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3.00 TAX DIVISION POLICY DIRECTIVES AND MEMORANDA

The Tax Division's policies and procedures are contained in a series of Tax Division Directives and Memoranda, which are set forth in the pages that follow for ease of reference.

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DEPARTMENT OF JUSTICE
TAX DIVISION DIRECTIVE NO. 52

March 17, 2008

**AUTHORITY TO APPLY FOR TITLE 26 OR TAX-RELATED
TITLE 18 SEARCH WARRANTS**

A. Pursuant to the authority vested in me by Part 0, Sub-Part N of Title 28 of the Code of Federal Regulations, Section 0.70, except as provided in paragraph B, below, I hereby delegate to the following officials authority with respect to approving applications for Title 26 U.S.C. or tax-related Title 18 U.S.C. search warrants directed at offices, structures, premises, etc., owned by, controlled by, or under the dominion of, the subject or target of a criminal investigation; search warrants directed to providers of electronic communication services or remote computing services and relating to a subject or target of a criminal investigation; and search warrants directed to disinterested third parties owning storage space businesses or similar businesses and relating to a subject or target of a criminal investigation:

1. Any United States Attorney appointed under 28 U.S.C. Section 541,
2. Any United States Attorney appointed under 28 U.S.C. Section 546,
3. Any permanently appointed representative within the United States Attorney's office assigned as First Assistant United States Attorney, and
4. Any permanently appointed representative within the United States Attorney's office assigned as chief of criminal functions.

This delegation of authority is expressly restricted to these, and no other, individuals.

This delegation of authority does not affect the statutory authority and procedural guidelines relating to the use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. Sec. 59.1, et seq.

B. 1. The Tax Division shall have exclusive authority to approve applying for a Title 26 or tax-related Title 18 search warrant directed at offices, structures or premises owned by, controlled by, or under the dominion of, a subject or target of an investigation who is reasonably believed to be:

- a. An accountant;
- b. A lawyer;

- c. A physician;
- d. A local, state, federal, or foreign public official or political candidate;
- e. A member of the clergy;
- f. A representative of the electronic or printed news media;
- g. An official of a labor union;
- h. An official of an organization deemed to be exempt under Section 501(c) of the Internal Revenue Code.

2. The Tax Division shall also have exclusive authority to approve applying for a Title 26 or tax-related Title 18 search warrant that is directed to a provider of electronic communication services or remote computing services or to a disinterested third party owning a storage space business, where the search warrant relates to a person who is reasonably believed to be:

- a. An accountant;
- b. A lawyer;
- c. A physician;
- d. A local, state, federal, or foreign public official or political candidate;
- e. A member of the clergy;
- f. A representative of the electronic or printed news media;
- g. An official of a labor union;
- h. An official of an organization deemed to be exempt under Section 501(c) of the Internal Revenue Code.

C. If authority to approve a particular application for a warrant to search for evidence of a criminal tax offense has not been delegated herein, the application must be specifically approved in advance by the Tax Division.

Notwithstanding this delegation, the United States Attorney or his delegate has the discretion to seek Tax Division approval of any search warrant or to request the advice of the Tax Division regarding any search warrant.

The United States Attorney shall notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and shall transmit to the Tax

Division copies of the search warrant (and attachments and exhibits), inventory, and any other relevant papers.

This directive provides an internal guide to federal law enforcement officials. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by any prospective or actual witness or party. *See United States v. Caceres*, 440 U.S. 741 (1979).

The United States Attorneys' Manual is hereby modified effective March 17, 2008.

Nathan J. Hochman
Assistant Attorney General Tax Division
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 86 - 58

May 14, 1986

Introduction. While it is the function of the Tax Division to carefully review the facts, circumstances, and law of each criminal tax case as expeditiously as possible, the taxpayer should be given a reasonable opportunity to present his/her case at a conference before the Tax Division. Where the rules governing conferences are so rigid and inflexible that such an opportunity is effectively denied a taxpayer, the interests of justice are not served. The following guidelines will assist the Tax Division attorneys in reviewing such cases.

(1) ***Vicarious Admissions.*** Effective immediately, the vicarious admissions rule for statements by lawyers attending conferences before the Criminal Section shall no longer be used by the Tax Division, except where the lawyer authenticates a written instrument, *i.e.*, document, memorandum, record, etc.

(2) ***Administrative Investigations.*** Effective July 1, 1986, plea negotiations may be entertained at the conference in non-grand jury matters, consistent with the policies of the appropriate United States Attorney's office. Written plea agreements should be prepared and entered into by the United States Attorney's office unless there is a written understanding between the Tax Division and the United States Attorney's office to the contrary. Where the prospective defendant indicates a willingness to enter into a plea of guilty to the major counts(s) and to satisfy the United States Attorney's office policy, the matter should be referred to the United States Attorney's office for plea disposition.

(3) ***Number of Conferences.*** There is no fixed number of conferences which may be granted in any one particular case. Ordinarily, one conference is sufficient. However, in some cases it may be that more than one conference is appropriate. The test is not in the number of conferences, for there is no right to a conference, but whether, under the facts and circumstances of the case, sufficient progress is or will be made in either the development of material facts or the clarification of the applicable law, without causing prejudice to the United States. Tax Division attorneys should be mindful that justice delayed is justice denied and, therefore, sound, professional judgment should be used at all times in such matters.

(4) ***Witness at Conferences.*** On occasion, the taxpayer or a witness may attend the conference. In rare situations, the taxpayer or a witness may attempt to make oral representations or statements at the conference. There are no restrictions on the use of such statements by the Government. However, such attempts should be discouraged, since the Tax Division is conducting a review of an investigation and is not conducting either a hearing or an investigation. Under no circumstances may evidence be presented

at the conference based upon any understanding that it is in lieu of any person testifying before a grand jury.

(5) ***Grand Jury Investigations and Coordination with United States Attorney's Office.*** Effective immediately, in every grand jury investigation where a conference is requested, the Tax Division trial attorney shall initially contact the United States Attorney's office and discuss the case with the appropriate Assistant United States Attorney, and ascertain whether disclosure of any facts of the case is likely to expose any person, including witnesses, to the risk of intimidation or danger. If there is such a risk, the trial attorney shall then advise the appropriate assistant chief of the Criminal Section, who shall decide the appropriate course of action. The Tax Division trial attorney shall advise the Assistant United States Attorney that he/she may attend the conference if they so desire.

ROGER M. OLSEN
Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

MEMORANDUM SUPPLEMENT TO TAX DIVISION DIRECTIVE 86-58

October 1, 2013

To: Chiefs, Assistant Chiefs, Senior Litigation Counsel, and Line Attorneys
Criminal Enforcement Sections

From: Kathryn Keneally
Assistant Attorney General

Subject: Supplemental procedures for Tax Division conferences associated with
litigation to which a Tax Division attorney has been assigned

To ensure the continued independent evaluation of a matter referred to the Tax Division for prosecution, when a taxpayer requests a Tax Division conference in litigation handled solely or in part by a Tax Division attorney, the following procedures will apply:

1. Upon request of the taxpayer, where a line attorney who is not a Senior Litigation Counsel has been or will be assigned to litigation of the case, a manager or Senior Litigation Counsel will attend the Tax Division conference;
2. Where a manager or Senior Litigation Counsel has been or will be assigned to litigation of the case, a different manager or Senior Litigation Counsel will attend any requested Tax Division conference alone with the assigned attorney(s), and will be assigned to review any memoranda prepared by the manager or Senior Litigation Counsel assigned to litigate the case; and
3. Upon completion of the conference, a memorandum of the conference should be prepared by of the Tax Division participants and should be signed by all Tax Division participants.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 86-59

**AUTHORITY TO APPROVE GRAND JURY EXPANSION REQUESTS TO
INCLUDE FEDERAL CRIMINAL TAX VIOLATIONS**

AGENCY: Department of Justice

ACTION: Notice

SUMMARY: This Directive delegates the authority to approve requests seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations from the Assistant Attorney General, Tax Division, to any United States Attorney, Attorney-In-Charge of a Criminal Division Organization Strike Force or Independent Counsel. The Directive also sets forth the scope of the delegated authority and the procedures to be followed by designated field personnel in implementing the delegated authority.

EFFECTIVE DATE: October 1, 1986

FOR FURTHER INFORMATION CONTACT: Edward M. Vellines, Senior Assistant Chief, Office of Policy & Tax Enforcement Analysis, Tax Division, Criminal Section (202-633-3011). This is not a toll number.¹

SUPPLEMENTARY INFORMATION: This order concerns internal Department management and is being published for the information of the general public.

¹ Questions concerning this directive should now be addressed to the Criminal Appeals and Tax Enforcement Policy Section at 202-514-5396.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 86-59

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, delegation of authority with respect to approving requests seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations is hereby conferred on the following individuals:

1. Any United States Attorney appointed under Section 541 or 546 of Title 28, United States Code.
2. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, United States Code.
3. Any Independent Counsel appointed under Section 593 of Title 28, United States Code.

The authority hereby 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. (Section 301.6103(h)(2)-1(a)(2)(ii) (26 C.F.R.)). *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 F.R.Cr.P. 6(e)(A)(ii) to seek the assistance of Government personnel assigned to the Internal Revenue Service 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 targets 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 Internal Revenue Service personnel and containing pertinent information relating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate Internal Revenue Service 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 Internal Revenue Service has made a referral pursuant to the provisions of 26 U.S.C. Section 6103(h)(3) in writing stating that it: (1) 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; (2) agrees to furnish the personnel needed to assist the Government attorney in his/her duty to enforce federal criminal law; and (3) has forwarded to the Tax Division a copy of the referral.
7. The grand jury proceedings will be conducted by attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the Internal Revenue Service and the Tax Division before undertaking to initiate criminal proceedings.

The authority hereby 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 Internal Revenue Service 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. Section 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 Task Force Investigations, individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the United States Attorney, Independent Counsel or Attorney-in-Charge of a Strike Force with a special agent's report and exhibits through Regional Counsel, (Internal Revenue Service) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of grand jury investigations conducted by an Organized Crime Drug Task Force shall

be forwarded directly to the Tax Division by the United States Attorney with a special agent's report and exhibits.

The authority hereby 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 Internal Revenue Service, 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.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *October 1, 1986*

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 87 – 61

**DELEGATION OF AUTHORITY FOR TAX PROSECUTIONS INVOLVING
RETURNS UNDER 26 U.S.C. SECTION 6050I**

By virtue of the authority vested in me by Part 0, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, delegation of authority with respect to authorizing tax prosecutions, under Title 26, United States Code (U.S.C.), Sections 7203 and 7206 with respect to Returns (IRS Form 8300) Relating to Cash Received in a Trade or Business as prescribed in 26 U.S.C. Section 6050I, is hereby conferred on the following individuals:

1. The Assistant Attorney General, Deputy Assistant Attorneys General, and Section Chiefs of the Criminal Division.
2. Any United States Attorney appointed under Section 541 or 546 of Title 28, U.S.C.
3. Any permanently appointed representative within the United States Attorney's Office assigned either as First Assistant United States Attorney or Chief of criminal functions.
4. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, U.S.C.
5. Any Independent Counsel appointed under Section 593 of Title 28, U.S.C.

This delegation of authority is expressly restricted to the aforementioned individuals and may not be redelegated.

The authority hereby conferred allows the designated official to authorize, on behalf of the Assistant Attorney General, Tax Division, tax prosecutions under 26 U.S.C. Sections 7203 and 7206 with respect to returns (IRS Form 8300) prescribed in 26 U.S.C. Section 6050I relating to cash received in a trade or business; Provided, that:

1. The prosecution of such tax offenses (e.g. Sections 7203 and 7206) involves solely cash received in a trade or business as required by 26 U.S.C. Section 6050I.
2. The matter does not involve the prosecution of accountants, physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; 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 publicly-held corporations and/or their officers.

3. The Tax Division of the Department of Justice will be furnished by certified mail a copy of the referral from the Internal Revenue Service to the designated field office personnel regarding the potential tax violations.

Except as expressly set forth herein, this delegation of authority does not include the authority to file an information or return an indictment on tax matters. The authority hereby delegated is limited solely to the authorization of tax prosecutions involving the filing or non-filing of returns (IRS Form 8300) pursuant to 26 U.S.C. Section 6050I. The authority to alter any actions taken pursuant to the delegation contained herein is retained by the Assistant Attorney General, Tax Division, in accordance with the authority contained in 28 C.F.R. 0.70.

Notwithstanding this delegation, the designated official has the discretion to seek Tax Division authorization of any proposed tax prosecution within the scope of this delegation or to request the advice of the Tax Division with respect thereto.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *February 27, 1987*.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 96

**DELEGATION OF AUTHORITY TO AUTHORIZE GRAND JURY
INVESTIGATIONS OF FALSE AND FICTITIOUS CLAIMS FOR TAX REFUNDS**

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, 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, is hereby conferred on all United States Attorneys.

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 in 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 in 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, the request for grand jury investigation letter, together with the Form 9131 and a copy of all exhibits, must be sent to 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 request for grand jury investigation letter (together with the completed 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 referral letter has not been forwarded to the Tax Division, Department of Justice (by overnight courier), by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United

States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This delegation of 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 delegation of authority to authorize prosecution of such cases (see United States Attorneys' Manual, Title 6, 4.243). 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 and fictitious claims for refunds, Tax Division authorization is required if prosecution is deemed appropriate in an electronic filing case.

SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: December 31, 1991

DEPARTMENT OF JUSTICE

February 17, 1993

MEMORANDUM

TO: All Criminal Enforcement Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

SUBJECT: **Tax Division Voluntary Disclosure Policy**

Recent new releases by the IRS and stories in the press have raised questions within the Division concerning the proper handling of cases in which a prospective criminal tax defendant claims to have made a voluntary disclosure. Notwithstanding the news stories and rumors to the contrary, the Division has not changed its policy concerning voluntary disclosure, and cases should be evaluated as they have in the past under the provisions of Section 4.01 of the Criminal Tax Manual.

The Service, takes the view that, notwithstanding reports to the contrary, it has not changed its voluntary disclosure practice. It claims that its press releases have been issued to inform the public of the manner it has historically applied the existing practice in referring nonfiler cases to the Department of Justice. The goal has been to demonstrate to the public that the practice has been applied liberally in the past and that a nonfiler interested in reentering the tax system should not be intimidated by a theoretical threat of criminal prosecution.

The Service's carefully worded press releases and public statements have been construed by some member of the press and the defense bar as an "amnesty". This is troublesome, because some inaccurate information has been and is being disseminated to the public by the press and members of the bar that is likely to cause confusion and could interfere with the prosecution of some criminal tax cases. At bottom, the Service's voluntary disclosure policy remains, as it has since 1952, an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers.

We in the Tax Division should have few occasions to consider whether the Service is properly adhering to its voluntary disclosure policy. If the Service has referred a case to the Division, it is reasonable and appropriate to assume that the Service has considered any voluntary disclosure claims made by the taxpayer and has referred the case to the Division in a manner consistent with its public statements and internal policies. As a result, our review is normally confined to the merits of the case and the application of the Department's voluntary disclosure policy set forth in Section 4.01 of the Criminal Tax Manual.

Cases may, however, arise in which there is some confusion over whether a local District Counsel's office has referred a nonfiler case that seems arguably to fall within one of the Service's press releases on voluntary disclosure or otherwise appears to have been referred to the Department in a manner inconsistent with our understanding of the Service's voluntary disclosure practice. If that occurs, Tax Division reviewing attorneys should not attempt to construe the Service's voluntary disclosure practice on their own but should bring all such questions to the immediate attention of their Section Chiefs. If it is determined that but for questions concerning the applicability of the Service's policy, prosecution of the case would be authorized (i.e., the case meets Tax Division prosecution criteria and does not violate the Division's voluntary disclosure policy set forth in Criminal Tax Manual §4.01), the Section Chief should forward the case (where applicable, consistent with limitations imposed upon the disclosure of grand jury information) to the Assistant Chief Counsel Criminal Tax (CC:CT) for that office's determination whether the Service's referral was consistent with its internal voluntary disclosure practice and whether the Service actually intends that the case be prosecuted. If the Office of Assistant Chief Counsel Criminal Tax determines that the referral was appropriate, the case should be processed by the Division in the normal manner.

Finally, Tax Division reviewing attorneys should exercise considerable care in drafting letters declining cases to ensure that they reflect Tax Division policy regarding voluntary disclosures. Assistant United States Attorneys and IRS field and National Office personnel rely on our correspondence as a reflection of Tax Division policy, and it is, therefore, crucial that our letters and memoranda addressed to other offices within the government accurately state our policies.

DEPARTMENT OF JUSTICE

February 12, 1993

MEMORANDUM

TO: All United States Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

RE: **Lesser Included Offenses in Tax Cases**

The purpose of this memorandum is to provide guidance concerning the government's handling of lesser included offense issues in certain kinds of tax cases. Two petitions for writs of certiorari involving the issue of lesser included offenses in tax cases have recently been filed in the Supreme Court. In *Becker v. United States*, No. 92-410, the defendant was convicted of attempting to evade taxes and of failure to file tax returns for the same years. The trial court sentenced the defendant to three years' imprisonment on the evasion counts and to a consecutive period of 36 months' imprisonment on the failure to file counts. The court of appeals affirmed. In his petition for a writ of certiorari, the defendant argued that the misdemeanor of failure to file a tax return is a lesser included offense of the felony of tax evasion and that the Constitution prohibits cumulative punishment in the same proceeding for a greater and lesser included offense.

In opposing certiorari on this question, the government argued that whether cumulative punishments could be imposed for a course of conduct that violated both 26 U.S.C. 7201 and 26 U.S.C. 7203 was solely a question of congressional intent. The government pointed to the statutory language of Sections 7201 and 7203 as clear evidence of Congress' intent to permit cumulative punishment where a defendant was convicted in a single proceeding of violating both Section 7201 and Section 7203. As further support for its position, the government argued that Sections 7201 and 7203 involve separate crimes under *Blockburger v. United States*, 284 U.S. 299 (1932) (and, thus, that a violation of Section 7203 is not a lesser included offense of a violation of Section 7201). The *Becker* petition is currently pending before the Supreme Court.

In *McGill v. United States*, No. 92-5842, the government argued, relying on *Sansone v. United States*, 380 U.S. 343 (1965), that willful failure to pay taxes (26 U.S.C. 7203) is a lesser included offense of attempted evasion of payment of taxes (26 U.S.C. 7201). The Supreme Court denied certiorari in *McGill* on December 7, 1992.

The government's position in *Becker* reflects an adoption of the strict "elements" test (see *Schmuck v. United States*, 489 U.S. 705 (1989)) and, consequently, a change in Tax Division policy. Accordingly, all attorneys handling tax cases should be notified of the following ramifications of this change in policy.

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.

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.

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 where 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 Section 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.

3. 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. at 352; *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.

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, *neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

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.

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.

These guidelines will remain in effect unless or until the Supreme Court grants certiorari in *Becker* and rules inconsistently with the newly adopted policy. Prosecutors are encouraged to consult with the Tax Division whenever they are faced with a case raising questions addressed in this memorandum by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 98

(Supersedes Tax Division Directive No. 57)

February 16, 1993

Press releases serve an important tax enforcement purpose. Thus, they alert the public to the potential consequences that attend noncompliance with the nation's revenue laws and inform the public that the revenue laws are, in fact, enforced. But the Division has certain responsibilities to ensure that all such press releases comply with Department policy (the Department's Media Policy is set forth in Chapter 7 of Title 1 of the United States Attorneys' Manual), and with the strictures of Section 6103 of the Internal Revenue Code and Rule 6(e) of the Federal Rules of Criminal Procedure. Certain safeguards are, therefore, appropriate to ensure that no press release that does not strictly conform to these provisions and to all applicable court rules is released from the Tax Division. While these safeguards require an additional measure of work from Division attorneys, the beneficial impact of a timely and informative press release upon our tax enforcement efforts more than outweighs the costs attributable to the effort.

Thus, the Tax Division adopts the following guidelines that must be followed prior to the Division's authorizing the issuance of such releases.

1. Attorneys should evaluate the appropriateness of a press release as soon as it is determined that action warranting a release is imminent and should consult with their section chiefs at that time.
2. In the event the section chief believes that a press release is appropriate, the attorney should prepare a draft of that release and that draft should clearly indicate that the draft is "Embargoed for Release." That draft should contain only information that will become a matter of public record, following the filing of the complaint, the return of the impending indictment, etc.
3. After the draft is approved within the applicable section, it should be discussed with the press officer in the local United States Attorney's office and with the Department's Office of Public Affairs. (In the case of press releases that are prepared by the Offices of United States Attorney, the attorney should obtain a copy of the draft release from that office.) All drafts of the press release should be clearly marked as "Embargoed for Release." And all press personnel should be alerted to the fact that information contained in the press release that is protected by either Section 6103 or Rule 6(e) cannot be released until final approval for issuance of the press release is obtained.
4. The draft press release should then be forwarded to the Office of the Assistant Attorney General. In criminal cases, an additional copy of the draft release should be provided to the Director, Criminal Enforcement Sections. Except in unusual

circumstances, this draft release should be forwarded two days in advance of the expected release date.

5. The attorney handling the case should then ensure that the Office of the Assistant Attorney General is informed when the complaint, indictment or other pleading is filed in the local court. At this time, the attorney should request a telefax copy of the pleading that is actually filed (preferably one that has been stamped as "filed" by the clerk's office). When the attorney is satisfied that the facts as set forth in the press release are consistent with the pleading, that the release does not disclose matters not set forth in the pleading, and that, under the local rules, public disclosure is permitted (e.g., some local rules prohibit public release of indictments until the defendant is arraigned), the attorney should inform the Office of the Assistant Attorney General that the release may be issued. (Attorneys should take special note of the fact that, while Department policies permit disclosure of the "defendant's name, age, residence, employment, marital status, and similar background information," disclosures in tax cases must be confined to matters set forth in the pleading.)

6. The Office of the Assistant Attorney General will then coordinate the final clearance of the release with the Office of Public Affairs. No press release can be cleared for issuance by the Tax Division without the final approval of the Office of the Assistant Attorney General.

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

October 15, 1997

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS

FROM: Loretta C. Argrett
Assistant Attorney General

SUBJECT: **Press Releases in Cases Involving the IRS**

ACTION REQUIRED: Forward, preferably via fax, a copy of each press release in criminal tax cases to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044. FAX (202) 514-5479.

DUE DATE: None

RESPOND TO: See Below

CONTACT PERSON: Bob Lindsay
(202) 514-3011 ^[note]

Note: This contact information is out of date. Please contact the Chief, Criminal Appeals and Tax Enforcement Policy Section at (202) 514-5396.

Summary

The purpose of this message is to provide guidance to United States Attorneys' offices about the use of press releases publicizing indictments, convictions, and sentences in criminal tax and other IRS-investigated cases, in light of a recent circuit court opinion and several earlier decisions. [This guidance also applies to civil tax cases.]

This recent decision has increased the confusion about the information that may be released in tax cases. On August 21, 1997, the United States Court of Appeals for the Fifth Circuit ruled that the prohibitions against the disclosure of tax returns and return information from IRS or DOJ files (26 U.S.C. § 6103) continue to apply even if the information has been made public in an indictment or court proceeding. Johnson v. Sawyer, 5th Cir. No. 96-20667 ___F.3d___. [120 F.3d 1307 (5th Cir. 1997)] The Fifth Circuit concluded that “[i]f the immediate source of the information claimed to be wrongfully disclosed is tax return information ..., the disclosure violates § 6103, *regardless* of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer confidentiality.” Several other circuits have addressed this issue, often reaching conflicting conclusions.

The practical effect of these holdings is that you should exercise caution when preparing tax press releases. Press releases cannot be written with information from IRS or the prosecutor's files, but must be based on, and contain only, public record information. Thus, a press release announcing an indictment should contain only information set forth in the publicly-filed indictment and indicate that the source of the information is the indictment. Similarly, a press release discussing a conviction should be based solely on information made public at the trial or in pleadings publicly filed in the case, and should indicate that the source of the information is the public court record.

Background

Section 7431 of the Internal Revenue Code (26 U.S.C.) authorizes a civil action for damages against the United States for the unauthorized disclosure of returns or return information. The minimum damage award for each negligent disclosure is \$1,000. The statute also provides for punitive damages for any unauthorized disclosures that are due to gross negligence or willfulness. A willful disclosure of returns or return information in a manner not authorized by Section 6103 also is punishable as a felony under 26 U.S.C. 7213.

“Return information” is defined in Section 6103 of the Code to include virtually all information collected or gathered by the IRS with respect to a taxpayer's tax liabilities, or any investigation concerning such liability. It prohibits any disclosure of either tax returns themselves or return information, except as specifically authorized by that section. The statute authorizes the IRS to disclose tax returns and return information to the Department of Justice for use in criminal and civil tax cases on its own initiative (Section 6103(h)(2) and (3)) and for use in non-tax criminal cases pursuant to a court order (Section 6103(i)(1)). Sections 6103(h)(4) and 6103(i)(4) permit the Department to disclose such returns or return information in civil or criminal judicial proceedings relating to tax administration and in non-tax criminal cases and civil forfeiture cases, respectively.

Several circuits have addressed the question of when the non-disclosure restrictions of Section 6103 no longer apply to return information. The Ninth Circuit has held that once return information has been made public in a judicial proceeding, the non-

disclosure restrictions no longer apply to that information. Lampert v. United States, 854 F.2d 335 (9th Cir. 1988). The Sixth Circuit has held that the return information disclosed by the filing of a notice of federal tax lien loses its confidentiality and is not protected by Section 6103, but emphasized that a notice of federal tax lien “is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public.” Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996). In an unpublished opinion, the Third Circuit has held that a press release did not contain unauthorized disclosures of return information because the information in the press release was public information. Barnes v. United States, 73 A.F.T.R. 2d (PH) ¶ 94-581, at 1160 (3rd Cir. 1994). On the other hand, the Tenth and the Fourth Circuits have held that public disclosure of return information does not lift the non-disclosure bar on further disclosure of such information. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). While the Seventh Circuit did not resolve the issue of whether return information disclosed in court loses its confidentiality, it concluded that information in a court opinion is not return information and, when the source of the information disclosed is the court opinion, no violation has occurred. Thomas v. United States, 890 F.2d 18 (7th Cir. 1989) In Johnson v. Sawyer, *supra*, the Fifth Circuit followed “the approach of the Fourth and Tenth Circuits, modified by the Seventh Circuit’s “source’ analysis.” Under the Fifth Circuit’s analysis, Section 6103 is violated only when tax return information -- which is not a public record open to public inspection -- is the immediate source of the information claimed to be wrongfully disclosed.

The starting point in determining what information may be included in a press release publicizing an indictment, conviction, or sentence is acknowledgment that the Section 6103 prohibitions on disclosure are source-based. **That is, the statute bars the public disclosure of information taken directly from IRS files, or returns and return information that have been accumulated in Department files as part of an investigation or prosecution.** It does not, however, ban the disclosure of information that is taken from the public court record.

Thus, for example, the statute, as interpreted by the majority of the circuits, prohibits the disclosure from IRS or Department files of a tax-crime defendant's name, or the fact that he was under investigation or has been indicted for a particular tax crime. To the extent that this same information has been placed in the public court record (*e.g.*, included in an indictment or other pleading), its dissemination from the public court record does not violate the statute.

Recommendations

United States Attorneys may (**and should**) continue to issue press releases in criminal tax cases. In light of the judicial interpretations of Section 6103 discussed above, however, a press release should contain only information the immediate source of which is the public record of the judicial proceeding, and the press release should attribute the information to the public court record.

A post-indictment press release may relate information set forth in the publicly-filed indictment, and should state that the information is from the publicly-filed indictment (for example: “according to the indictment, during the years 1993 and 1994, John Doe received income in excess of \$100,000 which he failed to report on his income tax returns. The indictment further charges . . .”). Facts (including minor details) that do not appear in the indictment (such as the defendant's age, full name, and address) should not be included in the press release unless they are obtained from and attributed to public records.

Post-conviction press releases should make it clear that the information being released came from the publicly-filed indictment, public filings in the case, or public testimony. Care should be taken to avoid statements that are ambiguous as to source. Statements that could be based on information in IRS or Department files should not be made unless the information in the statements are obtained from and attributed to specific public sources. (For example, the source of the facts in this statement -- “Doe shielded his income in offshore bank accounts” -- could be from the IRS special agent's files, trial testimony, or the indictment. If the source of the facts in the statement is trial testimony, the indictment, or other public record, disclosure is permissible.) Thus, statements of facts that could have come from the IRS files should not be made unless attributed to a specific public source.

Assistant United States Attorneys and Public Information Officers issuing a press release or responding to press inquiries should secure the source document from the public record and make it clear that the immediate source of the information they are providing is the public court record, and identify the source.

These rules apply to the use in press releases of any return information provided to the Department in any criminal [or civil] case. United State Attorneys should apply these guidelines in all cases in which tax return information has been made available to the attorney for the Government. Return information obtained for use in non-tax criminal cases and related civil forfeiture cases pursuant to a Section 6103(i) order is subject to the same disclosure restrictions as return information provided by the IRS for use in criminal tax cases. In addition, return information provided to the United States Attorney's office by the IRS in money laundering or narcotics cases that the IRS has determined are “related to tax administration,” pursuant to Section 6103(b)(4), is also subject to the same non-disclosure rules.

Request

The Tax Division requests that a copy of each press release in a criminal tax case be sent to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044, preferably by faxing the release to (202) 514-5479. The Division is actively seeking to obtain more publicity for successful results in criminal tax cases and maintains a tax-interested press list for faxing press releases reflecting favorable outcomes in such cases. The Division would be happy to forward press releases from individual United States Attorneys' offices to those in the media who have shown an

interest in such matters, thereby widening the publicity given to successful tax prosecutions.

DEPARTMENT OF JUSTICE

September 8, 2000

MEMORANDUM

To: All CES Chiefs, Assistant Chiefs, and Trial Attorneys

From: Paula M. Junghans
Acting Assistant Attorney General

Subject: **Press Releases in Criminal Tax Cases**

There has been a significant decline in the number of press releases prepared for criminal cases that Tax Division lawyers are litigating or that we are prosecuting in conjunction with personnel from the United States Attorneys' Offices. This trend may be due, in part, to certain appellate court decisions that have strictly interpreted the non-disclosure requirements of Section 6103. See, e.g., Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997). Press releases, however, serve an important function; *i.e.*, they "alert the public to the potential consequences that attend noncompliance with the nation's revenue laws and inform the public that the revenue laws are, in fact, enforced." See Tax Division Directive No. 98. Accordingly, the general rule is that press releases should be prepared for all noteworthy events that occur in criminal tax cases (*e.g.*, indictments, guilty pleas, trial convictions and sentencings). This is so regardless of whether the prosecution is being directed solely by Tax Division attorneys or jointly with an AUSA.

Nothing contained herein supersedes or alters the Tax Division's (or the Justice Department's) previous pronouncements on press releases and contacts with the news media.¹ For example, it is still up to each lawyer to "evaluate the appropriateness of a press release" in consultation with his or her criminal section chief. See Tax Division Directive No. 98. Not all cases—or all events that occur within a given case—will merit the drafting of a news release. On the other hand, just because the prosecution involves a misdemeanor does not mean that it is *not* newsworthy.

Simply stated, the Tax Division must renew its efforts to provide timely and informative press releases subject, of course, to the legal restrictions attendant to taxpayer return information (26 U.S.C. § 6103, *et seq.*) and grand jury proceedings (Fed. R. Crim. P. 6(e)). No doubt, preparing these releases will require additional work on the part of our

¹Trial attorneys should familiarize themselves with the following: Tax Division Directive No. 98; Bluesheet 1-7.000 to the U.S. Attorney's Manual (Media Relations); and the Memorandum dated October 15, 1997, from Assistant Attorney General Loretta C. Argrett to all U.S. Attorneys, Criminal Chiefs, and Civil Chiefs.

attorneys, but the beneficial impact to the nationwide tax enforcement program will substantially outweigh the costs attributable to that effort.

It is, in fact, imperative that we do so given current circumstances. As you are aware, the Internal Revenue Service continues to undergo a comprehensive restructuring of its entire organization. During this time, the Service has initiated fewer criminal tax investigations, civil audits and collections. These declines have been reported widely by the news media. To the extent that the Tax Division may counter the impression that it is now easier to cheat on one's taxes, we must. Prompt and informative press releases relating to our cases, therefore, has taken on an added significance.

Concerning tax prosecutions where the news release is prepared by the press officer in the U.S. Attorney's Office, the proposed release (clearly marked as a "draft" and "embargoed for release") should be forwarded to the Tax Division, OAG, as well as to the U.S. Department of Justice, Office of Public Affairs, two days in advance of the expected release date, absent unusual circumstances.² See Tax Division Directive No. 98, ¶ 4. In any event, approved press releases in tax cases that are subsequently issued by the local U.S. Attorney's Office should be sent, *via facsimile, on the day that they are released*, to:

U.S. Department of Justice
Office of Public Affairs
Attention: Mr. Charles Miller [Updated]
Fax No. (202) 514-5331 [Updated]

The Office of Public Affairs will disseminate the news releases to the national media or other press contacts that have an interest in tax matters. The goal is to expand the coverage of our significant cases for the reasons identified above.

It is also worth noting that news agencies often ignore press releases about a conviction or sentencing where the initial indictment was not covered. Accordingly, it is crucial that Tax Division attorneys prepare draft press releases for their indictments. Prior to the return of an indictment, there is ample time to craft a news release that is informative and which satisfies all relevant legal restrictions.

Finally, the Office of Public Affairs has provided some sample press releases which demonstrate the format that it prefers. These should be used as a guide in drafting press releases in criminal tax cases. Copies are attached for your reference.

cc: Thomas E. Zehnle
Counsel to the Acting Assistant Attorney General

² It remains the trial attorney's primary responsibility to insure that the information contained in the news release is attributable to specific public sources. (See generally Memorandum dated October 15, 1997, from Assistant Attorney General Loretta C. Argrett to all U.S. Attorneys, Criminal Chiefs, and Civil Chiefs). The trial attorney is in the best position to determine the source of the information in the case and to guard against improper disclosures.

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, FEBRUARY 3, 1999
WWW.USDOJ.GOV

TAX
(202) 514-2008
TDD (202) 514-5188

MARYLAND MAN INDICTED ON TAX CHARGES

WASHINGTON, D.C. - A Bel Air, Maryland, man was indicted late yesterday for attempting to evade his federal income taxes for 15 years, the Justice Department announced today.

Lloyd E. Darland was charged in a four-count indictment with evading the payment of his 1981 through 1992 income taxes by concealing his ownership interest in assets and income which could have been used by the IRS to satisfy his tax liabilities. He was also charged with evading the assessment of his 1993 through 1995 income taxes by concealing income earned during those years from the IRS.

According to the indictment, Darland generated income during the years 1981 through 1995 by various means, including a tax return preparation business, an Amway distributorship, and a federal pension. The indictment alleges that Darland has not filed a federal income tax return for any year from 1981 through 1995, despite owing taxes totaling approximately \$260,229 for this time period.

The maximum penalty for each count is five years imprisonment and a \$250,000 fine.

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Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, AUGUST 26, 1999
WWW.USDOJ.GOV

TAX
(202) 514-2007
TDD (202) 514-1888

FORMER FEDERAL PUBLIC DEFENDER

PLEADS GUILTY TO TAX CHARGES

WASHINGTON, D.C. - James R. Gailey, former federal public defender for the Southern District of Florida, pled guilty to criminal tax charges today, the Department of Justice announced.

Gailey pled guilty to an Information charging him with one felony count of filing a false U.S. Individual Income Tax Return, Form 1040, in which he reported his total 1992 income as \$111,100.50, although he knew his income was substantially greater.

The government contended, according to the plea agreement, that Gailey's actions resulted in a tax loss to the U.S. of more than \$100,000. In return for his pleading guilty to the Information, the government agreed to dismiss the original two count indictment at sentencing.

Judge K. Michael Moore scheduled sentencing for November 4, 1999. Under the terms of the Plea Agreement, Gailey could face up to three years imprisonment, followed by a term of supervised release. The court could also fine Gailey up to \$250,000 and order him to make restitution.

The case was investigated by the Internal Revenue Service Criminal Investigation Division and prosecuted by Arthur S. Lowry and Michael Yurkanin, Tax Division Trial Attorneys.

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99-381

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, AUGUST 12, 1998
WWW.USDOJ.GOV

TAX
(202) 616-2765
TDD (202) 514-1888

OKLAHOMA MAN PLEADS GUILTY TO TAX EVASION CHARGE

WASHINGTON, D.C. - David P. Luse pleaded guilty today in U.S. District Court in Tulsa, Oklahoma, to evading more than \$23,000 in taxes on income that included lottery winnings, the Department of Justice announced.

According to his plea, Luse, a Tulsa resident, admitted intentionally supplying a false Form W-4 to his employer to avoid having taxes withheld from his paycheck on his earnings from his job as an aircraft tool designer. Luse also admitted paying no taxes on a \$1,000 lottery prize he won from the Washington State Lottery.

Luse was originally charged in a four-count indictment in April, 1998 in Seattle, Washington. Luse pleaded guilty today to count two of the April indictment, which charged him with owing \$23,376 in taxes for Tax year 1992 based on his earnings of \$88,416.50 and the \$1,000 lottery prize.

Judge Terry C. Kern scheduled sentencing for November 12, 1998. Luse faces a five year prison term, a \$250,000 fine, or both.

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98-367

DEPARTMENT OF JUSTICE

December 4, 1998

MEMORANDUM

To: All Tax Division Criminal Enforcement Section Attorneys
Assistant United States Attorneys

From: Loretta C. Argrett
Assistant Attorney General

Subject: **Inclusion of State Tax Loss in Tax Loss Computation for
Federal Tax Offenses Under the Sentencing Guidelines**

Questions have been raised concerning whether state tax crimes can be treated as part of the relevant conduct for sentencing purposes in federal tax cases. For the reasons set out below, we believe that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG §1B1.3 and may be included in the calculation of the base offense level in appropriate cases.

Under the relevant conduct guideline, USSG §1B1.3, "relevant conduct" includes, inter alia, all acts that were part of the same course of conduct or common scheme or plan and all harm that resulted from those acts. Nothing in the language of the guideline limits relevant conduct to federal offenses, or harm to the United States or other victims of federal offenses. Moreover, the Ninth Circuit held in United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992), that nonfederal offenses may be considered for sentence enhancement under §1B1.3. Similarly, the Eleventh Circuit has held that state offenses that were part of the same course of conduct as federal offenses and part of a common scheme or plan must be considered relevant conduct under §1B1.3(a)(2). United States v. Fuentes, 107 F.3d 1515, 1526 (11th Cir. 1997).

Fuentes involved USSG §5G1.3, which relates to imposition of a sentence on a defendant subject to an undischarged term of imprisonment. The commentary to that guideline indicates that the Sentencing Guidelines contemplate the inclusion of state offenses in the determination of the base offense level for an offense. An example set out in Application Note 2 includes the following:

The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court.

Thus, there is ample support for including tax loss from state tax offenses in calculating the total tax loss in a federal tax case. Indeed, it could be argued that, in light

of the language of USSG § 1B1.3 that "the base offense level . . . shall be determined on the basis of... all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," state tax losses must be included as relevant conduct in the calculation of base offense level for a federal tax violation where they qualify as part of the same course of conduct or common scheme or plan. See United States v. Fuentes, 107 F.3d at 1523. In fact, if it is not included, it could result in dissimilarly situated defendants being treated similarly -- a result clearly at odds with the spirit of the Guidelines. (United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, 3.) For example, one defendant might evade federal excise taxes on fuel but pay the state excise tax, while another defendant evades both.¹ If the state tax loss is not taken into account, both of these defendants will end up with the same sentence as long as the federal loss is the same.

The government argued this position -- that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG § 1B1.3 and should be included in the calculation of the base offense level -- before the Fifth Circuit in United States v. Powell, 124 F.3d 655 (1997), a case involving federal and state excise taxes. The court accepted our position, holding that state taxes evaded by the defendant qualified as "relevant conduct" that could be included in "tax loss" under Sentencing Guidelines in sentencing defendant for evading federal fuel excise taxes, where evasion of state and federal taxes occurred at same time, was based on same conduct, and was not isolated or sporadic. 124 F.3d at 665-66.

Prosecutors, therefore, may seek inclusion of state tax loss in appropriate cases -- e.g., where the state tax loss is clearly part of the same course of conduct or common scheme or plan, where the loss is easily ascertainable, and where the loss is clearly due to criminal conduct. Assistant United States Attorneys and Tax Division trial attorneys are encouraged to consult with the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division ((202) 514-3011) prior to sentencing when they are faced with a case where the defendant has also committed state offenses which could be considered part of the same course of conduct or common scheme or plan as the offense of conviction.

We recognize that there may be problems of proof, and prosecutors should be aware of these possible problems. First, evidence of state tax loss may simply be unavailable in the absence of cooperation from state officials. Even where there is cooperation, it still may be difficult to prove the state loss without slowing down the sentencing process or unnecessarily complicating it.

In addition, guideline provisions simplifying the determination of tax loss will probably be unavailable. Under USSG §2T1.1(c)(1), tax loss is 28% of the magnitude of a particular false statement in a return or other tax document (34% in the case of a corporation) unless a more accurate determination of tax loss can be made; and under USSG §2T1.1(c)(2), tax loss is 20% of the amount of gross income that should have been reported by a defendant who has failed to file a return (25% in the case of a corporation)

¹ This is not that far-fetched an example. There has been at least one case where the defendants evaded the federal excise tax, but paid the state excise tax.

unless a more accurate determination of tax loss can be made. The applicable percentages in those guidelines are loosely based on federal tax rates and bear no relation to losses under state tax rates. Where there are problems of proof, prosecutors may, in the exercise of their discretion, decide not to seek inclusion of state tax loss in the tax loss computation.

A final matter bearing note is that there may be cases in which the ability to treat state tax offenses as relevant conduct would effectively limit the defendant's federal sentence. Under §5G1.3(a) of the Guidelines, if a defendant commits an offense while serving a term of imprisonment, the sentence for his new offense must run consecutively to his undischarged term of imprisonment. However, under §5G1.3(b), if §5G1.3(a) is not applicable and an undischarged term of imprisonment has been fully taken into account in the determination of the offense level for a defendant's new offense, the sentence for the new offense must be imposed to run concurrently with the undischarged term of imprisonment. Section 5G1.3(c) provides that in any other case, the sentence for the new offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior term to achieve a reasonable punishment for the new offense. In United States v. Fuentes, supra, the court held that where subsection (a) of §5G1.3 does not apply, "the 'fully taken into account' requirement of §5G1.3(b), is satisfied when the undischarged term resulted from an offense that §1B1.3 requires to be included as relevant conduct, regardless of whether the sentencing court actually took that conduct into account." 107 F.2d at 1522; see also 107 F.2d at 1524. Thus, under Fuentes, if state offenses for which a defendant was serving a sentence constituted relevant conduct, the sentencing court would be required to impose a concurrent sentence even if the state offenses were not used in the calculation of tax loss. However, we do not think the holding in Fuentes on the application of §5G1.3, even if adopted by other circuits, will have much impact on tax cases: to our knowledge, defendants in most tax cases are not often serving state sentences for related state tax offenses. Nevertheless, prosecutors should be aware of Fuentes.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 108A

SIGNATURE AUTHORITY OF LINE ATTORNEYS

The purpose of this Directive is to provide for uniform signature authority for line attorneys engaged in civil trial and appellate litigation and in criminal review work. Criminal review work is work relating to the authorization or declination of prosecution requests received from the Internal Revenue Service or U.S. Attorneys' offices.

For purposes of this Directive, all outgoing correspondence is divided into three categories: Routine Correspondence, Reviewed Correspondence, and Excepted Correspondence. This directive authorizes line attorneys to sign and send Routine Correspondence without prior review. A copy of all Routine Correspondence must be sent simultaneously to the Section Chief, or an authorized designee, who has responsibility for supervising the line attorney's handling of the case. This Directive authorizes line attorneys to sign Reviewed Correspondence following review by a Section Chief, or an authorized designee. Line attorneys may not sign Excepted Correspondence.

The policies set forth in this Directive do not affect, in any way, the prior approvals or signature authority required by other Division Directives, and policies for other documents and actions, including documents that must be signed by a Deputy Assistant Attorney General or the Assistant Attorney General.

This Directive supersedes Directive 108.

A. EXCEPTED CORRESPONDENCE

1. The correspondence described below as Excepted Correspondence shall be signed only by the Section Chief or an authorized designee.
2. Excepted Correspondence is correspondence that:
 - a. is directed to the personal attention of the Chief Counsel or an Area Counsel of the Internal Revenue Service; or
 - b. is directed to the personal attention of a United States Attorney; or
 - c. accepts, rejects, confirms, or modifies a settlement or acknowledges an offer; authorizes or declines to authorize the institution of a suit or filing of a complaint, adversary complaint, or counterclaim; gives notice of the filing of a complaint or counterclaim (e.g., presuit letter); recommends conceding or concedes an existing claim, or recommends raising or raises a new

claim or defense in a proceeding; or transmits a trial attorney's memorandum recommending compromise or concession; or

- d. pertains to criminal review work and is contained in the Criminal Sections Desk Reference Manual ("Red Book"), with the exception of the items listed in Section B.3.h., below; or
- e. discusses sanctions or attorney misconduct; or
- f. would be more appropriately sent under the signature of a Section Chief, in the discretion of the Section Chief and/or trial attorney, due to the subject matter of the correspondence or circumstances surrounding a case.

3. The signature block for Excepted Correspondence shall be patterned on one of the following:

Sincerely yours,

[Name]
Assistant Attorney General

By:
[Name]
Chief
[Section Name]

or

Sincerely yours,

[Name]
Chief
[Section Name]

B. ROUTINE CORRESPONDENCE

1. Line attorneys who have been with the Tax Division six months or longer are authorized to finalize, sign, and mail correspondence and documents described below as Routine Correspondence without prior review. A copy of all such correspondence must be sent simultaneously to the Section Chief, or an authorized designee, who has responsibility for supervising the line attorney's handling of the case.
2. This provision does not affect any review requirement for documents that may accompany Routine Correspondence.

3. Routine Correspondence is limited to:
 - a. notices of appearance and the cover letters that transmit them;
 - b. letters merely acknowledging receipt of correspondence, discovery materials, or other items, but not letters acknowledging receipt of settlement offers;
 - c. letters to IRS Chief Counsel's offices requesting information regarding (or assistance in obtaining) initial defense letters or administrative files;
 - d. notices of deposition and the cover letters that transmit them, and letters providing witnesses with scheduling and other logistical information (this provision does not apply to subpoenas and their cover letters, which must be reviewed);
 - e. letters to opposing counsel confirming agreed scheduling changes or consents to extensions of time allowed by the applicable court and local rules;
 - f. letters requesting that the United States Attorney, IRS Chief Counsel, or Special Procedures offices furnish copies of documents filed in courts in their districts;
 - g. cover letters that transmit previously filed documents; and
 - h. conference scheduling letters pertaining to criminal review work.
4. The signature block for Routine Correspondence shall be patterned on the following:

Sincerely yours,

[Name]
Trial Attorney
[Name of Section]

C. REVIEWED CORRESPONDENCE

1. All correspondence that is not Routine Correspondence or Excepted Correspondence is designated Reviewed Correspondence. Although Reviewed Correspondence generally shall be signed by a line attorney, it must be reviewed by a Section Chief, or an authorized designee, prior to mailing.
2. In each section, a section manager shall initial a copy of the Reviewed Correspondence, which will then be placed in the DJ file with a copy of the final version.

3. The signature block for Reviewed Correspondence shall be patterned after the following:

Sincerely yours,

[Name]
Trial Attorney
[Name of Section]

D. REVOCATION OF AUTHORITY

The delegations of signature and review authority granted by this Directive may be revoked:

1. for a particular attorney at any time if, in the discretion of the Section Chief, the attorney would not appropriately use this authority; or
2. for a particular issue, matter, opposing counsel, or judge if, in the discretion of the Section Chief, unique facts and circumstances warrant such a revocation.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 111

EXPEDITED PLEA PROGRAM

On March 1, 1986, the Tax Division, Department of Justice, and the Internal Revenue Service implemented the Simultaneous Plea Program. This program was designed to accommodate both the interests of the taxpayer who desired a speedy resolution to a criminal tax investigation and the interests of the government in obtaining a fair resolution of the case with a minimum expenditure of investigative and prosecutorial resources.

By memorandum dated February 25, 1986, the Acting Assistant Attorney General of the Tax Division notified the United States Attorneys of this program and described its operation. After reviewing the operation of the program since its inception in 1986, the Tax Division has decided to modify the program in several ways and rename it to more accurately reflect its function. This Directive is intended to explain those changes and formalize the new procedures for administering the program.

1. The program is designed to expedite the handling of criminal tax cases where the taxpayer, through counsel, indicates during the course of an administrative investigation being conducted by the Criminal Investigation Division, Internal Revenue Service, an interest in entering a guilty plea to some or all of the charges and years under investigation. The program is intended to dispose expeditiously of the entire case. It is not intended to be utilized to limit the taxpayer's exposure by curtailing or limiting the Service's investigation.
2. This program applies only to administratively investigated cases involving legal source income.
3. The program is available only to taxpayers represented by counsel.
4. The request for initiation of any plea discussions or negotiations must be originated by a taxpayer who is represented by counsel; Criminal Investigation Division shall not initiate the subject of plea discussions.
5. The taxpayer must be informed that the Internal Revenue Service has no authority to engage in plea negotiations and that only the Department of Justice can engage in such negotiations.
6. Taxpayer's counsel must provide a written statement to Criminal Investigative Division confirming the taxpayer's desire to engage immediately in plea negotiations with the Department of Justice regarding the charges under investigation.

7. The taxpayer must be informed that the taxpayer will be required to plead to the most significant violation involved, consistent with the Tax Division's Major Count Policy.
8. The Internal Revenue Service must take precautions to insure that information furnished by the taxpayer, prior to formal plea discussions with the Department of Justice, will not be foreclosed from future use under the restrictions of Rule 11(e)(6) of the Federal Rules of Criminal Procedure in the event that plea negotiations fail.
9. The Internal Revenue Service must obtain sufficient evidence to constitute a referable matter to the Tax Division.

Although the case does not have to be as fully developed as one that does not go through the Expedited Plea Program, any referral to the Tax Division for review of the proposed plea under the program must reflect the following:

- a. That, for the years implicated in the investigation, the taxpayer has provided all records in his or her possession, or to which the taxpayer has access, to the Service and the investigating agent has reviewed those records with sufficient particularity to insure that there are no significant undiscovered issues or tax losses in the case that have not been taken into account in assessing the merits of the referral;
 - b. A description of the nature and extent of the records supplied and the specific conclusions reached by the agent with respect to them;
 - c. That the taxpayer has submitted to an interview, the substance of the interview, and the agent's satisfaction with the nature and extent of the taxpayer's cooperation;
 - d. That the agent has secured and reviewed the taxpayer's returns for all years subsequent to the years under investigation (and any open prior years) and has addressed any issues raised by those returns in assessing the merits of the referral;
 - e. The agent has inquired, and obtained the details, if appropriate, as to any other (open or closed) Federal, state, or local investigations relating to the taxpayer.
10. If District Counsel, after receipt of the Special Agent's Report (SAR), concludes that prosecution is warranted, District Counsel will refer the case to the Tax Division, with a recommendation for prosecution based on the foregoing requirements. Such referral to the Division shall include all exhibits to the SAR, and the evidentiary basis for the referral.

- a. District Counsel will telephone the Tax Division liaison attorney in the appropriate Criminal Enforcement Section to advise that a referral is being made to the Tax Division;
 - b. The Tax Division liaison attorney will contact District Counsel by telephone to acknowledge receipt of the referral.
- 11. No plea negotiations may be undertaken until prosecution is authorized by the Tax Division.**
12. Within 30 days after receipt of the referral from District Counsel, the Tax Division will either authorize prosecution consistent with the proposed plea bargain or disapprove of the negotiation of such a plea.
 - a. If the proposed plea is not authorized, the Tax Division will notify the taxpayer's counsel in writing that the case is being returned to the Internal Revenue Service, and all exhibits and files submitted will be returned to the Service;
 - b. If the proposed plea is authorized, the Tax Division will refer all documents to the appropriate United States Attorney's office who may then undertake plea negotiations with the taxpayer and may accept a plea to the specified major count without further authorization from the Tax Division. If the United States Attorney's office desires to accept a plea to any count other than the specified major count, the approval of the Tax Division is required.
13. If plea negotiations are unsuccessful, the United States Attorney's office will notify in writing both the taxpayer's counsel and the Tax Division that the case is being returned to the Internal Revenue Service.
 - a. All files and exhibits submitted to the United States Attorney's office will be returned to the Service;
 - b. No information or evidence submitted to the United States Attorney's office by the taxpayer and/or counsel during the course of plea negotiations will be sent to the Internal Revenue Service unless the taxpayer expressly authorizes the Service's use of such information. In such a case, a written waiver of the restrictions of Federal Rule of Criminal Procedure 11(e)(6) should be obtained.
14. All procedures and requirements for administering this program that have heretofore been agreed to between the Internal Revenue Service and the Tax Division remain in force unless inconsistent with any provision of this Directive.

/s/ LORETTA C. ARGRETT
ASSISTANT ATTORNEY GENERAL
TAX DIVISION

DATED: 2/11/99

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 128

(Supersedes Directive No. 99)

**CHARGING MAIL FRAUD, WIRE FRAUD OR BANK FRAUD ALONE OR
AS PREDICATE OFFENSES IN CASES INVOLVING TAX ADMINISTRATION**

Tax Division approval is required for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant.¹ Tax Division authorization is required before charging mail fraud, wire fraud or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the IRS. Tax Division approval also is required for any charge based on a state tax violation if the case involves parallel federal tax violations.

The Tax Division may approve mail fraud, wire fraud or bank fraud charges in tax-related cases involving schemes to defraud the government or other persons if there was a large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of or in addition to Title 26 violations. *See generally* United States Attorneys' Manual (U.S.A.M.) §9-43.100. Absent unusual circumstances, however, the Tax Division will not approve mail or wire fraud charges in cases involving only one person's tax liability, or when all submissions to the IRS were truthful.

Fraud charges should be considered if there is a significant benefit at the charging stage (*e.g.*, supporting forfeiture of the proceeds of a fraud scheme; allowing the government to describe the entire scheme in the indictment); at trial (*e.g.*, ensuring that the court will admit all relevant evidence of the scheme; permitting flexibility in choosing witnesses); or at sentencing (*e.g.*, ensuring that the court can order full restitution). *See id.* §9-27.320(B)(3) ("If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges.").

¹ 28 C.F.R. §0.70(b): "Criminal proceedings arising under the internal revenue laws ... are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions.

An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade a responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

For example, mail fraud (18 U.S.C. §1341) or wire fraud (18 U.S.C. §1343) charges may be appropriate if the target filed multiple fraudulent returns seeking tax refunds using fictitious names, or using the names of real taxpayers without their knowledge.² Fraud charges also may be considered if the target promoted a fraudulent tax scheme.

Bank fraud charges (18 U.S.C. §1344) can be appropriate in the case of a tax fraud scheme that victimized a financial institution. Example: the defendant filed false claims for tax refund and induced a financial institution to approve refund anticipation loans on the basis of the fraudulent information submitted to the IRS.

Racketeering and Money Laundering Charges Based on Tax Offenses

The Tax Division will not authorize the use of mail, wire or bank fraud charges to convert routine tax prosecutions into RICO or money laundering cases. The Tax Division will authorize prosecution of tax-related RICO and money laundering offenses, however, when unusual circumstances warrant it.

A United States Attorney who wishes to charge a RICO violation (18 U.S.C. §1962) in any criminal matter arising under the internal revenue laws – including a predicate act based on a state tax violation, in the case of a parallel federal tax violation – must obtain the authorization of the Tax Division and the Criminal Division’s Organized Crime and Racketeering Section. U.S.A.M. §9-110.101.

A United States Attorney who wishes to bring a money laundering charge (18 U.S.C. §1956) based on conduct arising under the internal revenue laws must obtain the authorization of the Tax Division and, if necessary, the Criminal Division’s Asset Forfeiture and Money Laundering Section. U.S.A.M. §9-105.300.

Date: October _____, 2004 _____

EILEEN J. O’CONNOR
Assistant Attorney General

² It was the Tax Division’s prior practice to authorize the prosecution of fraudulent refund schemes and fraudulent tax promotions only under 18 U.S.C. §§ 286 (false claims conspiracy), 287 (false claims), 371 (conspiracy) and 1001 (false statements); and 26 U.S.C. § 7206 (false tax returns). Under this directive, such charges may still be pursued instead of, or in addition to, mail or wire fraud charges.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 129

(Supersedes Directive No. 77)

**CHARGING OBSTRUCTION OF OR IMPEDING THE DUE ADMINISTRATION OF
THE INTERNAL REVENUE LAWS UNDER SECTION 7212(a)**

The “omnibus clause” of 26 U.S.C. §7212(a) makes it a crime to corruptly obstruct or impede – or endeavor to obstruct or impede – the due administration of the internal revenue code.

A §7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation. Examples of such conduct include, but are not limited to, providing false information, destroying evidence, attempting to influence a witness to give false testimony, and harassing an IRS employee.³

A §7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties. Examples include, but are not limited to, assisting in preparing or filing a large number of fraudulent returns or other tax forms, or engaging in other corrupt conduct designed to obstruct the IRS from carrying out its lawful functions.

The omnibus clause should not be used as a substitute for a charge directly related to tax liability – such as tax evasion or filing a false tax return – if such a charge is readily provable. Alleging and proving an actual or intended tax loss may result in an enhanced sentence and may estop a target from contesting application of a civil fraud penalty.

The fact that conduct that violated §7212(a) was in furtherance of a preexisting criminal scheme – for example, an ongoing conspiracy or a continuing attempt to evade taxes – does not preclude prosecution under §7212(a). Targets who first commit primary tax crimes and then engage in conduct designed to obstruct the IRS can be held accountable for the obstruction and punished more severely than those who do not engage in additional criminal conduct.

When the obstruction involves a grand jury investigation, obstruction of justice or perjury charges (*e.g.*, 18 U.S.C. §§1510, 1512 or 1623) that more specifically address the conduct are preferable to §7212(a) charges.

³ An act or threat of force against an individual IRS employee acting in an official capacity may be prosecuted under the first clause of §7212(a), which does not require Tax Division authorization.

Date: October _____, 2004

EILEEN J. O'CONNOR
Assistant Attorney General

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 138

DELEGATION OF AUTHORITY RELATING TO CRIMINAL TAX CASES

By virtue of the authority vested in me by Part O, Subpart M of Title 28 of the Code of Federal Regulations, particularly Section 0.70, the delegation of authority with respect to criminal tax matters within the jurisdiction of the Tax Division is hereby conferred as follows:

1. Authority of the Assistant Attorney General that is Not Delegated

Action in the following criminal tax matters is expressly reserved for the Assistant Attorney General of the Tax Division ("AAG"):

- a. A request to present the same matter to a second grand jury or to the same grand jury after a no true bill has been returned;
- b. A request to recuse or disqualify a federal justice, judge or magistrate;
- c. A request to consent to a nolo contendere or *Alford* plea;
- d. A request to initiate or continue a federal prosecution affected by the Department's *Petite* policy (dual and successive prosecution);
- e. A request for disclosure of a tax return or return information pursuant to 26 U.S.C. 6103(h)(3)(B); and
- f. A request to authorize a subpoena, the interrogation, indictment, or arrest of a member of the news media;¹
- g. A subpoena of an attorney for information relating to the attorney's representation of a client; and
- h. A request to authorize prosecution of a person who has testified or produced information pursuant to a compulsion order for an offense or offenses first disclosed in, or closely related to, such testimony or information.²

¹See 28 C.F.R. § 50.10 for the policies regarding these matters, and the principles to be taken into account in requesting an authorization which may require the express approval of the Attorney General.

²See USAM 9-23.400.

2. **Delegation of Authority to the Deputy Assistant Attorney General Criminal**

The Deputy Assistant Attorney General, Criminal ("DAAG, Criminal"), is authorized to exercise all the powers and authority of the AAG with respect to criminal proceedings covered by this delegation, except those expressly reserved in Section 1 above.

In addition, the DAAG, Criminal, shall forward to the AAG matters which are deemed appropriate for action by the AAG.

3. **Delegation of Authority to the Chief of a Criminal Section**

A Chief of a Criminal Section ("Chief") is authorized to act in all matters arising within the jurisdiction of his or her section, except those specifically reserved for action by the AAG in Section 1 above and the following:

- a. Issuance of a search warrant when Tax Division approval is necessary (Tax Directive 52);
- b. A matter in which the recommendations of the Chief and Assistant Chief as to prosecution or declination conflict;
- c. Prosecution of an attorney for criminal conduct committed in the course of acting as an attorney;
- d. A prosecution involving: (a) a local, state, federal, or foreign public official or political candidate; (b) a representative of the electronic or print news media; (c) a member of the clergy or an official of an organization deemed to be exempt under section 501(c)(3) of the Internal Revenue Code; or (d) an official of a labor union;
- e. A request to issue a compulsion order in any case over which the Tax Division has jurisdiction;
- f. Any prosecutorial decision that requires a deviation from Tax Division policy or procedure; and
- g. A request to authorize dismissal of an indictment.

In addition, a Chief shall forward for action to the DAAG, Criminal, all matters that involve novel substantive, evidentiary, or procedural issues, or any other sensitive matter for which review at a higher level is appropriate.

Notwithstanding the foregoing, the DAAG, Criminal, may prescribe additional matters, the actions of which are within the authority of a Chief pursuant to this section, that the DAAG, Criminal, determines requires action by the DAAG, Criminal.

4. **Scope and Effect of this Delegation**

- a. This delegation includes all tax and tax-related offenses delegated to the Tax Division pursuant to 28 C.F.R. §§0.70 and 0.179a.
- b. This delegation supersedes Tax Division Directives 44, 53, 71, and 115 and all other delegations of authority to approve criminal tax or tax-related matters or cases previously issued.
- c. In the event a Chief is recused from acting on a particular matter, then the DAAG, Criminal, may select another Section Chief to act in that matter.
- d. When either, or both, the AAG or the DAAG, Criminal, is recused in a particular matter, a ranking Tax Division official will be authorized pursuant to 28 C.F.R. §0.137 to act as either the Acting AAG or the Acting DAAG, Criminal, in that matter.
- e. When an individual has been duly designated a specified "Acting" official, the individual shall have the same authority as the position commands, unless that authority is specifically limited in writing by the appropriate authorizing official.
- f. The Assistant Attorney General, at any time, may withdraw any authority delegated by this Directive.

APPROVED:

Date: July 14, 2010

_____/s/ John A. DiCicco
John A. DiCicco
Acting Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 140

DESIGNATION AS ACTING SECTION CHIEF

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Designation of Assistant Chiefs

Each section chief shall designate, in writing, the order of the assistant chiefs in his or her section to assume the duties of acting chief. If a chief fails to do so, the assistant chiefs in that chief's section will assume the duties of acting chief in order of their tenure as assistant chief.

2. Designation as Acting Section Chief

If a section chief is unavailable to perform his or her duties, whether due to absence from the office or other cause, then the next available assistant chief, in order as set forth in Section 1 above, is authorized to perform the functions and duties of the chief's position, as Acting Section Chief, unless the chief, or a Deputy Assistant Attorney General, designates another attorney as Acting Section Chief.

If none of the assistant chiefs is available, and a Deputy Assistant Attorney General determines that the section chief is unavailable to perform his or her duties and has not, for any reason, designated another attorney as Acting Section Chief, the Deputy Assistant Attorney General shall designate an attorney to be the Acting Section Chief.

All designations as Acting Section Chief shall be subject to the conditions set forth 5 C.F.R. 317.903 (describing time limits for a non-competitive temporary assignment of a non-member of the Senior Executive Service to an SES position).

3. Recusal of Section Chief

If a section chief is recused from a particular case or category of cases, under 18 U.S.C. 208, 5 C.F.R. § 2635.501-503, or 28 C.F.R. § 45.2, the first available assistant chief in order, as set forth in Section 1 above, is authorized to perform the functions and duties of the chief's position, as Acting Section Chief, for that case or category of cases. If none of the assistant chiefs is able to perform the

duties of acting chief, a Deputy Assistant Attorney General, in accordance with the procedures in Section 2 of this Directive, shall designate an Acting Section Chief for the particular case or category of cases.

4. Chief or Acting Chief for a particular case

If a section chief is of the opinion that, although an assistant chief or other attorney will be generally performing the duties of the chief's position (in accordance with Section 2 above), the interests of the United States would be better served if the section chief retains authority with respect to a particular case or category of cases, the chief shall retain authority to act with respect to that case or category of cases.

If, after a period of unavailability, a section chief has once again become available to perform his or her duties as chief, and is of the opinion that the interests of the United States would be better served if the attorney who was Acting Section Chief retains authority with respect to a particular case or category of cases, the chief shall delegate to that attorney the authority to act as section chief with respect to that case or category of cases.

5. Acting Section Chief treated as Section Chief

Where an attorney has been designated as Acting Section Chief by the Deputy Assistant Attorney General (in accordance with Section 2 above), then that person shall be treated as a section chief for the purpose of this directive.

6. Delegation Authority Preserved

All references in this Directive to a Deputy Assistant Attorney General also include the Assistant Attorney General and persons within the Department of Justice higher in the line of authority.

Date

John A. DiCicco

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 141

**DELEGATION OF AUTHORITY TO APPROVE SERVICE OF SUBPOENAS AND
FILING OF PETITIONS TO ENFORCE SUMMONSES ON ATTORNEYS**

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Delegation to Deputy Assistant Attorney General for Civil Trial Matters

The Deputy Assistant Attorney General for Civil Trial Matters is authorized to approve subpoenas to be issued to attorneys or law firms in civil cases and to approve the filing of petitions to enforce summonses issued to attorneys or law firms, whenever such approval is required.

2. Delegation to Deputy Assistant Attorney General for Criminal Matters

The Deputy Assistant Attorney General for Criminal Matters is authorized to approve subpoenas to be issued to attorneys or law firms in criminal cases, whenever such approval is required.

3. Action by the Assistant Attorney General or the Principal Deputy Assistant Attorney General

Whenever a Deputy Assistant Attorney General is of the opinion that, because of a question of law or policy, or for any other reason, a proposed subpoena to be issued to an attorney or a law firm or a proposed petition to enforce a summons issued to an attorney or a law firm, for which approval is required, should receive the personal attention of the Principal Deputy Assistant Attorney General or the Assistant Attorney General, then the Deputy Assistant Attorney General shall refer the proposed subpoena or petition to the Principal Deputy Assistant Attorney General or the Assistant Attorney General, as appropriate. xxxx

Date

John A. DiCicco

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 142

PRINCIPAL DEPUTY DELEGATION

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Delegation to Principal Deputy

If the Assistant Attorney General is unavailable to perform his or her duties, then the Principal Deputy Assistant Attorney General is authorized to perform all functions and duties of the Assistant Attorney General, to the extent permitted by law or written policies of the Department of Justice, unless the Assistant Attorney General authorizes, in writing, another attorney to perform those functions and duties.

2. Absence or Unavailability of Principal Deputy

In the absence or unavailability of the Principal Deputy Assistant Attorney General, the Deputy Assistant Attorney General with the longest tenure as Deputy Assistant Attorney General is authorized to perform all functions and duties of the Assistant Attorney General, to the extent permitted by law or written policies of the Department of Justice.

3. Recusal of Assistant Attorney General

If the Assistant Attorney General is recused from a particular case or category of cases, the Principal Deputy is authorized to perform the Assistant Attorney General's functions and duties, to the extent permitted by law or written policies of the Department of Justice, for that case or category of cases. The Principal Deputy is authorized to designate, in writing, another attorney to perform those functions and duties in the event the Principal Deputy is unable to perform them. In the absence or unavailability of the Principal Deputy Assistant Attorney General, the Deputy Assistant Attorney General with the longest tenure as Deputy Assistant Attorney General is authorized to perform the Assistant Attorney General's functions and duties, to the extent permitted by law or written policies of the Department of Justice, for that case or category of cases.

4. No Conflict with Vacancies Act

Nothing in this Directive shall be construed to conflict with any provision of the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345 et seq.

Date

John A. DiCicco
Acting Assistant Attorney General

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 144

**DELEGATION OF AUTHORITY TO AUTHORIZE GRAND JURY
INVESTIGATIONS, CRIMINAL COMPLAINTS, AND SEIZURE WARRANTS FOR
CERTAIN OFFENSES ARISING FROM STOLEN IDENTITY REFUND FRAUD**

Purpose and Scope

The purpose of this delegation is to provide federal law enforcement officials with the ability to timely address crimes of Stolen Identity Refund Fraud by delegating to the United States Attorney the authority to: (1) open certain tax-related grand jury investigations; (2) arrest and federally charge by criminal complaint a person engaged in Stolen Identity Refund Fraud crimes; and (3) seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from Stolen Identity Refund Fraud crimes, all without prior approval from the Criminal Enforcement Sections of the Tax Division.¹ This delegation of authority is subject to the following limitations and those set forth at Paragraphs 1 through 7 of this Directive.

First, the scope of this delegation is limited to Stolen Identity Refund Fraud crimes that entail the filing of wholly fraudulent tax returns without the named taxpayer's knowledge or consent. These crimes do not involve the legal analysis typically associated with the evaluation of whether or not a material item on a filed tax return is or is not intentionally and willfully false -- matters exclusively delegated to the Tax Division to ensure uniform enforcement and application of the tax laws.

Second, this delegation reflects the Tax Division's supervisory authority over all matters arising under the Internal Revenue laws (see 28 C.F.R. §0.70(b)²), regardless of

¹ In tandem with the delegation of authority in this Directive, the Tax Division has implemented expedited review procedures in Stolen Identity Refund Fraud cases when a defendant is arrested by a state, local, or federal agency. These procedures provide for simultaneous review of the proposed indictment or information by the Tax Division and the United States Attorney's Office. (See Memorandum from Assistant Attorney General Kathryn Keneally dated September 18, 2012, entitled, "Expedited and Parallel Review of Proposed Indictments Arising from Stolen Identity Refund Fraud"). The Tax Division may, in consultation with the Stolen Identity Refund Fraud Working Group of the Attorney General's Advisory Committee, modify or supplement the procedures governing expedited review in Stolen Identity Refund Fraud prosecutions.

² 28 C.F.R. §0.70(b): "Criminal proceedings arising under the internal revenue laws . . . are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions. An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade a

the level of participation in the Stolen Identity Refund Fraud investigation by the Internal Revenue Service, Criminal Investigation Division. However, it strongly encourages the participation of the Internal Revenue Service, Criminal Investigation Division, in Stolen Identity Refund Fraud investigations.³

Third, the application of this Directive is contingent upon the United States Attorney designating an attorney within the office to serve as a point of contact for Stolen Identity Refund Fraud cases (“USAO POC”) who will be responsible for meeting the respective notice requirements set forth within this Directive. (See enumerated Paragraph 4 of this Directive).

Fourth, in all cases in which the United States Attorney seeks and obtains a federal criminal complaint against a person for offenses involving Stolen Identity Refund Fraud, any subsequent charging decision by way of indictment, information, superseding indictment, or superseding information must be authorized in advance by the Tax Division.⁴

Fifth, in all cases in which the United States Attorney applies for and obtains a seizure warrant for proceeds derived from crimes involving Stolen Identity Refund Fraud, Tax Division approval is required before forfeiture of the funds is made (either administratively or judicially) if refunds of legitimate taxpayers are at risk of being forfeited. (See enumerated Paragraph 7 of this Directive).

Sixth, in all cases in which the United States Attorney applies for and obtains a seizure warrant for proceeds derived from crimes involving Stolen Identity Refund Fraud, any subsequent judicial forfeiture of the seized proceeds, whether through civil or criminal judicial process, must be authorized in advance by the Tax Division.

responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

For purposes of illustration, Stolen Identity Refund Fraud crimes generally implicate the following criminal statutes: 18 U.S.C. §286 (conspiracy as to false claims), 18 U.S.C. §287 (false claims), 18 U.S.C. §510 (Treasury check forgery), 18 U.S.C. §641 (theft of public money), 18 U.S.C. §1028 (identity theft), 18 U.S.C. §1028A (aggravated identity theft), 18 U.S.C. §1029 (access device fraud), 18 U.S.C. §1341 (mail fraud), 18 U.S.C. §1343 (wire fraud), 18 U.S.C. §1708 (theft or receipt of stolen mail) and/or 18 U.S.C. §1709 (mail theft by postal employee).

³ Participation of the Internal Revenue Service, Criminal Investigation, will make available to the prosecution team tax return and return information pursuant to 26 U.S.C. §6103(h).

⁴ Post indictment resolution of Stolen Identity Refund Fraud cases shall be consistent with Departmental policy.

Delegation

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, for all offenses involving “Stolen Identity Refund Fraud,” as hereinafter defined, and subject to the limitations set forth herein, authority is hereby conferred on all United States Attorneys to: (i) authorize tax-related grand jury investigations; (ii) file federal criminal complaints; and (iii) apply for seizure warrants for the forfeiture of criminally derived proceeds arising from Stolen Identity Refund Fraud crimes.

This delegation of authority is subject to the limitations set forth above and the following:

1. With respect to authorizing a tax-related grand jury investigation, the United States Attorney has determined, based upon the available information, that:
 - (a) there exist articulable facts supporting a reasonable belief that a crime involving Stolen Identity Refund Fraud is being, or has been, committed; (USAM §6-4.211. B) and
 - (b) a grand jury investigation is required to preserve evidence and witness testimony, to identify further culpable persons and protect government funds, or to initiate judicial process such as search warrants, arrest warrants, electronic surveillance, or compulsory orders.
2. With respect to the filing of a federal criminal complaint, the United States Attorney has determined, based upon the available information, that probable cause exists to believe that a person has committed a Stolen Identity Refund Fraud crime within his/her jurisdiction. (USAM §9-27.200).
3. The subject grand jury proceeding and/or charged defendant does not involve a person considered to have national prominence -- such as local, state, federal or foreign public official or a political candidate, members of the judiciary, a member of the clergy, representatives of the electronic or printed news media, an official of a labor union, and major corporations and/or their officers when they are the target (subject) of such proceeding.⁵
4. Upon the opening of a tax-related grand jury investigation (or expansion of a non-tax grand jury investigation) to include Stolen Identity Refund

⁵ See Tax Division Directive Nos. 59 and 138.

Fraud crimes, the Special Agent in Charge, Internal Revenue Service, Criminal Investigation, or the USAO POC shall immediately notify the Tax Division, through electronic transmission, of the name of the grand jury investigation, the date of its inception (or expansion), the target(s) named, if any have been identified, and the tax years under investigation. If the USAO POC is the notifying party for any of the above, the USAO POC shall notify the Internal Revenue Service, Criminal Investigation, at the same time the Tax Division is notified. Upon receipt of notice and evaluation, the Internal Revenue Service, Criminal Investigation, may make a determination whether to join the investigation, thus permitting access to material that can only be disclosed pursuant to 26 U.S.C. §6103(h).⁶

5. The authority hereby delegated includes the authority to designate: the targets (subjects) and the scope of such tax-related grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority for the United States Attorney to terminate such grand jury investigation, provided that prior written notification is given to both the Internal Revenue Service, Criminal Investigation, and the Tax Division. If the United States Attorney terminates a grand jury investigation involving Stolen Identity Refund Fraud crimes or de-targets subjects thereof, then the USAO POC shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. §7602 (c).
6. Upon the filing of a criminal complaint and/or application for a seizure warrant, in all Stolen Identity Refund Fraud cases, the United States Attorney shall, through his/her designated USAO POC, contemporaneously transmit an electronic copy of such pleading to the Tax Division to ensure that timely notice is made to the Chief of the appropriate Criminal Enforcement Section.
7. In Stolen Identity Refund Fraud cases involving application for a seizure warrant, actions of the United States Attorney shall be consistent with the procedures of the Internal Revenue Service, Criminal Investigation, concerning seizure of property and use of forfeiture process within criminal tax cases, except that approval of the Tax Division is not required prior to seizure.⁷ **However, if refunds of legitimate taxpayers are at**

⁶ If the Internal Revenue Service, Criminal Investigation, is not involved in the Stolen Identity Refund Fraud investigation, then all grand jury notice responsibilities will default to the USAO POC. Otherwise, grand jury notice responsibilities will lie with the Special Agent in Charge, Internal Revenue Service, Criminal Investigation.

⁷ Forfeiture procedures of the Internal Revenue Service, Criminal Investigation, are set forth at Sections 9.7.3 and 9.7.4 of the Internal Revenue Manual.

risk of being forfeited, Tax Division approval is required before forfeiture of the funds is made either administratively or judicially.

Definition

8. For purposes of this Directive, “Stolen Identity Refund Fraud” is defined as cases involving a fraudulent claim (or attempted claim) for a tax refund wherein the fraudulent claim for refund (i.e. tax return) is in the name of a person⁸ whose personal identification information appears to have been stolen or unlawfully used to make the claim, and the claim is intended to benefit someone other than the person to whom the personal identification information belongs. Stolen Identity Refund Fraud cases also include the negotiation (or attempted negotiation), possession, or transfer, of refund proceeds resulting from the above-defined scheme. (Examples of cases that fall within and outside the scope of this definition are set forth at Paragraphs 10 and 11 of this Directive.)
9. Stolen Identity Refund Fraud cases do not include situations in which the person whose personal identification information was used to make a fraudulent claim for tax refund intended such claim to be filed on his or another’s behalf.

Cases Within Delegation

10. The types of cases within the scope of this Directive include, but are not limited to:
 - (a) a situation in which personal identification information is stolen from a non-culpable person and then used to make a fraudulent claim for tax refund benefitting someone other than the person to whom the personal identification information belongs;
 - (b) a situation involving a large-volume false claim scheme, in which a person sells to a third party, or agrees to let the third party use, his/her personal identification information unaware that the personal identification information will be used to make a fraudulent claim for tax refund. This includes when a person agrees to endorse a Treasury Check, having no knowledge that the check relates to a fraudulent tax return using the person’s personal identification information. (But see Paragraph 11(d) of this Directive);
 - (c) a situation in which a return preparer makes and/or files a fraudulent claim for tax refund using non-client personal identification

⁸ The term “person” is construed to mean an individual (including decedents, non-filing minors, and illegal aliens), a trust, estate, partnership, association, company or corporation.

information that has been stolen or unlawfully used to make the claim. (But see Paragraph 11(d) of this Directive);

(d) a situation in which a culpable person in schemes matching the above scenarios:

- (i) receives, endorses, negotiates, utters, transfers, or cashes a refund check;
- (ii) receives, possesses or transfers fraudulent refunds in bank accounts or through prepaid debit cards; or
- (iii) makes ATM withdrawals from prepaid debit cards loaded with refunds.

Exceptions To Delegation

11. The types of cases outside the scope of this Directive include:

(a) a situation in which a culpable taxpayer files a fraudulent claim for refund using his own social security number but claims a false dependency exemption using another's social security number without lawful authority;

(b) a situation in which a return preparer alters the tax return of a client with or without the client's knowledge or consent, claiming a higher refund;

(c) a situation in which a return preparer and a client conspire to file a false tax return claiming an inflated refund;

(d) a situation in which a return preparer exploits or uses a client's (or potential client's) personal identification information without the client's (or potential client's) knowledge or consent, solely or in combination with other client (or potential client) information, to file a fraudulent claim for tax refund.

Dates of Effectiveness

12. This Directive originally took effect for a two-year period beginning on October 1, 2012, and thereafter was made permanent on the date noted below.

Any case directly referred to a United States Attorney's office for a tax-related grand jury investigation, criminal complaint, and or seizure warrant involving Stolen Identity Refund Fraud which does not meet all of the requirements of this Directive, will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's office authorize a tax-related grand jury

investigation or file a criminal complaint. Instead, the case must be forwarded to the Tax Division for authorization.

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.

This Directive provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Kathryn Keneally
Assistant Attorney General
Tax Division

APPROVED TO TAKE PERMANENT EFFECT ON: January 30, 2014

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 145

**RESTRAINT, SEIZURE AND FORFEITURE POLICY IN CRIMINAL TAX AND
TAX-RELATED INVESTIGATIONS AND PROSECUTIONS**

Purpose

1. The purpose of this Directive is to set forth Tax Division policy with respect to the restraint, seizure and forfeiture of property in criminal tax and tax-related investigations and prosecutions.¹

Declaration of Authority

2. The Tax Division has supervisory authority over all criminal proceedings arising under the internal revenue laws. *See* 28 C.F.R. §0.70(b).² As a result, Tax Division approval is required for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant. For example, Tax Division authorization is required before charging mail fraud, wire fraud, or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the Internal Revenue Service (“IRS”).

3. The Tax Division, therefore, also has authority over all:

(a) civil judicial forfeiture actions arising from a criminal tax or tax-related investigation and/or prosecution;

(b) criminal forfeiture actions arising from a tax or tax-related prosecution; and

¹ A thorough discussion of the restraint, seizure and forfeiture of property in criminal tax investigations and prosecutions is set forth in Chapter 26 of the Criminal Tax Manual. *See also* Internal Revenue Manual 9.7. Nothing in this Directive is intended to conflict with existing Departmental policy concerning the restraint, seizure, and forfeiture of property. If Tax Division policy overlaps with other Departmental policy, adherence to all policies is required. This Directive does not apply to the restraint, seizure or forfeiture of property pursuant to Chapter 53 of Title 26, 26 U.S.C. §§ 5801 et. seq., or any actions taken by the Bureau of Alcohol Tobacco, Firearms and Explosives (“ATF”) to enforce these provisions, nor is it intended to conflict with Departmental or ATF policy with regard to enforcement of the National Firearms Act.

² 28 C.F.R. § 0.70(b): “Criminal proceedings arising under the internal revenue laws ... are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division,” with a few specified exceptions. An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

(c) the restraint and/or seizure of property for forfeiture in a criminal tax or tax-related investigation and/or prosecution when an attorney for the Department of Justice (Tax Division Trial Attorney or Assistant United States Attorney) is assigned to, or asked to, assist law enforcement authorities in their attempt to restrain or seize property for forfeiture pursuant to any forfeiture law.

4. Tax Division authority extends to all tax and tax-related grand jury investigations in which any law enforcement agency is a participant.

5. The Tax Division retains final authority to approve the filing of tax and tax-related forfeiture actions brought pursuant to Title 26 (commonly referred to as "Code forfeitures").

6. The Tax Division retains final authority to approve the filing of all civil judicial forfeiture actions and criminal forfeitures brought pursuant to Title 18 arising from criminal tax and tax-related offenses.³

7. Tax Division authorization is generally not required to administratively forfeit property seized in a criminal tax and/or tax-related investigation. However, Tax Division approval is required before any declaration of forfeiture is entered by a seizing agency if preparation fees or rightful tax refunds of innocent taxpayers seized from a tax preparer are at risk of being forfeited (See subparagraph 8(b) below).

Delegation of Authority

8. Regarding the restraint and/or seizure of property for forfeiture as described in subparagraph 3(c) above, pursuant to the authority vested in me by Part 0, Sub-Part M, of Title 28 of the Code of Federal Regulations, Section 0.70, I hereby delegate to the United States Attorney the authority to apply to the district court for an order to restrain and/or seize personal property for forfeiture arising from a criminal tax and/or tax-related investigation or prosecution when said personal property is restrained or seized pursuant to a provision of Title 18, except that:

(a) No personal property shall be seized for forfeiture in a tax and/or tax-related investigation if the personal property consists entirely of legal

³ If a multi-agency criminal investigation includes both tax (and/or tax-related) and non-tax offenses, and the restraint, seizure, and/or forfeiture of property is legally based upon the non-tax criminal offenses, then the Tax Division has no authority over the restraint, seizure, and/or forfeiture of said property.

source income and the only criminal activity associated with the personal property is that unpaid taxes remain due and owing on the income.⁴

(b) Tax Division authorization is required before a declaration of forfeiture is entered by a seizing agency forfeiting from a tax preparer funds held on deposit in an account in a financial institution (as defined in 18 U.S.C. § 20) that may include tax preparation fees or rightful tax refunds of innocent taxpayers. For purposes of this Directive, no portion of a wholly fraudulent tax refund shall be deemed a “preparation fee.”

Notice requirement

9. The United States Attorney or his/her designee shall notify the Tax Division in writing of any actions taken pursuant to this delegation and shall electronically transmit to the Tax Division copies of all applications and court orders to restrain and/or seize property as well as the pleadings in support thereof. **If property is seized, the written notification must include acknowledgment that Tax Division authorization will be sought prior to forfeiture if either of the exceptions set forth in subparagraphs 8(a) or 8(b) above apply.**

10. The United States Attorney may seek the timely opinion and/or advice of the Tax Division regarding any matters contemplated herein, and if the United States Attorney elects not to exercise his or her delegation of authority as provided in paragraph 8 above, the Tax Division shall have final authority over all matters described therein.

11. If, per this Directive, the Tax Division is required to take action on any matter involving the restraint, seizure, and/or forfeiture of property arising in a criminal tax investigation and a deadline for that action has been imposed by statute, regulation, Departmental policy, or court order, the law enforcement agency or United States Attorney's Office responsible for administering or litigating the forfeiture-related matter shall, at the earliest possible date and no later than ten (10) business days preceding the deadline, forward to the Tax Division all relevant materials necessary to making a determination on the matter.

Effective date

12. This Directive shall be in effect beginning on the date noted below.

This Directive provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights,

⁴ The forfeiture laws should not be used to seize and forfeit personal property such as wages, salaries, and compensation for services rendered that is lawfully earned and whose only relationship to criminal conduct is the unpaid tax due and owing on the income. Title 18 fraud statutes such as wire fraud and mail fraud cannot be used to convert a traditional Title 26 legal-source income tax case into a fraud offense even if the IRS is deemed to be the victim of tax fraud.

substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

Kathryn Kenneally
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: January 30, 2014.

DEPARTMENT OF JUSTICE

November 17, 2004

MEMORANDUM

To: The Chiefs, Criminal Enforcement Sections,
For Distribution to all Criminal Enforcement Attorneys

From: Robert E. Lindsay
Chief, CATEPS

Re: **Final Advice re Tolling the Statute of Limitations under 18
U.S.C. 3292 and 3161 – The *Trainor* Decision**

On September 29, 2004, I issued a memorandum is to give interim advice regarding the Court of Appeals decision in *United States v. Trainor*, 376 F.3d 1325 (11th Cir. 2004). This decision has significant ramifications, i.e., the dismissal of indictments, for federal prosecutors seeking to toll the statute of limitations (SOL) under 18 U.S.C. 3292⁵ (and, indeed, 18 U.S.C. 3161(h)(9)) pending the execution

⁵ 18 U.S.C. 3292 provides as follows:

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request. (c) The total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

of an official request for evidence located in a foreign country. The purpose of this memorandum is to pass on the final advice on this matter given that the Office of International Affairs (OIA), Criminal Division. As was the case for my interim advice, this final advice should be considered for cases where no application or motion under Section 3292 has yet been filed, as well as cases where, even if such pleadings have been filed, there has not yet been an indictment. OIA's final advice and my interim advice are entirely consistent.

OIA has issued the following final advice re *Trainor*:

Attached are model pleadings to be used when making application to the court to toll the statute of limitations based upon an official U.S. request to obtain foreign evidence (18 U.S.C. § 3292). The application, declaration and order are drafted to conform to the ruling of the Eleventh Circuit in *United States v. Trainor*, 376 F.3d 1325 (11th Cir. 2004), which found that an unsworn application accompanied by only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292 which requires the Government to demonstrate, **by a preponderance of the evidence**, that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F. 3d at 1327. In essence, the court in *Trainor* found that the statute contemplated the submission of factual information, **under oath or otherwise verified**, that supported the two findings required to be made by the court: (1) that an official request has been made to a foreign government for evidence (within the statutory period); and (2) that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, located in the foreign country. (The Solicitor General decided against further review.) These pleadings are consistent with the recommendations sent to all Coordinators following the initial district court decision. *United States v. Trainor*, 277 F.Supp2d. 1278 (S.D.Fl.2003), (Coordinator Update E-004, August 5, 2003). The declaration and any attachments, filed with the application, would clearly constitute evidence for the court's consideration.

While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(9), asking for the exclusion of time when an official request to obtain foreign evidence is made, language of this provision is virtually identical to that of § 3292. We would urge that a declaration or sworn affidavit be used with all applications under § 3161 (h)(9) as well.

Please ensure that your office is aware of the ruling in *Trainor*, and that a declaration or sworn affidavit is used when seeking relief under these statutes. Andy Levchuk[(202) 353 3622] in OIA can provide assistance if needed.