CRIMINAL TAX MANUAL

JURY INSTRUCTIONS

18 U.S.C. § 2

GOVERNMENT PROPOSED JURY INST. NO. 1

Statutory Language

Section 2 of Title 18 of the United States Code provides, in part, as follows:

Section 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.

18 U.S.C. § 2

GOVERNMENT PROPOSED JURY INST. NO. 2

Principal -- To Aid, Abet, Cause, etc.
(Single Defendant)

The guilt of a defendant may be established without proof that the accused personally did every act constituting the offense charged.

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

"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."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally.

18 U.S.C. § 2

Jay Grenig, William Lee, and Kevin O'Malley, ***Federal Jury Practice and Instructions*** (5th Ed. 2000-2001), Section 18.01

Nye & Nissen v. United States, 336 U.S. 613, 618-20 (1949)

United States v. Hollis, 971 F.2d 1441, 1451-52 (10th Cir. 1992)

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)

GOVERNMENT PROPOSED JURY INST. NO. 3

Principal -- To Aid, Abet, Cause, etc.
(Multiple Defendants)

In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged.

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

"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."

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense. Participation is willful if done voluntarily and intentionally.

18 U.S.C. § 2

Jay Grenig, William Lee, and Kevin O'Malley, ***Federal Jury Practice and Instructions*** (5th Ed. 2000-2001), Section 18.02

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)

GOVERNMENT PROPOSED JURY INST. NO. 4

"Aid and Abet" -- Explained

A person may violate the law even though he or she does not personally do each and every act constituting the offense if that person "aided and abetted" the commission of the offense.

Section 2(a) of Title 18 of the United States Code provides:

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

Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated [himself] [herself] in some way with the crime charged and participated in it with the intent to commit the crime.

In order to be found guilty of aiding and abetting the commission of the crime charged in [Count ___ of] the indictment, the government must prove beyond a reasonable doubt that the Defendant:

One, knew that the crime charged was to be committed or was being committed,

Two, knowingly did some act for the purpose of [aiding] [commanding] [encouraging] the commission of that crime, and

Three, acted with the intention of causing the crime charged to be committed.

Before Defendant may be found guilty as an aider or an abettor to the crime, the government must also prove, beyond a reasonable doubt, that someone committed each of the essential elements of the offense charged as detailed for you [in Instruction No. _____].

Merely being present at the scene of the crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct for the jury to find that the defendant aided and abetted the commission of that crime.

The government must prove that the Defendant knowingly [and deliberately] associated [himself] [herself] with the crime in some way as a participant-- someone who wanted the crime to be committed-- not as a mere spectator.

18 U.S.C. § 2

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992),

Section 18.01

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), cert. denied, 490 U.S. 1028 (1989)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), cert. denied, 112 S. Ct. 882 (1992)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

GOVERNMENT PROPOSED JURY INST. NO. 6

Aiding and Abetting

Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must knowingly associate [himself] [herself] with the criminal venture, participate in it, and try to make it succeed.

18 U.S.C. § 2

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 5.08 (modified)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989)

GOVERNMENT PROPOSED JURY INST. NO. 7

Aiding and Abetting

A defendant may be found guilty of [name principal offense], even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:

First, the [principal offense] was committed;

Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured to commit _____, and

Third, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with, or was present at the scene of the crime, or unknowingly or unintentionally did things that were helpful to the principal.

The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping commit the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

18 U.S.C. § 2

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.01

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)

United States v. Abreu, 962 F.2d 1425, 1429 (1st Cir. 1992)

United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)

United States v. Singh, 922 F.2d 1169, 1173 (5th Cir.), *cert. denied*, 112 S. Ct. 260 (1991)

United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987)

United States v. Lanier, 838 F.2d 281, 284 (8th Cir. 1988)

United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)

GOVERNMENT PROPOSED JURY INST. NO. 9

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

So, if another is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to bring about the crime.

18 U.S.C. § 2

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Section 2.06

United States v. Walker, 621 F.2d 163 (5th Cir. 1980)

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Roan Eagle, 867 F.2d 436, 445 n.15 (8th Cir.), *cert. denied*, 490 U.S. 1028 (1989)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)

United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

GOVERNMENT PROPOSED JURY INST. NO. 11

Aiding And Abetting (Agency)

The guilt of a defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the defendant are willfully directed or authorized by the defendant, or if the defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the defendant responsible for the conduct of that other person just as though the defendant had engaged in such conduct himself.

Notice, however, that before any defendant can be held criminally responsible for the conduct of others it is necessary that the defendant willfully associate himself in some way with the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator.

18 U.S.C. § 2

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 6, p. 42

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)

United States v. Perez, 922 F.2d 782, 785 (11th Cir.), *cert. denied*, 111 S. Ct. 2840 (1991)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

COMMENT

United States v. Walker, 621 F.2d 163 (5th Cir. 1980), approved this instruction.

GOVERNMENT PROPOSED Jury Inst. No. 13

Willfully to Cause Criminal Act -- Defined

In order to cause another person to commit a criminal act, it is necessary that the accused willfully do, or willfully fail to do, something which, in the ordinary performance of official duty, or in the ordinary course of the business or employment of such other person, or by reason of the ordinary course of nature or the ordinary habits of life, results in the other person's either doing something the law forbids, or failing to do something the law requires to be done.

An act or a failure to act is "willfully" done, if done voluntarily and intentionally.

18 U.S.C. § 2

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 12.04

GOVERNMENT PROPOSED Jury Inst. No. 14

"Mere Presence" -- Defined

Merely being present at the scene of a crime or merely knowing that a crime is being committed or is about to be committed is not sufficient conduct to find that Defendant [name] committed that crime.

In order to find the defendant guilty of the crime, the government must prove, beyond a reasonable doubt, that in addition to being present or knowing about the crime, Defendant knowingly [and deliberately] associated [himself] [herself] with the crime in some way as a participant -- someone who wanted the crime to be committed -- not as a mere spectator.

18 U.S.C. § 2

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 16.09

United States v. Lindell, 881 F.2d 1313, 1323 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)

United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991)

United States v. Lard, 734 F.2d 1290, 1298 (8th Cir. 1984)

United States v. Esparsen, 930 F.2d 1461, 1470 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992)

United States v. Payne, 750 F.2d 844, 860 (11th Cir. 1985)

18 U.S.C. § 286

GOVERNMENT PROPOSED Jury Inst. No. 15

Conspiracy to Defraud the Government
With Respect to Claims (Elements)

To sustain the charge of conspiracy to defraud the government with respect to claims, the government must prove the following propositions:

First, the defendant entered into a conspiracy to [obtain payment; allowance; aid in obtaining payment; aid in obtaining allowance] **1** of a claim against [the United States; a department or agency of the United States]; **2**

Second, the claim was false, fictitious, or fraudulent; and,

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

If you find from your consideration of all 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.

Federal Criminal Jury Instructions of the Seventh Circuit (1986), Vol. III, p.23.

NOTES

1 Insert language to reflect the charges in the case.

2 Insert language to reflect the charges in the case.

COMMENT

1 Section 286 does not require the allegation or proof of an overt act. ***See United States v. Umentum***, 547 F.2d 987, 989-991 (7th Cir. 1976)(21 U.S.C. § 846); ***United States v. Cortwright***, 528 F.2d 168, 172 n.1 (7th Cir. 1975) (21 U.S.C. § 846).

18 U.S.C. § 287

GOVERNMENT PROPOSED Jury Inst. No. 16

False Claim -- Offense Charged

The 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 _____, made and presented to the United States Treasury Department a claim against the United States for payment, which he [she] knew to be false, fictitious, or fraudulent, by [e.g., preparing and causing to be prepared, and filing and causing to be filed, what purported to be a federal income tax return], **1** which was presented to the United States Treasury Department, through the Internal Revenue Service, wherein he [she] claimed [e.g., a refund of taxes] **2** in the amount of $_____, knowing such claim to be false, fictitious, or fraudulent.

Count II charges that * * *.

All in violation of Title 18, United States Code, Section 287.

NOTES

1 The instruction should be drafted so as to reflect the charge and basis for venue as set forth in the indictment.

2 The instruction should be drafted so as to reflect the charge as set forth in the indictment.

COMMENT

1 When the false claim charged was filed electronically, the prosecutor should insure that the indictment and instructions do not charge either the signing or the filing of a federal income tax return unless the paper Form 8453 relating to each false claim has been retrieved from the IRS and can be introduced into evidence along with the electronic portion of the return or the defendant used a self-selected personal identification number (PIN) in accordance with IRS instructions when filing the return. Without the Form 8453 or the use of a PIN, the government cannot prove that a "tax return" was filed. For further information, see "Prosecuting Electronic Fraud" (distributed to all U.S. Attorneys on February 6, 1993, and available from the Tax Division).

GOVERNMENT PROPOSED Jury Inst. No. 18

Statutory Language -- Section 287

Section 287 of Title 18 of the United States Code provides, in part, as follows:

Section 287. False, fictitious or fraudulent claims.

Whoever makes or presents to any person . . . in the civil . . . 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 . . . [guilty of an offense against the laws of the United States].

18 U.S.C. § 287

GOVERNMENT PROPOSED Jury Inst. No. 19

18 U.S.C. 287 -- Purpose of the Statute

The objective of Congress in enacting section 287 was to assure the integrity of claims and vouchers submitted to the government and thereby protect the funds and property of the government from fraudulent claims, regardless of the particular form of the claim or the particular function of the government department or agency against which the claim is made. Congress intended to prevent any deception that would impair, obstruct or defeat the lawful, authorized functions of government departments or agencies.

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-2, p. 18-3

Rainwater v. United States, 356 U.S. 590 (1958)

United States v. Maher, 582 F.2d 842 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

GOVERNMENT PROPOSED Jury Inst. No. 20

Elements of the Offense

In order to prove the crime of making a false claim, the government must establish beyond a reasonable doubt each of the following facts:

First, that on or about [insert date], the defendant knowingly made or presented a claim to [insert (1) name of person or officer in the civil or military service of the United States or (2) name of department or agency of the United States].

Second, that the claim which was presented was a claim against the United States or a department or agency of the United States.

Third, that the claim was false, fictitious, or fraudulent.

Fourth, that the defendant knew that the claim was false, fictitious, or fraudulent.

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-3, p. 18-4 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 21

First Element--Submission of Claim

The first element which the government must establish beyond a reasonable doubt is that the defendant knowingly made or presented a claim to [name of department or agency of the United States].

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-4, p. 18-6 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 22

Second Element -- Claim Against the United States

The second element the government must prove beyond a reasonable doubt is that the claim was made or presented upon or against the United States or a department or agency of the United States.

If you find that the claim received by an agency or department of the United States was one which the agency or department was expected to pay, then this element of the offense is satisfied.

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-6, p. 18-11 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 23

Third Element -- Claim was False, Fictitious or Fraudulent

The third element you must find beyond a reasonable doubt is that the claim was false, fictitious, or fraudulent.

A claim is false if it was untrue when made and was then known to be untrue by the person making it or causing it to be made.

A claim is fictitious if it is not real or if it does not correspond to what actually happened.

A claim is fraudulent if it was falsely made or caused to be made with the specific intent to deceive.

The question you must focus on is whether the claim in question contained any entry which you find from the evidence was false, fictitious, or fraudulent. You need not find that all of the entries on the claim were false, fictitious, or fraudulent, so long as you find that there was one entry which was false, fictitious, or fraudulent.

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-8, p. 18-8 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 24

Fourth Element -- Knowledge that Claim Was False

The fourth element the government must prove beyond a reasonable doubt is that the defendant had knowledge that the claim was false or fictitious or fraudulent.

An act is not done unlawfully or with knowledge of its false or fictitious or fraudulent character if it is done by mistake, carelessness, or other innocent reason.

It is not necessary, however, that the government prove that the defendant had exact knowledge of the relevant criminal provisions governing his conduct. You need only find that the defendant acted with knowledge that the claim was false or fictitious or fraudulent. 1

Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions: Criminal (1993 Ed.), Vol. 1, Instruction 18-9, p. 18-16 (modified)

NOTE

1 CAUTION: The courts have debated whether the government must prove that the defendant acted "willfully" (i.e., that the defendant knew he was violating the law) or that there was an intent to cause the government a loss. You should check the law of your circuit.

GOVERNMENT PROPOSED Jury Inst. No. 25

False Claims Against the Government

Title 18, United States Code, Section 287, makes it a crime to knowingly make a false claim against any department or agency of the United States. You are instructed that the [insert name of agency] is a department or agency of the United States within the meaning of that law.

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 knowingly presented to an agency of the United States a false or fraudulent claim against the United States; and

Second: That the defendant knew that the claim was false or fraudulent.

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

If you find that the government has proved these things, you do not need to consider whether the false claim was material, although that term is used in the indictment. This is not a question for the jury to decide.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Section 2.20, p.89

GOVERNMENT PROPOSED Jury Inst. No. 26

False, Fictitious, Or Fraudulent Claims (Elements)

To sustain the charge of making a false claim, the government must prove the following propositions:

First, that the defendant (made or presented) a claim upon or against (the United States or a department or agency of the United States);

Second, that the claim was (false, fictitious, or fraudulent);

Third, that the defendant knew the claim was (false, fictitious, or fraudulent); and

Fourth, that the defendant submitted the claim with intent to defraud. **1**

If you find from your consideration of all 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 one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Federal Criminal Jury Instructions of the Seventh Circuit (1983 Ed.), Vol. II, p. 40.

NOTE

1 The Fourth and the Ninth Circuits have held that it is not necessary to prove an intent to defraud when the charge is that the defendant filed a false claim for a refund. *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979). See also Section 22.06(1), *supra*.

GOVERNMENT PROPOSED Jury Inst. No. 27

False, Fictitious, Or Fraudulent Claims
(Claims Submitted to Third Parties)

To make a claim, the defendant need not directly submit the claim to an employee or agency of the United States. It is sufficient if the defendant submits the claim to a third party knowing that the third party will submit the claim or seek reimbursement from the United States (or a department or agency thereof).

Federal Criminal Jury Instructions of the Seventh Circuit (1983 Ed.), Vol. II, p. 42.

GOVERNMENT PROPOSED Jury Inst. No. 28

Making a False Claim Against the United States

The crime of making a (false, fictitious, or fraudulent) claim against the United States, as charged in Count [insert number of count] of the indictment, has three essential elements, which are:

One, the defendant (made or presented) to [insert name of U.S. officer or agency] a claim against (the United States or name of department or agency of the United States);

Two, the claim was (false, fictitious, or fraudulent) in that [describe how the claim was false, etc.]; and

Three, the defendant knew the claim was (false, fictitious, or fraudulent).

[Insert name of agency] is an agency of the United States and [describe the claim charged in the indictment] is a claim against the United States.

(A claim is "false" or "fictitious" if any part of it is 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 any part of it is known to be untrue, and made or caused to be made with the intent to deceive the Government agency to which submitted.)

(The materiality of the matters set forth in Element Two is not a matter with which you are concerned and should not be considered by you in determining the guilt or innocence of the defendant.)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, (1992 Ed.), p. 166 (modified).

GOVERNMENT PROPOSED Jury Inst. No. 29

Definition of Knowingly

When the word "knowingly" is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. [Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.]

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Vol. I, Sec. 6.03, p. 86 (modified).

GOVERNMENT PROPOSED Jury Inst. No. 30

False Claims Against the Government

Title 18, United States Code, Section 287, makes it a Federal crime or offense for anyone to knowingly make a false claim against any department or agency of the United States.

You are instructed that the [insert name of department or agency, e.g., Internal Revenue Service] is a department or agency of the United States within the meaning of that law.

The defendant can be found guilty of the offense of making a false claim against the government only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant knowingly presented to an agency of the United States a false and fraudulent claim against the United States, as charged in the indictment; and

Second: That the defendant acted willfully and with knowledge of the false and fraudulent nature of his claim

A claim is "false" or "fraudulent" if it is untrue at the time it is made and is then known to be untrue by the person making it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 3, p. 68 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 31

Knowledge of Falsehood
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

A defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

Thus, a finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 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), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See*, e.g., ***United States v. 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).

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.

2 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.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit), because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

18 U.S.C. § 371

GOVERNMENT PROPOSED Jury Inst. No. 33

Conspiracy -- Offense Charged

Count __ of the indictment charges that from on or about the ___ day of [month], 20__ , until on or about the ____ day of [month] , 20__ , in the District of _____ [and elsewhere], the defendant[s], [names], came to some type of agreement or understanding to [commit an offense against the United States namely, describe substantive offense or offenses] [defraud the United

States] 1 and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [describe overt act or acts].

Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.01

NOTE

1 Substitute appropriate language if a *Klein* conspiracy is charged, e.g., to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of the revenue: to wit, income taxes.

GOVERNMENT PROPOSED Jury Inst. No. 34

Statute Defining Offense

Section 371 of Title 18 of the United States Code provides, in part, that:

"If two or more persons conspire * * * to commit any offense against the United States, or to defraud the United States, or any agency thereof * * * and one or more of such persons do any act to effect the object of the conspiracy, * * *"

an offense against the United States has been committed.

18 U.S.C. § 371

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.02

GOVERNMENT PROPOSED Jury Inst. No. 35

Essential Elements of Offense --
When Conspiracy Offense Complete

In order to sustain its burden of proof for the crime of conspiracy to [describe substantive offense(s)] [defraud the United States] as charged in Count ___ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: The conspiracy, agreement, or understanding to [describe substantive offense(s)] [defraud the United States] 1, as described in the indictment, was formed, reached, or entered into by two or more persons;

Two: At some time during the existence or life of the conspiracy, agreement, or understanding, one of its alleged members knowingly performed one of the overt acts charged in the indictment in order to further or advance the purpose of the agreement; and

Three: At some time during the existence or life of the conspiracy, agreement, or understanding, defendant knew the purpose of the agreement, and then deliberately joined the conspiracy, agreement, or understanding.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.03

United States v. Falcone, 311 U.S. 205, 210 (1940)

United States v. O'Campo, 973 F.2d 1015, 1021 (1st Cir. 1992)

United States v. Wiley, 846 F.2d 150, 153-54 (2d Cir. 1988)

United States v. Rankin, 870 F.2d 109, 113 (3d Cir.), *cert. denied*, 493 U.S. 840 (1989)

United States v. Tedder, 801 F.2d 1437, 1446 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987)

United States v. Yamin, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989)

United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973)

United States v. Mealy, 851 F.2d 890, 896 (7th Cir. 1988)

United States v. Cerone, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 F.2d 1006 (1988)

United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987)

United States v. Gonzalez, 797 F.2d 915, 916 (10th Cir. 1986)

United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986)

United States v. Treadwell, 760 F.2d 327, 333 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986)

NOTE

1 Prosecutors charging Klein conspiracies in the Ninth Circuit should be aware of United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993).

GOVERNMENT PROPOSEDJury Inst. No. 37

Conspiracy -- Existence of an Agreement

A criminal conspiracy is an agreement or a mutual understanding knowingly made or knowingly entered into by at least two people to violate the law by some joint or common plan or course of action. A conspiracy is, in a very true sense, a partnership in crime.

A conspiracy or agreement to violate the law, like any other kind of agreement or understanding, need not be formal, written, or even expressed directly in every detail.

[To prove the existence of a conspiracy or an illegal agreement, the government is not required to produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. To prove that a conspiracy existed, moreover, the government is not required to show that all of the people named in the indictment as members of the conspiracy were, in fact, parties to the agreement, or that all of the members of the alleged conspiracy were named or charged, or that all of the people whom the evidence shows were actually members of a conspiracy agreed to all of the means or methods set out in the indictment.]

The government must prove that the defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would [violate some law(s)] [defraud the United States] by means of some common plan or course of action as alleged in Count of the indictment. It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration of the charge of conspiracy.

Unless the government proves beyond a reasonable doubt that a conspiracy, as just explained, actually existed, then you must acquit the defendant .

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.04

United States v. Falcone, 311 U.S. 205, 210 (1940)

United States v. Labat, 905 F.2d 18, 21 (2d Cir. 1990)

United States v. DePew, 932 F.2d 324, 328 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991)

United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982)

United States v. Hopkins, 916 F.2d 207, 212 (5th Cir. 1990)

United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990), *cert. denied*, 498 U.S. 1093 (1991)

United States v. Schultz, 855 F.2d 1217, 1221 (6th Cir. 1988)

United States v. McNeese, 901 F.2d 585, 599 (7th Cir. 1990)

United States v. Kibby, 848 F.2d 920, 922 (8th Cir. 1988)

United States v. Powell, 853 F.2d 601, 604 (8th Cir. 1988)

United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1992)

United States v. Gonzalez, 940 F.2d 1413, 1417 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 910 (1992)

GOVERNMENT PROPOSED Jury Inst. No. 39

Must be More Than One Conspirator

The indictment charges a conspiracy among the defendants A and B and others, some of whom are named in the indictment as co-conspirators and some who are not so named because the indictment says that the grand jurors do not know who they are. A person cannot conspire with himself and therefore you cannot find either of the defendants guilty unless you find beyond a reasonable doubt that he participated in a conspiracy as charged with at least one other person, whether a defendant or not, and whether named in the indictment or not. With this qualification, you may find both of the defendants guilty or one of the defendants guilty and one not guilty or both not guilty, all in accordance with these instructions and the facts you find.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 27.12

Morrison v. California, 291 U.S. 82, 92 (1934)

Rodgers v. United States, 340 U.S. 367, 375 (1951)

United States v. Giry, 818 F.2d 120, 125 (1st Cir.), *cert. denied*, 484 U.S. 855 (1987)

United States v. Barnes, 604 F.2d 121, 161 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980)

United States v. Allen, 613 F.2d 1248, 1253 (3d Cir. 1980)

United States v. Anderson, 611 F.2d 504, 511 (4th Cir. 1979)

United States v. Chase, 372 F.2d 453, 459 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967)

United States v. Lewis, 902 F.2d 1176, 1181 (5th Cir. 1990)

Sears v. United States, 343 F.2d 139, 141-42 (5th Cir. 1965)

United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991)

United States v. Galvan, 961 F.2d 738, 742 (8th Cir. 1992)

GOVERNMENT PROPOSED Jury Inst. No. 40

Conspiracy -- Membership in an Agreement

Before the jury may find that defendant , or any other person, became a member of the conspiracy charged in Count of the indictment, the evidence in the case must show beyond a reasonable doubt that the defendant knew the purpose or goal of the agreement or understanding and deliberately entered into the agreement intending, in some way, to accomplish the goal or purpose by this common plan or joint action.

[If the evidence establishes beyond a reasonable doubt that the defendant knowingly and deliberately entered into an agreement to [describe substantive offense] [defraud the United States], the fact that the defendant did not join the agreement at its beginning, or did not know all of the details of the agreement, or did not play a major role in accomplishing the unlawful goal is not important to your decision regarding membership in the conspiracy.]

Merely associating with others and discussing common goals, mere similarity of conduct between or among such persons, merely being present at the place where a crime takes place or is discussed, or even knowing about criminal conduct does not, of itself, make someone a member of the conspiracy or a conspirator.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.05

United States v. Flaherty, 668 F.2d 566, 580 (1st Cir. 1981)

United States v. Southland, 760 F.2d 1366, 1369 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985)

United States v. Rankin, 870 F.2d 109, 113 (3d Cir.), *cert. denied*, 493 U.S. 840 (1989)

United States v. Norris, 749 F.2d 1116, 1121 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985)

United States v. Yanin, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989)

United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986)

United States v. Warner, 690 F.2d 545, 550 (6th Cir. 1982)

United States v. Brown, 934 F.2d 886, 889 (7th Cir. 1991)

United States v. Zimmerman, 832 F.2d 454, 457 (8th Cir. 1987)

United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989)

United States v. Medina, 940 F.2d 1247, 1250 (9th Cir. 1991)

United States v. Horn, 946 F.2d 738, 740 (10th Cir. 1991)

United States v. Lynch, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992)

United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992)

United States v. Dale, 991 F.2d 819, 851 (D.C. Cir.), *cert. denied*, 114 S. Ct. 286 (1993)

GOVERNMENT PROPOSED Jury Inst. No. 42

"Overt Act" -- Defined
Success of Conspiracy Immaterial

In order to sustain its burden of proof on Count of the indictment, the government must prove beyond a reasonable doubt that one of the members of the conspiracy or parties to the agreement knowingly performed at least one overt act and that this overt act was performed during the existence of the life of the conspiracy and was done to somehow further the goal(s) of the conspiracy or agreement.

The term "overt act" means some type of outward, objective action performed by one of the parties to the agreement or one of the members of the conspiracy which evidences that agreement.

Although you must unanimously agree that the same overt act was committed, the government is not required to prove more than one of the overt acts charged.

The overt act may, but for the alleged illegal agreement, appear totally innocent and legal.

The government is not required to prove that the parties to the agreement or members of the conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Sections 28.07, 28.08

United States v. Yates, 354 U.S. 298, 334 (1957)

United States v. Arboleda, 929 F.2d 858, 865 (1st Cir. 1991)

United States v. Anderson, 611 F.2d 504, 510 (4th Cir. 1979)

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985)

United States v. Hermes, 847 F.2d 493, 495 (8th Cir. 1988)

United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 44

Conspiracy
(Regular Charge)

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case, the defendant is charged with conspiring to [describe the object of conspiracy as alleged in the indictment].

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

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 two or more persons made an agreement to commit the crime of [describe] as charged in the indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the

unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

18 U.S.C. § 371

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.) Title 18 Offenses, Instruction No. 2.21, p. 89

United States v. Hopkins, 916 F.2d 207, 212 (5th Cir. 1990)

United States v. Lewis, 902 F.2d 1176, 1181 (5th Cir. 1990)

United States v. Yamin, 868 F.2d 130, 133 (5th Cir.), *cert. denied*, 492 U.S. 924 (1989)

United States v. Holcomb, 797 F.2d 1320, 1327 (5th Cir. 1986)

United States v. Nicoll, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982)

United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 F.2d 946 (1980)

Sears v. United States, 343 F.2d 139, 141-42 (5th Cir. 1965)

GOVERNMENT PROPOSED Jury Inst. No. 46

Conspiracy

In order to establish the offense of conspiracy, the government must prove these elements beyond a reasonable doubt:

1. that the alleged conspiracy existed, and

2. that an overt act was committed in furtherance of the conspiracy, and

3. that the defendant knowingly and intentionally became a member of the conspiracy.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the actions and statements of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all the alleged participants.

A conspiracy is not proved unless the evidence establishes that at least one overt act was committed by at least one conspirator to further the purpose of the conspiracy. It is not necessary that all the overt acts charged in the indictment be proved, and the overt act proved may itself be a lawful act.

In determining whether the defendant became a member of the conspiracy you may consider only the acts and statements of that particular defendant.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be accomplished.

The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 5.11

United States v. Brown, 934 F.2d 886, 889 (7th Cir. 1991)

United States v. McNeese, 901 F.2d 585, 599 (7th Cir. 1990)

United States v. Mealy, 851 F.2d 890, 896 (7th Cir. 1988)

United States v. Noble, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 48

Conspiracy

The defendant is charged in [Count ____ of] the indictment with conspiring to _____ in violation of Section _____ of Title _____ 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, [beginning on or about and ending on or about] [starting sometime before] there was an agreement between two or more persons to commit at least one crime as charged in the indictment **1**;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership -- an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts. Once you have decided that the defendant was a member of a conspiracy, the defendant is responsible for what other conspirators said or did to carry out the conspiracy, whether or not the defendant knew what they said or did.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 8.05A

United States v. Caldwell, 989 F.2d 1056, 1060 (9th Cir. 1993)

United States v. Boone, 951 F.2d 1526, 1543 (9th Cir. 1992)

United States v. Esparza, 876 F.2d 1390, 1392 (9th Cir. 1989)

United States v. Penagos, 823 F.2d 346, 348 (9th Cir. 1987)

NOTE

1 Prosecutors charging ***Klein*** conspiracies in the Ninth Circuit should be aware of ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993). The first element of the jury instruction should read:

First, [beginning on or about ____ and ending on or about ____] [starting sometime before] there was an agreement between two or more persons to defraud the United States by cheating the government out of money, [such as income tax payments, or property] and also an agreement to defraud the United States that involved the impairing, impeding, obstructing, or defeating of the lawful functions of an agency of the government, such as the IRS, by deceit, craft, trickery, or means that are dishonest. ***Caldwell***, 989 F.2d at 1060.

GOVERNMENT PROPOSED Jury Inst. No. 51

General Conspiracy Charge

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case must show beyond a reasonable doubt is:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That that "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when considered alone, that is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing who all of the other members are. So, if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one does not thereby become a conspirator.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.1, p. 70

United States v. Andrews, 953 F.2d 1312, 1318 (11th Cir.), *cert. denied*, 112 S. Ct. 3007 (1992)

United States v. Gonzalez, 940 F.2d 1413, 1417 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 910 (1992)

United States v. Lynch, 934 F.2d 1226, 1231 (11th Cir. 1991), *cert. denied*, 112 S. Ct 885 (1992)

United States v. Cure, 804 F.2d 625, 628 (11th Cir. 1986)

United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 53

Conspiracy -- Offense Charged

Count _____ of the indictment charges that from on or about the _____ day of _____, 20__, until on or about the _____ day of _____, 20__ [the date of this indictment], in the _____ District of _____ [and elsewhere], the defendants, [insert name of first defendant], [insert name of second defendant], [insert names of other defendants], came to some type of agreement or understanding to [commit an offense against the United States, namely, (insert name of substantive offense or offenses)] [defraud the United States for the purpose of impairing, impeding, obstructing, or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income (or other relevant, e.g., excise) taxes] and then acted to achieve the goal[s] of the alleged conspiracy or agreement or understanding in that one of its members thereafter [describe overt act or acts]. **1**

In violation of Title 18, United States Code, Section 371. Count II charges that . . ..

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.01 (modified)

NOTE

1 The law is clear that overt acts in furtherance of a conspiracy need not be illegal in themselves. ***Yates v. United States***, 354 U.S. 298, 334 (1957); ***Braverman v. United States***, 317 U.S. 49, 53-54 (1942); ***United States v. Tuohey***, 867 F.2d 534, 537 (9th Cir. 1989).

However, in the case of a ***Klein*** conspiracy (e.g., "to defraud the United States for the purpose of impairing, impeding, obstructing or defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of income), while the indictment need not use any specific words, it must allege the means by which the defendants intended to accomplish the conspiracy, and those means must involve "deceit, craft, trickery, or at least * * * means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924).

GOVERNMENT PROPOSED Jury Inst. No. 54

Multiple Objects
(For Use With General Conspiracy Charge)

18 U.S.C. § 371

In this instance, with regard to the alleged conspiracy, the indictment charges that the defendants conspired [insert objects of conspiracy -- e.g., to file false income tax returns and to evade income taxes]. **1** It is charged, in other words, that they conspired to commit two separate, substantive crimes or offenses.

In such a case it is not necessary for the government to prove that the defendant under consideration willfully conspired to commit both of those substantive offenses. It would be sufficient if the government proves, beyond a reasonable doubt, that the defendant willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the two offenses the defendant conspired to commit. If you cannot agree in that manner, you must find the defendant not guilty.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.2, p. 73 (modified)

NOTE

1 If one of the objects of the conspiracy is to defraud the United States by impeding, impairing, and obstructing the Internal Revenue Service in its ascertainment, assessment, and collection of taxes, the better practice would be that the remainder of the instruction not talk of "offenses." Instead, the word "object" should be used. For example, "[i]t is charged, in other words, that they conspired to achieve two separate objects."

GOVERNMENT PROPOSED Jury Inst. No. 55

Overt Act During Period of Conspiracy

The government must also establish beyond reasonable doubt that at least one of the overt acts as alleged in the indictment **1** occurred while the conspiracy was still in existence.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 27.09

United States v. Arboleda, 929 F.2d 858, 865 (1st Cir. 1991)

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985)

United States v. Diecidue, 603 F.2d 535, 563 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)

United States v. Johnson, 575 F.2d 1347, 1357 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979)

United States v. Yates, 354 U.S. 298, 334 (1957)

NOTE

1 Convictions have been sustained in cases where the government failed to prove the overt act alleged in the indictment, but proved an overt act that was not alleged. ***United States v. Fassoulis***, 445 F.2d 13, 19 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); ***United States v. Armone***, 363 F.2d 385 (2d Cir. 1966), *cert. denied*, 385 U.S. 957 (1966); ***United States v. Negro***, 164 F.2d 168, 173 (2d Cir. 1947).

COMMENT

1 This instruction may not be necessary in a case in which the evidence shows that the conspiracy, if it existed at all, continued during the entire period indicated by the alleged overt acts. It should be given, however, if there is an issue of termination. See Devitt and Blackmar, ***Federal Jury Practice and Instructions***, (3d Ed. 1977), Sec. 27.09, Notes, p. 30:

GOVERNMENT PROPOSED Jury Inst. No. 56

Withdrawal of Alleged Overt Act Not Shown by Evidence

As you were advised following the close of the prosecution's case-in-chief, since no evidence was offered in support of the alleged overt act designated in the indictment as ___, that overt act has been withdrawn from your consideration and must be entirely disregarded in arriving at your verdict as to the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment.

However, the evidence in the case as to the remaining overt acts alleged in the indictment, and designated as _____, is to be considered in your determination of the guilt or innocence of the defendant of the offense of conspiracy charged in the indictment. The government does not have to establish performance of all of the remaining overt acts as set out in the indictment. Proof beyond a reasonable doubt of one such act is sufficient.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 27.02

United States v. Anderson, 611 F.2d 504, 510 (4th Cir. 1979)

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985)

United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 57

Single or Multiple Conspiracies

Count of the indictment charges that defendant _____ knowingly and deliberately entered into a conspiracy to [describe substantive offense(s)] [defraud the United States].

In order to sustain its burden of proof for this charge, the government must show that the single [overall] [umbrella] [master] conspiracy alleged in Count ____ of the indictment existed. Proof of separate or independent conspiracies is not sufficient.

In determining whether or not any single conspiracy has been shown by the evidence in the case, you must decide whether common, master, or overall goals or objectives existed which served as the focal point for the efforts and actions of any members to the agreement. In arriving at this decision you may consider the length of time the alleged conspiracy existed, the mutual dependence or assistance between various persons alleged to have been its members, and the complexity of the goal(s) or objective(s) shown.

A single conspiracy may involve various people at differing levels and may involve numerous transactions which are conducted over some period of time and at various places. In order to establish a single conspiracy, however, the government need not prove that an alleged coconspirator knew each of the other alleged members of the conspiracy nor need it establish that an alleged coconspirator was aware of each of the transactions alleged in the indictment.

Even if the evidence in the case shows that defendant _____ was a member of some conspiracy, you must acquit defendant _____ if this conspiracy is not the single conspiracy charged in the indictment.

Unless the government proves the existence of the single [overall] [umbrella] [master] conspiracy described in the indictment beyond a reasonable doubt, you must acquit defendant _____.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 28.09

Blumenthal v. United States, 332 U.S. 539, 557 (1947)

United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979), *cert. denied*, 445 F.2d 946 (1980)

United States v. Noble, 754 F.2d 1324, 1327 (7th Cir.), *cert. denied*, 474 U.S. 818 (1985)

United States v. Massa, 740 F.2d 629, 636 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985)

United States v. Horn, 946 F.2d 738, 740 (10th Cir. 1991)

GOVERNMENT PROPOSED Jury Inst. No. 59

Multiple Conspiracies

You must determine whether the conspiracy charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Title 18 Offenses, Instruction No. 2.22, p. 92

GOVERNMENT PROPOSED Jury Inst. No. 60

Multiple Conspiracies

You must decide whether the conspiracy charged in the indictment existed, and, if it did, who at least some of its members were. If you find that the conspiracy charged did not exist, then you must return a not guilty verdict, even though you may find that some other conspiracy existed. Similarly, if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 8.05B

GOVERNMENT PROPOSED Jury Inst. No. 61

Multiple Conspiracies
(For Use With General Conspiracy Charge)

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.

What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, not the one charged in the indictment, then you must acquit that defendant.

In other words, to find a defendant guilty you must unanimously find that he was a member of the conspiracy charged in the indictment and not a member of some other separate conspiracy.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.3, p. 74

COMMENT

1 ***United States v. Diecidue***, 603 F.2d 535, 548-549 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), approved this instruction.

GOVERNMENT PROPOSED Jury Inst. No. 62

Conspiracy -- Withdrawal

A person is not responsible for the conduct of another if, before the commission of a crime, he [she] terminates his [her] effort to promote or facilitate the commission of the crime by: [wholly depriving his prior efforts of effectiveness in the commission of the crime]; or [giving timely warning to the proper law enforcement authorities]; or [doing an affirmative act inconsistent with the object of the conspiracy where such act is communicated in a manner reasonably calculated to reach co-conspirators] or [making proper effort to prevent the commission of the crime].

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 5.12

United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981)

GOVERNMENT PROPOSED Jury Inst. No. 63

Conspiracy (Withdrawal -- Statute of Limitations)

One of the issues in this case is whether [defendant's name] withdrew from the conspiracy.

In order to withdraw, [defendant's name] must have taken some affirmative act to terminate his effort to promote or facilitate the conspiracy by [wholly depriving his prior efforts of effectiveness in the commission of the crime, giving timely warning to the proper law enforcement authorities, doing an affirmative act inconsistent with the object of the conspiracy

where the act is communicated in a manner reasonably calculated to reach co-conspirators, making proper effort to prevent the commission of the crime].

[Defendant's name] cannot be found guilty of the conspiracy charge if he [she] withdrew from the conspiracy more than five years **1** before the indictment was returned. The indictment in this case was returned on [date]. Thus, the government must prove beyond a reasonable doubt that [defendant's name] did not withdraw from the conspiracy prior to [date].

[*NOTES*: Choose appropriate term contained in brackets].

Federal Criminal Jury Instructions of the Seventh Circuit, Vol II (1983 Ed.), Instruction No. 5.13, p. 3

United States v. Read, 658 F.2d 1225, 1233 (7th Cir. 1981)

NOTE

1 The statute of limitations is six years in a conspiracy to evade income taxes and in a *Klein* conspiracy. See 2001 Criminal Tax Manual Section 23.08, STATUTE OF LIMITATIONS.

GOVERNMENT PROPOSED Jury Inst. No. 64

Withdrawal From Conspiracy

Once a person becomes a member of a conspiracy, that person remains a member until that person withdraws from it. One may withdraw by doing acts which are inconsistent with the purpose of the conspiracy and by making reasonable efforts to tell the coconspirators about those acts. You may consider any definite, positive step that shows that the conspirator is no longer a member of the conspiracy to be evidence of withdrawal.

The government has the burden of proving that the defendant did not withdraw from the conspiracy before the overt act -- on which you all agreed -- was committed by some member of the conspiracy.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 8.05D

United States v. Krasn, 614 F.2d 1229, 1236 (9th Cir. 1980)

GOVERNMENT PROPOSED Jury Inst. No. 65

Withdrawal From Conspiracy
(Use With General Conspiracy Charge)

As you have been instructed, a conspiracy, like the one charged in this case, does not become a crime until two things have occurred: first, the making of the agreement; and, second, the performance of some "overt act" by one of the conspirators.

So, if a defendant enters into a conspiracy agreement but later changes his mind and withdraws from that agreement before anyone has committed an "overt act," as previously defined, then the crime was not complete at that time and the defendant who withdrew cannot be convicted -- he would be not guilty of the alleged conspiracy offense.

However, in order for you to decide that a defendant withdrew from a conspiracy you must find that the defendant took affirmative action to disavow or defeat the purpose of the conspiracy; and, as just explained, he must have taken such action before he or any other member of the scheme had committed any "overt act."

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 4.4, p. 75

United States v. Finestone, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948 (1987)

18 U.S.C. § 1001

GOVERNMENT PROPOSED Jury Inst. No. 66

Concealing a Material Fact -- Offense Charged
(First Clause)

The indictment sets forth _____ counts or charges.

Count ___ of the indictment charges that on or about _____, 20__, in the District of _____, the defendant, _____, knowingly and willfully concealed or covered up a material fact from a department or agency of the United States, the Internal Revenue Service, by _____.

18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.01 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 67

Making a False, Fictitious or Fraudulent Statement -- Offense Charged
(Second Clause)

The indictment sets forth _____ counts or charges.

Count ___ of the indictment charges that on or about _____, 20__, in the District of _____, the defendant, _____, knowingly made a false, fictitious, or fraudulent statement or representation concerning a material fact within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by _____.

18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.05 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 68

Making or Using Any False Writing or Document -- Offense Charged
(Third Clause)

The indictment sets forth _____ counts or charges.

Count ___ of the indictment charges that on or about _____, 20__, in the District of _____, the defendant, _____, knowingly and willfully made or used a false writing or document containing a false, fictitious, or fraudulent statement or entry concerning a material matter within the jurisdiction of a department or agency of the United States, the Internal Revenue Service, by

_____.

18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.09 (modified)

GOVERNMENT PROPOSED Jury Inst. No. 69

Statute Defining Offense

Section 1001 of Title 18 of the United States Code provides, in part, as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any materially false, fictitious, or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry,]**1** shall be guilty of an offense against the laws of the United States.

18 U.S.C. § 1001

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Sections 37.02; 37.06; 37.10

NOTE

1 Select the appropriate language for the offense charged in the indictment.

GOVERNMENT PROPOSED Jury Inst. No. 70

The Essential Elements of the Crime Charged

In order to sustain its burden of proof for the crime of knowingly and willfully _____ **1** an agency of the federal government as charged in Count __ of the indictment, the government must prove the following four **2** essential elements beyond a reasonable doubt:

One: The defendant _____ knowingly [concealed a material fact by any trick, scheme or device; made a false, fictitious, or fraudulent statement or representation to the government; made or used a false writing or document containing a false, fictitious, or fraudulent statement] as detailed in the indictment;

Two: In so doing, the defendant _____ acted willfully;

Three: The [fact concealed; statement; or writing or document] was material; and

Four: The subject matter involved was within the jurisdiction of any department or agency of the United States.

A statement is "material" if it has a natural tendency to influence or is capable of influencing the decision of the decisionmaker to whom it was addressed.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Sections 37.03; 37.07; 37.11 (modified)

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)

O'Malley, Grenig, and Lee, 1A ***Fed. Jury Prac. & Instr.*** § 16.11 (5th ed.)

Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.08 (1998). (elements)

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit (2001 ed.), Instruction No. 2.49. (elements)

Pattern Criminal Jury Instructions for the Seventh Circuit (1998 ed.), p. 201, 18 U.S.C. 1001 (definition)

Eighth Circuit Manual of Model Criminal Jury Instructions (2002 ed.) Sections 6.18.1001A, B, C (elements)

Ninth Circuit Criminal Manual of Model Jury Instructions (Aug.2004) Section 8.66 (elements)

Eleventh Circuit Criminal Pattern Jury Instructions (2003 ed.) Section C-36 (elements)

NOTES

1 Choose the appropriate language depending on the crime charged: concealing a material fact from; making a false statement to; or making or using a false writing or document.

2 If the offense charged relates to the first clause, concealing a material matter, there is an additional fifth element -- "the defendant, _____, had a legal duty to disclose the fact concealed." Yet, see the law of your particular circuit as to whether the judge must instruct the jury as to this particular element. See 2001 Criminal Tax Manual Section 24.04.

GOVERNMENT PROPOSED Jury Inst. No. 72

The Essential Elements of the Crime Charged

Title 18, United States Code, Section 1001, makes it a crime for anyone to knowingly and willfully make a false or fraudulent statement to a department or agency of the United States.

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 made a materially false statement [gave a materially false document] to [name department or agency of United States government];

Second: That the defendant made the statement intentionally, knowing that it was false; and

Third: That the defendant made the false statement for the purpose of misleading the [name department or agency of United States government].

It is not necessary to show that the [name department or agency of United States government] was in fact misled.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit, Instruction No. 2.46 (1990)

GOVERNMENT PROPOSED Jury Inst. No. 73

The Essential Elements of the Crime Charged
Concealing a Material Fact

To sustain the charge of concealing a material fact, the government must prove the following propositions:

First, the defendant [concealed; covered up] a fact by trick, scheme or device;

Second, the fact was material;

Third, the defendant did so knowingly and willfully; and

Fourth, the material fact related to a matter within the jurisdiction of a federal department or agency.

If you find from your consideration of all 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.

Federal Criminal Jury Instructions, Seventh Circuit, Volume III, Chapter 47, p. 49 (1986)

GOVERNMENT PROPOSED Jury Inst. No. 74

The Essential Elements of the Crime Charged
Making a False Statement or Representation

To sustain the charge of making a [false; fictitious; fraudulent] [statement; representation], the government must prove the following propositions:

First, the defendant made a [false; fictitious; fraudulent] [statement; representation];

Second, the [statement; representation] was material;

Third, the [statement; representation] was made knowingly and willfully; and,

Fourth, the [statement; representation] was made in a matter within the jurisdiction of a department or agency of the United States.

If you find from your consideration of all 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.

Federal Criminal Jury Instructions, Seventh Circuit, Volume III, Chapter 47, p. 50 (1986)

GOVERNMENT PROPOSED Jury Inst. No. 75

The Essential Elements of the Crime Charged
Making or Using a False Writing or Document

To sustain the charge of [making; using] a false [writing; document] knowing it to contain any [false; fictitious; fraudulent] [statement; entry], the government must prove the following propositions:

First, the defendant [made; used] a false [writing; document];

Second, the defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry];

Third, the [statement; entry] was material;

Fourth, the defendant [made; used] the [document; writing] knowingly and willfully; and

Fifth, the defendant [made; used] the [document; writing] within the jurisdiction of a federal department or agency.

If you find from your consideration of all 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.

Federal Criminal Jury Instructions, Seventh Circuit, Volume III, Chapter 47, p. 51 (1986)

GOVERNMENT PROPOSED Jury Inst. No. 76

The Essential Elements of the Crime Charged
Concealing a Material Fact From a Government Agency

The crime of [falsifying] [concealing] a fact from a government agency, as charged in [Count _____of] the indictment, has three essential elements, which are:

One, the defendant [falsified][concealed] a material fact, [describe material fact falsified or concealed, (e.g. the true purchase price of the ABC Building)], in [describe the matter within agency jurisdiction, (e.g. a loan closing statement submitted to XYZ Association)];

Two, the defendant did so by use of a [trick] [scheme] [device], that is, a course of action intended to deceive others; and

Three, the defendant did these acts knowingly, voluntarily and intentionally.

[Describe matter, e.g. loan closing statements submitted to the XYZ Association] are matters within the jurisdiction of the [name agency, e.g. Internal Revenue Service] which is an agency of the United States.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 6.18.1001A (1992)

GOVERNMENT PROPOSED Jury Inst. No. 77

The Essential Elements of the Crime Charged
False Statement to Government Agency

The crime of making a materially [false] [fictitious] [fraudulent] [statement] [representation] in a matter within the jurisdiction of a government agency, as charged in [Count _____ of] the indictment, has three essential elements which are:

One, the defendant knowingly made a materially [false] [fictitious] [fraudulent] [statement] [representation];

Two, the [statement] [representation] was made voluntarily and intentionally; and

Three, the [statement] [representation] was made in [describe matter within agency jurisdiction, e.g. a federal income tax return].

[Statements] [representations] in [describe matter, (e.g. income tax returns)] are matters within the jurisdiction of the [name agency, (e.g. Internal Revenue Service)] which is an agency of the United States.

[A statement is "false" or "fictitious", if untrue when made, and then known to be untrue by the person making it or causing it to be made.] [A statement or representation is "fraudulent", if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom it was submitted.]

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 6.18.1001B (1992) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 78

The Essential Elements of the Crime Charged
Using a False Document

The crime of [making] [using] a false [writing] [document] in a matter within the jurisdiction of a government agency, as charged in [Count _____ of] the indictment, has three essential elements, which are:

One, the defendant knowingly [made] [used] a materially [false] [fictitious] [writing] [document] in [describe matter within agency jurisdiction, (e.g. support of claimed deductions during an audit conducted by the Internal Revenue Service)];

Two, at the time the defendant did so, he knew that the [writing] [document] contained a materially [false] [fictitious] [fraudulent] [statement] [entry]; and

Three, the defendant did these acts knowingly, voluntarily and intentionally.

[Describe matter, e.g. using a document in support of claimed deductions during an audit] is a matter within the jurisdiction of the [name agency, (e.g. Internal Revenue Service)] which is an agency of the United States.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 6.18.1001C (1992) (modified)

GOVERNMENT PROPOSED Jury Inst. No. 79

The Essential Elements of the Crime Charged

The defendant is charged in [Count _____ of] the indictment with knowingly and willfully [making a materially false statement] [or] [using a document containing a materially false statement] in a matter within the jurisdiction of a government agency or department in violation of Section 1001 of Title 18 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 a materially false statement] [used a writing which contained a materially false statement] in a matter within the jurisdiction of the [e.g., United States Treasury Department];

Second, the defendant knew that the statement was untrue; and

Third, the statement was material to the [United States Treasury Department]'s activities or decisions.

A statement is material if it could have influenced the agency's decisions or activities.

Manual of Model Jury Instructions, Ninth Circuit (1992 Ed.), Section 8.20

GOVERNMENT PROPOSED Jury Inst. No. 80

The Essential Elements of the Crime Charged

Title 18, United States Code, Section 1001, makes it a Federal crime or offense for anyone to willfully make a materially false or fraudulent statement to a department or agency of the United States.

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 knowingly [made a false statement] or [made or used a false document] in relation to a matter within the jurisdiction of a department or agency of the United States, as charged;

Second: That the [false statement] or [false document] related to a material matter; and

Third: That the defendant acted willfully with knowledge of the falsity.

A [statement] or [document] is "false" when [made] or [used] if it is untrue and is then known to be untrue by the person [making] or [using] it. It is not necessary to show, however, that the government agency was in fact deceived or misled.

[The Internal Revenue Service, Department of the Treasury, is an "agency of the United States," and the filing of documents with that agency to affect a matter or investigation concerning federal income taxes is a matter within the jurisdiction of that agency.]**1**

The [making of a false statement] or [use of a false document] is not an offense unless the falsity relates to a "material" fact. A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 29, p. 128

See ***Neder v. United States***, 527 U.S. 1, 15, (1999) (holding that materiality is an essential element of this crime and that the defendant has a constitutional right to have that issue submitted to the jury)

Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.27 (1998).

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Instruction No. 2.96 (2001).

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7206 (2002)

Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, Instruction No. 9.37 (2000).

NOTE

1 Language suggested for use when the Internal Revenue Service is involved.

GOVERNMENT PROPOSED Jury Inst. No. 82

"Conceals or Covers Up by Any Trick, Scheme, or Device -- Defined"
(18 U.S.C. 1001 - First Clause)

The phrase "conceals or covers up by any trick, scheme, or device" means any deliberate plan or course of action, or any affirmative act, or any knowing omission designed to deceive others by preventing or delaying the discovery of information.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.04

GOVERNMENT PROPOSED Jury Inst.No. 83

False, Fictitious or Fraudulent Statements or Representations

A false, fictitious statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

A fraudulent statement or representation is an assertion which is known to be untrue and which is made or used with the intent to deceive.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.08; See also Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 6.18.1001B (1992); ***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit, Instruction No. 29 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 84

False, Fictitious or Fraudulent Statements or Representations

A statement is false or fictitious if untrue when made and then known to be untrue by the person making or causing it to be made.

A statement or representation is fraudulent if known to be untrue, and made or caused to be made with intent to deceive.

Federal Criminal Jury Instructions, Seventh Circuit, Volume III, Chapter 47, pp. 54-5 (1986)

GOVERNMENT PROPOSED Jury Inst. No. 85

Makes or Uses Any False Writing or Document

The phrase "makes or uses any false writing or document" means to create, to bring into existence, or to submit, or to file some type of form, report, or letter, of any kind, which is not true.

A false statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

A fraudulent statement or representation is an assertion which is known to be untrue and which is made or used with the intent to deceive.

Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.12; see also Manual of Criminal Jury Instructions, Eighth Circuit, Instruction No. 6.18.1001C (1992); ***Pattern Jury Instructions, Criminal Cases***, Eleventh Circuit, Instruction No. 29 (1985)

GOVERNMENT PROPOSED Jury Inst. No. 86

Department or Agency of the United States

The [Internal Revenue Service] is an "agency of the United States"; and statements contained in [e.g., an affidavit submitted to an employee of the Internal Revenue Service to affect a matter or investigation concerning federal income taxes] are matters within the jurisdiction of an agency of the United States.**1**

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 28.03 (modified for a tax case)

NOTE

1 Whether a matter is within the jurisdiction of a federal agency or department is a question of law. It is uniformly conceded that the Internal Revenue Service, Department of the Treasury, is a department or agency of the United States within the meaning of 18 U.S.C. § 1001. See 2001 Criminal Tax Manual Section 24.05.

GOVERNMENT PROPOSED Jury Inst. No. 87

"Knowingly" - Defined

A person acts "knowingly", as that term is used in these instructions, if that person acts consciously and with awareness and comprehension and not because of ignorance, mistake or misunderstanding or other similar reason.

A person who makes, submits, or uses a statement or writing which that person believes to be truthful does not "knowingly" make, submit, or use a false, fictitious, or fraudulent statement.

Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.13; see also ***Federal Criminal Jury Instructions of the Seventh Circuit***, Instruction No. 6.04 (1980).

GOVERNMENT PROPOSED Jury Inst. No. 88

"Willfully" - Defined

A person acts "willfully", as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally.

Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 37.14.

GOVERNMENT PROPOSED Jury Inst. No. 89

Material

____A statement is "material" if it has a natural tendency to influence or is capable of influencing the decision of the decisionmaker to whom it was addressed.

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)

O'Malley, Grenig, and Lee, 1A ***Fed. Jury Prac. & Instr.*** § 16.11 (5th ed.)

Pattern Jury Instructions of the First Circuit, Criminal Cases, Instruction No. 4.08 (1998). (elements)

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit (2001 ed.), Instruction No. 2.49. (elements)

Pattern Criminal Jury Instructions for the Seventh Circuit (1998 ed.), p. 201, 18 U.S.C. 1001 (definition)

Eighth Circuit Manual of Model Criminal Jury Instructions (2002 ed.) Sections 6.18.1001A, B, C (elements)

Ninth Circuit Criminal Manual of Model Jury Instructions (Aug.2004) Section 8.66 (elements)

Eleventh Circuit Criminal Pattern Jury Instructions (2003 ed.) Section C-36 (elements)

18 U.S.C. § 1956

GOVERNMENT PROPOSED Jury Inst. No. 90

Elements of the Offense

There are four elements to Count _____ of this indictment which the government must prove:

First, the defendant must knowingly conduct or attempt to conduct a financial transaction;

Second, the defendant must know that the property involved in the financial transaction represents the proceeds of some form of unlawful activity;

Third, the property involved in the financial transaction must, in fact, involve the proceeds of specified unlawful activity; and

Fourth, the defendant must engage in the financial transaction with the intent to engage in conduct constituting a violation of §§ 7201 or 7206 of the Internal Revenue Code of 1986. In this case, [add specific conduct alleged in indictment.]

18 U.S.C. § 1956(a)(1)(A)(ii)

GOVERNMENT PROPOSED Jury Inst. No. 91

Provisions of Statute

Count ____ of the indictment charges the defendant with a violation of Title 18, U.S.C. § 1956(a)(1)(A)(ii). This statute provides in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(ii) with the intent to engage in conduct constituting a violation of §§ 7201 or 7206 of the Internal Revenue Code of 1986 is guilty of an offense against the United States.

18 U.S.C. § 1956(a)(1)(A)(ii)

26 U.S.C. § 7201

GOVERNMENT PROPOSED Jury Inst. No. 92

Tax Evasion -- Offense Charged

The indictment sets forth counts or charges.

Count I charges that the defendant, _____, who during the calendar year 20__ was married and resided at [city], [state], in the _____ District of _____, willfully attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 20__, by causing to be filed with the Director, Internal Revenue Service Center, at _____, _____ , on or about _____, 20__ , a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their joint taxable income for said calendar year was the sum of $_____, and that the amount of tax due and owing thereon was the sum of $_____ ; whereas, as the defendant then and there well knew, their joint taxable income for the said calendar year was the sum of $_____ upon which said taxable income there was owing to the United States of America an income tax of $_____ .

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7201.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.01 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 93

Statute Defining Offense

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

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title * * * shall * * * be guilty (of an offense against the laws of the United States)

26 U.S.C. § 7201

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.02

GOVERNMENT PROPOSED JURY INST. NO. 94

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, 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)

GOVERNMENT PROPOSED JURY INST. NO. 95

Essential Elements of Offense

In order to sustain its burden of proof for the crime of willfully attempting to evade and defeat 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 the defendant [in addition to that declared in the defendant's income tax return][in addition to that paid by the defendant];

Two: The defendant attempted to evade or defeat this [additional] tax as described in the indictment; and

Three: In attempting to evade or defeat such [additional] tax, the defendant acted willfully.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.03

GOVERNMENT PROPOSED JURY INST. NO. 96

Tax Evasion
(26 U.S.C. § 7201)

Title 26, United States Code, Section 7201, makes it a crime for anyone to willfully attempt to evade or defeat the payment of federal income tax. "Willfully" means with intent to violate a known legal duty.

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 20__ income tax return because he [e.g. failed to report income];

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

Third: That when the defendant filed his 20__ 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 it must be established beyond a reasonable doubt that the accused knowingly attempted to evade or defeat some substantial portion of the additional tax.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, § 2.88, p. 201

GOVERNMENT PROPOSED JURY INST. NO. 97

Income Tax Evasion
(26 U.S.C. § 7201)

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 20__ than was declared due on the defendant's income tax return;

Second: the defendant knew that [he][she] owed more federal income tax than was declared due on the defendant's income tax return; and

Third: The defendant [insert what the defendant did as indicated by the evidence] with the intention of defrauding the government of taxes owed.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 9.06A

GOVERNMENT PROPOSED JURY INST. NO. 98

Tax Evasion (General Charge)
(26 U.S.C. § 7201)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 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 that declared in his tax return; and

Second: That the defendant knowingly and willfully attempted to evade or defeat that tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of the additional tax as charged.

The word "attempt" contemplates that the defendant had knowledge and an understanding that, during the particular tax year involved, he had income which was taxable, and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which he knew he had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for

performing services. The tax is also levied upon 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.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common nontaxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1, p. 229

GOVERNMENT PROPOSED JURY INST. NO. 100

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 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.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, Instruction No. 2.88, p. 201 (modified)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Sections 56.08 and 56.23 (modified)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1 (portion)

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

NOTE

1 The 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*** (1990 Ed.), Section 9.06A Comment

GOVERNMENT PROPOSED JURY INST. NO. 101

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.24.

GOVERNMENT PROPOSED JURY INST. NO. 102

To "Attempt to Evade or Defeat" a 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 the 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 the defendant also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.04

Manual of Model Criminal Jury Instructions, Eighth Circuit (1992 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)

GOVERNMENT PROPOSED JURY INST. NO. 103

Willfulness

To find the defendant guilty of violating Section 7201, 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 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 alterations, 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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (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.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), *cert. denied*, 449 U.S. 1012 (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 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 2001 Criminal Tax Manual Section 8.06[3].

GOVERNMENT PROPOSED JURY INST. NO. 106

"Willfully" -- To Act or to Omit

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

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

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified).

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 For examples of conduct from which willfulness may be inferred, see 2001 Criminal Tax Manual Section 8.06[3].

GOVERNMENT PROPOSED JURY INST. NO. 107

Knowledge of Falsehood
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

The element of knowledge may be satisfied by inferences drawn from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you to as to whether you find any deliberate closing of the eyes and what inferences should be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of willfulness or knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 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), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See*, e.g., ***United States v. 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).

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.

2 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.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provided that the element of knowledge was established if the defendant was "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit), because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. 109

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].

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.23

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. 110

Failure to Collect or Pay Over Tax -- 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 _____, who conducted a business as a sole proprietorship **1** under the name and style of _____, with its principal place of business in _____, and who, during the _____ quarter **2** of the year 20__ , ending _____, 20__ , deducted and collected from the total taxable wages of his [her] employees federal income taxes and Federal Insurance Contributions Act taxes in the sum of $_____, did willfully fail to truthfully account for and pay over to the Internal Revenue Service said federal income taxes withheld and Federal Insurance Contributions Act taxes due and owing to the United States of America for the said quarter ending _____, 20__ .

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7202.

NOTES

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

2 Designate appropriate quarter.

GOVERNMENT PROPOSED JURY INST. NO. 111

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

GOVERNMENT PROPOSED JURY INST. NO. 112

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 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. 113

Obligation to File

The government must prove that the business in question had employees to whom it paid wages.

The law requires every employer of labor to deduct and withhold income taxes from the wages paid to employees.

The law also imposes on the income of every individual a tax equal to a specified percentage of his or her wages received with respect to employment as a contribution to his or her insurance

under Social Security and related programs. The employer is required under the law to collect this tax by deducting the amount of the taxes from the wages as and when paid.

Every employer therefore must deduct withholding taxes and Social Security taxes from the wages of its employees and is required to file for each calendar quarter a Form 941, Employer's Federal Quarterly Tax Return, reflecting such withholding of income and Social Security taxes and said return must be filed on or before the last day of the first calendar month following the period for which it is made. For example, a return for the first calendar quarter of a year would cover the period from January 1 through March 31 and must be filed before April 30.

26 U.S.C. §§ 3101, 3102(a) -- F.I.C.A. taxes; 3402(a) -- Withholding; 3403 -- Employer liable for tax

26 C.F.R. §§ 31.6071(a)- 1, 31.6011(a)-1 (1993)

Slodov v. United States, 436 U.S. 238, 242 (1978)

COMMENT

1 See ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970), for an explanation of an employer's duty and specifically the meaning of "collect."

GOVERNMENT PROPOSED JURY INST. NO. 115

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, and 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] was in a decision-making role and had the authority and duty to assure that withholding taxes and social security taxes are paid and when. The test as to who is responsible and who is not ultimately becomes one of who on behalf of the employing entity had significant control over the financial decision-making process within the employment entity as would give him [her] 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. § 7343 -- Definition of Term "Person"

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

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

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.), *cert. denied*, 423 U.S. 915 (1975)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

Pacific National Insurance v. United States, 422 F.2d 26, 30, 31 (9th Cir.), *cert. denied*, 398 U.S. 937 (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)

COMMENT

1 In ***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), the court cites cases for the use of the following criteria 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. 117

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.), *cert. denied*, 400 U.S. 821 (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. 118

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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1 (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.

26 U.S.C. § 7203

GOVERNMENT PROPOSED JURY INST. NO. 120

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.

Devitt, Blackmar, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.09

GOVERNMENT PROPOSED JURY INST. NO. 122

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.10 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 123

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.11

NOTES

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 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. 124

Failure to File -- Offense Charged

The defendant, _____, is accused of failing to file an income tax return for the year _____.

It is against federal law to fail to file a required income tax return. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ received income of [state applicable dollar amount] or more between January 1 and December 31 of [year].

Second, that _____ failed to file an income tax return as required by [April 15, 20__].

Third, that _____ knew he was required to file a return.

Fourth, that _____ failed to file on purpose, and not as a result of carelessness.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1991 Supp.), Section FJC 115 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 125

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

Title 26, United States Code, Section 7203, makes it a crime for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations. "Willfully" means with intent to violate a known legal duty.

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 received income of [state applicable dollar amount] or more between January 1 and December 31 of 20__;

Second: That the defendant failed to file an income tax return as required by [state applicable deadline date, e.g., April 15, 20__];

Third: That the defendant knew he was required to file a return; and

Fourth: That the defendant's failure to file was on purpose, and not as a result of accident, negligence or inadvertence.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, No. 2.89

GOVERNMENT PROPOSED JURY INST. NO. 126

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] [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__; and

Third, the defendant's failure to [file an income tax return] [pay the tax] was willful and not the result of accident or negligence.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1991 Supp.), Section 9-183 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 127

Failure to File Tax Return -- Offense Charged

Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations.

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 was required by law or regulation to make a return of his income for the taxable year charged;

Second: That the Defendant failed to make a return at the time required by law; and

Third: That the Defendant's failure to make the return was willful.

A person is required to make a federal income tax return for any tax year in which he has gross income in excess of _____.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1991 Supp.), Section 11-147

GOVERNMENT PROPOSED JURY INST. NO. 128

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, commission 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 calendar year 20__ exceeded $_____, even though that person may be entitled to deductions from that income so that no tax is due.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.12

GOVERNMENT PROPOSED JURY INST. NO. 129

The Requirement to File a Tax Return

A single person [under] [over] sixty-five years old was required to file a federal income tax return for the year(s) [insert years charged] if he [she] had gross income in excess of [insert amount].

A married individual who was required to file a federal income tax return for the year(s) _____, if he [she] had a separate gross income in excess of $_____, and a total gross income, when combined with that of his or her spouse, in excess of $_____ where [either] [both] [is] [are] [over] [under] sixty-five years old. **1**

Gross income includes the following: [Compensation for services, including fees, commissions and similar items] [Gross income derived from business] [Gains derived from dealings in property] [Interest] [Rents] [Royalties] [Dividends] [Alimony and separate maintenance payments] [Annuities] [Income from life insurance and endowment contracts] [Pensions] [Income from discharge of indebtedness] [Distributive share of partnership gross income] [Income in respect of a decedent] and [Income from an interest in an estate or trust]. **2**

The fact that a person may be entitled to deductions from income in sufficient amount so that no tax is due does not affect that person's obligation to file.

The government is not required to show that a tax was due and owing or that the defendant intended to evade or defeat the payment of taxes, only that he [she] willfully failed to file a return.

If you find beyond a reasonable doubt that the defendant had the required gross income in [insert year], then the defendant was required to file a tax return on or before [insert date, e.g. April 15, 20__].

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.12 *NOTES.*

NOTES

1 This paragraph should be tailored in accordance with 26 U.S.C. § 6012(a)(1)(iv) if there is any question as to whether the defendant was entitled to file a joint return, the defendant had the same household as his or her spouse at the end of the tax year, the defendant's spouse did not file a separate return for the year, or the taxpayer could not be claimed as a dependent by another taxpayer. In addition, where more than one year is charged and the gross income amount requiring that a return be filed differs in amount, it will be necessary to set forth the appropriate gross income for each of the years in issue. Note also that gross income requirements may vary

from year to year depending on the amount allowed as an exemption, the age of the defendant, and, in the case of a married defendant, the age of the spouse. 26 U.S.C. § 6012

2 The instruction should be simplified by eliminating sources of income not shown by the evidence.

GOVERNMENT PROPOSED JURY INST. NO. 131

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

NOTE

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)

Note that the statutory due dates should be adjusted so as to account for any extensions of time for filing a return.

GOVERNMENT PROPOSED JURY INST. NO. 132

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).

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. 133

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)

NOTE

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, 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. 134

Good Faith Belief Defense -- Failure to File

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 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.

It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] own belief that such 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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.26 (modified)

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

United States v. Murdock, 290 U.S. 389, 396 (1933)

United States v. Mueller, 778 F.2d 539, 541 (9th Cir. 1985)

United States v. Aitken, 755 F.2d 188 (1st Cir. 1985)

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)

NOTE

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, 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. 136

Willfulness -- Good Faith Belief Defense

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 willfully committed.

The term willfully 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 return **1** or an accidental, inadvertent, careless, negligent, or even grossly negligent failure to file such return.

United States v. Wilson, 550 F.2d 259, 260 (5th Cir. 1977)

NOTE

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, 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. 138

Willfulness -- Failure to File/Good Faith Belief Defense

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)

NOTE

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, 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. 140

Willfulness -- Failure to File/Good Faith Belief Defense

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 such 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)

NOTE

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, 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 INSTRUCTION NO. 142

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 taxpayer must assert the privilege specifically in response to particular questions and demonstrate real dangers of incrimination. **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].

NOTES

1 ***Garner v. United States***, 424 U.S. 648, 662-62 (1976); ***United States v. Malquist***, 791 F.2d 1399, 1401-02 (9th Cir.), *cert. denied*, 479 U.S. 954 (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. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***Stubbs v. United States***, 797 F.2d 936, 983 n. 2 (11th Cir. 1986) (Fifth Amendment does not protect against remote and speculative possibilities). *See also* ***United States v. Saussy***, 802 F.2d 849, 855 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (citing ***United States v. Albertson v. SACB***, 382 U.S. 70 (1965)).

GOVERNMENT REQUESTED JURY INSTRUCTION NO. 144

Tax Return Must Contain Sufficient Information

A taxpayer's return which does not disclose sufficient information from which tax liability can be calculated is not a tax return within the meaning of the Internal Revenue Code or the regulations adopted by the Secretary of the Treasury. **1** Therefore, a tax form that contains no information about the defendant's tax status is not a return. **2**

NOTES

1 ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984); ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979); ***United States v. Edelson***, 604 F.2d 232, 234 (3d 1979); ***United States v. Reed***, 670 F.2d 622, 623-624 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984); ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (en banc); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 F.2d 954 (1986); ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983); ***United States v. Brown***, 600 F.2d 248, 251-252 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979).

2 ***United States v. Klee***, 494 F.2d 394, 397 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). *See also* ***United States v. Saussy***, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987)

26 U.S.C. § 7205

GOVERNMENT PROPOSED JURY INST.NO. 145

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], a resident of [City], [State], and who 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, on or about the date of the commencement of employment by [Name of Employer], 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]. **1**

Count II charges that * * * .

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

26 U.S.C. § 7205

NOTE

1 The 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. 146

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 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. 147

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 failed to supply the 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.), *cert. denied*, 439 U.S. 896 (1978)

GOVERNMENT PROPOSED JURY INST. NO. 148

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.

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 (1993)

NOTE

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. 149

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 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

GOVERNMENT PROPOSED JURY INST. NO. 150

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 the defendant has filed 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 no Federal income tax was owed for the tax year prior to the filing of the Form W-4 and that the individual does not expect to owe any Federal income tax for the year of the filing of the Form W-4. 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, 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)

GOVERNMENT PROPOSED JURY INST. NO. 152

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.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Sections 16.06 (False -- Defined); 16.08 (Fraudulent -- Defined); 28.04 (modified)

United States v. Buttorff, 572 F.2d 619, 625 (8th Cir.), *cert. denied*, 437 U.S. 906 (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), *cert. denied*, 415 U.S. 978 (1974)

GOVERNMENT PROPOSED JURY INST. NO. 153

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 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 prohibits, that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (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 2001 Criminal Tax Manual Section 8.06[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. 154

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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 35.14 (modified)

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

26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. 155

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_____, 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 said [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)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.13

GOVERNMENT PROPOSED JURY INST. NO. 156

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 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)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.14

GOVERNMENT PROPOSED JURY INST. NO. 157

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

The gist of the offenses charged in Counts _____and _____ of the indictment is the willful making and subscribing by the defendant of his [her] [joint] individual income tax return[s] for the years _____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)

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

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

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

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

Hoover v. United States, 358 F.2d 87, 88 (5th Cir. 1966), *cert. denied*, 385 U.S. 822 (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), *cert. denied*, 459 U.S. 1018 (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)

United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982)

NOTE

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.), *cert. denied*, 459 U.S. 1018 (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.

GOVERNMENT PROPOSED JURY INST. NO. 159

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

Now, to prove the charge that is contained in each of these (three) 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.), *cert. denied*, 459 U.S. 1018 (1982), with the court "finding that the charge as a whole covered the essential elements of the offense (Sec. 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)

GOVERNMENT PROPOSED JURY INST. NO. 160

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 filed a tax return knowing that it contained false information as to a material matter; and

Second, that the defendant acted willfully and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.06D (1989)(modified)

GOVERNMENT PROPOSED JURY INST. NO. 161

False Return - Essential Elements
(False Income Tax Return)

Title 26, United States Code, Section 7206(1), makes it a federal crime or offense for anyone to willfully file a Federal income tax return knowing it to be false in some material way.

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

First: That the Defendant filed an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully, as charged.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 75 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 162

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

To convict a defendant, the government must prove each of the following three elements beyond a reasonable doubt:

1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;

2. that the return contained a written declaration that it was made under the penalties of perjury; and

3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.

The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.07D (1989)

The above instruction is quoted in ***United States v. Hedman***, 630 F.2d 1184, 1196 n.6 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), with the court commenting: "We therefore conclude

that the trial court properly instructed the jury with respect to the tax counts (Sec. 7206(1)) alleged in the indictment." ***Hedman***, 450 U.S. at 1196.

COMMENT

1 The opinion in Hedman is confusing. In the body of the opinion, the court states that false statements relating to gross income, irrespective of the amount, constitute material misstatements. But the jury instruction approved by the court requires the government to prove that the understatement was substantial. ***Hedman***, 630 F.2d at 1196 & n.6.

GOVERNMENT PROPOSED JURY INST. NO. 165

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

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th. Ed. 1990), Section 56.22

Cashio v. United States, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)

United States v. Wainwright, 413 F.2d 796, 802 n.3 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

United States v. Carrodeguas, 747 F.2d 1390, 1396 (11th Cir. 1982), *cert. denied*, 474 U.S. 816 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 166

Subscribed-Defined

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.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 and 6.26.7206 (1989)

GOVERNMENT PROPOSED JURY INST. NO. 167

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.

O'Malley, Grenig, and Lee, ***Federal Jury Practice And Instructions*** (5th ed. 2005), Section 16.11

GOVERNMENT PROPOSED JURY INST. NO. 170

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.

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

United States v. Taylor, 574 F.2d 232, 235-236 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978)

United States v. Cohen, 544 F.2d 781, 783 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977)

GOVERNMENT PROPOSED JURY INST. NO. 171

Material Matter -- Gross Income

I instruct you that gross income is a material matter as required under Section 7206(1).

United States v. Wilson, 887 F.2d 69, 75 (5th Cir. 1989)

United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)

United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987)

United States v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983)

United States v. Gaines, 690 F.2d 849, 857-858 (11th Cir. 1982)

See also, United States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990)

GOVERNMENT PROPOSED JURY INST. NO. 172

Material Matter -- Deductions

I instruct you that personal deductions are material matters as required under Section 7206(1).

United States v. Damon, 676 F.2d 1060, 1064 (5th Cir. 1982) -- business loss deductions, Sec. 7206(2), but applicable to Sec. 7206(1)

United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976)

GOVERNMENT PROPOSED JURY INST. NO. 173

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. On the other hand, if you find that none of these items was material and falsely reported on the defendant's return, then you should acquit the defendant.

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

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) and ***Neder v. United States***, 527 U.S. 1, 15 (1999).

GOVERNMENT PROPOSED JURY INST. NO. 174

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).

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1990), Section 56.19

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

United States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)

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 ***Sansone v. United States***, 380 U.S. 343, 352 (1965) -- re Sec. 7207 but materiality language of Secs. 7207 and 7206(1) is identical.

GOVERNMENT PROPOSED JURY INST. NO. 175

Proof of Tax Deficiency Not Required

It is not necessary that the Government be deprived of any tax by reasons of the filing of the return, or that it even be shown that additional tax is due to the Government, only that the Defendant willfully filed a false return.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 176

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.

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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (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.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (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 2001 Criminal Tax Manual Section 8.06[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. 179

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, truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he 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)

NOTE

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).

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.

26 U.S.C. § 7206(2)

GOVERNMENT PROPOSED JURY INST. NO. 181

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 return **1** [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 **1** it was represented that the said taxpayer **2** was entitled under the provisions of the internal revenue laws [to claim deductions **3** in the total sum of $_____ ;] whereas, as the defendant then and there well knew and believed, the [total deductions] **3** which the said taxpayer **2** 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).

NOTES

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). In such instances, the instruction should be modified accordingly.

2 The above instruction encompasses a situation when the defendant is not the taxpayer, 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 which refer to the "taxpayer."

3 The above instruction is framed in terms of false deductions. If income or other items are 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. 183

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)

NOTE

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

GOVERNMENT PROPOSED JURY INST. NO. 184

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 return **1** that is false or fraudulent as to a 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. Perez, 565 F.2d 1227, 1233-34 (2d Cir. 1977)

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. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990)

United States v. Crum, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976)

NOTE

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

GOVERNMENT PROPOSED JURY INST. NO. 186

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. 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), *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 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. 187

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), *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 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. 189

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.

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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (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.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (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 8.06[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. 192

"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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (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. 193

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.

[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)

GOVERNMENT PROPOSED JURY INST. NO. 194

Good Faith Belief of Defendant

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 preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

United States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989)

United States v. Kouba, 822 F.2d 768, 771 (8th Cir. 1987)

United States v. Holecek, 739 F.2d 331, 336 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985)

COMMENT

1 See also instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

26 U.S.C. § 7206(4)

GOVERNMENT PROPOSED JURY INST. NO. 195

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 is imposed, **1** with the intent to evade or defeat the assessment or collection of said tax.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), Section 38.01 (modified)

NOTE

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. 196

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. 197

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 authorized;

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

Four: With the intention to evade and defeat the collection of the assessed taxes.

26 U.S.C. § 7206(4)

See also Section 14.03, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 198

Concealing Property -- Levy Authorized

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

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 * * * for the payment of such tax. * * *

Certain property, however, 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. 202

Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about the _____ day of _____, 19 __, in the _____ District of _____, in connection with [an offer of 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)

GOVERNMENT PROPOSED JURY INST. NO. 203

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. 204

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. 205

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 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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (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.), cert. denied sub nom., ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (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 8.06[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. § 7207

GOVERNMENT PROPOSED JURY INST. NO. 208

False Document -- Offense Charged

The information or 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 _____ 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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.16 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 209

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

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 210

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

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

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.18 (modified in light of ***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))

GOVERNMENT PROPOSED JURY INST. NO. 216

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO. 217

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.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (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.), *cert. denied sub nom.*, ***Storm v. United States***, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (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 8.06[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)

GOVERNMENT PROPOSED JURY INST. NO. 220

Statute Defining Offense

Count _____ of the indictment charges the defendant with violating Section 7212(a) of the Internal Revenue Code. Section 7212(a) of the Internal Revenue Code provides, in pertinent part, as follows:

Whoever * * * in any * * * way corruptly * * * obstructs or impedes, or endeavors to obstruct or impede the due administration of this title, [shall be guilty of an offense against the United States].

26 U.S.C. § 7212(a)

GOVERNMENT PROPOSED JURY INST. NO. 221

Essential Elements of Section 7212(a)

The government must establish the following three essential elements beyond a reasonable doubt to establish a violation of the offense charged in Count ____ of the Indictment:

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. Williams, 644 F.2d 696, 699 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981) ("Laws" substituted for "Code" for ease of understanding.)

GOVERNMENT PROPOSED JURY INST. NO. 222

Definition of "Endeavor"

To "endeavor" is to undertake an act or to 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.

Instruction used in ***United States v. Dykstra***, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993), relying on definition of endeavor used in an obstruction case, ***United States v. Silverman***, 745 F.2d 1386, 1393, 1396 n. 12 (11th Cir. 1984).

GOVERNMENT PROPOSED JURY INST. NO. 223

Endeavor - Defined

The term "endeavors" as used in these instructions means to knowingly and deliberately act or to knowingly and deliberately make any effort which has a reasonable tendency to bring about the desired result.

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

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 41.05

United States v. Martin, 747 F.2d 1404, 1409 (11th Cir. 1984)

United States v. Williams, 644 F.2d 696, 699 n.14 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981)

GOVERNMENT PROPOSED JURY INST. NO. 224

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. Reeves, 752 F.2d 995, 1001 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985)

United States v. Dykstra, 991 F.2d 450, 453 (8th Cir.), *cert. denied*, 114 S. Ct. 222 (1993)

United States v. Yagow, 953 F.2d 423, 427 (8th Cir. 1992)

United States v. Popkin, 943 F.2d 1535, 1540 (11th Cir. 1991); *cert. denied*, 112 S. Ct. 1760 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 225

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. 226

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.

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 delivery of 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 said taxes in a separate bank account in trust for the United States, by the dates and in the amounts hereinafter specified:

COUNT DATE WAGES DATE DEPOSIT AMOUNT OF DEPOSIT

PAID REQUIRED REQUIRED

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. 228

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 notice **1**, 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 7512 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

NOTE

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 this 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. 230

Essential Elements of Offense

The essential elements of the offense charged in Count ____ of the 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 the 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 _____;]

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 information [indictment] 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 information [indictment], 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), *cert. denied*, 430 U.S. 967 (1977)

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

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

GOVERNMENT PROPOSED JURY INST. NO. 232

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 withheld by their employer 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, it is meant 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., para. 9270, pp. 86,046-86,048; 27 A.F.T.R.2d 865, 866-868 (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. 233

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

In order to be found guilty of the offenses charged in the information [indictment], 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.), *cert. denied*, 423 U.S. 915 (1975)

Pacific National Insurance v. United States, 422 F.2d 26 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

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

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)

GOVERNMENT PROPOSED JURY INST. NO. 234

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.), *cert. denied*, 444 U.S. 842 (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., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 869 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 235

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 would not necessarily relieve the defendant of his [her] responsibility.

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (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. 86,047; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

GOVERNMENT PROPOSED JURY INST. NO. 236

Proof of Exact Amounts Not Required

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

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

GOVERNMENT PROPOSED JURY INST. NO. 237

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. This can be illustrated by an employer who has gross payroll requirements of $1,000, with respect to which he [she] is required to withhold $100 of income taxes. If such an employer had on hand only $900 and paid out this entire amount in wages, withholding and depositing nothing, the fact that the net wages due equaled this amount 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, would, however, qualify under this exception if it were due to circumstances beyond the person's control. Examples of factors which might result in a lack of funds constituting circumstances beyond the control of the person after, but not immediately after, the payment of wages and within the period before the time the person was required to deposit the funds are 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. 1182, 85th Cong., 2d Sess. ((1958) 2 U.S. Code Cong. & Ad. News 2187, 2191-2192)

Methods of Proof

GOVERNMENT PROPOSED JURY INST. NO. 239

Specific Items Method of Proof
(Unreported Income)

To establish the first element of the offense charged, namely, the receipt by the defendant of unreported income upon which a substantial amount of tax was due and owing, the government has presented evidence under the "specific items" method of proof. The "specific items" method simply consists of offering evidence of particular or specific amounts of taxable income received by the defendant during a particular tax period, with evidence that the defendant did not include such amounts in his [her] tax return for such period, together with evidence concerning the defendant's knowledge of the omission and his [her] intent and willfulness in attempting to evade payment of tax by the omission.

United States v. Beck, 59-2 U.S.T.C., para. 9486, p. 73,115 (W.D. Wash. Feb. 19, 1959), *aff'd in part and rev'd in part on other grounds*, 298 F.2d 622 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962)

GOVERNMENT PROPOSED JURY INST. NO. 240

Specific Items Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he reported on his income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income omitted from his tax return, the government in this case has introduced evidence of [describe the specific items 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 the defendant received substantial income in addition to what he reported on his income tax return for the year in question, then you must decide whether, as a result of the defendant's additional, unreported income, there was tax due in addition to what was shown to be due on the return. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional 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 the defendant received substantial additional income and that, as a result of this additional income, there was tax due in addition to what was shown to be due on his income tax return, then this first element has been satisfied.

2 L. Sand, et al., Modern Federal Jury Instructions, (1993 Ed.), Instruction 59-5

GOVERNMENT PROPOSED JURY INST. NO. 241

Net Worth Method of Proof

Theory

To establish the understatement of tax for the evasion counts for the years ____, ____, and ____, the government relies upon proof by the so-called net worth method. I should explain that a person's "net worth" is the difference between his assets and his liabilities at any given date. It is the difference between what he [she] owns and what he [she] owes at that time. If a person has more assets at the end of the year than at the beginning of the year and if that person's liabilities remain the same or decrease, then his [her] net worth has obviously increased. However, only the cost price of the assets is to be considered. Mere increases in market value that have not been realized must not be taken into account.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint net worth and expenditures.] **1**

The theory of the net worth method of proof is that if the government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it, has increased during the taxable year, then it may be inferred that the defendant had receipts of either money or property during the year; and if the government satisfies you beyond a reasonable doubt that the defendant had a source of taxable income and that the receipts did not come from nontaxable sources, then you may find that the receipts constituted taxable income to the defendant.

If you also find that the government proved that the defendant spent money on items that did not add to the defendant's net worth at the end of the year (items such as living expenses and taxes), then it may be inferred that those expenditures also came from funds received during the year. Consequently, such expenditures also may be taken into account in determining the amount of the defendant's taxable income for the year, provided they were not deductible expenditures which the defendant was entitled to claim as deductions in computing taxable income on his [her] return.

In this case the government has undertaken to prove what the defendant was worth at the beginning of each year involved and what he [she] was worth at the end of that year, so as to

show that his [her] net worth increased during the year. The government also has introduced other evidence, which, if you believe it, would tend to establish money paid out by the defendant for such non-deductible items as federal income taxes, living expenses, and other personal expenditures.

The government claims that the sum of the defendant's net worth increases and non-deductible expenditures for each year, less adjustments, as shown by the government's evidence, represents the defendant's correct taxable income for that year. The resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return.

As I have already told you, an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. So you must consider the evidence as to each year separately in arriving at your verdict.

Opening Net Worth

Now, I want to point out to you that, because the net worth method of proving unreported income involves a comparison of the beginning and ending net worth of the defendant in each prosecution year, the result cannot be correct unless the beginning point, or the opening net worth, is reasonably accurate. You will readily appreciate that if, at the beginning point, the defendant actually owned substantial assets that the government has failed to include in its computations, apparent increases in net worth during the indictment years may be no more than he disclosure of money previously saved or the result of a change in the form of other assets that the defendant owned at the beginning of the year and that the government did not take into account. For example, a taxpayer might have had a substantial amount of cash on hand (not in a bank) which he [she] **1** had saved up in prior years and which he [she] used to acquire assets or make purchases or other expenditures during a prosecution year. In that case, an apparent increase in the defendant's net worth might be only the result of a conversion of prior accumulated cash into tangible property. Similarly, cash on hand accumulated from prior years may have been used to make non-deductible expenditures. You must, therefore, in order to convict, be satisfied that the government's evidence establishes an opening net worth with reasonable certainty as of the beginning of the year.

On the other hand, the government is not required to refute all possible speculation that, at the beginning of the year, the defendant might have had assets the investigation failed to disclose; nor is the government required to prove the exact cost of the assets owned by the defendant at the starting point or the precise amount of his [her] undeposited cash on hand. It is enough if the government, although unable to determine the exact cost of the assets owned by the defendant at the beginning of the year, can show beyond a reasonable doubt that such assets were insufficient to account for the subsequent increases in the defendant's net worth.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case the government has endeavored to prove that the defendant (and his [her] spouse) **1** did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by [e.g., tracing the financial and income tax return filing history of the defendant (and his spouse) and by introducing in evidence the defendant's own statements.] The evidence introduced by the government of the defendant's [income tax returns and] financial history in years prior to those named in the indictment may be considered by you only for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down all "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his [her] representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth included all of the defendant's assets. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, then such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will return a verdict of not guilty as to any such count of the indictment.

If you find as to any year that the funds reflected in increased net worth and expenditures are not substantially in excess of the income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of the reported income, then you will return a verdict of not guilty as to any such count of the indictment.

If you find, on the other hand, that the government has established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you also are convinced beyond a reasonable doubt that the funds reflected in increased net worth and expenditures during such year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented taxable income on which the defendant willfully attempted to evade or defeat the tax.

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's increased net worth and non-deductible expenditures arose from taxable, rather than nontaxable, sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, legal or illegal, carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources or that the funds did not come from nontaxable sources. In other words, the government must establish either a likely source of income from which you believe the net worth increases and expenditures sprang, or that nontaxable sources of income have been negated as a source of the net worth increases and expenditures.

If you find that the defendant offered timely explanations of the source of his funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations to prove the source of his net worth, for, as I have said, the burden is on the government to prove that the increases arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Koskerides, 877 F.2d 1129, 1137 (2d Cir. 1989)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 Where the defendant was married and filed joint returns and the net worth computation reflects a joint net worth, then appropriate language should be used in the instruction. This would also apply where both a husband and wife are charged.

GOVERNMENT PROPOSED JURY INST. NO. 247

The "Net Worth Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of the defendant for the year[s] , the government has relied upon proof by the so-called "net worth method" of determining income for that particular period. This "net worth method," if used correctly, is an indirect or circumstantial way to reliably determine income.

A person's "net worth" is the difference between that person's total assets and total liabilities on any given day. Said another way, a person's net worth is the difference between what a person owns and what that person owes at any particular time. If a person had more assets at the end of the year than at the beginning of that year, and if that person's liabilities remained the same during that same year, then that person's net worth has increased.

In determining net worth, however, only the cost price of the defendant's assets is to be considered. Mere increases in market value that have not been actually realized through sale or conversion into cash must not be taken into account in computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth,

computed in this manner, has increased during the year[s] in question, then the jury may find that the defendant had receipts of either money or property during that year. If the evidence in the case also establishes beyond a reasonable doubt that the defendant had one or more sources of taxable income and that the receipts just referred to did not come from taxable income, then the jury may find that such receipts constituted taxable income to the defendant during that period.

To show that the defendant's net worth increased in this case, the government has undertaken to prove the defendant's net worth at the beginning of the year 20__ , and also attempted to prove the defendant's net worth at the end of that same year. The government also has introduced evidence in an effort to prove that the defendant paid out various amounts of money during the taxable year for such non-deductible items as personal and living expenses.

Because the "net worth method" of determining income involves a comparison of the net worth of the defendant at the beginning and again at the end of the year in question, the result cannot be accepted as correct unless this starting net worth figure, the beginning point, is reasonably accurate. Although the government is not required to prove the exact value of each and every asset owned by the defendant at the starting point, the evidence must establish beyond a reasonable doubt that all assets owned by the defendant at the starting point were not sufficient to account for any subsequent increase in the defendant's net worth. Said another way, the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus the defendant's reported income for that same taxable year, do not add up to an amount sufficient to account for the increases in net worth plus non-deductible expenditures during that same year.

The government contends that any increases in the net worth of the defendant during the taxable year 20__ , plus any non-deductible expenditures by the defendant for that year as shown by the evidence in the case, represent the defendant's true and correct net income for that year. These resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return for the calendar year 20__ .

The burden is always upon the government to establish beyond a reasonable doubt that any amounts reflected in defendant's increased net worth plus non-deductible expenditures were from taxable, rather than non-taxable, sources. In this regard, you are instructed that federal income tax is levied on income derived from compensation for personal services of every kind, and in whatever form paid, as well as on income from interest, dividends, gains, profits, and certain other items not pertinent to this case.

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no federal income tax is levied on such funds or property, such funds or property do not need to be reported as income. Non-taxable funds or non-taxable property include such items as gifts, inheritances, the proceeds of life insurance policies, and certain other items not pertinent to this case.

If it appears from the evidence in the case that during the course of the investigation of his [her] income tax return and before the trial of this case, the defendant offered to Treasury agents certain explanations of the sources of certain funds or property and these sources of funds or property were reasonably capable of being checked and verified by Treasury agents, the government may not unreasonably disregard such explanations. In evaluating the evidence in this case you may take into consideration any failure of the government to reasonably investigate the truth of any such explanations as well as the trustworthiness of the explanations provided.

On the other hand, the government is not required, without suggestion or explanation from the defendant _____, to investigate every conceivable source of non-taxable funds. If it appears from the evidence in the case that the defendant did not provide an explanation as to the source or sources of any increase in his [her] net worth, then the jury may consider such failure as one of the circumstances in evidence in the case, bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty to offer or produce any evidence. The burden is always upon the government to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including the claim that any increase in the defendant's net worth was from taxable sources.

If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable degree of certainty at the beginning of the year 20__ , then the jury should find the defendant not guilty. If the jury should find that any increase in net worth is not substantially in excess of the income reported by the defendant on his [her] return for 20__ , then the jury should find the defendant not guilty.

On the other hand, if the evidence in the case establishes beyond a reasonable doubt the amount of the net worth of the defendant as of the beginning of the calendar year 20__ , and further establishes beyond a reasonable doubt that funds reflected in any increased net worth, plus the defendant's expenditures, during the same year substantially exceed the income reported on the defendant's tax return, the jury should then proceed to determine whether the evidence in the case also establishes beyond a reasonable doubt that such additional funds represented taxable income, and then proceed to determine whether the government has proven that the defendant acted willfully in attempting to evade or defeat the additional tax, as charged in Count ___ of the indictment.

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions*** - Criminal (4th Ed. 1990), § 56.05, pp. 987-990.

GOVERNMENT PROPOSED JURY INST. NO. 254

Net Worth Method

In this case the government relies upon the so-called "net worth method" of proving unreported income.

A person's "net worth" at any given date is the difference between his total assets and his total liabilities on that date. It is the difference between what he owns and what he owes (measuring the value of what he owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes, and other expenditures, which did not add to his net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and his net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the defendant at that time were insufficient by themselves to account for the subsequent increases in his net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's net worth was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed net worth of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the defendant or which otherwise arose during the investigation concerning other assets the defendant had at the beginning of the year (or other nontaxable sources of income he had during the year), then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the defendant's net worth at the beginning of the tax year and further establishes that any increase in his net worth at the end of that year, together with his nondeductible expenditures made during the year, did substantially exceed the amount of income

reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.2, pp. 231-233.

GOVERNMENT PROPOSED JURY INST. NO. 259

Expenditures Method of Proof

Theory

The government has introduced evidence of the expenditures method of proof to establish that the taxable income reported by the defendant on his [her] income tax returns is not true and correct. By this method, the government seeks to establish that the defendant **1** spent an amount greater than the amount reported on his [her] income tax returns as being available for spending. In other words, the government claims that the defendant could not have spent the amount that he [she] did in a given year unless he [she] had more income than the defendant reported on his [her] return for that year.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint expenditures.] 1

Under this method, the first step is to add up and total the amounts that the defendant spent during a given year. The next step is to subtract from the total amount spent: (1) any funds that the defendant had on hand at the beginning of the year which were spent during the year; (2) any monies received by a conversion into cash of assets that were on hand at the beginning of the year; and (3) any nontaxable funds received during the year.

The government claims that a reasonable approximation of the taxable income the defendant should have reported is the amount remaining after personal deductions, exemptions, and adjustments are subtracted from the defendant's income computed on the basis I have just explained to you.

Opening Net Worth

Now, I want to go over some of the points I have just mentioned. As I previously said, under the expenditures method you subtract from the total amount spent any funds the defendant had on hand at the beginning of the year and any monies received by converting into cash assets that were on hand at the beginning of the year. Another way of saying this is that a starting point or

opening net worth must be established so that the defendant is not improperly charged with spending that reflects only what he [she] earned or had from prior years.

You will readily appreciate that if the defendant actually owned substantial assets at the beginning point which the government has failed to consider in its computations, apparent spending of income during the indictment years may be no more than the disclosure of money previously saved or the result of a conversion into cash of assets the defendant owned at the beginning of the year.

For example, a taxpayer might have had a substantial amount of cash on hand that he [she] had saved up in prior years and used to make purchases or other expenditures during a prosecution year. In that case, an apparent spending out of income during the year might be only the result of spending money earned in a prior year. You must, therefore, be satisfied that the government's evidence establishes that the defendant has been given credit for any cash on hand that he [she] had as well as for any cash realized from the conversion into cash of assets that he [she] had on hand.

On the other hand, the government is not required to refute all possible speculation that the defendant might have converted into cash assets that he [she] had at the beginning of the year which the investigation failed to disclose; nor is it necessary for the government to prove the precise amount of cash on hand that the defendant had at the beginning of the year. It is enough if the government can show beyond a reasonable doubt that cash on hand and the conversion of assets into cash do not account for the expenditures of the defendant during the taxable year.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case, the government has endeavored to prove that the defendant did not have any cash on hand or assets at the beginning of the year which he [she] later converted into cash, other than those disclosed as a result of its investigation by, among other things, tracing the financial history of the defendant. The evidence introduced by the government of the defendant's [income tax return(s) and] financial history in years prior to those named in the indictment may be considered by you for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth relied on by the government is reasonably accurate. Obviously, improbable

explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will find that the defendant is not guilty for that year of reporting a taxable income that is not true and correct.

If you find as to any year that the funds spent by the defendant are not substantially in excess of the taxable income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of reported taxable income, then you will find that the defendant is not guilty for that year of reporting a taxable income that is not true and correct.

If you find, on the other hand, that the government has established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you are also convinced beyond a reasonable doubt that the expenditures established by the government during that year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented income.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from taxable, rather than nontaxable, sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, [legal or illegal], carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from a taxable source or sources or that the funds did not come from nontaxable sources. In other words, expenditures

alone do not establish the receipt of taxable income unless the evidence shows either: (1) a likely source of income from which you believe they sprang; or (2) that the government has established that the defendant did not have a nontaxable source of income which accounts for the expenditures.

If you find that the defendant offered timely explanations of the source of his [her] funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take that failure into account. The defendant is not required, however, to provide any explanations or to prove the source of his [her] funds, for, as I have said, the burden is on the government to prove that the funds used for expenditures arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), aff'd., 394 U.S. 315 (1969)

United States v. Citron, 783 F.2d 307, 315 (2d Cir. 1986)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Marshall, 557 F.2d 527, 529 (5th Cir. 1977)

United States v. Newman, 468 F.2d 791, 793 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973)

United States v. Penosi, 452 F.2d 217, 219 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972)

United States v. Caswell, 825 F.2d 1228, 1231-32 (8th Cir. 1987)

United States v. Pinto, 838 F.2d 426, 431-32 (10th Cir. 1988)

The instruction is also based on the rationale of the following decisions involving the net worth method, which is essentially the same as the expenditures method, ***Taglianetti v. United States***, 398 F.2d at 562:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 The instruction should be modified in those instances where a joint return is involved and also where the net worth computation reflects the joint net worth of a husband and wife, or, in rare instances, the joint net worth of a defendant and a third party.

GOVERNMENT PROPOSED JURY INST. NO. 265

Cash Expenditures Method

In this case the government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of his reported income together with nontaxable receipts and available cash at the beginning of the year, then the taxpayer has understated his income.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year, but also an examination of his "net worth" at the beginning and end of that year.

[The remainder of this instruction should consist of the text of Proposed Instruction No. 254, *supra,* from the second paragraph to the end of that instruction.]

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.4, p. 236

GOVERNMENT PROPOSED JURY INST. NO. 266

Cash Expenditures Method

To establish a substantial understatement of the tax on the income tax return of defendant for the year[s] _____, the government has relied upon proof by the so-called "cash expenditures method" of determining income for that particular period. This "cash expenditures method," if done correctly, is an indirect or circumstantial way to reliably determine income.

In this method of proof, if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth, exceed the total of reported income together with non-taxable receipts for that same year and available cash at the beginning of the year, then the taxpayer has unreported income.

A person's net worth is the difference between his total assets and his total liabilities on any given date. Said another way, net worth is the difference between what a person owns and what that person owes at any particular time.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year in question, but also an examination of the defendant's net worth at the beginning and again at the end of that year. **1**

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1990), § 56.06, pp. 999-1000.

NOTE

1 Notes following this jury instruction in Devitt, Blackmar, & O'Malley state, "The pertinent portions of the instruction on the "Net Worth Method," Section 56.05, should be given to the jury in conjunction with this instruction." Thus, the prosecutor should consult with the above net worth instructions for appropriate language to include. While the expenditures method is a "variant of the net worth method," there are certain different elements involved in their presentation, including the showing of net worth required. Under the expenditures method, "net worth need not be established by a formal net worth statement. Rather, accurate inclusion of diminution of resources serves the function of enabling the jurors to determine if expenditures were financed by liquidation of assets, depletion of a cash hoard, or unreported income." ***United States v. Citron***, 783 F.2d 307, 315 (2d Cir. 1986); *See* ***Taglianetti v. United States***, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); ***United States v. Caswell***, 825 F.2d 1228, 1232 (8th Cir. 1987); ***United States v. Pinto***, 838 F.2d 426, 432 (10th Cir. 1988).

GOVERNMENT PROPOSED JURY INST. NO. 268

Bank Deposits (Plus Cash Expenditures) Method **1**

To prove the alleged understatements of taxable income, the government relies upon the bank deposits [plus cash expenditures] method of proof. **2**

To use this method of proof, the government must establish that the defendant was engaged in an income-producing activity during the tax years in issue and that, during the course of such activity, regular and periodic deposits having the inherent appearance of current income were made into bank accounts in the defendant's name or under his [her] dominion and control.

Deposits into such accounts are totalled. Non-income transactions, such as transfers between bank accounts, redeposits, and deposits of nontaxable amounts, such as loans, gifts, inheritances, or prior accumulations, are subtracted from the total deposits. [To this total is added any additional undeposited income that the defendant received during the tax year in issue and any

cash or currency expenditures made with undeposited funds not derived from a nontaxable source.] **3**

The appropriate deductions, exclusions, exemptions, and credits to which the defendant is entitled then are subtracted, leaving an amount the government contends to be the corrected taxable income for the tax year in issue. This amount is then used to compute the corrected tax due and owing for the year, which is then compared with the actual tax paid in order to establish the alleged understatement of taxes.

If you find that the defendants bank deposits [plus undeposited income and cash expenditures] **3** establish for a tax return in issue a taxable income figure that exceeds the taxable income reported on the tax returns for the years involved, you will proceed to inquire whether the government has established that those excess deposits [and other funds received or spent but not deposited] **3** represent additional taxable income on which the defendant willfully attempted to evade or defeat the tax. In this connection, if the government has established that the defendant was engaged in an income-producing business or activity, that he [she] was making regular and periodic deposits of money to bank accounts in his [her] name or under his control, that the deposits and other funds received and available for deposit have the appearance of income, then you may, but are not required to, draw the inference that these deposits [and other funds available for deposit] represented income during the year in question.

Explanations or "leads" as to the source of the funds used or available for deposits during the prosecution years, such as cash-on-hand, **1** gifts, loans, or inheritances, may be offered to the government by or on behalf of the defendant. If such leads are relevant, reasonably plausible, and reasonably susceptible of being checked, then the government must investigate into the truth of the explanations. Additionally, leads must be furnished well in advance of trial for the

government to be obligated to investigate them or to include them in the government's computations. However, if no such leads are provided, the government is not required to negate every conceivable source of nontaxable funds.

The government claims that it has correctly taken into account all of the factors which I have mentioned and that the bank deposits plus undeposited income and cash expenditures result in a figure that fairly approximates the defendant's true individual taxable income for the calendar years 20__ and 20__.

This instruction is based on the rationale, and not the actual language, of the opinions below:

United States v. Morse, 491 F.2d 149, 151 (1st Cir. 1974)

United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974)

United States v. Nunan, 236 F.2d 576, 587 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957)

United States v. Venuto, 182 F.2d 519, 521 (3d Cir. 1950)

Morrison v. United States, 270 F.2d 1, 2 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959)

Skinnett v. United States, 173 F.2d 129 (4th Cir. 1949)

United States v. Conaway, 11 F.3d 40, 43-44 (5th Cir. 1993)

United States v. Tafoya, 757 F.2d 1522, 1528 (5th Cir. 1985)

United States v. Normile, 587 F.2d 784, 785 (5th Cir. 1979)

United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979)

United States v. Horton, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976)

United States v. Parks, 489 F.2d 89, 90 (5th Cir. 1974)

United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964), *cert. denied*, 386 U.S. 1003 (1967)

United States v. Ludwig, 897 F.2d 875, 878-882 (7th Cir. 1990)

United States v. Esser, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

United States v. Stein, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971)

United States v. Lacob, 416 F.2d 756, 759 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Mansfield, 381 F.2d 961, 965 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967)

United States v. Abodeely, 801 F.2d 1020, 1024-1025 (8th Cir. 1986)

United States v. Vannelli, 595 F.2d 402, 404 (8th Cir. 1979)

United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)

United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)

United States v. Hall, 650 F.2d 994, 999 (9th Cir. 1981)

United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977)

Percifield v. United States, 241 F.2d 225, 229 & n.7 (9th Cir. 1957)

United States v. Bray, 546 F.2d 851, 853 (10th Cir. 1976).

NOTES

1 CAUTION: The above instruction does not include an instruction on cash on hand. In those instances where the bank deposits computation includes cash expenditures or currency deposits, the cases indicate that the government must establish a beginning cash on hand figure. See Section 33.08, *supra*, CASH ON HAND. In such a case, the above instruction should be supplemented with a cash on hand instruction. For an example of a cash on hand instruction, see Proposed Jury Instruction 272 below.

2 The material in brackets applies to cases that include cash or currency expenditures.

3 The material in brackets applies to cases that include both cash or currency expenditures and undeposited income. Where either, but not both, are included in a case, the bracketed language should be modified accordingly.

GOVERNMENT PROPOSED JURY INST. NO. 272

Bank Deposits Method

In this case the government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money into bank accounts in his name or under his control, an inference arises that those bank deposits represent taxable income unless it appears that the deposits represented redeposits or transfers of funds between accounts, or that the deposits came from nontaxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the defendant of cash or currency from funds not deposited in any bank and not derived from a nontaxable source, similarly raise an inference that the cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the defendant's deposits and cash expenditures that came from taxable sources, the government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the cash on hand so long as it is established that the government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's cash on hand was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed cash on hand of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" that were suggested to them by the defendant, or otherwise surfaced during the investigation, concerning the existence of other funds at that time. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations that were advanced by the defendant, or otherwise arose during the investigation, concerning the defendant's cash-on-hand at the beginning of the year, then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant or reasonable leads that otherwise turned up; the government is not required to investigate every conceivable source of nontaxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt that the defendant's bank deposits together with his non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that the additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, p. 234

GOVERNMENT PROPOSED JURY INST. NO. 274

The "Bank Deposits Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of defendant for the year[s] _____, the government has relied upon proof by the so-called "bank deposits method" of determining income during a particular period. This "bank deposits method," if done correctly, is an indirect or circumstantial way to reliably determine income.

The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any "non-income"

deposits are excluded from this total and income which has not been deposited is included in the total. This procedure produces a gross income figure.

Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on his [her] tax return for that year, then that taxpayer has unreported income in that amount.

Because the "bank deposits method" of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a reasonable degree of certainty an accurate "cash on hand" figure for the beginning of the tax year in question. The government is not required to prove an exact "cash on hand" figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 20__, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 20__, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of the defendant substantially exceeded the amount reported on his [her] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant

willfully attempted to evade or defeat the additional tax as charged in Count ____ of the indictment.

Devitt, Blackmar, & O'Malley, ***Federal Jury Practice and Instructions*** - Criminal (4th Ed. 1990), § 56.07, pp. 1002-1004.

Miscellaneous

GOVERNMENT PROPOSED JURY INST. NO. 276

Consider Each Count Separately

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find [the] accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions***, Civil and Criminal (4th Ed. 1992), Section 12.12

GOVERNMENT PROPOSED JURY INST. NO. 277

Separate Consideration Of Multiple Counts

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.09

GOVERNMENT PROPOSED JURY INST. NO. 278

Consider Each Count And Each Defendant Separately

A separate crime is alleged against [each][one or more] of the defendants in each count of the indictment. Each alleged offense, and any evidence pertaining to it, should be considered separately by the jury. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that defendant or any other defendant.

You must give separate and individual consideration to each charge against each defendant.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions***, Civil and Criminal (4th Ed. 1992), Section 12.13

GOVERNMENT PROPOSED JURY INST. NO. 279

Separate Consideration Of Each Count And Each Defendant

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All of the instructions apply to each defendant and to each count (unless a specific instruction states that it applies only to [a specific defendant][or][a specific count]).

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO. 280

Give Each Defendant Separate Consideration

It is your duty to give separate and personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual defendant, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants.

Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts, statements, and conduct and any other evidence in the case which may be applicable to him [her].

The fact that you return a verdict of guilty or not guilty as to one defendant should not, in any way, affect your verdict regarding any other defendant.

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions***, Civil and Criminal (4th Ed. 1992), Section 12.14.

GOVERNMENT PROPOSED JURY INST. NO. 281

Separate Consideration For Each Defendant

Although the defendants are being tried jointly, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case decided on the evidence and the law applicable to him.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO. 282

Separate Consideration For Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so you must determine what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 2.14

GOVERNMENT PROPOSED JURY INST. NO. 283

Caution -- Punishment
(Single Defendant -- Single Count)

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. And you are not concerned with the guilt of any other person or persons not on trial as a defendant in this case.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.20, p. 31

GOVERNMENT PROPOSED JURY INST. NO. 284

Caution -- Punishment
(Single Defendant -- Single Count)

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not be a part of your consideration or discussions.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.21, p. 32

GOVERNMENT PROPOSED JURY INST. NO. 285

Caution -- Punishment
(Single Defendant -- Single Count)

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.1, p. 25

GOVERNMENT PROPOSED JURY INST. NO. 286

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.22, p. 33

GOVERNMENT PROPOSED JURY INST. NO. 287

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the

defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.2, p. 26

GOVERNMENT PROPOSED JURY INST. NO. 288

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.23, p. 34

GOVERNMENT PROPOSED JURY INST. NO. 289

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find any one of the defendants guilty or not guilty should not affect your verdict as to any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.3, p. 27

GOVERNMENT PROPOSED JURY INST. NO. 290

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant. You must give separate consideration as to each defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.24, p. 35

GOVERNMENT PROPOSED JURY INST. NO. 291

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.4, p. 28

GOVERNMENT PROPOSED JURY INST. NO. 292

"On Or About" -- Explained

The indictment charges that the offense alleged [in Count _____] was committed "on or about" a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in [Count _____ of] the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 13.05

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Basic Instructions, Instruction No. 119, p. 30.

GOVERNMENT PROPOSED JURY INST. NO. 293

Date Of Crime Charged

The indictment charges that the offense was committed "on or about." Although the evidence need not establish with certainty the exact date of the alleged offense, it must establish that the offense was committed on a date reasonably near the date charged.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.01

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 13.05, Notes, p. 394.

GOVERNMENT PROPOSED JURY INST. NO. 294

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.24

GOVERNMENT PROPOSED JURY INST. NO. 295

Proof of Precise Amount of Tax Owed Not Necessary

The government must prove beyond a reasonable doubt that the 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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.08

GOVERNMENT PROPOSED JURY INST. NO. 296

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.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO. 297

Funds or Property From Unlawful Sources

There has been evidence in this case that the defendant received funds or property from unlawful sources.

In determining the issue of the taxable income of the defendant, no distinction is made between income derived from lawful or unlawful sources. Funds or property received from unlawful or illegal sources, therefore, are treated in the same manner as funds or property from lawful or legal sources.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.21

26 U.S.C. § 61

James v. United States, 366 U.S. 213 (1961)

Rutkin v. United States, 343 U.S. 130 (1952)

GOVERNMENT PROPOSED JURY INST. NO. 298

Computation of Tax Deficiency

The first step in arriving at an individual's taxable income is to determine the gross income of that individual. Gross income generally means all income from whatever source derived. Gross income includes, but is not limited to, compensation for services, such as wages, salaries, fees, or commissions, income derived from a trade or business, gains from dealings in property, interest, royalties, and dividends. Gross income includes both lawful and unlawful earnings.

After having determined an individual's gross income, the next step in arriving at the income upon which the tax is imposed is to subtract from the gross income such deductions and losses as the law provides. In this connection, an individual is permitted to deduct from gross income all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business or other profit-seeking endeavors, to the extent those expenses are not reimbursed by the business.

The amount remaining after subtracting the allowable deductions and losses from gross income is termed "adjusted gross income." In arriving at income upon which the tax is imposed, the individual is permitted to deduct from adjusted gross income either the zero bracket amount allowed by law or, in the alternative, amounts paid during the year for itemized deductions, which are limited by law, such as medical expenses, state income and property taxes, interest, charitable contributions, and other miscellaneous items. An individual is then allowed a deduction for each qualified exemption. The resulting figure is termed "taxable income," that is to say, the sum on which the income tax is normally imposed.

26 U.S.C. §§ 61 through 223 (Corporations, 26 U.S.C. §§ 61 through 281)

GOVERNMENT PROPOSED JURY INST. NO. 299

Accrual Method of Accounting

Taxable income is computed by using the same method of accounting that the taxpayer used to compute his [her] income, as long as that accounting method clearly reflects income. In this case, the defendant reported taxable income and deductible expenses on the accrual method of accounting.

Under the accrual method of accounting, income is to be included in the taxable year when all events have occurred which fix the right to receive such income and the amount of the income can be determined with reasonable accuracy. Similarly, deductions are allowable for the taxable year in which all the events have occurred which establish the fact of liability giving rise to such deduction and the amount of the deduction can be determined with reasonable accuracy. When

income is actually received or an expense is actually paid is irrelevant in the accrual method of accounting.

26 U.S.C. §§ 446, 461(a)

Treasury Regulations on Income Tax (1986 Code), Sec. 1.461-1(a)(2) (26 C.F.R.)

GOVERNMENT PROPOSED JURY INST. NO. 300

Corporate Diversions **1**

Gains or profits and income derived from any source whatever are included in gross income for the purpose of taxation of income. This includes both lawful and unlawful gains.

You have heard evidence that the defendant was a stockholder in and received cash or other property from the [insert name of corporation], a corporation.

If you find that the defendant was a stockholder in the [insert name of corporation] and obtained cash or other property from the corporation, then you should proceed to determine whether this was income to the defendant.

In this connection, the question for you to determine is whether the defendant had complete control over the cash or other property he [she] obtained from the corporation, took it as his [her] own, and treated it as his [her] own, so that as a practical matter he [she] derived economic value from the money or property received. If you find this to be the case, then the money or property received by the defendant would be income; if you do not find this to be the case, then the money or property obtained by the defendant would not be income to the defendant.

United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978)

United States v. Miller, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977)

United States v. Leonard, 524 F.2d 1076, 1082-1084 (2d Cir. 1975)

DiZenzo v. Commissioner Of Internal Revenue, 348 F.2d 122, 125-127 (2d Cir. 1965)

United States v. Goldberg, 330 F.2d 30, 38 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964)

Hartman v. United States, 245 F.2d 349, 352-353 (8th Cir. 1957)

Davis v. United States, 226 F.2d 331, 334-335 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956)

Cf. ***United States v. Cruz***, 698 F.2d 1148 (11th Cir. 1983)

NOTE

1 In the Second, Third, Sixth, Eighth, and Eleventh Circuits, this instruction should be adequate in those situations where the defendant has not introduced evidence to the effect that there were no corporate earnings or profits from which a dividend could have been paid. If the defense does introduce such evidence, an instruction should be given that explains the part that earnings and profits and capital gains treatment play in determining whether, and to what extent, currency or property obtained from a corporation constitutes taxable income. For such an instruction, see below. In the Ninth Circuit, this instruction may be adequate even in the face of evidence by the defense that there were no corporate earnings or profits from which a dividend could have been paid. *See* ***United States v. Miller***, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977).

In circuits other than the Second, Third, Sixth, Eighth, Ninth, and Eleventh, the law should be researched and a determination made as to whether the above instruction is adequate or whether it is necessary to give an instruction on earnings and profits even though no evidence is introduced by the defendant as to an absence of earnings or profits.

COMMENT

1 Depending on the evidence, an instruction regarding loans may be appropriate. See below for an example of such an instruction.

GOVERNMENT PROPOSED JURY INST. NO. 302

Constructive Dividends **1**

The government has introduced evidence to establish that the defendant was a stockholder in [insert name of corporation], a corporation, and [e.g., obtained money or property from the corporation] and/or [caused the corporation to spend money for personal purposes of the defendant] **2** which represented a [dividend] [and/or capital gain income] **3** that should have been reported on the defendant's return.

The defendant has introduced evidence to establish that [describe defense, e.g., money (or property) obtained by the defendant from the corporation and expenditures made by the corporation for personal purposes of the defendant] was not income to the defendant but [e.g., a loan from the corporation or a nontaxable return of the defendant's investment in the corporation]. **4**

In determining whether the defendant received any income from his [her] corporation, you are instructed as follows:

1. Dividend. A distribution by a corporation to or for the benefit of a stockholder that is not a loan is reportable as a dividend to the extent that the distribution (or any part thereof) could have been paid out of the accumulated earnings and profits of the corporation; or out of the earnings and profits of the corporation for the taxable year in issue.

2. Return of Capital. If the accumulated and current earnings and profits of the corporation are not great enough in amount to account for all, or a part of, the distribution to the defendant, then that portion of the distribution which could not be paid out of earnings and profits would be a nontaxable return of capital up to the amount of money invested in the corporation by the defendant.

3. Capital Gain Income. Finally, any portion of the distribution which exceeds both the accumulated earnings and profits of the corporation and the amount the defendant had invested in the corporation, would be capital gain income to the defendant.

[4. Loan. If you find that a distribution received by the defendant (or any part thereof) was a loan from the corporation that was to be repaid, then to the extent that the distribution was a loan, it would not be income to the defendant.] **5**

United States v. Thetford, 676 F.2d 170, 175 n.5 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983)

Bernstein v. United States, 234 F.2d 475, 480-482 (5th Cir.), *cert. denied*, 352 U.S. 915 (1956)

NOTES

1 This instruction should be given in those situations where the defendant has introduced evidence to the effect that there were corporate earnings or profits from which a dividend could have been paid. Where the defendant has not introduced such evidence, the instruction on corporate diversions, *supra*, may be given.

2 Select language and alternatives that reflect the evidence introduced by the government.

3 Select language and alternatives that reflect the evidence introduced by the government.

4 If the defense evidence is to the effect that the defendant received no money or property from the corporation and no expenditures were made for personal purposes of the defendant, this portion of the instruction should be modified accordingly.

5 This portion of the instruction is to cover those situations where evidence has been introduced of a loan defense. Another instruction concerning loans is set forth below.

GOVERNMENT PROPOSED JURY INST. NO. 304

Loan -- Explained

A loan that the parties to the loan agree is to be repaid does not constitute gross income as that term is defined by the Internal Revenue Code. However, merely calling a transaction a loan is not sufficient to make it such. When money is acquired and there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.

United States v. Swallow, 511 F.2d 514, 522 n.7 (10th Cir.), *cert. denied*, 423 U.S. 845 (1975)

See also United States v. Rosenthal, 454 F.2d 1252 (2d Cir. 1972), *cert. denied*, 406 U.S. 931 (1972)

United States v. Rosenthal, 470 F.2d 837, 841-842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973)

United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968)

GOVERNMENT PROPOSED JURY INST. NO. 305

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

If a payment in funds or in property from one person to another proceeds primarily from a duty, either moral or legal, that payment is not a gift. Likewise, if the payment acts as an incentive for an anticipated benefit of an economic nature, then such payment is not a gift. Similarly, where the payment is in return for services rendered, it is not a gift. It does not matter whether the donor derives economic benefit from the payment.

Moreover, the donor's characterization of his [her] action is not conclusive. It is for you, the jury, to determine objectively whether what is called a gift is in reality a gift. Additionally, the parties' expectations or hopes as to the tax treatment of their conduct have nothing to do with the matter.

The decision as to whether individual payments are gifts or income [or political contributions] is a question of fact for you to determine in the light of practical human experience. If you find that a payment was a gift, as I have defined it, then that payment does not constitute income and need not be reported on an income tax return.

Commissioner v. Duberstein, 363 U.S. 278, 285-286 (1960)

GOVERNMENT PROPOSED JURY INST. NO. 306

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather, you the members of the jury must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the defendant for the funds. In addition, you may take into account the following factors:

1. A payment is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

4. A payment is not a gift if the person making the payment did so out of fear or intimidation.

This is not a complete listing of all the factors you should consider. You should take into account all the facts and circumstances of this case in determining whether any payment was a gift.

United States v. Terrell, 754 F.2d 1139, 1149 n.3 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) **1**

NOTE

1 The instruction in ***Terrell*** also stated, "A payment is not a gift to the defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the defendant.] This sentence would appear to be incomplete. In its opinion, the court correctly states the law on this point as follows, ***Terrell***, 754 F.2d at 1149:

> If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

GOVERNMENT PROPOSED JURY INST. NO. 308

Partnership Income

A partnership as such is not subject to income tax. Instead, each partner is individually taxed on and must report his [her] share of the partnership income, even if the income is not actually distributed to the partners.

If the partnership incurs a loss, each partner can deduct his [her] share of the loss on that partner's individual return.

26 U.S.C. §§ 701, 702

GOVERNMENT PROPOSED JURY INST. NO. 309

Partnership Losses

A partnership does not pay taxes. Its income or loss flows through to the individual partners. The loss which a partner is entitled to claim on his [her] tax return with respect to a partnership loss is limited to the amount of his [her] contribution to the partnership. A partner's contribution to the partnership includes the amount of money he [she] contributed to the partnership as well as his [her] proportionate share of the partnership's liabilities or debts.

In the present case, if you find that certain asserted partnership liabilities do not exist or are of lesser value than that asserted on the partnership tax return, then such claimed liability, or portion thereof, may not be included in determining a partner's contribution to the partnership.

On the other hand, if you find that liabilities in the amounts asserted by [Name of partnership] were in fact incurred, then each partner's contribution to the partnership would include his [her] proportionate share of those partnership liabilities in determining the amount of loss which each partner is entitled to claim on his [her] individual income tax return.

26 U.S.C. §§ 704(d), 722, & 752(a)

GOVERNMENT PROPOSED JURY INST. NO. 310

Deductions

Generally, there is an inference that a taxpayer will claim all deductions allowed on his [her] return, and the deductions stated on the return are prima facie proof of the maximum deductible amounts to which the defendant is entitled. Accordingly, if the defendant asserts additional deductions other than those shown on the return, it is incumbent upon the defendant to introduce evidence with respect to such additional deductions. The government has no burden of proving deductions beyond those claimed on the return.

This instruction is based on Fed. R. Evid. Rule 801(d) and the rationale of the opinions below:

United States v. Link, 202 F.2d 592, 593-594 (3d Cir. 1953)

United States v. Lacob, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Bender, 218 F.2d 869, 871-872 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955)

Clark v. United States, 211 F.2d 100, 103 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955)

United States v. Marabelles, 724 F.2d 1374, 1383 (9th Cir. 1984)

Elwert v. United States, 231 F.2d 928, 933 (9th Cir. 1956)

GOVERNMENT PROPOSED JURY INST. NO. 311

Overstatement of Lawful Deductions

An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions.

The term "deduction" means any item allowed by the internal revenue laws to be subtracted from gross income, in computing the amount of net or taxable income for income tax purposes.

In this case, it is charged that the income tax return was false because of an alleged willful

overstatement of the amount of the deductions allowed by the internal revenue laws.

A deduction from gross income is allowed by the internal revenue laws, within limits not pertinent here, for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar non-profit organizations.

A deduction from gross income is also allowed by the internal revenue laws for certain taxes, including State, County, and City taxes.

The internal revenue laws also permit, within limits not pertinent here, a deduction from gross income for expenses actually paid during the taxable year, not compensated for by insurance or otherwise, for medical and dental care regardless of when the incident or event which occasioned the expense occurred.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.07

See ***United States v. Helmsley***, 941 F2d 71, 92 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 1162 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 312

Proof of Lawful Deductions

The evidence in the case need not establish beyond a reasonable doubt that the deductions, as allowed by the revenue laws, totalled the exact amount alleged in the indictment, or that the allowable deductions were overstated in the exact amounts alleged. The evidence must establish beyond a reasonable doubt only that the accused willfully overstated, or caused to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the internal revenue laws, as charged in the indictment.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.08

GOVERNMENT PROPOSED JURY INST. NO. 313

Economic Substance **1**

A transaction without economic substance that is entered into solely for the purpose of tax avoidance cannot properly be used to compute taxes. That is to say, the law does not allow a deduction that arises out of a transaction which has no purpose, substance, or utility apart from the anticipated tax consequences. On the other hand, a deduction is proper in this context if there is some economic substance to the transaction giving rise to the deduction beyond the taxpayer's desire to secure a deduction.

A taxpayer may of course try to pay as little tax as possible, so long as he [she] uses legal means. Transactions may be arranged in an attempt to minimize taxes if the transactions have economic substance.

The government contends that [describe the transaction] has no economic substance. The defendant contends that this transaction did have economic substance.

In determining whether a particular transaction had economic substance or not, you are instructed to consider the overall circumstances surrounding the asserted transaction.

If, after reviewing the evidence regarding a transaction, you find that the reduction of taxes was the sole purpose for entering into the transaction and that the transaction had no other substance or utility, then you may disregard the intended tax effects of the transaction.

If, on the other hand, you find that the defendant's desire to reduce taxes was not the only motive for entering into the transaction but that the transaction had substance or utility apart from the

taxpayer's desire to reduce taxes, then you are to consider the tax aspects and impact of the transaction, as I have instructed you previously.

United States v. Ingredient Technology Corporation, 698 F.2d 88, 97 n.9 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983)

Goldstein v. Commissioner, 364 F.2d 734, 740-41 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967)

NOTE

1 This is an extremely complex area. Consequently, great care should be exercised in framing an instruction on economic substance. The law of your circuit should be carefully checked to insure that the instruction is consistent with the latest law on the question.

GOVERNMENT PROPOSED JURY INST. NO. 315

Income Tax on Ministers

The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such nontaxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

United States v. Terrell, 754 F.2d 1139, 1148-1149 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985) **1**

NOTE

1 The opinion in ***Terrell*** states that the district court instructed that "[v]oluntary contributions, when received by the minister, are income to him." It appears that the court was referring to a situation where a minister receives a contribution and uses it for personal purposes rather than turning the contribution over to the church.

GOVERNMENT PROPOSED JURY INST. NO. 316

Deductions -- Tax Exempt Organizations

The government contends in Counts ____, and ____, that the defendant, _____, falsely claimed, on his [her] income tax return, a deduction for charitable contributions [made to _____]. The defendant contends that the deduction was properly claimed as a charitable contribution made to a tax-exempt organization.

For a contribution to be deductible, it must have been made as a gift to a tax-exempt organization. For an organization to be tax exempt it must have been organized and operated exclusively for religious, charitable, or educational purposes, and no part of the net earnings of the organization may inure to the benefit of any private individual.

An organization is regarded as operated exclusively for religious, charitable, or educational purposes, only if all of the following criteria are met:

1. The organization must have been organized and operated exclusively for exempt purposes, i.e., religious, charitable, or educational purposes, and not, except to an insubstantial degree, for a non-exempt purpose. That is to say, an organization is not tax exempt if its activities involve a single non-exempt purpose that is substantial in nature, regardless of the number or importance of truly exempt purposes.

2. No part of the net earnings of the organization may inure in whole, or in part, to the benefit of any private stockholder or individual. A private individual for these purposes is a person having a personal and private interest in the activities of the organization. The phrase, net earnings inure to the benefit of a private individual, means that funds of the organization are used by a private individual for personal purposes.

3. The organization cannot have been organized or operated for the benefit of the personal or private interests of an individual but only for a public purpose. In other words, the

organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, the creator of the organization, or his family, or for persons controlled by such private interests.

26 U.S.C. § 170(c)(2)(B)&(C)

26 U.S.C. § 501(a)&(c)(3)

26 C.F.R. § 1.170A-1 (1993)

26 C.F.R. § 1.501(c)(3)-1(c)(2) (1993)

26 C.F.R. § 1.501(a)-1(c) (1993)

26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii) (1993)

United States v. Daly, 756 F.2d 1076, 1082-1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985)
McGahen v. Commissioner, 76 T.C. 468, 481-483 (1981), aff'd, 720 F.2d 664 (3d Cir. 1983)
Ecclesiastical Order of Ism of Am v. Commissioner, 80 T.C. 833, 839-841 (1983)
Better Business Bureau v. United States, 326 U.S. 279, 283 (1945)
Stephenson v. Commissioner, 79 T.C. 995, 1002 (1982), aff'd, 748 F.2d 331 (6th Cir. 1984)
Hall v. Commissioner, 729 F.2d 632, 634 (9th Cir. 1984)
Davis v. Commissioner, 81 T.C. 806, 818 (1983), aff'd, 767 F.2d 931 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 318

Charitable Contribution -- Defined

For income tax purposes, a charitable contribution is defined as a contribution or gift to an organization, corporation, trust, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to or is used for the benefit of any private shareholder or individual.

26 U.S.C. § 170(c)

GOVERNMENT PROPOSED JURY INST. NO. 319

Charitable Contributions And Gifts -- Year Deductible

If you find that a charitable contribution or gift, as previously defined, was made by the defendant to a tax-exempt organization, then you are instructed that any such charitable contribution or gift can only be claimed as a deduction (by the individual who made the contribution or gift) for the tax year in which the contribution was made, i.e., the year in which it was paid to a tax-exempt organization. For example, if a contribution to a tax-exempt organization was made in the year 2004, then it would only be deductible on the taxpayer's 2004 return.

26 U.S.C. § 170(a)(1)

GOVERNMENT PROPOSED JURY INST. NO. 322

Civil Tax Irrelevant

There is a distinction between the civil liability of a defendant and a defendant's criminal liability. This is a criminal case.

The defendant is charged under the law with the commission of a crime, and the fact that the defendant has or has not settled his [her] civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Spies v. United States, 317 U.S. 492, 495 (1943)

United States v. Dack, 747 F.2d 1172, 1174-1175 (7th Cir. 1984)

United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1984)

United States v. Voorhies, 658 F.2d 710, 714 (9th Cir. 1981)

United States v. Buras, 633 F.2d 1356, 1360 (9th Cir. 1980)

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 323

Settlement of Civil Liability is Immaterial

There is a distinction between civil liability for the payment of taxes, and criminal liability. This is a criminal case. The defendant is here charged with the commission of a crime, and the fact that he may or may not have settled his civil liability for the payment of taxes claimed to be due from him to the United States is not to be considered by the jury in determining the issues in this case, except as such evidence in the case may throw some light on the question of intent.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17

GOVERNMENT PROPOSED JURY INST. NO. 324

"Guilty Knowledge"

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed her [his] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of her [his] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 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), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g.*, ***United States v. 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). Consequently, 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.

2 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.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provided that the element of knowledge was established if the defendant was "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit), because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. 326

Willful Blindness **1**

The defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] willful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of either willfulness or knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

NOTE

1 The only difference between this instruction and the preceding one is at the end of the first paragraph. That instruction uses the words "deliberate blindness," whereas this instruction uses

the words "willful blindness." Traditionally, this type of an instruction has been referred to as a "willful blindness" instruction. Consequently, use of this terminology seems appropriate. Nevertheless, in a criminal tax case, use of the word "deliberate" in place of the word "willful" may be less confusing to a jury, which will also be instructed on the special meaning of the word "willfully."

COMMENTS

1 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), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. ***See, e.g.***, ***United States v. 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). Consequently, 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.

2 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, in a criminal tax case, no instruction should be requested that 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.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provided that the element of knowledge was established if the defendant was "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may

be used in the Tenth Circuit), because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. 328

Knowledge of Contents of Return

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 the defendant signed the return in question, then you may also draw the inference and may also find, but are not required to find, that the defendant knew of the contents of the return that the defendant signed.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

GOVERNMENT PROPOSED JURY INST. NO. 329

Proof of Knowledge of Contents of Returns

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 the 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 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.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 and 6.26.7206 (1989)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

GOVERNMENT PROPOSED JURY INST. NO. 330

Proof of Knowledge of Contents of Returns

Now, whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

United States v. Wainwright, 448 F.2d, 984, 986 (10th Cir. 1971), *cert. denied*, 407 U.S. 911 (1972)

GOVERNMENT PROPOSED JURY INST. NO. 331

Proof of Knowledge of Contents of Returns

Now, whenever the fact appears beyond a reasonable doubt from the evidence in the case that the defendant signed his income tax return, the jury may draw the inference and find that the defendant had knowledge of the contents of the return. Whether or not the jury draws such an inference is left entirely to the jury.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

United States v. Gaines, 690 F.2d 849, 853 (11th Cir. 1982)

GOVERNMENT PROPOSED JURY INST. NO. 332

Exculpatory Statements - Later Proved False

Statements knowingly and voluntarily made by Defendant upon being informed that a crime had been committed or upon being accused of a criminal charge, may be considered by the jury.

When a defendant voluntarily offers an explanation or voluntarily makes some statement tending to show his [her] innocence and it is later shown that the defendant knew that the statement or explanation was false, the jury may consider this as showing a consciousness of guilt on the part of Defendant since it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his [her] innocence.

Whether or not evidence as to a Defendant's explanation or statement points to a consciousness of guilt on his [her] part and the significance, if any, to be attached to any such evidence, are matters exclusively within the province of the jury as the sole judges of the facts of this case.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons--fully consistent with innocence--that could cause a person to give a false statement showing his innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

[Any testimony concerning a false exculpatory statement by Defendant is in no way attributable to any other defendant on trial in this case and may not be considered by you in determining whether the government has proven the charge[s] against any other defendant beyond a reasonable doubt.]

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.06

COMMENT

1 The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instruction be given. See the Committee Comments to the Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions after the Crime." See Federal Jury Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

GOVERNMENT PROPOSED JURY INST. NO. 334

Exculpatory Statements - Later Proved False

Now, during the course of the trial of this matter you heard witnesses testify about statements made by the defendant _____ after he been confronted with some suggestion that he might have been guilty of the commission of a crime, and I am expressing no opinion now about the evidence in the case, about what the facts are, but once in awhile I have to refer to some of the evidence which has been heard so that you understand the principle of law that I am referring to. I charge you that the conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the Jury in the light of other evidence in the case in determining the guilt or innocence of the accused. When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence or her innocence, and such explanation or statement is later shown to be false in whole or in part, the Jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance, if any, to be attached to any such evidence are matters for determination by the Jury. I am not suggesting to you that either of the defendants made any contradictory statements. I am not suggesting that at all. I express no opinion about it, but I give you that principle of law in the charge because, if you conclude that such contradictory statements were made either in whole or in part, then that is the principle of law for your consideration, but, as I say, I express no opinion about the matter whatsoever

This instruction was approved in ***United States v. Pringle***, 576 F.2d 1114, 1120 (5th Cir. 1979), *but see* Comment to prior instruction.

GOVERNMENT PROPOSED JURY INST. NO. 337

False Exculpatory Statements

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No.4.15 (1992)

See also ***United States v. Hudson***, 717 F.2d 1211, 1215 (8th Cir. 1983) and cases cited therein.

COMMENTS

1 If the defendant denies making the statement, or denies that it is exculpatory, this language should be changed to allow the jury to decide whether or not the statement was made or whether or not it was exculpatory. ***United States v. Holbert***, 578 F.2d 128, 130 (8th Cir. 1978).

2 If the falsity of the exculpatory statement is controverted, this language should be changed to allow the jury to find whether or not the statement was false. *See* ***United States v. Pringle***, 576 F.2d 1114, 1120 n.6 (5th Cir. 1978).

GOVERNMENT PROPOSED JURY INST. NO. 338

Similar Acts

During this trial, you have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 1.30 (1990)

COMMENT

United States v. Practi, 861 F.2d 82 (5th Cir. 1988), discusses the use of a limiting instruction when extraneous offenses are introduced. Ordinarily, the defendant must request such an instruction. Under some circumstances, the failure to give a limiting instruction, even in the absence of a request, may constitute plain error. *Id.*

GOVERNMENT PROPOSED JURY INST. NO. 340

Prior Similar Acts

(1) You have heard testimony that the defendant committed some acts other than the ones charged in the indictment.

(2) You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now. Instead, you can only consider it in deciding whether _____. Do not consider it for any other purpose.

(3) Remember that the defendant is on trial here for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

Pattern Jury Instructions for the Sixth Circuit, Criminal 1991, § 7.13

COMMENT

This instruction should be used when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid 404(b)

GOVERNMENT PROPOSED JURY INST. NO. 341

Prior Similar Acts

You [are about to hear] [have heard] evidence that the defendant previously committed [an act] [acts] similar to [the one] [those] charged in this case. You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged here, then you may use this evidence concerning [a] previous [act] [acts] to decide [describe purpose under 404(b) for which evidence has been admitted.]

[Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that he [she] committed such an act in this case. You may not convict a person simply because you believe he [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence or prior acts only on the issue of (state proper purpose under 404(b), e.g., intent, knowledge, motive.)]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 2.08 (1992).

See also, Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 17.08

GOVERNMENT PROPOSED JURY INST. NO. 342

Prior Similar Acts

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [e.g. intent] and for no other purpose.

Model Criminal Jury Instructions for the Ninth Circuit, 1992, § 4.04

COMMENTS

This comports with Fed. R. Evid. 404(b).

See also United States v. Herrell, 588 F.2d 711, 714 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979).

GOVERNMENT PROPOSED JURY INST. NO. 343

Prior Similar Offense

You are about to hear testimony that the defendant previously committed a crime similar to the one charged here. I instruct you that testimony is being admitted only for the limited purpose of being considered by you on the question of [e.g. defendant's intent].

Manual of Model Criminal Jury Instructions for the Ninth Circuit, (1992 Edition). Instruction No. 210

This instruction comports with Fed. R. Evid. 404(b). Such a limiting instruction must be given if requested (Fed. R. Evid. 105) and must be given *sua sponte* when appropriate. For an instruction to be given at the end of the case use the following:

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [e.g. intent] and for no other purpose.

COMMENT

1 Other circuits suggest that when using prior similar offense evidence as evidence of intent, motive, etc. (not for impeachment), instructions regarding prior similar acts should be used. See related instructions, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 344

Cautionary Instruction During Trial - Similar Acts

Evidence that an act was done or that an offense was committed by Defendant _____ at some other time is not, of course, any evidence or proof whatever that, at another time, the defendant performed a similar act or committed a similar offense, including the offense charged in [Count ____ of] this indictment.

Evidence of a similar act or offense may not be considered by the jury in determining whether the Defendant _____ actually performed the physical acts charged in this indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds beyond a

reasonable doubt from other evidence in the case, standing alone, that the defendant physically did the act charged in [Count _____ of] this indictment.

If the jury should find beyond a reasonable doubt from other evidence in the case that the Defendant _____ did the act or acts alleged in the particular count under consideration, the jury may then consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which the Defendant _____ actually did the act or acts charged in the particular count.

The defendant is not on trial for any acts or crimes not alleged in the indictment. Nor may a defendant be convicted of the crime[s] charged even if you were to find that he [she] committed other crimes--even crimes similar to the one charged in this indictment.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th. Ed. 1992), § 17.08

COMMENTS

1 While Federal Rule of Evidence 404(b) prohibits evidence of prior acts oroffenses "to show action in conformity therewith," the United States Supreme Court has held that such evidence is admissible for other purposes, including proof of knowledge or intent. ***Anderson v. Maryland***, 427 U.S. 463, 483 (1976).

2 A limiting instruction must be given, if requested. Fed. R. Evid. Rule 105.

GOVERNMENT PROPOSED JURY INST. NO. 346

Opinion Evidence -- The Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about issues in the case. An exception to this rule exists as to those witnesses who are described as "expert witnesses." An "expert witness" is someone who, by education or by experience, may have become knowledgeable in some technical, scientific, or very specialized area. If such knowledge or experience may be of assistance to you in fact, an "expert witness" in that area may state an opinion as to relevant and material matter in which he or she claims to be an expert.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider other evidence in this case. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion

is outweighed by other evidence [including that of other "expert witnesses"], you may disregard the opinion in part or in its entirety.

As I have told you several times, you -- the jury -- are the sole judges of the facts of this case.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.01

GOVERNMENT PROPOSED JURY INST. NO. 347

Opinion Evidence -- The Expert Witness

During the trial you heard the testimony of _____, who was described to us as an expert in _____.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because an expert has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit, Instruction No. 1.18 (1990)

GOVERNMENT PROPOSED JURY INST. NO. 348

Opinion Evidence -- The Expert Witness

(1) You have heard the testimony of _____, an expert witness. An expert witness has special knowledge or experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.03 (1991)

GOVERNMENT PROPOSED JURY INST. NO. 349

Opinion Evidence -- The Expert Witness

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved required knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given the expert opinion in the light of all the evidence in this case.

Federal Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.27 (1980)

GOVERNMENT PROPOSED JURY INST. NO. 350

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all other evidence in the case.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.10 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 351

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by education and experience, have become expert in some field may state their opinion on matters in that field and may also state their reasons for the opinion.

Expert opinion testimony should be judged just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons for the opinion, and all the other evidence in the case.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.16 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 352

Opinion Evidence -- The Expert Witness

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field -- one who is called an expert witness -- is permitted to state his or her opinion concerning those technical matters.

Merely because an expert has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, (1985 Ed.) Basic Instruction No. 7. p. 20

GOVERNMENT PROPOSED JURY INST. NO. 353

Charts and Summaries -- Not Admitted

Charts or summaries have been prepared by _____ and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard the charts or summaries.

In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.02

GOVERNMENT PROPOSED JURY INST. NO. 354

Charts and Summaries -- Not Admitted

You have seen some charts and summaries that may help explain the evidence. That is their only purpose, to help explain the evidence. They are not themselves evidence or proof of any facts.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.12 (1991)

GOVERNMENT PROPOSED JURY INST. NO. 355

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.11 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 356

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.17 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 357

Charts and Summaries -- Admitted

Charts or summaries have been prepared by _____, have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give it such weight or importance, if any, as you feel it deserves.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 14.02

GOVERNMENT PROPOSED JURY INST. NO. 358

Charts and Summaries -- Admitted

There have been admitted in evidence certain schedules or summaries. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case. **1**

and/or

There have been admitted in evidence certain schedules or summaries. Their accuracy has been challenged by [the government] [the defendant]. Thus the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the schedules or summaries are accurate. **2**

Pattern Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.29 and 3.30 (1980)

NOTES

1 This instruction should only be given when the accuracy and authenticity of the exhibits are not in question.

2 This instruction is not intended to cover the situation where some or all of the underlying materials are unavailable.

GOVERNMENT PROPOSED JURY INST. NO. 359

Charts and Summaries -- Admitted

You will remember that certain [schedules] [summaries] [charts] were admitted in evidence. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here. [However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.]

Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.12 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 360

Charts and Summaries -- Admitted

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.18 (1992)

GOVERNMENT PROPOSED JURY INST. NO. 361

Lesser Included Offense **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for a [less serious] [other] offense which is, by its very nature, necessarily included in the crime of [insert name of charged offense] that is charged in Count _____ of the indictment.

If the jury should unanimously find that the government has proven each of the essential elements of the offense of [insert name of charged offense] that is charged in Count _____ of the indictment beyond a reasonable doubt, the foreperson should write "guilty" in the space provided and the jury's consideration of that count [for that defendant] is concluded.

If the jury should determine unanimously **2** that the government has not proven each element of the offense of [insert name of charged offense] that is charged in Count _____ of the indictment beyond a reasonable doubt, then the foreperson should write "not guilty" in the space provided and the jury should then consider the guilt or innocence of the defendant for the [less serious] [other] offense necessarily included in the offense of [insert name of charged offense] charged in Count _____ of the indictment.

The crime of [insert name of charged offense] charged in Count _____ of the indictment necessarily includes the [less serious] [other] offense of [insert name of lesser included offense]. In order to find the defendant guilty of the [less serious] [other] included offense, the government must prove the following essential elements beyond a reasonable doubt: [list elements of lesser included offense].

The difference between the crime charged in Count _____ of the indictment and the [less serious] [other] included offense is [list additional elements necessary to prove charged offense].

The jury will bear in mind that the burden is always upon the government to prove, beyond a reasonable doubt, each and every essential element of any [less serious] [other] offense which is necessarily included in any crime charged in Count _____ of the indictment. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 20.05 (modified)

NOTES

1 CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.*, ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense charged in Count _____ of the indictment beyond a reasonable doubt, the jury should then consider whether the defendant is guilty or not guilty of the [less serious] [other] crime of [insert name of lesser included offense] which is necessarily included in the offense of [insert name of charged offense] charged in Count _____ of the indictment.

GOVERNMENT PROPOSED JURY INST. NO. 363

Lesser Included Offense
(Attempted Evasion of Payment/Failure to Pay) **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for any offense that is necessarily included in any crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously **2** find the accused "Not Guilty" of the crime of willfully attempting to evade or defeat payment of tax as charged in Count _____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

The crime of willfully attempting to evade or defeat payment of taxes, which is the crime charged in Count _____ of the indictment, necessarily includes the lesser offense of willful failure to pay the tax. This lesser offense is defined in Section 7203 of the Internal Revenue Code [26 U.S.C. § 7203], which provides in part that:

"Any person required . . . to pay any . . . tax, . . ., who willfully fails to pay such . . . tax . . . at the time or times required by law shall be guilty of an offense against the laws of the United States.

In order for the defendant to be found guilty of the lesser included offense of willful failure to pay the tax, the government must prove each of the following elements beyond a reasonable doubt:

1. That there was a tax due and owing by the defendant;

2. That the defendant failed to pay the tax when due; and

3. That the failure was willful.

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

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.09 (modified)

Schmuck v. United States, 489 U.S. 705 (1989)
Sansone v. United States, 380 U.S. 343, 351-352 (1965)

NOTES

1 CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.*, ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

So, if, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense of willfully attempting to evade or defeat payment of a tax as charged in Count _____ of the indictment beyond a reasonable doubt, then the jury must proceed to determine whether the government has proven beyond a

reasonable doubt the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

GOVERNMENT PROPOSED JURY INST. NO. 365

Lesser Included Offense **1**

We have just talked about what the government has to prove for you to convict the defendant of [insert name of greater crime]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime. If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of [insert name of lesser included crime]. You should find the defendant guilty of [insert name of lesser included crime] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it did not prove that the defendant [describe missing element].

To put it another way, the defendant is guilty of [insert name of lesser included crime] if the following things are proved beyond a reasonable doubt: [list elements of lesser included crime]. The defendant is guilty of [insert name of greater crime] if it is proved beyond a reasonable doubt that the defendant did all those things and, in addition, [describe missing element]. If your verdict is that the defendant is guilty of [insert name of greater crime], you need go no further. But if your verdict on that crime is not guilty, or if you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [insert name of lesser included crime].

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed [insert name of lesser included crime], your verdict must be not guilty of all of the charges.

Pattern Jury Instructions, Criminal Cases, ***Fifth Circuit*** (1990 Ed.), General & Preliminary Instructions, Instruction No. 1.32, p.45 (modified)

NOTE

1 CAUTION: There are only a limited number of circumstances where a lesser included offense is appropriate in a criminal tax case. See Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. 367

Lesser Included Offense **1**

The crime of [insert name of greater offense] with which the defendant is charged in the indictment includes the lesser offense of [insert name of lesser included offense].

If you find the defendant not guilty of the crime of [insert name of greater offense] charged in the indictment [or if you cannot unanimously agree that the defendant is guilty of that crime], then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of [insert name of lesser included offense].

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), § 2.03, p.12 (modified)

NOTE

1 CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. 368

Lesser Included Offense **1**

The crime of [insert name of greater offense] includes the lesser crime of [insert name of lesser included offense]. If (1) [any] [all] **2** of you are not convinced beyond a reasonable doubt that the defendant is guilty of [insert name of greater offense] and (2) all of you are convinced beyond a

reasonable doubt that the defendant is guilty of the lesser crime of [insert name of lesser included offense], you may find the defendant guilty of [insert name of lesser included offense].

In order for the defendant to be found guilty of the lesser crime of [insert name of lesser included offense], the government must prove each of the following elements beyond a reasonable doubt: [list elements of lesser included offense].

Manual of Model Criminal Jury Instructions For The Ninth Circuit (1992 Ed.). § 3.13, p.43.

NOTES

1 CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

2 Although, if the defendant expresses no choice, the trial court may employ either a jury instruction requiring the jury to unanimously acquit on the greater charge before considering the lesser included offense or an instruction advising the jury that it can consider the lesser included offense if it is unable after a reasonable effort to reach a verdict on the greater offense, it is error to reject the form of instruction that is timely requested by the defendant. ***United States v. Jackson***, 726 F.2d 1466, 1469-1470 (9th Cir. 1984).

GOVERNMENT PROPOSED JURY INST. NO. 369

Lesser Included Offense **1**

In some cases, the law that a defendant is charged with breaking actually covers two separate crimes -- one is more serious than the second, and the second is generally called a "lesser included offense."

So, in this case, with regard to the offense charged in Count _____, if you should find the defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the defendant is guilty or not guilty of the lesser included offense of [insert name of lesser included offense]. The lesser included offense would consist of proof beyond a reasonable doubt of the following element[s]: [list elements of lesser included offense], as defined above, but not the element[s] of: [insert additional elements required for conviction of greater offense].

Pattern Jury Instructions, Criminal Cases, ***Eleventh Circuit*** (1985 Ed.), Special Instructions, Instruction No. 5, p.41 (modified)

NOTE

1 CAUTION: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. See Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO. 370

Action on Advice of Counsel

Defendant claims that he [she] is not guilty of willful wrongdoing as charged in Count _____ of the indictment because he [she] acted on the basis of advice from his [her] attorney.

If before taking any action [failing to take any action], the defendant, while acting in good faith and for the purpose of securing advice on the lawfulness of his [her] future conduct, sought and obtained the advice of an attorney he [she] considered to be competent, and made a full and accurate report or disclosure to his [her] attorney of all important and material facts of which he [she] had knowledge or the means of knowing, and acted strictly in accordance with the advice his [her] attorney gave following this full report or disclosure, then the defendant would not be willfully doing wrong in performing [omitting] some act the law forbids [requires], as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of truly seeking guidance as to questions about which he [she] was in doubt, and whether he [she] acted strictly in accordance with the advice received, are all questions for the jury to determine.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 19.08 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 371

Defenses -- Reliance on Preparer

The defendant has introduced evidence showing that he [she] did not prepare the tax return in question and that it was prepared for him[her] by [insert name of person who prepared return], a person who held himself [herself] out as one qualified to prepare federal income tax returns for others.

If the defendant, while acting in good faith and believing [insert name of person who prepared return] to be competent to prepare federal income tax returns, provided [insert name of person who prepared return] with full information with relation to his [her] taxable income and expenses during the year, and the defendant then, in good faith, adopted, signed, and filed the tax return as prepared by [insert name of person who prepared return] without having reason to believe that it was not correct, then you will find the defendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant did not provide full and complete information to [insert name of person who prepared return], or that the defendant knew that the return as prepared by [insert name of person who prepared return] was not correct and substantially understated the tax liability of defendant [and his wife] [and her husband], then you are not required to find the defendant not guilty simply because he [she] did not prepare the return himself [herself] but rather had it prepared for him [her] by another.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 8-4 (Comment), pp. 8-20 -- 8-22.

See ***United States v. Vannelli***, 595 F.2d 402, 404-405 (8th Cir. 1979)

GOVERNMENT PROPOSED JURY INST. NO. 372

Good Faith Reliance Upon Advice of Counsel

Good faith is a complete defense to the charge in the indictment if good faith on the part of the defendant is inconsistent with the existence of willfulness, which is an essential part of the charge. The burden of proof is not on the defendant to prove his good faith, of course, since he [she] has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully as charged in the indictment.

So, a defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he [she] consulted in good faith an attorney whom he [she] considered competent, made a full and accurate report to her [his] attorney of all material facts of which he

[she] had the means of knowledge, and then acted strictly in accordance with the advice given to him [her] by his [her] attorney.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he [she] was in doubt, and whether he [she] made a full and complete report to her [his] attorney, and whether he [she] acted strictly in accordance with the advice he [she] received, are all questions for you to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 14, p. 51

GOVERNMENT PROPOSED JURY INST. NO. 373

Good Faith Belief of Accused

If a person, in good faith, believes that he [she] has paid all the taxes he [she] owes, he [she] cannot be guilty of criminal intent to evade the tax. But if a person acts without reasonable ground for belief that his [her] conduct is lawful, it is for the jury to decide whether he [she] acted in good faith, or whether he [she] willfully intended to evade the tax. This issue of intent, as to whether the defendant willfully attempted to evade or defeat the tax, is one which the jury must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.26 (modified)

COMMENTS

1 See also the instructions concerning a good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

2 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).

GOVERNMENT PROPOSED JURY INST. NO. 374

First Amendment

The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Speech which "incites imminent lawless activity" is not protected speech under the First Amendment. Speech which "merely advocates law violation" is protected by the First Amendment.

If you find that the defendant's speech was limited to the advocacy of violations of the income tax laws or remote action, then his speech is protected by the First Amendment and cannot be a basis for a guilty verdict. If, however, you find that the defendant's speech both was intended by him and, in fact, tended to produce or incite a likely imminent filing of a false income tax return, then such speech is not protected by the First Amendment.

Brandenburg v. Ohio, 395 U.S. 444 (1969)
United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985)

United States v. Damon, 676 F.2d 1060, 1062-63 (5th Cir. 1982)
United States v. Holecek, 739 F.2d 331, 334-35 (8th Cir. 1984)
United States v. Buttorff, 572 F.2d 619, 622-24 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978)
United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985)

COMMENT

1 An instruction such as this is appropriate, if at all (*see* ***United States v. Daly***, 756 F.2d 1076, 1082 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) ("the speech Daly claims is protected was not itself the wrong for which he was convicted, but it was merely the means by which he committed the crimes of which he was convicted")), only when the government's case is predicated solely on what the defendant said. If the defendant engaged in an illegal course of conduct, his activities are not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action. *See* ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir.), *cert. denied*, 110 S. Ct. 55 (1989); ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988); ***United States v. Gilbert***, 813 F.2d 1523, 1529 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).

GOVERNMENT PROPOSED JURY INST. NO. 376

Immunized Witnesses

The witnesses [insert name of first witness] and [insert name of second witness] testified under a grant of immunity, pursuant to court order, after a petition by the government was filed requesting such an order. Under the law, none of the testimony during this trial can ever be used against them in any subsequent criminal proceeding. However, if any one of them testified untruthfully under the grant of immunity, he [she] could be prosecuted for perjury or the making of a false statement even though he [she] was testifying under a grant of immunity.

The testimony of a witness who provides evidence against a defendant for immunity from prosecution, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness's testimony has been affected by interest, or by prejudice against the defendant.

United States v. Lea, 618 F.2d 426, 432 n.7 (7th Cir.), *cert. denied*, 449 U.S. 832 (1980) (modified)

GOVERNMENT PROPOSED JURY INST. NO. 377

Credibility of Witnesses -- Immunized Witness

The testimony of an immunized witness, someone who has been told either that his [her] crimes will go unpunished in return for testimony or that his [her] testimony will not be used against him [her] in return for that cooperation, **1** must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.

[Insert name of witness] may be considered to be an immunized witness in this case.

The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement he [she] has with the government, or by his [her] own interest in the outcome of this case, or by prejudice against the defendant.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Vol. 1, Sec. 15.03 (modified)

NOTE

1 Only the clause which fits the facts of the case should be chosen for use in the instruction.

GOVERNMENT PROPOSED JURY INST. NO. 378

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness] who received immunity; that is, a promise from the government that any testimony or other information he [she] provided would not be used against him [her] in a criminal case. You may give her [his] testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Vol. I, Sec. 3.19 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 379

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness], a witness who has received immunity. That testimony was given in exchange for a promise by the government that [insert either "the witness will not be prosecuted" or "the witness' testimony will not be used in any case against him [her]"].

In evaluating [insert name of witness]'s testimony, you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of ordinary witnesses.

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Sec. 4.09 (modified)