Criminal Tax Manual
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22.00 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS

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22.01 **STATUTORY LANGUAGE: 18 U.S.C. §§ 287, 286**

§287. *False, fictitious or fraudulent claims*

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years, and shall be subject to a fine in the amount provided in this title.

§286. *Conspiracy to defraud the Government with respect to claims*

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both. [FN1]

22.02 **GENERALLY**

The *United States Attorneys' Manual* (USAM) contains a general explanation of section 287 of Title 18. *USAM*, Sec. 9-42.160. This section focuses on the use of the false claims statute and false claims conspiracy statute in the prosecution of false claims for tax refunds.

The purpose of 18 U.S.C. § 287 is to protect the government from false, fictitious, or fraudulent claims. *United States v. Montoya*, 716 F.2d 1340, 1344 (10th Cir. 1983). *See also United States v. Computer Science Corp.*, 689 F.2d 1181, 1187 (4th Cir. 1982). The majority of tax false claims cases are brought against individuals who, within the same year, file multiple, fictitious income tax returns claiming refunds of income tax. The introduction of electronic filing (ELF) of income tax returns has led to a proliferation of multiple defendant, multiple return cases. Many false claim for refund cases could also be charged as violations of 26 U.S.C. § 7206(1) or as violations of 18 U.S.C. § 1001. Sections 286 and 287, however, are the preferred charges when one or more false claims for refund are made on false or fictitious income tax returns.

22.03 **18 U.S.C. § 287 -- ELEMENTS**

In order to establish a violation of 18 U.S.C. § 287, the following elements must be proved beyond a reasonable doubt:

1. The defendant made or presented a claim to a department or agency of the United States for money or property;

2. The claim was false, fictitious or fraudulent;

3. The defendant knew at the time that the claim was false, fictitious or fraudulent.

Johnson v. United States, 410 F.2d 38, 46 (8th Cir. 1969); *United States v. Computer Science Corp.*, 511 F. Supp. 1125, 1134 (E.D. Va. 1981), *rev'd on other grounds*, 689 F.2d 1181 (4th Cir. 1982). *See also United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982); *United States v. Miller*, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976).

22.03[1] **Claim Against the United States**

To establish a violation of section 287, the government must prove that the defendant filed or caused to be filed a claim against the United States, or any department or agency of the United States, for money or property. *United States v. Neifert-White Co.*, 390 U.S. 228 (1968); *United States v. Mastros*, 257 F.2d 808, 809 (3d Cir. 1958); *Johnson v. United States*, 410 F.2d 38, 44 (8th Cir. 1969). A tax return seeking a refund is a claim against the United States. *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982). Proof that a return was filed may include the IRS transcript of the account in which the refund claim was made. *See United States v. Bade*, 668 F.2d 1004, 1005 (8th Cir. 1982).

A claim must be made or presented to fall within section 287. For paper returns, the indictment may charge that the false claim was made by filing a return with the IRS. Although an ELF return is not a complete return until both the electronic portion and the paper Form 8453 are filed with the IRS, a section 287 violation is complete when the electronic portion of an ELF return is received by the IRS. Therefore, ELF indictments should charge the filing or causing to be filed with the IRS of a false claim for a refund of income taxes, without specifying that a "return" was filed. [FN2]

Although the language of the statute would appear to require that the government receive the claim, it does not require that the defendant present it directly to the government. *See United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981), holding that presentation of the claim to an intermediary authorized to accept the claim for presentation to the government satisfies the "presentation" requirement of section 287:

> [T]here was substantial evidence that . . . [one of the defendants] submitted invoices for hourly rates based on falsified resumes with knowledge that . . . [defendant's corporation] would seek reimbursement

> for the payment of the invoices from the GSA. This evidence amply supported the government's charge that . . . [defendants] violated section 287 by submitting false claims to the government through an intermediary, and we find that theory of prosecution to be consonant with the language and meaning of the false claims statute.

ELF returns can only be filed through an approved preparer or electronic return originator (ERO). Preparers and electronic return originators should be considered intermediaries, and should not be characterized as "agents" of the IRS. *See United States v. Hebeka*, 89 F.3d 279, 283-284 (6th Cir. 1996); *Blecker*, 657 F.2d at 634; *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974).. The defendant need not be the person who actually filed the claim for refund. *See* 18 U.S.C. § 2. *See also Blecker*, 657 F.2d at 633; *Scolnick v. United States*, 331 F.2d 598 (1st Cir. 1964); . The offense is complete on the filing of the claim with the government. The statute does not require that the government pay or honor the claim. Thus, violations of section 287 are chargeable even if the government has not lost money due to the false or fictitious claim. *United States v. Coachman*, 727 F.2d 1293, 1302 (D.C. Cir. 1984); *United States v. Miller*, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976).

22.03[2] **False, Fictitious, or Fraudulent Claim**

22.03[2][a] *False, Fictitious or Fraudulent*

Section 287 is phrased in the disjunctive. Thus, charges under the statute may be based on proof that a claim submitted to the government is either false, fictitious, or fraudulent. *United States v. Murph*, 707 F.2d 895, 897 (6th Cir. 1983) ("the government may prove and the trial judge may instruct in the disjunctive form used in the statute"); *United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981); *United States v. Irwin*, 654 F.2d 671, 683 (10th Cir. 1981); *United States v. Milton*, 602 F.2d 231, 233 n.5 (9th Cir. 1979); *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978). The conduct proscribed by section 287 has been defined as follows in *Irwin*, 654 F.2d at 683 n.15:

> A claim is false or fictitious within the meaning of Section 287 "if untrue when made, and then known to be untrue by the person making it or causing it to be made." A claim is fraudulent "if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted." *United States v. Milton*, *supra*, 602 F.2d at 233 & n.6 quoting 2 E. Devitt & Blackmar, Federal Jury Practice and Instructions §28.04 (3d ed. 1977).

See United States v. Haynie, 568 F.2d 1091 (5th Cir. 1978) (duplicate returns). A return may be false or fictitious under the statute if the facts and figures used on the return are fictitious, even though the taxpayer might be entitled to a refund if a true return were filed. For example, an individual who recruits others to file false returns based on fictitious reports of wages and withholding (Form W-2) could be charged under section 287 even if the recruited taxpayers are legally entitled to refunds. *See United States v. Gieger*, 190 F.3d 661, 667 (5th Cir. 1999); *United States v. Leahy*, 82 F.3d 624, 634 n.11 (5th Cir. 1996) (contractor violated section 286 even though the false claims were irrelevant to the total amount paid by the government to the contractor). The returns filed are false, and the taxpayers are not entitled to refunds on the facts represented on those returns. Similarly, a return may be false under the statute if the defendant files a correct return in the name of another taxpayer in an attempt to obtain for himself the refund that is due to the other taxpayer. *See*, *e.g.*, *Kercher v. United States*, 409 F.2d 814, 818 (8th Cir. 1969), ("What Kercher was trying to do . . . was to lay claim . . . to what were claims of the taxpayers against the government. Therein lies the falsity . . . .").

22.03[2][b] **Materiality**

Section 287 does not specifically require that a claim be false as to a "material" matter. Several circuits have expressly held that materiality is not an essential element of section 287 and need not be alleged in an indictment charging a violation of that statute. *United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Nash*, 175 F.3d 429, 433-34 (6th Cir.), *cert. denied*, 528 U.S. 888 (1999); *United States v. Upton*, 91 F.3d 677, 684-685 (5th Cir. 1995); *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.); *United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981). The Eighth Circuit has held that although materiality is an element of the crime, it is an issue for the trial judge to handle as a question of law. *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983). [FN3] The Eleventh Circuit, on the other hand, has held that the issue is for the trial judge to decide, even assuming it is an element of the offense. *United States v. White*, 27 F.3d 1531, 1535 (11th Cir. 1994). The Fourth Circuit has stated, in dictum, that materiality is an element of section 287. *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974).

The materiality issue has been drawn in question by several recent Supreme Court decisions. In *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), the Supreme Court, applying the rule that the Constitution gives a defendant the right to have a jury determine the defendant's guilt of every element of the crime with which he is charged, concluded that the element of materiality in a prosecution under 18 U.S.C. 1000 had to be submitted to and decided by the jury. Thus, in those circuits which have held that materiality is an element of section 287, the issue must be submitted to the jury.

In *United States v. Neder*, 527 U.S. 1, 27 (1999), the Supreme Court held that materiality was an element of the mail fraud, wire fraud, and bank fraud statutes, despite the fact that the term "materiality" was not mentioned in any of them. [FN4] The Court noted that the term "defraud" had a settled meaning at the common law that included the requirement of materiality and that the inference was that Congress meant to incorporate the established meaning of that term. Thus, applying *Neder*, a court may read the term "fraudulent" in section 287 to require that the claim be material and that this question be submitted to the jury. *See United States v. Foster*, 229 F.3d 1196 n.1 (5th Cir. 2000) (while expressly not deciding the issue, Fifth Circuit reads *Neder* to require a materiality instruction and states that "the better practice would be to give the instruction in a § 28[7] false claim offense"), *cert. denied*, 121 S.Ct. 1202 (2001). [FN5] But even assuming that *Neder* supports the conclusion that materiality is an element of a section 287 charge that the defendant made a fraudulent claim for refund (*but see Neder*, 527 U.S. at 27 n.7), the holding of *Neder* may be avoided by simply charging that the defendant filed a false claim for a refund, omitting any reference in the charge to "fraudulent."

For further discussion of materiality, *see* Section 12.08, *supra.*

22.03[3] **Knowledge -- Intent -- Willfulness**

Section 287 requires the government to prove that a false claim against the government was made, "knowing such claim to be false, fictitious or fraudulent . . . " A section 287 indictment should allege such knowledge, and the proof that the defendant knew the return was false is part of the government's burden of proof. *United States v. Holloway*, 731 F.2d 378, 380-81 (6th Cir. 1984). [FN6]

It is not necessary to allege willfulness in the indictment. The term "willfully" is not used in section 287 and is not "an essential element" of section 287. *United States v. Irwin*, 654 F.2d 671, 682 (10th Cir. 1981).

The circuits vary, however, on the proof of intent necessary to convict for a violation of section 287. In *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978), the court approved a jury instruction stating that under section 287 criminal intent "could be proved by either a showing that the defendant was

aware he was doing something wrong or that he acted with a specific intent to violate the law." In *United States v. Milton*, 602 F.2d 231, 234 (9th Cir. 1979), the court held that no instruction on "intent to defraud" is necessary where a false claim is charged (because it is not an element of the offense), but left open whether an "intent to deceive" is an element of a charge of submitting "fraudulent" claims. 602 F.2d at 233 n. 7. The Eighth Circuit, in *Kercher v. United States*, 409 F.2d 814, 817 (8th Cir. 1969), did not draw a distinction between false and fraudulent claims, but held without elaboration that section 287 requires proof of criminal intent.

22.04 **18 U.S.C. § 286 -- ELEMENTS**

Section 23 of this Manual discusses the law of conspiracy in detail. This section addresses only those aspects of 18 U.S.C. § 286 that differ from the general conspiracy to defraud statute, 18 U.S.C. § 371. For a further discussion of the differences between section 286 and section 371, *see United States v. Lanier*, 920 F.2d 887, 891-95 (11th Cir. 1991).

In order to establish a violation of 18 U.S.C. § 286, the following elements must be proved beyond a reasonable doubt:

1. An agreement, combination, or conspiracy to defraud the United States;

2. by obtaining or aiding to obtain the payment of any false, fictitious or fraudulent claim.

The crime proscribed by section 286 is the entering into an agreement to defraud the government in the manner specified. In order to convict, the government must prove that the defendants agreed to engage in a scheme to defraud the government [FN7] and knew that the objective of the scheme was illegal. The government need not charge or establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of section 286 because, unlike section 371, an overt act is not an element of a section 286 conspiracy. *United States v. Lanier*, 920 F.2d at 892. The government must also prove that the conspirators agreed to defraud the government by obtaining the payment of false claims against the government. There is no requirement that the coconspirators actually obtained the payment or that the government prove that any steps were taken to consummate the filing of a false claim, so long as the existence of the agreement can be proved. As a practical matter, the proof in section 286 cases generally does not differ from proof in section 371 tax cases, because in most false claims conspiracy cases the existence of the agreement will be proved by acts that were undertaken in furthering the conspiracy or in consummating the attempt to obtain payment of the claim. [FN8]

22.05 **VENUE**

The general venue statute provides that prosecution can be brought in any district where an offense was begun, continued, or completed. 18 U.S.C. § 3237(a). Venue has been found proper where the claim was made or prepared or in the district where the claim was presented to the government, *United States v. Leahy*, 82 F.3d 624, 633 (5th Cir. 1996); *United States v. Massa*, 686 F.2d 526, 528 (7th Cir. 1982); *United States v. Blecker*, 657 F.2d 629, 632 (4th Cir. 1981); and where the claim was acted upon, *Fuller v. United States*, 110 F.2d 815 (9th Cir. 1940). In ELF cases, venue may be proper in the district in which the false return was submitted to a preparer or electronic originator, in addition to the districts in which it was prepared or filed with the Internal Revenue Service.

Venue may be proved either by direct or circumstantial evidence. It need only be established by a preponderance of the evidence, not by proof beyond a reasonable doubt. Proof of venue, although an essential element of the government's proof, has been held to be more akin to jurisdiction than to a substantive element of the crime. Therefore, where venue is not disputed, it may

be ruled on by the court as a matter of law and need not be submitted to the jury with an instruction. *United States v. Massa*, 686 F.2d at 530-531. *See* Section 6.00, *supra*, for a general discussion of venue, and Section 23.11, *infra*, for a discussion of venue for conspiracy charges.

22.06 **STATUTE OF LIMITATIONS**

18 U.S.C. § 3282 provides a five-year statute of limitations for crimes for which a period of limitations is not otherwise specified. Section 6531(1) of the Internal Revenue Code, however, provides a six-year statute of limitations "for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." That section provides the statute of limitations for conspiracies to defraud the United States brought under 18 U.S.C. § 371. *See* Section 23.12, *infra*. That six-year limitations period may well apply to section 286 and 287 cases, but there is no case law on that point. The safer course is to bring false claims cases within five years of the commission of the offense. The plain language of the statute, however, provides an argument for a six-year limitations period in cases which have not been or cannot be indicted within the five-year period.

22.07 **THE MECHANICS OF A FALSE RETURN**

In general, most false return schemes are based on Forms W-2 which are false or fictitious. The paper refund fraud schemes generally involve one individual filing multiple false returns on which refunds are claimed to be due. Typically, a fictitious Form W-2 showing income tax withheld in excess of the computed tax liability is used to generate the false refund claim. In some instances, the Form W-2 may show a real employer and the proper employer identification number (EIN), while in other schemes both the employer and the identification number are fictitious. Although less common, some false returns are based on a fictitious Schedule C (reporting the income of a self-employed individual) or a false corporate income tax return (Form 1120) and fictitious estimated quarterly tax payments.

In some schemes, the individual or individuals involved may obtain a list of names and social security numbers (SSN) of persons who probably will not file income tax returns, and use those names and SSNs on the fictitious returns. In other instances, the name and SSN of the "taxpayer" are fictitious. The fictitious refunds generally are all directed to a common address or a mail drop. Such schemes are relatively simple and do not present unusual problems in developing sufficient facts to prosecute those responsible. Once the targets have been identified and linked to the false returns, prosecution is usually straightforward.

ELF schemes are typically larger, more organized, and involve more participants (usually 3 to 7) than a false paper return scheme. Recruiters, or "runners," recruit individuals to act as "taxpayers." One or more of the participants prepare false W-2s (and, in some cases, the false return as well) for each "taxpayer," using the "taxpayer's" real name and SSN. The false W-2 forms generally show an amount of income that would entitle the "taxpayer" to claim the Earned Income Credit as part of the refund. (The Earned Income Credit is a refundable credit for low-income taxpayers. It offsets tax liability and the portion of it that exceeds the tax due is payable directly to the taxpayer.)

If only W-2 forms were prepared, a recruiter, or runner, escorts each "taxpayer" to a tax return preparer's office, where the "taxpayer" requests a return to be prepared from the phony W-2s and other information supplied by the runners. If the participants in the scheme prepared a complete return, the runner escorts the "taxpayer" to an ERO where the return is filed using the "taxpayer's" name and social security number. In either case, the "taxpayer" applies for a refund anticipation loan. When the proceeds of the loan are available (usually within one or two days), the runner and the "taxpayer" pick up the check and cash it at a check cashing service. The "taxpayer" receives

a portion of the loan amount (usually $400 to $500) and the participants split the remainder of the funds. Many false claims for refund are just under the maximum refund anticipation loan limit (generally under $5,000). ELF schemes may involve as few as one or two returns, or as many as hundreds of returns and over $1,000,000 in false claims. One scheme involved 23 individuals and false claims exceeding $2 million in a matter of months. Several other schemes have exceeded $1 million in false claims. [FN9]

22.08 AUTHORIZATION OF INVESTIGATIONS AND PROSECUTIONS

22.08[1] Authorization of Grand Jury Investigations -- Tax Division Directive No. 96

On March 18, 1991, the Assistant Attorney General issued a temporary order that delegated to the United States Attorneys the authority to initiate grand jury investigations in 18 U.S.C. §§ 286 and 287 false and fictitious return cases referred to them by the IRS. With minor changes, that temporary delegation of authority was made permanent by Tax Division Directive No. 96, dated December 31, 1991. A copy of Directive No. 96 and the affected sections of the USAM are included in Sections 2.00 and 3.00, *supra*.

Tax Division Directive No. 96 confers upon all United States Attorneys the authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. § 286 and 18 U.S.C. § 287. That authority is limited to cases involving one or more individuals who have, for a single tax year, "filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled." [FN10]

Due to the sensitive nature of criminal investigations of professional tax return preparers, cases potentially targeting return preparers were excluded from the delegation of authority. (A "return preparer" is "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A." Section 7701(a)(36)(A) of the Internal Revenue Code.) Further, multi-year cases and cases involving Title 18 charges other than 286 and 287 and/or any Title 26 charges are outside the scope of the delegation of authority, and must be referred by the IRS to the Tax Division for authorization of a grand jury investigation.

The Directive also requires that in all direct referral cases a copy of the letter requesting a grand jury investigation be sent to the Tax Division by overnight courier or express mail. In cases involving arrests or other exigent circumstances, the request for grand jury investigation letter must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax. Any case directly referred by the IRS to a United States Attorney's office for grand jury investigation which does not meet the terms of the Directive is considered an improper referral and outside the scope of the delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

22.08[2] Authorization of Prosecution in False Claims Cases

In section 6-4.243(B) of the United States Attorneys' Manual, the Tax Division delegated to the United States Attorneys the authority to authorize prosecution for violations of section 286 and 287 where the case involved an individual or individuals (other than income tax preparers) who had filed multiple false or fictitious paper income tax returns claiming refunds of taxes for a single tax year. The authority to authorize prosecution in all other paper return cases and in all ELF false claims cases has been retained by the Tax Division, and was not delegated to the United States Attorneys. Charges in

multi-year paper return cases must be authorized by the Tax Division. The Tax Division has determined that the unique problems posed by electronically filed false and fictitious claims for refunds make it desirable to retain the authority to authorize prosecution of all ELF cases where prosecution is deemed appropriate at the conclusion of a grand jury investigation. Tax Division authorization is required prior to indictment in any ELF case.[FN11]

22.09 **SENTENCING GUIDELINES CONSIDERATIONS**

The Sentencing Guidelines generally require that a criminal sentence be based on the total harm caused by the defendant's conduct. USSG, §1B1.3(a)(2) provides that the enhancement for monetary loss from theft or a scheme to defraud includes the aggregate of losses intended or caused by "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG §1B1.3(a)(2). In false claims cases, the defendant should be held accountable for the total amount of false or fictitious refunds claimed by the defendant and/or co-conspirators that can be determined prior to sentencing.

Determining the total harm to the government may not be an easy task in some cases. The total number of false paper returns may not be determinable by the Internal Revenue Service in any given scheme. Therefore, additional investigation may be necessary to determine the scope of the scheme and the amount of the government's losses. Many ELF cases are referred for grand jury investigation before the full extent of a scheme is known. Even though there may be sufficient evidence to indict and convict one or more individuals at the time of the referral, it is important, when possible, to develop the case as fully as circumstances permit. Preferably, an indictment should not be sought until the scope of the scheme has been sufficiently developed so that at the time of sentencing there will be enough information to demonstrate to the court the severity of the defendant's conduct. In certain circumstances, however, an arrest or indictment may be necessary before the case can be fully developed. In those cases, the prosecutor and agents should continue to develop evidence regarding any additional false returns and participants.

FN 1. For the felony offenses set forth in sections 286 and 287, the maximum permissible fine is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. section 3571.

FN 2. On January 6, 1993, the Tax Division mailed to each United States Attorney an information package on ELF returns, entitled *Prosecuting Electronic Filing Fraud*, which explains the ELF program and ELF fraud in detail and contains sample indictments and plea agreements. Additional copies of that information package may be obtained from the Tax Division.

FN 3. In *Pruitt*, the court defined "materiality" for purposes of section 287 as: "A statement is material if it has a tendency to induce the government to act by placing the claimant in a position to receive government benefits." 702 F.2d at 155.

FN 4. In *United States v. Wells*, 519 U.S. 482 (1996), the Supreme Court laid out the approach a court should follow in determining whether a statute requires proof of a particular item as an element of the offense.

FN 5. In addressing "materiality" in the criminal tax context, the Supreme Court in *Neder* stated that "a false statement is material if it has a 'natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed,'" and noted that several courts had determined that "any failure to report income is material." *Neder,* 527 U.S. 16. The Court concluded that, under either formulation, no jury could reasonably find that defendant's failure to report substantial amounts of income

on his tax returns was not a material matter. *Id*. Applying *Neder* to a 287 filing false claim for tax refund prosecution involving so-called "black tax returns," the Fifth Circuit concluded, similarly to *Neder*, that defendant's false statements (seeking a refund of "black taxes in the amount of $43,209) were material to the tax refund claims. *United States v. Foster*, 229 F.3d 1196, 1197 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1202 (2001). The court stated that: "[T]here is no doubt that the amounts claimed in the "black tax returns" that [defendant] assisted with were as material as they were unjustified. The huge scope of IRS's processing and review activities makes it inevitable that a sensible threshhold of materiality must be applied to irregularities planted in tax returns. Were it not so, taxpayers would be encouraged to take advantage of IRS's practical inability to review each return individually.

FN 6. Although the element of knowledge can sometimes be established through proof of "willful blindness," extreme care should be exercised in seeking and framing appropriate jury instructions. *See* Section 8.06[4], *supra*.

FN 7. *See* discussion of *United States v. Neder*, 527 U.S. 1 (1999), *supra*, p. 22-6.

FN 8. There is a sample section 286 indictment attached to the Electronic Filing Fraud Package mentioned in note 1, *supra*, and also included in the forms in this Manual.

FN 9. It appears that 18 U.S.C. § 287 cannot be used in ELF cases in which the electronic return preparer, or ERO, has not transmitted the return to the IRS. Section 287 punishes those false claims that an individual "makes or presents" to the government, but does not punish attempts. Where the preparer or return originator has notified the IRS of a suspicious return and has not transmitted that return, the individual(s) who attempted to file the return should be charged with making a false statement in a matter within the jurisdiction of the IRS, in violation of 18 U.S.C. § 1001. A false statement punishable under section 1001 need not be submitted directly to the government. *See*, *e.g.*, *United States v. Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985); *United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981).

FN 10. Cases involving schemes that recruit real individuals to file returns in their own names, under their correct social security numbers, do not fall within the terms of the delegation of authority and must be referred to the Tax Division for authorization of the grand jury investigation.

FN 11. Tax Division authorization is also required before charging false claims for refunds as any other violation of Title 18 (such as the mail, wire or bank fraud statutes or as a money laundering violation). *See* Tax Division Directive No. 99, Section 3.00, *supra*.