Criminal Tax Manual
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21.00 AIDING AND ABETTING

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21.01 **STATUTORY LANGUAGE: 18 U.S.C. § 2**

§2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21.02 **GENERALLY**

A person may be convicted of a crime even if he or she personally did not perform every act constituting the crime. The basis for this liability is section 2 of Title 18, the accomplice statute. Under this statute, an individual may be indicted as a principal for commission of a substantive offense and may be convicted by proof showing him or her to be an aider and abettor. *Nye & Nissen v. United States*, 336 U.S. 613, 618-20 (1949); *United States v. Horton*, 847 F.2d 313, 321-22 (6th Cir. 1988); *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984).

Aiding and abetting, however, is not an independent crime. *United States v. Causey*, 835 F.2d 1289, 1291 (9th Cir. 1987); *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984). One cannot aid or abet oneself. Some underlying criminal offense must be pled and proved in order for liability to attach under 18 U.S.C. § 2. *United States v. Roan Eagle*, 867 F.2d 436, 445 (8th Cir. 1989); *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984).

Section 2 covers two types of aiding and abetting. *Causey*, 835 F.2d at 1291-92. Subsection (a) of the statute is aimed at traditional aiding and abetting, which requires proof of a substantive offense.

United States v. Motley, 940 F.2d 1079, 1082 (7th Cir. 1991). Under subsection 2(a), the government must prove that someone committed a crime, and that another person aided and abetted in the commission of that crime. *Causey*, 835 F.2d at 1292. In effect, the second person is made a "coprincipal with the person who takes the final step and violates a criminal statute." *United States v. Smith*, 891 F.2d 703, 711 (9th Cir. 1989).

Under subsection 2(b), frequently referred to as causing, the government is not required to prove that someone other than the defendant was guilty of a substantive offense. *Causey*, 835 F.2d at 1292. This subsection is aimed at the person "who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and . . . is innocent of the substantive offense." *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983).

Under subsection 2(b), it is irrelevant whether the agent who committed the criminal act is innocent or acquitted (*Motley*, 940 F.2d at 1081; *United States v. Ruffin*, 613 F.2d 408, 412 (2d Cir. 1979)); whether the agent lacked a criminal intent to commit the offense (*Causey*, 835 F.2d at 1292); or whether the accused lacked the capacity to commit the criminal offense without the agent's involvement (*Smith*, 891 F.2d at 711).

21.03 **ELEMENTS**

To establish a violation of 18 U.S.C. § 2, the government must establish the following elements beyond a reasonable doubt:

1. The defendant associated with the criminal venture;

2. The defendant knowingly participated in the venture; and,

3. The defendant sought by his or her actions to make the venture succeed.

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949). *See also United States v. Abreu*, 962 F.2d 1425, 1429 (1st Cir. 1992); *United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir. 1991); *United States v. Perez*, 922 F.2d 782, 785 (11th Cir. 1991); *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990); *United States v. Lanier*, 838 F.2d 281, 284 (8th Cir. 1988); *United States v. Torres*, 809 F.2d 429, 433 (7th Cir. 1987).

21.03[1] **Need Underlying Offense**

In order to sustain a conviction under subsection 2(a), the government must present evidence showing an underlying offense to have been committed by a principal and that the principal was aided and abetted by the accused. *United States v. Elusma*, 849 F.2d 76, 78 (2d Cir. 1988); *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984). The government is not required, however, to show that the principal was indicted, convicted or even identified. *United States v. Powell*, 806 F.2d 1421, 1424 (9th Cir. 1986); *United States v. Campa*, 679 F.2d 1006, 1010 (1st Cir. 1982); *Ray v. United States*, 588 F.2d 601, 603-04 (8th Cir. 1978). Moreover, the fact that the principal may have been acquitted of the underlying offense does not bar prosecution of the aider and abettor for the same offense. *Standefer v. United States*, 447 U.S. 10, 14 (1980).

Under subsection 2(b), the government does not have to establish the guilt of the actor, but only that of the accused who caused the actor to commit the offense. *United States v. Motley*, 940 F.2d 1079, 1082 (7th Cir. 1991). The government need only show that the aider and abettor caused the act to be performed. *United States v. Smith*, 891 F.2d 703, 711 (9th Cir. 1989).

21.03[2] **Association Defined**

Association with the criminal venture has been interpreted to mean the defendant "shared the criminal intent of the principal." *United States v. Roan Eagle*, 867 F.2d 436, 445 n.15 (8th Cir. 1989). In prosecutions under subsection 2(a), this means that the government must show that: (1) the perpetrator had the requisite criminal intent to commit the underlying offense and (2) the aider and abettor had the same requisite intent. *United States v. Perez*, 922 F.2d 782, 785 (11th Cir. 1991); *United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990); *United States v. Lindell*, 881 F.2d 1313, 1323 (5th Cir. 1989); *United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988); *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984);. *See also United States v. Bancarli*, 110 F.3d 1425, 1429-30 (9th Cir. 1997) (jury must find that defendant knowingly and intentionally aided and abetted the principals in each essential element of the crime).

Under subsection 2(b), the government need only show that the one causing the commission of the prohibited act had the requisite criminal intent to commit the underlying offense. The intent of the actor who committed the criminal act is irrelevant. *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988); *United States v. Rucker*, 586 F.2d 899, 905 (2d Cir. 1978).

The government may use circumstantial evidence to establish the aider and abettor's intent. *United States v. Castro*, 887 F.2d 988, 995 (9th Cir. 1989). Further, the government is not required to show that the aider and abettor knew every detail of the underlying crime. *Perez*, 922 F.2d at 785; *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987); *United States v. Torres*, 809 F.2d 429, 433 (7th Cir. 1987); *Lard*, 734 F.2d at 1298.

21.03[3] **Participation and Success of Venture**

In order to aid and abet, one must do more than merely be present at the scene of a crime and have knowledge of its commission. *United States v. Esparsen*, 930 F.2d 1461, 1470 (10th Cir. 1991); *United States v. Morrow*, 923 F.2d 427, 436 (6th Cir. 1991); *United States v. Lindell*, 881 F.2d 1313, 1323 (5th Cir. 1989); *United States v. Payne*, 750 F.2d 844, 860 (11th Cir. 1985); *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984). The element of participation requires the government to show some active participation or encouragement, or some affirmative act designed to further the crime. *Morrow*, 923 F.2d at 436; *United States v. Perez*, 922 F.2d 782, 785 (11th Cir. 1991).

This element may be established by circumstantial evidence. *United States v. Smith*, 832 F.2d 1167, 1170 (9th Cir. 1987). Further, the evidence may be of "relatively slight moment." *Esparsen*, 930 F.2d at 1470. While mere presence and association alone are insufficient to sustain a conviction under section 2, they are factors which may be considered along with other circumstantial evidence establishing participation. *United States v. Ivey*, 915 F.2d 380, 384 (8th Cir. 1990); *Lindell*, 881 F.2d at 1323.

21.04 **PLEADING REQUIREMENTS**

Because section 2 does not define a separate offense, the defendant must also be charged with a substantive offense as to which the defendant was an aider and abettor. *London-Gomez v. INS*, 699 F.2d 475, 477 (9th Cir. 1983); *United States v. Cowart*, 595 F.2d 1023, 1031 n.10 (11th Cir. 1979). Section 2 may be applied to any statute in the federal criminal code. *United States v. Sopczak*, 742 F.2d 1119, 1121 (8th Cir. 1984); *United States v. Jones*, 678 F.2d 102, 105 (9th Cir.

1982). *But see United States v. Southard*, 700 F.2d 1, 19-20 (1st Cir. 1983) (listing exceptions -- *e.g.*, a victim whose conduct significantly assisted in the commission of the crime, such as a person who pays extortion).

While it is preferable that an indictment charge a violation of section 2 if the government intends to proceed on a theory of aiding and abetting, it need not be specifically alleged in an indictment. *United States v. Vaughn*, 797 F.2d 1485, 1491 n.1 (9th Cir. 1986); *United States v. Cook*, 745 F.2d 1311, 1315 (10th Cir. 1984); *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983); *United States v. Beardslee*, 609 F.2d 914, 919 (8th Cir. 1979); *United States v. Tucker*, 552 F.2d 202, 204 (7th Cir. 1977).. Rather, all indictments for substantive offenses must be read as if the alternative provided by 18 U.S.C. § 2 were embodied in the indictment. *United States v. Sabatino*, 943 F.2d 94, 99-100 (1st Cir. 1991); *United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988); *United States v. Perry*, 643 F.2d 38, 45 (2d Cir. 1981); *United States v. Bullock*, 451 F.2d 884, 888 (11th Cir. 1971).

One may be convicted of aiding and abetting even though it is not alleged in the indictment, provided: (1) the jury is properly instructed on the aiding and abetting charge and (2) the defendant had sufficient notice of the aiding and abetting charge and was not unfairly surprised. *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984); *Tucker*, 552 F.2d at 204.

If an indictment charges section 2, it is not necessary for the indictment to state particulars such as who, when, how, and in what manner the defendant aided and abetted another in the commission of a substantive offense. *United States v. Garrison*, 527 F.2d 998, 999 (5th Cir. 1975).

21.05 **APPLICATION IN TAX CASES**

21.05[1] **Aiding in Preparation/Filing of False Return: 26 U.S.C. § 7206(2)**

Section 7206(2) of Title 26 makes it a felony to:

> Willfully aid[] or assist[] in . . . the preparation or presentation under . . . the internal revenue laws . . . of a return . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . . .

This statute is known as the Internal Revenue Code's aiding and abetting provision, and applies not only to tax return preparers but to anyone who causes a false return to be filed. *United States v. Sassak*, 881 F.2d 276, 277-78 (6th Cir. 1989); *United States v. Hooks*, 848 F.2d 785, 789 (7th Cir. 1988); *United States v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981). Reference should be made to the discussion of this statute in the section of this Manual dealing with section 7206(2). *See* Section 13, *supra*.

In prosecutions under subsection 2(a), the government must prove that an underlying offense was committed by someone. Under section 7206(2), proof of the underlying offense is unnecessary. *United States v. Griffin*, 814 F.2d 806, 811 (1st Cir. 1987). *See also United States v. Motley*, 940 F.2d 1079, 1082 (7th Cir. 1991) (language of section 7206(2) makes it clear that government does not have to show the taxpayers had guilty knowledge). Consequently, in false return cases, section 7206(2) should be charged rather than section 2(a).

21.05[2] **Filing False Claim for Refund: 18 U.S.C. § 287**

Section 287 of Title 18 makes it a felony to "make[] or present[] . . . a claim upon or against the United States . . . knowing such claim to be false, fictitious or fraudulent." 18 U.S.C. § 287 (1988). Sections 287 and 2(b) are commonly used in false claim for refund schemes.

For example, in *United States v. Causey*, 835 F.2d 1289, 1292 (9th Cir. 1987), the Ninth Circuit upheld the conviction of the defendant for causing 18 individuals to file false tax returns claiming refunds, in violation of 18 U.S.C. §§ 287 and 2. The defendant argued that the government failed to establish that the persons actually submitting the false claims knew they were false. The Ninth Circuit distinguished the two subsections of 18 U.S.C. § 2 and found that under subsection 2(b) a person "may be guilty of causing a false claim to be presented to the United States even though he or she uses an innocent intermediary to actually pass on the claim to the United States." 835 F.2d at 1292. The court then held that in a section 2 prosecution for violation of section 287, the government does not need to allege or prove that the person actually submitting the claims knew them to be false. *Id*.

Consequently, in prosecutions for false refund claims, it is recommended that prosecutors charge sections 287 and 2(b).

21.06 **VENUE**

Venue in an aiding and abetting charge is proper not only in the district in which the underlying offense took place, but also in the district where the accessorial acts took place. *United States v. Delia*, 944 F.2d 1010, 1013 (2d Cir. 1991); *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States v. Kilpatrick*, 458 F.2d 864, 867-68 (7th Cir. 1972).

For a general discussion of venue in criminal tax cases, *see* Section 6.00, *supra*.

21.07 **STATUTE OF LIMITATIONS**

The statute of limitations for the offense of aiding and abetting is the statute of limitations applicable to the substantive offense. *United States v. Musacchia*, 900 F.2d 493, 499 (2d Cir. 1990).

For a general discussion of statute of limitations in criminal tax cases, *see* Section 7.00, *supra*.