Criminal Tax Manual
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3.00 TAX DIVISION POLICY DIRECTIVES AND MEMORANDA

Updated May 2001

The Tax Division's policies and procedures are contained in a series of Tax Division Directives and Memoranda, which are set forth in the pages that follow for ease of reference.	
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DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 52

January 2, 1986

The Authority to Execute Title 26 or
Tax-related Title 18 Search Warrants

Pursuant to the authority vested in me by Part 0, Sub-Part N of Title 28 of the Code of Federal Regulations, Section 0.70, delegation of authority with respect to approving the execution of Title 26, U.S.C., or tax-related Title 18, U.S.C., search warrants directed at offices, structures, premises, etc., owned, controlled or under the dominion of the subject or target of a criminal investigation, is hereby conferred upon:

1. Any United States Attorney appointed under Section 541 of Title 28, U.S.C.,

2. Any United States Attorney appointed under Section 546 of Title 28 U.S.C.,

3. Any permanently appointed representative within the United States Attorney's office assigned as First Assistant United States Attorney,

4. Or to any permanently appointed representative within the United States Attorney's office assigned as chief of criminal functions.

This delegation of authority is expressly restricted to these, and no other, individuals.

This delegation of authority does not affect the statutory authority and procedural guidelines relating to the use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. Sec. 59.1, *et seq.*

The Tax Division shall have exclusive authority to seek and execute a search warrant that is directed at the offices, structures or premises owned, controlled, or under the dominion of a subject or target of an investigation who is:

1. An accountant;

2. A lawyer;

3. A physician;

4. A local, state, federal, or foreign public official or political candidate;

5. A member of the clergy;

6. A representative of the electronic or printed news media;

7. An official of a labor union;

8. An official of an organization deemed to be exempt under Section 501(c)(3) of the Internal Revenue Code.

Any application for a warrant to search for evidence of a criminal tax offense not specifically delegated herein must be specifically approved in advance by the Tax Division pursuant to Section 6-2.330 of the United States Attorneys' Manual.

Notwithstanding this delegation, the United States Attorney or his delegate has the discretion to seek Tax Division approval of any search warrant or to request the advice of the Tax Division regarding any search warrant.

The United States Attorney shall notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and shall transmit to the Tax Division copies of the search warrant (and attachments and exhibits), inventory, and any other relevant papers.

The United States Attorneys' Manual is hereby modified effective January 2, 1986.

ROGER M. OLSEN

Acting Assistant Attorney General

Tax Division

ATTACHMENT

Subject: Authority to Execute Title 26 Tax-Related Title 18 Search Warrants

Date: AUG. 7, 1984

To: All United States Attorneys
From: Glenn L. Archer, Jr.
Asst. Attorney General
Tax Division

By Tax Division Directive No. 49 (copy attached), I have authorized delegation to United States Attorney's offices the authority to approve the execution of certain limited Title 26 or tax-related Title 18 search warrants. At the request of the Internal Revenue Service, the effective date of this delegation is October 1, 1984. In recent years, the case law concerning search and seizure has developed to the point where it is clear that, upon a showing of probable cause, the Government may conduct reasonable searches for the purpose of obtaining documentary evidence establishing the commission of a crime. The developing case law has led, in part, to the decision to delegate the authority to approve requests for search warrants in tax cases on a limited basis.

The procedure will now permit a direct request from District Counsel's office to you. The delegation order permits consultation or referral of the matter to the Tax Division, as you choose. The delegation extends to the United States Attorney and the Chief of your Criminal Division. It cannot be delegated to anyone else in your office. There is a ten-day notification requirement which will permit the Tax Division to collect the relevant data necessary to evaluate the use of search warrants by the Internal Revenue Service and Department of Justice nationally.

If you have any questions whatsoever, please contact Roger M. Olsen, Deputy Assistant Attorney General, Tax Division, telephone: 633-2915, or Stanley F. Krysa, Chief, Criminal Section, Tax Division, telephone: 633-2973.

I would appreciate having the name and telephone number of the Assistant United States Attorney in each office who, in addition to the United States Attorney, is authorized to approve these warrants. A list of those names will be forwarded to the IRS and, of course, retained for the Tax Division's files.

Also attached is a brief, technical memorandum on the law of search warrants for documentary evidence.

BRIEF MEMORANDUM OF LAW
CONCERNING SEARCH WARRANTS

Ever since ***Warden v. Hayden***, 378 U.S. 294 (1967), established that the Government could seize ''mere evidence'' pursuant to a search warrant, the use of search warrants for items, such as personal papers and business records, became a viable legal possibility. In ***Warden v. Hayden***, although the items of clothing seized were evidentiary, their seizure did not violate the Fifth Amendment privilege, since the items were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself ..." *supra*, 302-303. Rule 41(b) of the Federal Rules of Criminal Procedure echoes this holding and provides that: "A warrant may be issued ... to search for and seize any ... property that constitutes evidence of the commission of a criminal offense ...".

In 1976, the possibility that a search and seizure of business records might violate the Fifth Amendment privilege against self-incrimination was foreclosed in ***Andresen v. Maryland***, 427 U.S. 463 (1976). The Supreme Court upheld the search of the defendant's law office and of the office of the real estate firm which he also controlled, although incriminating business records were found at both locations. The Court based its opinion on the finding that the individual against whom the search was directed was not required to aid in the discovery, production, or authentication of incriminating evidence; thus, the seizure of the business records was not a violation of the Fifth Amendment. *Cf.* ***United States v. Doe***, 52 U.S.L.W. 4296 (Feb. 28, 1984).

The Supreme Court's approval of a law office search in ***Andresen*** lends some support to similar searches in the future. However, the issue of attorney/client privilege or work-product doctrine was not specifically addressed in Andresen and is, therefore, still a matter of controversy and sensitivity. In addition, the search's legality may depend on whether the status in the investigation of the individual whose property is searched is that of a disinterested third party or whether he is believed to have engaged in criminal conduct. *See* ***Zurcher v. Stanford Daily***, 436 U.S. 547 (1978); ***United States v. Bithoney***, 631 F. 2d l (lst Cir. 1980), cert. denied, 449 U.S. 1083 (1981).

Because the questions of privilege and status in the investigation remain sensitive legal issues, the Tax Division has decided to delegate the authority to approve search warrants in tax cases only in those limited instances where the search warrant is directed at offices, structures, or premises owned, controlled, or under the dominion of the subject or target of a criminal investigation. The subject, or target, moreover, must not fall into the exempted categories listed in the delegation order, which categories we deem to be of such a sensitive nature, from the perspective of tax law enforcement, that prior approval of the Tax Division is still required before a search warrant is obtained.

Aside from questions of strict legality, search warrants in tax investigations involve potential problems and issues intrinsic to tax cases. The concept of seizing personal or business books and records as the evidence or instrumentality of a crime is not as direct or simple a problem as is the seizure of a contraband. These documents usually contain much personal and confidential information and these very same documents, which, by their own nature, are not unusual, illegal or dangerous, will be the evidence of or the instrumentality of the crime to be charged. In addition to the controversial nature of such a seizure of documents, the requirement that the items to be seized must be named with specificity is more difficult to meet. In tax cases, the warrant must be

specific, not only regarding the items to be seized and the place searched, but a specific time frame must also be stated.

DEPARTMENT OF JUSTICE
TAX DIVISION DIRECTIVE
NO. 86 - 58

May 14, 1986

Introduction. While it is the function of the Tax Division to carefully review the facts, circumstances, and law of each criminal tax case as expeditiously as possible, the taxpayer should be given a reasonable opportunity to present his/her case at a conference before the Tax Division. Where the rules governing conferences are so rigid and inflexible that such an opportunity is effectively denied a taxpayer, the interests of justice are not served. The following guidelines will assist the Tax Division attorneys in reviewing such cases.

(1) ***Vicarious Admissions***. Effective immediately, the vicarious admissions rule for statements by lawyers attending conferences before the Criminal Section shall no longer be used by the Tax Division, except where the lawyer authenticates a written instrument, *i.e.*, document, memorandum, record, etc.

(2) ***Administrative Investigations***. Effective July 1, 1986, plea negotiations may be entertained at the conference in non-grand jury matters, consistent with the policies of the appropriate United States Attorney's office. Written plea agreements should be prepared and entered into by the United States Attorney's office unless there is a written understanding between the Tax Division and the United States Attorney's office to the contrary. Where the prospective defendant indicates a willingness to enter into a plea of guilty to the major counts(s) and to satisfy the United States Attorney's office policy, the matter should be referred to the United States Attorney's office for plea disposition.

(3) ***Number of Conferences***. There is no fixed number of conferences which may be granted in any one particular case. Ordinarily, one conference is sufficient. However, in some cases it may be that more than one conference is appropriate. The test is not in the number of conferences, for there is no right to a conference, but whether, under the facts and circumstances of the case, sufficient progress is or will be made in either the development of material facts or the clarification of the applicable law, without causing prejudice to the United States. Tax Division attorneys should be mindful that justice delayed is justice denied and, therefore, sound, professional judgment should be used at all times in such matters.

(4) ***Witness at Conferences***. On occasion, the taxpayer or a witness may attend the conference. In rare situations, the taxpayer or a witness may attempt to make oral reprensentations or statements at the conference. There are no restrictions on the use of such statements by the Government. However, such attempts should be discouraged, since the Tax Division is conducting a review of an investigation and is not conducting either a hearing or an investigation. Under no circumstances may evidence be presented at the conference based upon any understanding that it is in lieu of any person testifying before a grand jury.

(5) ***Grand Jury Investigations and Coordination with United States Attorney's Office***. Effective immediatley, in every grand jury investigation where a conference is requested, the Tax Division trial attorney shall initially contact the United States Attorney's office and discuss the case with the appropriate Assistant United States Attorney, and ascertain whether disclosure of any facts of the case is likely to expose any person, including witnesses, to the risk of intimidation or danger. If there is such a risk, the trial attorney shall then advise the appropriate assistant chief of the Criminal Section, who shall decide the appropriate course of action. The Tax Division trial attorney shall advise the Assistant United States Attorney that he/she may

attend the conference if they so desire.

ROGER M. OLSEN
Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 86-59

AUTHORITY TO APPROVE GRAND JURY EXPANSION REQUESTS TO INCLUDE FEDERAL CRIMINAL TAX VIOLATIONS

AGENCY: Department of Justice

ACTION: Notice

SUMMARY: This Directive delegates the authority to approve requests seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations from the Assistant Attorney General, Tax Division, to any United States Attorney, Attorney-In-Charge of a Criminal Division Organization Strike Force or Independent Counsel. The Directive also sets forth the scope of the delegated authority and the procedures to be followed by designated field personnel in implementing the delegated authority.

EFFECTIVE DATE: October 1, 1986

FOR FURTHER INFORMATION CONTACT: Edward M. Vellines, Senior Assistant Chief, Office of Policy & Tax Enforcement Analysis, Tax Division, Criminal Section (202-633-3011). This is not a toll number. [FN1]

FN1. This information in the Directive is out of date. Questions concerning this directive should now be addressed to the Criminal Appeals and Tax Enforcement Policy Section at 202-514-3011.

SUPPLEMENTARY INFORMATION: This order concerns internal Department management and is being published for the information of the general public.

TAX DIVISION DIRECTIVE NO. 86-59

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, delegation of authority with respect to approving requests seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations is hereby conferred on the following individuals:

1. Any United States Attorney appointed under Section 541 or 546 of Title 28, United States Code.

2. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, United States Code.

3. Any Independent Counsel appointed under Section 593 of

Title 28, United States Code.

The authority hereby conferred allows the designated official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding which is being conducted within the sole jurisdiction of the designated official's office. (Section

301.6103(h)(2)-1(a)(2)(ii) (26 C.F.R.)). *Provided*, that the delegated official determines that--

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the Government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with F.R.Cr.P. 6(e)(A)(ii) to seek the assistance of Government personnel assigned to the Internal Revenue Service to assist said attorney in his/her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multijurisdictional investigation, nor are the targets individuals considered to have national prominence--such as local, state, federal, or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

4. A written request seeking the assistance of Internal Revenue Service personnel and containing pertinent information relating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate Internal Revenue Service official (e.g., Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential tax violations, and the Tax Division interposes no objection to the request.

6. The Internal Revenue Service has made a referral pursuant to the provisions of 26 U.S.C. Section 6103(h)(3) in writing stating that it: (1) has determined, based upon the information provided by the attorney for the Government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed; (2) agrees to furnish the personnel needed to assist the Government attorney in his/her duty to enforce federal criminal law; and (3) has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the Internal Revenue Service and the Tax Division before undertaking to initiate criminal proceedings.

The authority hereby delegated includes the authority to designate: the targets (subjects) and the scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, *provided*, that prior written notification is given to both the Internal Revenue Service and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. Section 7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Task Force Investigations, individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the United States Attorney, Independent Counsel or Attorney-in-Charge of a Strike Force with a special agent's report and exhibits through Regional Counsel, (Internal Revenue Service) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out

of grand jury investigations conducted by an Organized Crime Drug Task Force shall be forwarded directly to the Tax Division by the United States Attorney with a special agent's report and exhibits.

The authority hereby delegated is limited to matters which seek either to: (1) expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations; (2) designate the targets (subjects) and the scope of such inquiry; or (3) terminate such proceedings. In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the Internal Revenue Service, remains vested in the Assistant Attorney General in charge of the Tax Division as provided in 28 C.F.R. 0.70. In addition, authority to alter any actions taken pursuant to the delegations contained herein is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. 0.70.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *October 1, 1986*

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 87 - 61

DELEGATION OF AUTHORITY FOR TAX PROSECUTIONS
INVOLVING RETURNS UNDER 26 U.S.C. SECTION 6050I

By virtue of the authority vested in me by Part 0, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, delegation of authority with respect to authorizing tax prosecutions, under Title 26, United States Code (U.S.C.), Sections 7203 and 7206 with respect to Returns (IRS Form 8300) Relating to Cash Received in a Trade or Business as prescribed in 26 U.S.C. Section 6050I, is hereby conferred on the following individuals:

1. The Assistant Attorney General, Deputy Assistant Attorneys General, and Section Chiefs of the Criminal Division.

2. Any United States Attorney appointed under Section 541 or 546 of Title 28, U.S.C.

3. Any permanently appointed representative within the United States Attorney's Office assigned either as First Assistant United States Attorney or Chief of criminal functions.

4. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, U.S.C.

5. Any Independent Counsel appointed under Section 593 of Title 28, U.S.C.

This delegation of authority is expressly restricted to the aforementioned individuals and may not be redelegated.

The authority hereby conferred allows the designated official to authorize, on behalf of the Assistant Attorney General, Tax Division, tax prosecutions under 26 U.S.C. Sections 7203 and 7206 with respect to returns (IRS Form 8300) prescribed in 26 U.S.C. Section 6050I relating to cash received in a trade or business; Provided, that:

1. The prosecution of such tax offenses (e.g. Sections 7203 and 7206) involves solely cash received in a trade or business as required by 26 U.S.C. Section 6050I.

2. The matter does not involve the prosecution of accountants,

physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly-held corporations and/or their officers.

3. The Tax Division of the Department of Justice will be furnished by certified mail a copy of the referral from the Internal Revenue Service to the designated field office personnel regarding the potential tax violations.

Except as expressly set forth herein, this delegation of authority does not include the authority to file an information or return an indictment on tax matters. The authority hereby delegated is limited solely to the authorization of tax prosecutions involving the filing or non-filing of returns (IRS Form 8300) pursuant to 26 U.S.C. Section 6050I. The authority to alter any actions taken pursuant to the delegation contained herein is retained by the Assistant Attorney General, Tax Division, in accordance with the authority contained in 28 C.F.R. 0.70.

Notwithstanding this delegation, the designated official has the discretion to seek Tax Division authorization of any proposed tax prosecution within the scope of this delegation or to request the advice of the Tax Division with respect thereto.

Roger M. Olsen

Assistant Attorney General

Tax Division

Approved to take effect on *February 27, 1987*.

DEPARMENT OF JUSTICE
TAX DIVISION DIRECTIVE NO. 75
March 21, 1989

MODIFICATION OF POLICY RE USE OF 26 UNITED STATES CODE SECTION 7207 IN FALSE RETURN FILING CIRCUMSTANCES

INTRODUCTION

The Tax Division recognizes that United States Attorneys frequently investigate financial crimes through joint tax and nontax grand jury investigations. In such matters, it is appropriate that the culpable parties be prosecuted for felony violations, that immunity be used sparingly, and that cooperating participants in the corrupt activity be required to plead guilty to the commission of some significant aspect of the original conduct.

We also recognize there are instances when a minor target seeks to cooperate, and his or her culpability is such that neither immunity nor a plea to a felony is appropriate. In short, the criminal conduct is more suited to a misdemeanor charge, when there is an agreement to cooperate in the ongoing investigation of the principal target(s).

In some situations, described above, the only misdemeanor charges that may be available to the prosecution are tax misdemeanors, i.e., sections 7203 or 7207 of Title 26 U.S.C. Where a tax return has not been filed, a section 7203 violation (failure to file) may exist. However, if a tax return has been filed and the false aspect of that return is minor, e.g., the corrupt person may have accepted bribes of relatively minor amounts that were not reported or the payor may have falsely deducted the bribe payment as a business expense, then the conduct would constitute the filing of a false return, punishable either as a felony under 26 U.S.C. Section 7206(1) or a misdemeanor under 26 U.S.C. Section 7207.

In the past, the Tax Division would not approve either a prosecution or guilty plea pursuant to section 7207, when the false document was a tax return, because it has been our long-standing policy that prosecution of materially false returns should be for felony charges. We believe that the use of section 7207 should generally be restricted to circumstances where taxpayers submitted false or altered *documents* to the IRS in support of information submitted on a tax return.

We recognize that this policy has created problems because an individual, who desires to cooperate, may be willing to plead to a misdemeanor but not to a felony. To address this problem, the Tax Division is modifying its policy to provide United States Attorneys with a means of dealing with the limited situation described above.

Accordingly, the Tax Division will now entertain requests for the approval of guilty pleas to a violation(s) of 26 U.S.C. section 7207 in appropriate circumstances where the taxpayer is involved in the corrupt activity under investigation and *agrees to cooperate in the ongoing investigation against the principal target(s)*. The guidelines for the limited use of 26 U.S.C. section 7207 are set forth below.

The relaxation of the Tax Division policy relative to section 7207 prosecutions will be limited to the circumstances described in the guidelines. Defendants providing assistance to the Government should otherwise be rewarded by receiving leniency in the imposition of sentence, as provided by the new Sentencing Guidelines, rather than by being permitted to plead to reduced charges.

The procedures outlined will be utilized throughout the remainder of fiscal years 1989 and 1990. The Tax Division will assess the effect of this change on the National Tax Compliance Program before making this policy change permanent.

GUIDELINES

The Department of Justice, Tax Division, agrees to consider approving plea agreements with charges brought under 26 U.S.C. section 7207 for witnesses cooperating in Title 18 and Title 26 grand jury investigations and in no other circumstances under the following conditions.

1. Approval for section 7207 charges will not be given in any case in which the Tax Division has previously authorized charges against the subject under section 7206(1), section 7201, or a tax (***Klein***) conspiracy.

2. The Tax Division must be provided with a prosecution statement or letter describing the outlines of the Title 26 and/or Title 18 investigation, the involvement of the cooperating witness who will plead, and the anticipated cooperation that the witness is expected to provide in the investigation.

3. The subject must have agreed to be a cooperating witness in a Title 18 or Title 26 investigation to which the witness' proposed income tax violation is related.

4. In addition to his cooperation in the ongoing criminal investigation and prosecution, the subject must agree to cooperate fully and truthfully with the Internal Revenue Service in any civil audit or adjustment of the tax liability arising out of the circumstances of the criminal case.

5. The subject must be informed that any plea agreement to tax misdemeanors under 26 U.S.C. Section 7207 is subject to the approval of the Tax Division, Department of Justice. No such plea agreement is to be executed until authorized by the Tax Division or, if executed, unless it contains a provision that the plea agreement is subject to the approval of the Tax Division.

6. Approval for use of section 7207 will not be given, hence should not be requested, if the underpayment of taxes resulting from the false statements in the return exceeds $2500 in any of the years. In such cases the plea must be to a tax felony charge.

7. The IRS must make a referral pursuant to 26 U.S.C. Section 6103(h)(3)(A). The United States Attorney must have obtained tax disclosure confirming the filing of the return(s). The Tax Division should be provided with an abbreviated SAR, a computation of the taxes due, the tax return(s) involved, and a copy of the plea agreement or a statement of its terms. Section 7207 approval will not be given if the tax disclosure material suggests that a tax misdemeanor would be an inappropriate disposition of the case.

8. The subject must sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved in all the years under investigation.

JAMES I. K. KNAPP
Acting Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 77

July 7, 1989

Section 7212(a) Policy Statement

The Tax Division occasionally receives for review recommendations for prosecution involving the "omnibus" clause of 26 U.S.C. Sec. 7212(a) which prohibits corrupt endeavors to obstruct or impede the due administration of the Internal Revenue Code. To promote uniform enforcement of the internal revenue laws, the Tax Division issues this internal directive setting forth criteria for use of this clause.

In general, the use of the "omnibus" provision of Section 7212(a) should be reserved for conduct occurring after a tax return has been filed -- typically conduct designed to impede or obstruct an audit or criminal tax investigation, when 18 U.S.C. Section 371 charges are unavailable due to insufficient evidence of a conspiracy. However, this charge might also be appropriate when directed at parties who engage in large-scale obstructive conduct involving actual or potential tax returns of third parties. Continually assisting taxpayers in the filing of false returns or engaging in other conduct designed to make audits difficult; and other numerous, large-scale violations of 26 U.S.C. Section 7206(2) or 18 U.S.C. Section 287 (as it pertains to refund claims for other or fictitious taxpayers), are examples of situations when Section 7212(a) charges might be appropriate. Such an application of the "omnibus" clause is consistent with what we believe to be the overall purpose of Section 7212(a), which is to penalize conduct aimed directly at IRS personnel in the performance of their duties, and at general IRS administration of the federal tax enforcement program, but not to penalize tax evasion as such.

The omnibus clause should not be utilized when other more specific charges are available and adequately reflect the gravamen of the offense. Section 7212(a) pleadings might be utilized to set forth allegations concerning attempted conspiracies with undercover agents to impede or impair the functions of the IRS, but no Section 7212(a) count should be predicated on such conduct alone, as that conduct by itself would rarely be sufficient to impede or impair the due administration of the Internal Revenue Code.

Use of the omnibus clause in an indictment must be approved by the Director[FN2] of the Criminal Enforcement Sections or higher.

FN2. There no longer is a Director of the Criminal Enforcement Sections. Use of the omnibus clause now requires approval of the Deputy Assistant Attorney General (Criminal). *See* Tax Division Directive No. 115, ***infra***.

SHIRLEY D. PETERSON
Assistant Attorney General

Tax Division

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 96

Re: Delegation of Authority to Authorize Grand Jury Investigations of False and Fictitious Claims for Tax Refunds

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287, is hereby conferred on all United States Attorneys.

This delegation of authority is subject to the following limitations:

1. The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

2. Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself /herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

In all cases, the request for grand jury investigation letter, together with the Form 9131 and a copy of all exhibits, must be sent to the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the request for grand jury investigation letter (together with the completed Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the referral letter has not been forwarded to the Tax Division, Department of Justice (by overnight courier), by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This delegation of authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the delegation of authority to authorize prosecution of such cases (see United States Attorneys' Manual, Title 6, 4.243). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation.

Due to the unique problems posed by electronically filed false and fictitious claims for refunds, Tax Division authorization is required if prosecution is

deemed appropriate in an electronic filing case.

SHIRLEY D. PETERSON

Assistant Attorney General

Tax Division

APPROVED TO TAKE EFFECT ON: December 31, 1991

January 15, 1993

Honorable Abraham N. M. Shashy, Jr.
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224

Attention: Barry J. Finkelstein
Assistant Chief Counsel (Criminal Tax)

Re: ***Interpretation of Tax Division Directive No. 96***

Dear Mr. Shashy:

I appreciate the opportunity that I had to meet with Mr. Finkelstein and the Deputy Regional Counsel for Criminal Tax on December 15, 1992. Face-to-face discussions of issues that concern all of us are always helpful. In our discussions, we left one issue involving referral of electronic filing (ELF) cases unresolved, and I am writing to express my views on that topic.

Tax Division Directive No. 96 delegated to the United States Attorneys the authority to authorize grand jury investigations of matters under the purview of the Tax Division in certain, limited circumstances. Counsel in the regions have interpreted the scope of that delegation of authority differently in situations involving schemes that recruit individuals to file fraudulent returns in their own names, using their own social security numbers. Tax Division Directive No. 96 provides that United States Attorneys may authorize grand jury investigations in cases prosecutable under 18 U.S.C. 286, 287 where:

> 1 * * * an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax returns to which he/she is not entitled. All other cases must be referred to the Tax Division for authorization of the grand jury investigation.

Deputy Regional Counsel Shipley and Waller have interpreted the phrase "in the names of real taxpayers who do not intend the returns to be their own" to exclude situations in which the target has recruited real individuals to file returns in their names. They have reasoned that even though the information used on the return is fictitious, the "taxpayers" have filed returns that affect those taxpayers' accounts and that can be treated as their returns by the Service. They have concluded that such cases fall outside the terms of Directive No. 96 and must be referred to the Tax Division to authorize the grand jury investigation. Other regions have reasoned that the "taxpayers" involved in such situations do not intend the returns to be their real returns, and thus referral directly to the United States Attorneys for grand jury investigation is permitted under Directive No. 96.

We agree with Messrs. Shipley and Waller that when real individuals file returns using their own names and social security numbers the case falls outside Tax Division Directive 96. The "taxpayer" intends to file a tax return in his or her own name, and the Service must treat that filing as a "return." Thus,

such cases must be referred to the Tax Division and cannot be directly referred to the United States Attorneys. The purpose of Directive No. 96 was to extend to the United States Attorneys the authority to institute grand jury investigations in cases in which they already had authority to authorize prosecutions (18 U.S.C. 286, 287 charges in false paper return cases) and in other false claims cases falling into that same pattern. The prior delegation of authority did not extend to the United States Attorneys the authority to authorize prosecution of an individual who filed a return in his or her own name, using the correct social security number. The facts that the taxpayers are not targets of the investigation and that the real target may know that such returns are fictitious does not bring the case within Directive 96, and such cases may not be referred directly to the United States Attorneys.

I would appreciate it if you would insure that my views on this subject are communicated to the Deputy Regional Counsels for Criminal Tax. If Mr. Finkelstein or any of the Deputy Regional Counsel have further comments or questions on this issue, they may contact me or our ELF coordinator, Tony Whitledge.

Sincerely,

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

February 17, 1993

MEMORANDUM

TO: All Criminal Enforcement Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

SUBJECT: ***Tax Division Voluntary Disclosure Policy***

Recent new releases by the IRS and stories in the press have raised questions within the Division concerning the proper handling of cases in which a prospective criminal tax defendant claims to have made a voluntary disclosure. Notwithstanding the news stories and rumors to the contrary, the Division has not changed its policy concerning voluntary disclosure, and cases should be evaluated as they have in the past under the provisions of Section 4.01 of the Criminal Tax Manual.

The Service, takes the view that, notwithstanding reports to the contrary, it has not changed its voluntary disclosure practice. It claims that its press releases have been issued to inform the public of the manner it has historically applied the existing practice in referring nonfiler cases to the Department of Justice. The goal has been to demonstrate to the public that the practice has been applied liberally in the past and that a nonfiler interested in reentering the tax system should not be intimidated by a theoretical threat of criminal prosecution.

The Service's carefully worded press releases and public statements have been construed by some member of the press and the defense bar as an "amnesty". This is troublesome, because some inaccurate information has been and is being disseminated to the public by the press and members of the bar that is likely to cause confusion and could interfere with the prosecution of some criminal tax cases. At bottom, the Service's voluntary disclosure policy remains, as it has since 1952, an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers.

We in the Tax Division should have few occasions to consider whether the Service is properly adhering to its voluntary disclosure policy. If the Service has referred a case to the Division, it is reasonable and appropriate to assume

that the Service has considered any voluntary disclosure claims made by the taxpayer and has referred the case to the Division in a manner consistent with its public statements and internal policies. As a result, our review is normally confined to the merits of the case and the application of the Department's voluntary disclosure policy set forth in Section 4.01 of the Criminal Tax Manual.

Cases may, however, arise in which there is some confusion over whether a local District Counsel's office has referred a nonfiler case that seems arguably to fall within one of the Service's press releases on voluntary disclosure or otherwise appears to have been referred to the Department in a manner inconsistent with our understanding of the Service's voluntary disclosure practice. If that occurs, Tax Division reviewing attorneys should not attempt to construe the Service's voluntary disclosure practice on their own but should bring all such questions to the immediate attention of their Section Chiefs. If it is determined that but for questions concerning the applicability of the Service's policy, prosecution of the case would be authorized (i.e., the case meets Tax Division prosecution criteria and does not violate the Division's voluntary disclosure policy set forth in Criminal Tax Manual §4.01), the Section Chief should forward the case (where applicable, consistent with limitations imposed upon the disclosure of grand jury information) to the Assistant Chief Counsel Criminal Tax (CC:CT) for that office's determination whether the Service's referral was consistent with its internal voluntary disclosure practice and whether the Service actually intends that the case be prosecuted. If the Office of Assistant Chief Counsel Criminal Tax determines that the referral was appropriate, the case should be processed by the Division in the normal manner.

Finally, Tax Division reviewing attorneys should exercise considerable care in drafting letters declining cases to ensure that they reflect Tax Division policy regarding voluntary disclosures. Assistant United States Attorneys and IRS field and National Office personnel rely on our correspondence as a reflection of Tax Division policy, and it is, therefore, crucial that our letters and memoranda addressed to other offices within the government accurately state our policies.

February 12, 1993

MEMORANDUM

TO: All United States Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

RE: ***Lesser Included Offenses in Tax Cases***

The purpose of this memorandum is to provide guidance concerning the government's handling of lesser included offense issues in certain kinds of tax cases. Two petitions for writs of certiorari involving the issue of lesser included offenses in tax cases have recently been filed in the Supreme Court. In ***Becker v. United States***, No. 92-410, the defendant was convicted of attempting to evade taxes and of failure to file tax returns for the same years. The trial court sentenced the defendant to three years' imprisonment on the evasion counts and to a consecutive period of 36 months' imprisonment on the failure to file counts. The court of appeals affirmed. In his petition for a writ of certiorari, the defendant argued that the misdemeanor of failure to file a tax return is a lesser included offense of the felony of tax evasion and that the Constitution prohibits cumulative punishment in the same proceeding for a greater and lesser included offense.

In opposing certiorari on this question, the government argued that whether cumulative punishments could be imposed for a course of conduct that violated both 26 U.S.C. 7201 and 26 U.S.C. 7203 was solely a question of congressional intent. The government pointed to the statutory language of Sections 7201 and

7203 as clear evidence of Congress' intent to permit cumulative punishment where a defendant was convicted in a single proceeding of violating both Section 7201 and Section 7203. As further support for its position, the government argued that Sections 7201 and 7203 involve separate crimes under ***Blockburger v. United States***, 284 U.S. 299 (1932) (and, thus, that a violation of Section 7203 is not a lesser included offense of a violation of Section 7201). The ***Becker*** petition is currently pending before the Supreme Court.

In ***McGill v. United States***, No. 92-5842, the government argued, relying on ***Sansone v. United States***, 380 U.S. 343 (1965), that willful failure to pay taxes (26 U.S.C. 7203) is a lesser included offense of attempted evasion of payment of taxes (26 U.S.C. 7201). The Supreme Court denied certiorari in ***McGill*** on December 7, 1992.

The government's position in ***Becker*** reflects an adoption of the strict "elements" test (*see* ***Schmuck v. United States***, 489 U.S. 705 (1989)) and, consequently, a change in Tax Division policy. Accordingly, all attorneys handling tax cases should be notified of the following ramifications of this change in policy.

1. 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 now 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.

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.

2. 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 where 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 Section 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.

3. 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. at 352; ***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.

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, *neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. *See e.g.*, ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992); ***United States v. Boone***, 951 F.2d 1526, 1541 (9th Cir. 1991); ***United States v. Kaiser***, 893 F.2d 1300, 1306 (11th Cir. 1990); ***United States v. Lodwick***, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 (1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set out in this memorandum be followed.

6. 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.

These guidelines will remain in effect unless or until the Supreme Court grants certiorari in ***Becker*** and rules inconsistently with the newly adopted policy. Prosecutors are encouraged to consult with the Tax Division whenever they are faced with a case raising questions addressed in this memorandum by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

March 12, 1993

MEMORANDUM

To: All United States Attorney

From: James A. Bruton
Acting Assistant Attorney General
Tax Division

Re: ***Policy Change in Tax Cases Involving Lesser Included Offenses***

On February 12, 1993, the Tax Division circulated a memorandum providing guidelines concerning the government's handling of lesser included offense issues in certain kinds of tax cases. In that memorandum, we referred to ***Becker v. United States*** (S. Ct. No. 92-410), where defendant sought certiorari

on the ground that the misdemeanor of failure to file a tax return (26 U.S.C. § 7203) is a lesser included offense of the felony of attempted tax evasion (26 U.S.C. §7201) and that cumulative punishment for the greater and lesser offenses is therefore unconstitutional. The government opposed certiorari, arguing that Congress intended to authorize cumulative punishment for the two offenses and, in any event, that the willful failure to file a tax return is not a lesser included offense of attempted tax evasion. As we noted in our earlier memorandum the latter argument reflects an adoption of the strict "elements" test set forth in ***Schmuck v. United States***, 489 U.S. 705 (1989), and, consequently, a change in Tax Division policy.

On March 8, 1993, the Supreme Court denied the petition for a writ of certiorari in ***Becker***. Accordingly, there will no change in the guidelines set forth in the February 12 memorandum and they will remain in effect until further notice.

Prosecutors are encourage to consult with the Tax Division whenever they are faced with a tax case raising questions regarding lesser included offenses by calling the Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 99

Re: Clarification of Tax Division Policy Concerning the Charging of Tax Crimes as Mail Fraud, Wire Fraud, or Bank Fraud (18 U.S.C. §§ 1341, 1343, 1344) or as Predicates to a RICO Charge or as the Specified Unlawful Activity Element of a Money Laundering Offense

The purpose of this directive is to clarify Tax Division policy concerning the charging of tax crimes as mail fraud, wire fraud, or bank fraud (18 U.S.C. §§ 1341, 1343, 1344), or as predicates to a RICO charge or as the specified unlawful activity element of a money laundering offense. Although primarily concerned with tax crimes charged as mail fraud, [FN1] wire fraud, or bank fraud, either directly or as a basis for some other charge, the policy stated herein is equally applicable to tax crimes charged under any statute -- be it one found in Title 26 or one found in Title 18 or any other title of the United States Code.

The extent of Tax Division jurisdiction in the criminal arena is set out in section 70(b), Subpart N, Part O of Title 28 of the Code of Federal Regulations (28 C.F.R. § 0.70(b)). That section provides that, with a few specified exceptions, all "[c]riminal proceedings arising under the internal revenue laws" * * * "are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division * * *." Tax Division jurisdiction, thus, depends not on the particular criminal statute utilized in charging the defendant, but on the nature of the underlying conduct. Whenever the violation can be said to be one arising under the internal revenue laws, Tax Division authorization is required before bringing any charges, irrespective of the statute or statutes under which they are brought. [FN2] In general, an offense can be said to arise under the internal revenue laws when it involves (1) an evasion of some responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

In particular, this means that the authorization of the Tax Division is required before charging mail, wire or bank fraud, either independently or as predicate acts to a RICO charge or as the specified unlawful activity element of a money laundering charge, when the mailing, wiring, or representation charged is used to promote or facilitate any criminal violation arising under the internal revenue laws. In the exercise of its prosecutorial discretion, the Tax Division will grant such authorization only in exceptional circumstances. As a

general rule, the use of such charges will not be approved (1) when the only mailing charged is a tax return or other internal revenue form or document, or a tax refund check; (2) when the only wire transmission is a transmission of tax return information to the IRS or the transmission of a refund to a bank account by electronic funds transfer; or (3) when the mailing, wiring, or representation charged is only incidental to a violation arising under the internal revenue laws (for example, although the mailing of a set of instructions to a cohort in a tax shelter scheme might support a mail fraud charge, such a mailing would be considered incidental to the primary purpose of the scheme which is to defraud the United States by abetting the filing of false income tax returns).

Normally, violations arising under the internal revenue laws should be charged as tax crimes and the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecutions when essentially tax law violations are involved, even though other crimes may have been committed. [FN3] Thus, for example, the filing of a false tax return, which almost invariably involves either a mailing or, in the case of an electronically-filed return, an interstate wiring, is a tax crime chargeable generally under 26 U.S.C. 7206(1) (if the violator is the taxpayer), 26 U.S.C. 7206(2) (if the violator is, for example, a tax return preparer or promoter of a fraudulent tax scheme), or under 18 U.S.C. 287. Moreover, in the exercise of its prosecutorial discretion, the Tax Division will only authorize tax charges or false claims charges, and will not authorize mail, wire or bank fraud charges, where the United States is defrauded in a revenue raising capacity and is the only one defrauded. Tax charges and the false claims statutes are the established means for litigating such criminal tax matters.

A mail, wire, or bank fraud charge arising out of a scheme to defraud the Government through the use of the revenue laws might be appropriate in addition to, but never in lieu of, other charges based on violations of the internal revenue laws, however, where the Government has also lost money in a non-revenue raising capacity or individuals or other entities have been the financial victims of the crime. The bringing of such charges will seldom, if ever, be justified by the mere desire to see a more severe term of imprisonment or fine imposed. Rather, they must serve some federal interest not adequately served by the bringing of traditional tax charges. Each individual case will be reviewed to determine whether it warrants the use of charges in addition to the appropriate Title 26 charges or Title 18 charges (i.e., §§ 286, 287, 371, 1001).

For example, in an electronic filing fraud, a bank making a refund anticipation loan for the amount of the fictitious refund claim may be the financial victim in the scheme, and bank fraud charges, drafted to reflect that the bank was victimized by the scheme, may be appropriate. Similarly, in motor fuel excise tax evasion schemes and fraudulent tax shelter schemes in which individuals or entities other than the United States are demonstrably victimized in a direct, substantial and measurable way that will be charged, the use of mail or wire fraud charges may also be appropriate in a particular case.

A similar policy will be followed with respect to RICO or money laundering charges predicated on mail, wire, or bank fraud violations which involve essentially only a federal tax fraud scheme. Tax offenses are not predicate acts for RICO or specified unlawful activities for money laundering offenses -- a deliberate Congressional decision -- and converting a tax offense into a RICO or money laundering case through the charging of mail, wire or bank fraud based on a violation of the internal revenue laws as the underlying illegal act could be viewed as circumventing Congressional intent unless circumstances justifying the use of a mail, wire or bank fraud charge are present.

A United States Attorney who wishes to charge a RICO violation in any criminal matter arising under the revenue laws must obtain the authorization of the Tax Division prior to alleging the predicate act, [FN4] and must obtain the authorization of the Organized Crime and Racketeering Section of the Criminal Division prior to charging a RICO violation. The Tax Division and the Organized Crime and Racketeering Section will approve the use of the RICO statute in revenue matters as appropriate. In addition, traditional tax charges must also be brought, as noted above, and the prosecution package must allow for forfeitures under the Internal Revenue Code.

Tax Division authorization is also required before a money laundering charge may be brought where the specified unlawful activity is based on a violation arising under the internal revenue laws. [FN5] The Tax Division will approve the use of mail fraud, wire fraud, or bank fraud as the specified unlawful activity only in cases that meet the requirements set forth in this Directive. When a request is made to include such a money laundering charge in an indictment, the Tax Division will consult with or refer the case to the Money Laundering Section of the Criminal Division, as the case may require, prior to authorizing the money laundering charges or the use of one of the fraud statutes as the specified unlawful activity. See USAM 9-105.00, as amended by bluesheet dated October 1, 1992. The Tax Division should be consulted early in any investigation to determine whether mail fraud, wire fraud, or bank fraud charge are appropriate.

FN 1. Tax Division policy concerning the charging of tax crimes as mail fraud violations, either independently or as predicate acts underlying a RICO charge, is set out in Section 6-4.211(1) of the United States Attorneys' Manual, ***Filing False Tax Returns: Mail Fraud Charges or Mail Fraud Predicates for RICO***. This directive clarifies that policy and explains how it fits into the overall Tax Division jurisdiction over criminal proceedings arising under the internal revenue laws.

FN 2. The authorization of the Tax Division is also required in any case which involves parallel state and federal tax violations and the charges are based on the parallel state tax violations.

FN 3. Pursuant to 28 C.F.R. 0.70(b), the Tax Division has traditionally authorized prosecution of certain crimes under various provisions of Title 18 (e.g., 18 U.S.C. §§ 286, 287, 371, and 1001). While Title 26 offenses are the preferred vehicle for criminal tax prosecutions, charges for offenses arising under the internal revenue laws have never been limited to that title.

FN 4. Tax Division authorization is also required when the predicate act is based on a state tax violation.

FN 5. This is in addition to the requirement that Tax Division authorization is required for any prosecution under 18 U.S.C. § 1956(a)(1)(A)(ii).

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: March 30, 1993

June 3, 1993

MEMORANDUM

TO: All CES Attorneys

FROM: Stanley F. Krysa
Director
Criminal Enforcement Sections

SUBJECT: Civil Settlements in Plea Agreements

It is not unusual for the taxpayer, in the course of negotiating a plea agreement, especially in cases arising from a grand jury investigation, to seek to include a civil settlement for the years involved. Very often, in such a situation, the Internal Revenue Service is agreeable to settlement. The Internal Revenue Service often believes the money to be paid is likely all it could ever realize because of Rule 6(e) restrictions and scarce audit resources. The Tax Division, however, has long followed a policy against approving plea agreements that include such global settlements. This policy wisely reflects the substantial differences between criminal and civil tax litigation.

Criminal tax investigations are frequently narrow in focus and substantially more targeted than any civil audit. For example, a criminal investigation centering on a complex return will normally focus on large items of unreported income or improper deductions that are easily provable rather than complex tax adjustments that may result in further taxes due, which, either because of difficulties of proof or the uncertain state of the substantive tax law, cannot form the focus of a criminal case.

In a civil tax setting, the determination by the Internal Revenue Service that an item of income was realized or that a deduction claimed was not allowable constitutes a prima facie case for inclusion or disallowance, as the case might be, and the taxpayer bears the burden of proving that determination wrong. Accordingly, reasonable inferences from known facts can support a finding of civil liability, but often would not provide a basis for indictment.

The Tax Division cannot authorize a plea agreement in a case that, by its terms, bars the Government from a further examination of the target's civil tax liabilities. We can and will, however, approve acceptance of a plea that includes certain civil admissions by the target. Thus, we would be willing to authorize a plea agreement in which the target would make the following civil admissions:

1. An admission by the defendant that he received enumerated amounts of unreported income or claimed enumerated amounts of illegal deductions for years set forth in the plea agreement.

2. A stipulation by the target that he was liable for the fraud penalty imposed by the Code (formerly Section 6653 and now Section 6663) on the understatements of liability for the years involved.

3. An agreement by the target that he or she will file, prior to the time of sentencing, initial or amended personal returns for the years subject to the above admissions, correctly reporting all previously unreported income or proper deductions, will provide the Internal Revenue Service information, if requested, regarding the years covered by the returns, and will pay at sentencing all additional taxes, penalties and interest owing. Such an agreement should also include a provision pursuant to which the target agrees that he or she will promptly pay any additional amounts determined to be owing with respect to that return because of computational errors.

4. An agreement by the target that he will not thereafter file any claims for refund of taxes, penalties or interest for amounts attributable to the return filed incident to the plea.

As a final note, all such provisions must be drafted with considerable care. A plea agreement is an undertaking by the United States and, if not properly crafted, could be construed to foreclose the civil side of the Internal Revenue Service from examining and making any civil audit adjustments to the returns involved after they are filed.

In reviewing or negotiating any proposed plea agreements the above principles should be applied. If you have any questions contact your respective Chiefs. All plea agreements negotiated by you should be in writing. They should be submitted for review and approval by the Chief before executed.

October 15, 1997

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS

FROM: Loretta C. Argrett
Assistant Attorney General

SUBJECT: *Press Releases in Cases Involving the IRS*

ACTION REQUIRED: Forward, preferably via fax, a copy of each press release in criminal tax cases to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044. FAX (202) 514-5479.

DUE DATE: None

RESPOND TO: See Below

CONTACT PERSON: Bob Lindsay
(202) 514-3011

Summary

The purpose of this message is to provide guidance to United States Attorneys' offices about the use of press releases publicizing indictments, convictions, and sentences in criminal tax and other IRS-investigated cases, in light of a recent circuit court opinion and several earlier decisions. [This guidance also applies to civil tax cases.]

This recent decision has increased the confusion about the information that may be released in tax cases. On August 21, 1997, the United States Court of Appeals for the Fifth Circuit ruled that the prohibitions against the disclosure of tax returns and return information from IRS or DOJ files (26 U.S.C. § 6103) continue to apply even if the information has been made public in an indictment or court proceeding. *Johnson v. Sawyer*, 5th Cir. No. 96-20667 ____F.3d___.[FN1] The Fifth Circuit concluded that "[i]f the immediate source of the information claimed to be wrongfully disclosed is tax return information ..., the disclosure violates § 6103, *regardless* of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer confidentiality." Several other circuits have addressed this issue, often reaching conflicting conclusions.

FN1. 120 F.3d 1307 (5th Cir. 1997).

The practical effect of these holdings is that you should exercise caution when preparing tax press releases. Press releases cannot be written with information from IRS or the prosecutor's files, but must be based on, and contain only, public record information. Thus, a press release announcing an indictment should contain only information set forth in the publicly-filed indictment and indicate that the source of the information is the indictment. Similarly, a press release discussing a conviction should be based solely on information made public at the trial or in pleadings publicly filed in the case, and should indicate that the source of the information is the public court record.

Background

Section 7431 of the Internal Revenue Code (26 U.S.C.) authorizes a civil action for damages against the United States for the unauthorized disclosure of returns or return information. The minimum damage award for each negligent disclosure is $1,000. The statute also provides for punitive damages for any unauthorized disclosures that are due to gross negligence or willfulness. A willful disclosure of returns or return information in a manner not authorized by Section 6103 also is punishable as a felony under 26 U.S.C. 7213.

"Return information" is defined in Section 6103 of the Code to include virtually all information collected or gathered by the IRS with respect to a taxpayer's tax liabilities, or any investigation concerning such liability. It prohibits any disclosure of either tax returns themselves or return information, except as specifically authorized by that section. The statute authorizes the IRS to disclose tax returns and return information to the Department of Justice for use in criminal and civil tax cases on its own initiative (Section 6103(h)(2) and (3)) and for use in non-tax criminal cases pursuant to a court order (Section 6103(i)(1)). Sections 6103(h)(4) and 6103(i)(4) permit the Department to

disclose such returns or return information in civil or criminal judicial proceedings relating to tax administration and in non-tax criminal cases and civil forfeiture cases, respectively.

Several circuits have addressed the question of when the non-disclosure restrictions of Section 6103 no longer apply to return information. The Ninth Circuit has held that once return information has been made public in a judicial proceeding, the non-disclosure restrictions no longer apply to that information. *Lampert v. United States*, 854 F.2d 335 (9th Cir. 1988). The Sixth Circuit has held that the return information disclosed by the filing of a notice of federal tax lien loses it confidentiality and is not protected by Section 6103, but emphasized that a notice of federal tax lien "is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public." *Rowley v. United States*, 76 F.3d 796, 801 (6th Cir. 1996). In an unpublished opinion, the Third Circuit has held that a press release did not contain unauthorized disclosures of return information because the information in the press release was public information. *Barnes v. United States*, 73 A.F.T.R. 2d (PH) . 94-581, at 1160 (3rd Cir. 1994). On the other hand, the Tenth and the Fourth Circuits have held that public disclosure of return information does not lift the non-disclosure bar on further disclosure of such information. *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir. 1983); *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993). While the Seventh Circuit did not resolve the issue of whether return information disclosed in court loses its confidentiality, it concluded that information in a court opinion is not return information and, when the source of the information disclosed is the court opinion, no violation has occurred. *Thomas v. United States*, 890 F.2d 18 (7th Cir. 1989) In *Johnson v. Sawyer*, *supra*, the Fifth Circuit followed "the approach of the Fourth and Tenth Circuits, modified by the Seventh Circuit's "source' analysis." Under the Fifth Circuit's analysis, Section 6103 is violated only when tax return information -- which is not a public record open to public inspection -- is the immediate source of the information claimed to be wrongfully disclosed.

The starting point in determining what information may be included in a press release publicizing an indictment, conviction, or sentence is acknowledgment that the Section 6103 prohibitions on disclosure are source-based.

That is, the statute bars the public disclosure of information taken directly from IRS files, or returns and return information that have been accumulated in Department files as part of an investigation or prosecution. It does not, however, ban the disclosure of information that is taken from the public court record.

Thus, for example, the statute, as interpreted by the majority of the circuits, prohibits the disclosure from IRS or Department files of a tax-crime defendant's name, or the fact that he was under investigation or has been indicted for a particular tax crime. To the extent that this same information has been placed in the public court record (*e.g.*, included in an indictment or other pleading), its dissemination *from the public court record* does not violate the statute.

Recommendations

United States Attorneys may (**and should**) continue to issue press releases in criminal tax cases. In light of the judicial interpretations of Section 6103 discussed above, however, a press release should contain only information the *immediate source* of which is the public record of the judicial proceeding, and the press release should attribute the information to the public court record.

A post-indictment press release may relate information set forth in the publicly-filed indictment, and should state that the information is from the publicly-filed indictment (for example: "according to the indictment, during the years 1993 and 1994, John Doe received income in excess of $100,000 which he failed to report on his income tax returns. The indictment further charges . . .."). Facts (including minor details) that do not appear in the indictment (such as the defendant's age, full name, and address) should not be included in

the press release unless they are obtained from *and attributed to* public records.

Post-conviction press releases should make it clear that the information being released came from the publicly-filed indictment, public filings in the case, or public testimony. Care should be taken to avoid statements that are ambiguous as to source. Statements that could be based on information in IRS or Department files should not be made unless the information in the statements are obtained from and attributed to specific public sources. (For example, the source of the facts in this statement -- "Doe shielded his income in offshore bank accounts" -- could be from the IRS special agent's files, trial testimony, or the indictment. If the source of the facts in the statement is trial testimony, the indictment, or other public record, disclosure is permissible.) Thus, statements of facts that could have come from the IRS files should not be made unless attributed to a specific public source.

Assistant United States Attorneys and Public Information Officers issuing a press release or responding to press inquiries should secure the source document from the public record and make it clear that the immediate source of the information they are providing is the public court record, and identify the source.

These rules apply to the use in press releases of any return information provided to the Department in any criminal [or civil] case. United State Attorneys should apply these guidelines in all cases in which tax return information has been made available to the attorney for the Government. Return information obtained for use in non-tax criminal cases and related civil forfeiture cases pursuant to a Section 6103(i) order is subject to the same disclosure restrictions as return information provided by the IRS for use in criminal tax cases. In addition, return information provided to the United States Attorney's office by the IRS in money laundering or narcotics cases that the IRS has determined are "related to tax administration," pursuant to Section 6103(b)(4), is also subject to the same non-disclosure rules.

Request

The Tax Division requests that a copy of each press release in a criminal tax case be sent to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044, preferably by faxing the release to (202) 514-5479. The Division is actively seeking to obtain more publicity for successful results in criminal tax cases and maintains a tax-interested press list for faxing press releases reflecting favorable outcomes in such cases. The Division would be happy to forward press releases from individual United States Attorneys' offices to those in the media who have shown an interest in such matters, thereby widening the publicity given to successful tax prosecutions.

December 4, 1998

MEMORANDUM

To: All Tax Division Criminal Enforcement
Section Attorneys
Assistant United States Attorneys

From: Loretta C. Argrett /s/
Assistant Attorney General

Subject: **Inclusion of State Tax Loss in Tax Loss Computation for Federal Tax Offenses Under the Sentencing Guidelines**

Questions have been raised concerning whether state tax crimes can be treated as part of the relevant conduct for sentencing purposes in federal tax cases. For the reasons set out below, we believe that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG §1B1.3 and may be included in the calculation of the base offense level in appropriate cases.

Under the relevant conduct guideline, USSG §1B1.3, "relevant conduct" includes, *inter alia*, all acts that were part of the same course of conduct or common scheme or plan and all harm that resulted from those acts. Nothing in the language of the guideline limits relevant conduct to federal offenses, or harm to the United States or other victims of federal offenses. Moreover, the Ninth Circuit held in *United States v. Newbert*, 952 F.2d 281, 284 (9th Cir. 1991), *cert. denied*, 503 U.S. 997 (1992), that nonfederal offenses may be considered for sentence enhancement under §1B1.3. Similarly, the Eleventh Circuit has held that state offenses that were part of the same course of conduct as federal offenses and part of a common scheme or plan must be considered relevant conduct under §1B1.3(a)(2). *United States v. Fuentes*, 107 F.3d 1515, 1526 (11th Cir. 1997).

Fuentes involved USSG §5G1.3, which relates to imposition of a sentence on a defendant subject to an undischarged term of imprisonment. The commentary to that guideline indicates that the Sentencing Guidelines contemplate the inclusion of state offenses in the determination of the base offense level for an offense. An example set out in Application Note 2 includes the following:

> The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court.

Thus, there is ample support for including tax loss from state tax offenses in calculating the total tax loss in a federal tax case. Indeed, it could be argued that, in light of the language of USSG § 1B1.3 that "the base offense level . . . shall be determined on the basis of... all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," state tax losses must be included as relevant conduct in the calculation of base offense level for a federal tax violation where they qualify as part of the same course of conduct or common scheme or plan. *See United States v. Fuentes*, 107 F.3d at 1523. In fact, if it is not included, it could result in dissimilarly situated defendants being treated similarly -- a result clearly at odds with the spirit of the Guidelines. (United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A, 3.) For example, one defendant might evade federal excise taxes on fuel but pay the state excise tax, while another defendant evades both.[FN1] If the state tax loss is not taken into account, both of these defendants will end up with the same sentence as long as the federal loss is the same.

> FN1. This is not that far-fetched an example. There has been at least one case where the defendants evaded the federal excise tax, but paid the state excise tax.

The government argued this position -- that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG § 1B1.3 and should be included in the calculation of the base offense level -- before the Fifth Circuit in *United States v. Powell*, 124 F.3d 655 (1997), a case involving federal and state excise taxes. The court accepted our position, holding that state taxes evaded by the defendant qualified as "relevant conduct" that could be included in "tax loss" under Sentencing Guidelines in sentencing defendant for evading federal fuel excise taxes, where evasion of state and federal taxes occurred at same time, was based on same conduct, and was not isolated or sporadic. 124 F.3d at 665-66.

Prosecutors, therefore, may seek inclusion of state tax loss in appropriate cases -- *e.g.*, where the state tax loss is clearly part of the same course of conduct or common scheme or plan, where the loss is easily ascertainable, and where the loss is clearly due to criminal conduct. Assistant United States Attorneys and Tax Division trial attorneys are encouraged to consult with the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division ((202) 514-3011) prior to sentencing when they are faced with a case where the defendant has also committed state offenses which could be considered part of the same course of conduct or common scheme or plan as the offense of conviction.

We recognize that there may be problems of proof, and prosecutors should be aware of these possible problems. First, evidence of state tax loss may simply be unavailable in the absence of cooperation from state officials. Even where there is cooperation, it still may be difficult to prove the state loss without slowing down the sentencing process or unnecessarily complicating it.

In addition, guideline provisions simplifying the determination of tax loss will probably be unavailable. Under USSG §2T1.1(c)(1), tax loss is 28% of the magnitude of a particular false statement in a return or other tax document (34% in the case of a corporation) unless a more accurate determination of tax loss can be made; and under USSG §2T1.1(c)(2), tax loss is 20% of the amount of gross income that should have been reported by a defendant who has failed to file a return (25% in the case of a corporation) unless a more accurate determination of tax loss can be made. The applicable percentages in those guidelines are loosely based on federal tax rates and bear no relation to losses under state tax rates. Where there are problems of proof, prosecutors may, in the exercise of their discretion, decide not to seek inclusion of state tax loss in the tax loss computation.

A final matter bearing note is that there may be cases in which the ability to treat state tax offenses as relevant conduct would effectively limit the defendant's federal sentence. Under §5G1.3(a) of the Guidelines, if a defendant commits an offense while serving a term of imprisonment, the sentence for his new offense must run consecutively to his undischarged term of imprisonment. However, under §5G1.3(b), if §5G1.3(a) is not applicable and an undischarged term of imprisonment has been fully taken into account in the determination of the offense level for a defendant's new offense, the sentence for the new offense must be imposed to run concurrently with the undischarged term of imprisonment. Section 5G1.3(c) provides that in any other case, the sentence for the new offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior term to achieve a reasonable punishment for the new offense. In *United States v. Fuentes*, *supra,* the court held that where subsection (a) of §5G1.3 does not apply, "the 'fully taken into account' requirement of §5G1.3(b), is satisfied when the undischarged term resulted from an offense that §1B1.3 requires to be included as relevant conduct, regardless of whether the sentencing court actually took that conduct into account." 107 F.2d at 1522; *see also* 107 F.2d at 1524. Thus, under *Fuentes*, if state offenses for which a defendant was serving a sentence constituted relevant conduct, the sentencing court would be required to impose a concurrent sentence even if the state offenses were not used in the calculation of tax loss. However, we do not think the holding in *Fuentes* on the application of §5G1.3, even if adopted by other circuits, will have much impact on tax cases: to our knowledge, defendants in most tax cases are not often serving state sentences for related state tax offenses. Nevertheless, prosecutors should be aware of *Fuentes*.

DEPARTMENT OF JUSTICE
TAX DIVISION DIRECTIVE
NO. 111

EXPEDITED PLEA PROGRAM

On March 1, 1986, the Tax Division, Department of Justice, and the Internal Revenue Service implemented the Simultaneous Plea Program. This program was designed to accommodate both the interests of the taxpayer who desired a speedy resolution to a criminal tax investigation and the interests of the government in obtaining a fair resolution of the case with a minimum expenditure of investigative and prosecutorial resources.

By memorandum dated February 25, 1986, the Acting Assistant Attorney General of the Tax Division notified the United States Attorneys of this program and described its operation. After reviewing the operation of the program since its inception in 1986, the Tax Division has decided to modify the program in several ways and rename it to more accurately reflect its function. This Directive is intended to explain those changes and formalize the new procedures for administering the program.

1. The program is designed to expedite the handling of criminal tax cases where the taxpayer, through counsel, indicates during the course of an administrative investigation being conducted by the Criminal Investigation Division, Internal Revenue Service, an interest in entering a guilty plea to some or all of the charges and years under investigation. The program is intended to dispose expeditiously of the entire case. It is not intended to be utilized to limit the taxpayer's exposure by curtailing or limiting the Service's investigation.

2. This program applies only to administratively investigated cases involving legal source income.

3. The program is available only to taxpayers represented by counsel.

4. The request for initiation of any plea discussions or negotiations must be originated by a taxpayer who is represented by counsel; Criminal Investigation Division shall not initiate the subject of plea discussions.

5. The taxpayer must be informed that the Internal Revenue Service has no authority to engage in plea negotiations and that only the Department of Justice can engage in such negotiations.

6. Taxpayer's counsel must provide a written statement to Criminal Investigative Division confirming the taxpayer's desire to engage immediately in plea negotiations with the Department of Justice regarding the charges under investigation.

7. The taxpayer must be informed that the taxpayer will be required to plead to the most significant violation involved, consistent with the Tax Division's Major Count Policy.

8. The Internal Revenue Service must take precautions to insure that information furnished by the taxpayer, prior to formal plea discussions with the Department of Justice, will not be foreclosed from future use under the restrictions of Rule 11(e)(6) of the Federal Rules of Criminal Procedure in the event that plea negotiations fail.

9. The Internal Revenue Service must obtain sufficient evidence to constitute a referable matter to the Tax Division.

   Although the case does not have to be as fully developed as one that does not go through the Expedited Plea Program, any referral to the Tax Division for review of the proposed plea under the program must reflect the following:

   a. That, for the years implicated in the investigation, the taxpayer has provided all records in his or her possession, or to which the taxpayer has access, to the Service and the investigating agent has reviewed those records with sufficient particularity to insure that there are no significant undiscovered issues or tax losses in the case that have not been taken into account in assessing the merits of the referral;

   b. A description of the nature and extent of the records supplied and the specific conclusions reached by the agent with respect to them;

   c. That the taxpayer has submitted to an interview, the substance of the interview, and the agent's satisfaction with the nature and extent of the taxpayer's cooperation;

   d. That the agent has secured and reviewed the taxpayer's returns for all years subsequent to the years under investigation (and any open prior years) and has addressed any issues raised by those returns in assessing the merits of the referral;

   e. The agent has inquired, and obtained the details, if appropriate, as to any other (open or closed) Federal, state, or local

investigations relating to the taxpayer.

10. If District Counsel, after receipt of the Special Agent's Report (SAR), concludes that prosecution is warranted, District Counsel will refer the case to the Tax Division, with a recommendation for prosecution based on the foregoing requirements. Such referral to the Division shall include all exhibits to the SAR, and the evidentiary basis for the referral.

    a. District Counsel will telephone the Tax Division liaison attorney in the appropriate Criminal Enforcement Section to advise that a referral is being made to the Tax Division;

    b. The Tax Division liaison attorney will contact District Counsel by telephone to acknowledge receipt of the referral.

11. No plea negotiations may be undertaken until prosecution is authorized by the Tax Division.

12. Within 30 days after receipt of the referral from District Counsel, the Tax Division will either authorize prosecution consistent with the proposed plea bargain or disapprove of the negotiation of such a plea.

    a. If the proposed plea is not authorized, the Tax Division will notify the taxpayer's counsel in writing that the case is being returned to the Internal Revenue Service, and all exhibits and files submitted will be returned to the Service;

    b. If the proposed plea is authorized, the Tax Division will refer all documents to the appropriate United States Attorney's office who may then undertake plea negotiations with the taxpayer and may accept a plea to the specified major count without further authorization from the Tax Division. If the United States Attorney's office desires to accept a plea to any count other than the specified major count, the approval of the Tax Division is required.

13. If plea negotiations are unsuccessful, the United States Attorney's office will notify in writing both the taxpayer's counsel and the Tax Division that the case is being returned to the Internal Revenue Service.

    a. All files and exhibits submitted to the United States Attorney's office will be returned to the Service;

    b. No information or evidence submitted to the United States Attorney's office by the taxpayer and/or counsel during the course of plea negotiations will be sent to the Internal Revenue Service unless the taxpayer expressly authorizes the Service's use of such information. In such a case, a written waiver of the restrictions of Federal Rule of Criminal Procedure 11(e)(6) should be obtained.

14. All procedures and requirements for administering this program that have heretofore been agreed to between the Internal Revenue Service and the Tax Division remain in force unless inconsistent with any provision of this Directive.

LORETTA C. ARGRETT
ASSISTANT ATTORNEY GENERAL
TAX DIVISION

DATED: 2/11/99

DEPARTMENT OF JUSTICE
TAX DIVISION
DIRECTIVE NO. 115

Delegation of Authority Relating to Criminal Tax Cases

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, the delegation of authority with respect to criminal tax matters within the jurisdiction of the Tax Division is hereby conferred as follows:

1. Authority of the Assistant Attorney General that is Not Delegated

Action in the following criminal tax matters is expressly reserved for the Assistant Attorney General of the Tax Division ("AAG"):

a. A request to present the same matter to a second grand jury or to the same grand jury after a no true bill has been returned;

b. A request to recuse or disqualify a federal justice, judge or magistrate;

c. A request to consent to a polo contendere or *Alford* plea;

d. A request to initiate or continue a federal prosecution affected by the Department's ***Petite*** policy (dual and successive prosecution);

e. A request for disclosure of a tax return or return information pursuant to 26 U.S.C. 6103(h)(3)(B);

f. A request to authorize a subpoena, the interrogation, indictment, or arrest of a member of the news media; [FN1]

FN1. See 28 C.F.R. . 50.10 for the policies regarding these matters, and the principles to be taken into account in requesting an authorization which may require the express approval of the Attorney General.

g. A subpoena of an attorney for information relating to the attorney's representation of a client; and

h. A request to authorize prosecution of a person who has testified or produced information pursuant to a compulsion order for an offense or offenses first disclosed in, or closely related to, such testimony or information.[FN2]

FN2. *See* USAM *9-23.400*.

2. ***Delegation of Authority to the Deputy Assistant Attorney General Criminal***

The Deputy Assistant Attorney General, Criminal ("DAAG, Criminal"), is authorized to exercise all the powers and authority of the AAG with respect to criminal proceedings covered by this delegation, except those expressly reserved in Section 1 above.

In addition, the DAAG, Criminal, shall forward to the AAG matters which are deemed appropriate for action by the AAG.

3. ***Delegation of Authority to the Section Chiefs in Criminal Tax Matters***

A Chief of a Criminal Section is authorized to act in all matters arising within the jurisdiction of his or her section, *except* those specifically reserved for action by the AAG in Section 1 above and the following:

a. A prosecution pursuant to 26 U.S.C. Section 7212(a);

b. A prosecution pursuant to 18 U.S.C. Section 1001;

c. Issuance of a search warrant when Tax Division approval is necessary (Tax Directive 52);

d. A matter in which the recommendations of the Chief and Assistant Chief as to prosecution or declination conflict;

e. Prosecution of an attorney for criminal conduct committed in the course of acting as an attorney;

f. A prosecution involving: (a) a local, state, federal, or foreign public official or political candidate; (b) a representative of the electronic or print news media; (c) a member of the clergy or an official of an organization deemed to be exempt under section 501(c)(3) of the Internal Revenue Code; or (d) an official of a labor union;

g. A request to issue a compulsion order in any case over which the Tax Division has jurisdiction;

h. Prosecution pursuant to 18 U.S.C. Section 1956(a)(1)(A)(ii);

i. Any prosecutorial decision that requires a deviation from Tax Division policy or procedure; and

j. A request to authorize dismissal of an indictment.

In addition, a Chief shall forward for action to the DAAG, Criminal, all matters that involve novel substantive, evidentiary, or procedural issues, or any other sensitive matter for which review at a higher level is appropriate.

Notwithstanding the foregoing, the DAAG, Criminal, may prescribe additional matters, the actions of which are within the authority of a Section Chief pursuant to this section, that the DAAG, Criminal, determines requires action by the DAAG, Criminal.

4. ***Scope and Effect of this Delegation***

a. This delegation includes all tax and tax-related offenses delegated to the Tax Division pursuant to 28 C.F.R. §§0.70 and. 179a.

b. This delegation supersedes Tax Division Directives 44, 53, and 71, and all other delegations of authority to approve or decline criminal tax or tax-related matters or cases previously issued.

c. In the event a Section Chief is recused from acting on a particular matter, then the DAAG, Criminal, may select another Section Chief to act in that matter.

d. When either, or both, the AAG or the DAAG, Criminal, is recused in a particular matter, a ranking Tax Division official will be authorized pursuant to 28 C.F.R. §0.132 to act as either the Acting AAG or the Acting DAAG, Criminal, in that matter.

e. When an individual has been duly designated a specified "Acting" official, the individual shall have the same authority as the position commands, unless that authority is specifically limited in writing by the appropriate authorizing official.

f. The Assistant Attorney General, at any time, may withdraw any authority delegated by this Directive

APPROVED:

Date: *July 26. 1999*

Loretta C. Argrett

Assistant Attorney General
Tax Division