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Last updated: July 2015

8.00 ATTEMPT TO EVADE OR DEFEAT TAX

8.01 STATUTORY LANGUAGE: 26 U.S.C. § 7201

Section 7201. ***Attempt to evade or defeat tax***

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.[1]

8.02 TAX DIVISION POLICY

"Tax evasion" is a shorthand phrase that many people use for all manner of tax fraud. But the charge of tax evasion, in violation of 26 U.S.C. § 7201, is not necessarily the best one to bring against individuals defrauding the IRS. Defendants frequently seek to exploit the fact that, in order to establish the crime of tax evasion, the government must prove the existence of a tax due and owing and willfulness. Prosecutors therefore should consider other charges, such as conspiring to defraud the United States, 18 U.S.C. § 371; filing false returns, 26 U.S.C. § 7206; or endeavoring to obstruct the IRS, 26 U.S.C. § 7212(a), as alternatives or supplements to the charge of tax evasion.

8.03 GENERALLY

Section 7201 proscribes a single crime – attempted evasion of tax – which can be committed in two distinct manners: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax. *See* ***United States v. Mal***, 942 F.2d 682, 686-88 (9th Cir. 1991); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir.1990); ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990); *see also* ***United States v. Hunerlach***, 197 F.3d 1059, 1065 (11th Cir. 1999); *but see* ***Sansone v. United States***, 380 U.S. 343, 354 (1965); ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir.1988). A defendant attempting to evade assessment generally attempts to prevent the government from determining the true tax liability. *See* ***United***

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[1] For offenses under Section 7201, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) & (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, 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(d).

States v. Mal, 942 F.2d at 687. A defendant attempting to evade payment generally seeks to evade the payment of the true tax liability by hiding assets from the government. *See* ***United States v. Hogan***, 861 F.2d at 315; ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984). Although ***Sansone*** has been cited for the proposition that evasion of payment and evasion of assessment constitute two distinct crimes, *see*, *e.g.*, ***Hogan***, 861 F.2d at 315, several circuits have rejected duplicity challenges to indictments by holding that Section 7201 proscribes only one crime, tax evasion, which can be committed either by attempting to evade assessment or by attempting to evade payment. *See* ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990), *judgment vacated*, 498 U.S. 1043 (1991), *ruling on duplicity issue reinstated on remand*, 927 F.2d 955, 956 (7th Cir. 1991); ***United States v. Mal***, 942 F.2d at 686. Furthermore, although the First Circuit initially expressed some skepticism concerning whether ***Masat*** and ***Dunkel*** were consistent with ***Sansone***, *see* ***United States v. Waldeck***, 909 F.2d 555, 557-58 (1st Cir. 1990), it subsequently relied on ***Dunkel*** in rejecting a defendant's duplicity claim, noting that "[n]o matter how one resolves the semantic question, . . . it is beyond reasonable dispute that the indictment charged [defendant] with a single, cognizable crime, and that the jury convicted him of the same crime. *See* ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990)." ***United States v. Huguenin***, 950 F.2d 23, 26 (1st Cir. 1991).[2]

In order to establish the offense of tax evasion, whether of assessment or of payment, the government must prove, *inter alia*, that the defendant engaged in some affirmative conduct for the purpose of misleading the IRS or concealing tax liability or assets. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and Section 7201 expressly says "attempts in any manner" to evade or defeat any tax or the payment thereof. A common method used to attempt to

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[2] The First Circuit also rejected the defendants' duplicity claims in both ***Huguenin*** and ***Waldeck*** on the grounds that the defendants in those cases were clearly apprised that the government was proceeding on an evasion of assessment theory. *See* ***Huguenin***, 950 F.2d at 26; ***Waldeck***, 909 F.2d at 558.

Although the court in ***Waldeck*** stated (909 F.2d at 558) that "the indictment could have been clearer by specifying that the crime charged was attempting to evade and defeat the assessment of taxes," the Tax Division believes that an indictment which tracks the first part of the statute and alleges an attempt to evade and defeat a tax clearly charges an attempt to evade tax by evasion of assessment. Similarly, an indictment that tracks the second part of the statute and alleges an attempt to evade payment of a tax clearly alleges an attempt to evade tax by evasion of payment. This analysis is consistent with the result in both ***Huguenin*** and ***Waldeck***.

evade or defeat assessment of a tax is the filing of a false tax return that understates tax liability, either by omitting income, claiming deductions to which the taxpayer is not entitled, or both.

In evasion of payment cases, evading or defeating the correct assessment of the tax is not the issue. Evasion of payment usually occurs after the existence of a tax due and owing has been established, either by the taxpayer's reporting the amount of tax due and owing, by the Internal Revenue Service's examining the taxpayer and assessing the amount of tax deemed to be due and owing, or by operation of law on the date that the return is due, if the taxpayer fails to file a return and the government can prove that there was a tax deficiency on that date (*see* ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992)).[3] The taxpayer then seeks to evade the payment of the taxes due and owing.[4] In order to establish the crime of attempted evasion of payment of tax, the government must establish that the taxpayer took some affirmative action to defeat the payment of the tax. "Merely failing to pay assessed taxes, without more, * * * does not constitute evasion of payment."[5] ***United States v. McGill***, 964 F.2d 222, 231 (3d Cir. 1992) (citing ***Sansone***, 380 U.S. at 351); ***United States v. Romano***, 938 F.2d 1569, 1573 (2d Cir. 1991) (evidence that defendant merely carried cash to Canada and failed to file return not sufficient to establish existence of affirmative act of evasion of payment); *see also* ***United States v. Masat***, 896 F.2d 88, 97 (5th Cir. 1990) (citing ***Spies v. United States***, 317 U.S. 492, 499 (1943)); ***United States v. Voorhies***, 658 F.2d 710, 715 (9th Cir.1981). Generally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay taxes or the removal of assets from the reach of the IRS. *See* ***United States v. McGill***, 964 F.2d at 231.

Historically, the crime of willfully attempting to evade and defeat the assessment of tax through evasion of assessment, as opposed to willfully attempting to evade the payment of a tax, has been the principal revenue offense. Although the basic elements of the crime are relatively simple, actually proving the necessary elements can be difficult.

[3] Neither a formal assessment nor a demand for payment is required. *See* ***United States v. Daniel***, 956 F.2d at 542.

[4] This is not to imply that an affirmative act to evade payment of a tax can never occur prior to its assessment. *See* ***United States v. McGill***, 964 F.2d 222, 231 (3d Cir. 1992).

[5] Willfully failing to pay taxes is, however, a misdemeanor covered by 26 U.S.C. § 7203.

8.04 PLEADING TAX LOSS IN THE INDICTMENT

The government does not have to prove the exact amount of tax due and owing in a tax case, and it is common for the unreported income or the tax due and owing figures in the indictment to differ from those established by the evidence presented to the jury and included in the final criminal tax computations made by the government's summary witness. An important preliminary charging decision is whether or not to specify a tax loss in the indictment.

The primary benefit to including the specific tax loss amount in the indictment is that the tax loss figure becomes public information within the context of Federal Rule of Criminal Procedure 6(e) and 26 U.S.C. § 6103 when the indictment is returned or unsealed. Once public, the tax loss amount is available for use in a press release, or any other public forum.

The primary concern about including a specific tax loss amount in the indictment is the likelihood that the tax loss number will change during the course of trial. For example, the prosecutor may decide to limit the number of witnesses called in order to streamline a case, the testimony of a coconspirator may change on the witness stand, or the court may decide to exclude business records pertaining to one or more transactions. Furthermore, a discrepancy between the tax loss charged and proved may confuse or distract the jury and create an opportunity for a defense attorney to undermine the jury's confidence in the government's case.

Of course, if the prosecutor decides not to include the specific tax loss figure in the indictment, the defendant may seek a bill of particulars arguing that his or her ability to prepare for trial is impaired by the failure of the indictment to identify the tax loss at issue. *See* Fed. R. Crim. P. 7(f); *see also* ***United States v. Salisbury***, 983 F.2d 1369, 1375 (6th Cir. 1993); ***United States v. Rosa***, 891 F.2d 1063,1066 (3d Cir. 1989); ***United States v. DiCesare***, 765 F.2d 890, 897 (9th Cir. 1985) (bill of particulars only appropriate when the indictment is insufficient to permit the preparation of an adequate defense); ***United States v. Giese***, 597 F.2d 1170, 1180 (9th Cir. 1979).

When determining whether to include a specific tax loss amount in the indictment, the prosecutor must assess the facts and circumstances of the case, including the need for publicity and the likelihood of changes in the tax loss computations

8.05 ELEMENTS OF EVASION

To establish a violation of Section 7201, the following elements must be proved:

1. An affirmative act constituting an attempt to evade or defeat a tax or the payment thereof. ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Spies v. United States***, 317 U.S. 492, 497-99 (1943).

2. An additional tax due and owing. ***Boulware v. United States***, 552 U.S. 421, 424 (2008); ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Lawn v. United States***, 355 U.S. 339, 361 (1958).

3. Willfulness. ***Cheek v. United States***, 498 U.S. 192, 193 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 358-59 (1973); ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Holland v. United States***, 348 U.S. 121, 124, 139 (1954).

The government must prove each element beyond a reasonable doubt. ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990); ***United States v. Williams***, 875 F.2d 846, 849 (llth Cir. 1989).

8.06 ATTEMPT TO EVADE OR DEFEAT

The means by which defendants can attempt to evade are virtually unlimited. As noted above, Section 7201 expressly prohibits attempts to evade tax "in any manner." In order to violate Section 7201, the taxpayer generally must take some affirmative action with an intent to evade tax. The general rule is that omissions to act will not satisfy the affirmative act requirement. For example, a mere failure to file a return, standing alone, cannot constitute an attempt to evade taxes. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. Hoskins***, 654 F.3d 1086, 1091 (10th Cir. 2011) ("To be liable under § 7201, a defendant must do more than passively fail to file a tax return"); United ***States v. Nelson***, 791 F.2d 336, 338 (5th Cir. 1986).

Generally, for tax evasion purposes, "any conduct, the likely effect of which would be to mislead or to conceal" constitutes an affirmative attempt to evade tax. ***Spies***, 317 U.S. at 499; *see, e.g.,* ***United States v. Bishop***, 264 F.3d 535, 545 (5th Cir. 2001). Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax. *See* ***United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996); ***United States v. Jungles***, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of Section 7201); ***United States v. Conley***, 826 F.2d 551, 556-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).

Note that the government "need not prove each affirmative act alleged." ***United States v. Mackey***, 571 F.2d 376, 387 (7th Cir. 1978); ***Conley***, 826 F.2d at 558-59; *cf.* ***United States v. Miller***, 471 U.S. 130, 145 (1985) (government's proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act); ***Turner v. United States***, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged"); ***Crain v. United States***, 162 U.S. 625, 634-36 (1896) (indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are proved).

8.06[1] Attempt To Evade Assessment

Although filing a false return is a common method of attempting to evade the assessment of a tax, the requirement of an affirmative attempt to evade can be met by proof of any affirmative act undertaken with a tax evasion motive. The Supreme Court "by way of illustration, and not by way of limitation," set out examples of what can constitute an "affirmative willful attempt" to evade, in ***Spies v. United States***, 317 U.S. 492, 499 (1943):

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of 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.

Failing to file a return, coupled with an affirmative act of evasion and a tax due and owing, has come to be known as ***Spies***-evasion, an example of which is found in ***United States v. Goodyear***, 649 F.2d 226, 227-28 (4th Cir. 1981). The Goodyears failed to file a tax return for the year in question. Later, Mr. Goodyear falsely stated to Internal Revenue Service agents that the Goodyears had earned no income in that year, and the Goodyears both falsely told the agents that they had deposited all business receipts into corporate bank accounts. The false statements to the agents were the affirmative acts of evasion supporting the Goodyears' Section 7201 convictions. ***Goodyear***, 649 F.2d at 227-28. Similarly, proof of a false statement, on an application for an extension of time to file a tax return, that no tax is owed for the year is sufficient to meet the affirmative act requirement. ***United States v. Klausner***, 80 F.3d 55, 62 (2d Cir. 1996).

False statements to Internal Revenue Service agents are frequently alleged as affirmative acts of evasion. *See, e.g.*, ***United States v. Higgins***, 2 F.3d 1094, 1097 (10th Cir. 1993); ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (holding that repeated false statements to IRS agents and instructing employees not to talk to IRS agents were sufficient to support a jury finding of at least one affirmative act); ***United States v. Ferris***, 807 F.2d 269, 270-71 (1st Cir. 1986); ***United States v. Neel***, 547 F.2d 95, 96 (9th Cir. 1976); ***United States v. Calles***, 482 F.2d 1155, 1160 (5th Cir. 1973). *But see* ***United States v. Romano***, 938 F.2d 1569, 1572-73 (2d Cir. 1991) (holding that defendant who was stopped while trying to transport $359,500 to Canada did not commit affirmative act of evasion despite initially claiming that he had only $30,000 to $35,000 in cash and only gradually acknowledging the full amount to U.S. customs officials; at the time of the conduct, the defendant had no obligation to disclose existence of the money to the IRS).

The false statements may be made before, simultaneously with, or after the taxpayer's failure to file a return. *See* ***United States v. Copeland***, 786 F.2d 768, 769-70 (7th Cir. 1985); ***Goodyear***, 649 F.2d at 227-28; *see also* ***United States v. Beacon Brass Co.***, 344 U.S. 43, 45-46 (1952); ***United States v. Dandy***, 998 F.2d 1344, 1348 (6th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 386 (7th Cir. 1992) (indictment does not fail for alleging that affirmative acts occurred on or about filing due date when they in fact occurred earlier); ***United States v. Winfield***, 960 F.2d 970, 973 (11th Cir. 1992) (allegation that defendant made false statements six years after tax return was due satisfies affirmative act element); ***United States v. Mal***, 942 F.2d 682, 684 (9th Cir. 1991). The affirmative act must, however, have been committed with the intent to evade taxes owed for the year charged. *See* ***United States v. Voigt***, 89 F.3d 1050, 1089-91 (3d Cir. 1996).

Courts have uniformly held that the filing of a false Form W-4 may constitute an affirmative act of evasion. *See* ***United States v. DiPetto***, 936 F.2d 96, 97 (2d Cir. 1991) (filing and maintaining false Forms W-4 constituted affirmative acts of evasion); ***United States v. Williams***, 928 F.2d 145, 148-49 (5th Cir. 1991) (maintenance of fraudulent Form W-4); ***United States v. Waldeck***, 909 F.2d 555, 560 (1st Cir. 1990); ***United States v. Connor***, 898 F.2d 942, 944-45 (3d Cir. 1990); ***United States v. Copeland***, 786 F.2d 768, 770-71 (7th Cir. 1985); ***United States v. King***, 126 F.3d 987, 990 (7th Cir.1997). Moreover, a false W-4 filed prior to the prosecution years may constitute an affirmative act in each year that it is maintained, because the taxpayer is under a continuing obligation to correct intentional misrepresentations on the form. *See* ***Williams***, 928 F.2d at 149 (defendant properly convicted of tax evasion for years 1983-85 where false Form W-4 claiming 50 exemptions was filed in 1983 and remained in effect through the prosecution years)***; United States v. King***, 126 F.3d 987, 990-93 (7th Cir. 1997); ***DiPetto***, 936 F.2d at 97.

The courts of appeals have recognized that various types of affirmative conduct can constitute affirmative attempts to evade tax. *See, e.g.*, ***United States v. Josephberg***, 562 F.3d 478 (2d Cir. 2009) (establishing stock accounts for his children into which [the defendant] had his investment banking income redirected). ***United States v. Beall***, 970 F.2d 343, 346-47 (7th Cir. 1992) (using a warehouse bank and instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion);[6] ***United States v. Carlson***, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers and incorrect dates and places of birth could easily have misled or concealed information from the IRS); ***United States v. Valenti***, 121 F.3d 327, 333 (7th Cir. 1997) (use of cash, not keeping business records, paying employees in cash and not reporting their wages to the IRS, advising employees they did not have to pay taxes)***; United States v. Jungles***, 903 F.2d 468, 472- 74 (7th Cir. 1990) (employee's use of "independent contractor" agreement to eliminate withholding and warehouse bank to evade income tax were affirmative acts).

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[6] The ***Beall*** court held also that the government need not prove the defendant personally received any of the money, so long as the defendant earned it. 970 F.2d at 345.

A false return does not need to be signed to be treated as an affirmative act of evasion, as long as it is identified as the defendant's return. *See* ***United States v. Robinson***, 974 F.2d 575, 578 (5th Cir. 1992) (rejecting defendant's claim of variance between indictment's allegation that she filed a false return and evidence proving she filed an unsigned Form 1040, stating, "[t]he government did not have to prove that the false Form 1040 was a 'return' in order to show an affirmative act of evasion"); ***United States v. Maius***, 378 F.2d 716, 718 (6th Cir. 1967); ***Gariepy v. United States***, 220 F.2d 252, 259 (6th Cir. 1955); ***Montgomery v. United States***, 203 F.2d 887, 889 (5th Cir. 1953). Nor does the fact that the return was signed by someone other than the defendant preclude a finding that the defendant knew of its falsity and had it filed in an attempt to evade. *See* ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989).

The fact that a return or other tax document is signed with the defendant's name is prima facie evidence that the defendant signed the document. 26 U.S.C. § 6064; ***United States v. McKee***, 506 F.3d 225, 233 (3d Cir. 2007); ***United States v. Kim***, 884 F.2d 189, 195 (5th Cir. 1989); ***United States v. Brink***, 648 F.2d 1140, 1143 (8th Cir. 1981). Prosecutors need to carefully craft jury instructions reflecting the rule of section 6064. Note that "it is improper to charge a taxpayer with conclusive knowledge of the contents [of a return] on the basis of the signature alone. Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the tax return is prima facie evidence that the signor knows the contents thereof." ***United States v. Bass***, 425 F.2d 161, 163 (7th Cir. 1970). Courts have ruled that if a jury finds beyond a reasonable doubt that the defendant signed the document, they may infer that the defendant knew of the document's contents. ***Wainwright***, 413 F.2d at 801-02; ***United States v. Rayborn***, 491 F.3d 513, 519 (6th Cir. 2007). Prosecutors must be aware, however, that 26 U.S.C § 6064 does not create a rebuttable presumption that the defendant knew the contents of the document. ***United States v. Trevino***, 419 F.3d 896, 902 (9th Cir. 2005); ***Rayborn***, 491 F.3d at 519.

8.06[2] Attempt To Evade Payment

The affirmative acts of evasion associated with evasion of payment cases almost always involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. Obstinately refusing to pay taxes due and possession of the funds needed to pay the taxes, *without more*, does not establish the requisite affirmative act necessary for an attempted evasion of payment charge. *See* ***Spies***, 317 U.S. at 499. *Accord* ***United States v. Hoskins,*** 654 F.3d 1086, 1091 (11th Cir. 2011) (evasion of assessment case) (a defendant must do more than passively fail to file a tax return, the statute also "requires a positive act of commission designed to mislead or conceal"). Importantly, however, "[t]he government only need[s] to show one affirmative act of evasion for each count of tax evasion." ***Id.*** (citation omitted); *see also* ***United States v. Gross***, 626 F.3d 289, 293 (6th Cir. 2010) "([Section 7201] is distinct from the "willful failure to file" misdemeanor under § 7203, which requires the Government to prove only that the defendant willfully failed to pay income tax or perform one of the other requirements specified under that section.").

Examples of affirmative acts of evasion of payment include placing assets in the names of others, dealing in currency, using nominees to conduct business, buy and sell assets, or conduct other financial transactions, or providing false information about assets or income to the IRS. *See* ***Cohen v. United States***, 297 F.2d 760, 762, 770 (9th Cir. 1962); *see also* ***United States v. Carlson***, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers, incorrect places of birth, and incorrect dates of birth could easily have misled or concealed information from the IRS); ***United States v. Gonzalez***, 58 F.3d 506, 509 (10th Cir. 1995) (signing and submitting false financial statements to the IRS)***; United States v. Pollen***, 978 F.2d 78, 88 (3d Cir. 1992); (defendant placed assets out of the reach of the United States Government by maintaining more than $350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at bank, in a fictitious name); ***United States v. Beall***, 970 F.2d 343, 345-47 (7th Cir. 1992) (defendant instructed employer to pay income to a tax protest organization); ***United States v. McGill***, 964 F.2d 222, 227-29, 232-33 (3d Cir. 1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); ***United States v. Brimberry***, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax)***; United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant used other persons' credit cards, used cash extensively, placed assets in other persons' names); ***United States v. Conley***, 826 F.2d 551, 553 (7th Cir. 1987) (defendant concealed "nature, extent, and ownership of his assets by placing his assets, funds, and other property in the names of others and by transacting his personal business in cash to avoid creating a financial record"); ***United States v. Shorter***, 809 F.2d 54, 57 (D.C. Cir. 1987) (defendant maintained a "cash lifestyle" in which he "conducted all of his professional and personal business in cash," possessed no credit cards, never acquired attachable assets, and maintained "no bank accounts, office ledgers, or receipts or disbursement journals”), *abrogated on other grounds by* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** 509 U.S. 579, 597-98 (1993); ***United States v. Hook***, 781 F.2d 1166, 1168-69 (6th Cir. 1986) (defendant did not file a false return or fail to file, but concealed assets); ***United States v. Voorhies***, 658 F.2d 710, 712 (9th Cir. 1981) (defendant removed money from the United States and laundered it through Swiss banks); *but see* ***McGill***, 964 F.2d at 233 (mere failure to report the opening of an account in one’s own name and in one’s own locale is not an affirmative act).

It is possible for a taxpayer to evade the payment of his or her taxes without making any misrepresentation. For example, a taxpayer who openly moves his assets beyond the reach of the IRS has committed an affirmative act of evasion. *See* ***Kawashima v. Holder***, 132 S. Ct. 1166, 1175 (2012) ([I]t is still true that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit.”)

8.06[3] Proof of an Intent to Evade Tax

It is crucial that the affirmative act be committed with an intent to evade tax. The mere fact that there was a non-payment or understatement of taxes is insufficient; the government must prove that the defendant committed an affirmative act with the specific intent to evade tax. *See* ***United States v. Slutsky***, 487 F.2d 832, 844 (2d Cir. 1973); ***United States v. Coblentz***, 453 F.2d 503, 505 (2d Cir. 1972). That said, “[i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.” ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996); ***United States v. Nolen***, 472 F.3d 362, 379 (5th Cir. 2006); ***United States v. King***, 126 F.3d 987, 989-90 (7th Cir. 1997). Evidence proving that a defendant has engaged in “any conduct, the likely effect of which would be to mislead or to conceal,” including “keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind” (***Spies***, 317 U.S. at 499), can establish intent to evade assessment or payment of tax.

8.07 ADDITIONAL TAX DUE AND OWING

8.07[1] Generally

A tax deficiency is an essential element of a tax evasion case.[7] "The Courts of Appeals have divided over whether the Government must prove the tax deficiency is 'substantial."' ***Boulware v. United States***, 552 U.S. 421, 424 (2008) (citing ***United States v. Daniels***, 387 F.3d 636, 640-41 & n.2 (7th Cir. 2004)) (collecting cases). A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. 26 U.S.C. § 6211; ***United States v. Bishop***, 264 F.3d 535 (5th Cir. 2001). The inability to prove a tax deficiency means that there may be a false return case, or some other kind of case, but not a tax evasion case.

The tax deficiency need not be for taxes due and owing by the defendant; the deficiency may be for taxes due and owing by another taxpayer. One may attempt to evade the assessment or payment of taxes of another. *See* ***United States v. Wilson***, 118 F.3d 228, 231, 236 (4th Cir. 1997) (attorney convicted of attempting to evade a client's taxes); ***United States v. Townsend***, 31 F.3d 262, 264, 266-67 (5th Cir. 1994) (motor fuels excise tax owed by someone other than defendant).

For purposes of trial preparation and the trial itself, tax computations prepared by the Internal Revenue Service are furnished to the prosecuting attorney. In addition, a revenue agent or special agent is assigned to the case to make any additional tax computations necessitated by changes during trial preparation and at the trial. In hard-fought cases, trial developments frequently will necessitate changes in the figures originally calculated by the Service and set forth in the indictment.

Although a tax deficiency must be established in all Section 7201 cases, the proof is often much simpler in an evasion of payment case. For example, if the taxpayer has filed a return and not paid the tax reported as due and owing, the reporting of the tax is a self-assessment of the tax due and owing. The existence of a tax due and owing is established by the introduction of the return. Similarly, if the Service has assessed the tax, then the element of a tax due and owing may be satisfied by introducing the Internal

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[7] When the tax at issue is the employees' share of payroll taxes withheld by the employer, careful consideration should be given to charging the misconduct under 26 U.S.C. 7202 instead of under Section 7201. *See* Section 9.03, *infra*.

Revenue Service's certificate of assessments and payments reflecting the assessment of the tax due and owing. A certificate of assessments and payments is prima facie evidence of the asserted tax deficiency, which, if unchallenged, may suffice to prove the tax due and owing. ***United States v. Silkman***, 220 F.3d 935, 937 (8th Cir. 2000); ***United States v. Voorhies***, 658 F.2d 710, 715 (9th Cir. 1981). However, it should be borne in mind that an assessment is not necessary to evasion of payment; a tax obligation arises by operation of law. ***Voorhies***, 658 F.2d at 714-15.

The amount of tax deficiency in a particular case may include penalties and interest. 26 U.S.C. § 6671(a) (the phrase "'tax' imposed by this title" also refers to the penalties and liabilities imposed by this subchapter [Subtitle F, Chapter 68B]); 26 U.S.C. § 6665(a)(2) (the phrase "'tax' imposed by this title" also refers to the additions to the tax, additional amounts, and penalties provided by this chapter [Subtitle F, Chapter 68A]); 26 U.S.C. § 6601(e)(1) (the phrase "tax imposed by this title" also refers to interest imposed by that section on such tax); USSG §2T1.1, comment, (n.1) (tax loss includes interest and penalties in evasion of payment and willful failure to pay cases). *But see* ***United States v. Wright***, 211 F.3d 233, 236 (5th Cir. 2000) (dictum) ("The IRC specifically excludes interest from being treated as tax for purposes of deficiency procedures. [Citing 26 U.S.C. § 6601.] The Sentencing Guidelines also exclude interest and penalties in assessing the penalty for tax evasion."). As a practical matter, the inclusion of penalties and interest as part of the tax deficiency will be relevant only in evasion of payment cases where it can be proved that the defendant was aware of the obligation for the additional amount of penalties and interest. The government may be able to show such knowledge by proving that, during the collection process, the IRS sent the defendant a notice and demand for payment setting forth the amount of tax, penalties, and interest for which the defendant was liable.

As noted, it is not essential that the Service has made an assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. And the government need not adjudicate a tax liability either civilly or administratively prior to bringing charges of evasion of payment of tax. *See* ***United States v. Ellett***, 527 F.3d 38, 40 (2d Cir. 2008); ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992); ***United States v. Hogan***, 861 F.2d 312, 315-16 (1st Cir. 1988) (no need to make a formal assessment of tax liability when government finds tax due and owing); ***United States v. Dack***, 747 F.2d 1172, 1174-75 (7th Cir. 1984) (per curiam); ***Voorhies***, 658 F.2d at 714-15. In both ***Ellett*** and ***Daniel***, the defendants argued that there was no tax deficiency since no assessment or demand for payment had been made. The courts rejected this argument. ***Ellett***,527 F.3d at 38; ***Daniel***, 956 F.2d at 542. In ***Daniel***, the court held that a tax deficiency arises by operation of law on the date that the return is due if the taxpayer fails to file a tax return and the government can show a tax liability. ***United States v. Voorhies***, 658 F.2d at 714-15.

8.07[2] Unit of Prosecution

As federal income taxes are paid on an annual basis, an alleged evasion of assessment must relate to a specific year and it must be shown that the defendant received, in the year alleged in the indictment, the income upon which the assessment of the tax was evaded. ***United States v. Boulet***, 577 F.2d 1165, 1167-68 (5th Cir. 1978).[8] Consequently, in most evasion of assessment cases, each tax year charged stands alone as a separate offense. Thus, if, for example, a defendant attempted to evade and defeat the assessment of tax for the years 2005, 2006, and 2007, there should be three separate counts in the indictment. *But cf.* ***United States v. Root***, 585 F.3d 145 (3d Cir. 2009) (holding that a defendant could be charged in a single count with evading assessment for multiple tax years where an "analysis of the concerns traditionally associated with duplicitous charges" demonstrated that the defendant "was not prejudiced").

Evasion of payment, on the other hand, often involves single or multiple acts that are intended to evade the payment of several years of tax due the government. Thus, in evasion of payment cases, it is often permissible to charge, in one count, that the defendant attempted to evade tax due and owing for multiple years. *See* ***United States v. Shorter***, 809 F.2d 54, 56-57 (D.C. Cir. 1987), *abrogated on other grounds by* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579, 597-98 (1993); ***Root***, 585 F.3d at 152. In ***Shorter***, the court approved the use of a single count to cover several years of attempted evasion of payment, when the offense was charged "as a course of conduct in circumstances such as those . . . where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes" for those years. ***Shorter***, 809 F.2d at 56. During the twelve years covered by the single count in the indictment, the defendant in ***Shorter*** had conducted all of his personal and professional business in cash, refused to acquire attachable assets, and failed to record receipts and disbursements. These activities demonstrated a continuous course of

[8] The government's proof of additional tax in a given year cannot be based upon income that should have been reported in a different year. *See* ***United States v. Wilkins***, 385 F.2d 465, 469-70 (4th Cir. 1967).

conduct, and "each affirmative act of tax evasion was intended to evade payment of all taxes owed" or that the defendant anticipated he might owe, at the time of his acts. *Id.* at 57. The court noted that the same evidence used to prove one multi-year count would be admissible to support the first of twelve single year counts. ***Shorter***, 809 F.2d at 57. *See also* ***United States v. Pollen***, 978 F.2d 78, 83-87 (3d Cir. 1992) (each of four counts covered the same seven years but indictment not multiplicitous when each count alleged a different affirmative act); ***United States v. England***, 347 F.2d 425, 427 (7th Cir. 1965) (defendants charged with one count of evasion of payment of taxes owed from three consecutive years).

The determination of the unit of prosecution can have an impact on the validity of an indictment. In ***United States v. Pollen***, 978 F.2d at 81-82 (3d Cir. 1992), the defendant made several international transfers of hundreds of thousands of dollars, in attempts to evade payment of seven years' taxes. Some of these transfers were made in one year. The four counts of the indictment each charged attempted evasion of the taxes for all seven years, but each count alleged a distinct affirmative act. The defendant asserted that the indictment was impermissibly multiplicitous, subjecting him to multiple punishment for the same violations of section 7201, a result prohibited by the Double Jeopardy Clause of the Fifth Amendment, *see* ***United States v. Stanfa***, 685 F.2d 85, 86-87 (3d Cir. 1982). *See also* ***Jones v. Thomas***, 491 U.S. 376, 381 (1989) (interest protected by the Double Jeopardy Clause in the multiple punishment context is confined to "ensuring that the total punishment did not exceed that authorized by the legislature"). The court of appeals rejected this contention. Looking at the plain language of section 7201, the court found that it "proscribes 'attempts' to evade or defeat any tax and thus speaks in terms of the act of evasion, as well as the taxes evaded." ***Pollen***, 978 F.2d at 86. The court then concluded that "Section 7201 permits a unit of prosecution based on separate significant acts of evasion." ***Pollen***, 978 F.2d at 86. Therefore, separate counts of an indictment may relate to evasion of payment for the same years without raising a multiciplicity problem, provided each count alleges a different affirmative act.

8.07[3] Substantial Tax Deficiency

Tax evasion prosecutions are not collection cases, and it is not necessary to charge or prove the exact amount of the tax that is due and owing. ***United States v. Bishop***, 264 F.3d 535, 550-52 (5th Cir. 2001); ***United States v. Thompson***, 806 F.2d 1332, 1335-36 (7th Cir. 1986); ***United States v. Harrold***, 796 F.2d 1275, 1278 (10th Cir. 1986); ***United***

States v. Citron, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573-74 (9th Cir. 1979); ***United States v. Marcus***, 401 F.2d 563, 565 (2d Cir. 1968).

It is enough to prove that a defendant attempted to evade a substantial income tax, even though the actual amount of tax that he or she owes may be greater than the amount charged in the criminal case. Indeed, the criminal tax figures will almost invariably be lower than the civil tax figures since, for example, items turning on reasonably debatable interpretations of the Tax Code that would increase the tax due and owing are not included in figures used in the criminal case. In other words, any doubts as to taxability are resolved in favor of the defendant in a criminal case even though they may ultimately be resolved against him or her civilly.

As noted, it is enough in a criminal case to prove that the defendant attempted to evade a substantial income tax. And as long as the amount proved as unreported is substantial, it makes no difference whether that amount is more or less than the amount charged in the indictment. *See* ***United States v. Johnson***, 319 U.S. 503, 517-18 (1943); ***United States v. Mounkes,*** 204 F.3d 1024, 1028 (10th Cir. 2000); ***United States v. Plitman,*** 194 F.3d 59, 65-66 (2d Cir. 1999); ***Marcus***, 401 F.2d at 565; ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962). *See, e.g.*, ***United States v. Burdick***, 221 F.2d 932, 933-34 (3d Cir. 1955) (upholding a conviction where the indictment charged $33,000 as unreported taxable income and the proof at trial established only $14,500 as unreported). Similarly, in ***United States v. Costello***, 221 F.2d 668, 675, 679 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the court upheld a conviction where the bill of particulars alleged $244,000 gross income as unreported and about $288,000 was proved at trial. In ***United States v. Citron***, 783 F.2d 307 (2d Cir. 1986), the court upheld an "open-ended" 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the defendant had attempted to evade "a large part" of the income tax due and that the tax due was "substantially in excess" of the amount he reported. ***Citron***, 783 F.2d at 314-15.

Since the government only has to prove that a substantial tax was due and owing, any bill of particulars that is filed should note that proof of an exact amount is not required and that any figures furnished in a bill of particulars represent only an approximation. Whether a tax deficiency is substantial is a jury question, and the cases suggest that relatively small sums can be deemed substantial. *See* ***United States v. Gross***, 286 F.2d 59, 60-61 (2d Cir. 1961) (unreported income in the amount of two $2500 payments deemed “substantial”); ***United States v. Nunan***, 236 F.2d 576, 585 (2d Cir. 1956) (“[A] few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution.”); *see also* **United States v. Davenport**, 824 F.2d 1511, 1516-17 (7th Cir. 1987) ($3,358.68 in taxes evaded sufficient to support taxpayer’s conviction); ***United States v. Cunningham***, 723 F.2d 217, 230-31 (2d Cir. 1983) (the evaded tax of $2,617 as compared to the total tax due of $33,539 held to be substantial), *implied overruling on other grounds recognized by* ***United States v. Mandanici***, 205 F.3d 519, 526-27 (2d Cir. 2000).

The Seventh and Ninth Circuits have held that there is no substantiality requirement for a Section 7201 violation. ***United States v. Daniels***, 387 F.3d 636, 639 (7th Cir. 2004); ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990). The Seventh Circuit stated, "We take this opportunity to clarify the law in this Circuit: the government need not charge a substantial tax deficiency to indict or convict under 26 U.S.C. § 7201. To hold otherwise would contradict the clear language of the statute and lead to an absurd result. Requiring the government to charge and prove that a defendant's tax deficiency is substantial in order to prosecute her for tax evasion would prevent the prosecution and punishment of those who willfully cheat the government out of small or "insubstantial" amounts of money. A substantiality element would invite taxpayers to cheat on their taxes in small amounts without fear of prosecution. We cannot countenance such a result. Although evidence of a large or substantial tax deficiency may aid the government in proving willfulness, it is not itself an element of the offense." ***Daniels***, 387 F.3d at 641. In ***Marashi***, the court held that both Section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade “any tax” and impose no minimum amount in their language. ***Marashi***, 913 F.2d at 735. As a result, the court reasoned, the trier of fact needs to find only “some tax deficiency” to warrant a conviction. ***Marashi***, 913 F.2d at 736.

8.07[4] Method of Accounting

The general rule is that when using the net worth method of proof to approximate income, the government must follow the same method of accounting used by the taxpayer. ***Fowler v. United States***, 352 F.2d 100, 103 (8th Cir. 1965); ***United States v. Vardine***, 305 F.2d 60, 64 (2d Cir. 1962). Conversely, if the defendant has used a particular method of reporting income, then the defendant is bound by that choice at trial.

See ***United States v. Helmsley***, 941 F.2d 71, 85 (2d Cir. 1991) (defendant having used one depreciation method during the prosecution years could not recalculate her taxes under another depreciation method during trial). Thus, a defendant cannot report his income on the cash basis and then defend at trial by showing that on the accrual basis unreported income would be far less than the government proved using the cash basis. *See* ***Clark v. United States***, 211 F.2d 100, 105 (8th Cir. 1954). In a similar vein, if the taxpayer has used a hybrid method of accounting, then the taxpayer "is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." ***United States v. Lisowski***, 504 F.2d 1268, 1275 (7th Cir. 1974); ***Morrison v. United States***, 270 F.2d 1, 4 (4th Cir. 1959).

8.07[5] Loss Carryback – Not a Defense

A defendant will sometimes argue that there is no tax deficiency and hence no evasion because a loss carryback from a subsequent year wipes out the tax deficiency in the prosecution year. For example, a defendant may admit not reporting certain income in 1989, but argue that he is not guilty of attempting to evade tax, because a 1990 loss carryback eliminates any tax deficiency for 1989. This defense is not valid; the "lucky loser argument" was expressly rejected in ***Willingham v. United States***, 289 F.2d 283, 287-88 (5th Cir. 1961). *See also* ***United States v. Keltner***, 675 F.2d 602, 604 (4th Cir. 1982). The "crime [was] complete when with willful intent, a false and fraudulent return [was] filed" – any adjustment from a loss in a subsequent year does not change in any way the fraud committed in the earlier year. ***Willingham***, 289 F.2d at 288. Any evidence of a loss in a subsequent year is therefore irrelevant.

The same argument failed when the net operating loss in a subsequent year was for a Subchapter S corporation. ***Keltner***, 675 F.2d at 604. The applicable principle is that each tax year is treated as a separate unit and all items of gross income and deductions must be reflected as they exist at the close of the tax year. *See* ***United States v. Cruz***, 698 F.2d 1148, 1151-52 (11th Cir. 1983) (applying this principle to a situation involving a claimed foreign tax credit); *cf.* ***United States v. Suskin***, 450 F.2d 596, 597-98 (2d Cir. 1971) (corporate carryforward loss not available to individual).

8.07[6] Methods of Proof

The general rule is that unreported income may be established by several methods of proof, and the government is free to use one or more legal methods available in determining whether the taxpayer has correctly reported her or his income. ***Holland v. United States***, 348 U.S. 121, 132 (1954); ***United States v. Baum***, 435 F.2d 1197, 1201 (7th Cir. 1970); ***United States v. Doyle***, 234 F.2d 788, 793 (7th Cir. 1956).

The various methods of proof used in tax cases to establish unreported income are discussed in detail in Chapters 30, 31, 32, and 33, *infra*. Briefly, the specific items method of proof consists of direct evidence of the items of income received by a taxpayer in a given year, *e.g.*, testimony by third parties as to monies paid to the taxpayer for goods or services. The net worth method of proof is an indirect method of proof that measures increases in the wealth of the taxpayer and compares the results with reported income. A variation of the net worth method is the expenditures method of proof, which reflects the expenditures made by a taxpayer. The expenditures method is particularly appropriate in the case of a taxpayer who does not purchase durable assets, such as stocks and real estate, but spends monies for consumable items, such as vacations, entertainment, food, drink, and the like. Another indirect method of proof is the bank deposits method, which is essentially a reconstruction of income by an analysis of bank deposits by a taxpayer who is in an income-producing business and makes regular and periodic deposits to bank accounts.

The Seventh Circuit and the District of Columbia Circuit have approved a variation of the expenditures method, which is called the cash method of proof. ***United States v. Hogan***, 886 F.2d 1497, 1508-11 (7th Cir. 1989); ***United States v. Khanu***, 662 F.3d 1226 (D.C. Cir. 2011). This method "focuses on the taxpayer's sources and uses of income." ***Hogan*** at 1509; ***Khanu*** at 1229. When using this method, the government is required to present evidence relating to the taxpayer's cash expenditures. ***Khanu*** at 1229 *citing* ***United States v. Touchin***, 899 F.2d 617, 619 (7th Cir. 1989). In this method of proof, the government compares the defendant's cash expenditures with her or his known cash sources, including cash on hand, for each tax period. ***Hogan*** at 1509; ***Khanu*** at 1229. If such expenditures exceed sources, the excess is presumed to be unreported income. ***Touchin*** at 620; ***Khanu*** at 1229.

Except for the cash method, each of these methods of proof is discussed in detail in sections 30.00 through 33.00, and reference should be made to these sections for the applicable case law.

8.07[7] Income Examples

Examples of sources of income with respect to which defendants have attempted to evade taxes include the following:

1. Campaign contributions, when used for personal purposes. ***United States v. Scott***, 660 F.2d 1145, 1151-52 (7th Cir. 1981).

2. Gambling proceeds. The taxpayer must report winnings and may deduct losses only to the extent of winnings. ***Garner v. United States***, 501 F.2d 228, 233 (9th Cir. 1974) (en banc), *aff'd on other grounds*, 424 U.S. 648 (1976)***;*** ***McClanahan v. United States***, 292 F.2d 630, 631-32 (5th Cir. 1961).

3. Embezzlement. Embezzled funds constitute taxable income to the recipient. ***James v. United States***, 366 U.S. 213, 219-21 (1961); ***United States v. Guidry***, 199 F.3d 1150, 1157-58 (10th Cir. 1999); ***United States v. Harris***, 942 F.2d 1125, 1134 (7th Cir. 1991). The funds are considered to be income in the year of embezzlement. ***James v. United States***, 366 U.S. 213, 219-21 (1961); ***United States v. Lippincott***, 579 F.2d 551, 552 (10th Cir. 1978) (alleged loan from embezzled funds); ***United States v. Milder***, 459 F.2d 801, 804 (8th Cir. 1972).

4. Extortion. "[M]oney obtained by extortion is income taxable to the extortioner." ***Rutkin v. United States***, 343 U.S. 130, 131 (1952); *see also* ***United States v. Cody***, 722 F.2d 1052, 1061 (2d Cir. 1983) (defendant had duty to report income generated by extortion, kickbacks, and acceptance of valuable services).

5. Fraud. ***Moore v. United States***, 412 F.2d 974, 978 (5th Cir. 1969); *see also* ***United States v. Dixon***, 698 F.2d 445, 446 (11th Cir. 1983).

6. Alleged loans lacking intent to repay. ***United States v. Swallow***, 511 F.2d 514, 519 (10th Cir. 1975); ***United States v. Rosenthal***, 470 F.2d 837, 842 (2d Cir. 1972)***; United States v. Rochelle***, 384 F.2d 748, 751 (5th Cir. 1967).

7. Kickbacks. ***United States v. Sallee***, 984 F.2d 643, 647-48 (5th Cir. 1993); ***United States v. Fogg***, 652 F.2d 551, 553-56

(5th Cir.1981); ***United States v. Wyss***, 239 F.2d 658, 660 (7th Cir. 1957).

8. Bribery. ***United States v. Anderson***, 809 F.2d 1281, 1288 (7th Cir. 1987); ***United States v. Isaacs***, 493 F.2d 1124, 1144-46 (7th Cir. 1974).

9. Gratuities received by government employees. ***United States v. St. Pierre***, 377 F. Supp. 1063, 1064 (S.D. Fla. 1974), *aff'd*, 510 F.2d 383 (5th Cir. 1975).

10. Narcotics sales. ***United States v. Palmer***, 809 F.2d 1504, 1505 (11th Cir. 1987) (court implicitly included narcotics sales proceeds in income).

8.07[8] Cases Involving Corporate Diversions

One common fact pattern involves a shareholder in a closely held company who diverts corporate funds for personal use, either through the diversion of corporate gross receipts that are not reflected in the corporate books and records, or through the payment of personal expenses that are deducted as business expenses. In such circumstances, it is relatively straightforward to charge a false corporate return, in violation of 26 U.S.C. § 7206, as either the gross receipts line or the expense line of the corporate return is false. Charging a personal income tax offense against the shareholder, however – such as evasion (Section 7201) or filing a false return (Section 7206) – requires the government to prove that the diverted funds were taxable income, such as salary, a constructive dividend, or a capital gain. A defendant, on the other hand, may argue that the funds were not taxable because they represented a return of capital. *See* 26 U.S.C. § 301(c)(3)(A).

Whether diverted funds constitute a constructive dividend, a capital gain, or a return of capital requires a determination of the amount of the current or accumulated earnings and profits of the corporation, if any, and the shareholder's adjusted basis in his stock. Diverted funds may be a constructive dividend to the extent of the corporation's current earnings and profits in the first instance, and to the extent of the corporation's accumulated earnings and profits in the second. *See* 26 U.S.C. §361(a)(1) and (2). If the diverted funds exceed both current and accumulated earnings and profits, they will be treated as a nontaxable return of capital to the extent of the shareholder's adjusted basis in the stock. *See* 26 U.S.C. § 301(c)(2). If the diverted funds exceed not only any current or accumulated earnings and profits but also the shareholder's adjusted basis in the stock, the excess will be treated as a capital gain to the shareholder. *See* 26 U.S.C. § 301(c)(3)(A).

In ***Boulware v. United States***, 552 U.S. 421, 430(2008), the Supreme Court reaffirmed that "[e]conomic substance [is] the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books." The Court held, however, that a shareholder may establish that a diversion was a return of capital, not a dividend, "without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital." *Id*. at 424. In so ruling, the Court overruled ***Miller v. United States***, 545 F2d 1204 (9th Cir. 1976), wherein the Ninth Circuit held that a corporation's earnings and profits were not relevant unless the defendant could show that the parties intended the funds to be a return of capital at the time the funds were diverted.

Notably, upon remand from the Supreme Court, the Ninth Circuit affirmed Boulware's convictions, finding that he had failed to proffer sufficient evidence of a return of capital claim to warrant a jury instruction on the issue. ***United States v. Boulware***, 558 F.3d 971 (9th Cir. 2009). Citing *Boulware*, 552 U.S. at 436 and 437 n.12, the court of appeals noted that "the return of capital theory requires: (1) a corporate distribution with respect to a corporation's stock, (2) the absence of corporate earnings or profits, and (3) the stockholder's stock basis be in excess of the distribution." 558 F.3d at 975. The court found that Boulware's proffer was insufficient to satisfy the first and the third elements. As for the first, "[h]e failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. . . . [that is] without any offer to prove that the distribution was 'with respect to stock,' or that any nexus existed between the distribution and [his] stock ownership." 558 F.3d at 977. And as for the third, there was "no formal evidence of Boulware's stock basis in the record, nor did he make an offer of proof as to the amount." 558 F.3d at 978. In light of ***Boulware***, prosecutors should not assume that a given distribution was "with respect to stock," but should consider the specific facts of the case to determine whether the distribution was made to a shareholder in his capacity as a shareholder; that is, because of his ownership of the stock. 552 U.S. at 437. Factors bearing on this determination include "the distribution of stock ownership [and] conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to good reason to treat a payment of property as salary)." 552 U.S. at 437-38. Prosecutors should also be prepared to prove a corporation's earnings and profits, and a shareholder's stock basis, where appropriate.

8.08 WILLFULNESS

8.08[1] Definition

Willfulness has been defined by the courts as a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 200-01 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Therefore, in order to establish willfulness, the government must establish that the defendant was aware of his or her obligations under the tax laws. *See* ***United States v. Bishop***, 264 F.3d 535, 546 (5th Cir. 2001); ***United States v. Buford***, 889 F.2d 1406, 1409 (5th Cir. 1989); ***United States v. Conforte***, 624 F.2d 869, 875 (9th Cir. 1980); ***United States v. Peterson***, 338 F.2d 595, 598 (7th Cir. 1964). As the Seventh Circuit Court of Appeals has stated, there must be "proof that appellant knew he was violating a 'known legal duty.'" ***United States v. Fitzsimmons***, 712 F.2d 1196, 1198 (7th Cir. 1983).

When determining whether a defendant has acted willfully, the jury must apply a subjective standard; thus a defendant asserting a good faith defense is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. ***Cheek v. United States***, 498 U.S. 192, 202-03 (1991); ***United States v. Powell***, 955 F.2d 1206, 1211-12 (9th Cir. 1992); ***United States v. Regan***, 937 F.2d 823, 826 (2d Cir. 1991), *amended by*, 946 F.2d 188 (2d Cir. 1992); ***United States v. Whiteside***, 810 F.2d 1306, 1311 (5th Cir. 1987). The jury must therefore focus its inquiry on the knowledge of the defendant, not on the knowledge of a reasonable person. The jury may, however, "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993); ***United States v. Middleton***, 246 F.3d 825, 837 (6th Cir. 2001).

Although ignorance and misunderstanding of the law may be asserted in an attempt to negate willfulness, disagreement with the constitutional validity of the law may not. Once it has been established that the defendant was aware of a legal duty and intentionally violated that duty, it is no defense that the defendant believed that the law imposing the duty was unconstitutional. ***Cheek***, 498 U.S. at 204-06. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. ***Cheek***, 498 U.S. at 206; *see also* ***United States v. Bonneau***, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge's redaction of constitutionality arguments from defendant's exhibits did not unfairly prejudice the defense). *But see* ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992) (defendant should have been allowed to present excerpts of court opinions upon which he relied in determining whether he was required to file tax returns to the jury).

In some of its opinions prior to ***United States v. Pomponio***, 429 U.S. 10 (1976), the Supreme Court spoke of willfulness in terms of "bad faith or evil intent" (***United States v. Murdock***, 290 U.S. 389, 398 (1933)), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer" (***Spies v. United States***, 317 U.S. 492, 498 (1943)). This caused some confusion in the circuits, which was cleared up in ***United States v. Pomponio***, 429 U.S. 10 (1976).

In ***Pomponio***, the Court stated that its prior references to bad faith or evil intent did not modify the definition of willfulness as a "voluntary, intentional violation of a known legal duty." *Id.* at 12. The clarification is important since it provides the answer to defense requests for an instruction that speaks in terms of a bad purpose or evil intent and which gives the defendant room to argue that he did not act willfully because he acted with a good purpose or motive. Such an instruction would impose an undue burden on the government and is not required. ***Id***. The Supreme Court has made clear that "willfulness" connotes a "voluntary, intentional violation of a known legal duty," and "[i]t does not require proof of any other motive." ***United States v. Jerde***, 841 F.2d 818, 821 (8th Cir. 1988) (citing ***United States v. Pomponio***, 429 U.S. at 12); *accord*, ***United States v. Sato***, 814 F.2d 449, 451 (7th Cir. 1987) (no need to prove "evil-meaning mind"); ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir. 1978) ("Proof of evil motive or bad intent is not required"); ***United States v. Patrick***, 542 F.2d 381, 388-89 (7th Cir. 1976) ("bad" before "purpose" may be omitted from willfulness instruction); ***United States v. Moylan***, 417 F.2d 1002, 1004 (4th Cir. 1969) ("to require a bad purpose would be to confuse the concept of intent with that of motive").

Note that the Ninth Circuit has said that a showing of "bad purpose or evil motive" can substitute for a showing of intentional violation of a known legal duty as a means of establishing willfulness. ***Powell***, 955 F.2d at 1211. In ***Powell***, the court stated that evidence of bad motive or evil purpose could be used by the government to establish that the defendants acted willfully but that such proof was not required. Rather, the government had the alternative of showing that the defendants had voluntarily and intentionally violated a known legal duty, in which case, proof of evil motive or bad purpose would not be necessary. ***Powell***, 955 F.2d at 1211.

Notwithstanding the alternative methods of proving willfulness set forth in ***Powell***, the fact remains that the Supreme Court has definitively and unequivocally defined willfulness as the "voluntary, intentional violation of a known legal duty." Thus, the government should never rely on any "alternative method" of proof that does not establish the defendant's voluntary and intentional violation of a known legal duty. Similarly, juries should always be instructed that it is the government's burden to prove that a defendant acted voluntarily and intentionally and violated a known legal duty.

Good motive alone is not a defense to a finding of willfulness, and the Supreme Court has upheld as proper a jury instruction that instructed the jury that "'[g]ood motive alone is never a defense where the act done or omitted is a crime,' and that consequently motive was irrelevant except as it bore on intent." ***Pomponio***, 429 U.S. at 11; *accord*, ***United States v. Dillon***, 566 F.2d 702, 704 (10th Cir. 1977).

Note that, while some tax crimes are felonies (*e.g.*, 26 U.S.C. § 7201, attempt to evade or defeat a tax), and others are misdemeanors (*e.g.*, 26 U.S.C. § 7203, failure to file an income tax return), the word "willfully" has the same meaning for both misdemeanors and felonies. ***Pomponio***, 429 U.S. at 12. The Supreme Court, in ***United States v. Bishop***, 412 U.S. 346 (1973), rejected its previous holdings that willfulness does not have the same meaning in felony and misdemeanor cases, holding that the willfulness requirement in either class of offense is the same – "a voluntary, intentional violation of a known legal duty." ***Bishop***, 412 U.S. at 356-61.

8.08[2] Proof of Willfulness

The element of willfulness is often the most difficult element to prove in an evasion case. Absent an admission or confession, which is seldom available, or accomplice testimony, willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct. *See* ***United States v. Bishop***, 264 F.3d 535, 545-46, 550-52 (5th Cir. 2001); ***United States v. Guidry,*** 199 F.3d 1150, 1156-1158 (10th Cir. 1999)***; United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989); ***United States v. Collorafi***, 876 F.2d 303, 305-06 (2d Cir. 1989); ***United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986); ***United States v. Ashfield***, 735 F.2d 101, 105 (3d Cir. 1984); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984)***; United States v. Ramsdell***, 450 F.2d 130, 133-34 (10th Cir. 1971); ***Paschen v. United States***, 70 F.2d 491, 498-99 (7th Cir. 1934).

To prove willfulness, the third element, the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Miller***, 588 F.3d 897, 907 (5th Cir. 2009); ***United States v. Beale***, 574 F.3d 512, 517-18 (8th Cir. 2009). Once the evidence establishes that a tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from that conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse, employer or creditors. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943)***; Guidry***, 199 F.3d at 1157; ***United States v. DeTar***, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

The decision whether to infer willfulness from the evidence, however, must be left to the trier of fact. The government may not present expert witnesses to testify regarding whether the defendant acted willfully. *See* ***United States v. Windfelder***, 790 F.2d 576, 580-81 (7th Cir. 1986). In ***Windfelder***, an IRS agent opined that the defendant intentionally understated his income and that the defendant was well aware of what happened with certain assets. 790 F.2d at 582. The court of appeals held that, under Rule 704(b) of the Federal Rules of Evidence, the district court erred in admitting the agent's testimony because it impermissibly stated an opinion as to the defendant's willfulness. ***Id***. In light of the overwhelming nature of the evidence as to the defendant's willfulness, however, the court of appeals found that the erroneous admission of the testimony was harmless. ***Windfelder***, 790 F.2d at 580, 582-83.

When the underlying tax law at issue in a case is vague or highly debatable, it may be difficult, if not impossible, to prove that a defendant acted willfully. There may be situations, for example, when the law concerning whether a transaction has generated taxable income is not clear. While such cases are unusual, and normally readily distinguishable from most tax cases, an example of such a case is ***United States v. Critzer***, 498 F.2d 1160 (4th Cir. 1974). In ***Critzer***, the defendant had earned income from businesses located on land in which she had possessory interest on a Cherokee Indian Reservation. The court found that there was a disputed question as to whether the "income" the defendant earned from her businesses was subject to federal income taxes and that even different branches of the federal government had reached directly opposite conclusions on the question. In light of these findings, the court held that the convictions had to be reversed. "As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions." ***Id***. at 1162. The court also noted that "[i]t is settled that when the law is vague or highly debatable, a defendant – actually or imputedly – lacks the requisite intent to violate it." ***Critzer***, 498 F.2d at 1160-62. *See also* ***United States v. Harris***, 942 F.2d 1125, 1127-28, 1131-35 & n.6 (7th Cir. 1991) (law on tax treatment of payments received by mistresses from wealthy widower provided no fair warning that failure to report such payments as income would be criminal activity, and case law favored proposition that payments should be treated as gifts; criminal prosecutions are no place for the government to try out pioneering interpretations of tax law); ***United States v. Heller***, 830 F.2d 150, 151, 154-55 (11th Cir. 1987) (existence of a prior case in which Tax Court approved "case-closed method" of reporting advance payments of costs and fees received by an attorney meant that use of the method was not proscribed in reasonably certain terms, and prior case therefore was sufficient, as a matter of law, to make it inappropriate to impose criminal liability upon defendant-attorney for using the same method)***; United States v. Garber***, 607 F.2d 92, 93-94, 97-100 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was "novel and unsettled" question).

Care should be taken to distinguish the average criminal tax case from a case such as ***Garber***, which was based on "unique, indeed near bizarre, facts." ***United States v. Burton***, 737 F.2d 439, 444 (5th Cir. 1984); *see also* ***United States v. Daly***, 756 F.2d 1076, 1083-84 (5th Cir. 1985). In ***Burton***, the Fifth Circuit explained and limited its opinion in ***Garber***. The court stated that "apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance," explaining that "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." ***Burton***, 737 F.2d at 444. And, in ***United States v. Curtis***, 782 F.2d 593, 598-600 (6th Cir. 1986), the Sixth Circuit rejected ***Garber*** on the following grounds: (1) ***Garber*** allows juries to find that uncertainty in the law negates willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) it requires the jury to assume the judge's "responsibility to rule on questions of law."

In those few courts that have recognized uncertainty in the law as a potential defense, the court looks to see whether the law clearly prohibited the defendant's alleged conduct. *See* ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir. 1987) (explaining that application of decision in ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983), is limited to mere advocacy of tax shelter program). In ***Dahlstrom***, the court reversed the convictions of the defendants, who had advocated the creation of tax shelters to investors, because the legality of the shelters was "completely unsettled." ***Dahlstrom***, 713 F.2d at 1423, 1425, 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. *See* ***United States v. Krall***, 835 F.2d 711, 714 (8th Cir. 1987). *Compare* ***United States v. Mallas***, 762 F.2d 361, 361-365 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) *with* ***Krall***, 835 F.2d at 711, 713, 714 ("[a]lthough precise 'foreign trust' arrangement used by Krall had not yet been declared illegal, there is no doubt the scheme violated well-established principles of tax law"; thus defendant could not claim that his conviction violated due process); ***United States v. Tranakos***, 911 F.2d 1422, 1431 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled); ***United States v. Schulman***, 817 F.2d 1355, 1359-60 (9th Cir. 1987) (tax shelters based on sham transactions clearly illegal); *and* ***United States v. Crooks***, 804 F.2d 1441, 1449 (9th Cir. 1986) ("The doctrine of substance versus form is well ensconced in tax law.")

To minimize problems presented by trying to establish willfulness at trial, items turning on reasonably debatable interpretations of the Tax Code and questionable items of income should be eliminated from the case; and, whenever possible, complicated facts should be simplified. This is advantageous for purposes of presentation of the case to the jury: it strengthens the government's argument that there is no doubt that the defendant committed criminal acts to evade taxes, because the taxability and tax consequences were known to the taxpayer.

The Supreme Court has furnished excellent guidance on the type of evidence from which willfulness can be inferred. In the leading case of ***Spies v. United States***, 317 U.S.

492, 499 (1943), the Supreme Court, "[b]y way of illustration, and not by way of limitation," set forth the following as examples of conduct from which an "affirmative willful attempt" may be inferred:

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of 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.

Particularly noteworthy is the Court's reference to "any conduct, the likely effect of which would be to mislead or to conceal." It is apparent that the Court was intent on making it clear that there are no artificial limits on the type of conduct from which willfulness can be inferred and that evidence of any conduct at all is admissible, as long as the "likely effect" of the conduct would be to mislead or conceal.

8.08[3] Examples: Proof of Willfulness

1. Willfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Kim***, 884 F.2d 189, 192-93 (5th Cir. 1989) (evidence of willfulness was sufficient where taxpayer, *inter alia*, failed to report $182,601 of income over three years); ***United States v. Kryzske***, 836 F.2d 1013, 1019-20 (6th Cir. 1988) (willfulness found where taxpayer failed to file complete tax returns over a four-year period and underreported his income by $940.50 for one of those years); *see also* ***United States v. Guidry***, 199 F.3d 1150, 1157 (10th Cir. 1999) (willfulness cannot be inferred solely from the understatement of income); ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996); ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir. 1980); ***United States v. Larson***, 612 F.2d 1301, 1303, 1305 (8th Cir. 1980); ***United States v. Gardner***, 611 F.2d 770, 776 (9th Cir. 1980).

2. Providing accountant or return preparer with inaccurate and incomplete information. ***United States v. Bishop***, 264 F.3d 535, 552 (5th Cir. 2001); ***United States v. Samara***, 643 F.2d 701, 703 (10th Cir. 1981) (taxpayer kept receipt book for cash received but did not give the firm that prepared his returns any cash receipt books, thus concealing cash receipts); *see also* ***United States v. Guidry***, 199 F.3d 1150, 1157 (10th Cir.1999); ***United States v.***

Brimberry, 961 F.2d 1286, 1290 (7th Cir. 1992); ***United States v. O'Keefe***, 825 F.2d 314, 318 (11th Cir. 1987); ***United States v. Garavaglia***, 566 F.2d 1056, 1057-60 (6th Cir. 1977) ("taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape responsibility for the false tax returns which result"); ***United States v. Chesson***, 933 F.2d 298, 305 (5th Cir. 1991); ***United States v. Michaud***, 860 F.2d 495, 500 (1st Cir. 1988); ***United States v. Ashfield***, 735 F.2d 101, 107 (3d Cir. 1984); ***United States v. Conforte***, 624 F.2d 869, 876-77 (9th Cir. 1980); ***United States v. Scher***, 476 F.2d 319, 323-24 (7th Cir. 1973).

3. False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir. 1991); ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (taxpayer falsely stated that she did not receive income from other employees who worked in her massage parlor and that she deposited most of her income into the bank)***; United States v. Walsh***, 627 F.2d 88, 91-92 (7th Cir. 1980); ***United States v. Thompson***, 518 F.3d 832, 852-53 (10th Cir. 2008) (presenting "false, backdated loan document to the IRS"); ***United States v. Callanan***, 450 F.2d 145, 150 (4th Cir. 1971); ***United States v. Jett***, 352 F.2d 179, 182 (6th Cir. 1965); *see also* ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996); ***United States v. Pistante***, 453 F.2d 412, 413 (9th Cir. 1971); ***United States v. Adonis***, 221 F.2d 717, 719-20 (3d Cir. 1955).

4. Keeping a double set of books. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Daniels***, 617 F.2d 146, 148, 150 (5th Cir. 1980).

5. Hiding, destroying, throwing away, or "losing" books and records. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Chesson***, 933 F.2d 298, 304-05 (5th Cir. 1991) (taxpayers condoned the alteration and destruction of invoices after undergoing a civil audit for underreporting income); ***United States v. Holovachka***, 314 F.2d 345, 357-58 (7th Cir. 1963); ***Gariepy v. United States***, 189 F.2d 459, 463 (6th Cir. 1951); *see also* ***United States v. Walker***, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid assets "in an attempt to conceal them from the IRS").

6. Making or using false documents, false entries in books and records, false invoices, and the like. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997); ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir. 1991); ***United States v. Walker***, 896 F.2d 295, 296, 298 (8th Cir. 1990) (defendants submitted false invoices to their family company "so that the company would treat their personal expenses as business expenses").

7. Destruction of invoices to customers. ***United States v. Garavaglia***, 566 F.2d 1056, 1059 (6th Cir. 1977).

8. Use of Nominees. Placing property or a business in the name of another. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992); ***United States v. Peterson***, 338 F.2d 595, 597 (7th Cir. 1964); ***United States v. Woodner***, 317 F.2d 649, 650-51 (2d Cir. 1963).

9. Extensive use of currency or cashier's checks. ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant "used cash extensively, even converting checks to cash immediately," and paid employees and insurance policies in cash); ***United States v. Holovachka***, 314 F.2d 345, 358 (7th Cir. 1963); ***Schuermann v. United States***, 174 F.2d 397, 398 (8th Cir. 1949).

10. Spending large amounts of cash which could not be reconciled with the amount of income reported, ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Simonelli***, 237 F.3d 19, 30 (1st Cir. 2001); ***United States v. Olbres***, 61 F.3d 967, 971 (1st Cir. 1995); ***United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir. 1980); *see also* ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978)***; United States v. Mortimer***, 343 F.2d 500, 503 (7th Cir. 1965) (purchasing money orders).

11. Use of bank accounts held under fictitious names. ***United States v. Ratner***, 464 F.2d 101, 105 (9th Cir. 1972); ***Elwert v. United States***, 231 F.2d 928, 935-36 (9th Cir. 1956); *cf.* ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969) (separate personal bank account into which large amounts of cash from unidentified sources was deposited properly offered as evidence of willfulness).

12. Cashing checks and depositing currency in an out-of-town bank account. ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969).

13. Unorthodox accounting practices with deceptive results. ***United States v. Slutsky***, 487 F.2d 832, 844 (2d Cir. 1973); ***United States v. Waller***, 468 F.2d 327, 329 (5th Cir. 1972).

14. Repetitious omissions of items of income, *e.g.*, income from various sources not reported. ***United States v. Walker***, 896 F.2d 295, 299 (8th Cir. 1990) (over a two-year period taxpayer failed to report, *inter alia*, interest income totaling $20,476); ***United States v. Tager***, 479 F.2d 120, 122 (10th Cir. 1973); ***Sherwin v. United States***, 320 F.2d 137, 140-41 (9th Cir. 1963).

15. Prior and subsequent similar acts reasonably close to the prosecution years. ***United States v. Middleton***, 246 F.3d 825, 836-837 (6th Cir. 2001); ***Matthews v. United States***, 407 F.2d 1371, 1381 (5th Cir. 1969); ***United States v. Johnson***, 386 F.2d 630, 631 (3d Cir. 1967); ***United States v. Magnus***, 365 F.2d 1007, 1009-10 (2d Cir. 1966); ***United States v. Alker***, 260 F.2d 135, 139, 149 (3d Cir. 1958); *cf.* Fed. R. Evid. 404(b).

16. Alias used on gambling trip – relevant to an intent to evade taxes. ***United States v. Catalano***, 491 F.2d 268, 273 (2d Cir. 1974).

17. The defendant's attitude toward the reporting and payment of taxes generally. ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988); ***United States v. Stein***, 437 F.2d 775, 777, 780 (7th Cir. 1971); ***United States v. O'Connor***, 433 F.2d 752, 754 (lst Cir. 1970); ***United States v. Taylor***, 305 F.2d 183, 185-86 (4th Cir. 1962).

18. Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. ***United States v. Guidry***, 199 F.3d 1150, 1157-58 (10th Cir.1999) (willfulness inferred from defendant's expertise in accounting via her business degree and her work experience as comptroller of a company)***;*** ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996) (defendant's background as a CPA and extensive business experience including that as a professional tax preparer); ***United States v. Smith***, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); ***United States v.***

Rischard, 471 F.2d 105, 108 (8th Cir. 1973); *see also* ***United States v. Diamond***, 788 F.2d 1025, 1026, 1230 (4th Cir. 1986); ***United States v. MacKenzie***, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business).

19. Offer to bribe government agent. ***Barcott v. United States***, 169 F.2d 929, 931-32 (9th Cir. 1948) (attempt to bribe revenue agent).

20. Use of false names and surreptitious reliance on the use of cash. ***United States v. Walsh***, 627 F.2d 88, 92 (7th Cir. 1980); ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978).

21. Backdating documents to gain a tax advantage. ***United States v. Drape***, 668 F.2d 22, 25-26 (1st Cir. 1982); ***United States v. Crum***, 529 F.2d 1380, 1381-82 (9th Cir. 1976); ***United States v. O'Keefe***, 825 F.2d 314, 318 (11th Cir. 1987).

22. Illegal sources of income. ***United States v. Palmer***, 809 F.2d 1504, 1505-06 (11th Cir. 1987) ("From the illegal source of funds, a jury could reasonably infer an intent to conceal income"; sale of drugs).

8.08[4] Conscious Avoidance/Willful Blindness Instruction[9]

Most courts have ruled that if there is evidence that the defendant deliberately avoided acquiring knowledge of a fact or the law, the jury may infer that the defendant actually knew of the fact or the law and was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See, e.g.*, ***United States v. Poole,*** 640 F.3d 114, 122 (4th Cir. 2011); ***United States v. Williams***, 612 F.3d 500, 506-07 (6th Cir. 2010); ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc); *see also* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir. 1986) (mail and wire fraud); *but see* ***United States v. Alston-Graves***, 435

[9] Such instructions also have been referred to as deliberate ignorance, ostrich, or head-in-the-sand instructions. To minimize the potential for confusion with the meaning of "willfulness" as it relates to the defendant's intent, the Tax Division recommends using the term "conscious avoidance" or "deliberate ignorance" and avoiding the phrase "willful blindness."

F.3d 331, 338 (D.C. Cir. 2006) (no evidence of deliberate ignorance on the part of the defendant, but error in giving instruction harmless; collecting cases addressing willful blindness instructions).[10] In such a case, the use of a conscious avoidance instruction may be appropriate.

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means**.** ***United States v. Pool***e, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." ***Id***. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge*."* ***Id.*** *citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***, *supra.*

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). *Accord* ***United States v. Miller*** 588 F.3d 897, 906 (5th Cir. 2009) ("The evidence demonstrates that [the defendant] was subjectively aware of a high probability of existence of illegal conduct.").

The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Poole***, 640 F.3d at 122; ***Stadtmauer***, at 255; ***Jewell,*** 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under Section

[10] Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991).

271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit[11] – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69. The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71.

Although ***Global-Tech Appliances*** has seemingly approved the use of the conscious avoidance instructions, it is important to note that circuit courts have approved their use only under proper circumstances. *See, e.g.,* ***United States v. Whiteford,*** 676 F.3d 348, 357 (3d Cir. 2012) (A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of

[11] *See* ***Alston-Graves***, *supra*.

deliberate ignorance), *citing* ***United States v. Clay***, 618 F.3d 946, 953 (10th Cir. 2010); ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988)***; United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Willis***, 277 F.3d 1026, 1031-32 (8th Cir. 2002); ***United States v. Dean***, 487 F.3d 840, 851 (11th Cir. 2007). Indeed, at least one court has said that the use of such an instruction is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). *See also* ***United States v. Jinwright,*** 2012 WL 2362632 (4th Cir. 2012) (requests for willful blindness instructions should be handled with caution).

Accordingly, prosecutors should take care to ensure that a conscious avoidance instruction is given only when the facts warrant its use and that the court complies with the relevant rules of the circuit when giving such an instruction. *See, e.g.*, ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). A conscious avoidance instruction "is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because the courier knows full well that he is likely to find drugs there." ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

Furthermore, in a tax case, the language of any conscious avoidance instruction must not conflict with the government's obligation to prove the voluntary, intentional violation of a known legal duty. *See* Section 8.08. Care must be taken to ensure that the conscious avoidance instruction applies only to the element of "knowledge," and does not extend to the government's obligation to prove a "voluntary, intentional violation." *See* ***United States v. Stadtmauer***, 620 F.3d 238, 258-259 (3d Cir. 2010) ("The Court's instructions made clear that willful blindness applied only to the element of knowledge"). When a deliberate ignorance or conscious avoidance instruction is given, the jury should also be given a separate Good Faith instruction, which expressly directs the jury not to convict for negligence or mistake.

8.09 VENUE

Tax evasion is a continuing offense under 18 U.S.C. § 3237(a). Venue is therefore proper in any district in which an affirmative act occurred.

As previously noted, one of the most common ways in which defendants attempt to evade tax involves the filing of a false return. In such a case, venue is proper in the district where a false return was filed. *See* ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977); ***Holbrook v. United States***, 216 F.2d 238, 239 (5th Cir. 1954). Venue also lies in the district in which a false return is prepared or signed, even though the return is filed in a different district. ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973)***;*** ***King***, 563 F.2d at 562; ***United States v. Hoover***, 233 F.2d 870, 872 (3d Cir. 1956); ***Kowalsky v. United States***, 290 F.2d 161, 162-63 (5th Cir. 1961); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987); ***United States v. Humphreys***, 982 F.2d 254, 260 (8th Cir. 1992); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985). This is also true in cases in which the affirmative act of evasion is the filing of a false withholding Form W-4 rather than a false tax return: venue is proper where the false W-4 was prepared and signed or where it was received and filed. *See* ***United States v. Felak***, 831 F.2d 794, 798-99 (8th Cir. 1987).

In tax evasion cases, venue is not limited to the district of signing, filing, or preparation of the false tax return. Venue is appropriate in any district where an attempt to evade took place. Thus, venue may be proper in the district in which a false statement is made to an I.R.S. agent, ***United States v. Goodyear***, 649 F.2d 226, 228 (4th Cir. 1981), where the making of false records or the concealment of assets took place, ***Beaty v. United States***, 213 F.2d 712, 715-17 (4th Cir. 1954), *vacated and remanded for reconsideration on other grounds*, 348 U.S. 905, (1955), *reaff'd*, 220 F.2d 681 (4th Cir. 1955), or where there was a concealment of assets, ***Reynolds v. United States***, 225 F.2d 123, 128 (5th Cir. 1955).

Reference should also be made to the discussion of venue in Section 6.00, *supra*.

8.10 STATUTE OF LIMITATIONS

The statute of limitations is six years "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof." 26 U.S.C. § 6531(2). For a discussion concerning the measurement of the six-year period of limitations, *see*

Section 7.00, *supra*. The most frequently litigated issue with respect to the statute is when the period of limitations commences.

The general rule is that the six-year period of limitations begins to run from the latter of the due date of the tax return or the last affirmative act constituting an attempt to evade. *See* ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997); ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir. 1991); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir. 1991); ***United States v. Winfield***, 960 F.2d 970, 974 (11th Cir. 1992). (For rules relating to employment taxes, see Section 7.02[5].) Thus, if the delinquent filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. ***United States v. Habig***, 390 U.S. 222, 225 (1968). However, where a false return is filed before the statutory due date, the statute of limitations does not start running until the statutory due date. ***United States v. Silverman***, 449 F.2d 1341, 1346 (2d Cir. 1971); ***United States v. Ayers***, 673 F.2d 728, 729-30 (4th Cir. 1982). When the affirmative act occurs before a tax deficiency is incurred, the statute of limitations generally begins to run at the time the tax deficiency arises. ***United States v. Carlson***, 235 F.3d 466, 470 (9th Cir. 2000) ("the statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally, a tax deficiency"); ***United States v. Payne***, 978 F.2d 1177, 1179 (10th Cir. 1992).

In tax evasion cases involving affirmative acts of evasion carried out after the statutory due date, the limitations period runs from the date of the last such act, thereby extending the period beyond six years from the time filing was required (or unpaid taxes were due). *See, e.g.*, ***United States v. Anderson***, 319 F.3d 1218, 1219 (10th Cir. 2003); ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986) (false statements by defendant to revenue agents and prosecutor regarding income from prior year in question were affirmative acts which triggered the statute of limitations computation); ***United States v. Dandy***, 998 F.2d 1344, 1355 (6th Cir. 1993) ("[T]o hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed"); ***United States v. Trownsell***, 367 F.2d 815, 816 (7th Cir.1966) (the statute of limitations started running in 1961 when defendant transferred a sum of money to a Swiss bank, notwithstanding that the taxes were due between 1946 and 1953); ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable more than six years before the indictment); ***United States v.***

Hunerlach, 197 F.3d 1059, 1065 (11th Cir. 1999) (hiding rental income by purchasing property in nominee name within six years of indictment was timely affirmative act of evasion for limitations purposes).

In those situations in which the last affirmative act is the filing of a false return after the original due date of the return, but before the last day of the extended period resulting from the defendant's filing for an extension of the statutory due date, the limitations period should be considered to commence upon the defendant's filing of the false return. *See* ***Habig***, 390 U.S. at 226 ("This provision [26 U.S.C. § 6513] does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and file the return before the last day of the extended period * * *").[12]

8.11 LESSER INCLUDED OFFENSES

Prosecutors should always familiarize themselves with the law in their circuits concerning lesser included offense issues, and all other issues in their cases. Prosecutors faced with lesser included offense issues in criminal tax cases should consult with the Tax Division's Criminal Appeals and Tax Enforcement Policy Section at (202) 514-5396.

The Supreme Court has held that the strict elements test applies to determine whether an offense constitutes a lesser included offense of a charged offense. ***Schmuck v. United States***, 489 U.S. 705, 709-10, 715-22 (1989). An offense is a lesser included offense of the offense charged only where "the elements of the lesser offense are a subset of the elements of the charged offense." ***Schmuck v. United States***, 489 U.S. at 716. Accordingly, no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." Id. Of course, "if on the facts of a given case there are disputed issues of fact which would enable the jury rationally to find that, although all the elements of [one offense] have not been proved, all the elements of one or more lesser offenses have been, it is clear that the defendant is entitled to a lesser-included offense charge as to such lesser offenses." ***Sansone v. United States***, 380 U.S. 343, 351 (1965); *see also* ***United States v. Colon***, 268 F.3d 367, 373-77 (6th Cir. 2001); ***United States v. Wright***, 131 F.3d 1111, 1112-13 (4th Cir. 1997); ***United States v. Nichols***, 9 F.3d 1420, 1421-22 (9th Cir. 1993); ***United States v. Doyle***, 956 F.2d

[12] Keep in mind that 26 U.S.C. § 6531 provides for a nine-month extension of the limitations period "[w]here a complaint is instituted before a commissioner of the United States."

73, 74-75 (5th Cir. 1992); ***United States v. Lodwick***, 410 F.2d 1202, 1206 (8th Cir. 1969)

In ***United States v. Becker***, 965 F.2d 383, 391 (7th Cir. 1992), the Seventh Circuit held that failure to file was not a lesser included offense of tax evasion. "Section 7203 does not require 'an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense.'" 965 F.2d at 391 (quoting ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986)). *See also* ***United States v. Hassebrock***, 663 F.3d 906, 917 (7th Cir. 2011).

In ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir. 1992), and ***United States v. DeTar***, 832 F.2d 1110, 1113-14 (9th Cir. 1987), however, the Third and Ninth Circuits each held that failure to pay, in violation of Section 7203, is a lesser included offense of evasion of payment. In ***McGill***, the defendant was charged with five counts of evasion of payment. The jury convicted him of three counts of evasion of payment and of failure to pay regarding the other two years. McGill argued that section 7203 is not a lesser included offense of Section 7201 "because one element of the misdemeanor – failure to pay a tax – requires different proof than the parallel affirmative act of evasion under § 7201 which as the Court held in ***Spies*** cannot be the mere failure to pay." The Third Circuit disagreed, noting that "McGill's argument overlooks the fact that it is exactly in the situation where proof of the affirmative act to evade payment fails, that the lesser included offense of willful failure to pay may become relevant." ***McGill***, 964 F.2d at 225-26, 239.

The Tax Division's policies, set forth in a Tax Division Memorandum dated February 12, 1993, are as follows:

> Section 7203
>
> In cases charged as ***Spies***-evasion (*i.e.*, failure to file, failure to pay, and an affirmative act of evasion) under section 7201, it is the government's position that *neither* party is entitled to an instruction that willful failure to file (section 7203) is a lesser included offense of which the defendant may be convicted. Thus, if there is reason for concern that the jury may not return a guilty verdict on the section 7201 charges (for example, where the evidence of a tax deficiency is weak), consideration should be given to

including counts charging violations of both section 7201 *and* section 7203 in the indictment. It is important to note, however, that a willful failure to pay is a lesser included offense of a willful attempt to evade the payment of tax. ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir. 1992); ***United States v. DeTar***, 832 F.2d 1110, 1113-14 (9th Cir. 1987).

The issue whether cumulative punishment is appropriate where a defendant has been convicted of violating both section 7201 and section 7203 generally will arise only in pre-guidelines cases. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. Thus, only in those cases involving an extraordinary tax loss will the sentencing court be required to consider an imprisonment term longer than five years. In those cases in which cumulative punishments are possible and the defendant has been convicted of violating both sections 7201 and 7203, the prosecutor may, at his or her discretion, seek cumulative punishment. However, where the sole reason for including both charges in the same indictment was a fear that there might be a failure of proof on the tax deficiency element, cumulative punishments should not be sought.

Section 7206

Similarly, in evasion cases where the filing of a false return (section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. *See* ***Schmuck v. United States***, 489 U.S. 705 (1989) (one offense is necessarily included in another only when the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with ***Spies*** evasion cases, prosecutors should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the false return charge, nothing generally would be gained by charging violations of both sections 7201 and 7206.

Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (*e.g.*, where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

Section 7207

Although the elements of section 7207 do not readily appear to be a subset of the elements of section 7201, the Supreme Court has held that a violation of section 7207 is a lesser included offense of a violation of section 7201. *See* ***Sansone v. United States***, 380 U.S. 343, 352 (1965); ***Schmuck v. United States***, 489 U.S. at 720, n.11. Accordingly, in an appropriate case, either party may request the giving of a lesser included offense instruction based on section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document.

Other Offenses

In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (*i.e.*, assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations – that is, the strict elements test of ***Schmuck v. United States***, 489 U.S. 705, should be applied.