United States v. Skalicky*, 615 F.2d 1117 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980); *United States v. Larson*, 612 F.2d 1301 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980); *United States v. Gardner*, 611 F.2d 770 (9th Cir. 1980).
2. Failure to supply an accountant with accurate and complete information. *United States v. Samara*, 643 F.2d 701, 703 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981) (taxpayer kept receipt books for cash received but did not supply them to accountant, thus concealing cash receipts); *see also United States v. Michaud*, 860 F.2d 495, 500 (1st Cir. 1988); *United States v. Ashfield*, 735 F.2d 101, 107 (3d Cir. 1984); *United States v. Chesson*, 933 F.2d 298, 305 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); *United States v. Brimberry*, 961 F.2d 1286, 1290 (7th Cir. 1992); *United States v. Scher*, 476 F.2d 319 (7th Cir. 1973); *United States v. Meyer*, 808 F.2d 1304, 1306 (8th Cir. 1987); *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).
3. The question of willfulness is not removed from jury consideration merely because the defendant claims inefficient bookkeeping and a negligent accountant. *United States v. Venditti*, 533 F.2d 217, 219 (5th Cir. 1976).
4. Taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape criminal responsibility for the resulting false returns. *United States v. Garavaglia*, 566 F.2d 1056 (6th Cir. 1977); *United States v. O'Keefe*, 825 F.2d 314, 318 (11th Cir. 1987).
5. False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. *United States v. Callanan*, 450 F.2d 145, 150 (4th Cir. 1971); *United States v. Chesson*, 933 F.2d 298, 304 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); *United States v. Jett*, 352 F.2d 179, 182 (6th Cir. 1965); *United States v. Walsh*, 627 F.2d 88 (7th Cir. 1980); *United States v. Frederickson*, 846 F.2d 517, 520-21 (8th Cir. 1988) (taxpayer

- falsely stated that she did not receive income from other employees who worked in her massage parlor and that she deposited most of her income in the bank); *United States v. Tager*, 481 F.2d 97, 100 (10th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974); *see also United States v. Adonis*, 221 F.2d 717, 719 (3d Cir. 1955); *United States v. Pistante*, 453 F.2d 412 (9th Cir. 1971).
6. Keeping a double set of books. *United States v. Daniels*, 617 F.2d 146 (5th Cir. 1980).
  7. Destroying, throwing away, or "losing" books and records. *United States v. Walker*, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid records and assets in an attempt to conceal them from the IRS). *See United States v. Chesson*, 933 F.2d 298, 304-05 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); (taxpayer altered and destroyed invoices after undergoing a civil audit for underreporting income); *Gariepy v. United States*, 189 F.2d 459, 463 (6th Cir. 1951); *United States v. Holovachka*, 314 F.2d 345, 357 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963); *United States v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).
  8. Making or using false documents, false entries in books and records, false invoices, and the like. *United States v. Chesson*, 933 F.2d 298, 304 (5th Cir.), *cert. denied*, 112 S. Ct. 583 (1991); *United States v. Walker*, 896 F.2d 295, 298 (8th Cir. 1990) (defendants submitted false invoices to their family company so that the company would treat their personal expenses as business expenses).
  9. Destruction of invoices to customers. *United States v. Garavaglia*, 566 F.2d 1056, 1059 (6th Cir. 1977).
  10. Nominees. Placing property or a business in the name of another. *United States v. Woodner*, 317 F.2d 649, 651 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963); *United States v. Daniel*, 956 F.2d 540 (6th Cir. 1992); *United States v. Peterson*, 338 F.2d 595, 597 (7th Cir. 1964), *cert. denied*, 380 U.S. 911 (1965); *Banks v. United States*, 204 F.2d 666, 672 (8th Cir. 1953), *vacated and remanded*, 348 U.S. 905 (1955), *reaff'd*, 223 F.2d 884 (8th Cir. 1955), *cert. denied*, 350 U.S. 986 (1956).
  11. Extensive use of currency and cashier's checks. *United States v. Daniel*, 956 F.2d 540 (6th Cir. 1992) (defendant used cash extensively, immediately converted checks to cash, and paid employees and insurance policies in cash); *United States v. Holovachka*, 314 F.2d 345, 358 (7th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Schuermann v. United States*, 174 F.2d 397,

- 398 (8th Cir.), *cert. denied*, 338 U.S. 831 (1949).
12. Spending large amounts of cash which could not be reconciled with the amount of income reported, *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, *United States v. Skalicky*, 615 F.2d 1117 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980). See also *United States v. Mortiner*, 343 F.2d 500, 503 (7th Cir.), *cert. denied*, 382 U.S. 842 (1965) (money orders and cashier's checks); *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831 (1978).
  13. Bank accounts held under fictitious names. *United States v. Ratner*, 464 F.2d 101 (9th Cir. 1972); *Elwert v. United States*, 231 F.2d 928 (9th Cir. 1956); cf. *United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).
  14. Checks cashed and the currency deposited in an out-of-town bank account. *United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).
  15. Unorthodox accounting practices with deceptive results. *United States v. Slutsky*, 487 F.2d 832, 834 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *United States v. Waller*, 468 F.2d 327, 329 (5th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).
  16. Repetitious omissions of items of income, e.g., income from various sources not reported. *United States v. Walker*, 896 F.2d 295, 299 (8th Cir. 1990) (over a two-year period taxpayer failed to report interest income totalling \$20,476); *Sherwin v. United States*, 320 F.2d 137, 141 (9th Cir. 1963), *cert. denied*, 375 U.S. 964 (1964); *United States v. Tager*, 479 F.2d 120, 122 (10th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).
  17. Prior and subsequent similar acts reasonably close to the prosecution years. *United States v. Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967); *United States v. Johnson*, 386 F.2d 630 (3d Cir. 1967); *United States v. Alker*, 260 F.2d 135 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959); *Matthews v. United States*, 407 F.2d 1371, 1381 (5th Cir. 1969), *cert. denied*, 398 U.S. 968 (1970); cf. Fed. R. Evid. Rule 404(b).
  18. Alias used on gambling trip -- relevant to an intent to evade taxes. *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).
  19. The defendant's attitude toward the reporting and payment of taxes

- generally. *United States v. Hogan*, 861 F.2d 312 (1st Cir. 1988); *United States v. O'Connor*, 433 F.2d 752, 754 (1st Cir. 1970), *cert. denied*, 401 U.S. 911 (1971); *United States v. Taylor*, 305 F.2d 183, 185 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962); *United States v. Stein*, 437 F.2d 775 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971).
20. Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. *United States v. Smith*, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); *United States v. Segal*, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); *United States v. Rischard*, 471 F.2d 105, 108 (8th Cir. 1973). See *United States v. Diamond*, 788 F.2d 1025 (4th Cir. 1986); *United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business). Caution: *compare and distinguish* *Bursten v. United States*, 453 F.2d 605 (5th Cir. 1971), *cert. denied*, 409 U.S. 843 (1972).
  21. Offer to bribe witness or government agent. *Ewing v. United States*, 386 F.2d 10, 15 (9th Cir. 1967), *cert. denied*, 390 U.S. 991 (1968) (attempt to bribe government witness); *Barcott v. United States*, 169 F.2d 929, 932 (9th Cir. 1948), *cert. denied*, 336 U.S. 912 (1949) (attempt to bribe revenue agent).
  22. Use of false names and surreptitious reliance on the use of cash. *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir.), *cert. denied*, 439 U.S. 831 (1978); *United States v. Walsh*, 627 F.2d 88, 92 (7th Cir. 1980).
  23. Backdating documents, such as receipts, contracts, and the like, to gain a tax advantage. *United States v. Drape*, 668 F.2d 22 (1st Cir. 1982); *United States v. Crum*, 529 F.2d 1380 (9th Cir. 1976); *United States v. O'Keefe*, 825 F.2d 314 (11th Cir. 1987).
  24. Illegal sources of income. *United States v. Palmer*, 809 F.2d 1504, 1505-06 (11th Cir. 1987).

#### 8.06[4] *Willful Blindness*

It is a defense to a finding of willfulness that the defendant was ignorant of the law or of facts which made the conduct illegal, since willfulness requires a voluntary and intentional violation of a known legal duty. However, if the defendant deliberately avoided acquiring knowledge of a fact or the law, then the jury may infer that he actually knew it and that he was merely trying to

avoid giving the appearance (and incurring the consequences) of knowledge. See *United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir.), cert. denied sub nom. *McCreary v. United States*, 476 U.S. 1186 (1986).<sup>4</sup> In such a case, the use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a *Jewell* instruction (see *United States v. Jewell*, 532 F.2d 697 (9th Cir.), cert. denied, 426 U.S. 951 (1976) -- may be appropriate.

A number of courts have approved the use of such instructions under proper circumstances. See, e.g., *United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986); *United States v. MacKenzie*; 777 F.2d 811, 818-19 (2d Cir.), cert. denied, 476 U.S. 1169 (1986); *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979); *United States v. Dube*, 820 F.2d 886, 892 (7th Cir. 1987); *United States v. Bussey*, 942 F.2d 1241, 1246 (8th Cir.), cert. denied, 112 S. Ct. 1936 (1991) (post-*Cheek* decision); *United States v. Fingado*, 934 F.2d 1163, 1166-1167 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991). However, it has also been said that the use of such instructions is "rarely appropriate." *United States v. deFrancisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (relying on several 9th Circuit cases).<sup>3</sup> Thus, it is advisable not to request such an instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the Government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in *United States v. Fingado*, 934 F.2d at 1166, appears to be suitable for a criminal tax case.<sup>4</sup> Further, to avoid potential confusion with the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance."<sup>5</sup>

### 8.07 VENUE

Venue in an evasion case lies in any district where an affirmative act occurred. As previously noted, the most common attempt to evade involves the filing of a false return. Thus, venue can always be laid in the district where a false return was filed. *United States v. King*, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978); *Holbrook v. United States*, 216 F.2d 238 (5th Cir. 1954), cert. denied, 349 U.S. 915 (1955).

In addition to the district of filing, venue will also lie in the district where a false return was prepared or signed, even though the return is filed in a different district. *United States v. King*, 563 F.2d 559, 562 (2d Cir. 1977), cert. denied, 435 U.S. 918 (1978); *United States v. Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974); *United States v. Marrinson*,

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<sup>3</sup> But see *United States v. Rodriguez*, 983 F.2d 455, 457 (2d Cir. 1993) (Second Circuit more willing than Ninth Circuit to authorize use of this type of instruction).

<sup>4</sup> Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in *United States v. MacKenzie*, 777 F.2d 811, 818 n.2 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

<sup>5</sup> It is suggested that any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

832 F.2d 1465, 1475 (7th Cir. 1987); *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 61 (1993); *United States v. Marchant*, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); 18 U.S.C. § 3237(a). This is also true in cases in which the affirmative act of evasion is the filing of a false withholding Form W-4 rather than a false tax return: venue is proper where the false W-4 was prepared and signed, or where it was received and filed. *United States v. Felak*, 831 F.2d 794, 798-99 (8th Cir. 1987).

Venue is not limited, however, to the district of signing, filing, or preparation. The rule is that venue will lie in any district where an attempt to evade took place, *e.g.*, the district where a false statement was made to an I.R.S. agent, *United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981), where the making of false records or the concealment of assets took place, *Beaty v. United States*, 213 F.2d 712, 715 (4th Cir. 1954), *vacated and remanded*, 348 U.S. 905, *reaff'd*, 220 F.2d 681 (4th Cir.), *cert. denied*, 349 U.S. 946 (1955), where false returns were prepared, *United States v. Albanese*, 224 F.2d 879, 882 (2d Cir.), *cert. denied*, 350 U.S. 845 (1955), or where there was a concealment of assets, *Reynolds v. United States*, 225 F.2d 123, 128 (5th Cir.), *cert. denied*, 350 U.S. 914 (1955).

Reference should also be made to the discussion of venue in Section 6.00, *supra*.

#### 8.08 STATUTE OF LIMITATIONS

The statute of limitations is six years "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof." 26 U.S.C. § 6531(2). For a discussion as to the measurement of the six-year period of limitations, *see* Section 7.00, *supra*.

The general rule is that the six-year period of limitations begins to run from the last affirmative act constituting an attempt to evade. *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952). Thus, if the filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. However, where a false return is filed before the statutory due date, the statute of limitations does not start running until the statutory due date arrives. *United States v. Habig*, 390 U.S. 222, 225 (1968); *United States v. Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S. 1918 (1972); *United States v. Ayers*, 673 F.2d 728, 729 (4th Cir. 1982). When the affirmative act occurs before the tax deficiency, the statute of limitations begins at the time of the tax deficiency. *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2441 (1993).

In all evasion cases, affirmative acts of evasion carried out after the statutory due date renew the limitations period and allow it to extend beyond six years from the time filing was required (or unpaid taxes were due). *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986), *cert. denied*, 480 U.S. 950 (1987) (false statements by defendant to revenue agents and prosecutor regarding income from prior year in question were affirmative acts which triggered the statute of limitations computation); *United States v. Dandy*, 998 F.2d 1344 (6th Cir. 1993) ("To hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed"); *United States v. DeTar*, 832 F.2d 1110, 1113

(9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable over six years ago).

In *Spies* evasion cases, where no return is filed, the statute of limitations period runs from the later of the due date of the tax return at issue or the commission of the affirmative act. *United States v. DiPetto*, 936 F.2d 96, 98 (2d Cir.), *cert. denied*, 112 S. Ct. 193 (1991); *United States v. Williams*, 928 F.2d 145, 149 (5th Cir.), *cert. denied*, 112 S. Ct. 58 (1991); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992). Thus, if the defendant committed the affirmative act during the tax year (*e.g.*, filed a false Form W-4), then the limitations period runs from the due date of the tax return. If the defendant committed the affirmative act after the filing due date (*e.g.*, lied to investigating agents), then the limitations period does not start until the date of the affirmative act.

### 8.09 LESSER INCLUDED OFFENSES

Tax Division Memorandum dated February 12, 1993, regarding Lesser Included Offenses in Tax Cases (hereinafter "Memorandum") explains the Tax Division's policy on lesser included offenses. The Memorandum states the government's adoption of the strict "elements" test of *Schmuck v. United States*, 489 U.S. 705, 709-10 (1989). This test makes one offense included in another only when the statutory elements of the lesser offense are a subset of the elements of the greater offense. *Id.* The policies relevant to tax evasion appear quoted below.

(Section 7203)

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

The issue whether cumulative punishment is appropriate where a defendant has been convicted of violating both section 7201 and section 7203 generally will arise only in pre-guidelines cases. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. Thus, only in those cases involving an extraordinary tax loss will the sentencing court be required to

consider an imprisonment term longer than five years. In those cases in which cumulative punishments are possible and the defendant has been convicted of violating both sections 7201 and 7203, the prosecutor may, at his or her discretion, seek cumulative punishment. However, where the sole reason for including both charges in the same indictment was a fear that there might be a failure of proof on the tax deficiency element, cumulative punishments should not be sought. Memorandum at 2.

(Section 7206)

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

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

(Section 7207)

Although the elements of section 7207 do not readily appear to be a subset of the elements of section 7201, the Supreme Court has held that a violation of section 7207 is a lesser included offense of a violation of section 7201. See *Sansone v. United States*, 380 U.S. 343, 352 (1965); *Schmuck v. United States*, 489 U.S. at 720, n.11. Accordingly, in an appropriate case, either party may

request the giving of a lesser included offense instruction based on section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document. Memorandum at 3.

(Other Offenses)

6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (*i.e.*, assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of *Schmuck v. United States*, 489 U.S. 705, should be applied. Memorandum at 4.

(General Warning)

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. *See, e.g., United States v. Doyle*, 956 F.2d 73, 74-75 (5th Cir. 1992); *United States v. Boone*, 951 F.2d 1526, 1541 (9th Cir. 1991); *United States v. Kaiser*, 893 F.2d 1300, 1306 (11th Cir. 1990); *United States v. Lodwick*, 410 F.2d 1202,1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set out in this memorandum be followed. Memorandum at 3.

[T]hese guidelines will remain in effect unless or until the Supreme Court . . . rules inconsistently with the . . . policy. Memorandum at 4.

The policy statement was issued partially in response to recent appellate court decisions on the issue of whether section 7203 is a lesser included offense of section 7201. The Seventh Circuit held in *United States v. Becker*, 965 F.2d 383 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1411 (1993), that failure to file was not a lesser included offense of tax evasion ("[s]ection 7203 does not require 'an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense. . . .") *Becker*, 965 F.2d at 391 (quoting *United States v. Foster*, 789 F.2d 457, 460 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986)).

In *United States v. McGill*, 964 F.2d 222, 239-40 (3d Cir.), *cert. denied*, 113 S. Ct. 664 (1992), however, the Third Circuit held that failure to pay was a lesser included offense of evasion

of payment. McGill was charged with five counts of evasion of payment. The jury convicted the defendant of three counts of evasion of payment and of failure to pay regarding the other two years. McGill argued that section 7203 is not a lesser included offense of section 7201 "because one element of the misdemeanor -- failure to pay a tax -- requires different proof than the parallel affirmative act of evasion under § 7201 which as the court held in *Spies* cannot be the mere failure to pay". The court disagreed: "McGill's argument overlooks the fact that it is exactly in the situation where proof of the affirmative act to evade payment fails, that the lesser included offense of willful failure to pay may become relevant." *McGill*, 964 F.2d at 239.

Prosecutors dealing with tax cases involving lesser included offense issues are encouraged to consult with the Tax Division's Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

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1. Changed to 18 U.S.C. § 3571, commencing Nov. 1, 1986.

2. The First Circuit also rejected the defendants' duplicity claims in both *Huguenin* and *Waldeck* on the grounds that the defendants in those cases were clearly apprised that the government was proceeding on an evasion-of-assessment theory. See *Huguenin*, 950 F.2d at 26; *Waldeck*, 909 F.2d at 558.

Although the court in *Waldeck* stated (909 F.2d at 558) that "the indictment could have been clearer by specifying that the crime charged was attempting to evade and defeat the assessment of taxes," the Tax Division believes that an indictment which tracks the first part of the statute and alleges an attempt to evade and defeat a tax clearly charges an attempt to evade tax by evasion of assessment. Similarly, an indictment which tracks the second part of the statute and alleges an attempt to evade payment of a tax clearly alleges an attempt to evade tax by evasion of payment. This analysis is consistent with the result in both *Huguenin* and *Waldeck*.

3. The government's proof of additional tax in a given year cannot be based upon income which should have been reported in an earlier or later year. *United States v. Wilkins*, 385 F.2d 465, 469 (4th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

4. Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991). *But see United States v. MacKenzie*, 777 F.2d 811, 818 n.2 (2d Cir.), *cert. denied*, 476 U.S. 1169 (1986).