

[Criminal Tax Manual](#)

[prev](#) • [next](#)

TABLE OF CONTENTS

|  |    |
|--|----|
| 22.00 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS .....                            | 1  |
| 22.01 STATUTORY LANGUAGE: 18 U.S.C. §§ 287, 286.....                           | 1  |
| 22.02 TAX DIVISION POLICY .....  | 1  |
| 22.02[1] Policy.....   | 1  |
| 22.02[2] Authorization of Grand Jury Investigations in False Claim Cases ..... | 2  |
| 22.03 GENERALLY.....   | 3  |
| 22.04 18 U.S.C. § 287 -- ELEMENTS .....  | 3  |
| 22.04[1] Claim Against the United States .....                                 | 4  |
| 22.04[2] False, Fictitious, or Fraudulent Claim.....                           | 5  |
| 22.04[2][a] False, Fictitious, or Fraudulent .....                             | 5  |
| 22.04[2][b] Materiality .....  | 6  |
| 22.04[3] Knowledge -- Intent -- Willfulness .....                              | 8  |
| 22.05 18 U.S.C. § 286 -- ELEMENTS .....  | 9  |
| 22.06 VENUE.....   | 10 |
| 22.07 STATUTE OF LIMITATIONS .....   | 11 |
| 22.08 THE MECHANICS OF A FALSE RETURN .....                                    | 11 |
| 22.09 SENTENCING GUIDELINES CONSIDERATIONS .....                               | 13 |

## **22.00 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS**

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

#### ***§ 287. False, fictitious or fraudulent claims***

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

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

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.<sup>1</sup>

### ***22.02 TAX DIVISION POLICY***

#### ***22.02[1] Policy***

Title 18 false claims and false claims conspiracy charges are among the non-Title 26 statutes traditionally used in tax prosecutions that involve fraudulent refund schemes. Tax charges under these statutes often are brought against a defendant who filed multiple fictitious income tax returns claiming refunds of income tax in the same year, particularly when the defendant personally received and retained some or all of the proceeds.

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

Many false refund claim cases could also be charged using 26 U.S.C. § 7206(1) or (2) (false returns),<sup>2</sup> or 18 U.S.C. § 1001 (false statements), § 1341 (mail fraud) or § 1343 (wire fraud). Section 287 is preferred to Section 7206 when the defendant pocketed the refund proceeds, because restitution for Title 18 offenses is more readily available than for Title 26 offenses. *See* 18 U.S.C. § 3663(a)(1). Also *see* [Chapter 44](#), *infra*, for a full discussion of restitution for criminal tax offenses.

When a scheme involves many false claims, the prosecutor should consider mail fraud or wire fraud charges if they yield strategic advantages. Such situations may include cases in which conspiracy is not a viable charge; when a fraud-scheme charge would ensure the admission of all relevant evidence; or when a fraud-scheme charge would serve as a predicate for the government to charge money laundering, to pursue asset forfeiture or to seek full restitution.

If the tax return preparer willfully created a fraudulent refund return for an undercover agent and actually filed the false return by mail or electronic filing, it may be strategically useful to charge the defendant with a substantive offense for filing the undercover agent's return because the defendant will have no basis to attack the credibility of the undercover agent. The preparer may be prosecuted under 18 U.S.C. § 287 for filing the undercover agent's false return.

### ***22.02[2] Authorization of Grand Jury Investigations in False Claim Cases***

The Assistant Attorney General has delegated to United States Attorneys the authority to authorize grand jury investigations of false and fictitious claims in cases where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself or herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which

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<sup>2</sup> The statute of limitations for offenses under 26 U.S.C. § 7206(1) and (2) is six years. *See* 26 U.S.C. § 6531(3) & (5).

the individual is not entitled.<sup>3</sup> See USAM [6-4.122\(D\)](#), [6-4.243](#); [Tax Division Directive No. 96](#).

These are known as “direct referral” cases, because the IRS is authorized to refer the cases directly to United States Attorneys. However, in every direct referral case, a copy of the letter requesting a grand jury investigation must be sent to the Tax Division.

### **22.03 GENERALLY**

The purpose of 18 U.S.C. § 287 is to protect the government from false, fictitious, or fraudulent claims.<sup>4</sup> *United States v. Montoya*, 716 F.2d 1340, 1344 (10th Cir. 1983).

### **22.04 18 U.S.C. § 287 -- ELEMENTS**

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

1. The defendant made or presented a claim to a department or agency of the United States for money or property;
2. The claim was false, fictitious or fraudulent;
3. The defendant knew at the time that the claim was false, fictitious or fraudulent.

*Johnson v. United States*, 410 F.2d 38, 46 (8th Cir. 1969); *United States v. Computer Science Corp.*, 511 F. Supp. 1125, 1134 (E.D. Va. 1981), *rev'd on other grounds*, 689 F.2d 1181 (4th Cir. 1982); *see also United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982) (holding that the signing and filing of a false tax return claiming a refund constituted a false claim under 18 U.S.C. § 287); *United States v. Miller*, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976) (same), *abrogated on other grounds by Boulware v. United States*, 522 U.S. 421, 436 (2008).

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<sup>3</sup> Cases involving schemes that recruit real individuals to file returns in their own names and under their correct Social Security numbers do not fall within the terms of the delegation of authority and must be referred to the Tax Division for authorization of the grand jury investigation.

<sup>4</sup> The *United States Attorneys' Manual* (USAM) contains a general explanation of 18 U.S.C. § 287. USAM [9-42.001](#) and Criminal Resource Manual [921](#), [922](#).

## **22.04[1] Claim Against the United States**

To establish a violation of Section 287, the government must prove that the defendant filed or caused to be filed a claim against the United States, or any department or agency of the United States, for money or property. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968); *Johnson v. United States*, 410 F.2d 38, 44 (8th Cir. 1969); *United States v. Mastros*, 257 F.2d 808, 809 (3d Cir. 1958) (*per curiam*). A tax return seeking a refund is a claim against the United States. *United States v. Thayer*, 201 F.3d 214, 223 (3d Cir. 1999); *United States v. Parsons*, 967 F.2d 452, 456 (10th Cir. 1992); *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982). Proof that a return was filed may include the IRS transcript of the account in which the refund claim was made. See *United States v. Bade*, 668 F.2d 1004, 1005 (8th Cir. 1982) (*per curiam*). Note, however, that it has been held that a taxpayer who attempts to pay taxes with a bad check has not filed a claim against the United States. See *United States v. McBride*, 362 F.3d 360, 369-71 (6th Cir. 2004). In *McBride*, the Sixth Circuit reasoned that, “[b]ecause [the defendant] never received any advance payments from the government to which he was not entitled, nor could his action of sending the IRS a bad check have possibly elicited any payment from the government, he cannot, as a matter of law, be found liable under § 287.” *Id.* at 371-72. However, the presentation of a government check by a party who is not entitled to it constitutes a presentation of a false claim within the meaning of the False Claims Act. *United States v. Branker*, 395 F.2d 881, 889 (2d Cir. 1968) (presentation of a false refund check for payment constitutes the making of a false claim against the United States under Section 287); *Scolnick v. United States*, 331 F.2d 598, 599 (1st Cir. 1964) (endorsement and deposit for collection of a government check to which the depositor was not entitled constituted a false claim within the meaning of the civil false claims statute, 31 U.S.C. § 231); *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983)(same).

Although the language of the statute would appear to require that the government receive the claim, it does not require that the defendant present it directly to the government. For example, in *United States v. Blecker*, 657 F.2d 629 (4th Cir. 1981), the Fourth Circuit held that presentation of a claim to an intermediary authorized to accept the claim for presentation to the government satisfied the “presentation” requirement of Section 287:

[T]here was substantial evidence that [the corporate defendant] submitted invoices for hourly rates based on falsified resumes with

knowledge that [the company employing the corporate defendant] would seek reimbursement for the payment of the invoices from the GSA. This evidence amply supported the government's charge that [the corporate defendant and the individual defendant, who was its president,] violated section 287 by submitting false claims to the government through an intermediary, and we find that theory of prosecution to be consonant with the language and meaning of the false claims statute.

*Id.* at 634.

Tax return preparers and electronic return originators should be considered intermediaries, and should not be characterized as “agents” of the IRS. *See United States v. Hebeke*, 89 F.3d 279, 283-84 (6th Cir. 1996); *Blecker*, 657 F.2d at 634; *United States v. Catena*, 500 F.2d 1319, 1322 (3d Cir. 1974). The defendant need not be the person who actually filed the claim for refund. *See* 18 U.S.C. § 2; *see also Blecker*, 657 F.2d at 633; *Scolnick v. United States*, 331 F.2d 598 (1st Cir. 1964). The offense is complete on the filing of the claim with the government. The statute does not require that the government pay or honor the claim. Thus, violations of Section 287 are chargeable even if the government has not lost money because of the false or fictitious claim. *United States v. Coachman*, 727 F.2d 1293, 1302 (D.C. Cir. 1984); *United States v. Miller*, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976), *abrogated on other grounds by Boulware v. United States*, 522 U.S. 421, 436 (2008).

The Third and Tenth Circuits have held that § 287 does not require a defendant who presents a false claim directly to the federal government to know that he is presenting the claim to the federal government. *United States v. Gumbs*, 283 F.3d 128, 135-36 (3d Cir. 2002); *United States v. Montoya*, 716 F.2d 1340, 1331 (10th Cir. 1983). The Third Circuit, however, reserved deciding whether a defendant who causes an intermediary to submit a false claim to the government under §§ 287 and 2(b) must know that he is causing the intermediary to submit a false claim and also that the claim will be presented to the federal government. *Gumbs*, 283 F.3d at 136.

#### ***22.04[2] False, Fictitious, or Fraudulent Claim***

##### ***22.04[2][a] False, Fictitious, or Fraudulent***

Section 287 is phrased in the disjunctive. Thus, charges under the statute may be based on proof that a claim submitted to the government is either false, fictitious, or

fraudulent. *United States v. Murph*, 707 F.2d 895, 896-97 (6th Cir. 1983) (*per curiam*) (“[T]he government may prove and the trial judge may instruct in the disjunctive form used in the statute.”); *United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981); *United States v. Irwin*, 654 F.2d 671, 683 (10th Cir. 1981), *overruled on other grounds by United States v. Daily*, 921 F.2d 994, 1004 & n.11 (10th Cir. 1990); *United States v. Milton*, 602 F.2d 231, 233 n.5 (9th Cir. 1979); *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978). The conduct proscribed by Section 287 has been defined as follows:

A claim is false or fictitious within the meaning of § 287 if untrue when made, and then known to be untrue by the person making it or causing it to be made. A claim is fraudulent if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted.

*Irwin*, 654 F.2d at 683 n.15 (internal quotation marks omitted) (quoting *Milton*, 602 F.2d at 233 & n.6). A return may be false or fictitious under the statute if the facts and figures used on the return are fictitious even though the taxpayer might be entitled to a refund if a true return were filed. For example, an individual who recruits others to file false returns based on fictitious reports of wages and withholding (Forms W-2) could be charged under Section 287 even if the recruited taxpayers were legally entitled to refunds. See *United States v. Gieger*, 190 F.3d 661, 666-67 (5th Cir. 1999); *United States v. Leahy*, 82 F.3d 624, 634 n.11 (5th Cir. 1996) (contractor violated Section 286 even though the false claims were irrelevant to the total amount paid by the government to the contractor). Similarly, a return may be false under Sections 286 and 287 if the defendant files a correct return in the name of another taxpayer in an attempt to obtain for himself or herself the refund that is due to the other taxpayer. See, e.g., *Kercher v. United States*, 409 F.2d 814, 818 (8th Cir. 1969) (“What Kercher was trying to do . . . was to lay claim . . . to what were claims of the taxpayers against the government. Therein lies the falsity and § 287 has appropriate application.”).

#### **22.04[2][b] Materiality**

Section 287 does not specifically require that a claim be false as to a “material” matter. Several circuits have expressly held that materiality is not an essential element of § 287 and need not be alleged in an indictment charging a violation of that statute. See *United States v. Lawrence*, 405 F.3d 888,899 (10th Cir. 2005); *United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Upton*, 91 F.3d 677, 684-685 (5th Cir. 1995); *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *United States v.*

*Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984), *overruled on other grounds by United States v. Ali*, 68 F.3d 1468 (2d Cir. 1995). However, the Eighth Circuit has held that materiality is an element of § 287, and the Fourth Circuit has suggested as much in *dictum*. See *United States v. Pruitt*, 702 F.2d 152, 155 (8th Cir. 1983); *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974). Similarly, the Fifth Circuit, which had held in *United States v. Upton*, 91 F.3d 677, 684-85 (5th Cir. 1995) that materiality was not an element of the offense, later suggested in dicta that the better practice would be to give a materiality instruction in a § 287 case. *United States v. Foster*, 229 F.3d 1196, 1196 n.2 (5th Cir. 2000). The Third Circuit found that materiality is not **always** an element of § 287. *United States v. Saybolt*, 577 F.3d 195, 199-200 (3d Cir. 2009). The Third observed that Section 287 forbids the filing of claims that are false, fictitious, or fraudulent. Since the statute is written in the disjunctive, each word must be given separate meanings. *Id.* The court then stated, “[W]e read Section 287 to demand a showing that the claim was known to be either “fraudulent,” which would require proof of materiality, or “false” or “fictitious,” which would not require proof of materiality.” *Id.* at 200. Note that in those circuits that have held that materiality is an element of Section 287, the issue must be submitted to the jury. See *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995).

In *United States v. Neder*, 527 U.S. 1, 20-25 (1999), the Supreme Court held that materiality is an element of the mail fraud, wire fraud, and bank fraud statutes, despite the fact that the term “materiality” was not mentioned in any of them.<sup>5</sup> The Court noted that the term “defraud” had a settled meaning at common law that included the requirement of materiality and that the inference was that Congress meant to incorporate the established meaning of that term. *Id.* at 22. Thus, applying *Neder*, a court may read the term “fraudulent” in Section 287 to require that the claim be material and that this question be submitted to the jury. See *United States v. Foster*, 229 F.3d 1196, 1196 & n.1 (5th Cir. 2000) (while expressly not deciding the issue, the Fifth Circuit reads *Neder* to require a materiality instruction and states that “the better practice would be to give the instruction in a § 28[7] false claim offense”).<sup>6</sup> But even assuming that *Neder* supports the conclusion

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<sup>5</sup> In *United States v. Wells*, 519 U.S. 482, 490-94 (1996), the Supreme Court laid out the approach a court should follow in determining whether a statute requires proof of a particular item as an element of the offense.

<sup>6</sup> In addressing “materiality” in the criminal tax context, the Supreme Court stated in *Neder* that “a false statement is material if it has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed,’” and the Court noted that several courts had determined that “any failure to report income is material.” *Neder*, 527 U.S. 16 (citations omitted). The



that materiality is an element of a Section 287 charge that the defendant made a fraudulent claim for a refund (*but see Neder*, 527 U.S. at 23 n.7), it would seem that the holding of *Neder* could be avoided by a charge that the defendant filed a false claim for a refund, omitting any reference in the charge to “fraudulent.”

For further discussion of materiality, *see* Section [12.08](#), *supra*.

### **22.04[3] Knowledge -- Intent -- Willfulness**

Section 287 requires the government to prove that a false claim against the government was made, “knowing such claim to be false, fictitious, or fraudulent . . . .” A Section 287 indictment should allege such knowledge, and the proof that the defendant knew the return was false is part of the government’s burden of proof. *United States v. Holloway*, 731 F.2d 378, 380-81 (6th Cir. 1984).<sup>7</sup>

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

The circuits vary, however, on the proof of intent necessary to convict for a violation of Section 287. In *United States v. Maher*, 582 F.2d 842, 847 (4th Cir. 1978), the Fourth Circuit approved a jury instruction stating that, under § 287, criminal intent “could be proved by either a showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law.” In *United States v. Milton*, 602 F.2d 231, 234 (9th Cir. 1979), the court held that no instruction on “intent to defraud” is necessary where a false claim is charged (because it is not an element of the offense), but left open whether an “intent to deceive” is an element of a charge of submitting a “fraudulent” claim. *Id.* at 233 n.7. The Eighth Circuit, in *Kercher*

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Court concluded that, under either formulation, no jury could reasonably find that the defendant’s failure to report substantial amounts of income on his tax returns was not a material matter. *Id.* Applying *Neder* to a § 287 prosecution for filing false claims for tax refunds involving so-called “black tax returns,” the Fifth Circuit concluded, similarly to *Neder*, that the defendant’s three false statements (each seeking a refund of “black taxes” in the amount of \$43,209) were material to the tax refund claims. *Foster*, 229 F.3d at 1197. The court stated, “[T]here is no doubt that the amounts claimed in the ‘black tax returns’ that [the defendant] assisted with were as material as they were unjustified. The huge scope of IRS’s processing and review activities makes it inevitable that a sensible threshold of materiality must be applied to irregularities planted in tax refund claims. Were it not so, taxpayers would be encouraged to take advantage of IRS’s practical inability to review each return individually.” *Id.*

<sup>7</sup> Although the element of knowledge can sometimes be established through proof of “willful blindness,” care should be exercised in seeking and framing appropriate jury instructions. *See* [Section 8.08\[4\]](#), *supra*.

*v. United States*, 409 F.2d 814, 817 (8th Cir. 1969), did not draw a distinction between false and fraudulent claims, but held without elaboration that § 287 requires proof of criminal intent.

## 22.05 18 U.S.C. § 286 -- ELEMENTS

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

The courts of appeals have reached slightly different conclusions as to the elements of a § 286 offense. The Sixth Circuit has held that the necessary elements are: “(1) the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; (2) the claim was false, fictitious, or fraudulent; (3) the defendant knew or was deliberately ignorant of the claim’s falsity, fictitiousness, or fraudulence; (4) the defendant knew of the conspiracy and intended to join it; and (5) the defendant voluntarily participated in the conspiracy.” *United States v. Dedman*, 527 F.3d 577, 593-94 (6th Cir. 2008). In contrast, the Fifth Circuit has held that, in order to establish a violation of § 286, the government need only prove “that the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; that the claim was false, fictitious, or fraudulent; and that the defendant knew at the time that the claim was false, fictitious, or fraudulent.” *United States v. Leahy*, 82 F.3d 624, 633 (5th Cir. 1996).

The crime proscribed by § 286 is entering into an agreement to defraud the government in the manner specified. In order to convict, the government must prove that the defendant agreed to engage in a scheme to defraud the government<sup>8</sup> and knew that the objective of the scheme was illegal. The government need not charge or establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of § 286 because, unlike § 371, an overt act is not an element of a § 286 conspiracy. See *Dedman*, 527 F.3d at 594 n.7; *Lanier*, 920 F.2d at 892.<sup>9</sup> The government must also prove

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<sup>8</sup> See discussion of *United States v. Neder*, 527 U.S. 1 (1999), *supra*, [§ 22.04\[2\]\[b\]](#).

<sup>9</sup> The Eleventh Circuit has suggested that § 286 has an overt act requirement. See *United States v. Gupta*, 463 F.3d 1182, 1194 (11th Cir. 2006). However, *Gupta* derives the overt act requirement from a case involving a conspiracy under 18 U.S.C. § 371, rather than 18 U.S.C. § 286. See *Gupta*, 463 F.3d at 1194 (quoting *United States v. Suba*, 132 F.3d 662, 672 (11th Cir. 1998)).

that the conspirators agreed to defraud the government by obtaining the payment of false claims against the government. There is no requirement that the coconspirators actually obtained the payment or that the government prove that any steps were taken to consummate the filing of a false claim, so long as the existence of the agreement can be proved. Cf. *United States v. Coachman*, 727 F.2d 1293, 1302 (D.C. Cir. 1984). As a practical matter, the proof in § 286 cases generally does not differ from proof in § 371 tax cases, because in most false claims conspiracy cases, the existence of the agreement will be proved by acts that were undertaken in furthering the conspiracy or in consummating the attempt to obtain payment of the claim.<sup>10</sup>

## 22.06 VENUE

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

Venue may be proved either by direct or circumstantial evidence. It need only be established by a preponderance of the evidence, not by proof beyond a reasonable doubt. Proof of venue, although an essential element of the government's proof, has been held to be more akin to jurisdiction than to a substantive element of the crime. Therefore, where venue is not disputed, it may be ruled on by the court as a matter of law and need not be submitted to the jury with an instruction. *Massa*, 686 F.2d at 530-531. See [Chapter 6](#), *supra*, for a general discussion of venue, and [§ 23.09](#), *infra*, for a discussion of venue for conspiracy charges.

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<sup>10</sup> There is a [sample section 286 indictment](#) included in the forms in this Manual.

## ***22.07 STATUTE OF LIMITATIONS***

Section 3282 of Title 18 provides a five-year statute of limitations for crimes for which a period of limitations is not otherwise specified. Section 6531(1) of the Internal Revenue Code, however, provides a six-year statute of limitations “for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner.” That statute provides the statute of limitations period for conspiracies to defraud the United States brought under 18 U.S.C. § 371. *See* § [23.08](#), *infra*. That six-year limitations period may well apply to Section 286 and 287 cases, but the Tax Division is not aware of any case law on that point. The safer course is to bring false claims cases within five years of the commission of the offense. The plain language of § 6531(1), however, provides an argument for a six-year limitations period in cases that have not been or cannot be indicted within the five-year period.

## ***22.08 THE MECHANICS OF A FALSE RETURN***

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

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

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

If only Forms W-2 were prepared, a recruiter, or runner, escorts each “taxpayer” to a tax return preparer’s office, where the “taxpayer” requests a return to be prepared from the phony W-2s and other information supplied by the runners. If the participants in the scheme prepared a complete return, the runner escorts the “taxpayer” to an Electronic Return Originator (ERO), where the return is filed using the “taxpayer’s” name and SSN. In either case, the “taxpayer” applies for a refund anticipation loan. When the proceeds of the loan are available (usually within one or two days), the runner and the “taxpayer” pick up the check and cash it at a check cashing service. The “taxpayer” receives a portion of the loan amount (usually \$400 to \$500) and the participants split the remainder of the funds. Many false claims for refund are just under the maximum refund anticipation loan limit (generally under \$5,000). ELF schemes may involve as few as one or two returns, or as many as hundreds of returns and over \$1,000,000 in false claims. One scheme involved 23 individuals and false claims exceeding \$2 million over a period of several months. Other schemes have also exceeded \$1 million in false claims.<sup>11</sup>

Another § 287 scheme involves filing fraudulent federal income tax returns and other documents, including false Forms 1099-OID and Forms Schedule B. The taxpayer fabricates federal income tax withholdings on tax returns, resulting in fraudulent claims

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

for refund. The district court in *United States v. McIntyre* described such a scheme as follows:

IRS Forms 1099–OID are used by issuers of financial instruments generating original issue discount (“OID”) to report OID income and any federal income tax withheld from that income. OID income refers to the difference between the discounted price at which a debt instrument is sold at issuance and the stated redemption price at maturity; it is taxable as interest over the life of the obligation. IRS Forms Schedule B are used to report interest and dividend income, and are attached to IRS Forms 1040. The fraudulent Forms 1099–OID that [taxpayers] prepare and submit with returns they prepare falsely state that [the taxpayers] are “payees” who receive OID income from their creditors. The fraudulent Forms 1099–OID typically show false income paid by a [taxpayer’s] creditors to the [taxpayer]. Some of these forms even show the [taxpayer] paying OID income to himself.<sup>12</sup>

*United States v. McIntyre*, 715 F. Supp. 2d 1003, 1006-07 (C.D. CA 2010) (internal citations omitted). Thus, through his scheme, nonexistent withheld taxes reported in the returns that are prepared and filed result in sometimes massive undeserved claimed refunds.

## **22.09 SENTENCING GUIDELINES CONSIDERATIONS**

Section 287 of Title 18 prohibits the presentation of false, fictitious, or fraudulent claims to the government. Similarly, 18 U.S.C. § 286 prohibits conspiracies to defraud the government by obtaining or aiding to obtain the payment of any false, fictitious, or

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<sup>12</sup> This theory is based on a tax defier theory that has been described as implausible and clearly nonsense. “Under this theory, there exists an ‘unrestricted right for collections and return of funds/securities’ issued to every child born in the United States. . . see [] *United States v. Weldon*, No. 1:08–cv–01643–LJO–SMS, 2010 WL 1797529, \* 2 (E.D. CA May 4, 2010) (discussing the ‘redemption’ or ‘charge-back’ theory). The birth certificates issued to such children become a registered security representing that child’s life-long labor on a general average basis. The security is held in trust by the United States government, in whom the children are its stockholders, as a redeemable bond. The Social Security Administration tracks each persons’ funds. Individuals may access the funds held in trust by filing an IRS Form 1099. This theory has been routinely rejected in all other jurisdictions. See *Weldon*, 2010 WL 1797529, at \* 3.” *United States v. Jones*, 2011 WL 2680742, \*5 (D. ID 2011).

fraudulent claim. In the criminal tax context, these statutes generally apply to individuals who file income tax returns claiming false or fraudulent refunds of income tax.

The Statutory Index, found in Appendix A of the sentencing guidelines, provides a list to help determine the offense guidelines applicable to statutes of conviction. This Statutory Index lists USSG §2B1.1 as the applicable guideline for violations of 18 U.S.C. §§ 286 and 287. By its own terms, §2B1.1 governs larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; and offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States. Section 2B1.1 also includes, however, a cross-reference provision that instructs the court to use a different guideline when certain circumstances are present. Specifically, when the case involves false, fictitious, or fraudulent statements and “the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline,” the court is to apply that other guideline. USSG §2B1.1(c)(3)<sup>13</sup> The application note for this provision makes clear that, when a defendant is convicted under a general fraud statute but the conduct underlying the count of conviction is covered by a more specific guideline, the sentencing court should apply the more specific guideline. USSG §2B1.1 comment (n.15).

The Tax Division takes the position that the tax guidelines apply when a defendant has been convicted of filing a false claim for a tax refund in violation of 18 U.S.C. § 287 or conspiring to file a false claim for a tax refund in violation of 18 U.S.C. § 286. Although the statutes are not tax statutes, the offense conduct relates to a tax scheme. When a defendant is convicted of filing a false claim for a tax refund, the defendant has necessarily filed a false tax return. This conduct is specifically covered by §2T1.1, which applies to tax offenses. Relying on the cross-reference provision, §2B1.1(c)(3), sentencing courts should use §2T1.1 when a defendant has been convicted of filing a false claim for a tax refund.

This position is supported by case law in which several courts have held that §2T1.1 applies to a false claim for a tax refund when the defendant has been convicted under 18 U.S.C. § 286 or § 287. *See United States v. Brisson*, 448 F.3d 989, 991-92 (7th Cir. 2006) (“Brisson’s offense conduct was at heart a scheme to file fraudulent tax returns and thus could be considered on a par with tax fraud”); *United States v. Barnes*, 324 F.3d

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<sup>13</sup> This provision does not apply to offenses listed in §2B1.1(c)(1) and §2B1.1(c)(2), which are offenses involving firearms, explosives, or arson.

135, 139-40 (3d Cir. 2003); *United States v. Aragbaye*, 234 F.3d 1101, 1105-06 (9th Cir. 2000).

Accordingly, the prosecutor should request the court to apply the provisions of §2T1.1 when the defendant has been convicted of filing a false claim for a tax refund in violation of 18 U.S.C. § 287 or of conspiring to file a false claim for a tax refund in violation of 18 U.S.C. § 286. We reach this conclusion because, as noted, filing a false claim for a tax refund is essentially a tax offense. Thus, applying §2T1.1 will achieve one of the sentencing goals set forth in 18 U.S.C. § 3553 -- “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” *See* 18 U.S.C. § 3553(a)(6). Moreover, this approach has the advantage of simplifying guidelines calculations in cases involving defendants who have been convicted of both 18 U.S.C. §§ 286/287 and Title 26 offenses, since the intended losses from all of the offenses would be aggregated under a single guideline. *See* USSG §3D1.2(d).