

[Criminal Tax Manual](#)

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## **4.00 TAX DIVISION POLICIES AND PROCEDURES**

### ***4.01 VOLUNTARY DISCLOSURE***

#### ***4.01[1] Policy Respecting Voluntary Disclosure***

Whenever a person voluntarily discloses that he or she committed a crime before any investigation of the person's conduct begins, that factor is considered by the Tax Division along with all other factors in the case in determining whether to pursue criminal prosecution. *See generally* [USAM, § 9-27.220, et. seq.](#)

If a putative criminal defendant has complied in all respects with all of the requirements of the Internal Revenue Service's voluntary disclosure practice,<sup>1</sup> the Tax Division may consider that factor in its exercise of prosecutorial discretion. It will consider, *inter alia*, the timeliness of the voluntary disclosure, what prompted the person to make the disclosure, and whether the person fully and truthfully cooperated with the government by paying past tax liabilities, complying with subsequent tax obligations, and assisting in the prosecution of other persons involved in the crime.

A person who makes a "voluntary disclosure" does not have a legal right to avoid criminal prosecution. Whether there is or is not a voluntary disclosure is only one factor in the evaluation of a case. Even if there has been a voluntary disclosure, the Tax Division still may authorize prosecution. *See United States v. Hebel*, 668 F.2d 995 (8th Cir.), *cert. denied*, 456 U.S. 946 (1982).

### ***4.02 DUAL PROSECUTION AND SUCCESSIVE PROSECUTION***

#### ***USAM, § 9-2.031***

The Department's dual and successive prosecution policy ("Petite Policy") is set forth in detail in [USAM, § 9-2.031](#). In order to prevent unwarranted dual or successive

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<sup>1</sup>*See United States v. Knottnerus*, 139 F.3d 558, 559-560 (7th Cir. 1998) (holding that prior visit by special agent disqualified defendant from voluntary disclosure program); *United States v. Tenzer*, 127 F.3d 222, 226-28 (2d Cir. 1997), *vacated in part and remanded on other grounds*, 213 F.3d 34, 40-41 (2d Cir. 2000) (taxpayer must pay or make *bona fide* arrangement to pay taxes and penalties owed to qualify for consideration); and *United States v. Hebel*, 668 F.2d 995 (8th Cir. 1982).

prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to the initiation or continuation of a federal prosecution once a prior prosecution has reached the stage of acquittal, conviction (by verdict or guilty plea), or dismissal or termination after jeopardy has attached. In criminal tax cases, it is the Assistant Attorney General, Tax Division, who must authorize the subsequent charges. 28 C.F.R. §§ [0.70](#), [0.179](#). The United States will move to dismiss any prosecution governed by this policy in which the required prior approval was not obtained, unless the appropriate Assistant Attorney General retroactively approves it. [USAM, § 9-2.031\(E\)](#).

#### ***4.02[1] Applicability of Policy in Tax Cases***

The federal government can prosecute a state criminal defendant on federal charges for similar conduct (*i.e.*, filing false federal tax returns that fail to report the same income that was not reported on state tax returns), and it can prosecute a federal criminal defendant for failing to pay taxes on ill-gotten gains from non-tax criminal conduct. The Justice Department’s “Dual and Successive Prosecution Policy” calls upon prosecutors to evaluate whether it is a wise investment of federal resources and whether it is unfair to the defendant in a particular case, before the government brings federal charges that are based on “substantially the same act(s) or transaction(s)” as previous charges. [Id.](#), [§ 9-2.031\(A\)](#). The Tax Division adheres to the spirit of the policy when considering tax prosecutions, even if the two prosecutions in issue are not based on exactly the same acts or transactions. Thus, even though a tax prosecution based on unreported criminal proceeds is not based on the same acts or transactions as the underlying crime itself -- *i.e.*, the tax prosecution is based on the filing or non-filing of a federal tax return, while the underlying crime may have nothing to do with federal taxes (*e.g.*, embezzlement from an employer or a *Ponzi* or other fraud scheme) -- the Tax Division makes the kind of evaluation required under the policy. Likewise, the Tax Division makes such an evaluation where there has been a prior prosecution for state tax fraud, even though such a prosecution would be based on the filing or non-filing of state tax returns rather than federal tax returns.

The Department’s policy precludes the initiation of a federal prosecution following a prior federal or state prosecution based on substantially the same act or transaction unless the Assistant Attorney General concludes that four conditions are satisfied:

1. the matter must involve a substantial federal interest;
2. the prior prosecution must have left that interest demonstrably unvindicated;
3. the defendant's conduct must constitute a federal offense for which the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact; and
4. prosecution is otherwise justified under the Principles of Federal Prosecution. [USAM, § 9-27.00](#).

[USAM, § 9-2.031\(A\)](#).

### **1. Substantial Federal Interest**

The federal government's interest in prosecuting an offender who commits a particular tax crime increases with the amount of the tax loss, the sophistication of the tax crime, the number of tax years involved, and the actual or potential prevalence of the type of tax crime at issue .

### **2. Federal Interest Demonstrably Unvindicated**

“In general, the Department will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest.” [Id., § 9-2.031\(D\)](#). If the target was convicted in the previous prosecution, this presumption may be overcome “if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence -- including forfeiture and restitution as well as imprisonment and fines -- is available through the contemplated federal prosecution.” *Id.* In this regard, the strong federal interest in deterrence of tax fraud through criminal prosecution will almost always be unvindicated by a prior prosecution on non-tax charges.

### **3. Federal Offense Likely to Result in Conviction**

This is the same test that is applied to all federal prosecutions under the Principles of Federal Prosecution. The Tax Division will not authorize prosecution unless it appears that there is sufficient admissible evidence to obtain and sustain a conviction.

#### **4. Principles of Federal Prosecution**

Apart from the successive prosecution policy, the Principles of Federal Prosecution require the Tax Division to evaluate whether a “substantial Federal interest would be served by prosecution.” [USAM, § 9-27.230](#). In making that decision, we “should weigh all relevant considerations,” including federal law enforcement priorities, the nature and seriousness of the federal offense, the potential deterrent effect of prosecution, the target’s culpability, criminal history, and willingness to cooperate, and the probable sentence or other consequences of a conviction. *Id.*

##### ***4.02[2] Pretrial Diversion***

The Tax Division's long-standing, strict policy is that defendants in criminal tax cases should not be granted pretrial diversion. Therefore, authorization of the Assistant Attorney General is required before a U.S. Attorney agrees to such a disposition in a tax case. *See* [USAM, § 9-22.000](#).

#### **4.03 INCARCERATED PERSONS - [USAM § 9-27.230](#)**

##### ***4.03[1] General***

Whenever a proposed tax defendant is incarcerated on other charges and subsequent prosecution is not barred by the Department's dual and successive prosecution policy, *see* [§ 4.02](#), *supra*, the prosecutor nonetheless should consider other factors before deciding to bring charges.

##### ***4.03[2] Prosecution of Incarcerated Persons***

In proposed tax prosecutions of incarcerated persons, the most important issues in the exercise of prosecutorial discretion are the nature and seriousness of the proposed tax offense, the deterrent effect of a tax prosecution, and the probable sentence or other consequences if the person is convicted on the tax charges. If the target is already subject to a substantial sentence or is already incarcerated, the prosecutor should weigh the likelihood that a subsequent conviction on tax charges will result in a meaningful addition to his or her sentence. The prosecutor also should consider the desirability of instituting a prosecution to prevent the running of the statute of limitations on the proposed tax charges and to preserve these charges if there appears to be a reasonable

chance that the target's prior conviction may be reversed. [USAM, § 9-27.230](#). In this regard, the prosecutor should consider the appropriateness of an "adequate non-criminal alternative to prosecution, " *e.g.*, "civil tax proceedings." [USAM, 9-27.250\(B\)](#).

#### ***4.04 PHYSICAL OR MENTAL INABILITY TO STAND TRIAL***

##### ***4.04[1] General Policy***

Whether a case against a person who otherwise warrants prosecution should be declined or dismissed because the person is in poor mental or physical health generally is best decided by the trial court. Only if it is clear beyond any doubt that a proposed defendant will never be able to stand trial because of a terminal physical condition should a case be declined because the defendant is in poor health.

##### ***4.04[2] Court Determination of Health***

If a criminal defendant seeks a continuance or other delay of the trial on the ground that the defendant is not able to assist his counsel in presenting a defense and/or that a trial will pose a serious threat to the defendant's health, the prosecutor should ensure that the relevant facts and the court's decision are made a matter of record.

The prosecutor should consider (1) asking the IRS special agent to conduct a discrete investigation to determine the extent of the defendant's daily activities and to eliminate the possibility of malingering; (2) asking the court to appoint a physician to conduct an examination, including hospitalization if necessary; and (3) requesting a hearing in open court to discuss the facts.

##### ***4.04[3] Mental Incompetency***

A person's mental state at the time that he or she committed the alleged tax crime will almost always be relevant to the decision whether to prosecute, because nearly all tax crimes are specific intent crimes. In criminal tax cases, the government usually can overcome a defense claim of lack of mental responsibility with evidence that the defendant was operating a successful business or otherwise earning substantial income during the time in question. Once the Tax Division has decided to authorize prosecution and charges have been filed, the prosecutor generally should let the court determine whether the defendant is competent to stand trial. *See USAM §§ [9-9.000](#) and [9-18.000](#).*

*See also* 18 U.S.C. § 17 (insanity defense); 18 U.S.C. §§ 4241, *et seq.* (pertaining to offenders with mental disease or defect). Sections 4241-4248 of Title 18 U.S.C. govern, *inter alia*, procedures for the determination of competency to stand trial and the commitment of a defendant. If the prosecutor, defense counsel, or the court perceives that competency is an issue, then the court may order a psychiatric examination and hold a hearing on the defendant's competency to stand trial.