

Criminal Tax Manual

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26 U.S.C. § 7201

GOVERNMENT PROPOSED Jury Inst. No. 26.7201-1

Tax Evasion –The Nature of the Offense Charged

Count ___ of the indictment charges that on or about the ___ day of _____, 20___, in the _____ District of _____, Defendant _____ willfully attempted to evade and defeat a substantial income tax which was due [*in addition to any income tax declared on the defendant's tax return*] [*in addition to any income tax the defendant paid*].

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.01

[JI-40]

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-2

The Statute Defining the Offense Charged

Section 7201 of the Internal Revenue Code provides, in part:

“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall * * *”

be guilty of an offense against the laws of the United States.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008),
Section 67.02

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-3

The Essential Elements Of Attempt To Evade Or Defeat A Tax

To establish the offense of attempting to evade and defeat a tax, the government is required to prove beyond a reasonable doubt the following three elements:

First, a substantial income tax was due and owing from the defendant in addition to that declared in his [her] income tax return;

Second, [after _____,]¹ the defendant made an affirmative attempt, in any manner, to evade or defeat an income tax, and

Third, the defendant willfully attempted to evade and defeat the tax.

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

26 U.S.C. § 7201

Spies v. United States, 317 U.S. 492 (1943)
Lawn v. United States, 355 U.S. 339, 361 (1958)
Sansone v. United States, 380 U.S. 343, 351 (1965)
United States v. Pomponio, 429 U.S. 10, 12 (1976)
Cheek v. United States, 498 U.S. 192, 195 (1991)

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-4

The Essential Elements of the Offense Charged

In order to sustain its burden of proof for the crime of willfully attempting to [evade and defeat] [the payment of] a tax, as charged in Count ___ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: A substantial income tax was due from Defendant _____ [*in addition to that declared on the defendant's income tax return*][*in addition to that paid by the defendant*];

Two: The defendant, [after _____,]¹ attempted to evade or defeat this [*additional*] tax as detailed in the indictment; and

[JI-41]

Three: In attempting to [evade or defeat] [evade the payment of] such [*additional*] tax, Defendant _____ acted willfully.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.03 (6th ed. 2008) (modified)

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-5

The Essential Elements of the Offense Charged

[Defendant] is charged with income tax evasion. For you to find [defendant] guilty of this crime, the government must prove the following things beyond a reasonable doubt:

First, that [defendant] owed substantially more federal income tax for the year[s] [_____] than was indicated as due on his/her income tax return;

Second, that [defendant] intended to evade or defeat the assessment or payment of this tax; and

Third, that, [after _____,]¹ [defendant] willfully committed an affirmative act in furtherance of this intent.

[Fourth, that [defendant] did not have a good-faith belief that he/she was complying with the provisions of [specific provision]. A belief may be in good faith even if it is unreasonable.]

A person may not be convicted of federal tax evasion on the basis of a willful omission alone; he/she also must have undertaken an affirmative act of evasion. The affirmative act requirement can be met by [the filing of a false or fraudulent tax return that substantially understates taxable income or by other affirmative acts of concealment of taxable income such as keeping a double set of books, making false entries or invoices or documents, destroying books or records, concealing assets or covering up sources of income, handling one's affairs so as to avoid keeping records, and/or other conduct whose likely effect would be to mislead the Internal Revenue Service or conceal income].

[Defendant] acted "willfully" if the law imposed a duty on him/her, he/she knew of the duty, and he/she voluntarily and intentionally violated that duty. Thus, if [defendant] acted in good faith, he/she cannot be guilty of this crime. The burden to prove intent, as with all other elements of the crime, rests with the government. This is a subjective standard: what did [defendant] honestly believe, not what a reasonable person should have believed. Negligence, even gross negligence, is not enough to meet the "willful" requirement. But philosophical disagreement with the law or a belief that the tax laws are invalid or unconstitutional does not satisfy good faith and does not prevent a finding of willfulness.

Pattern Jury Instructions of the First Circuit, Criminal Cases, § 4.26.7201 (2008)
(elements) (modified)

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-6

The Essential Elements of the Offense Charged

Title 26, United States Code, Section 7201, makes it a crime for anyone willfully to attempt to evade or defeat the payment of federal income tax.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant owed substantially more tax than he reported on his [year] income tax return because he [e.g., intentionally failed to report income];

Second: That when the defendant filed that income tax return, he knew that he owed [JI-42] substantially more taxes to the government than he reported on that return; and

Third: That when the defendant filed his [year] income tax return, he did so with the purpose of evading payment of taxes to the government.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but the government must prove beyond a reasonable doubt that the defendant attempted to evade or defeat payment of some substantial portion of the additional tax he knew he was required by law to pay.

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, OI 107.1 (2011 ed.) (modified)

Fifth Circuit Criminal Jury Instructions § 2.95 (2001 ed.) (modified)

COMMENT

¹ The circuit pattern instructions on which this instruction is based refer to the offense as attempting to evade or defeat the "payment" of federal income tax. But understating of income tax liability on a tax return is usually associated with evasion of assessment. Affirmative acts associated with evasion of payment typically involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. See [§ 8.06\[2\]](#) of this Manual. In any event, it has been held that evasion of assessment and evasion of payment are not different offenses but are different means of committing the single offense of attempted evasion. See, e.g., *United States v. Mal*, 942 F.2d 682, 688 (9th Cir. 1991); *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990).

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-7

The Essential Elements of the Offense Charged

To sustain a charge of attempting to evade or defeat the defendant's individual tax, the government must prove the following propositions:

First, on April 15¹ [or date of a legal extension] of the year following the tax year, federal income tax was due and owing by the defendant;

Second, the defendant intended to evade or defeat the ascertainment, assessment, computation or payment of the tax; and

Third, [after _____,]² the defendant willfully did some act in furtherance of the intent to evade tax or payment of the tax.

If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

If you find beyond a reasonable doubt that the defendant had a tax liability for a particular year, then I instruct you as a matter of law, that tax was due and owing on April 15 [or other date set by law or legal extension] of the following year.

Failure to file a tax return, without any additional act, does not establish the crime of willful attempt to evade or defeat income tax.

[JI-43]

[Where specific acts of evasion are charged, the court should consider whether to give a unanimity instruction (See Fed. Crim. Jury Instr. 7th Cir. 4.03 (1999))]

Pattern Criminal Federal Jury Instructions for the Seventh Circuit, pp. 345 - 349, November 30, 1998

¹ Note that April 15th is the due date for individual returns. Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C. § 6072(b). If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that pursuant to 26 U.S.C. 7503 the term "legal holiday" also includes any statewide holiday, and, accordingly, taxpayers who file at the Andover Service Center may get an extra day if the filing date falls on Patriots' Day in Massachusetts which is the third Monday in April. NOTE ALSO that the statutory due dates should be adjusted to account for any extensions of time for filing a return.

² If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-8

The Essential Elements of the Offense Charged

The crime of tax evasion as charged in [Count[s] _____ of] the indictment has three elements:

One, the defendant owed substantial income tax in addition to that which [he] [she] reported on his return;

Two, the defendant attempted to evade and defeat that additional tax;¹ and

Three, the defendant acted willfully.

To “attempt to evade or defeat” a tax involves two things: first, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent. So, the word “attempt” contemplates that the defendant knew and understood that, during the calendar year charged, [he] [she] had some income which was taxable and which he was required by law to report; but that [he] [she] nevertheless attempted to evade or defeat all or a substantial portion of the tax on that income, by willfully failing to report all [his] [her] known income which [he] [she] knew [he] [she] was required by law to state in [his] [her] return for such year; or in some other way or manner.

To “evade and defeat” a tax means to escape paying a tax by means other than lawful avoidance.

Various schemes, subterfuges, and devices may be resorted to in an attempt to evade or defeat a tax. [The one alleged in the indictment is that of filing false and fraudulent returns with the intent to evade or defeat the tax.] The statute makes it a crime to willfully attempt, in any way or manner, to evade or defeat any income tax imposed by law.

An attempt to evade an income tax for one year is a separate offense from the attempt to evade the tax for a different year.

[JI-44]

Even though the indictment alleges a specific amount of tax due for each of the calendar years, the proof need not show the precise amount of the additional tax due. The Government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the indictment.

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state that an attempt must have been made during that period.

[The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.]

To act “willfully” means to voluntarily and intentionally violate a known legal duty.

(Insert paragraph describing Government's burden of proof, *see* Model Crim. Jury Instr. 8th Cir. 3.09 (2012))

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 6.26.7201 (2012 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-9

The Essential Elements of the Offense Charged

The defendant is charged in [Count _____ of] the indictment with income tax evasion in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant owed more federal income tax for the calendar year [_____] than was declared due on the defendant's income tax return;

Second, the defendant knew that more federal income tax was owed than was declared due on the defendant's income tax return;

Third, the defendant made an affirmative attempt to evade or defeat an income tax;¹ and

Fourth, in attempting to evade or defeat such additional tax, the defendant acted willfully.

Manual of Model Jury Instructions for the Ninth Circuit (2010 ed.), Section 9.37

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state that an affirmative attempt must have been made during that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-10

The Essential Elements of the Offense Charged

The defendant is charged in count ____ with a violation of 26 U.S.C. section 7201.

This law makes it a crime for anyone to willfully attempt to evade or defeat the payment of federal income tax.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: the defendant owed substantial income tax in addition to the tax liability which he [JI-45] reported on his [_____] income tax return;

Second: the defendant intended to evade and defeat payment of that additional tax;

Third: [after _____,]¹ the defendant committed an affirmative act in furtherance of this intent, that is he [_____]; and

Fourth: the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty.

To “evade and defeat” the payment of tax means to escape paying a tax due other than by lawful avoidance.

The indictment alleges a specific amount of tax due for each calendar year charged. The proof, however, need not show the exact amount of the additional tax due. The government is required only to prove, beyond a reasonable doubt, that the additional tax due was substantial.

Criminal Pattern Jury Instructions: Tenth Circuit Pattern Crim. Jury Instr. 10th Cir. 2.92 (2006) (modified)

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-11

The Essential Elements of the Offense Charged

Section 7201 of the Internal Revenue Code (26 USC 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

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

First: That the Defendant owed substantial income tax in addition to the amount declared on [his] [her] tax return; and

Second: That the Defendant knew when [he] [she] filed that income tax return that [he] [she] owed substantially more taxes than the amount reported on [his] [her] return; and¹

Third: That the Defendant intended to evade paying taxes he knew he was required by law to pay.

The Government does not have to prove the precise amount of the additional tax due. But it must prove beyond a reasonable doubt that the Defendant knowingly ~~and willfully~~ attempted to evade or defeat paying a substantial part of the additional tax.

The word “attempt” indicates that the Defendant knew and understood that, during the particular tax year involved, [he] [she] had income that was taxable, and that [he] [she] had to report by law; but [he] [she] tried to evade or defeat paying the tax or a substantial portion of the tax on that income, by failing to report all of the income he knew he was required by law to report.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether it’s wages, commissions, or money earned for performing services. The tax is also levied on profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term “gross income” means all income from whatever source unless it is specifically excluded by law.

The law allows exemptions from income taxes for funds acquired from certain sources. The most common non-taxable sources are loans, gifts, inheritances, [JI-46] the proceeds of insurance policies, and funds received from selling an asset to the extent that the amount received is the same or less than the asset’s cost.

Pattern Jury Instructions: Eleventh Circuit (2010), 93.1

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state that a willful attempt must have been made during that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-12

Tax Evasion

(26 U.S.C. § 7201)

To sustain a charge of attempting to evade or defeat the defendant's individual tax, the government must prove the following propositions:

First, on April 15 [or date of a legal extension] of the year following the tax year, federal income tax was due and owing by the defendant;

Second, the defendant intended to evade or defeat the ascertainment, assessment, computation or payment of the tax; and

Third, [after _____,]¹ the defendant willfully did some act in furtherance of the intent to evade tax or payment of the tax.

If you find from your consideration or of all of the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Pattern Federal Jury Instructions for the Seventh Circuit, p. 344, (1998 ed.) (modified)

¹If there is evidence of affirmative acts both within and without the statute of limitations period, state the date of the beginning of that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-13

Tax Evasion

(26 U.S.C. § 7201)

The crime of tax evasion as charged in [Count[s] of] the indictment has three elements:

One, the defendant owed substantial income tax in addition to that which [he] [she] reported on his return;

Two, the defendant attempted to evade and defeat that additional tax;¹ and

Three, the defendant acted willfully.

To "attempt to evade or defeat" a tax involves two things: first, an intent to evade or defeat the tax; and second, some act willfully done in furtherance of such intent. So, the word "attempt" contemplates that the defendant knew and understood that, during the calendar year charged, [he] [she] had some income which was taxable, and which he was required by law to report; but that [he] [she] nevertheless attempted to evade or defeat all or a substantial portion of the tax on that income, by willfully failing to report all [his] [her] known income which [he] [she] knew [he] [she] was required by law to state in [his] [her] return for such year; or in some other way or manner.

[JI-47]

To "evade and defeat" a tax means to escape paying a tax by means other than lawful avoidance.

Various schemes, subterfuges, and devices may be resorted to in an attempt to evade or defeat a tax. [The one alleged in the indictment is that of filing false and fraudulent returns with the intent to evade or defeat the tax.] The statute makes it a crime to willfully attempt, in any way or manner, to evade or defeat any income tax imposed by law.

An attempt to evade an income tax for one year is a separate offense from the attempt to evade the tax for a different year.

Even though the indictment alleges a specific amount of tax due for each of the calendar years, the proof need not show the precise amount of the additional tax due. The Government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, whether greater or less than the amount charged in the indictment.

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state that an attempt must have been made during that period.

[The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.]

To act “willfully” means to voluntarily and intentionally violate a known legal duty.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2012 ed.), Section 6.26.7201

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-14

Tax Deficiency

One element of attempted tax evasion is a substantial tax deficiency or, in other words, a substantial amount of Federal income tax due and owing by the defendant over and above the amount of tax reported in the defendant's return(s). Each year must be considered separately. In other words, the defendant's tax obligation in any one year must be determined separately from his [her] tax obligations in any other year.

The defendant is charged with attempting to evade a specific amount of tax due for each of the calendar years alleged in the indictment. The proof need not show, however, the precise amount or all of the additional tax due as alleged. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax,¹ whether greater or less than the income tax charged as due in the indictment.

United States v. Johnson, 319 U.S. 503, 517-518 (1943)

[JI-48]

¹The tax deficiency need not be "substantial" in the Ninth Circuit. *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990); *Manual of Model Jury Instructions for the Ninth Circuit* (2005 Ed.), Section 9.35 Comment

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-15

Proof of Precise Amount of Tax Owed Not Necessary

The government must prove beyond a reasonable doubt that Defendant _____ willfully attempted to evade or defeat a substantial portion of the tax owed.

Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of (additional) tax owed.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.08

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-16

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008),
Section 67.24

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-17

“Attempts in Any Manner to Evade or Defeat Any Tax” -- Explained

The phrase “attempts in any manner to evade or defeat any tax” involves two things: first, the formation of an intent to evade or defeat a tax; and second, willfully performing some act to accomplish the intent to evade or defeat that tax.

The phrase "attempts in any manner to evade or defeat any tax" contemplates and charges that Defendant _____ knew and understood that during the calendar year 20__ , [he] [she] owed a substantial federal income tax [*substantially more federal income tax than was declared on the defendant's federal income tax for that year*] [*substantially more federal income tax than had been paid for that year*] and then tried in some way to avoid that [*additional*] tax.

In order to show an "attempt(s) in any manner to evade or defeat any tax", therefore, the government must prove beyond a reasonable doubt that the Defendant _____ intended to evade or defeat the tax due and that Defendant _____ also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

2B Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.04

See also Manual of Model Criminal Jury Instructions, Eighth Circuit (2012 ed.), Section 6.26.7201 (portion)

Spies v. United States, 317 U.S. 492, 500 (1943)

Sansone v. United States, 380 U.S. 343 (1965)

[JI-49]

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-18

“Willfully” -- Defined

In order to sustain its burden of proof for the crime of tax evasion as charged in Count ___ of the indictment, the government must prove beyond a reasonable doubt that Defendant _____ acted “willfully”.

To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.

Negligent conduct is not sufficient to constitute willfulness.

2B Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.20 (modified)

The term “willfully” means the voluntary and intentional violation of a known legal duty, in other words, acting with the specific intent to avoid paying a tax imposed by the income tax laws or to avoid assessment of a tax that it was the legal duty of the defendant to pay to the government, and that the defendant knew it was his/her legal duty to pay. *Pattern Federal Jury Instructions for the Seventh Circuit*, p. 345, (1998 ed.)

An act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty. *United States v. Sehnai*, 930 F.2d 1420, 1427 (9th Cir. 1991)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of “bad purpose” or “evil motive.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also 2001 Criminal Tax Manual Section 8.06[1].

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

3 For examples of conduct from which willfulness may be inferred, see 2008 Criminal Tax Manual [Section 8.08\[3\]](#).

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-19

Knowledge of Falsehood
(Deliberate Ignorance)

The government may prove that Defendant _____ acted “knowingly” by proving, beyond a reasonable doubt, that this defendant deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. In order to infer knowledge, you must find that two things have been established:

First, that the defendant was aware of a high probability of [the fact in question].

Second, that the defendant consciously and deliberately took actions to avoid learning about the existence of that fact.

It is entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and any inferences to be drawn from any such evidence.

You may not conclude that the defendant had knowledge, however, from proof of a mistake, negligence, or carelessness. You may not conclude that defendant had knowledge if the defendant did not actually believe in the existence of that fact. There must be an awareness of a high probability of the existence of the fact and a deliberate effort to remain ignorant of the fact.

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 17.09 (6th ed. 2008) (modified);

Pattern Criminal Jury Instructions for the District Courts of the First Circuit, § 2.16 (2012 ed.);

Third Circuit Model Criminal Jury Instructions, § 5.06 (2010 ed.);

Sixth Circuit Pattern Criminal Jury Instructions, § 2.09 (2011 ed.);

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 7.04 (2012 ed.);

Ninth Circuit Model Criminal Jury Instructions, § 5.7 (2010 ed.);

Tenth Circuit Criminal Pattern Jury Instructions, § 1.37 (2005 ed.).

COMMENTS

1 In *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. ___, 131 S. Ct. 2060 (2011), the Supreme Court noted that “the doctrine of willful blindness is well established in criminal law.” Observing that all of the Courts of Appeals - with the possible exception of the District of Columbia Circuit - have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not also apply to civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. *See id.* at 2071 (collecting cases); *see also United States v. Griffin*, 524 F.3d 71, 79 n.6 (“The circuits are uniform in approving willful blindness instructions for specific intent criminal offenses.”).

2 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g., United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several courts have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support giving the instruction. *See, e.g., United States v. Whiteford*, 676 F.3d 348, 357 (3d Cir. 2012) (A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance); *Mapelli*, 971 F.2d at 287; *United States v. Barnhart*, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see United States v. Stone*, 9 F.3d 934 (11th Cir. 1993). Finally, some courts have held that it is inconsistent for a court to give instructions on both actual knowledge and willful blindness. *See, e.g., United States v. Alston-Graves*, 435 F.3d 331, 342 n. 15 (D.C. Cir. 2006). *But see United States v. Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000) (approving concurrent use of instructions on actual knowledge and willful blindness).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it. *See United States v. Jinwright*, 633 F.3d 471, 478 (4th Cir. 2012) (requests for willful blindness instructions should be handled with caution).

3 If the evidence does clearly support a “deliberate ignorance” instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in *Cheek v. United States*, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty. *See United States v. Stadtmauer*, 620 F.3d 238, 258-58 (3d Cir. 2010) (“The Court’s instruction made clear that willful blindness applied only to the element of knowledge.”).

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-20

When the Offense May Be Complete

If you find beyond a reasonable doubt from the evidence in the case that [*a fraudulent return was filed*] [*the defendant failed to file a return*] and that this was done willfully as charged in Count _____ of the [*indictment*] [*information*], then you may find that the offense charged was complete [*when the fraudulent return was filed*] [*on the date the return was due*].

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.23 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-21

No Need for Tax Assessment

If the defendant has incurred a tax liability, it exists from the date the return is due. A taxpayer's **[JI-51]** tax liability exists independent of any administrative assessment. It is not necessary that a taxpayer receive a tax assessment before he is charged with a criminal violation of willful attempt to evade or defeat income tax.

Pattern Federal Jury Instructions for the Seventh Circuit, p. 347, (1998 ed.)

Committee Comment:

This instruction should be given only if the contrary position is argued by the defendant.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-22

Tax Evasion - Elements of the Offense (26 U.S.C. § 7201)

Count (*No.*) of the indictment charges the defendant (*name*) with income tax evasion, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That (*name*) had a substantial income tax deficiency;

Second: That (*name*) made an affirmative attempt to evade or defeat the (*assessment*) (*payment*) of the income tax;¹ and

Third: That (*name*) acted willfully.

Model Criminal Jury Instructions for the Third Circuit, 6.26.7201 (2010 ed.)

¹ If there is evidence of affirmative acts both within and without the statute of limitations period, state that an affirmative attempt must have been made during that period.

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-23

Tax Evasion - Tax Deficiency Defined

The first element that the government must prove beyond a reasonable doubt is that *(name)* had a substantial tax deficiency due and owing, that is that *(name)* owed *(a substantial federal income tax) (substantially more federal income tax than (he)(she) reported on (his)(her) tax return) (substantially more federal income tax than (he)(she) paid)* for calendar year(s) *(specify year(s))*.

The government does not have to prove the exact amount that *(name)* owed or that *(name)* evaded all of the taxes charged in the indictment. The government is required to establish only that *(name)* owed a substantial amount of income tax during the year(s) in question, regardless whether it is more or less than the amount set forth in the indictment.

Model Criminal Jury Instructions for the Third Circuit, 6.26.7201-1 (2010 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-24

Tax Evasion - Computation of Tax Deficiency

In order to prove a tax deficiency in this case, the government has introduced evidence that *(name)* received income that was omitted from *(his)(her)* tax return, that is, *(describe the specific item of income or other evidence which is the basis for the allegation of evasion)*.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that *(name)* received income *(in addition to what (he)(she) reported on [JI-52] (his)(her) income tax return for the year in question)*, then you must decide whether there was a substantial tax due *(in addition to what was shown to be due on the return)(in addition to what (name) paid)*, as a result of *(name)*'s *(additional,)* unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the testimony introduced during the trial concerning the computation of *(name)*'s tax liability, when the alleged *(additional)* income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that *(name)* received *(additional)* income, and that there was a substantial tax due *(in addition to what was shown to be due on (his)(her) income tax return) (in addition to what (name) paid)*, as a result of this *(additional)* income, then this first element has been satisfied.

Model Criminal Jury Instructions for the Third Circuit, 6.26.7201-2 (2010 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-25

Tax Evasion - Affirmative Attempt to Evade or Defeat Defined

The second element that the government must prove beyond a reasonable doubt is that *(name)* made an affirmative attempt to evade or defeat a tax. The phrase “attempt to evade or defeat any tax” involves two things: first, the formation of an intent to evade or defeat a tax; and, second, willfully performing some act to accomplish the intent to evade or defeat that tax.

The government must first prove beyond a reasonable doubt that *(name)* knew and understood that during the calendar year(s) (*specify year(s)*), *(he)(she)* had a tax deficiency. The government then must prove beyond a reasonable doubt that *(name)* intended to evade or defeat the tax due and that *(name)* also willfully did some affirmative act to try to accomplish this intent to evade or defeat that tax.

An affirmative act is an act done to mislead the government with respect to the amount of taxes due and owing for the year(s) in question or to conceal income to avoid the assessment or payment of a tax. In this case, the government alleges in the indictment that *(name)* (*describe specific affirmative act(s) alleged in the indictment*). Even otherwise lawful or innocent conduct may constitute an affirmative act if you find that *(name)* acted with intent to conceal income or mislead the government. An act likely to mislead the government or conceal funds satisfies this element. *[However, failing to file a federal tax return, standing alone, is not an affirmative attempt to evade or defeat a tax.]*

[The government needs only to prove one act to satisfy this element of the offense, but you must unanimously agree on which (act was) (or acts were) committed.]

Model Criminal Jury Instructions for the Third Circuit, 6.26.7201-3 (2010 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-26

Tax Evasion - Willfully Defined

The third element the government must prove beyond a reasonable doubt is that *(name)* acted willfully. “Willfully” means a voluntary and intentional violation of a known legal duty. *(Name)*’s conduct was not willful if *(he)(she)* acted through negligence, mistake, accident, or due to a good faith misunderstanding of the requirements of the law. A good faith belief is one that is honestly and genuinely held.

[JI-53]

[This definition of “willfulness” applies to all of the tax offenses charged in this case.]

[However, mere disagreement with the law or belief that the tax laws are unconstitutional or otherwise invalid does not constitute a good faith misunderstanding of the requirements of the law; all persons have a duty to obey the law whether or not they agree with it.]

Model Criminal Jury Instructions for the Third Circuit, 6.26.7201-4 (2010 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7201-27

Willfully Defined (26 U.S.C. §§ 7201, 7203, 7206, 7207)

In order to prove that the defendant acted “willfully,” the government must prove beyond a reasonable doubt that the defendant knew federal tax law imposed a duty on [him] [her], and the defendant intentionally and voluntarily violated that duty.

[A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if [his] [her] understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that [he] [she] was complying with the law.]

Comment

Sections 7201–7207 of the Internal Revenue Code use the term “willfully.” In *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Supreme Court set forth the following definition: “Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.” This same definition applies equally to all tax offenses, misdemeanors and felonies alike. *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (citing *United States v. Bishop*, 412 U.S. 346, 359–60 (1973)). “In other words, if you know that you owe taxes and you do not pay them, you have acted willfully.” *United States v. Easterday*, 564 F.3d 1004, 1006 (9th Cir.2009). Despite earlier case law suggesting the contrary, the element of willfulness does not require that the defendant have the financial ability to pay the taxes. *Id.* at 1005 (holding that *United States v. Poll*, 521 F.2d 329 (9th Cir.1975) is no longer controlling authority in light of intervening Supreme Court decisions). In a failure to file tax return prosecution, the government is not required to prove an intent to evade or defeat a tax, but may instead prove an intent to disobey or disregard the law, which may be the intent not to file a return, rather than the intent to evade or defeat a tax. *United States v. Meredith*, 685 F.3d 814, 826 (9th Cir. 2012).

The bracketed second paragraph of this instruction may be used when there is evidence a defendant acted on a good faith, but erroneous belief as to the requirements of the tax laws. In *United States v. Trevino*, 419 F.3d 896, 901 (9th Cir. 2005), the Ninth Circuit explained:

The government’s burden of proving willfulness requires negating [1] a defendant’s claim of ignorance of the law *or* [2] a claim that because of a *misunderstanding of the law*, he had a *good-faith belief* that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. *Cheek v. United States*, 498 U.S. 192, 202, 111 S. Ct. 604, 112 L.Ed.2d 617 (1991) (emphasis added). . . . In order to rely on a good faith defense, the defendant must in fact have some

“belief;” either that her own understanding was correct, or that she in good faith relied on the tax advice of a qualified tax professional. *See United States v. Bishop*, 291 F.3d 1100, 1106-07 (9th Cir. 2002).

Nonetheless, Ninth Circuit precedent forecloses the argument a defendant is entitled to a separate “good faith” instruction “when the jury has been adequately instructed with regard to the intent required to be found guilty of the crime charged. . . .” *United States v. Hickey*, 580 F.3d 922, 931 (9th Cir. 2009) (no good faith instruction needed when jury properly instructed on intent to defraud), *cert. denied*, 130 S. Ct. 2115 (2010).

A defendant’s views regarding the validity of a tax statute is irrelevant to the issue of willfulness and, if heard, the jury should be instructed to disregard such views. *Cheek*, 498 U.S. at 202. *See also United States v. Powell*, 955 F.2d 1206, 1212 (9th Cir. 1992) (no plain error to instruct that “mere disagreement with the law, in and of itself, does not constitute good faith misunderstanding under the requirements of law[] [b]ecause it is the duty of all persons to obey the law whether or not they [agree with it].”)

Willfulness is a state of mind that may be established by evidence of fraudulent acts. *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981); *United States v. Conforte*, 624 F.2d 869, 875 (9th Cir. 1980).

Model Criminal Jury Instructions for the Ninth Circuit, 9.42 (2010 ed.)

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-1

Willful Failure To Truthfully Account For Or Pay Over Tax:
Nature Of The Offense Charges

Counts __ through __ of the Indictment charge that beginning on or about _____, and continuing up to and including on or about _____, in the _____ District of _____ and elsewhere, the defendant [NAME] deducted and collected federal income taxes and Federal Insurance Contributions Act (“FICA”) taxes from the wages of the employees of [BUSINESS]¹ but willfully failed to truthfully account for and pay over to the Internal Revenue Service all of the taxes withheld and due and owing to the United States on behalf of [BUSINESS] and its employees for the _____ quarter of [YEAR] and each of the four quarters of YEAR, as alleged in the Indictment.

In violation of Title 26, United States Code, Section 7202.

¹ Where the taxpayer is a corporation, the instruction should be modified to follow the wording of the indictment.

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-2

Statute Defining Offense -- 26 U.S.C. 7202

Section 7202 of the Internal Revenue Code provides, in part, as follows:

Any person required * * * to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall * * * be guilty [of an offense against the laws of the United States.]

26 U.S.C. § 7202

United States v. Thayer, 201 F.3d 214, 219 (3d Cir. 1999).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-3

Elements of the Offense

In order to establish the offense charged in the indictment, the government must prove the following three elements beyond a reasonable doubt:

First, the defendant was a person who had a duty to collect, truthfully account for, and pay over **[JI-54]** federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____;

Second, the defendant failed to collect or truthfully account for and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____; and

Third, the defendant acted willfully.

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-4

Taxability of Wages

The law imposes an income tax, a social security tax, and a hospital insurance (Medicare) tax on the wages of individual employees equal to a percentage of the wages earned by the employee. To assist the government in collecting these taxes, the law requires every employer to deduct these taxes from wages paid to employees and hold them in trust for the United States. Furthermore, the withheld amounts must be deposited with an authorized financial institution or Federal Reserve Bank, at certain intervals that depend on the amounts withheld.

These “trust fund taxes” are for the exclusive use of the government and are not to be held by the employee or the employer.

The law also imposes excise taxes on every employer for social security and hospital insurance (Medicare) equal to a certain percentage of the wages paid to the employee by the employer.

26 U.S.C. § 3101(a) & (b) (imposing upon employee FICA taxes based on employee’s wages).

26 U.S.C. § 3102(a) (requiring employer to collect FICA taxes from employee wages at the time of compensation).

26 U.S.C. § 3111(a) & (b) (imposing upon employer excise taxes for social security and hospital insurance on the wages paid to employees).

26 U.S.C. § 3301 (imposing upon employer federal unemployment tax based on wages of employees).

26 U.S.C. § 3401(a).

26 U.S.C. § 3402(a) (requiring employer to withhold income taxes from wages at the time of compensation).

26 U.S.C. § 3403.

26 U.S.C. § 6302; 26 C.F.R. § 31.6302-1 (establishing the requirements for employers’ deposits of withheld income taxes and FICA taxes); 26 C.F.R. § 31.6011(a)-1 (a), -3(a) and -4(a); 26 C.F.R. § 6071(a)-1(a), and (4).

[JI-55]

Slodov v. United States, 436 U.S. 238, 243 (1978).

Brewery, Inc. v. United States, 33 F.3d 589, 591-92 (6th Cir. 1994) (financial difficulties can never constitute reasonable cause to excuse the penalties for non-payment of withholding taxes by an employer).

Gephart v. United States, 818 F.2d 469, 473 (6th Cir. 1987) (extended discussion of withholding tax requirements and responsible person test).

Jones v. United States, 60 F.3d 584, 587-88 (9th Cir. 1995).

Matter of American Biomaterials Corp., 954 F.2d 919, 920-22 (3d Cir. 1992).

Schon v. United States, 759 F.2d 614, 616 (7th Cir. 1985).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-5

Requirement To Report Withholding Of Income And Social Security Taxes

The law requires that employers file a Form 941, Employer's Federal Quarterly Tax Return, each calendar quarter. The Form 941 reports the withholding of employee income, social security, and Medicare taxes. The employer must file this Form 941 on or before the last day of the first calendar month following the period for which it is made. Thus, for the quarter ending March 31, the Form 941 is due by April 30; for the quarter ending June 30, the Form 941 is due by July 31; for the quarter ending September 30, the Form 941 is due by October 31; and for the quarter ending December 31, the Form 941 is due by January 31.

Jones v. United States, 60 F.3d 584, 588 (9th Cir. 1995).

Matter of American Biomaterials Corp., 954 F.2d 919, 920 (3d Cir. 1992).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-6

Requirement To Pay Over Withheld Taxes To The United States

The law further requires that an employer pay over the withheld income and social security taxes, commonly known as “trust fund taxes,” to the United States before the Form 941 quarterly tax return is due. Once an employer has withheld an employee’s wages, the government deems the employee to have paid the withheld taxes.

26 U.S.C. § 3102(b) (establishing liability of employer for withheld FICA taxes and indemnifying him from employee lawsuit for said taxes).

Jones v. United States, 60 F.3d 584, 588 (9th Cir. 1995) (explaining when taxes required to be reported on each return are due and payable, and that deposits must be made periodically in federal depositories).

Matter of American Biomaterials Corp., 954 F.2d 919, 920 (3d Cir. 1992) (payroll tax returns and payment of employment taxes are due every calendar quarter).

Buffalow v. United States, 109 F.3d 570, 572 (9th Cir. 1997).

[JI-56]

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-7

A Failure To Comply With Any One Of The Three Duties Is A Violation Of The Statute

The defendant may be found guilty of violating Section 7202 if he [she] had a duty to (a) collect, (b) account for, *or* (c) pay over a tax and failed to comply with any one of the above-mentioned duties. In other words, the government need not prove that the defendant was responsible for all three duties. It is enough to prove that the defendant was responsible for one of the three duties. Likewise, the government need only prove that the defendant failed to comply with one of the three duties for which he [she] was responsible.

For example, a responsible person who collects taxes from his [her] employees and files Forms 941 with the Internal Revenue Service, but willfully fails to pay over the taxes to the United States, is in violation of 26 U.S.C. § 7202.

United States v. Gilbert, 266 F.3d 1180, 1185 (9th Cir. 2001) (holding that defendant was properly convicted for failing to pay over employment taxes he had collected from his employees).

United States v. Thayer, 201 F.3d 214, 220 (3d Cir. 1999) (noting that to interpret the statute in the conjunctive would lead to the incongruous result of criminalizing a failure to collect a tax, while permitting collecting the tax, reporting it to the IRS, and spending it for one's "own selfish purposes").

United States v. Evangelista, 122 F.3d 112, 120-22 (2d Cir. 1997).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-8

Wages - Defined

For purposes of determining withholding taxes, the law defines wages as all compensation “for services performed by an employee for his employer, including the cash value of all [compensation] paid by any [means] other than cash. . . .”

26 U.S.C. § 3401(a).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-9

Employer - Defined

An employer is the person for whom an individual performed a service, of whatever nature. If the person for whom the service was performed did not control the payment of wages, then the employer is the person who did have such control.

26 U.S.C. § 3401(d).

United States v. Thayer, 201 F.3d 214, 219 n. 6 (3d Cir. 1999).

[JI-57]

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-10

Employee - Defined

An employee is defined according to the common sense use of the term, and includes an officer of a corporation.

26 U.S.C. § 3401(c).

United States v. Thayer, 201 F.3d 214, 219 n.6 (3d Cir. 1999).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-11

Person Required To Collect, Account For, And Pay Over Tax

In order to be found guilty of the offenses charged in the information, the defendant must have been a person required to collect, truthfully account for, or pay over withheld federal income and Social Security (FICA) taxes.

An individual is such a person if he [she] was [an officer or employee of a corporation] or [a member or employee of a partnership] or [connected or associated with a business entity] in a manner such that he [she] had the authority and duty to assure that withholding taxes and social security taxes were collected, accounted for, or paid over and when.

Responsibility is a matter of status, duty, or authority, not knowledge. A responsible person need only have significant control over the company finances, not exclusive control. A person has significant control if he has the power and responsibility to determine who would get paid and who would not. An individual may be a responsible person regardless of whether he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 6671(b) -- Definition of Term "Person."

26 U.S.C. § 6672.

Slodov v. United States, 436 U.S. 238, 245 (1978).

Gephart v. United States, 818 F.2d 469, 473-74 (6th Cir. 1987) (factors in determining responsible person: (1) the duties of the officer as outlined by the corporate by-laws; (2) the ability of the individual to sign checks of the corporation; (3) the identity of the officers, directors, and shareholders of the corporation; (4) the identity of the individuals who hired and fired employees; and (5) the identity of the individual(s) who were in charge of the financial affairs of the corporation).

United States v. Jones, 33 F.3d 1137, 1139 (9th Cir. 1994).

United States v. Carrigan, 31 F.3d 130, 133 (3d Cir. 1994) (citing the above cases and factors).

Quattrone Accountants, Inc. v. IRS, 895 F.2d 921, 927 (3d Cir. 1990).

United States v. Vespe, 868 F.2d 1328, 1332 (3d Cir. 1989) (holding that a responsible person need only have significant control over the company finances, not exclusive control).

Caterino v. United States, 794 F.2d 1, 6 n.1 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987)

[JI-58]

Godfrey v. United States, 748 F.2d 1568, 1574-75 (Fed. Cir. 1984)

Commonwealth Nat. Bank of Dallas v. United States, 665 F.2d 743, 750-51 (5th Cir. 1982)

United States v. McMullen, 516 F.2d 917, 920 (7th Cir. 1975)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir. 1970)

Pacific National Insurance v. United States, 422 F.2d 26, 30, 31 (9th Cir. 1970)

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

Datlof v. United States, 252 F. Supp. 11 (E.D. Pa.), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967) (noting criteria for use in determining whether an individual is a responsible person: (a) contents of corporate by-laws; (b) ability to sign checks on the company's bank account; (c) identity of the individual who signed returns of the firm; (d) the payment of other creditors instead of the United States; (e) the identity of the officers, directors, and principal stockholders in the firm; (f) the identity of the individuals who hired and discharged employees, and (g) in general, the identity of the individual who was in control of the financial officers of the firm in question).

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-12

More Than One Responsible Person

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

Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir. 1970)

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7202-13

Willfulness

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

An omission or failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to fail to do something the defendant knows the law requires to be done; that is to say, with intent either to disobey or to disregard the law.

[JI-59]

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (6th ed. 2008), Section 67.20 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 7.02 (2012 ed.) (Comment)

Manual of Model Jury Instructions for the Ninth Circuit, § 5.5 (2010 ed.) (Comment)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, Special Instr. 9 (2010 ed.) (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Pomponio, 429 U.S. 10, 12 (1976)
United States v. Bishop, 412 U.S. 346, 360 (1973)

COMMENTS

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

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

3 See also instructions on willfulness set forth as part of the [instructions on 26 U.S.C. § 7201](#), supra.

4 In *United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009), the Ninth Circuit held that, the government may establish willfulness under Section 7202 without proving that a defendant had the money to pay the taxes when due. The court concluded that its earlier decision in *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975), to the extent it

could be interpreted to the contrary, was inconsistent with *Pomponio* and was no longer binding circuit precedent.

26 U.S.C. § 7203

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-1

The Nature of the Offense Charged

Count ____ of the indictment [information] charges that the defendant _____ was required by law to file a tax return for the tax year 20__, on or before the ____ day of _____, 20__, and that the defendant willfully failed to file such a return.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.09 (6th ed. 2008)

[JI-60]

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-2

Failure to File -- Statute

Section 7203 of Title 26 of the United States Code provides, in part, that:

Any person required * * * (by law or regulation) * * * to make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, * * * shall be guilty [of an offense against the laws of the United States].

26 U.S.C. § 7203.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.10 (6th ed. 2008) (modified).

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-3

Failure To File -- The Essential Elements of the Offense Charged

In order to sustain its burden of proof for the crime of willful failure to file a tax return as charged in Count ____ of the indictment [information], the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: The defendant _____ was required by law or regulation to file a tax return concerning his [her] income for the taxable year ended December 31, 20__;

Two: The defendant failed to file such a return at the time required by law;¹ and

Three: In failing to file the tax return, the defendant _____ acted willfully.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.11 (6th ed. 2008).

[JI-61]

¹ Returns of individuals are due April 15th of after the close of the tax year. Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C. § 6072(b). If April 15th or March 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that pursuant to 26 U.S.C. 7503 the term "legal holiday" also includes any statewide holiday, and, accordingly, taxpayers who file at the Andover Service Center may get an extra day if the filing date falls on Patriots' Day in Massachusetts, which is the third Monday in April. ALSO NOTE that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C. § 7503.

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-4

Failure to File -- The Requirement to File a Return--Explained

A person is required to file a federal income tax return for any calendar year in which he [she] has gross income in excess of \$_____. Gross income means the total of all income received before making any deductions allowed by law.

Gross income includes the following: (1) compensation for services, including fees, commissions and similar items; (2) gross income derived from business; (3) gains derived from dealings in property; (4) interest; (5) rents; (6) royalties; (7) dividends; (8) alimony and separate maintenance payments; (9) annuities; (10) income from life insurance and endowment contracts; (11) pensions; (12) income from discharge of indebtedness; (13) distributive share of partnership gross income; (14) income in respect of a decedent; and (15) income from an interest in an estate or trust.

For the crime of willful failure to file a tax return, the government is not required to show that a tax is due and owing from the defendant. Nor is the government required to prove an intent to evade or defeat any taxes.

A person is required to file a return if his [her] gross income for the calendar year 20____ exceeded \$_____, even though that person may be entitled to deductions from that income so that no tax is due.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.12 (6th ed. 2008).

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-5

Failure to Pay Tax or File Tax Return -- Offense Charged

The defendant is charged in [Count _____ of] the indictment with failure [to pay tax] [to file a tax return] in violation of Section 7203 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [owed income tax] [was required to file a return] [was required to keep records] [was required to supply information] [~~had gross income of more than~~ \$_____] for the calendar year ending December 31, 20__.

Second, the defendant failed to [[pay the tax] [file an income tax return]] [[by April 15, 20__]] as required by Title 26 of the United States Code;¹ and

Third, in failing to do so, the defendant acted willfully.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 9.38 (2010 ed.) (modified).

[JI-62] ALSO NOTE that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C. § 7503.

¹ If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that pursuant to 26 U.S.C. 7503 the term "legal holiday" also includes any statewide holiday and, accordingly, taxpayers who file at the Andover Service Center may get an extra day if the filing date falls on Patriots' Day in Massachusetts which is the third Monday in

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-6

The Requirement to File a Tax Return

To sustain the charge of willful failure to file an [individual, partnership, corporate, trust] income [or other] tax return, the government must prove the following propositions:

First, the defendant was a person required by law to file an [individual, partnership, corporate, trust, or other] income [or other] tax return for [calendar or fiscal year in question];

Second, the defendant failed to file the return as required by law; and

Third, the defendant acted willfully.

If you find from your consideration of all the evidence as to a particular count that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence as to a particular count that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty of that count.

Federal Criminal Jury Instructions of the Seventh Circuit, p. 350, No. 7203[1] (1998 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-7

When a Person is Obligated to File Return

A [single individual, married individual filing separately, etc.] [under] [over] 65 years old was required to make and file an individual income tax return if that individual had a gross income of \$____ or more.

A married individual was required to file a federal income tax return if he/she had a separate gross income in excess of \$_____ and a total gross income, when combined with that of his/her spouse, in excess of \$_____ where [either] [both] [is] [are] [over] [under] 65 years old.

Any person who received more than \$____ net income from business (Schedule C), was required to make and file an individual income tax return.

Federal Criminal Jury Instructions of the Seventh Circuit, p. 353, No. 7203[4] (1998).

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-8

When An Entity Is Obligated To File Return

I instruct you, as a matter of law, that for the years ____, a corporation [partnership, trust] was required to make and file a corporate [partnership, trust] income tax return, whether or not that corporation had income.

Federal Criminal Jury Instructions of the Seventh Circuit, p. 354, No. 7203[5] (1998).

[JI-63]

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-9

Time Required by Law

The second element of the offense of failure to file is that the defendant failed to file a timely income tax return for each of the years charged in the indictment [information].

The law provides that a return made on the basis of the calendar year shall be made on or before the 15th day of April, following the close of the calendar year, except that when April 15th falls on a Saturday, Sunday, or legal holiday, returns are due on the first day following April 15th which is not a Saturday, Sunday, or legal holiday.¹

If you find beyond a reasonable doubt that the defendant had the required gross income in [Year, e.g., 2002], then, as a matter of law, the defendant was required to file a tax return on or before [Date, e.g., April 15, 2003].

26 U.S.C. §§ 6072, 6081, 7503.

¹ Returns made on the basis of a fiscal year are generally required to be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C. § 6072(a). Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C. § 6072(b). If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that pursuant to 26 U.S.C. 7503 the term “legal holiday” also includes any statewide holiday, and, accordingly, taxpayers who file at the Andover Service Center may get an extra day if the filing date falls on Patriots' Day in Massachusetts which is the third Monday in April. NOTE ALSO that the statutory due dates should be adjusted to account for any extensions of time for filing a return.

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-10

Willfulness

The third and final element that the government must prove beyond a reasonable doubt in order to establish the offense of willful failure to file income tax returns is that the defendant's failure to file returns was "willful."

The word "willful" means a voluntary, intentional violation of a known legal duty. Willfulness, in the context of a failure to file an income tax return, simply means a voluntary, intentional violation of a known legal duty to make and file a return.

Cheek v. United States, 498 U.S. 192, 201-202 (1991).

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

COMMENTS

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

[JI-64]

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-11

Failure To Pay -- Willfulness Defined

The specific intent of willfulness is an essential element of the offense of willful failure to pay one's income taxes. The term willfully used in connection with this offense means a voluntary, intentional violation of a known legal duty.

The failure to pay income taxes is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what he [she] knew the law requires to be done; that is to say, with intent to disobey or disregard the law that requires him [her] to pay federal income taxes.

On the other hand, the defendant's conduct is not willful if you find that he [she] failed to pay his [her] income taxes because of negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or due to his [her] good faith misunderstanding of the requirements of the law.¹

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

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

United States v. Ausmus, 774 F.2d 722, 725-726 (6th Cir. 1985).

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-12

Good Faith Belief Defense -- Failure to File
(disagreement with law or belief law is unconstitutional)

In the context of Section 7203, the element of willfulness is established by proving that the defendant had knowledge of his [her] legal obligation to file a tax return but, nevertheless, voluntarily and intentionally chose not to do what the law required.

Defendant's conduct is not "willful" if his [her] failure to file a tax return was due to negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or was the result of a good faith misunderstanding of the requirement of the law that he [she] file a return.

In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he [she] sincerely misunderstood the requirements of the law -- or whether the defendant [JI-65] knew that he [she] was required to file a return and did not do so.¹ This issue of intent, as to whether the defendant willfully failed to file an income tax return, is one which you must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

I instruct you, however, that neither a defendant's disagreement with the law, nor his [her] own belief that the law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

Cheek v. United States, 498 U.S. 192, 201 (1991).
United States v. Burton, 737 F.2d 439, 442 (5th Cir. 1984).
United States v. Koliboski, 732 F.2d 1328, 1331 (7th Cir. 1984).
United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984).
United States v. Ness, 652 F.2d 890, 893 (9th Cir. 1981).
United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980).
United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979).
United States v. Edelson, 604 F.2d 232, 235 (3d Cir. 1979).

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-13

Willfulness -- Good Faith Belief Defense
(claim inadequate records)

The third element which the government must prove beyond a reasonable doubt is that the defendant's failure to make the return in question was willful. The term "willful" for purposes of these instructions means a voluntary, intentional violation of a known legal duty.

The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do that which he [she] knew the law required, that is to say, with the intent to disobey or disregard the law that requires him [her] to make a timely return.

The willfulness which the government must prove beyond a reasonable doubt does not require the government to prove that the defendant had a purpose to evade a tax or to defraud the government. The failure of a taxpayer to have or keep records adequate to permit him [her] or his [her] agents or employees to prepare accurate tax returns is no legal justification for not filing a timely income tax return. The only justification for not filing a tax return when the same is required by law to be filed is a good faith misunderstanding by the taxpayer as to his [her] legal obligation to file the return¹ or an accidental, inadvertent, careless, negligent, or even grossly negligent failure to file such return.

[JI-66]

Cheek v. United States, 498 U.S. 192, 201 (1991).
United States v. Wilson, 550 F.2d 259, 260 (5th Cir. 1977).

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-14

Willfulness -- Failure to File/Good Faith Belief Defense
(disagreement with law)

Willfulness is an essential element of the crime of failure to file an income tax return. The term “willfully” used in connection with this offense means a voluntary, intentional violation of a known legal duty. Defendant's conduct is not "willful" if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law.¹ However, mere disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Also, a person's belief that the tax laws violate his [her] constitutional rights does not constitute a good faith misunderstanding of the requirements of the law. Furthermore, a person's disagreement with the government's monetary system and policies does not constitute a good faith misunderstanding of the requirements of the law.

[Where appropriate, an explanation of the evidence introduced by the defendant and its place in the jury's deliberations may be included here. For example: The defendant has introduced evidence of advice he [she] heard given by speakers at meetings, tape recorded lectures, essays, pamphlets, court opinions, and other material that he [she] testified he [she] relied on in concluding that he [she] was not a person required to file income tax returns for the years _____ and _____.]

This evidence has been admitted solely for the purpose of aiding you in determining whether or not the defendant's failure to timely file tax returns for _____ and _____ was willful, and you should not consider it for any other purpose. You are not to consider this evidence as containing any law that you are to apply in reaching your verdicts, because all of the law applicable to this case is set forth in these instructions.

Cheek v. United States, 498 U.S. 192, 201 (1991).
United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980).

[JI-67]

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-15

Willfulness -- Failure to File/Good Faith Belief Defense
(No income because paid in Federal Reserve Notes not in dollars)

Willfulness is an essential element of the crime of willful failure to file an income tax return. The word “willfully,” used in connection with this offense, means a voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful intent not to file a return that defendant was required by law to file and knew he [she] should have filed. There is no necessity that the government prove that the defendant had an intention to defraud it or to evade the payment of any taxes for the defendant's failure to file to be willful under this provision of the law.

Defendant's conduct is not “willful” if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law.¹ It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] belief that the law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not. The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

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

United States v. Ware, 608 F.2d 400, 404-405 (10th Cir. 1979)

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-16

Fifth Amendment Defense

The defendant has claimed that he [failed to file a tax return] [failed to provide information on his tax return] because of his Fifth Amendment right against self-incrimination. A valid exercise of the Fifth Amendment privilege against self-incrimination is a complete defense to a section 7203 charge.¹ A taxpayer is not justified in [failing to file a tax return] [failing to answer questions contained on a tax return] unless the taxpayer shows substantial hazards of self-incrimination that are real and appreciable, and has cause to perceive such danger.²

To support a claim of privilege against self-incrimination, the taxpayer cannot make a blanket Fifth Amendment claim concerning a generalized fear of criminal prosecution.³ Rather, the **[JI-68]** taxpayer must assert the privilege specifically in response to particular questions and demonstrate real dangers of incrimination not remote and speculative possibilities.⁴ Thus, the Fifth Amendment privilege does not give a person the right to withhold required information when the information sought does not tend to incriminate him [her].

¹ *Garner v. United States*, 424 U.S. 648, 660-62 (1976); *United States v. Malquist*, 791 F.2d 1399, 1401-02 (9th Cir. 1986).

² *Boday v. United States*, 759 F.2d 1472, 1474 (9th Cir. 1985).

³ *Boday v. United States*, 759 F.2d 1472, 1474-75 (9th Cir. 1985).

⁴ *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972); accord, *Heitman v. United States*, 753 F.2d 33, 34-35 (6th Cir. 1984); *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982) (taxpayer needed to show that his invocation of the privilege was based upon a colorable claim that he was involved in activities for which he could be criminally prosecuted and that such activities would be revealed if he supplied data on his [tax] form); *United States v. Leidender*, 779 F.2d 1417, 1418 (9th Cir. 1986) (privilege against self-incrimination does not justify a complete failure to file a return and may be asserted on a filed return only in response to specific questions on the return). See also *United States v. Saussy*, 802 F.2d 849, 855 (6th Cir. 1986).

NOTE ALSO that there is a conflict in the circuits on whether a tax return that has all zeros for financial information constitutes a tax return for purposes of Section 7203. Compare *United States v. Long*, 618 F.2d 74 (9th Cir.1980) (defendant's 1980 return was a valid return, even if erroneous, because a tax could be computed from the information contained on the form), with *United States v. Mosel*, 738 F.2d 157, 158 (6th Cir. 1984) ("[W]e align ourselves with those circuits which have specifically considered and rejected the Ninth Circuit's decision in *Long*." (Citing *United States v. Rickman*, 638 F.2d 182 (10th Cir.1980); *United States v. Moore*, 627 F.2d 830 (7th Cir.1980), cert. denied, 450 U.S. 916 (1981); see also *United States v. Smith*, 618 F.2d 280 (1980); *States v. Grabinski*, 558 F. Supp. 1324 (D. Minn.1983)).

[JI-69]

GOVERNMENT PROPOSED JURY INST. NO. 26.7203-17

Tax Return Must Contain Sufficient Information

A tax form which does not contain sufficient financial information to enable the Internal Revenue Service to determine the individual's tax liability is not a tax return within the meaning of the law.¹ Submitting a Form 1040 [or other tax return form] lacking such information does not constitute the filing of a tax return for purposes of the statute that is involved here. However, it is for you to determine whether the tax form filed by the defendant contained sufficient information to enable the Internal Revenue Service to determine defendant's tax liability and so whether it constituted a tax return as I just defined that term.²

¹*United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986); *United States v. Malquist*, 791 F.2d 1399, 1401 (9th Cir. 1986); *United States v. Mosel*, 738 F.2d 157, 158 (6th Cir. 1984); *United States v. Vance*, 730 F.2d 736, 738 (11th Cir. 1984); *United States v. Stillhammer*, 706 F.2d 1072, 1075 (10th Cir. 1983); *United States v. Reed*, 670 F.2d 622, 623-624 (5th Cir. 1982); *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979).

² *United States v. Saussy*, 802 F.2d 849, 854-55 (6th Cir. 1986). *See also United States v. Klee*, 494 F.2d 394, 397 (9th Cir. 1974).

26 U.S.C. § 7205

GOVERNMENT PROPOSED JURY INST.NO. 26.7205-1

False Withholding Allowance Certificate (Form W-4)
Offense Charged -- False No. of Allowances

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

Count I charges that the defendant, [Defendant's Name], a resident of [City], [State], who during the calendar year 20__ was employed by [Name of Employer], and who, on or about the date of the commencement of employment by [Name of Employer], was required under the Internal Revenue laws to furnish [Name of Employer] with a signed Employee's Withholding Allowance Certificate, Form W-4, setting forth the number of withholding allowances claimed, did willfully supply a false and fraudulent Employee's Withholding Allowance Certificate, Form W-4, to [Name of Employer], on which he [she] claimed _____ withholding allowances, whereas, as the defendant then and there well knew and believed, he [she] [was not entitled to claim _____ withholding allowances]¹ or [was entitled to claim only ____ withholding allowances].

Count II charges that * * * .

All in violation of Title 26, United States Code, Section 7205.

26 U.S.C. § 7205

¹The government does not have to prove the number of [allowances] [exemptions] to which the defendant was entitled. *United States v. McDonough*, 603 F.2d 19, 24 (7th Cir. 1979).

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-2

Statute Defining Offense

The Internal Revenue Code provides, in part, as follows:

On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

26 U.S.C. § 3402(f)(2)(A)

Section 7205 of the Internal Revenue Code provides, in part, as follows:

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder [**J1-70**] which would require an increase in the tax to be withheld under section 3402, shall * * * [be guilty of an offense against the laws of the United States].

26 U.S.C. § 7205

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-3

Elements of Offense

To establish a violation of Section 7205 of the Internal Revenue Code, the government must prove beyond a reasonable doubt that:

1. The defendant was required to furnish an employer with a signed withholding exemption certificate, Form W-4, certifying information as to the defendant's tax liability and withholding tax allowances;
2. The defendant did furnish his [her] employer with a signed withholding exemption certificate, Form W-4 [or The defendant failed to supply his [her] employer with a signed withholding exemption certificate];
3. The information supplied by the defendant was false or fraudulent; and
4. The defendant acted willfully.

26 U.S.C. § 7205

United States v. Bass, 784 F.2d 1282, 1284 (5th Cir. 1986)

United States v. Herzog, 632 F.2d 469, 471-472 (5th Cir. 1980)

United States v. Olson, 576 F.2d 1267, 1271 (8th Cir. 1978)

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-4

Withholding Allowances

The law requires an employee to complete an Employee's Withholding Allowance Certificate, Form W-4, so that an employer can withhold federal income tax from the employee's pay.

An Employee's Withholding Allowance Certificate, Form W-4, requires an employee to certify the total number of allowances claimed. For purposes of this case you are instructed that if you find that the defendant was an employee, then the defendant was entitled to claim [set forth applicable allowances based on the evidence, e.g., one allowance for himself [herself], one allowance for his [her] spouse, one allowance for each dependent, etc.]¹

26 U.S.C. § 3402(f)

26 C.F.R. § 31.3402(f)(1)-1 (2007)

[JI-71]

¹ Reference should be made to 26 C.F.R. § 3402(f)(1) and a determination made as to which withholding allowances are applicable based on the evidence in the case.

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-5

Exempt Status

An exemption from withholding may be claimed by an employee on his [her] Employee's Withholding Allowance Certificate, Form W-4, only if the employee:

- (1) incurred no liability for income tax for the preceding taxable year; and
- (2) anticipates that he [she] will incur no liability for income tax for the current taxable year.

26 U.S.C. § 3402(n)

26 C.F.R. § 31.3402(n)-1 (2007)

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-6

Withholding Allowances (Exempt Status)

Withholding Allowances. The indictment charges that the defendant submitted false and fraudulent Employee's Withholding Allowance Certificates, Forms W-4, to his [her] employer. In this regard, I charge you that all employees are required by law and regulations to furnish their employer with a signed Employee's Withholding Allowance Certificate, Form W-4, on or before the date of commencement of employment with that employer, indicating the number of withholding allowances which the employee claims. The number of allowances claimed on the Form W-4 may not exceed the number to which the individual is entitled.

A Form W-4 is false and fraudulent if it was used to supply false or fraudulent information regarding the appropriate number of allowances. Thus, if you find that the defendant submitted to his [her] employer a Form W-4 claiming more allowances than those to which the defendant was entitled by law, then you may find that the defendant has submitted a false and fraudulent Form W-4.

Exempt Status. Under some circumstances, an individual is entitled to claim total exemption from the withholding of federal taxes.

To properly claim exempt status, however, the individual must certify in a Form W-4 that he or she did not owe federal income tax for the preceding tax year and that he or she does not expect to owe any federal income tax for the current tax year. Thus, if you find that the defendant did owe income tax for the calendar year preceding the year in which the defendant filed a Form W-4 claiming exempt status or that the defendant did expect to owe an income tax for the calendar year in which the defendant filed the Form W-4 claiming exempt status, then you may find that the Form W-4 on which the defendant claimed exempt status was false and fraudulent.

26 U.S.C. §§ 3402, 7205

United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984)

United States v. Annunziato, 643 F.2d 676, 677 (9th Cir. 1981)

United States v. Shields, 642 F.2d 230, 231 (8th Cir. 1981)

United States v. Herzog, 632 F.2d 469, 473 (5th Cir. 1980)

[JI-72]

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-7

False or Fraudulent

The government charges that the information supplied by the defendant in the Form W-4 filed with his [her] employer was false and fraudulent in that the defendant reported that he [she] was entitled to [exempt status] or [number claimed] allowances.

Information is false if it was untrue when made and was then known to be untrue by the person then supplying the information or causing such information to be supplied.

Information is fraudulent if it is supplied or caused to be supplied with the intent to deceive.

It is sufficient if the evidence establishes beyond a reasonable doubt that the information supplied by the defendant in the Form W-4 furnished to his [her] employer was either false or fraudulent. The evidence need not establish that it was both false and fraudulent.

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, §§ 16.06 (False -- Defined), 16.08 (Fraudulent -- Defined) (6th ed. 2008).

2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 30.05 (False, fictitious, or fraudulent -- Defined) (6th ed. 2008).

United States v. Buttorff, 572 F.2d 619, 625 (8th Cir. 1978)

United States v. Peterson, 548 F.2d 279, 280 (9th Cir. 1977)

United States v. Smith, 484 F.2d 8, 10 (10th Cir. 1973)

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-8

Willfulness -- Section 7205

To find the defendant guilty of violating Section 7205, you must not only find that the defendant did the acts of which the defendant stands accused, but you must also find that the defendant did the acts willfully.

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

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th ed. 2008) (modified).

Cheek v. United States, 498 U.S. 192, 201 (1991)
United States v. Bishop, 412 U.S. 346, 360 (1973)
United States v. Pomponio, 429 U.S. 10, 12 (1976)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also 2008 Criminal Tax Manual [Section 8.08\[1\]](#), *supra*.

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

[JI-73]

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7205-9

Knowledge Of Contents Of Form W-4

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed and submitted a Form W-4, then you may draw the inference and find that the defendant had knowledge of the contents of the Form W-4.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.18 (6th ed. 2008).

United States v. Ruffin, 575 F.2d 346, 354 (2d Cir. 1978)

COMMENT

1 Be careful that the language in the instruction does not go beyond allowing a permissible inference. The jury should not be instructed that it can presume from the defendant's signature on the Form W-4 that the defendant knew of the contents of the Form W-4. *See United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005).

26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-1

Offense Charged

The indictment sets forth ____ counts or charges.

Count I charges that on or about the ____ day of _____, 20__ , in the _____ District of _____ , the defendant, _____, a resident of [City], [State], did willfully make and subscribe [Describe Document], which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at [City], [State], which said [Describe Document] he [she] did not believe to be true and correct as to every material matter in that the [Describe Document and False Fact(s)], whereas, he [she] then and there well knew and believed, [Describe Correct Fact(s)].

Count II charges that * * *.

All in violation of Title 26, United States Code, Section 7206(1).

26 U.S.C. § 7206(1)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.13 (6th ed. 2008) (modified).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-2

False Return -- Statute Involved

Section 7206(1) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [w]illfully makes and subscribes any return, statement, or other **[JI-74]** document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty [of an offense against the laws of the United States].

26 U.S.C. § 7206(1)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.14 (6th ed. 2008).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-3

Elements of Section 7206(1)
(False Income Tax Return)

The gist of the offense[s] charged in Count[s] _____ [and _____] of the indictment is the willful making and subscribing by the defendant[s] of his [her] [their] personal income tax return[s] for the year[s] _____ [and _____], which contains [contain] a written declaration that it [they] was [were] made under the penalties of perjury, and which the defendant did not believe to be true and correct as to every material matter. [Each year, that is _____ and _____, is to be considered separately by you.]

To prove a violation, the government must establish each of the following four (4) elements beyond a reasonable doubt:

1. The defendant made, or caused to be made, and signed (subscribed) an income tax return for the year in question that was false as to a material matter.
2. The return contained a written declaration that it was made under the penalties of perjury.
3. The defendant did not believe the return to be true and correct as to the material matter[s] charged in the indictment;¹ and
4. The defendant made, or caused to be made, and signed (subscribed) the return willfully.

26 U.S.C. § 7206(1)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.15 (6th ed. 2008) (modified).

United States v. Bishop, 412 U.S. 346, 350, 359 (1973)

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

United States v. Griffin, 524 F.3d 71, 75-76 (1st Cir. 2008)

United States v. Monteiro, 871 F.2d 204, 208 (1st Cir. 1989)

United States v. Drape, 668 F.2d 22, 25 (1st Cir. 1982)

United States v. Aramony, 88 F.3d 1369, 1382 (4th Cir. 1996)

¹ It has been held that an instruction can specify the material matters charged in the indictment. Thus, in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir. 1982), the court upheld the following instruction given by the trial court:

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

United States v. Clayton, 506 F.3d 405, 410, 413 (5th Cir. 2007)
Hoover v. United States, 358 F.2d 87, 88 (5th Cir. 1966)
United States v. Sassak, 881 F.2d 276, 278 (6th Cir. 1989)
United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988)
United States v. Gurtunca, 836 F.2d 283, 287 (7th Cir. 1987)
United States v. Whyte, 699 F.2d 375, 381 (7th Cir. 1983)
United States v. Oggoian, 678 F.2d 671, 673 (7th Cir. 1982)
United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980)
United States v. Holland, 880 F.2d 1091, 1096 (9th Cir. 1989)
United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

[JI-75]

United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982)
United States v. Owen, 15 F.3d 1528, 1532 (10th Cir. 1994)
United States v. Kaiser, 893 F.2d 1300, 1305 (11th Cir. 1990)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-4

False Return -- Essential Elements (False Income Tax Return)

Now, to prove the charge that is contained in each of these [] counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.

The first one is that the defendant made, or caused to be made, and that the defendant signed, the federal tax return for the year in question, an income tax return.

The second element that has to be proved is that the tax return was false as to a material matter.

Third, that when the defendant made, or caused to be made, and when the defendant signed, the return, he did so willfully and knowingly.

Fourth, that the return contained a written declaration that it was made under the penalties of perjury.

It is not enough for the government to prove simply that the tax return is erroneous. If you find from your consideration of all the evidence, that each of the four numbered propositions has been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count.

COMMENT

The above instruction is quoted with approval in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir. 1982), with the court "finding that the charge as a whole covered the essential elements of the offenses [under 26 U.S.C. § 7206(1)], including knowledge of the appellant that the returns were false as to material matters." *Oggoian*, 678 F.2d at 674.

See also Sansone v. United States, 380 U.S. 343, 352 (1965)

[JI-76]

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-5

False Return - Essential Elements
(False Income Tax Return)

The defendant is charged in [Count ____ of] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant made and signed a tax return for the year [year] that he knew contained false information as to a material matter;

Second, the return contained a written declaration that it was being signed subject to the penalties of perjury; and

Third, in filing the false tax return, the defendant acted willfully.

A matter is material if it had a natural tendency to influence, or was capable of influencing, the decisions or activities of the Internal Revenue Service.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, No. 9.39 (2010 ed.)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-6

False Return -- Essential Elements (False Income Tax Return)

To sustain the charge that the defendant willfully made [and caused to be made] a false individual [corporate, partnership, trust] income tax return, the government must prove the following propositions:

First, the defendant made [or caused to be made] the income tax return;

Second, the defendant signed the income tax return, which contained a written declaration that it was made under penalties of perjury;

Third, the defendant filed the income tax return [or caused the income tax return to be filed] with the Internal Revenue Service;

Fourth, the income tax return was false as to a material matter, as charged in the count; and

Fifth, when the defendant made and signed the tax return, the defendant did so willfully and did not believe that the tax return was true, correct and complete as to every material matter.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the particular count, then you should find the defendant guilty of the particular count.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the particular count, then you should find the defendant not guilty of that particular count.

[JI-77]

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-7

Subscribed – Defined Proof of Signing of Return

The word “subscribe” simply means the signing of one's name to a document.

"The fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him," which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

26 U.S.C. § 6064

Cashio v. United States, 420 F.2d 1132, 1135 (5th Cir. 1969)

United States v. Wainwright, 413 F.2d 796, 802 n.3 (10th Cir. 1969)

United States v. Carrodegua, 747 F.2d 1390, 1396 (11th Cir. 1982)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-8

Subscribed-Defined

Section 6064 of Title 26 of the United States Code provides, in part, that:

The fact that an individual's name is signed to a return ... shall be prima facie evidence for all purposes that the return ... was actually signed by him.

In other words, you may infer and find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to accept any such inference or to make any such finding.

If you find beyond a reasonable doubt from the evidence in the case that Defendant signed the tax return in question, then you may also draw the inference and may also find, but are not required to find, that Defendant knew of the contents of the return that [he] [she] signed.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.22 (6th. ed. 2008).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-9

Subscribed-Defined

In general, the word "subscribe" simply means to sign one's name to a document. In the case of an electronically filed return, an electronic signature made in accordance with guidance published by the Internal Revenue Service is for all purposes the same as a written signature on a paper tax return.¹

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed [his] [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

[JI-78]

26 U.S.C. 6061(b)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instructions 6.26.7201 & 6.26.7206 (2012 ed.) (modified).

¹ The prosecutor should also propose an instruction setting forth the IRS guidance in effect at the time of the filing of the electronic return at issue.

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-10

Materiality

A statement or representation is "material" if it has a natural tendency to influence *or* is capable of influencing a decision or action of [the Internal Revenue Service].

To be "material" it is not necessary that the statement or representation, in fact, influence or deceive.

1A Kevin F. O'Malley et al., *Federal Jury Practice And Instructions*, § 16.11 (6th ed. 2008).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-11

Omission of Material Matter

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

United States v. Griffin, 524 F.3d 71, 76 (1st Cir. 2008)

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

United States v. Taylor, 574 F.2d 232, 235-236 (5th Cir. 1978)

United States v. Cohen, 544 F.2d 781, 783 (5th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-12

Proof Of One False Material Item Enough

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

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

Griffin v. United States, 502 U.S. 46, 49 (1991)

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

[JI-79]

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

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

See United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that "materiality" is a question for the jury, not the judge, to decide); *Neder v. United States*, 527 U.S. 1, 15 (1999).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-13

Proof of Tax Deficiency Not Required

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

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

United States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984)

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

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

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

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

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

See also Sansone v. United States, 380 U.S. 343, 352 (1965) (addressing 26 U.S.C. § 7207, which has same materiality language as § 7206(1)).

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-14

Willfulness -- Section 7206(1)

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

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

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

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

[JI-80]

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [set forth examples appropriate under the evidence, *e.g.*, making false entries or alteration, or false invoices or documents, concealing assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

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

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th ed. 2008)

Third Circuit Model Criminal Jury Instructions, § 6.26.7201-4 (2010 ed.)

Fifth Circuit Criminal Jury Instructions, § 2.96 (note) (2001 ed.)

Criminal Federal Jury Instructions of the Seventh Circuit, 26 U.S.C. § 7206 (Definition of Willfully), p. 357 (1998)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, §§ 6.26.7206, 7.02 (committee comments) (2012 ed.)

Manual of Model Jury Instructions for the Ninth Circuit, § 9.42 (comment) (2010 ed.)

Tenth Circuit Criminal Jury Instructions, § 2.93 (2005 ed.)

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

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

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

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

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir. 1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980)

United States v. Ramsdell, 450 F.2d 130, 133-34 (10th Cir. 1971)

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

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also 2008 Criminal Tax Manual [Section 8.08\[1\]](#), *supra*.

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

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

[JI-81]

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(1)-15

Willfully -- Good Faith Defense

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

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

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

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

COMMENTS

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

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

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

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

26 U.S.C. § 7206(2)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-1

Preparing False Return -- Offense Charged

The indictment sets forth ___ counts or charges.

Count I charges that on or about _____, in the District of _____, the defendant, _____, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service of an income tax return¹ [of one [Taxpayer's Name]]² for the calendar year _____ that was false and fraudulent as to a material matter in that in said return it was represented that the said taxpayer was entitled under the provisions of the internal revenue laws [to claim deductions³ in the total sum of \$ _____ ;] whereas, as the defendant then and there well knew and believed, **[JI-82]** the [total deductions] which the said taxpayer was lawfully entitled to claim for said calendar year were [in the total sum of not more than \$ _____ .]

Count II charges * * *.

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

26 U.S.C. § 7206(2)

See United States v. Gaudin, 515 U.S. 506, 510 (1995) (holding that "materiality" is a question for the jury, not the judge, to decide), and *Neder v. United States*, 527 U.S. 1, 15 (1999).

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

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-2

Statute Defining Offense

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

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

26 U.S.C. § 7206(2)

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-3

Elements of Offense

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

First: The act or acts of aiding, or assisting in, or procuring, or counseling, or advising, the preparation, or the presentation, of an income tax return¹ that is false or fraudulent as to a [JI-83] material matter, as charged;

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

Third: Doing such act or acts willfully.

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

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

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

26 U.S.C. § 7206(2)

United States v. Smith, 424 F.3d 992, 1009 (9th Cir. 2005)
United States v. Gambone, 314 F.3d 163, 174 (3d Cir. 2003)
United States v. Aramony, 88 F.3d 1369, 1382 (4th Cir. 1996)
United States v. Klausner, 80 F.3d 55, 59 (2d Cir. 1996)
United States v. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990)
United States v. Sassak, 881 F.2d 276, 278 (6th Cir. 1989)
United States v. Hooks, 848 F.2d 785, 788-89 (7th Cir. 1988)
United States v. Perez, 565 F.2d 1227, 1233-34 (2d Cir. 1977)
United States v. Crum, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976)

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-4

Knowledge or Consent of Taxpayer

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

26 U.S.C. § 7206(2)

United States v. Jennings, 51 Fed. Appx. 98, 99-100 (4th Cir. 2002) (*per curiam*) (unpublished)

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

[JI-84]

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

See also United States v. Motley, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983); *cf. United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and therefore violated Section 7206(2), regardless of whether tax preparer knew of falsity or fraud).

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-5

Signing of Returns Knowledge of Taxpayer Irrelevant

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

And it is not necessary for the government to prove that any taxpayer whose returns were fraudulent or false had knowledge of the falsity of the returns. In this respect, I instruct you as a matter of law, that if you find beyond a reasonable doubt that the defendant knowingly and willfully furnished, prepared, or caused to be prepared, false and fraudulent documents (and offered false advice), which the defendant knew would be relied on in the preparation of income tax returns and would result in [understated income] or [false or overstated deductions] on the returns named in Counts _____, and _____ of the Indictment, then the government has met its burden of proof under this element of the offense.

26 U.S.C. § 7206(2)

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

Accord United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978); *see also United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F. 2d 1275, 1278 (9th Cir. 1983); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982); *cf. United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and therefore violated Section 7206(2), regardless of whether tax preparer knew of falsity or fraud).

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-6

Willfulness

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

[JI-85]

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

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

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

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

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

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 17.07 (6th ed. 2008) (modified and supplemented)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th ed. 2008) (modified)

Fifth Circuit Criminal Jury Instructions, § 2.96, Section 1.38 (2001 ed.) (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1998 ed.), Section 4.09 (comment)

Federal Criminal Jury Instructions of the Seventh Circuit (1998 ed.), 26 U.S.C. § 7201, p. 344 (Definition of Willfully)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 7.02 (2012 ed.) (Comment)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, Basic Instruction No. 9.1A (2010 ed.) (modified)

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

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

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

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

[JI-86]

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir. 1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980)

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

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

COMMENTS

1 It is not necessary to define the term “willfully” in a tax case in terms of “bad purpose” or “evil motive.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also [Section 8.08\[1\]](#), *supra*.

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-7

“Willfully” -- To Act or to Omit

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

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

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

2B Kevin F. O’Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th Ed. 2008) (modified)

COMMENT

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

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(2)-8

Willfulness

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

[JI-87]

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

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

26 U.S.C. § 7206(4)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(4)-1

Concealing Property -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, 20__, in the _____ District of _____, the defendant, _____, willfully concealed goods and commodities, to wit, [Describe goods and commodities concealed] for and in respect of which a tax of the United States was imposed,¹ with the intent to evade or defeat the assessment or collection of said tax.

² Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.01 (6th Ed. 2008) (modified)

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(4)-2

Statute Defining Offense

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

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

26 U.S.C. § 7206(4)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(4)-3

Concealment of Property -- Elements

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

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

Two: The defendant owned or had an interest in the property in question upon which levy was **[JI-88]** authorized;

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

Four: The defendant had the intention to evade and defeat the collection of the assessed taxes.

26 U.S.C. § 7206(4)

See also [Section 14.04](#), *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(4)-4

Concealing Property -- Levy Authorized

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

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

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

26 U.S.C. §§ 6331 and 6334

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(5)-1

Offense Charged

The indictment sets forth _____ counts or charges.

Count ___ charges that on or about the _____ day of _____, 20 __, in the _____ District of _____, in connection with [an offer in compromise, or a compromise, or a closing statement] relating to his [her] liability for [type of tax] taxes due and owing by him [her] to the United States of America for the calendar year(s) _____, did willfully conceal from [Specify particular officer, with job title] and all other proper officers and employees of the United States, [Describe property belonging to taxpayer or other person liable for the tax] or did willfully [“receive” “withhold” “destroy” “mutilate” or “falsify,” Describe book, document or record involved].

26 U.S.C. § 7206(5)

[JI-89]

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(5)-2

Statute Defining Offense

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

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

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(5)-3

Essential Elements

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

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

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

Third: the defendant acted willfully.

26 U.S.C. § 7206(5)

GOVERNMENT PROPOSED JURY INST. NO. 26.7206(5)-4

Willfulness

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

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

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and **[JI-90]** circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

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

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

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

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 17.07 (6th Ed. 2008) (modified and supplemented)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th Ed. 2008) (modified)

Fifth Circuit Criminal Jury Instructions, § 2.96 (1998 ed.) (Note)

Federal Criminal Jury Instructions of the Seventh Circuit, § 4.09 (1998 ed.)

Federal Criminal Jury Instructions of the Seventh Circuit, 26 U.S.C. 7201, p. 344
(Definition of Willfully) (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2012 ed.), § 7.02 (Comment)

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 5.5 (2010 ed.)
(Comment)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 9.1A (2010 ed.)
(modified)

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

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

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

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

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir. 1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980)

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

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

[JI-91]

COMMENTS

1 It is not necessary to define the term “willfully” in a tax case in terms of “bad purpose” or “evil motive.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also [Section 8.08](#), *supra*.

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

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

26 U.S.C. § 7207

GOVERNMENT PROPOSED JURY INST. NO. 26.7207-1

False Document -- Offense Charged

The information or indictment sets forth _____ counts or charges.

Count___ charges that on or about the _____ day of _____, 20___, in the District of _____, the defendant, _____, a resident of _____ did willfully file a document with the Internal Revenue Service, United States Treasury Department, at _____, which the defendant knew to be false as to a material matter.

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.16 (6th Ed. 2008) (modified)

GOVERNMENT PROPOSED JURY INST. NO. 26.7207-2

Statute Defining Offense

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

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

26 U.S.C. § 7207

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.17 (6th Ed. 2008) (modified)

GOVERNMENT PROPOSED JURY INST. NO. 26.7207-3

False Document -- Essential Elements

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

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

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

[JI-92]

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

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.18 (6th ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. 26.7207-4

Not Necessary to Show Any Additional Tax Due

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

2B Kevin O'Malley, *Federal Jury Practice and Instructions*, § 67.19 (6th ed. 2008)

GOVERNMENT PROPOSED JURY INST. NO. 26.7207-5

Willfulness

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

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

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

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

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as [set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

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

[JI-93]

1A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 17.07 (6th Ed. 2008) (modified and supplemented)

2B Kevin F. O'Malley et al., *Federal Jury Practice and Instructions*, § 67.20 (6th Ed. 2008) (modified)

Fifth Circuit Criminal Jury Instructions, § 2.96 (1998 ed.) (Note)

Federal Criminal Jury Instructions of the Seventh Circuit, § 4.09 (1998 ed.)

Federal Criminal Jury Instructions of the Seventh Circuit, 26 U.S.C. 7201, p. 344 (Definition of Willfully) (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2012 ed.), § 7.02 (Comment)

Manual of Model Criminal Jury Instructions for the Ninth Circuit, § 5.5 (2010 ed.) (Comment)

Pattern Jury Instructions: Eleventh Circuit, Criminal Cases, BI 9.1A (2010 ed.) (modified)

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

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

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

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

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir. 1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980)

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

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

COMMENTS

1 It is not necessary to define the term “willfully” in a tax case in terms of “bad purpose” or “evil motive.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976). See also [Section 8.08\[1\]](#), *supra*.

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

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

26 U.S.C. § 7212(a) (Omnibus Clause)

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-1

Statute Defining Offense

Count _____ of the indictment charges the defendant with violating 26 U.S.C. § 7212(a). That statute makes it a crime for anyone to corruptly obstruct or impede, or endeavor to obstruct or impede, the due administration of the Internal Revenue laws.

26 U.S.C. § 7212(a)

[JI-94]

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-2

Elements of Section 7212(a)

In order for you to find the defendant guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt:

First: The defendant in any way corruptly;

Second: Endeavored to;

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

United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997)

United States v. Williams, 644 F.2d 696, 699 (8th Cir. 1981)

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-3

Definition of "Endeavor"

Endeavor means to knowingly and intentionally act or to knowingly and intentionally make any effort which has a reasonable tendency to bring about the desired result.

United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998)

United States v. Dowell, 430 F.3d 1100, 1110 (10th Cir. 2005)

See also *United States v. Palivos*, 486 F.3d 250, 258 (7th Cir. 2007) (obstruction of justice)

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-4

Endeavor - Defined

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

United States v. Frank, 354 F.3d 910, 922 (8th Cir. 2004) (obstruction of justice)

United States v. Silverman, 745 F.2d 1386, 1396 n.12 (11th Cir. 1984) (obstruction of justice)

Instruction used in *United States v. Dykstra*, 991 F.2d 450, 453 (8th Cir. 1993) (but not addressed in court of appeals decision)

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-5

Success not necessary

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

United States v. Cioffi, 493 F.2d 1111, 1118-19 (2d Cir. 1974)

United States v. Williams, 644 F.2d 696, 699 n.14 (8th Cir. 1981)

2A Kevin F. O'Malley, *Federal Jury Practice and Instructions*, § 48.05 (6th ed. 2008)

[JI-95]

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-6

Definition of “Corruptly”

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

United States v. Saldana, 427 F.2d 298, 204-05 (5th Cir. 2005);
United States v. Winchell, 129 F.3d 1093, 1098 (10th Cir. 1997);
United States v. Valenti, 121 F.3d 327, 331 (7th Cir. 1997);
United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997);
United States v. Workinger, 90 F.3d 1409, 1414 (9th Cir. 1996);
United States v. Dykstra, 991 F.2d 450, 453 (8th Cir. 1993);
United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991);
United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985).

GOVERNMENT PROPOSED JURY INST. NO. 26.7212(a)-7

Definition of "Obstruct or Impede"

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

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

26 U.S.C. § 7215

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-1

Failure to Deposit Withholding Taxes -- Offense Charged

The [information or indictment] sets forth counts ____ or charges.

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

1. That during the period _____, 20__ , to _____, 20__ , in the _____ District of _____, the defendant, _____, was an employer of labor required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. That the defendant did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending _____, 20__ , _____, 20__ , _____, 20__ , and _____, 20__ .

3. That on _____, 20__ , the defendant was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512, which notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after the delivery of such notice, and, not later than at the end of the second banking day after such collection, to deposit said taxes in a separate bank account established by him [her] in trust for the United States to be kept therein until paid over to the United States.

[JI-96]

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

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

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

26 U.S.C. § 7215

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-2

Statutes Defining Offense

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

Any person who is required to collect, account for, and pay over any [withholding taxes], * * * if notice has been delivered to such person [for failure to comply], * * * shall collect the [withholding] taxes * * * which became collectible after delivery of such notice¹, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank * * *, and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

26 U.S.C. § 7512(b)

Section 7215 of the Internal Revenue Code provides, in part, as follows:

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

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

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

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

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

26 U.S.C. § 7215

[JI-97]

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-3

Essential Elements of Offense

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

First, that during the period from _____, 20__, to _____, 20__, the defendant, _____, was an employer of labor and, as such, was required to collect, account for, and pay over to the United States federal income and F.I.C.A. taxes withheld from the wages of his [her] employees;

[First, that during the period from _____, 20__, to _____, 20__, the defendant, _____, was a person in such a relationship to _____ Corporation that he [she] was a person required to collect, account for, and pay over the federal income and F.I.C.A. taxes withheld from the wages of the employees of _____ Corporation;]

Second, that prior to _____, 20__, the defendant failed to collect, truthfully account for, or pay over such taxes, or failed to make deposits, payments, or returns of such taxes at the time and in the manner prescribed by law or regulations;

Third, that on _____, 20__, the defendant was notified by a notice delivered in hand of the failure to do so;

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

Fifth, that on _____, 20__, two banking days after the collection of the taxes, the defendant failed to deposit the amount of \$_____ in federal income and F.I.C.A. taxes collected from the wages of his [her] employees in a separate bank account in trust for the United States.

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

United States v. Hemphill, 544 F.2d 341, 343-344 (8th Cir. 1976)

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

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

[JI-98]

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-4

Withholding Taxes

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

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

D'Orazi v. United States, 71-1 U.S.T.C., ¶9270, pp. 86,046-86,048; 27 A.F.T.R.2d 865, 866-68 (N.D. Cal. Nov. 5, 1970)

Neale, Sr. v. United States, 13 A.F.T.R.2d 1721, 1722 (Kan. April 29, 1964)

26 U.S.C. §§ 3101, 3102, 3401, 3402, 3403 6302(c), & 7501

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-5

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

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

26 U.S.C. § 7343

United States v. McMullen, 516 F.2d 917, 920-921 (7th Cir. 1975)

Pacific National Insurance v. United States, 422 F.2d 26 (9th Cir. 1970)

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

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

[JI-99]

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-6

Defendant Cannot Delegate Responsibility

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

Mazo v. United States, 591 F.2d 1151, 1155 (5th Cir. 1979)

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

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

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-7

More Than One Responsible Person

There may be more than one person connected with a corporation who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual has no effect on the responsibility of either individual.

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir. 1970)

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-8

Proof of Exact Amounts Not Required

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

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

GOVERNMENT PROPOSED JURY INST. NO. 26.7215-9

Exception -- Circumstances Beyond Control

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

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

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

26 U.S.C. § 7215(b)

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

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

S. Rep. No. 85-1182 (1958), as reprinted in 1958 U.S.C.C.A.N. 2187, 2191-92