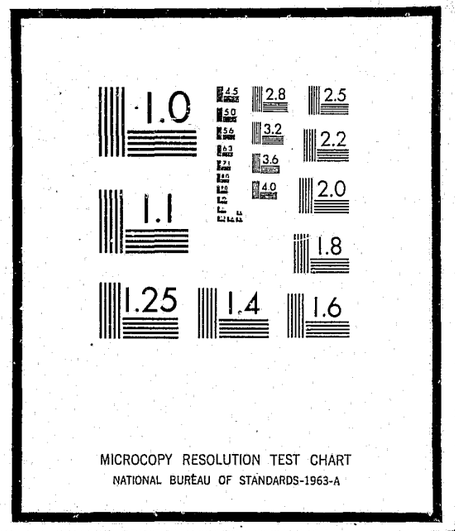

USE OF STATE REVENUE STATUTES IN ORGANIZED CRIME PROSECUTIONS

January 1976

U.S. DEPARTMENT OF JUSTICE
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

CONTENTS

INTRODUCTION

The importance of using every appropriate method, including state revenue statutes, in the fight against organized crime, is apparent upon consideration of the many statements made by Presidents, presidential commissions, and U.S. Attorneys General over the past decade. It is the purpose of this publication to discuss the federal experience in combatting organized crime and prosecuting racketeers through the use of revenue statutes, and to suggest to the States reasons for their active participation in this method.

Effectiveness of Federal Criminal Tax Prosecutions In Combatting Organized Crime

In organized crime prosecutions there is often difficulty in proving the criminal activity involved. One problem is the unavailability of witnesses to directly prove the illegal activity. This is because the operation of gambling, houses of prostitution, or the distribution of narcotics produce no victims ready to complain. Also, the threat of retribution often dissuades willing witnesses. A further factor is that the major racketeers divorce themselves from the actual criminal acts by an extensive chain of command. This tends to insure immunity for those who control organized crime.

In spite of the problems mentioned in the foregoing paragraph, enforcement of criminal tax sanctions on the Federal level has been an effective weapon in the fight against organized crime. The reasons for this is that income is generated by the illegal activities involved. Thus, particularly through use of the net worth or bank deposits methods of proof in criminal tax prosecutions, the exact nature of the illegal activities generating the income does not necessarily need to be proven. As a result, even though the victims may not be known or will not testify, or there may be no available witnesses to the illegal activity, there can still be a successful tax prosecution. This is true since bank records or other business records and testimony, not necessarily directly related to the illegal activity, may be used in proving income. Thus, in many instances, criminal tax prosecutions have resulted in the conviction of individuals who have effectively insulated themselves from all other criminal sanctions.

Importance of Using State As Well As Federal Tax Statutes In Combatting Organized Crime

All Available information indicates that there are very few criminal prosecutions for violation of state revenue laws. In view of the success of the Federal Government in using criminal tax prosecutions in fighting organized crime, it is the purpose of this publication to provide information and make suggestions to the states on this subject. Then, through the use of state statutes and state manpower and agencies, criminal prosecutions for violation of state revenue statutes should become a major weapon in the drive against organized crime.

In addition to other obvious benefits resulting from the elimination of organized crime, an important factor to consider is that criminal tax prosecutions of racketeers could also have a deterrent effect on the average citizen who will then realize that there are at least occasional prosecutions for violations of state tax laws. Those who evade taxes would seem to be intelligent enough to realize that at present the federal tax laws are being enforced by criminal sanctions,

whereas in general the state tax laws are not. Thus, there should be an increase in the collection of state revenues as a result of at least some criminal prosecutions for violation of state tax laws. In this connection, it would also be well to consider some prosecutions of average citizens if they violate state revenue laws.

Federal Statutes and Case Law

Rather than an extensive discussion of the Federal statutes and case law at this point it would appear to be more beneficial to make available excerpts from a Justice Department publication which is used by Federal prosecutors as a guide in criminal tax prosecutions. Therefore, include herewith as Part A is a publication entitled "Excerpts From Tax Division's Manual For Criminal Tax Trials." This material is in current use by prosecutors, and gives details concerning Federal tax prosecutions. In the discussion which follows, Part A will be used as a basis for comparison with state statutes and procedures.

Applicability of Federal Case Law To State Statutes Substantially Similar to Federal Statutes

The Federal experience has been that income tax prosecutions create the best opportunity to successfully convict racketeers who may have insulated themselves from prosecution for other types of crimes. The statutes most often used in federal criminal tax prosecutions of racketeers are as stated below. (Texts of the statutes are set forth in Part A at the pages indicated, followed by a discussion of the elements of the offenses. Unless otherwise stated therein the discussion in Part A pertains to income taxes, although the statutes listed below can also be used in excise tax prosecutions.)

26 U.S.C. Section 7201, Willful Attempt to Evade Taxes (p.1)

26 U.S.C. Section 7203, Wilful Failure to File, Supple Information, or Pay Tax (p. 9)

26 U.S.C. Section 7206(1) and Section 7206(2), Willfully Making and Subscribing a Document Not Believed to be True; and Aiding or Assisting In, or Procuring Counseling, or Advising Preparation or Presentation of False and Fraudulent Document (p. 14)

18 U.S.C. Section 371, Conspiracy (p. 17)

18 U.S.C. Section 1001, Presenting False Statements (p. 20)

In many states there are statutes sufficiently similar to those listed above so that Federal case law should be applicable. Thus, it is strongly recommended that there be state prosecutions of racketeers which take advantage of this built-in body of case law. (See cases cited in Part A.)

Our study of state laws also indicates that there are some states which do not have statutes which are comparable to one or more of the Federal statutes. Also, we note that in a number of states there are statutes comparable to the Federal statutes but they may be applicable to only a limited number of types of state taxes. In these situations it is recommended that consideration be given to passing new statutes, or broadening the coverage of existing statutes, as needed.

Some states have clearly set forth in their statutes the fact that it is the intent of the legislature to have the statutes parallel the Federal Internal Revenue Code. This tends to insure

even more that Federal case law should apply. For example, Section 30-1101 of the Delaware Code is as follows:

> Any terms used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States referring to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the provisions of the Internal Revenue Code of 1954 and amendments thereto and other provisions of the laws of the United States relating to federal income taxes, as they may be or become effective any time or from time to time, for the taxable year.

Other states having similar statutes include Idaho, Section 63-3002; Maine, Section 5102-11; Nebraska, Section 77-2714; and Pennsylvania, 1971 Tax Reform Code, Section 302. However, even if such statutes do not exist, it appears clear that the principles of federal case law should be applicable to state statutes which are similar to Federal Statutes.

Nothing stated herein should be construed to mean that we are suggesting that statutes similar to Federal criminal tax statutes are the only answer in this area. Obviously, it is our purpose to propose more criminal tax prosecutions under state statutes of whatever type. However, the point is that to the extent the statutes are similar to the federal sanctions, prosecutions may be facilitated because of existing Federal case law.

Need for More Extensive Use of False Statement Statutes in Prosecutions Involving All Types of State Taxes

A number of states have statutes similar to 26 U.S.C. 7206(1) and 18 U.S.C. 1001. It is recommended that such statutes be used more often in criminal tax prosecutions. They can be particularly effective in connection with the numerous state and local tax laws, including excise, occupational, franchise, licensing, sales, property, etc. It is often less difficult to prove such false statements than to prove attempted evasion. (See pages 14-17 and 20-22 of Part A.)

In states where false statement statutes do not exist or are not broad enough to cover all types of taxes, it is recommended that such statutes be passed and utilized.

Effectiveness of Net Worth and Bank Deposits Methods of Proof in Prosecuting Racketeers

Chapter II of Part A (pages 23-36) is a discussion of theories of proof in criminal tax cases. Included therein are discussions of direct and circumstantial evidence. Under circumstantial evidence there is a discussion of the net worth plus expenditures method (pages 28-34) and the bank deposits method (pages 34-36).

As previously discussed, there are problems in prosecuting racketeers directly for their illegal activities. However, if they use the money obtained from their illegal operations to purchase assets and for personal expenditures, a net worth plus expenditures case can be developed. Some of the most significant Federal criminal tax prosecutions of racketeers have involved the use of this method of proof. To a lesser extent the bank deposits method has been used. It is strongly recommended that the states having income tax statutes use these methods in prosecuting racketeers.

Sample Indictment Forms

From page 44 of Part A are sample indictment and information forms for 26 U.S.C. Section 7201, 7203, 7206(1), 7206(2); and 18 U.S.C. Sections 1001 and 371. These forms have successfully withstood attacks in the Federal courts. Thus, where state statutes are substantially similar to the Federal statutes, it is suggested that these indictment and information forms be used as guides.

Investigative Procedures and Techniques

Included herewith as Part B is a manual entitled "Excerpts From Chapter 9900 of the Internal Revenue Service Manual," "Handbook for Special Agents." The manual contains extracts from Internal Revenue Service publications used in training special agents for criminal tax investigations. It includes a discussion of investigative procedures as well as the Federal statutory provisions pertaining to criminal tax prosecutions, and citations to relevant case law.

It will be noted that there are discussions in Part B of the Federal statutes mentioned above. Attention is particularly invited to the "General Investigative Procedure" sections of Part B (Sections 210-284). These sections contain valuable information concerning the conduct of criminal tax investigations.

Conclusion

It appears clear that the states can do more in the drive against organized crime by criminally prosecuting racketeers under existing state tax statutes. In the process, there may be a deterrent factor as to other taxpayers, causing tax collections to increase generally. If additional legislation is needed, it is suggested that it be patterned after Federal statutes so the Federal case law will apply. The guidelines in Part A and B should be helpful since they have been developed based on the experience of the United States Department of Justice and Internal Revenue Service. Finally, the Federal Government, through the Law Enforcement Assistance Administration and the Internal Revenue Service, stands ready to assist in developing prosecuting and investigating units, and to assist in the training necessary for successful criminal tax prosecutions of racketeers.

PART A

EXCERPTS FROM TAX DIVISION'S MANUAL FOR CRIMINAL TAX TRAILS

I. OFFENSES

A. Willful Attempt to Evade Taxes.

Section 7201 of the Internal Revenue Code of 1954 provides:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

1. Elements.

The crime of willful attempted evasion of taxes defined in Section 7201, Internal Revenue Code of 1954, is the principal revenue enforcement offense. Its elements are traditionally stated to be:

(a). An Additional Tax Due and Owing (Lawn v. United States, 355 U.S. 339 (1958); Sansone v. United States, 380 U.S. 343 (1965);

(b). Willfulness (Spies v. United States, 317 U.S. 492 (1943); Holland v. United States, 348 U.S. 121 (1954); Sansone v. United States, supra);

(c). An Attempt to Evade or Defeat (Spies v. United States, supra; Sansone v. United States, supra).

The offense could as well be said to contain only two elements, i.e., an additional tax due and owing; and a willful attempt to evade or defeat it. Efforts to define the word "attempt" out of context often result in giving it an additional connotation of intent. E.g., in United States v. Beck, 3 A.F.T.R. 2d 1364, (W.D. Wash.), aff'd in part, 298 F.2d (9th Cir. 1962), cert den., 370 U.S. 919, the court instructed the jury as follows:

> The word "attempt" as used in the law * * * * involves two essentials: 1. An intent to evade or defeat income tax, and 2. Some act by the taxpayer in furtherance of such intent.

See also United States v. Mattila, 434 F. 2d 834 (8th Cir. 1970).

After such definitions of "attempt", a definition of "willfulness" results in a redundancy which could create the impression that something in addition to a specific criminal intent is necessary to make out the element of willfulness. For this reason, it is probably better to define the phrase "willful attempt" than to attempt to define the words separately.

Furthermore, in setting forth the elements of Section 7201, some courts have tried to clarify matters by stating (3) above as "an affirmative act constituting an attempted evasion of the tax due," which would seem to confine the attempt to the act alone, leaving willfulness as the requisite specific intent. United States v. Wilkins, 385 F.2d 465 (4th Cir. 1967), cert. den., 390 U.S. 951; United States v. Brown, Jr., 446 F.2d 119 (10th Cir. 1971).

2. An Additional Tax Due and Owing.

As has been noted, the cases repeatedly say that there must be a tax due and owing. Lawn v. United States, supra; Sansone v. United States, supra; Koontz v. United States, 277 F.2d 53 (5th Cir. 1960); United States v. Schenck, 126 F.2d 702 (2nd Cir. 1942), cert. den., sub nom. Moskowitz v. United States, 316 U.S. 705 (1942); Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), cert. den., 297 U.S. 709. United States v. Wilkins, supra; United States v. Stone, 431 F.2d 1286 (5th Cir. 1970), cert. den., 401 U.S. 912; United States v. Levy, 449 F.2d 769 (2nd Cir. 1971); United States v. Brown, Jr., supra; United States v. Ramsdell, 450 F.2d 130 (10th Cir. 1971); United States v. Dowell, et al., 446 F.2d 145 (10th Cir. 1971), cert. den., 404 U.S. 984.

Because of this requirement, the defense often concentrates on this particular element of a case. In the face of clear evidence of a wilful attempt, the taxpayer may present some purely technical considerations, even relating to prior or subsequent years, which, he contends, wipes out any tax deficiency for the prosecution year or years. In Willingham v. United States, 289 F.2d 283 (5th Cir. 1961), cert. den., 368 U.S. 828, the court held that a subsequent loss may not be carried back to offset income in the prosecution year as it "abates the (civil) deficiency but not the (criminal) penalty." It also held under the particular facts of that case that a prior loss could not be carried forward to offset income in the evasion year. See also Sherwin v. United States, 320 F.2d 137, 156 (9th Cir. 1963), cert. den., 375 U.S. 964; United States v. Suskin, 450 F.2d 591 (2nd Cir. 1971). In Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956), cert. den., 352 U.S. 915, rehearing den., 352 U.S. 977, involving unreported receipts distributed as dividends, the defendant unsuccessfully contended that there would arise additional tax, penalties, and interest on the unreported receipts which liabilities should be deducted from the corporation's earned surplus before any dividend could be declared or paid. The court said that obviously such a computation had no part in ascertaining the corporation's financial position "as of the dates on which the jury found its officers received the unreported income." The court went on to say it could not predict the course of future civil litigation on the issue. See also United States v. Campbell, 351 F.2d 336 (2nd Cir. 1965), cert. den., 383 U.S. 907, in which the unsuccessful defense effort to wipe out the tax deficiency was based on an offsetting foreign tax credit.

Generally, the courts have rejected efforts on the part of taxpayers to show that no tax would have been due and owing had they used a different reporting method. See United States v. Vardine, 305 F.2d 60 (2nd Cir. 1962); Clark v. United States, 211 F.2d 100, 105 (8th Cir. 1954), cert. den., 348 U.S. 922. But it has been held that the use by the Government of the bank deposits method of proof does not preclude the taxpayer from using the net worth method. United States v. Moody, 339 F.2d 161 (6th Cir. 1964). However, compare McGarry v. United States, 388 F.2d 862 (1st Cir. 1967), cert. den., 394 U.S. 921, in which it was held no error to refuse to admit the taxpayer's net worth chart because the figures in the chart were based on an alleged $300,000 gift, for which there was no supporting evidence.

Note that the Government is not required to present a net worth proof as corroboration for the bank deposits method. United States v. Stein, 437 F.2d 775 (7th Cir. 1971), cert. den., 403 U.S. 905. As the Supreme Court said in Holland v. United States, supra, p. 131, the net worth "technique" is not a method of accounting at all and made it clear that the expression "accounting method" refers to cash or accrual methods and not to circumstantial reconstruction of income. Thus, in summary, neither the Government nor the taxpayer should be able to show what the tax would have been had some other method of accounting been used (so holding is United States v. Mathews, 335 F.Supp. 157 (W.D. Pa. 1971)). But either may show a comparable reconstruction by circumstantial evidence, i.e., bank deposits or net worth. However, if the taxpayer is on an accrual basis, the net worth computations must be made comparable by taking into consideration accounts receivable and payable and inventories; otherwise, cash received for sales made and reported in prior years would improperly be attributed to the prosecution years. The difficulties in

making the bank deposits theory comparable to the accrual method, though not insuperable, are such that it would seem peculiarly inapposite to an accrual taxpayer.

Each time these purely technical defenses are advanced the prosecutor should urge on the courts the two concepts that (1) it is not what the taxpayer might have done but what he actually tried to do that the statute seeks to punish; and (2) it is the situation at the time of the offense which controls, not ante or post. Even where there exists a bona fide carry-forward loss this should not alter or vitiate a clear willful attempt to evade a tax. Support for this limitation, at least, of the requirement of a tax due and owing is found in the language of the Supreme Court in Spies v. United States, supra, p. 498 quoted hereinafter. It is also indicated by some of the language in the Bernstein and Campbell cases, supra.

In determining whether a tax deficiency has been proved, all of the attendant circumstances in a given case must be measured and not any set percentage of the alleged understated income. United States v. Nunan, 236 F.2d 576 (2nd Cir. 1956), cert. den., 353 U.S. 912, Canaday v. United States, 354 F.2d 849 (8th Cir. 1966). For a reversal of one count for an error of 80 percent of the deficit in the first prosecution year see United States v. Archilli, 234 F.2d 797 (7th Cir. 1957), aff'd in other respects, 353 U.S. 373. For a reversal of one count because defendant's income was erroneously overstated by $44,000 see United States v. Garcia, 412 F.2d 999 (10th Cir. 1969). See also Flemister v. United States, 260 F.2d 513 (5th Cir. 1958). An attempt relating to one tax year is separate offense from an attempt to evade a tax for a different year, and separate successive attempts can conceivably occur as to the same tax year.

3. Willfulness.

Willfulness is one of the crucial elements of the offense of attempted evasion, and has become the most frequently contested element of Section 7201 litigation. It involves a specific intent or active desire to evade taxes; "the tax evasion motive", Spies v. United States, supra. Its approved expression in terms suitable for an instruction is that the attempt, to be willful, must be made with intent to keep from the United States Government a tax imposed by the income, estate, or other tax laws which it was the duty of the defendant to pay to the Government, that is, intentionally done to defraud the Government of the tax due from the defendant. Guzik v. United States, 54 F.2d 618 (7th Cir. 1931), cert. den., 285 U.S. 545. It should be noted that the Ninth Circuit has held that a willful attempt to delay payment of the tax due does not constitute the required specific intent to evade or defeat the tax due. United States v. Edwards, 375 F.2d 862 (9th Cir. 1967). Of course, the specific intent may be to defraud the Government of the tax due from another, i.e., from a spouse, a corporation in a corporate evasion case, or a client in the case of evasion by an accountant or attorney of a client's tax. United States v. Troy, 293 U.S. 58 (1935); Leathers v. United States, 250 F.2d 159 (9th Cir. 1957); Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1937), cert. den., 301 U.S. 689, rehearing den., 301 U.S. 715; United States v. Gordon, 242 F.2d 122, 125 (3rd Cir. 1957), cert. den., 354 U. S. 921; United States v. Edwards, 230 F. Supp. 881 (D. Ore.), rev'd on other grounds, 375 F.2d, supra; United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert. den., 389 U.S. 905; United States v. Petti, 448 F.2d 1257 (3rd Cir. 1971), but see contra, United States v. Mesheski, 286 F.2d 345 (7th Cir. 1961). The necessity for this specific intent, as opposed to or in addition to a general bad purpose, would seem to arise from the definition of the offense itself. An attempt to evade or defeat a tax without more describes a sufficient intentional bad purpose.

Although the often cited case of United States v. Murdock, 290 U.S. 389 (1933), involved a willful failure to supply information, its standards of willingness have been applied to willful attempts to evade or defeat, especially as embodied in charges to the jury. (See Friedberg v. United States, 207 F.2d 777 (6th Cir. 1954), aff'd, 348 U.S. 142; Himmelfarb v.

United States, 175 F.2d 924 (9th Cir. 1949), cert. den., 338 U.S. 860; O'Connor v. United States, 175 F.2d 477 (9th Cir. 1949). These opinions do not show the charge; it does appear in the respective records of those cases.

Thus, in drafting proposed instructions for the courts, the use of such general phrases as "without justifiable excuse"; "without ground for believing it is lawful"; "careless disregard"; or any language which appears less or other than the requisite specific intent to evade, should be avoided. Examples of accepted definitions or phrases are, "deliberately and knowingly" [United states v. Edwards, supra] and intentional action with a bad purpose [United States v. Rizzo, 313 F. Supp. 734 (D. Del. 1970)].

Some lower courts continue to hold that willfulness under the failure to file statute or under the felony statute is indistinguishable. The Supreme Court's decision in United States v. Bishop, No. 71-1698 (May 29,1973) would so indicate. The definition of the word "willfulness" in the respective statutes becomes particularly important, however, when the question arises of the admissibility in an evasion case of a prior pattern of failure to file returns. As a general proposition of law, it is well of failure to file returns. As a general proposition of law, it is well settled that prior and subsequent acts, whether they portray criminality or not, when substantially similar to the subject matter forming the basis of the indictment, are probative to negate the inference that the crucial conduct was unintentional, inadvertent or the product of mistake. United States v. Alker, 260 F. 2d 135 (3rd Cir. 1958), cert. den., 359 U.S. 906; United States v. Schipani, 362 F. 2d 825 (2nd Cir. 1966), vac. and rem. on other grounds, 385 U.S. 372, and extensive authorities cited in footnote 92 of the Alker decision. There is a body of case law which allows in evidence "integral parts of the principal event" to fill in the background surrounding the transaction in question, without "relation to a subsidiary issue." Alker, page 156, citing Wigmore, 3rd Ed., Vo. I, Sec. 218, Vo. II, Sec. 306. In the Alker case, the court upheld, in an evasion prosecution for the year 1947-1950, inclusive, the admissibility of evidence that the taxpayer had failed to file a return for 1946. The court distinguished its holding in United States v. Long, 257 F. 2d 340 (3rd Cir. 1958), that a prior failure to file was not admissible in an evasion case by pointing out that Alker's 1947 return falsely stated that he had filed for 1946; that proof of this falsity was relevant to willfulness. It also held to be admissible under the other rule as the falsity was an integral component of a return on which the indictment was based. In accord with Alker are United States v. Steele, 148 F. Supp. 515 (W.D. Pa. 1957); Harris v. United States, 243 F. 2d 74 (5th Cir. 1957), cert. den., 355 U.S. 817, and United States v. Schipani, supra. In Emmich v. United States, 298 Fed. 5 (6th Cir. 1924), cert. den., 266 U.S. 608, and United States v. Taylor, 305 F. 2d 183, 184 (4th Cir. 1962), cert. den., 371 U.S. 894, it was held that prior failures to file were sufficiently like the offense of willful attempted evasion to be admissible on the question of intent. But the rationale of the court in Emmich appears to be incorrect, being based on the now discredited view (see Spies, supra) that a failure to file is merely another aspect of an attempt to defraud. The language of the Supreme Court in Sansone v. United States, supra, may also support a contention that the two offenses are sufficiently similar, at least in certain factual situations (e.g., a Spies-type evasion), to warrant the admissibility of a prior failure to file pattern in an evasion case. See also Radford v. United States, 290 F. 2d 9 (9th Cir. 1961).

Direct proof of a defendant's intent to evade is rarely to be found. It may, however, be inferred from all the facts and circumstances attenting the accomplishment of an understatement of taxable income and tax by the taxpayer. United States v. Commerford, 64 F. 2d 28 (2nd Cir. 1933), cert. den., 289 U.S. 759; Paschen v. United States, 70 F. 2d 491 (7th Cir. 1934); Tinkoff v. United States, supra; Battges v. United States, 172 F. 2d 1, 5 (6th Cir. 1949); United States v. Rosenblum, 176 F. 2d 321, 330 (7th Cir. 1949), cert. den., 338 U.S. 893, rehearing den., 338 U.S. 940; Gaunt v. United States, 184 F. 2d 284 (1st Cir. 1950), cert. den., 340 U.S. 917; Norwitt v. United States, 195 F. 2d 127 (9th Cir. 1952), cert. den., 344 U.S. 817; Hooper v. United States, 216 F. 2d 684 (10th Cir. 1954); Wilson v. United States,

250 F. 2d 312 (9th Cir. 1957), new trial granted on other grounds, 264 F. 2d 74 (9th Cir. 1959); United States v. Alker, supra, p. 148; cf. United States v. Bridell, 180 F. Supp. 268 (N.D. Ill. 1960), and Blauner v. United States, 293 F. 2d 723 (8th Cir. 1961), cert. den., 368 U.S. 931; United States v. Magnus, 365 F. 2d 1007 (2nd Cir. 1966), cert. den., 386 U.S. 909; United States v. Mansfield, 381 F. 2d 961 (7th Cir. 1967), cert. den., 389 U.S. 1015; Feichtmer v. United States, 389 F. 2d 498 (9th Cir. 1968); United States v. Stone, 431 F. 2d 1286 (5th Cir. 1970), cert. den., 401 U.S. 912; United States v. Ramsdell, 450 F. 2d 130 (10th Cir. 1971); United States v. Null, 415 F. 2d 1178 (4th Cir. 1969); United States v. Spinelli, 443 F. 2d 2 (9th Cir. 1971); United States v. Pawlak, 72-2 U.S.T.C., par. 9646 (S.D.N.Y. 1972).

In Spies v. United States, supra, p. 499, the Supreme Court listed "by way of illustration" some circumstances attendant on an established under reporting of taxable income from which willfulness could be inferred: "Keeping a double set of books [Wiggins v. United States, 64 F. 2d 950 (9th Cir. 1933), cert. den., 290 U.S. 657; Shinyu Noro v. United States, 148 F. 2d 696 (5th Cir. 1945), cert. den., 326 U.S. 720; Mitchell v. United States, 213 F. 2d 951 (9th Cir. 1954), cert. den., 348 U.S. 912], making false entries or alterations [United States v. Lange, 161 F. 2d 699 (7th Cir. 1947); United States v. Stoehr, 196 F. 2d 276 (3rd Cir. 1952), cert. den., 344 U.S. 826, United States v. Spinney, 385 F. 2d 908 (1st Cir. 1967), cert. den. 390 U.S. 921], or false invoices or documents [United States v. Lange, supra; Marienfeld v. United States, 214 F. 2d 632 (8th Cir. 1954), cert. den., 348 U.S. 865], destruction of books or records [Yoffe v. United States, 153 F. 2d 570 (1st Cir. 1946); Gariepy v. United States, 189 F 2d 459 (6th Cir. 1951); Gariepy v. United States, 220 F. 2d 252 (6th Cir. 1955), cert. den., 350 U.S. 825; United States v. Stone, 431 F. 2d 1286 (5th Cir. 1970), cert. den. 401 U.S. 912], concealment of assets or covering up sources of income [Gendelman v. United States, 191 F.2d 993 (9th Cir. 1951), cert. den., 342 U.S. 909; Locke v. United States, 166 F. 2d 449 (5th Cir. 1948), cert. den., 334 U.S. 837; United States v. Chapman, 168 F. 2d 997 (7th Cir. 1948), cert. den., 335 U.S. 853; United States v. Mansfield, supra; United States v. Callanan, 450 F. 2d 145 (4th Cir. 1971); United States v. Wenger, 455 F. 2d 308 (2nd Cir. 1972), cert. den,, 407 U.S. 920], handling one's affairs to avoid making the records usual in transactions of the kind [Gariepy v. United States, supra; United States v. Cindrich, 140 F.Supp. 356 (W.D. Pa.) aff'd, 241 F.2d 54 (3rd Cir. 1956); Gleckman v. United Staest, 80 F.2d 394 (8th Cir. 1935), cert. den., 297 U.S. 709; United States v. Dowell et al., 446 F.2d 145 (10th Cir. 1971), cert. den., 404 U.S. 984; United States v. Mathews, 335 F.Supp. 157 (W.D. Pa. 1971), and any conduct the likely effect of which would be to mislead or conceal [Schuermann v. United States, 174 F.2d 397 (8th Cir. 1949), cert. den., 338 U.S. 831, rehearing den., 338 U.S. 881; United States v. Wenger, supra. (Bracketed case references added.) Other common affirmative acts include the placing of property in the name of others as in Chinn v. United States, 228 F.2d 151 (4th Cir. 1955); United States v. Schipani, supra, and United States v. Berkman, 418 F.2d 212 (2nd Cir. 1969), cert. den., 396 U.S. 1014, and the use of fictitious names on bank accounts [Elwert v. United States, 231 F.2d 928 (9th Cir. 1956); false explanations [United States v. Murray, 297 F.2d 812 (2nd Cir. 1962), cert. den., 369 U.S. 828; Feichtmeir v. United States, supra], and the general failure to keep adequate records [United States v. Levy, 449 F.2d 769 (2nd Cir. 1971); United States v. Frank et al., 437 F.2d 452 (9th Cir. 1971), cert. den., 402 U.S. 974; United States v. Ramsdell, supra; United States v. Rosenthal, 454 F.2d 1252 (2nd Cir. 1972), cert. den., 406 U.S. 931. However, it should be noted that this list, from Spies is neither exclusive, nor exhaustive. United States v. Pawlak, 72-2 U.S.T.C., par 9646 (S.D.N.Y. 1972).

Some courts have instructed the jury in relation to willful intent that "the presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax". Guzik v. United States, supra; McKenna v. United States, 232 F.2d 431 (8th Cir. 1956); cf. Bateman v. United States, 212 F2d 61 (9th Cir. 1954). As previously noted, the courts have generally construed "willfully" as requiring a specific intent under Section 7201, an active desire to evade or

defeat a tax. Therefore, as the instruction quoted above really describes a general intent (i.e., the doing of an act raises a presumption that is consequences were intended) it was held to have erroneously charged the jury to presume intent on the facts established without permitting the jury to consider exculpatory defense contentions. Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954). Accord, Block v. United States, 221 F.2d 786 (9th Cir. 1955). v. United States, 222 F.2d 678 (9th Cir. 1955), and Sherwin v. United States, supra; Mann v. United States, 319 F.2d 404 (5th Cir. 1963), cert. den., 375 U.S. 986 (distinguished in Helms v. United States, 340 F.2d 15 (5th Cir. 1964), cert. den., 382 U.S. 814). As even the cases holding the instruction was not error, in context, are critical of the "natural presumption" language, it is urged that the instruction not be used.

Although willfulness may not be inferred solely from an understatement of income, a consistent pattern of understated income may be sufficient to support the inference. Holland v. United States, supra; United States v. Moran, 236 F.2d 361 (2nd Cir. 1956), cert. den., 352 U.S. 909; Canton v. United States, 226 F.2d 313 (8th Cir. 1955), cert. den., 350 U.S. 965; and Epstein v. United States, 246 F.2d 563 (6th Cir. 1957), cert. den., 355 U.S. 868; United States v. Magnus, supra; United States v. Mancuso, 378 F.2d 612, mod., 387 F.2d 376 (4th Cir. 1967), cert. den., 390 U.S. 955; United States v. Mansfield, supra; United States v. Schipani, supra; United States v. McCarty, 409 F.2d 793 (10th Cir. 1969), cert. den., 396 U.S. 836; United States v. Stone, supra; United States v. Frank, supra; United States v. Potts, 321 F.Supp. 717 (E.D. Wis.), aff'd, 459 F.2d 412 (7th Cir. 1972); United States v. Dowell et al., supra; United States v. Ramsdell, supra; United States v. Mathews, 335 F.Supp. 157 (W.D. Pa. 1971); United States v. Siragusa, 450 F.2d 592 (2nd Cir. 1971), cert. den., 405 U.S. 974; United States v. Pawlak, 72-2 U.S.T.C., par. 9646 (S.D.N.Y. 1972), Similarly under Holland, an understatement coupled with unrecorded income would be enough. And the taxpayer's conduct during the investigation by the Revenue Service can be cogent evidence of willfulness. Holland v. United States, supra; Barcott v. United States, 169 F.2d 929, 932 (9th Cir. 1948), cert. den., 336 U.S. 912; Clark v. United States, supra, at p. 104. Levin v. United States, 5 F.2d 598 (9th Cir. 1925), cert. den., 269 U.S. 562; United States v. Cindrich, supra; Burke v. United States, 293 F.2d 398 (1st Cir. 1961), cert. den., 368 U.S. 930.

Also, recent cases have admitted evidence of the defendant's educational or business background as negating defense claims of lack of willfulness. United States v. Ostendorff, 371 F.2d 729 (4th Cir.), cert. den., 386 U.S. 982 (1967), Supra; United States v. Coblentz, 453 F.2d 503 (2nd Cir. 1972), cert. den., 406 U.S. 918. However, in those cases, the defendant's background was only a factor in determining willfulness and not the exclusive evidence thereof. Compare United States v. Tonahill, 308 F.Supp. 97 (E.D. Tex. 1970), rev'd on other grounds, 430 F.2d 1042 (5th Cir. 1970), cert den., 400 U.S. 943, where the court said that an attorney -- defendant in a tax fraud case is held to no higher duty of knowledge of tax law and procedure than any other defendant.

Willfulness would not exist in a case of bona fide misunderstanding as to the taxpayer's liability for tax, or his duty to make a return. United States v. Murdock, supra, p. 396. Nor is it the purpose of the law to penalize frank differences of opinion or innocent errors made despite the exercise of reasonable care. Spies v. United States; supra.

4. The Attempt and Its Manner.

(a.) An "Attempt to Evade or Defeat".—Of the word "attempt" as used in Section 7201, 1954 Code (and 145(b), 1939 Code), the Supreme Court has stated in Spies v. United States, supra, pp. 498-499, in contrasting that statute with Section 7203 (145(a), 1939 Code):

> The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt", as used in the felony subsection. It is not necessary to involve this subject with

> the complexities of the common-law "attempt". The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete and nothing is added to its criminality by successor consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. * * * *

Although it was held in United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), rev'd. 319 U.S. 503 (1943), rehearing den., 320 U.S. 808, that the tax evasion statute does not define a continuing offense (see also dictum in Norwitt v. United States, supra. p. 133), the Supreme Court, reversing (319 U.S. 503), generally repudiated the Circuit Court's concept of the offense. The Court said that the false return was only one aspect of a "process of tax evasion" or merely "one phase" of the evasion. The broad language of the statute, condemning willful attempts "in any manner", scheme or plan of action of a continuing nature. The receptivity of the Supreme Court to such an interpretation was evidenced in United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952), in which it was held that repeated violations of the Fair Labor Standards Act constituted only one offense because the acts all arose from a singleness of thought or purpose. See also United States v. Albanese, 117 F.Supp. 736 (S.D.N.Y.), aff'd, 224 F.2d 879 (2nd Cir. 1955), cert. den., 350 U.S. 845, and the provisions of 18 U.S.C. 3237.

(b.) "Manner" of the Attempt.—The words "in any manner" in Section 7201 constitute a comprehensive and all-inclusive concept. The act which most frequently constitutes the "manner" of the attempt to evade or defeat any tax is that of filing a false and fraudulent return. Cave v. United States, 159 F.2d 464 (8th Cir. 1947), cert den., 331 U.S. 847, rehearing den., 332 U.S. 786; Rick v. United States, 161 F.2d 897 (D.C. Cir. 1947); United States v. Rosenblum, supra; United States v. Raub, 177 F.2d 312 (7th Cir. 1949); United States v. Crossant, 178 F.2d 96 (3rd Cir. 1949), cert. den., 339 U.S. 927; United States v. Pannell, 178 F.2d 98 (3rd Cir. 1949); and e.g. United States v. Rossi, 66-2 U.S.T.C. 96 49 (W.D. NY., 1965). supra; Spinney v. United States, supra; United States v. Stone, supra; United States v. Coppola, 425 F.2d 660 (2nd Cir. 1969). The enumeration by the Supreme Court in Spies, supra, of possible methods of evasion is not all inclusive and does not preclude the filing of a false return as constituting the punishable manner of the attempt. Gaunt v. United States, supra; accord, Hartman v. United States, 245 F.2d 349 (8th Cir. 1957); United States v. Callanan, 450 F.2d 145 (4th Cir. 1971). It should be noted that a false return need not be signed to be admissible as evidence of intent to defeat and evade (Emmich v. United States, supra, p. 15), as long as it is identified as defendant's return, Montgomery v. United States, 203 F.2d 887 (5th Cir. 1953); Gariepy v. United States, 220 F.2d 252 (6th Cir. 1955), cert. den., 350 U.S. 825; United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert den., 389 U.S. 905. And, a return signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it and had knowledge of the contents of the return. Section 6064, Internal Revenue Code of 1954. United States v. Wainright, 413 F.2d 769 (10th Cir. 1969), cert. den., 396 U.S. 1009; United States v. Cashio, 420 F.2d 1132 (5th Cir. 1970), cert. den., 397 U.S. 1007; United States v. Bass, 425 F.2d 161 (7th Cir. 1970); United States v. Harper, 458 F.2d 891 (7th Cir. 1971).

Although willful failure to file, standing alone, only constitutes a misdemeanor, when combined with affirmative activities showing a purpose to evade tax (i.e., keeping duplicate books, making false or altered entries, false invoices, destroying of records, concealing of sources of income, handling transactions to avoid usual records, or any conduct likely to conceal or mislead) the felony is made out. See Spies v. United States, supra; United States v. Kafes, 214 F.2d 887 (3rd Cir. 1954), cert. den., 348 U.S. 887.

If only the negative act of failure to file is alleged as the "manner" of attempted evasion (and, indeed, more should be alleged), proof of such affirmative acts over and above failure to file is essential to make out a case and the jury must be instructed that they cannot convict for attempted evasion only on proof of failure to file. Spies v. United States, supra, p. 500; United States v. Jannuzzio, 184 F.Supp. 460 (D. Del. 1960). The indictment should, of course, allege the affirmative acts of evasion in addition to the failure to file when so-called "Spies-type" evasion charges are drafted.

In the Spies case, supra, p. 499, the court enumerated various types of evasion-motivated conduct, "by way of illustration and not by way of limitation." In spite of the fact that the court called this an illustrative listing, it has been argued that filing of a false return is not a "manner" of the attempt to evade because it is not enumerated in the Spies case and because, like failure to file, subscribing to a false return is the subject of a separate penal sanction. But filing a false return has been held to constitute the "manner" of the attempt. (See Cave v. United States, supra, and following cases.) This is easily understandable in light of the rationale of the Spies case in which the court said that in using the word "attempt" " * * * Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors." Spies v. United States, supra, p. 499. (Emphasis added.) The Spies opinion was only concerned with proof which would, with proof of failure to file, suffice to show that the matter was a tax evasion attempt. The plain significance of the opinion is that had there been a false return alleged and proved that would have constituted sufficient affirmative action. United States v. Yuncker, 147 F.Supp. 97 (S.D. Ind. 1956), and the cases cited therein.

The Court of Appeals for the Fifth Circuit has held that it is not enough to allege merely the failure to pay the tax as the "manner" of attempted evasion. Clay v. United States, 218 F.2d 483 (5th Cir. 1955). But the same circuit held in a later case that an indictment "need not specify the means whereby the defendant attempted to evade and defeat the tax." Reynolds v. United States, 225 F.2d 123 (5th Cir. 1955), cert. den., 350 U.S. 914, and cases therein at p. 126.

False returns and the types of tax-evasion conduct listed are not exclusive alternatives. Other means that have been employed in charging attempted evasion include the filing of false amended returns (United States v. Yvette Co., 93 F.2d 1019 (2nd Cir. 1937), cert. den., 303 U.S. 647; Norwitt v. United States, supra), the making of false statements to prevent discovery of an additional tax liability as to a prior tax year, even one long since past (United States v. Beacon Brass Co., Inc., 344 U.S. 43 (1952), the filing of false tentative returns (United States v. Giglio, 232 F.2d 589 (2nd Cir. 1956), cert. granted, 352 U.S. 865, aff'd, sub nom. Lawn v. United States, 355 U.S. 339 (1958), rehearing den., 355 U.S. 967, and the making of false statements during negotiations to compromise (United States v. Mousley, 194 F.Supp. 119 (E.D. Pa. 1961)).

The manner of an attempt to evade the payment of a tax, as opposed to an attempt to evade the liability therefore, may be by concealment of the money or assets with which the tax could be paid. United States v. Bardin, 224 F.2d 255 (7th Cir. 1955), cert. den., 350 U.S. 883, rehearing den., 350 U.S. 919; United States v. Mollet, 290 F.2d 273 (2nd Cir. 1961); Cohen v. United States, 297 F.2d 760 (9th Cir. 1962), cert. den., 369 U.S. 865; United States v. Edwards, supra; United States v. Trownsell, 367 F.2d 815 (7th Cir. 1966).

5. Persons Liable.

No one is "exempt from punishment * * * who actively endeavors to defeat a "tax" whatever may be his relation to the taxpayer. United States v. Troy, supra; Tinkoff v. United States, supra, p. 876; Leathers v. United States, supra. See United States v. Frazier et al., 365 F.2d 316 (6th Cir. 1966), cert. den., 386 U.S. 971, where defendant was convicted for attempted evasion of another's taxes by the concealment of assets. To prevent the rich and powerful from evading the income tax law with impunity, a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution under the circumstances without regard to large amounts of "reported income." United States v. Nunan, supra; United States v. Cindrich, 241 F.2d 54 (3rd Cir. 1957). In cases charging corporate officers for the evasion of corporate taxes it is most essential in establishing willfulness that the officer be sufficiently connected with the bookkeeping, tax returns, or other acts of evasion. Pechenik v. United States, 236 F.2d 844 (3rd Cir. 1956), and contrast Pezznola v. United States, 232 F.2d 907 (1st Cir. 1956), cert. den., 352 U.S. 834; United States v. Bernard, 287 F.2d 715 (7th Cir. 1961), cert. den., 366 U.S. 961. An individual who aids in the preparation of a false return as the manner of attempted evasion need not have actually filed the return himself to be guilty of willful attempted evasion. United States v. Gordon, supra; Blauner v. United States, supra; Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. den., 370 U.S. 919; United States v. Cain, 288 F.2d 934 (7th Cir. 1962), cert. den., 370 U.S. 902.

B. Willful Failure to File, Supply Information, or Pay Tax.

Section 7203 of the Internal Revenue Code of 1954 provides:

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

These are the provisions chiefly relied upon to prosecute misdemeanors arising out of the failure to perform certain duties imposed by law. Their substantial identity is readily discernible. The possible offenses spelled out are (1) the willful failure to pay the estimated tax or tax; (2) the willful failure to make a return or declaration (declarations excluded from 1954 re-enactment); (3) the willful failure to keep records; and (4) the willful failure to supply information.

1. Persons Liable.

The following persons may commit the offense and are liable to prosecution under the section: (1) Those required under any provision of the 1954 Code to pay any estimated tax or tax, whether corporate or individual, the term "person" including an officer or employee of a corporation or a member or employee of a partnership under a duty to pay such tax or to perform any act in respect of which the several violations, spelled out by this section, occur; (2) those required by law or regulation to (a) make a return (or declaration) or (b) keep any records or (c) supply information for any purpose under the 1954 Code.

2. Elements of Proof.

(a.) Failure to File.—In order to sustain a conviction for willful failure to file a return, it is necessary for the Government to establish three things: (1) that the defendant was a person required by law to file a return for the taxable period; (2) that he failed to file a return at the time required by law; (3) that the failure to file was willful. United States v. McCormick, 67 F.2d 867 (2nd Cir. 1933), cert. den., 291 U.S. 662. United States v. Ostendorff, 371 F.2d 729 (4th Cir. 1967), cert. den., 386 U.S. 982; United States v. MacCorkle, 69-1 U.S.T.C., par. 9364 (D. W. Va.), aff'd., 407 F.2d 497 (4th Cir. 1969), cert. den., 395 U.S. 906; United States v. Matosky, 421 F.2d 410 (7th Cir. 1970), cert. den., 398 U.S. 904.

(b.) Failure to Pay.—In addition to the obvious requirements of (1) a defendant required by law to pay a tax, and (2) a failure to pay, there is a necessity to show willfulness and as a part of such showing to establish an ability to pay thereby avoiding mere imprisonment for debt. Spies v. United States, supra, p. 497. Under this reasoning, a conviction for failure to pay was reversed on the theory that though the evidence of the defendant's "luxury living" had some probative value it did not render inescapable the conclusion that the failure to pay was willful. The pattern of defendant's behavior suggested, but did not prove, the evil motive required by the statute. Palermo v. United States, 259 F.2d 872 (3rd Cir. 1958); but cf. United States v. Goodman, 190 F.Supp. 847 (N.D. Ill. 1961).

3. Persons Required to File a Return.

An individual taxpayer is required to file a return if he had a minimum gross income in an amount [$1,700 for years 1970 and 1971; $2,050 for 1972 and years thereafter] set forth in the statutes or regulations as requiring the filing of a return regardless of the amount of taxable income involved for the same period. United States v. Miro, 60 F.2d 58 (2nd Cir. 1932). See also, e.g., United States v. McCabe, 416 F.2d 957 (7th Cir. 1969), cert. den., 396 U.S. 1058; United States v. Berkman, 302 F.Supp. 1285, aff'd., 418 F.2d 212 (2nd Cir. 1969), cert den., 396 U.S. 1014; United States v. MacLeod, 436 F.2d 947 (8th Cir. 1971), cert. den., 402 U.S. 907. See Internal Revenue Code of 1964, Section 6012(a). The particular problems involved in the computation of gross income of a professional gambler and the solution of offsetting losses in each race against winnings in that race before computing the gain constituting gross income are outlined in Winkler v. United States, 230 F.2d 766 (1st Cir. 1956).

A corporate taxpayer must file a return regardless of the amount of gross or taxable income earned. Internal Revenue Code of 1954, Section 6012. As to the responsible corporate officer, see Uhl Estate Co. v. Commissioner, 116 F.2d 403 (9th Cir. 1940); United States v. Fago, 162 F.Supp. 125 (W.D.N.Y. 1958); Wilson v. United States, supra, p. 316; Bloom v. United States, 272 F.2d 215 (9th Cir. 1959), cert. den., 363 U.S. 803; Heligman v. United States, 407 F.2d 448 (8th Cir. 1969), cert. den., 395 U.S. 977. A showing that an officer has in the past filed the corporate returns, both income and employers' quarterly returns, was the major stockholder and the one responsible for the affairs of the business, both internally and in the eyes of third parties dealing with the * * * corporation, is clearly sufficient to establish responsibility to file corporate returns. Lumetta v. United States, 362 F.2d 644 (8th Cir. 1966). See Lumetta also as to corporate status, and see 26 U.S.C. 7701, defining a "corporation."

Only true income can be considered in determining whether a person was obliged to file an individual tax return for a particular year. Clawson v. United States, 198 F.2d 792 (9th Cir. 1952), cert. den., 344 U.S. 929, reh. den., 345 U.S. 914. The taxpayer had contended that certain income of a "dummy" corporation was income to the corporation, not to him. The evidence, however, justified the conclusion that money obtained by defendant from the "dummy" corporation was a constructive dividend constituting income to him personally. Cf. Currier v. United States, 166 F.2d 346 (1st Cir. 1947).

Testimony of an official whose responsibility it is to have custody of income tax returns can establish whether or not a taxpayer has filed a return for a particular year in question. The Certificate of Assessments and Payments [Form 899], which certificate is generally issued by the District Director of Internal Revenue or the head of the Audit Division in each district will contain information as to an individual's filing history. An examination of this certificate will disclose whether a return has been filed.

4. Willfulness

Willfulness is a requisite of the offenses condemned by this statute. United States v. McCormick, supra; Spies v. United States, supra. United States v. Ostendorff, supra; United States v. Matosky, supra; and e.g., United States v. Berkman, supra; and United States v. Lemlich, 418 F.2d 212 (5th Cir. 1969), cert. den., 397 U.S. 913. As previously discussed, in United States v. Murdock, supra, involving a willful failure to supply information, the Supreme Court defined willfulness in the predecessor of Section 7203 as meaning with a bad purpose, or without ground for believing that one's act is lawful, or with a careless disregard whether one has the right so to act. However, the "careless disregard" expression was held in Haner v. United States, 315 F.2d 792 (5th Cir. 1963), to be reversible error, permitting the jury to convict the defendant for mere carelessness or inadvertence. The court said that "willfulness" means intentional, knowing, or purposeful, as opposed to careless, thoughtless, heedless, or inadvertent, and it means nothing less as used in Section 7203. See also United States v. Vitiello, 363 F.2d 240 (3rd Cir. 1966), reversing the conviction; Edwars v. United States, supra; United States v. Fahey, 411 F.2d 1213 (9th Cir. 1969), cert. den., 396 U.S. 957; United States v. Haseltine, Jr., 419 F.2d 579 (9th Cir. 1969); United States v. Matosky, supra; United States v. Rizzo, 313 F.Supp. 734 (D. Del. 1970); United States v. Platt, 435 F.2d 789 (2nd Cir. 1970); United States v. MacLeod, supra; United States v. Polack, 442 F.2d 446 (3rd Cir. 1971), cert. den., 403 U.S. 931. The "careless disregard" instruction has very recently been disapproved by the Ninth Circuit in Gurtner, 73-1 U.S.T.C. 9228 (9th Cir. 1973), and the language was held by the Supreme Court in United States v. Bishop, (decided May 29, 1973) not to provide a valid difference in the element of willfulness between the felony and misdemeanor provisions of Title 26, U.S.C.

The Department does not approve the use of the careless disregard language and it should not be employed.

Expressions comparing the different uses of the word "willful" in quantitative form appear to have originated in language in Spies, supra, to the effect that "it may mean something more as applied to nonpayment of tax than when applied to failure to make a return." As noted above, the Court of Appeals for the Fifth Circuit said, in Haner, followed in Thompson, supra (in comparing uses of the world willful in Section 7203 and Section 7201), that "it means nothing less as used in Section 7203." The Haner quantitative expression appears innocuous enough because it refers merely to the requirement that the failure to file be "intentional, knowing, or purposeful" but it may be misconstrued to mean that the requirements of willfulness in Sections 7201 and 7203 are different. This, however, has been effectively laid to rest by the Supreme Court in United States v. Bishop, No. 71-1698, (decided May 29, 1973) holding that willfulness is the same in both the felony and misdemeanor sanctions of the Internal Revenue Code:

> The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in Murdock, supra.

Another expression in some of the failure to file cases which may be troublesome is found in the instruction in Yarborough v. United States, supra, p. 61:

> "I instruct you that the only bad purpose or motive, which it is necessary for the Government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed, so that the Government would not know the extent of the liability." (Underscoring supplied.)

The phrase "so that" was held by the same court in United States v. Fullerton, 189 F.Supp. 211 (D. Md., 1960) to mean with the result that " rather than "in order that". The difficulty with the Fullerton definition is that the result of an act or failure to act, unless known and intended by the defendant, does not mean specific intent. The Yarborough instruction (also found in Litman, supra, and others) was drafted to fit the classic failure to file case in which the taxpayer's purpose is to hide his existence and his liability from the Government. For this reason, taxpayers of whose existence the Government is aware (at least, in theory) through the filing of partnership returns, estimated returns, etc., or by reason of an audit of other years, contend their failures to file were not willful in the conventional sense. Such a defense was unsuccessfully made in United States v. Hayes, 60-2 U.S.T.C., par. 9783 (E.D. Wisc. 1960), in which the court noted that even though the partnership returns were filed they did not reveal the tax he as an individual owed. The fact that he was permitted to file late returns for other years should have been a warning to him of his current dereliction. Such a defense was successfully made in United States v. Power, 68-2 U.S.T.C., par 9443 (E.D. Wisc. 1968). There, the defendant's W-2 forms were properly filed, disclosing almost his entire tax liability, which, with the fact that the defendant was unable to pay the tax, the court found negated the requisite "evil motive". See also Haskell v. United States, 241 F.2d 790 (10th Cir. 1957), cert. den., 354 U.S. 921, and United States v. Harrison, 72-2 U.S.T.C., par. 9573 (E.D. N.Y. 1972).

Thus, the Yarborough-Litman definition of willfulness should be sufficiently broad to cover the Hayes-type failure to file.

There are also rare cases in which the taxpayer simply refuses, openly and consistently, to perform any of the duties required by the Revenue Code, including the filing of returns. Although such a case is, again, different from the classic failure to file, the provisions of Section 7203 should be broad enough to cover it. Indeed, the Yarborough definition may be sufficiently broad because as the court said in the Hayes case, the Government may know of his existence as a taxpayer and may even know of his income but it still does not know the extent of his tax liability. Although some parts of the Murdock language have been criticized in other respects, some of it seems particularly appropriate to the taxpayer who refuses to do anything: "stubbornly, obstinately, perversely." In United States v. Porth, 426 F.2d 519 (10th Cir. 1970), cert. den., 400 U.S. 824, the defendant filed a tax return, blank except for his name. The court said that a return which does not contain any information relating to the taxpayer's income from which the tax can be computed, is not a return within the meaning of the Internal Revenue Code, thus permitting prosecution and conviction under Section 7203.

As under Section 7201, willfulness in Section 7203 would not exist in a case of bona fide misunderstanding as to the taxpayer's liability for tax, or his duty to make a return. United States v. Murdock, supra; United States v. Matosky, supra; United States v. Collins, 457 F.2d 781 (6th Cir. 1972). In Collins, the defendant was aided by an Internal Revenue Agent in preparing and filing his returns for 1960-62. His defense was that he expected to be similarly

helped in subsequent years, which defense, of a mistaken or ignorant belief, was held valid, as negating willfulness. However, excuses that the defendant is "too busy" are not sufficient to negate willfulness. Edwards v. United States, supra; Eustis, Jr. v. United States, 409 F.2d 228 (9th Cir. 1969). Evidence of domestic and financial stresses, proffered by the defendant as negating criminal intent were held inadmissible as irrelevant in Bernabei v. United States, No. 72-1866, decided Feb. 28, 1973 (6th Cir. 1973). Late filing or late tax payment is also immaterial on the issue of willfulness. United States v. Browney, 421 F.2d 48 (4th Cir. 1970); United States v. O'Connor, 433 F.2d 752 (1st Cir. 1970), cert. den., 401 U.S. 911; United States v. Ming, Jr., 466 F.2d 1000 (7th Cir. 1972), cert. den., Oct. 1972.

5. Tax Liability Not a Requisite.

The willful failure to make a return, keep records, or supply information when required is made a misdemeanor without regard to the existence of a tax liability. Spies v. United States, supra. United States v. Gorman, 393 F.2d 209 (7th Cir. 1968), cert. den., 393 U.S. 832, reh. den., 395 U.S. 917; United States v. McCabe, 416 F.2d 957 (7th Cir.1969), cert. den., 396 U.S. 1058. If it is established that the defendant was under a duty to file a return, it is not necessary to prove that a tax was due since the duty to file a return is created by statute: Internal Revenue Code of 1954 Sections 6001, 6012(a) (individual); Section 6062 (corporation); Section 6012 (b) (fiduciaries); Sections 6031, 6065 (partnership). It is not necessary to prove a tax liability for any of the willful omissions under this section except, of course, the failure to pay a tax. The filing of declarations of estimated tax and partial payment of the tax liability is therefore, no bar to a successful criminal prosecution. Haskell v. United States, supra.

6. Distinguished from Felony Provisions.

Prior to Spies v. United States, supra, prosecution for the felony of willfully attempting to evade and defeat a tax was sanctioned when the only means of evasion charged was the willful failure to file a return or pay a tax. See United States v. Miro, supra; O'Brien v. United States, 51 F.2d 193 (7th Cir. 931), cert. den., 284 U.S. 673. But the Supreme Court held in the Spies case that although the willful but passive neglect of the statutory duties enumerated in Section 7203 was enough to constitute a violation of that misdemeanor provision, it would be necessary to prove additional affirmative evasion motivated acts to make out the felony of attempted evasion described in Section 7201. It was held (p. 500) that the taxpayer was entitled to a charge pointing out "the necessity *** for an inference of willful attempt to defeat or evade the tax from some proof other than that necessary to make out the misdemeanors." The difference is found in the affirmative action implied from the term "attempt" as used in the felony section. See also Jones v. United States, 164 F.2d 398 (5th Cir. 1947); Wardlaw v. United States, supra, p. 886; United States v. Kafes, supra; Hartman v. United States, 215 F.2d 386 (8th Cir. 1954); United States v. Albanese, supra; Foley v. United States, 290 F.2d 562 (8th Cir. 1961), cert. den., 368 U.S. 888; Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960), mod., 366 U.S. 209; United States v. Ming, Jr., supra.

7. Election Between Counts.

In the United States v. Kafes, supra, the defendant was convicted under 7201 and 7203 which define separate offenses. Spies v. United States, supra. Since the 7203 violation was used to prove in part the 7201 violation, the question arose whether the defendant could be convicted for the misdemeanor. The governing rule has been reiterated in Pereira v. United States, 347 U.S. 1 (1954): "Defendant may be convicted of both [two separate offenses] even though the charges arise from a single act or series of acts, so long as each requires the proof

of a fact not essential to the other." See United States v. Rosenthal, supra, where the Section 7203 Conviction was vacated because it was a lesser-included offense of the 7201 conviction. It is not necessary to prove a failure to file to convict for an attempt to evade; conversely, it is not necessary to show the acts of commission required by the Spies case to prove a willful failure to file a return. The rule sanctions the use of one act as part of the proof of both offenses; the Government is not required to elect between counts; the defendant is not put in double jeopardy by such action. See Chaifetz v. United States, supra; United States v. Jannuzzio, supra; United States v. Magnus, 365 F.2d 1007 (2nd Cir. 1966), cert. den., 386 U.S. 909.

C. Willfully Making and Subscribing a Document Not Believed to be True, and Aiding and Assisting in, or Procuring, Counseling, or Advising Preparation or Presentation of False and Fraudulent Returns.

Section 7206, Internal Revenue Code of 1954, provides:

> SEC. 7206. FRAUD AND FALSE STATEMENTS
>
> Any person who –
>
> (1) Declaration Under Penalties of Perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> (2) Aid or Assistance—Willfully aids or assists in, or procures, counsels, or assists in the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document *** shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than 3 years, or both, together with the costs of prosecution.

1. Section 7206(1).

General.—The gist of the offense described by Section 7206(1) is the willful making and subscribing of a return or other Revenue Service form, containing the provision that it is to be signed subject to the penalties of perjury, which is not believed to be true and correct as to every material matter. See Blumenfield v. United States, 306 F.2d 892 (8th Cir. 1962); Siravo v. United States, 377 F.2d 469 (1st Cir. 1967); United States v. Brown, Jr., 446 F.2d 119 (10th Cir. 1971); United States v. Engle, 458 F.2d 1017 (8th Cir. 1972). In creating this provision in the Revenue Act of 1942 (c.619, 56 Stat. 798, Sec. 136), Congress was retaining the effect of the perjury statute which became inapplicable to tax returns by reason of the coincidental elimination of the requirement that such returns be made and signed under oath. Cohen v. United States, 201 F.2d 386 (9th Cir. 1953), cert. den., 345 U.S. 951. And the courts have rejected arguments that Section 7206(1) is itself a perjury statute. Escobar v. United States, 388 F.2d 661 (5th Cir. 1967), cert. den., 390 U.S. 1024; Hensley v. United States, 406 F.2d 481 (10th Cir. 1968). Its enactment accomplished no limitation on the allegation the filing of a false return as a means of attempted evasion uner Section 7201 because the offense of making and subscribing is distinct from a filing and the offense of attempted evasion by means of such filing. Taylor v. United States, 179 F.2d 640 (9th Cir. 1950). By a parity of reasoning, Section 7206(1) has been held not to have repealed, as to revenue returns, Section 1001, Title 18 U.S.C. Gaunt v. United States, supra; Cohen v. United States, supra.

Section 7206 (1) has been considered an appropriate sanction to invoke when it is possible to prove the falsity of a return but where it is difficult to establish an attempted evasion or an ascertainable amount of tax, or when a relatively small tax evasion results from the falsification. In United States v. Rayor, 204 F. Supp. 4862 (S. D. Cal. 1962) it was held that the lack of a tax deficiency would not prevent making a prima facie case. In other cases the lack of a tax deficiency, has been held irrelevant: [Silverstein v. United States, 377 F. 2d 269 (1st Cir. 1967); Schepps v. United States, 395 F. 2d 749 (5th Cir. 1968), cert. den., 393 U.S. 925], and that a deficiency need not be proved at all [United States v. Jernigan, 411 F. 2d 471 (5th Cir. 1969), cert. den. 396 U.S. 927]. See also United States v. Baker, 401 F. 2d 958 (D.C. Cir. 1968), remanding to the district court on other grounds and eventually aff'd., 430 F. 2d 499 (D.C. Cir. 1970), cert. den., 400 U.S. 965, which involved a return concealing a conduit relationship. A return that omits material items is not "true and correct" within the meaning of Section 7206 (1). Siravo v. United States, supra. One court's test of materiality is whether the particular item must be reported in order that the taxpayer estimate and compute his tax correctly. United States v. Null, 415 F. 2d 1178 (4th Cir. 1969). Another test is would the matter have a tendency to influence the Internal Revenue Service in its normal processing of returns, United States v. DiVarco, et al., 342 F. Supp. 101 (N.D. Ill. 1972). For the omission of substantial income as a "material" matter, see Hoover v. United States, 358 F. 2d 87 (5th Cir. 1966). And see United States v. DiVarco, et al., supra, in a case of first impression, where the court held the source of the defendant's income a "material" matter within Section 7206 (1). It has also been held that if knowingly false statements are made for the purpose of inducing the Government's reliance thereon, it is not necessary that there be actual reliance. Gentsil v. United States, 326 F. 2d 243 (1st Cir. 1964), cert. den., 377 U.S. 916.

On the issue of willfulness, it was held in Helms v. United States, supra, that a "presumptive intent" instruction was not reversible error in regard to offenses arising under this section. However, as with respect to the evasion statute (Section 7201), it is requested that such a charge not be used. Furthermore, the fact that the amount of tax owing is insubstantial casts no light on the question of willfulness. Siverstein v. United States, 377 F.2d, supra. For cases discussing the issue of willfulness generally, in 7206 (1) prosecutions, see Escobar v. United States, supra; United States v. Jernigan, supra; United States v. Null, supra; United States v. Frank, et at, 437 F.2d 452 (9th Cir. 1971), cert. den., 402 U.S. 974; United States v. Waller, 72-2 U.S.T.C., par 9721 (5th Cir. 1972).

2. Section 7206 (2).

(a) General.—To warrant a conviction under this section three elements of the offense must be proved. (1) It must be shown that the defendant aided or assisted in, or procured, counseled, or advised the preparation or presentation of a return, affidavit, claim, or document which involved a matter arising under the Internal Revenue laws. (2) It must be established that the return or other document was fraudulent or false as to a material matter. (3) It must be shown that the act of the defendant was willful. The conjuctive allegation of the prohibited acts of "aiding, assisting in, procuring, counselling and advising" as a single offense in the same count of an indictment is not duplicitous. United States v. Brown, 56 F.2d 659 (W.D. Wash 1931). United States v. Warner, 428 F.2d 730 (8th Cir. 1970).

(b) Persons Liable.—Prosecutions may result under this section whether or not the falsity or fraud is with the consent or knowledge of the person authorized or required to present the document with respect to which fraud is alleged. Soeder v. United States, 142 F.2d 236 (6th

Cir. 1944), cert. den., 323 U.S. 720; United States v. Brill, 270 F.2d 525 (3rd Cir. 1959) (convictions for felonious counsel and advice in preparation of a return for a de facto corporation); United States v. Baker, 262 F. Supp. 657 (D. D.C. 1967); United States v. Jackson, 452 F.2d 144 (7th Cir. 1971); and eg. United States v. Edwards, supra; United States v. Egenberg, 441 F.2d 441 (2nd Cir. 1971), cert. den., 404 U.S. 994; United States v. McKee, 456 F.2d 1049 (6th Cir. 1972), cert. den., 407 U.S. 910. Despite the clear indication to the contrary in the language of Section 7206 (2) it was contended, unsucessfully, in United States v. Kelley, 105 F.2d 912 (2nd Cir. 1939), that the crime denounced presupposed that the taxpayer himself was a party to the fraud. The person committing the offense spelled out in 7206(2) may be the object of a criminal indictment, then, even though the taxpayer had no knowledge of the fraud, since the purpose of the act "was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent." United States v. Kelley, supra; Cosgrove v. United States, 224 F. 2d 146 (9th Cir. 1954) (a case the logic of which may be suspected in other respects). See also United States v. Baker, supra, in which the defendant was charged with aiding and abetting in the preparation of a third-party's false returns. A motion to dismiss the indictment on this count was denied, rejecting defense claims that an overstatement of income is not an offense. Income falsely reported by the third-party, was actually the defendant's income.

(c) Elements of Proof.—The statue itself lists the kinds of false documents, preparation or presentation of which will inculpate an aider or advisor. Generally, income tax return or partnership information returns are involved. e.g., United States v. Kelly, supra; United States v. Borgis, 182 F.2d 274 (7th Cir. 1950); Bateman v. United States, supra; United States v. Herskovitz, 209 F.2d 881 (2nd Cir. 1954); United States v. Cramer et al., 447 F.2d 210 (2nd Cir. 1971), cert. den., 404 U.S. 1024. In addition, claims for refunds (United States v. Newton, 68 F. Supp. 952 (W.D. Va.), aff'd, 162 F.2d 795 (4th Cir. 1947), cert. den., 333 U.S. 848), applications under special statutes for amortization readjustments (Butzman v. United States, supra), the numerous reports and documents required to be prepared and filed in connection with the liquor trading and narcotics taxing laws (e.g., United Sattes v. Moody, 102 F.Supp. 315 (W.D. Mo. 1952); Johnson v. Warden, 134 F.2d 166 (9th Cir. 1943), cert. den., 319 U.S. 763), United States Information Returns (Form 1099) (United States v. Cantone et al., 426 F.2d 902 (2nd Cir. 1970), cert. den., 400 U.S. 827; United States v. Cobb, 466 F.2d 1174 (2nd Cir. 1971), cert. den., 404 U.S. 984; United States v. Salerno, 330 F.Supp. 1401 (M.D. Pa. 1971); United States v. Kessler, 449 F.2d 1315 (2nd Cir. 1971); United States v. Maistrow et al., 451 F.2d 1342 (2nd Cir. 1971), and any document required or authorized to be filed can give rise to this offense. Obviously, the falsity of the document can be established by either direct evidence (Butzman v. United States, supra) or circumstantial evidence (Bateman v. United States, supra). And the participation by the defendant in the form of aid, or advice, or procurement in the false preparation or the presentation of the completed false document may be sufficiently shown by evidence from which such aid, advice, or procurement can reasonably be inferred, e.g., Butzman v. United States, supra. In order, however, for the crime to be completed, the cases seem to indicate that the false document must be filed or lodged with the Internal Revenue Service (see United States v. Kelly, supra; United States v. Newton, supra; Butzman v. United States, 205 F.2d 343 (6th Cir. 1953) regardless of whether "preparation" or "presentation" is involved in the charge. Finally, the crime is complete on the submission of the false products of the aid or advice without regard (1) to whether the fraud succeeds in exacting a benefit (United States v. Borgis, supra, (2) to whether the Government was possessed in advance of knowledge of the falsity, (3) to the fact that by filing a different and truthful document the defendant or his principal might have been entitled to equivalent relief or benefit (Butzman v. United States, supra), or (4) to the fact that the defendant himself didn't sign or file the returns (United States v. Maius, supra). In Maius, supra, the court said that evidence that the defendant was a party to a scheme of concealing receipt of income and of not reporting it on corporate records together with his knowledge of the use of such records in preparing tax returns was sufficient, under all these circumstances to sustain defendant's conviction under Section

7206(2). It is not necessary that the Government prove the exact amount of understatement in a prosecution under this section. Johnson v. United States, 325 F.2d 709 (1st Cir. 1963). Furtheremore, it was held not error in Hull v. United States, 324 F.2d 817 (5th Cir. 1963), to fail to charge the jury that a showing of a tax deficiency was a prerequisite to conviction.

It has been held that evidence that the defendant lied as to assets of former years, though those years bore no relation to the years in question, was admissable as bearing on the element of willfulness. United States v. Brott, 264 F.2d 433 (2nd Cir. 1959) cert. den., 359 U.S. 985. United States v. Egenberg, supra. Where the defendant proved that the taxpayer for whom he prepared the return did not receive control of the allegedly falsely omitted income until the next taxable years, his motion to dismiss was sustained. United States v. Unger, 159 F.Supp. 850 (D. N.J. 1958); cf. United States v. Accardo, 61-1 U.S.T.C., par. 9197 (N.D. Ill. 1960), rev'd and rem., 298 F.2d 133 (7th Cir. 1962), where the defendant was convicted on the Government's proof that he deducted certain automobile expenses as business expenses when they were in fact personal expenses.

D. Conspiracy.

Section 371, 18 U.S.C. provides:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

A policy of self-restraint has been applied by the Department with regard to the use of this statute. Generally speaking, conspiracy charges have been considered inadvisable when evidence was available to make out charges of violations of substantive statutes. If proof exists to support substantive charges, they would ordinarily be instituted and the addition of conspiracy counts would involve needless duplications. The aider and abettor statute, Section 2, 18 U.S.C., makes all who knowingly participate in a revenue fraud subject to punishment for the substantive crime. United States v. Johnson, 319 U.S. 503 (1943), rehearing den., 320 U.S. 808. The breadth of the rules for admissibility of evidence in conspiracy cases is not lost for "although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." Davis v. United States, 12 F.2d 253 (5th Cir. 1926);

see also American Fur Co. v. United States, 27 U.S. (2 Pet.) 358 (1829); Neal v. United States, 185 F.2d 441 (D.C. Cir. 1950), cert. den., 340 U.S. 937; Ladrey v. United States, 155 F.2d 417 (D.C. Cir. 1946), cert. den., 329 U.S. 723; United States v. Pugliese, 153 F.2d 497 (2nd Cir. 1945); Lee Dip v. United States, 92 F.2d 802 (9th Cir. 1937), cert. den., 303 U.S. 638; Quercia v. United States, 70 F.2d 997 (1st Cir. 1934); Sandez v. United States, 245 F.2d 712 (9th Cir. 1957); United States v. Cranello, et al., 403 F.2d 337 (2nd Cir. 1968), cert. den., 363 U.S. 1095; United States v. Dukow, 330 F.Supp. 360 (W.D. Pa. 1971). Resort to the conspiracy device is therefore not required in order to punish all participants. The Supreme Court has warned that it will view with disfavor attempts to broaden the already pervasive and widespreading nets of conspiracy prosecutions. Grunewald v. United States, 353 U.S. 391 (1957). Similarly, there has been judicial criticism of the unnecessary joining of conspiracy counts with substantive counts on the same facts as expressed in United States v. Rosenblum, 176 F.2d 321 (7th Cir. 1949), cert. den., 338 U.S. 893, rehearing den., 338 U.S. 940 and cases there cited. Despite all this, there are cases in which the use of conspiracy charges is appropriate in criminal tax cases. Conspiracies to evade taxes: United States v. Haskell, 327 F.2d 281 (2nd Cir. 1964), cert. den., 377 U.S. 945; Gajewski v. United States, 321 F.2d 261 (8th Cir. 1963), cert. den., 375 U.S. 968; United States v. Giglio, 232 F.2d 589 (2nd Cir. 1956), cert. granted, 352 U.S. 865, aff'd., sub nom. Lawn v. United States, 335 U.S. 339 (1958), rehearing den., 355 U.S. 967; United States v. Knox Coal Co., 347 F.2d 33 (3rd Cir. 1965); Forman v. United States, 261 F.2d 181 (9th Cir. 1958), aff'd., 361 U.S. 416 (1960). Conspiracies to defraud: United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), rev'd. on other grounds, 319 U.S. 503 (1943), rehearing den., 320 U.S. 808; Connelly v. United States, 271 F.2d 333 (8th Cir. 1959), cert. den., 362 U.S. 936; United States v. Klein, 247 F.2d 908 (2nd Cir. 1957), cert. den., 355 U.S. 924; Benatar v. United States, 209 F.2d 734 (9th Cir. 1954), cert. den., 347 U.S. 974; Schino v. United States, 209 F.2d 67 (9th Cir. 1954), cert. den., 347 U.S. 937; Kobey v. United States, 208 F.2d 583 (9th Cir. 1953); United States v. Gisehaltz, 278 F.Supp. 434 (S.D. N.Y. 1967); United States v. Green, 421 F.2d 1237 (2nd Cir. 1970); United States v. Kessler, 449 F.2d 1315 (2nd Cir. 1971).

Because of the growing problem of severance in criminal tax cases, a conspiracy count may afford allegations on the face of the indictment to forestall a severance and to provide the basis for joinder in compliance with Rule 8. Federal Rules of Criminal Procedure (Joinder of Offenses and of Defendants). See Schaffer v. United States, 362 U.S. 511 (1960), rehearing den., 363 U.S. 858; United States v. Rosenfeld, 235 F.2d 544 (7th Cir. 1956), cert. den., 352 U.S. 928; United States v. Kessler, supra; United States v. Cranello, supra; United States v. Baker, 262 F.Supp. 657 (D. D.C. 1967).

1. Elements of Proof.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. Marino v. United States, 91 F.2d 691 (9th Cir. 1937), cert. den., sub nom. Gullo v. United States, 302 U.S. 764 (1938); Pettibone v. United States, 148 U.S. 197 (1893); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); United States v. Hutto, 256 U.S. 524 (1921); Weniger v. United States, 47 F.2d 692 (9th Cir. 1931); United States v. Gisehaltz, supra. The gist of the offense of conspiracy is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. United States v. Falcone, 311 U.S. 205 (1940). No formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown if there be concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose. Marino v. United States, supra; Fowler v. United States, 273 Fed. 15 (9th Cir. 1921). To be classed as a party to the agreement, the conspirator must have knowingly and willfully entered

into the conspiracy and have known that he was a party to the violation of an Internal Revenue Service statute. United States v. Gisehaltz, supra. When there is but one agreement, only one conspiracy may be charged though the object of the agreement is to commit several substantive offenses. Braverman v. United States, 317 U.S. 49 (1942); United States v. Baker, supra and see Maxfield v. United States, 152 F.2d 593, (9th Cir. 1946), Cert. den., 327 U.S. 794, wherein conviction on a two-count indictment was affirmed, despite the existence of a single conspiracy only, because the resulting sentences ran concurrently. See also Kotteakos v. United States, 328 U.S. 750 (1946), reversing convictions and United States v. Lopez, 420 F.2d 313 (2nd Cir. 1969), dismissing charges on a single conspiracy count when the proof reflected several unrelated conspiracies, and Blumenthal v. United States, 332 U.S. 539 (1947), affirming convictions on a single charge when the proof reflected two interrelated conspiracies. Substantive offenses and the conspiracy to commit them are separate and distinct crimes. Pinkerton v. United States, 328 U.S. 640 (1946); Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929), cert. den., 279 U.S. 873; cf. United States v. Rosenblum, supra. They may be joined in a single indictment. United States v. Wexler, 79 F.2d 526 (2nd Cir. 1935), cert. den., 297 U.S. 703; Lisansky v. United States, supra. If the object of a conspiracy is to defraud the Government of taxes it is "necessary only that it should appear that some amount was due." Cooper v. United States, 9 F.2d 216 (8th Cir. 1925). It is also settled that an acquittal on a charge of a substantive crime does not preclude a prosecution of a conspiracy to commit the same substantive crime. Pinkerton v. United States, supra; United States v. Waldin, 149 F.Supp. 912 (E.D. Pa.), aff'd., 253 F.2d 551 (3rd Cir. 1958), cert. den., 356 U.S. 973; United States v. Kessler, supra; United States v. Handel, 464 F.2d 679 (2nd Cir. 1972). However, in line with Pinkerton the defendant must have been a member of the conspiracy at the time the substantive offense was committed in order to be charged with the substantive crime. United States v. Cantone, 426 F.2d 902 (2nd Cir. 1970), cert. den., 400 U.S. 827.

Where there are only two defendants indicted on a conspiracy charge and there is no evidence implicating anyone else, the acquittal of one requires the acquittal of the other. United States v. Fox, 130 F.2d 56 (3rd Cir. 1942), cert. den., 317 U.S. 666. However, a conviction of one defendant may be sustained for conspiring with a named co-conspirator even if the latter is not indicted and the only other co-defendant is acquitted. United States v. Gordon, 242 F.2d 122 (3rd Cir. 1957), cert. den., 354 U.S. 921. One person can be convicted of conspiracy with persons whose names are unknown. Rogers v. United States, 340 U.S. 367 (1951); United States v. Green, supra.

By statutory definition, the unlawful agreement does not ripen into a punishable conspiracy until an overt act is done by some one or more of the conspirators to effect the object of the agreement. "An overt act is something apart from the conspiracy, and is an act to effect the object of the conspiracy." Marino v. United States, supra, pp. 694-695, quoting Joplin Mercantile Co. v. United States, 236 U.S. 531, 535 (1915). Preparing, signing and filing a false return, United States v. Kelley, 105 F.2d 912 (2nd Cir. 1939), or supplying false revenue information, United States v. Gisehaltz, supra; United States v. Kessler, supra; United States v. Green, supra; United States v. Cantone, supra, are appropriate over acts. Systematic channelings of corporate income to avoid double taxation are also appropriate overt acts. United States v. Keenan, 267 F.2d 118 (7th Cir. 1959), cert. den., 361 U.S. 863, rehearing den., 361 U.S. 921; Blauner v. United States, 293 F.2d 723 (8th Cir. 1961), cert. den., 368 U.S. 931; Giardano v. United States, 251 F.2d 109 (8th Cir. 1958), cert. den., 356 U.S. 973, rehearing den., 357 U.S. 944; cf. United States v. Klein, 247 F.2d 908 (2nd Cir. 1957), cert. den., 355 U.S. 924.

2. Duration of Conspiracy.

A conspiracy is deemed to continue as long as there is a course of conduct in violation of law to effect its purpose (Ryan v. United States, 216 Fed. 13 (7th Cir. 1914)), or until the contrary is established (Marino v. United States, supra, p. 695). It concludes on the ending of the concert of action. United States v. Kissel, 218 U.S. 601 (1910); Fiswick v. United States, 329 U.S. 211 (1946); Krulewitch v. United States, 336 U.S. 440 (1949); Forman v. United States, 361 U.S. 416 (1960). Upon termination of a conspiracy, no subsidiary conspiracy to conceal the crime may be implied. United States v. Hickey, 360 F.2d 127 (7th Cir. 1966). If, however, the original conspiracy included certain predetermined steps after the principal objective was reached, the conspiracy may be found to continue. Atkins v. United States, 307 F.2d 937 (9th Cir. 1962); cf. United States v. Allegretti, 340 F.2d 254 (7th Cir. 1964), cert. den., 381 U.S. 911.

3. Admissibility of Evidence.

In a conspiracy case, wide latitude is allowed in presenting evidence, whereby it is within the discretion of the trial court to admit evidence which even remotely tends to establish the conspiracy charged. Schino v. United States, supra; Nye & Nissen v. United States, 168 F.2d 846 (9th Cir. 1948), aff'd., 336 U.S. 613 (1949). To the same effect, it was held in Benatar v. United States, supra, that evidence of manipulation of another taxpayer's accounts to conceal the defendant's nonpayment of taxes was admissible to establish fraud in a conspiracy case. And see Maxfield v. United States, supra; Lisansky v. United States, supra; United States v. Wexler, supra; Cooper v. United States, supra; Borgia v. United States, 78 F.2d 550 (9th Cir. 1935), cert. den., 296 U.S. 615; White v. United States, 80 F.2d 515 (4th Cir. 1935); Shinyu Noro v. United States, 148 F.2d 696 (5th Cir. 1945), cert. den., 326 U.S. 720; Yoffe v. United States, 153 F.2d 570 (1st Cir. 1946); Thomas v. United States, 168 F.2d 707 (5th Cir. 1948). While mere statements made by a conspirator after the conspiracy has ended cannot establish the conspiracy, they may serve to implicate the speaker. If the statement is in the form of an admission, it may be used against him. United States v. Gisehaltz, supra.

E. Presenting False Statements.

Section 1001, 18 U.S.C. provides:

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY.

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

1. General.

Prosecution under this statute would seem particularly appropriate when fraudulent representations have been made by a taxpayer or witness in a form contemplated in the description of the offense, e.g., false or fraudulent representation to a Revenue Agent during the course of an investigation. See United States v. McCue, 301 F.2d 452, (2nd Cir. 1962), cert. den., 370 U.S. 939 and cases cited therein at pp. 455-456. There is, however, a line of cases holding that the statute

does not apply to a bare exculpatory denial. See cases cited in United States v. Philippe, 173 F.Supp. 582 (S.D. N.Y. 1959), expressly disapproved in McCue, supra, but revived in Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962). (The court in Paternostro, relying heavily on Philippe, did not consider McCue until on motion for rehearing, which was denied.) In United States v. Ratner, 464 F.2d 101 (9th Cir. 1972), however, the court disagrees with the reasoning of Paternostro which purported to distinguish that case from those dealing with "written statements." Ratner explicitly holds that material false statements to Revenue Agents are outside the sope of the "exculpatory no" rule.

Section 1001, supra, might be used in the case of a false statement in a return when proof of an understatement of taxable income would be so difficult as to prevent an effective prosecution under Section 7201 of the Internal Revenue Code of 1954. But if the return is signed under the penalties of perjury, Section 7206(1), Internal Revenue Code, would appear more appropirate. By way of comparison, see United States v. Beacon Brass Co., Inc., 344 U.S. 43 (1952) and United States v. Mousley, 194 F.Supp. 119 (E.D. Pa. 1961), in which the false statements alleged as the means of attempted corporate tax evasion could as well have given rise to a charge under Section 1001. And see Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), cert. den., 340 U.S. 917, wherein both attempted evasion and Section 1001 violations were based on the same false return and charged in separate counts of the same indictment. A sentence not to exceed the maximum of the more "inclusive" offense was required in that case. See further, Poonian v. United States, 294 F.2d 74 (9th Cir. 1961).

2. Elements of Proof.

The purpose of the statute apparently is to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. United States v. Gilliland, 312 U.S. 86 (1941). The statute is concerned with false statements which might impede the exercise of federal authority. United States v. Leviton, 193 F.2d 848 (2nd Cir. 1951), cert. den., 343 U.S. 946, (1952). The materiality of the deception involved must be judged accordingly. Pecuniary loss to the Government is not necessary. Any impairment of administration of its governmental functions is sufficient, and the commission of the crime is not dependent upon the success of the fraudulent intent. Butzman v. United States, 205 F.2d 343 (6th Cir. 1953), cert. den., 346 U.S. 828; United States v. Mellon, 96 F.2d 462 (2nd Cir. 1938), cert. den., 304 U.S. 586; United States v. J. Greenbaum & Sons, Inc., 123 F.2d 770 (2nd Cir. 1941); United States v. Goldsmith, 108 F.2d 917 (2nd Cir. 1940), cert. den., 309 U.S. 678, rehearing den., 310 U.S. 657.

The requirement of materiality in the first clause of the statute is not restated in the second clause, "or makes any false, fictitious or fraudulent statements * * *." This omission has resulted in a sharp conflict of opinion in the circuits on whether materiality is a requirement in the second clause. See collection of cases pro and con in Gonzales v. United States, 286 F.2d 118, 120, fn. 2 (10th Cir. 1960), cert. den., 365 U.S. 878. The trend has been to reverse (Poonian v. United States, supra) or to distinguish (United States v. McCue, supra; United States v. Sorkin, 275 F.2d 330, 331 (2nd Cir. 1960), cert. den., 362 U.S. 989) prior holdings that there is no requirement of materiality in the second clause of the statute. See also Freidus v. United States, 223 F.2d 598 (D.C. Cir. 1955); Rolland v. United States, 200 F.2d 678 (5th Cir. 1953), cert. den., 345 U.S. 964; United States v. Ratner, supra. Therefore, because of this trend of the jurisprudence and the fact that, to be prosecutable, a false statement must be a meaningful one, the indictment should allege, and the proof show materiality.

This section is not limited to statements which are required to be made by some law or regulation, and, therefore, the giving of a false statement to agents of the Treasury Department concerning declarant's financial affairs is a violation of this section, though the statement is voluntarily given. Cohen v. United States, 201 F.2d 386 (9th Cir. 1953), cert. den., 345 U.S. 951; and

Knowles v. United States, 224 F.2d 168 (10th Cir. 1955). Such statements need not be made under oath to fall within the statute. United States v. Dumas, 288 Fed. 247 (E.D. N.Y. 1923). It has been suggested that if a purported return which is unsigned by the taxpayer does not constitute an income tax return under the law, it might still be a false statement under this section. Canton v. United States, 226 F.2d 313 (8th Cir. 1955), cert. den., 350 U.S. 965.

The making of a false statement which is covered by Section 1001 can be proved by the testimony of the person to whom the statement is made even though such testimony is uncorroborated by other witnesses and even though such testimony is contrary to that of the defendant. Neely v. United States, 300 F.2d 67 (9th Cir., 1962), cert. den., 369 U.S. 864.

A wrongful purpose, i.e., willfulness, is an essential ingredient to prove. United States v. Buckley, 49 F.Supp. 993 (D. D.C. 1943). But willfulness does not mean "evil intent." Neely v. United States, supra.

If, in alleging the offense, the alleged falsity is stated in detail, the Government's proof is confined to establishing the falsity in the stated particulars. But the statement need only be proved false in any one of the specified material respects. Cohen v. United States, supra; Stevens v. United States, 206 F.2d 64 (6th Cir. 1953).

II. THEORIES OF PROOF

A. General.

The discussion under this heading will be confined to the formulas of proof employed in tax evasion cases. To the extent that other revenue offenses involve the issues of the existence or non-existence of a tax liability and "willful" intent, the theories of proof employed under Section 7201, Internal Revenue Code of 1954, will be applicable.

As previously noted, the elements to be proved in a prosecution under Section 7201, Internal Revenue Code of 1954, are (1) the additional tax owing, (2) willfulness, and (3) an attempt in any manner to evade or defeat. The means employed in the attempt, i.e., the return, or statement, or course of conduct, is susceptible of direct proof. Its falsity, or deceitfulness, may be proven by either direct or circumstantial evidence. Willfulness, absent an admission or confession or accomplice testimony, will rarely be subject to direct proof; it must generally be inferred from the circumstances of the case. Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1937), cert. den., 301 U.S. 689; Paschen v. United States, 70 F.2d 491 (7th Cir. 1934); United States v. Commerford, 64 F.2d 28 (2nd Cir. 1933), cert. den., 289 U.S. 759; Cooper v. United States, 9 F.2d 216 (8th Cir. 1925); Buttermore v. United States, 180 F.2d 853 (6th Cir. 1950); Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), cert. den., 340 U.S. 917, rehearing den., 340 U.S. 939; United States v. Stoehr, 100 F. Supp. 143 (M.D. Pa.), aff'd., 196 F.2d 276 (3rd Cir. 1952), cert. den., 344 U.S. 826; United States v. Magnus, 365 F.2d 1007 (2nd Cir. 1966), cert. den., 386 U.S. 909; United States v. Mansfield, 381 F.2d 961 (7th Cir. 1967), cert. den., 389 U.S. 1015; Feichtmeir v. United States, 389 F.2d 498 (9th Cir. 1968); United States v. Stone, 431 F.2d 1286 (5th Cir. 1970), cert. den., 401 U.S. 912; United States v. Ramsdell, 450 F.2d 130 (10th Cir. 1971); United States v. Spinelli, 443 F.2d 2 (9th Cir. 1971); United States v. Dowell, et al., 446 F.2d 145 (10th Cir. 1971), cert. den., 404 U.S. 984; and see Spies v. United States, 317 U.S. 492 (1943). The existence of an additional tax owing i.e., the tax liability defendant sought to thwart, may obviously be established by either direct or circumstantial evidence. The courts have said that the existence of unreported income may be proved by any practical method available in the circumstances of the particular case. United States v. Doyle, 234 F.2d 788 (7th Cir. 1956), cert. den., 352 U.S. 893; Davis v. United States, 226 F.2d 331 (6th Cir. 1955), cert. dent., 350 U.S. 965, rehearing den., 351 U.S. 915; United States v. Achilli, 234 F.2d 797 (7th Cir. 1956), aff'd. in other respects, 353 U.S. 373 (1957); Holland v. United States, 348 U.S. 121 (1954). Which kind of evidence will be available will ordinarily depend on the method of investigation adopted by the agents of the Revenue Service. And this, in turn, is dictated by highly practical considerations, such as the nature of the defendant's books and records, the feasibility of discovering all his business transactions, or the irreconcilability of known wealth with superficially proper tax accounting. A five and dime store's customers would be impossible to canvass. Discovery of two sets of books might provide the classic proof of fraudulent understatement of taxable income and taxes, e.g., Mitchell v. United States, 213 F.2d 951 (9th Cir. 1954), cert. den., 348 U.S. 912. Lacking any books or other means of reconstructing the income-producing picture, wholly circumstantial proof to measure the receipt of additional taxable income would be necessary. Direct evidence may often be corroborated or augmented by circumstantial evidence. Holland v. United States, supra. p. 126, and cases cited therein; Heasley v. United States, 218 F.2d 86, 90 (8th Cir. 1955), cert. den., 350 U.S. 882, and cases there cited. Bank deposits proof corroborated specific items in Canton v. United States, 226 F.2d 313 (8th Cir. 1955), cert. den., 350 U.S. 965; United States v. Lacob, 416 F.2d 756 (7th Cir. 1969), cert. den., 369 U.S. 1059, rehearing den., 397 U.S. 1003; United States v. Rifkin, 451 F.2d 149 (2nd Cir. 1971); net worth proof corroborated specific items in Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); United States v. Meriwether, 440 F.2d 753 (5th Cir. 1971); and in United States v.

Cramer, et al., 447 F.2d 210 (2nd Cir. 1971), cert. den., 404 U.S. 1024; net worth proof corroborated bank deposit proof in United States v. Doyle, supra; United States v. Mathews, 335 F.Supp 157 (W.D. Pa. 1971), appeal dismissed, 463 F.2d 182 (3d Cir.), cert. den., ____ U.S. ____ (1972). Although the burden of proof for each element of the crime of tax evasion is "beyond a reasonable doubt", United States v. Tolbert, Sr., 406 F.2d 81 (7th Cir. 1969); United States v. Brown, Jr., 446 F.2d 119 (10th Cir. 1971); United States v. Ramsdell, supra, corroboration evidence need not be proved beyond a reasonable doubt. United States v. Parenti, 326 F.Supp. 717 (E.D. Pa. 1971). It has also been held that consistency in the accounting for deductions is not necessary so that deductions allowable under a bank deposit theory of proof are not binding and need not be allowed in a specific items theory of proof for the same years involved. Canton v. United States, supra. It is also possible to employ one theory of proof such as the net worth method corroborated by specific items in one prosecution year followed by another theory of proof such as the specific items theory alone in the next prosecution year. Chinn v. United States, 228 F.2d 151 (4th Cir. 1955), and see United States v. Cindrich, 241 F.2d 54 (3rd Cir. 1956) and United States v. Dawson, 400 F.2d 194 (2nd Cir. 1968), cert. den., 393 U.S. 1023. In any event, proof of additional tax owning is the element of primary importance on which the courts concentrate.

Although a method of accounting (cash or accrual) other than that used by the taxpayer may be employed in civil cases under the provisions of Section 446, Internal Revenue Code of 1954 (when the method employed by taxpayer does not clearly reflect income), showing criminal responsibility can "only be accomplished by adopting and consistently applying the taxpayer's own method of accounting." Morrison v. United States, 270 F.2d 1 (4th Cir. 1959), cert. den., 361 U.S. 894; United States v. Vardine, 305 F.2d 60 (2nd Cir. 1962); and Fowler v. United States, 352 F.2d 100 (8th Cir. 1955), cert. den., 383 U.S. 907. Some confusion on this point has arisen from dictum in McKenna v. United States, 232 F.2d 431 (8th Cir. 1956), and reference therein to Section 41, Internal Revenue Code of 1939 (Section 446, Internal Revenue Code of 1954). However, on its facts and actual holding McKenna is consistent with Morrison and Vardine. The purpose of a Section 7201, Internal Revenue Code, prosecution is to show what taxpayer was "attempting to do. As the court said in the Vardine case, supra, p. 64, this is possible only "if the figures used in computing net worth are keyed to the taxpayer's method of accounting. If a taxpayer disregards his accounts payable in reporting income on his annual tax return, i.e., reports as a cash basis taxpayer, then the Government in computing his net worth in order to check the income reported on his tax return must also disregard these amounts. Whether this computation reflects net worth as accountants define it * * * is irrelevant." See also Clark v. United States, 211 F.2d 100, 106 (8th Cir. 1954), cert. den., 348 U.S. 911.

The same reasoning would apply, of course, to specific items or bank deposits cases, as a comparison of the accrual basis to the cash basis is inapposite (and vice versa). For example, the usual bank deposits computation (a cash method in its simple form) may well reflect, in part, current receipts from sales reported in a prior year by the accrual method. However, both the net worth method and the bank deposits method may be made comparable to an accrual basis taxpayer's method of accounting if accounts receivable and payable and inventory figures are available.

One should carefully distinguish between method of proof (direct or circumstantial evidence) and method or basis of accounting (cash or accrual). There were a number of decisions in the lower courts that Section 41, Internal Revenue Code of 1939 (Section 446, Internal Revenue Code of 1954), which limited the authority of the Government to deviate from the taxpayer's method of accounting, confined the net worth method to situations in which the taxpayer's books were lacking or inadequate. The Supreme Court expressly overruled this line of cases in Holland v. United States, supra, p. 131, pointing out that the net worth method is not a method of accounting--it is a method of proof, a measuring device to establish income and to test the validity of the reported income; that the cited section requiring income to be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer" was not intended as "a set of blinders which prevents the Government from looking beyond the self-serving declarations in a taxpayer's books." Nevertheless, there are still cases saying that the net worth method is only properly used in cases where the taxpayer's books are lacking or inadequate. United States v. Mancuso, 378 F.2d 612, modified other grounds, 387 F.2d 376 (4th Cir. 1967), cert. den., 390 U.S. 955; United States v. Dawson, supra; United States v. Dong, 293 F.Supp. 1249 (D. Ariz.), affirmed 436 F.2d 1237 (9th Cir. 1971). As in other fields of criminal law, the offense may be shown by either direct or circumstantial evidence, or both, and there is no sine qua non for the use of net worth or bank deposits proof.

B. Direct Evidence.

Little need be said about the theories of proving understatement of income and, hence, understatement of tax, by direct evidence. The real problem in the use of direct evidence is to demonstrate convincingly the mechanics by which specific net income was omitted from the defendant's returns. For example, if defendant's books were used to provide his return figures, the returns would be introduced and an agent would testify as to his examination of the books and that they were in substantial agreement with the returns. Specific sales or transactions, known to the Government to have been omitted, would next be proved, generally by third-party testimony and records. E.g., Cohen v. United States, 363 F.2d 321 (5th Cir. 1966), cert. den., 385 U.S. 957; and Hill v. United States, 363 F.2d 176 (5th Cir. 1966). Testimony by the Revenue Agent or Special Agent would establish that these specific sales were not recorded. It would necessarily follow that those sales were not reported. A new gross income figure could then be determined, the taxable income computed, and the correct tax liability determined by the Government's expert witness, e.g., Turner v. United States, 222 F.2d 926 (4th Cir. 1955), cert. den., 350 U.S. 831.

Here it is appropriate to note, as stated in Leeby v. United States, 192 F.2d 331 (8th Cir. 1951), that tax evasion prosecutions are not proceedings to collect the amount of the tax alleged to be due, and it is not necessary to determine the exact amount of the defendant's income for the years in question. All that the Government need show by either direct or circumstantial evidence is that a substantial amount was omitted from reported income. To the same effect see United States v. Johnson, 319 U.S. 503 (1943), rehearing den., 320 U.S. 808; United States v. Ragen, 314 U.S. 513 (1942); Rose v. United States, 128 F.2d 622 (10th Cir. 1942), cert. den., 317 U.S. 651; United States v. Schenck, 126 F.2d 702 (2nd Cir. 1942), cert. den., sub nom. Moskowitz v. United States, 316 U.S. 705 (1942); Tinkoff v. United States, supra; Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), cert. den., 297 U.S. 709; Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), cert. den., 338 U.S. 860; United States v. Rossi, 66-2 U.S.T.C., par. 9649 (W.D. N.Y. 1965); United States v. Marcus, 401 F.2d 563 (2nd Cir. 1968), cert. den., 393 U.S. 1023; United States v. Stein, 437 F.2d 775 (7th Cir. 1971), cert. den., 403 U.S. 905; and e.g., United States v. Callanan, 450 F.2d 145 (4th Cir. 1971).

For a discussion of what may be considered "substantial" see United States v. Nunan, 236 F.2d 576 (2nd Cir. 1956), cert. den., 353 U.S. 912; Canaday v. United States, 354 F.2d 849 (8th Cir. 1966). Compare United States v. Cindrich, 140 F.Supp. 356 (W.D. Pa.), aff'd., 241 F.2d 54 (3rd Cir. 1956), questioning the necessity for a "substantial" understatement of taxable income in a direct evidence case, vis-a-vis a circumstantial case the results of which can only be a reasonably accurate approximation. The understatement proved should not fall so far short of the amount stated in the indictment as to give rise to the claim that the indictment figures were so inflated as to be prejudicially inflaming to the jury. See Steinberg v. United States, 14 F.2d 564 (2nd Cir. 1926); and United States v. Achilli, supra.

In order for direct evidence to be effective to establish further tax liability, it must be such that it permits a finding by the jury that taxable income is understated. The tax is, of course, computed only on the taxable income. In case, therefore, the Government has evidence of specific items of income omitted from tax returns, it must at the same time adduce proof of deductions, business costs and expenses, and exemptions. In most cases the defendant's own assertions as to these in his returns are available to prove the statutory offsets to gross income. The inference is that normally a taxpayer will claim in his return all that is in his favor. Barrow v. United States, 171 F.2d 286 (5th Cir. 1948); United States v. Hornstein, 176 F.2d 217 (7th Cir. 1949); United States v. Link, 202 F.2d 592 (3rd Cir. 1953); Clark v. United States, supra; United States v. Bender, 218 F.2d 869 (7th Cir. 1955), cert. den., 349 U.S. 920; Siravo v. United States, 377 F.2d 469 (1st Cir. 1967). Some investigations involve a complete reconstruction of gross income, expenses, etc., by third-party records and testimony or by discovering accurate records of the defendant. This provides a proper basis for determining the taxes owing. When the Government relies chiefly on the deductible items claimed on the defendant's returns, it should elicit testimony from the examining agents to establish (if such be the case) that their investigation revealed no other allowable deductions. The basis for disallowance of those claimed by the defendant at the trial may be brought out in rebuttal. And properly allowable and provable additional deductions discovered by the agents should in fairness be conceded by proof in the Government's case in chief.

The extent to which the Government should investigate "leads" with respect to deductions is discussed in United States v. Shavin, 320 F.2d 308 (7th Cir. 1963), cert. den., 375 U.S. 944. Unfortunately, however, the court seems to have misconstrued Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. den., 370 U.S. 919, as holding that the Government should investigate "claimed deductions" in a net worth case. Actually, in Beck, the court was considering whether the evidence of unreported expense money was sufficient to support the conviction on counts which had, otherwise, to be reversed in light of James v. United States, 366 U.S. 213 (1961), holding willfulness could not be shown for failure to report embezzled funds. Although it is true that Beck, supra, was primarily a net worth case, the expense money aspect was specific items. Note United States v. Suskin, 450 F.2d 591 (2nd Cir. 1971) in which the court said the "leads" doctrine was misapplied by the lower court because the method of proof was by specific items. However, it was considered harmless error. See also United States v. Vardine, supra.

A fraudulent understatement of taxable income and tax can, of course, result from the taking of false deductions. United States v. Ragen, supra, (corporate profit distributions falsely expensed as "commission"); United States v. Kelley, 105 F.2d 912 (2nd Cir. 1939) (grossly padded circus property inventory used to inflate depreciation allowance); Wagner v. United States, 118 F.2d 801 (9th Cir. 1941), cert. den., 314 U.S. 622 (inflated depreciation); United States v. Schenck, supra (grossly exaggerated entertainment and travel expense deductions, fictitious stock sales losses); United States v. Lange, 161 F.2d 699 (7th Cir. 1947) (payroll paddings; employee expense accounts and excess "kicked-back"; fictitious expenses); United States v. Borgis, 182 F.2d 274 (7th Cir. 1950), and United States v. Lennon, 246 F.2d 24 (2nd Cir. 1957), cert. den., 355 U.S. 836 (fictitious dependency exemptions); United States v. Herskovitz, 209 F.2d 881 (2nd Cir. 1954) (fictitious personal deductions for contributions, taxes, auto expense, etc.); Janko v. United States, 281 F.2d 156 (8th Cir. 1960), rev'd. on other grounds, 366 U.S. 716 (deductions for children actually in custody of estranged wife); Eggleton v. United States, 227 F.2d 493 (6th Cir. 1955), cert. den., 352 U.S. 826 (overstating costs on second hand cars sold by used car dealer); United States v. Spinney, 264 F.Supp. 774, aff'd., 385 F.2d 908 (1st Cir. 1967), cert. den., 390 U.S. 921 (dentist, overstated dental supplies deductions; fictitious entertainment deductions); United States v. Bagdasian, 398 F.2d 971 (4th Cir. 1968) (false self-employment deductions); United States v. Potts, 321 F.Supp. 717 (E.D. Wisc.), aff'd., 459 F.2d 412 (7th Cir. 1972) (overstated expenses for supplies); United States v. Berger, 325 F.Supp. 1297 (S.D. N.Y.), aff'd., 456 F.2d 1349 (2nd Cir. 1972) (parent corporation improperly deducted expenses of a subsidiary); United States v. Coblentz, 453 F.2d 503 (2nd Cir. 1972, cert. den., 406

U.S. 918 (falsely as unmarried head of household when actually married)). Charges of attempted evasion resting on false deductions would ordinarily be proved by direct evidence. The only real difficulty inheres in those cases in which the Government must employ circumstantial evidence to prove a negative, i.e., that the deductible expenses were not incurred at all or not in the amounts claimed. Under the Ragen opinion, supre, however, the question whether defendant's returns claimed unreasonable amounts may properly be decided by a jury. This would logically allow the Government to proceed on circumstantial evidence to prove unreasonableness of claimed expenses, i.e., a negative fact of somewhat nebulous quality. See also the expense money aspect of Beck, supre. In United States v. Cohen, 363 F. 2d 321 (5th Cir. 1966), cert. den., 385 U.S. 957, the Government successfully used circumstantial proof of a negative, to refute a defense claim of a partnership and a split of receipts among the alleged partners. Of note in this case, is the fact that the defendant had a written receipt from one of his partners.

As already noted, a specific item case if often corroborated by net worth or bank deposit proof to support the understatement of income alleged in the indictment. A recent development has been the contention by the taxpayers that the use of net worth increases in corroboration of specific item proof constitutes prejudicial error. This danger is noted in Brown v. United States, 224 F. 2d 845 (6th Cir. 1955), cert. den., 350 U.S. 912, where the court said that, in a case in which the issue of evasion may be close upon balanced direct evidence, prejudice might be perceived in the introduction of a net worth statement subject to criticism for infirmities therein. Cases following Canton v. United States, supra; Eggleton v. United States, supra; and McKenna v. United States, supra; United States v. Cramer, et al., supra, clearly allow net worth proof in specific item cases and should meet the taxpayer's contentions.

C. Circumstantial Evidence.

Because tax evasion cases involved the financial affairs of individuals and corporations, the theories of circumstantial proof have evolved very naturally from the everyday experience of the business world. Lending institutions daily risk large sums on the basis of borrower's financial statements; lines of credit are entended or curtailed, depending on the results of periodic comparisons of such financial statements. The so-called "net worth" method of proof has it logical genesis in this sound test of business weel-being. Similarly, the description of an individual as a "regular depositor" is indicative of the common practice of using bank deposit activity as an index of earning capacity; hence, the "bank deposit" theory of proof has been sanctioned. The net worth method (which encompasses the "expenditures" method as the reverse side of the same coin) and the bank deposits method are the almost exclusive circumstantial evidence theories in evasion cases. Occasionally the markup of a merchandising business can be sufficiently proved to permit a reconstruction of gross income from volume of business. Blauner v. United States, 293 F 2d 723 (8th Cir. 1961), cert. den., 368 U.S. 931. But, generally, other devices of indirect proof are found inadequate for criminal cases because one or more premises for inferring receipt of additional taxable income is not susceptible of proof. There is no prerequisite to the use of circumstantial evidence in tax cases. The Government is free to use all legal evidence available to it. Holland v. United States, supra, p. 132. It may, therefore, resort to net worth without first proving the defendant's books and records to be inadequate. By the same token it may resort to such proof without a prior determination by the Revenue Service under Section 41, Internal Revenue Code of 1939 (Section 446 of the 1954 Code), that the defendant's accounting methods do not clearly reflect income. United States v. Achilli, supra. Nevertheless, be aware that some cases still imply that the net worth method is only proper in cases where the

taxpayer's books are inadequate. United States v. Mancuso, supra; United States v. Dawson, supra; United States v. Dong, supra. When measured against the standard of its effectiveness to overcome "reasonable doubt", circumstantial evidence "is intrinsically no different from testimonial evidence." Holland v. United States, supra, p. 140.

1. Erroneous "Reasonable Hypothesis" Rule.

On occasion in the past the trial courts have instructed juries that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. In the Holland case, the Supreme Court said (pp. 139-140) that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is "confusing and incorrect." The refusal to give such an instruction was held not to be error in Strangway v. United States, 312 F.2d 283 (9th Cir. 1963), cert. den., 373 U.S. 903; and Armstrong v. United States, 327 F.2d 189 (9th Cir. 1964); United States v. Tolbert, Sr., supra; United States v. Lodwick, Jr., 410 F.2d 1202 (8th Cir. 1969), cert. den., 396 U.S. 841; United States v. Merrick, 464 F.2d 1087 (10th Cir. 1972), cert. den., 11/72. In accord: United States v. Ostendorff, 371 F.2d 729 (4th Cir. 1967), cert. den., 386 U.S. 982.

2. The Net Worth Method.

The term "net worth", as here used means the difference between the actual cost-of-acquisition value of a "person's" assets and the liabilities at any given date (in tax cases, at the beginning or end of a tax year). Holland v. United States, supra, p. 125. The simple theory of the use of net worth as a method of proof is that if a taxpayer realizes during a particular year an increase in net worth, which is not attributable to gifts, inheritances, or other nontaxable sources, the increase constitutes a measure of taxable income. If the increase in net worth substantially exceeds reported taxable income, an inference is justified that the taxpayer has received income which he failed to report. The validity of this evidentiary theory has been universally and finally approved in principle by the federal appellate courts. Holland v. United States, supra; Friedberg v. United States, 348 U.S. 142 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Calderon, 348 U.S. 160 (1954); United States v. Johnson, supra, p. 517; United States v. Norris, 205 F.2d 828 (2nd Cir. 1953); United States v. Vassallo, 181 F.2d 1006 (3rd Cir. 1950); Bell v. United States, 185 F.2d 302 (4th Cir. 1950), cert. den., 340 U.S. 930; Sasser v. United States, 208 F.2d 535 (5th Cir. 1953); Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951); United States v. Chapman, 168 F.2d 997 (7th Cir. 1948), cert. den., 335 U.S. 853; Mitchell v. United States, 208 F.2d 854 (8th Cir. 1954), cert. den., 347 U.S. 1012; Barcott v. United States, 169 F.2d 929 (9th Cir. 1948), cert. den., 336 U.S. 912; Hooper v. United States, 216 F.2d 684 (10th Cir. 1954). And more recently, United States v. Rossi, supra; Whitfield v. United States, 383 F.2d 142 (9th Cir. 1967); Feichtmeir v. United States, supra; United States v. Balistrieri, 403 F.2d 474 (7th Cir. 1968), cert. den., 394 U.S. 985, vacated and remanded on other grounds, 395 U.S. 710 (1969); United States v. Dong, supra; United States v. Miriani, 310 F.Supp. 217 (E.D. Mich.), aff'd., 422 F.2d 150 (6th Cir. 1970), cert. den., 393 U.S. 910; United States v. Parenti, supra; United States v. Potts, supra; United States v. Carter, 462 F.2d 1252 (6th Cir. 1972), cert. den., 11/72; and e.g., United States v. Tolbert, Sr., supra.

In United States v. Johnson, supra, the Supreme Court referred to the method of proof as the "expenditures method" because the Government's computations treated all of the defendant's nondeductible disbursements as expenditures without regard to whether they increased his net worth. Actually, the bulk of the defendant's expenditures in that case represented investments in realty. If these investments had been assembled to reflect annual net worth increases instead of the continuous outflow of money, the result would have been the same, Such "payouts" as were dissipated in the form of nondeductible living expense and tax payments, and not put into

continuing assets, were properly totted up in the Johnson case and may properly be added, in strictly orthodox net worth cases, to the annual net worth increases to reflect even more fully the defendant's income. See also United States v. Irving, 241 F.2d 306 (7th Cir. 1957), cert. den., 353 U.S. 983; Holland v. United States, supra, p. 125; United States v. Penosi, 452 F.2d 217 (5th Cir. 1971) 405 U.S. 1065 (1972); United States v. Newman, 72-2 U.S.T.C., par. 9719 (5th Cir. 1972). In the Holland case and in Costello v. United States, 350 U.S. 359 (1956), the Supreme Court classed the Johnson case, supra, as a net worth case. Because of this and because the net worth method has been authoritatively approved and is more easily understood, it is considered desirable that cases investigated on the "expenditures" basis should, whenever possible, be converted to and tried as net worth cases. The underlying evidence and essentials of proof are the same under either theory. The conversion to net worth would simply be accomplished by translating the available evidence into annual net worth increases plus annual nondeductible expenditures. The agents would have to accomplish this by their testimony and in their charts and summaries. This would avoid some of the confusing concepts and terminology that are injected into the exposition of "expenditures" theory cases (e.g., "flow of funds analysis", "available currency analysis", or "cash receipts and disbursements analysis").

Normally, the Government eliminates estimated values and estimated nondeductible expenditures from net worth expenditures computations. In some cases, it has appeared proper to include some palpably minimum estimated living expense figures, e.g., Dawley v. United States, 186 F.2d 978 (4th Cir. 1951); United States v. Glazer, 110 F.Supp. 558 (E.D. Mo. 1952), appeal dismissed on motion of counsel for both parties 205 F.2d 421 (8th Cir. 1953).

a. Opening Net Worth.—It is essential to make out a prima facie case for the Government to establish the defendant's net worth at the beginning of the tax year (or sequence of years) in question with reasonable accuracy. Absolute accuracy is impossible but the Government's evidence should show that opening net worth includes all assets on hand at the outset, including undeposited cash-on-hand, with reasonable certainty; otherwise the comparison with net worth at the end of the year might indicate an illusory increase. Holland v. United States, supra; Friedberg v. United States, supra; Sasser v. United States, supra, p. 537; Bell v. United States, supra, p. 308; Brodella v. United States, 184 F.2d 823 (6th Cir. 1950); United States v. Rossi, supra; Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968), aff'd., 394 U.S. 316 (1969); United States v. Dong, supra; Agoranos v. United States, 409 F.2d 833 (5th Cir. 1969), cert. den., 396 U.S. 824; United States v. Potts, supra; United States v. Parenti, supra; United States v. Penosi, 452 F.2d 217 (5th Cir. 1972) cert. den., 405 U.S. 1065 (1972); United States v. Carter, supra. If the defendant had other undiscovered assets at the starting point, his later "visible" increases could well be attributed to the utilization of funds derived from such assets. Thus, the proof must show assets affirmatively and provide a solid evidentiary basis for the conclusion that there are no more. If the evidence does not reasonably preclude the existence of other beginning point assets, an essential ingredient of a prima facie case is lacking. Bryan v. United States, 175 F.2d 223 (5th Cir. 1949), aff'd. on other grounds, 338 U.S. 552 (1950); United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949); Dupree v. United States, 218 F.2d 781 (5th Cir. 1955), rehearing den., 220 F.2d 748 (1955). Thus, for example, the omission of an asset from opening net worth which reduced the understatement of income by 80 percent for the first prosecution year was held prejudicial error in United States v. Achilli, supra, but compare Lutfy v. United States, 230 F.2d 643 (9th Cir. 1956).

Of all the categories of beginning assets, the cash-on-hand item is the most difficult of proof and is, therefore, almost universally claimed by defendants to exist as a secret board of sufficient size to account for the bulge in their net worth. The existence or non-existence of cash-on-hand at the starting point is obviously a jury question. United States v. Ford, 237 F.2d 57 (2nd Cir. 1956), cert. granted, 352 U.S. 100, judgement vacated and remanded, 355 U.S. 38; McGarry v. United States, 288 F.2d 862 (1st Cir. 1967), cert. den., 394 U.S. 921; Hayes v. United States, 407 F.2d 189 (5th Cir. 1969), cert. dismissed, 395 U.S. 972; United States v. Carter, supra,

Admissions made to the investigating agents are most effective to pin down the cash assets; the admissibility of such admissions was resolved in Smith v. United States, 348 U.S. 147 (1954); and United States v. Calderon, supra; see also, Bell v. United States, supra; Sasser v. United States, supra; McGarry v. United States, supra; Hayes v. United States, supra. The failure to question a taxpayer as to cash-on-hand does not invalidate net worth proof if the taxpayer has made no reference to his cash position. Kampmeyer v. United States, 227 F.2d 313 (8th Cir. 1955). Often some event such as a bankruptcy judgment will provide a point prior to the start of the first year named in the indictment from which net worth can be worked forward to the technical beginning point. United States v. Vassallo, supra, involved proof of a bankruptcy in 1940. The Court of Appeals opinion, however, does not detail this evidence. See also United States v. Schipani, 362 F.2d 825 (2nd Cir. 1966), vacated and remanded on other grounds, 385 U.S. 372 (1966), where it was held that the defendant's opening net worth may properly be based on a statement defendant made to prison officials regarding his assets at that time.

Financial statements filed by the defendant with lending institutions prior to the beginning point are a sound base for a reconstruction of possible available cash. Friedberg v. United States, supra; Bateman v. United States, 212 F.2d 61 (9th Cir. 1954); Hooper v. United States, supra; United States v. Potson, 171 F.2d 495 (7th Cir. 1948); United States v. Norris, supra; United States v. Tolbert, Sr., supra. Revenue Service files often contain statements and agreements made in earlier inquiries into the tax affairs of defendants. Banks v. United States, 204 F.2d 666 (8th Cir. 1953), judgment vacated and remanded, 348 U.S. 905, reaffirmed, 223 F.2d 884 (8th Cir. 1955), cert. den., 350 U.S. 986; Warring v. United States, 222 F.2d 906 (4th Cir. 1955), cert den., 350 U.S. 861. From these, from income filing histories, and from financial histories showing frequent borrowings, foreclosures, and the like, derived from third-party sources and from the taxpayer, it is possible to adduce evidence which will constitute sufficient proof of no appreciable cash-on-hand. Holland v. United States, supra (financial history from prior tax returns, prior indebtedness, compromise of overdue debt, avoidance of bankruptcy); Smith v. United States, supra; Schuermann v. United States, 174 F.2d 397 (8th Cir. 1949), cert. den., 338 U.S. 831, rehearing den., 338 U.S. 881; Leeby v. United States, supra; Mitchell v. United States, supra; Hooper v. United States, supra; United States v. Tolbert, Sr., supra (prior tax return history); United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941), cert. den., 315 U.S. 800, rehearing den., 315 U.S. 828 (prior tax return history, pre- and post-offense admissions); Barcott v. United States, supra (sold dividend paying stock to discharge obligation, installment buying); Gariepy v. United States, supra (medical student, internship, history of prior low earnings and indebtedness); Remmer v. United States, 205 F.2d 277 (9th Cir. 1953), judgment vacated and remanded, 347 U.S. 227 (1954), reaffirmed, 222 F.2d 720 (9th Cir. 1955), remanded on other grounds, 350 U.S. 377 (1956) (seven-year-old debt paid in first prosecution year); United States v. Caserta, 199 F.2d 905 (3rd Cir. 1952) (no prior tax returns filed); United States v. Chapman, supra (defendant's book entries as to cost prior tax history); McFee v. United States, 206 F.2d 872 (9th Cir. 1953), judgment vacated and remanded, 348 U.S. 905, reaffirmed, 221 F.2d 807 (9th Cir. 1955), cert. den., 350 U.S. 825 (history of prior low earnings and expenditures, checks returned marked insufficient funds, prior tax return history); United States v. Balistrieri, supra (net worth statement signed by taxpayer and submitted to state department of taxation); Hayes v. United States, supra (admissions of taxpayer's accountant who had power-of-attorney for taxpayer). A starting point sufficient to support a conviction and overcome a cash hoard contention was based upon prior returns, assessments paid, and reports of financial condition filed with the parole board in Smith v. United States, 236 F.2d 260 (8th Cir. 1956), cert. den., 352 U.S. 909, rehearing den., 353 U.S. 989. Another fruitful source of starting point information has been the work sheets of the taxpayer's accountant obtainable because communications between an accountant and his client are not privileged. Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), cert. den., 346 U.S. 864. This is true in a federal prosecution even though the state has created a statutory privilege. United States v. Jaskiewicz, 272 F. Supp. 214 (E.D.Pa. 1967). United States v. Balistrieri, supra. However, if the accountant's workpapers are lawfully in the possession of the taxpayer, their production has been refused. In the Matter of House, 144 F.Supp. 95 (N.D. Cal. 1956). Compare Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964), cert. den., 379 U.S. 967, a civil case, in which the taxpayer's attorney

was ordered to comply with an Internal Revenue Service summons for production of an accountant's workpapers. The accountant had given the papers to the attorney for examination, and had requested their return before the summons was served. The court reasoned that since neither the attorney, nor his client had any right to retain the workpapers, there would be no violation of the privilege against self-incrimination to require their production. See also Couch v. United States, 409 U.S. 322 (1973), in which the Supreme Court affirmed enforcement of an Internal Revenue summons issued by a special agent to the taxpayer's accountant, finding no violation of the taxpayer's privilege against self-incrimination. An example of a financial history which was too remote and an inadequate filing history is contained in United States v. Calderon, supra; see also Vloutis v. United States, 219 F.2d 782 (5th Cir. 1955), as to the ineffectiveness of a history of year-end bank balances to demonstrate a lack of cash accumulations.

Proof of other beginning point assets is usually easily produced in the form of bank balance records, county real estate records, brokerage records, Bureau of Public Debt records as to Government bonds, inventory and depreciable asset data from returns. These are what may be termed "visible assets" and are ascertainable through a thorough investigation. The New York Appellate Division now requires certain attorneys to file financial statements. It has been held that once filed, these statements become the property of the Division, and may be inspected by the Internal Revenue Service and used in prosecutions. United States v. Silverman, 311 F. Supp. 485 (S.D. N.Y.), aff'd., 499 F.2d 1341 (2nd Cir. 1971), cert. den., 405 U.S. 918.

In Holland v. United States, supra, p. 127, and pp. 135-136, the Supreme Court, in effect, noted that the Government's investigation should follow up obvious "leads" or explanations offered by the taxpayer; that failure to do so might justify a trial court in assuming the truth of an explanation, e.g., Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); United States v. Vardine, supra. Conversely, the court said, at p. 138, that "where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant." See also Talik v. United States, 340 F.2d 138 (9th Cir. 1965); Feichtmeir v. United States, supra; United States v. Tolbert, Sr., supra; United States v. Potts, supra; United States v. Carter, supra. The Government prosecutor should, accordingly, satisfy himself that the taxpayer's contentions have been investigated. See, e.g., Warring v. United States, supra. It is frequently effective to elicit testimony from the agents as to the defense explanations and then refute those explanations in the case-in-chief. This may prove to be the most practical way to establish the starting point. See Gariepy v. United States, supra; United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959), cert. den., 360 U.S. 918. And, given an explanation, the Government need not negate other possibilities, or at least need not concentrate on such negation. See further discussion or "leads" on p. 78, infra.

In Merritt v. United States, 327 F.2d 820 (5th Cir. 1964), the court reversed the conviction because the Special Agent admitted on cross-examination that he had found other assets which were not included in the net worth computations. The court said that the defendant is not required to substantiate the existence of assets uncovered by the Government in its own investigation.

b. Equation of Net Worth Increases to Taxable Income.—The Supreme Court speaks in the Holland case, supra, at pp. 126-128, of "assumptions" implicit in the net worth theory of proof. It is the Department's position that only logical inferences are relied upon to support the conclusion that the defendant has unreported taxable income. The net result of the Holland opinion is to reassert the safeguards already embodied in the formula, to foreclose "assumptions", and to confirm the position of the Government. Specifically, the court said, "* * * the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income." The court noted, as a frailty of this assumption, that the increases could result from nontaxable "gifts, inheritances, loans and the like." Id., p. 127. As a method of proof, however, the net worth theory has always included as an essential component the requirement that the Government's computation must eliminate from the unexplained increases all nontaxable accretions to the taxpayer's wealth.

This may be accomplished by proving the non-receipt during the prosecution years of such forms of wealth as gifts and inheritances by the taxpayer's admissions, or by documentary or third-party testimonial proof of the size and point of time of estates of deceased parents and relatives, or by direct or circumstantial refutation of asserted claim of gifts and inheritances, e.g., Gariepy v. United States, supra, p. 463; United States v. Adonis, 221 F.2d 717 (3rd Cir. 1955); United States v. Holovachka, 314 F. 2d 345 (7th Cir. 1963), cert. den., 374 U.S. 809, rehearing den. 374 U.S. 859; Whitfield v. United States, supra; Feichtmeir v. United States, supra; United States v. Carter, supra. Here again, as in the case of cash on hand, the proffer by the taxpayer of an explanation not ascribing any part of the increase to nontaxable receipts in the year of increase may properly be relied upon to support the inference that no such receipts were received.

The Supreme Court in the Holland case, supra, pp. 137-138, stated that the Government's proof of "a likely [taxable] source, from which the jury could reasonably find that the net worth increases sprang", is sufficient to carry with it the negation of possible non-taxable sources not otherwise expressly claimed and refuted.

Part of the proof generally adduced to accomplish the logical equation of net worth increases to current taxable income is evidence of a likely taxable source, e.g., Holland v. United States, supra, pp. 137-138; United States v. Johnson, supra; United States v. Chapman, supra; Schuermann v. United States, supra; Jelaza v. United States, 179 F.2d 202 (4th Cir. 1950); United States v. Rossi, supra; Whitfield v. United States, supra; Feichtmeir v. United States, supra; United States v. Jaskiewicz, supra; United States v. Dong, supra; United States v. Balistrieri, supra; United States v. Schipani, supra; United States v. Potts, supra; United States v. Parenti, supra; United States v. Penosi, supra. To open up a likely source, proof may be made that defendant is in an income producing business by direct evidence of a business and evidence lifting the "reported income" lid by establishing that defendant had no books (e.g., Smith v. United States, 348 U.S. 147, (1954); Feichtmeir v. United States, supra; United States v. Dong, supra) or that the books did not record all income (e.g., United States v. Calderon, supra, pp. 165-166), or that the defendant's business was one "with indeterminate possibilities". United States v. Costello, 221 F.2d 668 (2nd Cir. 1955), aff'd., 350 U.S. 359 (1956). If the books of an income producing business appear superficially to be complete, the likelihood that they are false and that the business had greater income, can, of course, be shown by circumstantial evidence going to the earning capacity of the business (e.g., Holland v. United States, supra, p. 137). As the examples, just cited will indicate, no distinction is made between legal and illegal businesses as possible sources. See also United States v. Potts, supra, in which the Government successfully contended that the defendant's likely source of income was from the evasion of taxes throughout the indictment years.

When the probably sources of the defendant's income are actually reported in full in the tax returns in question or are inherently limited, the equation of unexplained increases in wealth to taxable income is more difficult. It is felt, nonetheless, that these circumstances should not foreclose the establishment of a logically and factually complete prima facie case. It should only be necessary in such cases to proceed further than in the case of an "open" taxable source to adduce evidence negating all possible nontaxable sources, i.e., affirmatively to foreclose the possible receipt of gifts, inheritances, loans, and the like. The result to be sought is a set of circumstances from which the logical inference must be drawn that, absent any nontaxable source from which unexplained increases in net worth could have derived, it must have come from an unknown successfully concealed taxable source. It can be argued that this proposition is implicit in the Supreme Court's statement in the Holland case, supra, p. 137, to the effect that affirmative proof of source "carried with it the negations" of gifts, loans, inheritances, etc.; these, the defendants had urged, should also have been affirmatively refuted though never advanced by them as an explanation. The converse, affirmative negation of all reasonably possible and likely nontaxable sources, should carry with it the inference that the burgeoning increases came from some taxable source. The language of the Court of Appeals opinion in the Holland case, supra, 209 F.2d 516 (10th Cir. 1954), squares with this view. See also, Hooper v. United States, supra, and

United States v. Schipani, supra. In [Fred M.] Ford v. United States, 210 F.2d 313 (5th Cir. 1954), it was stated, in the case of a Chief of Police, that there was sufficient evidence that the defendant had opportunities to receive income from graft, but he must be presumed not to have done so. The court went on, however, "It was nevertheless within the jury's province to say whether the presumption had been overcome, or to infer that the defendant had some other source of income, from the testimony that the expenditures so far exceeded the available resources disclosed by the evidence, and from the evidence that such expenditures could not be accounted for by accumulated assets or by nontaxable receipts". (Emphasis added.) With the stressed words, this ruling is considered direct authority that affirmative proof of source is not essential to the net worth formula, provided nontaxable possibilities are negatived. And in United States v. Adonis, supra, it was held that successful refutation of claimed nontaxable sources was sufficient to support the conclusion that the increased wealth was taxable. And see Cohen v. United States, 363 F.2d 321 (5th Cir. 1966), cert. den., 385 U.S. 957. For similar logic in civil cases, see Ferris v. Commissioner, 317 F.2d 333 (2nd Cir. 1963); and Gatling v. Commissioner, 286 F.2d 139 (4th Cir. 1961). It would appear that to hold otherwise "would be tantamount to holding that skillful concealment is an invincible barrier to proof." United States v. Johnson, 319 U.S. 503 (1943).

The First Circuit is Massei v. United States, 241 F.2d 895 (1st Cir. 1957), reversed a conviction for the reason that affirmative proof of a likely source was lacking. On certiorari, the Supreme Court held that proof of a likely source is not indispensable, 355 U.S. 595 (1958). In a second case, United States v. Ford, supra, the Second Circuit held that the Government's proof precluded all possible non-taxable sources and the unexplained net worth increases could properly be found by the jury to have stemmed from some taxable source. The source suggested by other circumstantial proof was graft and the evidence was considered corroborative of the already inferable fact of some taxable source. The petitioner's death mooted further proceedings. See also United States v. Holovachka, supra. The Government need not prove the specific source of the income. Armstrong v. United States, supra.

Furthermore, when proof of a likely source is used, the Government is not also required to negate all possible nontaxable sources. Either is sufficient. United States v. Schipani, supra; United States v. Dong, supra; United States v. Potts, supra.

c. Net Worth Increases Taxable Income—The ultimate purpose of the net worth-expenditures method is to reach a reflection of taxable income from which to compute the corrected tax liability. Because of the elimination from the computation of nontaxable accretions and the inherent exclusion, by the method itself, of deductible expenditures, the result is equivalent to "taxable income." If the taxpayer itemized his personal deductions and contributions he should be allowed the full amount (unless fraudulent) plus any additional amounts disclosed by the investigation. This may be accomplished either by the exclusion in the method itself or by adding them on as expenditures and then deducting them. The advantage of the latter method is to demonstrate that the Government is allowing all deductions. The disadvantage is that it is a departure from the strict theory of adding only nondeductible expenditures to net worth increases. If, however, the taxpayer had taken the "standard deduction," he has had a hypothetically possible maximum $1,000 to spend out of reported adjusted gross income. Thus, this amount should be deducted from the net worth-expenditures computation before the corrected tax is computed. In the case of a taxpayer whose reported income was so low that it enabled him to use the optional tax table to compute his tax from "adjusted gross" income, the net worth-expenditures computation should be treated as "adjusted gross" income. The benefit of the standard deduction is, then, automatically received by use of the optional tax table.

d. Allocation of Increase Between Years—Each offense of attempted evasion must relate to a given tax year. When an increase is apparent over a number of years the problem arises as to which tax year or years to attribute the increase. Holland v. United States, supra. Obviously the purpose of starting point proof is to establish that subsequent increases in net worth did not

derive from pre-existing wealth. All that is thereafter required is to establish year-end net worth, in short, to break up a span-of-years increase into year-by-year increases. Each year-end then automatically becomes the starting point for the succeeding year. If this cannot be accomplished there is a fatal hiatus in the Government's proof. Almost always the break-down can be made. And if net worth proof is not the frontline of the Government's case, but is corroborative only, an unexplained span-of-years increase has effective corroborative weight. United States v. Calderon, supra, p. 168,

e. Husband and Wife Assets—In many net worth cases assets appear in the joint names of husband and wife, or the increases are in the form of assets held or expenditures made in the name of a defendant's spouse. In these instances and in the case wherein both the defendant and his or her spouse have independent income, it may be necessary to establish that the non-defendant spouse had no separate income, or that such income as he or she had did not account for the excessive net worth increase. As to the kind and quantum of proof, see Smith v. United States, 210 F.2d 496 (1st Cir. 1954), aff'd., 348 U.S. 147 (1954); O'Connor v. United States, 203 F.2d 301 (4th Cir. 1953); United States v. Costello, supra; Vloutis v. United States, supra. For wife's admissions made in husband's presence as his agent, see Peek v. United States, 321 F.2d 934 (9th Cir. 1963), cert. den., 376 U.S. 954; and United States v. Mackiewicz, et al., 274 F.Supp. 805 (D. Conn.), aff'd., 401 F.2d 219 (2nd Cir. 1968), cert. den., 393 U.S. 923. Compare United States v. Chikata, 427 F.2d 385 (9th Cir. 1970), where the court held that the wife's net worth was properly excluded because she had a vested right in community property; and United States v. Meriwether, supra, where the court reversed because the Government failed to include the wife's income in establishing the defendant's opening net worth.

f. Leads.—Holland v. United States, supra, requires either the checking of leads reasonably susceptible of being checked which, if true, would establish the taxpayer's innocence, or the presentation of evidence showing the implausibility of such leads. Most leads refer to cash hoards and courts have said that the following types of leads are not within the category of reasonable verification: (vague gambling winnings, oral claims to large bills in safes and deposit boxes). Mighell v. United States, 233 F.2d 731 (10th Cir. 1956), cert. den., 352 U.S. 832; (funds in "an old mail bag or an old iron pot"), Smith v. United States, 236 F.2d 260 (8th Cir. 1956), cert. den., 352 U.S. 909, rehearing den., 353 U.S. 989; (the taxpayer's son need not be questioned when he was in the Army and the taxpayer said he would not answer questions), Mighell v. United States, supra; (cash in a suitcase), Lewis v. United States, 227 F.2d 561 (9th Cir. 1955), cert. den., 350 U.S. 842; and (gifts from a great aunt which were vague), United States v. Ford, supra. The burden is to provide an effective negation of reasonable explanations. A sentence of conviction has been set aside when it was not shown that loans accounting for the net worth increases were beyond the range of resonable probability. United States v. Rully, 136 F.Supp. 881 (D. Conn. 1955). Compare United States v. Moody, 371 F.2d 688 (6th Cir. 1967), cert. den., 386 U.S. 1003, in which a lead to alleged loans was held adequately checked although not in impossible detail.

3. Bank Deposits.

In a consistent but small number of cases each year, the Government has, for lack of direct evidence, successfully resorted to the bank deposit method of proof to prove unreported income.

a. General.—There is no necessity to disprove the accuracy of taxpayer's books and records as a prerequisite to the use of this method. (Section 41 of the 1939 Code, and Section 446 of the 1954 Code.) Bostwick v. United States, 218 F.2d 790 (5th Cir. 1955), and Canton v. United States, supra. See also Holland v. United States, supra. If it can be proved that the taxpayer has a business or calling of a lucrative nature, and that during the taxable years involved

he made regular periodic deposits of money in bank accounts in his own name, or in accounts over which he exercised dominion and control, there is potent testimony that he has income, and if the annual total of such deposits exceeds exemptions and deductions, the balance represents taxable income. This basic rule for proving income from defendant's bank deposits was laid down in the leading case of Gleckman v. United States, supra, which sets forth the requisite elements necessary to establish income by the bank deposit method. See also Stinnet v. United States, 173 F.2d 129 (4th Cir. 1949), cert. den., 337 U.S. 957; United States v. Venuto, 182 F.2d 519 (3rd Cir. 1950); Beard v. United States, 222 F.2d 84 (4th Cir. 1955), cert. den., 350 U.S. 846, rehearing den., 350 U.S. 904; United States v. Mansfield, 381 F.2d 961 (7th Cir. 1967), cert. den., 398 U.S. 1015. Bank deposits proof alone will suffice to support a conviction, and is not a mere form of corroboration for other kinds of evidence. E.g., Holbrook v. United States, 216 F.2d 238 (5th Cir. 1954), cert. den., 349 U.S. 915. Nor must it be corroborated by another method of proof. United States v. Stein, supra. For an excellent explanation of this method of proof, see Percifield v. United States, 241 F.2d 225 (9th Cir. 1957), footnote 7, cited in Price v. United States, 335 F.2d 671 (5th Cir. 1964) (a civil fraud case).

To sustain the charge of willful attempted tax evation, the Government must show that the income was taxable. The fact that taxpayer has a business will support the inference that periodic deposits were business income and will tend to refute the usual defensive contention that the deposits in the prosecution years represented non-taxable gifts or inheritances, or funds dribbled into the bank account (or accounts) from prior accumulation of funds. Malone v. United States, 94 F.2d 281 (7th Cir. 1938), cert. den., 304 U.S. 562. See also United States v. Ramsdell, 450 F.2d 130 (10th Cir. 1971); United States v. Stein, supra.

To clinch the "equation" of bank deposits to taxable income, the Government should show that the deposits (1) were regularly and periodically made, (2) have the inherent appearance of business receipts, and (3) have been analyzed to eliminate from the annual sum of deposits all loans, redeposits, exchanges between accounts and non-income deposits that an investigation could reasonably be expected to ascertain. Of course, the dates of the deposits in a particular year then give rise to the inference that they are income for that year. From the sum of properly included deposits, so determined, must be allowed the taxpayer's business expenses, personal deductible expenses and his exemptions to arrive at a reasonably correct taxable income. E.g., Beard v. United States, supra. Comparison of this result with reported taxable income completes the demonstration of unreported income.

b. Regularity and Periodicity of Deposits.—The mere deposit of a sum of money in a bank does not alone show unreported income and tax. But consistent day-by-day, week-by-week, or month-by-month deposits are consistent with the orderly business practice of depositing current receipts. See Graves v. United States, 191 F.2d 579 (10th Cir. 1951). By way of contrast, occasional sporadic deposits might well represent merely a convenience for isolated checking or credit purposes. But irregular deposits are not necessarily ruled out; they may, if properly analyzed, be considered as income. United States v. Doyle, supra.

c. Inherent Appearance of Income.—The size and composition of the deposits are often highly and even completely persuasive that they are current taxable receipts. For example, deposit tickets may well show numerous small checks and the makers can testify directly that these checks are payments for merchandise or services purchased from the defendant. Absent deposit tickets, or in the case of currency deposits, the existence of consistently odd amounts (as opposed to round figures), the fluctuations in deposit amounts concomitant with generally known or proven seasonal variations in the defendant's business, and whether in small bills, checks, or coin all will be matters tending to indicate current receipts.

d. Analysis of Deposits.—The examining agents of the Revenue Service must make an analysis of the defendant's accounts and that analysis is essential to the Government's proof. Gleckman v. United States, supra; Kirsch v. United States, 174 F.2d 595 (8th Cir. 1949); United States v. Callahan, 450 F.2d 145 (4th Cir. 1971). Usually it is given by the Revenue Agent as the concluding Government witness. See Stinnett v. United States, supra. But in Greenberg v. United States, 295 F.2d 903 (1st Cir. 1961) the court reversed a conviction and held that testimony of the agent as to the purpose for which certain checks were issued was hearsay in nature and could be established only by the payees or third parties or records or admissions of parties. The analysis must demonstrate that the annual sum of deposits considered to be income has excluded loans received and deposited (ascertainable generally from the defendant's admissions or from a canvass of lending institutions), redeposits (ascertainable from the defendant and conceded as hypothetically possible from cash withdrawals not otherwise traceable, cf. United States v. Caserta, supra), transfers of funds between accounts (ascertainable from canceled checks and bank records), and non-income deposits (ascertainable from investigation of capital gains transactions of the defendant, examination of his possibilities to have inherited money, and his admissions as to gifts, inheritances and the like). Conversely, it will be fatal to the Government's case if the agents have not made "a reasonable effort" to eliminate all non-income deposits from their analysis and to refute defense explanations of non-income deposits. Kirsch v. United States, supra; but see Buttermore v. United States, supra, in which it was held that the trial court had considerable discretion in determining what was a reasonable effort to identify deposits and had there properly submitted the issue to the jury under appropriate instructions. And see also United States v. Doyle, supra, indicating this same liberal view when there is no evidence that deposits represent anything other than income. The importance of a thorough investigative analysis of deposits is reinforced by the statements of the Supreme Court as to the necessity for the Government to check out leads provided by the defendant. Holland v. United States, supra.

e. Deductions and Expenses.—The statutory off-sets to gross income (business expenses, deductible personal expenses, exemptions), can often be determined by an investigation of the defendant's books, or his cancelled checks. Holbrook v. United States, supra. Or, absent such proof, the Government may adopt the defendant's version of these deductions as set forth in his returns. See cases cited ante on this point in the discussion of direct evidence.

f. Starting Point.—Because the bank deposits method calls into play a different complex of inferences than does the "net worth" method, the Government is not required to establish a "starting point" in the sense that one must be established in a "net worth" case. The basic distinction between the two types of proof is that a net worth case rests upon inferences reasonably to be drawn from the annual increases in net worth, whereas in a bank deposits case there exists a record of every deposit in the form of bank ledger cards and deposit slips which are subject to investigation and analysis item by item. The character of the bank deposits proof inherently indicates the currency of income reflected in deposits. And the agent's analysis serves the same purpose (and may be as complete) as starting point proof in a net worth case, i.e., it excludes any non-income deposits out of pre-existing wealth.

III. MISCELLANEOUS DEFENSES

A. General.

From the nature of the elements of the principal revenue offenses, it will readily be seen that affirmative factual defenses will be concerned with either (1) disproving the commission of the prohibited act or failure to act, or (2) disproving the willful intent. Little discussion would seem to be required of these possibilities. Most of the available defenses on the merits are suggested in the discussions of the elements and theories of proof of particular violations. For example, the usual defense assertion of unclaimed deductions or prior cash hoard to offset omitted income are covered in Chapter II. A few "special" defenses do recur and are mentioned here.

B. Advice of Counsel.

If a defendent can establish that he, in good faith, relied and acted upon the advice of an attorney or accountant or other qualified advisor in doing or refraining from doing an act made criminal if "willfully" committed, he has made out a valid defense. United States v. Phillips, 217 F.2d 435 (7th Cir. 1954); Benetti v. United States, 97 F.2d 263 (9th Cir. 1938); United States v. McCormick, 67 F.2d 867 (2nd Cir. 1933), cert. den., 291 U.S. 662; Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929), 279 U.S. 873; United States v. Clayton-Kennedy, 2 F.Supp. 233 (D. Md. 1933); Bursten v. United States, 395 F.2d 976 (5th Cir. 1968); United States v. Platt, 435 F.2d 789 (2nd Cir. 1970). He is, therefore, entitled to offer evidence to that effect and to have the issue thus raised submitted to the jury in a proper charge. United States v. Phillips, supra; Haigler v. United States, 172 F.2d 986 (10th Cir. 1949); United States v. Platt, supra.

But there are important qualifications to the scope of the advice of defense counsel. Obviously, it is most damaging evidence against the defendant if he receives proper advice and does not follow it. Barrow v. United States, 171 F.2d 286 (5th Cir. 1948); Hill v. United States, 363 F.2d 176 (5th Cir. 1966); Frohmann v. United States, 380 F.2d 832 (8th Cir. 1967), cert. den., 389 U.S. 976; United States v. Berkman, 302 F.Supp. 1285, aff'd 418 F.2d 212 (2nd Cir. 1969), cert. den., 396 U.S. 1014. In United States v. McCormick, supra, the taxpayer, as a deputy city clerk, had "exacted" a substantial amount of money from bridegrooms in connection with his performance of marriage ceremonies and had failed to report it as income. The taxpayer sought to show that the failure to make any return of the funds was not willful because he had consulted a legislator and two lawyers, all of whom were deceased at the time of trial. The conviction was sustained despite the assertion of lack of intent. The court stated that there was no attempt to show that the taxpayer's method of securing the funds was disclosed to the persons whom he consulted as to whether they should be returned as income; that the disclosure must be full in order to refute intent; and that it is not required that the jury be charged that partial disclosure may be evidentiary as to lack of intent. Thus, it is essential to the defense of reliance on advice of counsel or accountant that all the facts concerning taxpayer's income be disclosed to the advisor. United States v. Cox, 348 F.2d 294 (6th Cir. 1965); United States v. Baldwin 307 F.2d 577 (7th Cir. 1962), cert. den., 371 U.S. 947; Bisno v. United States, 299 F.2d 711 (9th Cir. 1961), cert. den., 370 U.S. 952, reh. den., 371 U.S. 855; Bursten v. United States, supra; United States v. Pawlak, 72-2 USTC, par. 9646 (S.D. N.Y. 1972).

In Benetti v. United States, supra, the taxpayer claimed that he was advised by a deputy collector of internal revenue that he was not required to report income derived from his illegal business. It was held that under the circumstances it was proper for the trial court to charge the jury that there was a presumption of law that a public official entrusted with a public duty performs it in a lawful manner and that the presumption must be overcome by competent evidence. The court also sustained the charge to the jury to the effect that since the alleged advisor was dead

at the time of trial, the taxpayer's testimony concerning the advice given "must be received by you with caution and the closest scrutiny and weighed by you in the light of all the testimony and evidence in the case."

The case of United States v. Phillips, supra, held it was error to refuse an instruction submitting the advice of counsel defense to the jury even though the only evidence on the point consisted of a recitation elicited on cross-examination of Government witnesses of the defendant's self-serving explanations. The correctness of this decision might be questioned, but when confronted with this situation, Government counsel should be alert to seek an off-setting qualification in such a charge to the effect that self-serving hearsay declarations of the defendant must be weighed with greatest caution. See Benetti v. United States, supra; Reagan v. United States, 157 U.S. 301 (1895), and Bursten v. United States, supra.

C. Shift of Responsibility.

Akin to the advice of counsel defense is the defense that another person made out the returns or kept the books and was responsible for the omissions or wrong entries. This shift of responsibility, if successful, would negative willfulness. Pechenik v. United States, 236 F.2d 844 (3rd Cir. 1956); United States v. Melillo, 275 F.Supp. 314 (E.D. N.Y. 1967); United States v. Schwartz, 390 F.2d 1 (3rd Cir. 1968). It would, accordingly be error to refuse evidence to support the contention or, given such evidence in the records, to refuse a charge submitting the defense to the jury. Lurding v. United States, 179 F.2d 419 (6th Cir. 1950). The defense is fully refuted "when the Government has established, by direct proof or by circumstances, that the taxpayer knew or perhaps should have known that the return was false." Idem; and see the same, Lurding v. United States, 191 F.2d 921 (6th Cir. 1951), after retrial with a proper instruction; see also Vloubis v. United States, 219 F.2d 782 (5th Cir. 1955); Benham v. United States, 215 F.2d 472 (5th Cir. 1954); United States v. Albanese, 224 F.2d 879 (2nd Cir. 1955), cert. den., 350 U.S. 845; United States v. Allied Stevedoring Corp., 241 F.2d 925 (2nd Cir. 1957), cert. den., 353 U.S. 984; Blauner v. United States, 293 F.2d 723 (8th Cir. 1961), cert. den., 368 U.S. 931; cf. United States v. Bernard, 287 F.2d 715 (7th Cir. 1961), cert. den., 366 U.S. 961; Windisch v. United States, 295 F.2d 531 (5th Cir. 1961); Norwitt v. United States, 195 F.2d 127 (9th Cir. 1952), cert. den., 344 U.S. 817; United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert. den., 389. U.S. 905 United States v. Stone, 431 F.2d 1286 (5th Cir. 1970), cert. den., 401 U.S. 912; United States v. Ponder, Jr., 444 F.2d 816 (5th Cir. 1971), cert. den., 405 U.S. 918.

In Katz v. United States, 321 F.2d 7 (1st Cir. 1963), cert. den., 375 U.S. 903, where defendants executed their returns in blank and an accountant prepared them on the basis of information given him by only one of the defendants, the court held that the return is not short of willful falsity because the taxpayer chose to keep himself uninformed as to the full extent of its insufficiency or as to what exact figures should have been inserted. In accord: United States v. Harper, 458 F.2d 891 (7th Cir. 1971). In United States v. Magnus, 365 F.2d 1007 (2nd Cir. 1966), the government introduced the taxpayer's record of non-filing of both State and Federal returns in years prior to the indictment years and prior to the hiring of an account. This proof undercut the attempt to blame the accountant.

D. Avoidance Distinguished from Evasion.

In tax evasion cases, it is occasionally contented that the defendant's actions constituted an attempt legally to avoid taxes as opposed to an attempt to evade them. If the evidence established that defendant's purpose was to avoid taxes by legally accepted devices, he has a sound defense. There is nothing morally or legally wrong in attempting to avoid, but not to evade taxes and in proper and legal steps to do this. Nicola v. United States, 72 F.2d 780 (3rd Cir. 1934). See also

United States v. Isham 84 U.S. 496 (1973); Bullen v. Wisconsin, 240 U.S. 625 (1916); Superior Oil Co. v. Mississippi ex rel. Knox, 280 U.S. 390 (1930); Clapp v. Heiner, 51 F.2d 244 (3rd Cir. 1931). Such a defense would, of course, raise an issue of fact with respect to the charge of willfulness. An illegal device would provide convincing refutation. Cf. Barrow v. United States, supra. And the Government will rarely proceed in a case in which the question of avoidance is genuinely debatable.

E. Illegal Income.

Over the course of the past twenty-five years or more, gangsters, racketeers, blackmarketeers, swindlers and other sharp dealers have defended the omission from their tax returns of their illegal receipts on the ground that such ill-gotten gains were not taxable. The courts have consistently held to the contrary (with the principal exceptions of Commissioner v. Wilcox, 327 U.S. 404 (1946), discussed below). Unlawful gains constituted taxable income within the meaning of Section 22(a), Internal Revenue Code of 1939 (Section 61, Internal Revenue Code of 1954). Burnet v. Wells, 289 U.S. 670 (1933); Corliss v. Bowers, 281 U.S. 376 (1930). The Supreme Court has applied this rule to bootlegging receipts (United States v. Sullivan, 274 U.S. 259 (1927); protection money (Johnson v. United States, 318 U.S. 189 (1943), reh. den., 318 U.S. 801); gambling receipts (United States v. Johnson, 319 U.S. 503 (1943), reh. den., 320 U.S. 808); and to extortion money (Rutkin v. United States, 343 U.S. 130 (1952). The decision of the Circuit and District Courts have affirmed the taxability, not only of bootlegging income (Steinberg v. United States, 14 F. 2d 564 (2nd Cir. 1926); Benetti v. United States, supra), protection money (United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941), cert. den., 315 U.S. 800, reh. den., 315 U.S. 828), gambling receipts (United States v. Zimmerman, 108 F.2d 370 (7th Cir. 1939)), and extortion money (Humphreys v. Commissioner, 125 F.2d 340 (7th Cir. 1942), cert. den., 317 U.S. 637), but also the taxability of bribes (United States v. Pendergast, 28 F.Supp. 601 (W.D. Mo. 1939); Caldwell v. Commissioner, 135 F.2d 488 (5th Cir. 1943); United States v. Commerford, 64 F.2d 28 (2nd Cir. 1933), cert. den., 289 U.S. 759; Rose v. United States, 128 F.2d 622 (10th Cir. 1942), cert. den., 317 U.S. 651; Chadick v. United States, 77 F.2d 961 (5th Cir. 1935), cert. den., 296 U.S. 609), usurious interest (Barker v. Magruder, 95 F.2d 122 (D.C. Cir.(1938)), false pretense and swindling receipts (Akers v. Scofield 167 F.2d 718 (5th Cir. 1948), cert. den., 335 U.S. 823; Rollinger v. United States, 208 F.2d 109 (8th Cir. 1953)), black market gains (United States v. Chapman, 168 F.2d 997 (7th Cir. 1948), cert. den., 355 U.S. 853), misappropriations by fiduciary or bailee (National City Bank of New York v. Helvering, 98 F.2d 93 (2nd Cir. 1938); Briggs v. United States, 214 F.2d 699 (4th Cir. 1954), cert. den., 348 U.S. 864; Marienfeld v. United States, 214 F.2d 632 (8th Cir. 1954), cert. den., 348 U.S. 865; United States v. Iozin, 104 F.Supp. 846 (S.D. N.Y. 1952)), unlawful dividends (Currier v. United States, 166 F.2d 346 (1st Cir. 1947); Kann & Commissioner, 210 F.2d 247 (3rd Cir.1953), cert. den., 347 U.S. 967), and prostitution receipts (Smith v. United States, 257 F.2d 133 (10th Cir. 1958)).

In Commissioner v. Wilcox, supra, the Supreme Court held that embezzled funds did not constitute taxable income to the embezzler. This decision was subsequently limited to its facts by Rutkin v. United States, supra, and the Courts of Appeals in general showed little inclination to interpret broadly the Wilcox rule of nontaxability for embezzled funds. But see Dix v. Commissioner, 223 F.2d 436 (2nd Cir. 1955), cert. den., 350 U.S. 894. On May 15, 1961, the Supreme Court expressly overruled the Wilcox decision, and held that embezzled funds, like funds obtained through other crimes, are taxable. However, the Court reversed appellant's conviction. It reasoned that as long as Wilcox was on the books, failure to report embezzled funds as taxable income could not, as a matter of law, constitute the requisite willful intent to evade tax. James v. United States, 366 U.S. 213 (1961). The Court's reasoning would seem to rule out convictions for attempted evasion based on failure to report embezzled funds until the time that the James decision)—which removed the uncertainties of Wilcox—was handed down. See also Beck v. United States, 298 F.2d 622 (9th Cir. 1962), cert. den., 370 U.S. 919, wherein the court stated that the James case would require the dismissal of any pre-James evasion indictments based on failure to report embezzled funds. Thus, the embezzlement

defense does not apply to returns filed after May 15, 1961. Nortstrom v. United States, 360 F.3d 734 (8th Cir. 1966), cert. den., 385 U.S. 826; United States v. Dawson, 400 F.2d 194 (2nd Cir. 1968), cert. den., 393 U.S. 1023.

F. Diversion of Funds of Corporations.

In many cases, individuals who are sole owners or principal stockholders of corporations have attempted to evade and defeat the taxes both of themselves and the corporations by diverting receipts to their own use and benefit and failing to report such receipts on the records of the corporations. In some instances the scheme includes or consists of overstatement of purchases through the use of false invoices and checks or the claiming of personal expenses on the books of the corporation. The Department has consistently undertaken prosecution of such persons for attempted evasion both of their own and the corporation's taxes. See Lash v. United States, 221 F.2d 237 (1st Cir. 1955), cert. den., 350 U.S. 826; Currier v. United States, 166 F.2d, supra; Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), cert. den., 297 U.S. 709; Spahr, et al. v. United States, 409 F.2d 1303 (9th Cir. 1969), cert. den., 396 U.S. 840. See also United States v. Miro, 60 F.2d 58 (2nd Cir. 1932); Guzik v. United States, 54 F.2d 618 (7th Cir. 1931), cert. den., 285 U.S. 545; Strauss v. United States, 376 F.2d 416 (5th Cir. 1967); United States v. White, et al., 417 F.2d 89 (2nd Cir. 1969), cert. den., 397 U.S. 912; United States v. Berger, 325 F.Supp 1297 aff'd, 456 F.2d 1349 (2nd Cir. 1972).

Prior to the clear opinion of the Supreme Court, in James v. United States, supra, that embezzled funds are taxable, taxpayers attempted to argue, usually without success, that diverted corporation income was nontaxable to the individual. See United States v. Chapman, supra; United States v. Currier, 70 F.Supp. 219 (D. Mass.), aff'd., 166 F.2d 346 (1st Cir. 1947); and United States v. Goldberg, 330 F.2d 30 (3rd Cir. 1964), cert. den., 377 U.S. 953. In United States v. Dawson, supra, the defendant unsuccessfully contended that James was inapplicable because the embezzlement occured prior to the James decision. The court held that the crime occured upon the filing of the tax return, which was after the James decision. Cf. Dix v. Commissioner, supra. There are also occasional contentions that the evasion charge cannot be sustained as to the corporation's taxes because there would be an offsetting "embezzlement" loss and, thus, no tax deficiency. As the embezzlement losses are deductible in the year of discovery (Section 165(e), Internal Revenue Code of 1954), the officer-stockholder contends that his own knowledge at the time of the taking constitutes that "discovery." But the usual subject of such a charge has such ownership and control that he cannot "embezzle" from his own corporation. In any event, if the subject has signed the corporation returns "under the penalties of perjury," then Section 7206(1), Internal Revenue Code of 1954, would be appropriate as the understatement of receipts or overstatement of purchases would be false as to a material matter. See United States v. Rayor, 204 F.Supp. 486 (S.D. Cal. 1962); and note United States v. Jernigan, 411 F.2d 471 (5th Cir. 1969), cert. den., 396 U.S. 927.

Funds diverted by the defendant-stockholder are usually referred to as "constructive" or "informal" dividends. As Section 316, Internal Revenue Code of 1954, provides that "dividend" means a distribution made by a corporation to its shareholders, whether in money or in property, out of its accumulated earnings and profits, or out of its earnings and profits of the taxable year, the proof in such criminal tax cases should include an analysis of the corporate surplus and a computation of the "informal dividend" out of such surplus. See Bernstein v. United States, 234 F.2d 475 (5th Cir. 1956), cert. den., 352 U.S. 915, reh. den., 352 U.S. 977. However, in Davis v. United States, 226 F.2d 331 (6th Cir. 1955), cert. den., 350 U.S. 965, reh. den., 351 U.S. 915, it was held that it made no difference whether money milked from a corporation was from surplus or not. If the taxpayer realized economic gain and had command over the property taxed, the gain constituted taxable income. This holding was followed in Hartman v. United States, 245 F.2d 349 (8th Cir. 1957). But see discussion and criticism of Davis and Hartman in DiZenzo v. Commissioner, 348 F.2d 122 (2nd Cir. 1965).

The difficulty with the Davis theory is that Section 301(c)(2), Internal Revenue Code of 1954, provides that distributions in excess of earnings and profits shall be first applied against the adjusted basis of the stock. (Any amount in excess of basis is treated as a gain from the sale or exchange of property (Section 301(c)(3)(A)) so that diversions in excess of both earnings and profits and basis of the stock would constitute a capital gain.) The DiZenzo and Bernstein cases would seem to indicate that the Courts of Appeals for the Second and Fifth Circuits will not accept a "double standard" for criminal and civil tax cases as to what constitutes taxable income. Additional argument for the theory of the Davis and Hartman cases is that, in a Section 7201 criminal case, we are concerned with what the taxpayer "attempted to do so;" that he was attempting, through such diversions which never appeared on the records of the corporations, to get the personal benefit and economic gain from the funds without diminishing his stock interest of record. It should be kept in mind that the Supreme Court carefully distinguished the "attempt" condemned by Section 7201 from the common law offense by pointing out that the former is not barred by some impossibility of fruition of the attempt. See Spies v. United States, 317 U.S. 492 (1943). But, usually, reliance on Davis is not necessary and a computation of informal dividends out of earnings and profits is easily (and more safely) made.

As to minority or less than controlling stockholders, such diversions would either be condoned or not condoned. If condoned, they could be held to represent additional salary or other remuneration from the corporation. If not condoned, they may constitute embezzled or missappropriated funds and thus still be taxable under James and Rutkin, supra. The question as to whether or not funds have been embezzled is a jury question and cannot be raised for the first time on appeal. United States v. Wallace, 300 F.2d 525 (4th Cir. 1962), cert. den., 370 U.S. 923.

Because in constructive dividend situations the prosecution has usually undertaken to prove that sufficient corporate earnings were available, defendants have urged that the fraud penalty (Section 6653(b), 1954 Code) must be accrued to the corporation and deducted from earnings with constructive dividends to be computed out of whatever earned surplus was left over. This seems now to be the rule governing the computation of dividends out the assessment of tax deficiencies civilly. Drybrough v. Commissioner, 238 F.2d 735 (6th Cir. 1956). But this is not a rule applicable to criminal tax evasion cases. The tax evasion prosecution is not a proceeding to determine the tax due (Leeby v. United States, 192 F.2d 331 (8th Cir. 1951)), rather, it is a proceeding to demonstrate the tax consequences of what the defendant was attempting. Those consequences are to be measured against the tax effects of correct and honest corporate reporting at the time of the offense and "without reference to any future determination by the Commissioner of Internal Revenue that the corporation was subject to delinquency of fraud penalties or the fact that it would owe interest on deficiencies in its normal tax." Bernstein v. United States, supra.

G. Income Constructively the Taxpayer's

Occasionally a defendant will contend that money the government claims is income to him, is really income to someone else, and that the defendant is merely holding it, i.e. a type of bailment theory. See United States v. Pollock, 394 F.2d 922 (7th Cir. 1968), cert. den., 393 U.S. 924; United States v. Dawson, supra. This defense is refuted by evidence that the defendant had exclusive control and use of the funds, and that they were used for his own benefit.

Analogous to this is United States v. Rosenthal, 454 F.2d 1252 (2nd Cir. 1971), cert. den., 406 U.S. 931, in which property acquired on credit was held to be constructive income to the defendant because he had no intention to pay for it and knowledge of his probable inability to pay for it.

See also Strauss v. United States, supra, in which property distributed to the defendant's wife by the corporation of which she was the sole shareholder was attributed to the defendant.

This case reversed the lower court for its failure to instruct the jury as to defendant's defense that his distribution was a valid sale for value.

H. Motive Unrelated to Revenue Laws.

In cases involving illegal activities a stock defense contention is that the proscribed act or omission was done by the defendant, not for the purpose of escaping his tax responsibilities, but to prevent discovery of his wrongful money-making activities by local or federal agencies other than the Revenue Service, e.g., United States v. Bruswitz, 219 F.2d 59 (2nd Cir. 1955), cert. den., 349 U.S. 913. The universally applicable answer to this is that if the defendant made this decision he necessarily and wrongfully determined that he would sidestep and evade his responsibilities under the revenue laws. Far fron being exculpatory, this contention is a virtual confession of willfulness. Speaking of such dual motivation, the Supreme Court states in Spies v. United States, supra, at p. 499. "If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." The Seventh Circuit, however, has held that where the defendant had prepared returns for others, received tax payments from them, but failed to file their returns or pay their tax for them, his reprehensible actions were designed to hinder detection of the strictly local crime of embezzlement and do not constitute such affirmative conduct as clearly and reasonably infers a motive to evade or defeat tax. United States v. Mesheski, 286 F.2d 345 (7th Cir. 1961). The Department disagrees with this holding. And see United States v. Donovan, 250 F.Supp. 463 (W.D. Tex. 1966), disagreeing with Mesheski. Cf. United States v. Marquez, 332 F.2d 162 (2nd Cir. 1964), cert. den., 379 U.S. 890, a wagering tax case. In United States v. Edwards, 375 F.2d 862 (9th Cir. 1967), the court reversed the tax evasion conviction on the ground that intent to delay is not enough to constitute the requisite specific intent to evade.

I. Payment of Taxes.

If a taxpayer offers to and does pay all taxes and penalties, he has gained no immunity from criminal prosecution. United States v. McCormick, supra, p. 870. If a compromise is approved for settlement of all criminal and civil penalties on the payment of taxes and civil penalties and a plea of guilty or nolo contendere entered to less than all the counts in the indictment, the other counts having been dismissed, the compromise is no bar to the imposition of a jail sentence on the counts to which the plea is entered. Burr v. United States, 86 F.2d 502 (7th Cir. 1936), cert. den., 300 U.S. 664; United States v. Sabourin, 157 F.2d 820 (2nd Cir. 1946), cert. den., 329 U.S. 800; United States v. LaFontaine, 54 F.2d 371 (D. Md. 1931).

J. Carry-back and Carry-forward Losses.

Section 172, Internal Revenue Code of 1954, provides that a loss sustained in one year may be carried back to offset taxable income of the three preceding years and carried forward to offset taxable income in five subsequent years. This provision may give rise to a defense that no taxes were due and owing in the year for which the defendent is charged with attempted evasion. A carry-forward loss may be a valid defense to an evasion charge. The defendant, however, must qualify under Section 172 to use this defense. Thus, where a corporation sought to carry forward losses sustained prior to its reorganization and the court found that the corporation had become a different entity on reorganization and could not carry forward the losses, the defense was denied. Willingham v. United States, 289 F.2d 283 (5th Cir. 1961), cert. den., 368 U.S. 828. See also United States v. Suskin, 450 F.2d 591 (2nd Cir. 1971), rejecting defendant's attempt to use prior corporate losses for a carry-forward defense; and e.g., Bursten v. United States, supra. However, a charge of subscribing a false return under the provisions of Section 7206(1), Internal Revenue Code of 1954, may be appropriate where there is no tax deficiency because of a carry-forward loss. A false return, understating income or overstating deductions, may well be material as to the computation of tax for other years. See analogous problem with respect to offsetting foreign tax credits: United States v. Campbell, 351 F.2d 336 (2nd Cir. 1965), cert. den., 383 U.S. 907.

On the otherhand, a carry-back loss allowed under Section 172 is no valid defense to a criminal prosecution. It is well settled that a carry-back loss "abates the (civil) liability but not the (criminal) penalty." This reasoning is based on the idea that the crime of attempted evasion is complete before the year in which the carry-back loss is made available to offset the civil liability. Manning v. Seeley Tube and Box Co., Inc. 338 U.S. 561 (1950); Willingham v. United States, supra; see also United States v. Goo. 10 F.R.D. 332 (D. Ha.), aff'd, 187 F.2d 62 (9th Cir. 1951), cert. den., 341 U.S. 916, where after pleading guilty to an information charging three counts of attempted evasion, the defendant's motion to withdraw the pleas, apparently grounded on a subsequently discovered available carry-back loss, was denied.

K. Shifting Accounting Methods to Minimize Understatement.

In at least two Circuits, district court rulings have been approved which precluded proof that, if the defendant were to shift to the accrual basis, his unreported income would be diminised or eliminated. The offense charged must be weighed against what he did, not what he might have done. Clark v. United States, 211 F.2d 100 (8th Cir. 1954), cert. den., 348 U.S. 911, and United States v. Vardine, 305 F.2d 60 (2nd Cir. 1962).

L. Defense of Selective Prosecution.

Recently, taxpayers have been claiming that the selection by I.R.S., of particular cases for prosecution constitutes a denial of equal protection. The Supreme Court, in Oyler v. Boles, 368 U.S. 448 (1962), rejected this argument saying that selective enforcement by itself is not a constitutional violation where such selection is not based on a unjustifiable standard such as race or religion. For a recent case on this point, see United States v. Goldstein, 30 A.F.T.R. 2d 5475 (E.D. N.Y. 1972).

M. Political Contributions Defenses by Politicians.

According to Rev. Ruling 54-80, 1954-1 Cum. Bul. 11 (1954), campaign funds which are diverted and used for personal use constitute taxable income. See United States v. Jett, 352 F.2d 179 (6th Cir. 1965), cert. den., 383 U.S. 935. In United States v. Miriani, 422 F.2d 150 (6th Cir. 1970), cert. den., 393 U.S. 910, unspent contributions invested in municipal bonds and allegedly earmarked for later political use were held to support a conviction for tax fraud. See also cases cited therein.

IV. FORMS

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____) Section 7203)

The United States Attorney charges:

That during the calendar year* 19__, _____, who was a resident of the City of _____ State of _____, had and received a gross income of $ _____; that by reason of such income he was required by law, following the close of the calendar year* 19__ and on or before April 15, 19__, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of _____, at _____, in the _____ District of _____, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

_____
United States Attorney

*If fiscal year is involved substitute for "calendar year" "fiscal year ended _____". Fiscal year returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year.

[Individual–Failure to File: For years in which returns were required to be filed with the District Director]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____ _____) Section 7203)

The United States Attorney charges:

That during the calendar year* 19__, _____ and _____ conducted a business as a partnership under the name and style of _____, with its principal place of business at _____, and by reason of such facts they were required by law, following the close of the calendar year* 19__ and on or before April 15, 19__, for and on behalf of said partnership to make a partnership return of income to the District Director of Internal Revenue for the Internal Revenue District of _____ _____, at _____, in the _____ or to the Director, Internal Revenue Service Center, _____ Region, _____, ** stating specifically the items of the partnership's gross income*** and the deductions and credits allowed by law; that well knowing all of the foregoing facts, they did wilfully and knowingly fail to make said return to said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code: 26 U.S.C., Section 7203.

_____
United States Attorney

* If the fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

Fiscal year returns must be filed on or before the 15th day of the fourth month following the close of the fiscal year.

[Partnership - Failure to File]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code Section 7203)

The United States Attorney charges:

That during the calendar year* 19__, _____ and _____ were the _____ and _____, respectively, of _____, a corporation not expressly exempt from tax, with its principal place of business at _____, and by reason of such facts _____ were required by law, after the close of the calendar year* 19__ and on or before _____, 19__, for and on behalf of the said corporation to make an income tax return to the District Director of Internal Revenue for the Internal Revenue District of _____, at _____, in the _____ District of _____, or to the Director, Internal Revenue Service Center _____ Region, _____, stating specifically the items of the corporation's gross income** and the deductions and credits allowed by law; that well knowing all of the foregoing facts, did wilfully and knowingly fail to make said return to said District Director of Internal Revenue, to the said Director of the Internal Revenue Service Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

_____
United States Attorney

*If the fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

**As the duty to file corporation returns is not conditioned on proof of gross income, a modification could be made in an appropriate case to allege gross receipts. See Sec. 6012(a)(b), I.R.C. of 1954 and Reg. 1.6012-2.

[Corporation — Failure to File]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code Section 7203)

The United States Attorney charges:

That during the calendar year 19__, _____, late of _____, hereinafter called the defendant, made payments of (rent) (salaries) (wages) (premiums) (annuities) (compensations) (remunerations) (gains) (profits) (income) to the persons and in the amounts following:

(Name)	(Address)	(Amount)
_____	_____	_____

That by reason of such payments the said defendant was required by law to make a return on United States Treasury Department Internal Revenue Service Form 1096 on or before the 28th day of February 19__ to *_____, setting forth the number of returns on United States Treasury Department Internal Revenue Service Form 1099 attached thereto; that well knowing all of the foregoing facts, the said defendant did wilfully and knowingly fail to make said return to the said _____ at the said time and place, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code, 26 U.S.C., Section 7203.

_____
United States Attorney

*Use appropriate Internal Revenue Service Center where Form 1096 was required to be filed. See Instructions for Forms 1096; 26 CFR Sec. 1.6041-6.

[Individual — wilful failure to file information return]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code Section 7203)

The United States Attorney charges:

That during the calendar year 19__, _____, who was a resident of _____, _____, had and received a taxable income of $ _____, which said taxable income he owed to the United States of America income tax of $ _____; that he was required by law on or before April 15, 19__, to pay such tax to the District Director of Internal Revenue for the Internal Revenue District of _____, at _____, in the _____ District of _____, or to the Director, Internal Revenue Service Center, _____ Region, _____;* that well knowing all the foregoing facts, the said _____ did wilfully fail to pay his income tax to the said District Director of Internal Revenue, to the said Director of the Internal Revenue Center, or to any other proper officer of the United States.

In violation of Section 7203, Internal Revenue Code; 26 U.S.C., Section 7203.

_____
United States Attorney

[Wilful failure to pay tax]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code Section 7201)

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____, _____, a resident of _____, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year* 19__, by filing and causing to be filed with the Director, Internal Revenue Service Center, _____ Region, at _____**, a false and fraudulent income tax return wherein he stated that his taxable income*** for the said calendar year was the sum of $_____ and that the amount of tax due and owing thereon* was the sum of $ _____, whereas, as he then and there well knew his taxable income for the said calendar year* was the sum of $ _____, upon which said taxable income he owed to the United States of America an income tax of $ _____.

*If fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

**When appropriate, substitute "District Director of Internal Revenue for the Internal Revenue District of _____, at _____."

***If adjusted gross income does not exceed $10,000, ($5,000 for years prior to 1970), and tax table is used, substitute for "taxable income", "adjusted gross income".

When the taxpayer uses adjusted gross income and the short form return (Form 1040A), allege as stated; but if his true income was such that he should have used the long form (Form 1040) allege in second clause that his adjusted gross income was $_____ and his taxable income was $_____ etc.

Forms 1040 for some years subsequent to 1960 do not use the phrase "taxable income". However, what constitutes taxable income as defined in Section 63, I.R.C. is actually computed on the appropriate line of the return.

[Individual – attempt to evade and defeat establishing venue in the district of filing]

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____) Section 7201)

The grand jury charges:

That on or about the _____ day of _____, 19__, in the _____ District of _____, _____, a resident of _____ _____, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year* 19__, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the _____ District of _____ a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he stated that his taxable income** for said calendar year* was the sum of $_____ and that the amount of tax due and owing thereon was the sum of $_____, whereas, as he then and there well knew, his taxable income** for the said calendar year*

*If fiscal year is involved substitute for "calendar year," fiscal year ended _____".

**If adjusted gross income does not exceed $10,000 ($5,000 for years prior to 1970), and tax table is used, substitute for "taxable income," "adjusted gross income."

When the taxpayer uses adjusted gross income and the short form return (Form 1040A), allege as stated; but if his true income was such that he should have used the long form (Form 1040) allege in second clause that his adjusted gross income was $_____ and his taxable income was $_____etc. (Footnote continues on next page.)

[Individual — attempt to evade and defeat establishing venue in the district of preparation, etc.]

was the sum of $_____, upon which said taxable income he owed to the United States of America an income tax of $_____.

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____) Section 7201)

The grand jury charges:

That on or about the _____ day of _____ , 19__, in the _____ District of _____ , a resident of _____ , who during the calendar year* 19__ was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 19__ , by filing and causing to be filed with the Director, Internal Revenue Service Center, _____ , Region, at _____ **, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income*** for said calendar year was the sum of $ _____ and that the amount of tax due and owing thereon was the sum of $ _____ , whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $ _____ , upon which said taxable income there was owing to the United States of America an income tax of $ _____ .

*If fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

**When appropriate, substitute "District Director of Internal Revenue for the Internal Revenue District of _____ , at _____ ."

***If adjusted gross income does not exceed $10,000 ($5,000 for years prior to 1970), and tax table is used, substitute for "taxable income", "adjusted gross income".

When the taxpayers used adjusted gross income and the short form return (Form 1040A) allege as stated; but if their true joint income was such that they should have used the long form (Form 1040) allege in second clause that their adjusted gross income was $ _____ and their taxable income was $ _____ etc.

Forms 1040 for some years subsequent to 1960 do not use the phrase "taxable income". However, what constitutes taxable income as defined in Section 63, I.R.C. is actually computed in the appropriate line of the return.

[Individual (false joint return) – attempt to evade and defeat establishing venue in the district of filing]

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code
Section 7201)

The grand jury charges:

That on or about the ____ day of _____ , 19__, in the _____ District of _____ , _____ , a resident of _____ who during the calendar year* 19__ was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year* 19__, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the _____ District of _____ a false and fraudulent income tax return on behalf of himself and his said wife, which was filed with the Internal Revenue Service, wherein it was stated that their taxable income** for said calendar year* was the sum of $ _____ and that the amount of tax due and owing thereon was the sum of $_____ ,

*If fiscal year is involved substitute for "calendar year," "fiscal year ended_____."

**If adjusted gross income does not exceed $10,000 ($5,000 for years prior to 1970), and tax table is used, substitute for "taxable income," "adjusted gross income."

When the taxpayers use adjusted gross income and the short form return (Form 1040A), allege as stated; but if their true joint income was such that they should have used the long form (Form 1040) allege in second clause that their adjusted gross income was $_____ and their taxable income was $ _____etc.

Forms 1040 for some years subsequent to 1960 do not use the phrase "taxable income." However, what constitutes taxable income as defined in Section 63, I.R.C. is actually computed on the appropriate line of the return.

[Individual (false joint return) – attempt to evade and defeat establishing venue in the district of preparation, etc.]

whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $ _____ , upon which said taxable income there was owing to the United States of America an income tax of $ _____ .

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____) Section 7201)

The grand jury charges:

That commencing on or about [or "That on or about"*] the ____ day of _____ , 19__, and continuing through and including the _____ day of _____, 19__, in the _____ District of _____ , _____, a resident of _____ , did wilfully and knowingly attempt to evade and defeat the payment of a large part of the income tax due and owing by the said _____ to the United States of America for the calendar year** _____ in the amount of $ _____ , by various means including [spell out the affirmative acts constituting the wilful attempt, such as the following: concealing and attempting to conceal from the Internal Revenue Service the nature and extent of his assets and the location thereof: making false statements to agents of the Internal Revenue Service; placing funds and property in the names of nominees; placing funds and property beyond the reach of service of process; etc.]

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

*The "attempt" may consist of one definitive act (e.g., secretion of assets) rather than a course of conduct.

**If fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

[Individual – attempt to evade and defeat the payment]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-) No. _____
) (26 United States Code
_____) Section 7201)

The grand jury charges:

That on or about the _____ day of _____ , 19__, in the _____ District of _____ , _____ , and _____ who were the _____ and _____ , respectively, of _____ , a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by the said corporation to the United States of America for the calendar year* 19__ , by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the _____ District of _____ a false and fraudulent income tax return, which was filed with the Internal Revenue Service, wherein he (or they) alleged that the taxable income of the corporation for the said calendar year was the sum of $ _____ and that the total amount of tax due thereon was the sum of $ _____ , whereas, as he (or they) then and there well knew, the taxable income of the corporation for the said calendar year was the sum of $ _____ , upon which taxable income the corporation owed to the United States of America a total tax of $_____ .

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

*If fiscal year is involved substitute for "calendar year", "fiscal year ended _____".

[Corporation – attempt to evade and defeat taxes of]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code
Section 7201)

That on or about the ____ day of _____ , 19__, in the _____ District of _____ , _____ , a resident of _____, who conducted a retail business* as a _____ under the name and style of _____ , with its principal place of business in _____, did wilfully attempt to evade and defeat a large part of the retail dealer's excise tax on [article], imposed by Section _____ of the Internal Revenue Code, due and owing to the United States of America for the month of _____ , 19___, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the _____ , District of _____ a false and fraudulent retail dealer's excise tax return, which was filed with the Internal Revenue Service, wherein it was stated that the retail dealer's excise tax due and owing the United States of America by reason of the retail sale of [article] for said month was the sum of $_____ , whereas, as he (or they) then and there well knew, there were due and owing to the United States of America for the said month retail dealer's excise taxes in the sum of $_____ .

In violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201.

A True Bill.

_____
Foreman

_____
United States Attorney

*If taxpayer is a corporation, refer to Form No. 17 as a guide in charging appropriate corporate officials with attempting to evade and defeat taxes due from corporation.

[Sole proprietorship or partnership – attempt to evade and defeat excise tax]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA)
)
-against-)
)
_____)

No. _____
(26 United States Code
Section 7206(2))

The grand jury charges:

That on or about the ____ day of _____ , 19__ , in the _____ District of _____ , _____ , a resident of _____ , hereinafter called the defendant, did wilfully and knowingly aid and assist in, and counsel, procure, and advise the preparation and presentation to the Internal Revenue Service, of [describe document, e.g., an income tax return of _____ for the calendar year* 19__,] which was false and fraudulent as to a material matter, in that [describe ultimate false fact, e.g., it represented that the said _____ ** was entitled under the provisions of the Internal Revenue laws to claim deductions in the total sum of $ _____], whereas, as the said defendant then and there well knew and believed, [describe correct ultimate fact, e.g., the total deductions which the said _____ was entitled to claim for said calendar year were in the total sum of $ _____].

In violation of Section 7206(2), Internal Revenue Code; 26 U.S.C., Section 7206(2).

A True Bill.

_____
Foreman

_____
United States Attorney

*If fiscal year is involved substitute for "calendar year", "fiscal year ended _____ ."

**If income was omitted allege, "had and received a taxable income for said calendar year in the sum of $ _____ , whereas, as the said defendant then and there well knew the said _____, had and received a taxable income of $ _____ for said calendar year."

[Aiding and assisting in the preparation and presentation of a false and fraudulent document, e.g., an income tax return]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
-against-	)	No. _____
	)	(26 United States Code
	)	Section 7206(1))
_____	)	

The grand jury charges:

That on about the ____ day of _____ , 19__ , in the _____ District of _____ , _____ , a resident of _____ , did wilfully and knowingly make and subscribe* a (describe document), which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, _____ Region, at _____ ,** which said (describe document) he did not believe to be true and correct as to every material matter in that the said (describe document—and ultimate false fact) whereas, as he then and there well knew and believed, (describe correct ultimate fact).

In violation of Section 7206(1), Internal Revenue Code; 26 U.S.C., Section 7206(1).

A True Bill.

_____

Foreman

_____

United States Attorney

*An aider and abettor may be jointly charged with the principal under 18 U.S.C. 2. If this is done the language "and did wilfully and knowingly aid, abet, assist and cause to be so made and subscribed" should be inserted after the word "subscribe" and appropriate reference made to 18 U.S.C. 2 in the statute captions.

**When appropriate, substitute "District Director of Internal Revenue for the Internal Revenue District of _____ , at _____ ".

[Making and subscribing a false return, statement, or other document — establishing venue in district of filing.]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
-against-	)	No. _____
	)	(26 United States Code
	)	Section 7206(1))
_____	)	

The grand jury charges:

That on or about the _____ day of _____ , 19__, in the _____ District of _____, _____, a resident of _____ , did wilfully and knowingly make and subscribe* a (describe document), which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said (describe document) he did not believe to be true and correct as to every material matter in that the said (describe document—and ultimate false fact) whereas, as he then and there well knew and believed, (describe correct ultimate fact).

In violation of Section 7206(1), Internal Revenue Code; 26 U.S.C., Section 7206(1).

A True Bill.

_____

Foreman

_____

United States Attorney

*An aider and abettor may be jointly charged with the principal under 18 U.S.C. 2. If this is done, the language "and did wilfully and knowingly aid, abet, assist and cause to be so made and subscribed" should be inserted after the word "subscribe" and appropriate reference made to 18 U.S.C. 2 in the statute captions.

[Making and subscribing a false return, statement, or other document-establishing venue in district of preparation, etc.]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
-against-	)	No. _____
	)	(18 United States Code
_____	)	Section 371)

The grand jury charges:

That on or about the_____ day of _____, 19___, the exact date being to the grand jurors unknown, and continuously thereafter up to and including_____, in the_____ District of _____, and in other judicial districts of the United States, _____, and _____, all residents of _____, hereinafter referred to as defendants, did unlawfully, and wilfully, conspire,* combine, confederate and agree together, with each other, and with diverse other persons to the grand jurors unknown, to wilfully attempt to evade and defeat a large part of the [income] taxes to be due and owing and due and owing to the United States of America by [name individual(s) or corporation] for the calendar years** 19___, and 19___, under the circumstances and by the means and in the manner following:

*When the object of the conspiracy is alleged to be to defraud the United States, the following language can be used:

> "to defraud the United States by impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of the revenue, to-wit: income taxes, under the circumstances and by the means and in the manner following:"

**If fiscal year is involved substitute for "calendar years", "fiscal years ended 19____ and 19___".

[Conspiracy to evade and defeat taxes]

That at all times material herein [describe relationship of conspirators to individual or corporate entity liable for the tax].

It was a part of said conspiracy [set forth description of scheme] _____

_____.

It was further a part of said conspiracy _____

_____.

OVERT ACTS

The grand jury further charges that at the times and at the places hereinafter named, in furtherance of, in the execution of and for the purpose of carrying into effect the object, designs and purpose of said conspiracy, the defendants hereinafter named did do and perform the following overt acts.

In violation of Title 18, Section 371, United States Code.

A True Bill.

_____

Foreman

_____

United States Attorney

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE _____ DISTRICT OF _____

UNITED STATES OF AMERICA	)	
	)	
-against-	)	No. _____
	)	(18 United States Code
_____	)	Section 1001)

The grand jury charges:

That on or about the ____ day of _____ , 19__, _____ a resident of _____ , did wilfully and knowingly make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States by [enter here nature of false statement or representation and describe official with whom false document was filed, or to whom oral statement was made], at _____ , in the _____ District of _____ , whereas as he then and there well knew [enter here converse or false statement or representation].

In violation of Title 18, Section 1001, United States Code.

A True Bill.

_____
Foreman

_____
United States Attorney

[Individual – False statements and representations]

PART B

EXCERPTS FROM CHAPTER 9900 OF THE INTERNAL REVENUE SERVICE MANUAL, "HANDBOOK FOR SPECIAL AGENTS"

Amended and Supplemented by MS CR 9966-23

110 INTRODUCTION

This chapter contains the complete text of the sections of Title 18, United States Code, that may be involved in Intelligence investigations; the more frequently used penal and civil penalties of the Internal Revenue Code of 1954 (Title 26, United States Code); and the sections of Title 18 and the Internal Revenue Code of 1954 relating to limitations on criminal prosecution. The less frequently used penalties of the internal revenue codes and the sections concerning periods of limitation for assessment and collection of tax are set forth in outline form.

120 CRIMINAL PENALTIES APPLICABLE TO FRAUD AND MISCELLANEOUS INVESTIGATIONS

121 Internal Revenue Code of 1954

121.1 EFFECTIVE DATE AND APPLICATION

Chapter 75 of the Internal Revenue Code of 1954, entitled Crimes, Other Offenses, and Forfeitures, is effective for offenses committed after August 16, 1954. The following penal sections of chapter 75 apply to all taxes imposed by Title 26, United States Code (Internal Revenue Code of 1954) unless the particular section states that it applies to a specific tax.

121.2 IRC 7201. ATTEMPT TO EVADE OR DEFEAT TAX

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

121.3 IRC 7202. WILLFUL FAILURE TO COLLECT OR PAY OVER TAX

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

121.4 IRC 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

121.5 IRC 7204. FRAUDULENT STATEMENT OR FAILURE TO MAKE STATEMENT TO EMPLOYEES [1]

"In lieu of any other penalty provided by law (except the penalty provided by section 6674) any person required under the provisions of section 6051 to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051, or regulations prescribed thereunder, shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both."

121.6 IRC 7205. FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION

"Any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both."

121.7 IRC 7206. FRAUD AND FALSE STATEMENTS

"Any person who—

"(1) *Declaration Under Penalties of Perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

"(2) *Aid or Assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

"(3) *Fraudulent Bonds, Permits, and Entries.*—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

[1] (Applies to withholding statements required of employers).

(121.7 IRC 7206 FRAUD AND FALSE STATEMENTS—Cont.)

"(4) *Removal or Concealment With Intent to Defraud.*—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

"(5) *Compromises and Closing Agreements.*—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

"(A) *Concealment of Property.*—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

"(B) *Withholding, Falsifying, and Destroying Records.*—Receives, withholds, destroys, mutilates, or falsifies any book, document or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

121.8 IRC 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS

"Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

121.9 IRC 7210. FAILURE TO OBEY SUMMONS

"Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution."

121.10 IRC 7212. ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS

"(a) *Corrupt or Forcible Interference.*—Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

"(b) *Forcible Rescue of Seized Property.*—Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years."

121.11 OTHER CRIMINAL PENALTIES

See Exhibit 100–1 for a listing of other criminal penalties.

121.12 IRC 7215. OFFENSES WITH RESPECT TO COLLECTED TAXES

"(a) *Penalty.*—Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year; or both, together with the costs of prosecution.

"(b) *Exceptions.*—This section shall not apply—

"(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

"(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

"For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person."

121.13 IRC 7512. SEPARATE ACCOUNTING FOR CERTAIN COLLECTED TAXES, ETC.

"(a) *General Rule.*—Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33—

"(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

"(2) is notified, by notice delivered in hand to such person of any such failure,

"then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee, shall, for the purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust to all officers, partners, trustees, and employees thereof.

"(b) *Requirements.*—Any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C or chapter 33 which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

"(c) *Relief From Further Compliance With Subsection (b).*—Whenever the Secretary or his delegate is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of such cancellation."

(121.(13) IRC 7512. SEPARATE ACCOUNTING FOR CERTAIN COLLECTED TAXES, ETC.—Cont.)

122 Title 18, United States Code

122.1 INTRODUCTION

The following penal sections of Title 18 apply to violations that may be encountered in connection with intelligence investigations.

122.2 SECTION 2. PRINCIPALS

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

"(b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

122.3 SECTION 3. ACCESSORY AFTER THE FACT

"Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

"Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

122.4 SECTION 4. MISPRISION OF FELONY

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both."

122.5 SECTION 111. ASSAULTING, RESISTING, OR IMPEDING CERTAIN OFFICERS OR EMPLOYEES [1]

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

122.6 SECTION 201. OFFER TO OFFICER OR OTHER PERSON

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for on on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

"This section shall not apply to violations of section 212 of this title." (This section relates to an offer or threat to a customs officer or employee.)

122.7 SECTION 284. DISQUALIFICATIONS OF FORMER OFFICERS AND EMPLOYEES IN MATTERS CONNECTED WITH FORMER DUTIES

"Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed

[1] The provisions of IRC 7212 relating to Attempts to Interfere with Administration of Internal Revenue Laws, are set forth in Subsection 121.(10).

(122.7 SECTION 284. DISQUALIFICATIONS OF FORMER OFFICERS AND EMPLOYEES IN MATTERS CONNECTED WITH FORMER DUTIES. —Cont.)

or performed duty, shall be fined not more than $10,000 or imprisoned not more than one year, or both."

122.8 SECTION 285. TAKING OR USING PAPERS RELATING TO CLAIMS

"Whoever, without authority, takes and carries away from the place where it was filed, deposited, or kept by authority of the United States, any certificate, affidavit, deposition, statement of facts, power of attorney, receipt, voucher, assignment, or other document, record, file, or paper prepared, fitted, or intended to be used or presented to procure the payment of money from or by the United States or any officer, employee, or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States, whether the same has or has not already been so used or presented, and whether such claim, account, or demand, or any part thereof has or has not already been allowed or paid; or

"Whoever presents, uses, or attempts to use any such document, record, file, or paper so taken and carried away, to procure the payment of any money from or by the United States, or any officer, employee, or agent thereof, or the allowance or payment of the whole or any part of any claim, account, or demand against the United States—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

122.9 SECTION 286. CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS

"Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

122.10 SECTION 287. FALSE, FICTITIOUS OR FRAUDULENT CLAIMS

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

122.11 SECTION 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

122.12 SECTION 372. CONSPIRACY TO IMPEDE OR INJURE OFFICER

"If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both."

122.13 SECTION 494. CONTRACTORS' BONDS, BIDS, AND PUBLIC RECORDS

"Whoever falsely makes, alters, forges, or counterfeits any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or

"Whoever utters or publishes as true or possesses with intent to utter or publish as true, any such false, forged, altered, or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited; or

"Whoever transmits to, or presents at any office or to any officer of the United States, any such false, forged, altered or counterfeited writing, knowing the same to be false, forged, altered, or counterfeited—

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

122.14 SECTION 495. CONTRACTS, DEEDS, AND POWERS OF ATTORNEY

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

122.15 SECTION 1001. STATEMENTS OR ENTRIES GENERALLY

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

122.16 SECTION 1002. POSSESSION OF FALSE PAPERS TO DEFRAUD UNITED STATES

"Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

122.17 SECTION 1084. TRANSMISSION OR WAGERING INFORMATION

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communications facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

"(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used, or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal, or agency, that such facility should not be discontinued or removed, or should be restored."

122.18 SECTION 1114. PROTECTION OF OFFICERS AND EMPLOYEES OF THE UNITED STATES

"Whoever kills . . . any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties . . . while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title."

122.19 SECTION 1501. ASSAULT ON PROCESS SERVER

"Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized, in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States Commissioner; or

"Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process—

"Shall, except as otherwise provided by law, be fined not more than $300 or imprisoned not more than one year, or both."

122.20 SECTION 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissoiner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to

= Sections 1111 and 1112 provide the penalties for murder and manslaughter.

(122.(20) SECTION 1503. INFLUENCING OR INJURING OFFICER, JUROR OR WITNESS GENERALLY—Cont.)

influence, obstruct, or impede, the due administration of justice, shall not be fined more than $5,000 or imprisoned not more than five years, or both."

122.(21) SECTION 1510. OBSTRUCTION OF CRIMINAL INVESTIGATIONS

"(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any person to a criminal investigator; or

"Whoever injures any person in his person or property on account of giving by such person or by any other person of any such information to any criminal investigator—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"(b) As used in this section, the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States."

122.(22) SECTION 1621. PERJURY GENERALLY

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

122.(23) SECTION 1622. SUBORNATION OF PERJURY

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

122.(24) SECTION 1952. INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

"(c) Investigation of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

122.(25) SECTION 1953. INTERSTATE TRANSPORTATION OF WAGERING PARAPHERNALIA

"(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita or similar game shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel ticket where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

"(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

122.(26) SECTION 2071. CONCEALMENT, REMOVAL, OR MUTILATION GENERALLY

"(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

"(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years,

(122.(26) SECTION 2071. CONCEALMENT, REMOVAL, OR MUTILATION GENERALLY—Cont.)

or both; and shall forfeit his office and be disqualified from holding any office under the United States."

122.(27) SECTION 2231. ASSAULT OR RESISTANCE

"(a) Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both; and—

"(b) Whoever, in committing any act in violation of this section, uses any deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

122.(28) SECTION 2233. RESCUE OF SEIZED PROPERTY

"Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

130 CRIMINAL PENALTIES APPLICABLE TO WAGERING TAX INVESTIGATIONS

131 IRC 7262. Violation of Occupational Tax Laws Relating to Wagering—Failure to Pay Special Tax

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

132 Other Criminal Penalties

The criminal penalties of chapter 75, Internal Revenue Code of 1954 (Subsection 121), other than those which relate to specifically named taxes, are applicable to the wagering taxes. The penalties provided in Title 18, United States Code (Subsection 122) also may be considered in connection with the wagering taxes.

140 PERIODS OF LIMITATION ON CRIMINAL PROSECUTION

141 IRC 6531. Periods of Limitation

"No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offence, except that the period of limitation shall be 6 years—

"(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

"(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

"(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

"(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

"(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

"(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

"(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

"(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

"The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a magistrate of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the magistrate of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable."

142 IRC 6513. Time Return Deemed Filed and Tax Considered Paid

"(a) *Early Return or Advance Payment of Tax.*—For purposes of section 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. For purposes of section 6511 (b) (2) and (c) and section 6512, payment of any portion of the tax made before the last day prescribed for the payment of the tax shall be considered made on such last day. For purposes of this subsection, the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer and without regard to any election to pay the tax in installments.

"(b) *Prepaid Income Tax.*—For purposes of section 6511 or 6512, any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31. For purposes of section 6511 or 6512, any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to any extension of time for filing such return).

"(c) *Return and Payment of Social Security Taxes and Income Tax Withholding.*—Notwithstanding subsection (a), for purposes of section 6511 with respect to any tax imposed by chapter 21 or 24—

"(1) If a return for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such succeeding calendar year; and

"(2) If a tax with respect to remuneration paid during any period ending with or within a calendar year is paid before April 15 of the succeeding calendar year, such tax shall be considered paid on April 15 of such succeeding calendar year.

"(d) *Overpayment of Income Tax Credited to Estimated Tax.*—If any overpayment of income tax is, in accordance with section 6402(b), claimed as a credit against estimated tax for the succeeding taxable year, such amount shall be considered as a payment of the income tax for the succeeding taxable year (whether or not claimed as a credit in the return of estimated tax for such succeeding taxable year), and no claim for credit or refund of such overpayment shall be allowed for the taxable year in which the overpayment arises."

143 Title 18, United States Code—General Statute of Limitations—Section 3282. Offenses Not Capital

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 828 and September 1, 1954, ch. 1214, 2d. session, 68 Stat. 1142.)"

144 Title 18, United States Code—Fugitives From Justice

144.1 SECTION 3290. FUGITIVES FROM JUSTICE

"No statute of limitations shall extend to any person fleeing from justice."

144.2 SECTION 1073. FLIGHT TO AVOID PROSECUTION OR GIVING TESTIMONY

"Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, shall be fined not more than $5,000 or imprisoned not more than five years or both.

"Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

150 CIVIL PENALTIES APPLICABLE TO FRAUD AND MISCELLANEOUS INVESTIGATIONS

151 Introduction

The complete texts of the civil penalty sections relating to income and miscellaneous taxes are set forth herein.

152 Internal Revenue Code of 1954, As Amended By Tax Reform Act of 1969

152.1 IRC 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX

"(a) Addition to the Tax.—In case of failure—

"(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date pre-

(152.1 IRC 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX—Cont.)

scribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

"(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

"(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 10 days of the date of the notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

"(b) Penalty Imposed on Net Amount Due.—For purposes of—

"(1) subsection (a)(1), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return,

"(2) subsection (a)(2), the amount of tax shown on the return shall, for purposes of computing the addition for any month, be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed on the return, and

"(3) subsection (a)(3), the amount of tax stated in the notice and demand shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the beginning of such month.

"(c) Limitations and Special Rule.—

"(1) Additions under more than one paragraph.—

"(A) with respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month to which an addition to tax applies under both paragraphs (1) and (2).

"(B) With respect to any return, the maximum amount of the addition permitted under paragraph (3) of subsection (a) shall be reduced by the amount of the addition under paragraph (1) of subsection (a) which is attributable to the tax for which the notice and demand is made and which is not paid within 10 days of notice and demand.

"(2) Amount of tax shown more than amount required to be shown.—If the amount required to be shown as tax on a return is less than the amount shown as tax on such return, subsections (a)(2) and (b)(2) shall be applied by substituting such lower amount.

"(d) Exception for Declarations of Estimated Tax.—This section shall not apply to any failure to file a declaration of estimated tax required by section 6015 or to pay any estimated tax required to be paid by section 6153 or 6154."

152.2 IRC 6652. FAILURE TO FILE CERTAIN INFORMATION RETURNS

"(a) *Additional Amount.*—In case of each failure to file a statement of a payment to another person, required under authority of section 6041 (relating to information at source), section 6042 (relating to payments of corporate dividends), section 6044 (relating to patronage dividends), section 6045 (relating to returns of brokers), or section 6051(d) (relating to information returns with respect to income tax withheld), unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid by the person failing to file the statement, upon notice and demand by the Secretary or his delegate and in the same manner as tax, $1 for each such statement not filed, but the total amount imposed on the delinquent person for all such failures during any calendar year shall not exceed $1,000."

152.3 IRC 6653. FAILURE TO PAY TAX

"(a) *Negligence or Intentional Disregard of Rules and Regulations With Respect to Income or Gift Taxes.*—If any part of any underpayment (as defined in subsection (c)(1) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

"(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

"(c) *Definition of Underpayment.*—For purposes of this section, the term "underpayment" means—

"(1) Income, Estate, Gift and Chapter 42 Taxes.[1]—

[1] See IRC 6211.

(152.3 IRC 6653. FAILURE TO PAY TAX—Cont.)

In the case of a tax to which Section 6211 (relating to income, estate, gift and chapter 42 taxes) is applicable, a deficiency as defined in that section (except that, for this purpose, the tax shown on a return referred to in section 6211(a)(1)(A) shall be taken into account only if such return was filed on or before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing), and

"(2) *Other Taxes.*—In the case of any other tax, the amount by which such tax imposed by this title exceeds the excess of—

"(A) The sum of—

"(i) The amount shown as the tax by the taxpayer upon his return (determined without regard to any credit for an overpayment for any prior period, and without regard to any adjustment under authority of sections 6205(a) and 6413(a)), if a return was made by the taxpayer within the time prescribed for filing such return (determined with regard to any extension of time for such filing) and an amount shown as the tax by the taxpayer thereon, plus

"(ii) Any amount, not shown on the return, paid in respect of such tax over—

"(B) The amount of rebates made.

"For purposes of subparagraph (B), the term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed was less than the excess of the amount specified in subparagraph (A) over the rebates previously made.

"(d) *No Delinquency Penalty if Fraud Assessed.*—If any penalty is assessed under subsection (b) (relating to fraud) for an underpayment of tax which is required to be shown on a return, no penalty under section 6651 (relating to failure to file such return or pay tax) shall be assessed with respect to the same underpayment.

"(e) *Failure to Pay Stamp Tax.*—Any person (as defined in section 6671(b)) who willfully fails to pay any tax imposed by this title which is payable by stamp, coupons, tickets, books, or other devices or methods prescribed by this title or by regulations under authority of this title, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of 50 percent of the total amount of the underpayment of the tax."

152.4 IRC 6211. DEFINITION OF A DEFICIENCY [2]

"(a) In General.—For purposes of this title in the case of income, estate, gift, and excise taxes, imposed by subtitle A and B, and chapter 42, the term "deficiency" means the amount by which the tax imposed by *subtitle* A or B or chapter 42 exceeds the excess of—

"(1) the sum of

"(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

"(B) The amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b)(2), made.

"(b) *Rules for Application of Subsection (a).*—For purposes of this section—

"(1) The tax imposed by chapter 1 and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, without regard to the credit under section 31, and without regard to so much of the credit under section 32 as exceeds 2 percent of the interest on obligations described in section 1451.

"(2) The term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed by *subtitle A or B or chapter 42* was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

"(3) The computation by the Secretary or his delegate, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

"The civil penalties of the Internal Revenue Code of 1954 which apply to all types of taxes (including sections 6651—failure to file return or to pay tax, 6653(b)—fraud, and 6653(e)—failure to pay stamp tax or willful attempt to evade) are applicable to the wagering taxes."

152.5 OTHER CIVIL PENALTIES

See Exhibit 100–2 for a listing of other civil penalties.

[2] Id.

EXHIBIT 100–1

Handbook Reference: 121.(11)

OTHER CRIMINAL PENALTIES

Section	*Description of offense*	*Maximum penalty*
7208	Offenses relating to stamps—	$10,000, 5 yrs.
	(1) Counterfeiting,	
	(2) Mutilation or removal,	
	(3) Use of mutilated, insufficient, or counterfeited stamps,	
	(4) Reuse of stamps,	
	(5) Disposal and receipt of emptied stamped packages.	
7209	Unauthorized use or sale of stamps.	$1,000, 6 months.
7211	False statements to purchasers or lessees relating to tax.	$1,000, 1 yr.
7213 (a) (2) and (3)	Unauthorized disclosure of information on income returns by State employees or shareholders of corporation.	$1,000, 1 yr.
7231	Failure to obtain license for collection of foreign items.	$5,000, 1 yr.
7232	Failure to register or give bond, or false statement by manufacturers or producer of gasoline or lubricating oil.	$5,000, 5 yrs.
7233	Failure to pay, or attempt to evade payment of, tax on cotton futures, and other violations.	$20,000, 3 yrs.
7234	Oleomargarine or adulterated butter—	
	(a) False branding, selling, or packing, in violation of law.	$1,000, 2 yrs.
	(b) Removal or defacement of stamps, marks, or brands.	$2,000, 6 months.
	(c) Failure of wholesale dealers to keep or permit inspection of books, or to render returns.	$500, 6 months.
	(d) Imported oleomargarine or adulterated butter.	
	(2) (A) Failure to destroy stamps on empty packages.	$50, 6 months.
	(2) (B) Fraudulently gives away, accepts, sells, buys, uses empty package.	$100, 1 yr.
	(3) Sale when improperly packed or stamped.	$5,000, 2 yrs.
	(4) Fraud by importer.	$5,000, 3 yrs.
7235	Adulterated, process, or renovated butter—	
	(a) False branding, sale, packing, or stamping in violation of law.	$1,000, 2 yrs.
	(b) Failure of wholesale dealers to keep or permit inspection of books, or to render returns.	$500, 6 months.
	(c) Failure to comply with provisions relating to the manufacture, storage, and marking of process or renovated butter.	$1,000, 6 months.
	(d) Failure of dealer to pay tax.	$500 fine.
	(e) Fraud by manufacturer.	$5,000, 3 yrs.
7236	Filled cheese—false branding, sale, packing, or stamping in violation of law.	$500, 1 yr.
7239	White phosphorous matches—	
	(a) Selling unstamped matches.	$1,000, 2 yrs.
	(b) Use of insufficient stamps.	$1,000, 2 yrs.
7241	Interest Equalization Tax—	
	Willful execution of a false or fraudulent certificate of American ownership or certificate of sales to foreign persons.	$1,000, 1 yr.
7261	Representation that retailers' excise tax is excluded from price of article.	$1,000 fine.
7264	Failure of manufacturer of adulterated butter to pay special tax.	$5,000 fine.
7265 (a)	Oleomargarine or adulterated butter—omission or removal of label.	$50 fine, each pkg.
7266	Filled cheese—	
	(a) Failure to pay special tax—	
	(1) Manufacturer	$3,000 fine.
	(2) Wholesale dealer	$1,000 fine.
	(3) Retail dealer	$500 fine.
	(b) Failure of manufacturer to comply with requirements relating to factory number and signs, and bonds.	$1,000 fine.
	(c) Failure of wholesale and retail dealers to display signs.	$200 fine.
	(d) Omission or removal of label.	$50 fine, each pkg.
7267	White phosphorous matches—	
	(b) Omission, neglect, or refusal of manufacturer to comply with law, or doing things prohibited by law.	$1,000 fine.
	(c) Omission or removal of label.	$50 fine, each pkg.
	(d) Omission or factory number from packages.	$50 fine, each pkg.
7270	Failure to affix stamps on foreign insurance policies with intent to evade.	Double amount of tax (fine).

EXHIBIT 100–2
Handbook Reference: 152.5

OTHER CIVIL PENALTIES

Section	*Description of offense*	*Penalty*
6656	Failure to make deposit of taxes.	5% of the amount of the under payment.
6657	Bad checks tendered not in good faith.	1% of amount of check; Minimum: $5 or amount of check.
6658	Addition to tax for violation of section 6851 (relating to termination of taxable year by reason of jeopardy).	25% of total amount of tax or deficiency.
6672	Failure to collect and pay over tax, or attempt to evade or defeat a collected tax.	Total amount of tax evaded, not collected, or not accounted for and paid over.
6674	Willfully furnishing fraudulent withholding statement or failing to furnish statement to employee.	$50
6675	Making an excessive claim with respect to the use of gasoline or lubricating oil.	Equal to double the excessive amount claimed.
6676	Failure to supply identifying numbers on returns, statements, or documents; or to other persons, as required.	$5 for each failure.
6677(a)	Failure to file a return required under Section 6048, I.R.C. (transfers to foreign trusts) or failure to report information required on such return.	5% of the amount transferred, not to exceed $1,000.
6678	Failure to furnish statements to recipients of certain items of income (dividends, interest, certain wage payments, etc.)	$10, each failure.
6679	Failure to file a required return, or to show required information, relating to organization of, or acquisition of stock of, a foreign corporation.	$1,000.
6680	Failure to file an Interest Equalization Tax return.	5% of the amount of tax involved, not to exceed $1,000.
6681	Executing a false Interest Equalization Tax certificate.	125% of tax involved.
6682	Supplying false information with respect to itemized deductions for withholding tax allowance purposes.	$50.
7263	Penalties relating to cotton futures.	$2,000.
7265(b)	Oleomargarine or adulterated butter—purchasing when not properly branded or stamped.	$50.
7265(c)	Oleomargarine or adulterated butter—other offenses.	$1,000.
7266(e)	Filled cheese—purchasing when special tax not paid.	$100.
7266(f)	Filled cheese—purchasing when not stamped, branded, or marked according to law.	$50.
7268	Possession of goods on which taxes are imposed with intent by possessor to sell in fraud of law or to evade tax.	$500, or not less than double the amount of taxes fraudulently attempted to be evaded.
7269	Failure to produce records or property relating to estate tax.	Not exceeding $500.
7271	Penalties relating to stamps—failure to attach or cancel; making, selling, issuing articles or documents without payment of full amount of tax, etc.	$50.
7272	Failure to register.	$50.
7273(a)	Failure to post stamps (not including wagering tax stamp).	
	Not willful.	Equal to special tax but not less than $10.
	Willful.	Double above penalty.
7274	White phosphorus matches—failure of manufacturer to mark factory number on packages.	$50, each package.
7304	Fraudulent claiming drawback on goods on which no tax was paid, or claiming greater amount than tax paid.	$500, or triple amount of drawback claimed.

200 General Investigative Procedure

210 PLANNING (GENERALLY)

(1) The purpose of a special agent's investigation is to obtain facts and evidence. His primary aim is to determine whether the person under investigation has committed a criminal violation, and, if the facts disclose violations subject to criminal or civil penalties within the jurisdiction of the Intelligence Division, to obtain whatever evidence is required to sustain criminal proceedings or the assertion of civil penalties.

(2) The special agent should first determine what he is attempting to prove. This involves an evaluation and analysis of the allegation to ascertain whether the available facts indicate a violation within Intelligence jurisdiction and what evidence must be obtained to establish the elements of the crime. A work chart or other plan of procedure may then be developed. This essentially involves a determination of listing of information and evidence required and the probable source thereof. Planning for fraud investigations is discussed in Subsection 336.

220 KNOWLEDGE OF LAW AND EVIDENCE

221 References

Planning and conducting investigations involves the application of knowledge of the criminal and tax laws contained in the Internal Revenue Code (Title 26, United States Code) and the Criminal Code (Title 18, United States Code), together with a working knowledge of the fundamental rules of evidence. Handbook Subsections 222 and 223 concern general information relative to law and evidence. Specific laws encountered in Intelligence investigations are set forth in Handbook Chapter 100. Trial procedure is discussed in Handbook Chapter 600, and the sections of the Handbook concerning particular investigative devices, techniques, and procedures, such as interviewing witnesses and obtaining documentary evidence, include information regarding related rules of evidence.

222 Law

222.1 DEFINITIONS OF LAW

(1) *Laws* are rules of conduct which are prescribed or formally recognized as binding, and are enforced by the governing power.

(2) *Common and Statutory*

(a) Common law comprises the body of principles and rules of action relating to government and security of persons and property which derive their authority solely from usages and customs or from judgments and decrees of courts recognizing, affirming, and enforcing such usages and customs.

(b) Statutory law refers to laws enacted and established by a legislative body. All Federal crimes are statutory but common law is frequently resorted to for defining words used in the statutes. For example, statutes provide penalties for attempted evasion of income tax but they do not define the terms "attempt" and "evasion."

(3) *Substantive and Adjective*—Substantive law creates, defines, and regulates rights, duties, responsibilities, and obligations, whereas adjective or remedial law provides rules for enforcing rights or obtaining redress for their invasion. Adjective law provides rules of practice concerning proceedings before, during, and after trial, and rules of evidence relating to the admission of evidence at trials and the testing of the credibility and competency of witnesses.

(4) *Criminal and Civil*—Criminal law is that branch of law which defines crimes and provides punishments. Civil law relates to the establishment, recovery, or redress of private and civil rights.

222.2 DEFINITIONS OF CRIMES

An act is a crime against the United States only if committed or omitted in violation of a statute forbidding or commanding it, or in violation of a regulation having legislative authority. Crimes are classified and defined in section 1, Title 18, United States Code, as follows:

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

222.3 PARTIES TO CRIMINAL OFFENSES

(1) Section 2, Title 18 defines as a principal, and punishable as such, one who commits an offense against the United States; aids, abets, counsels, commands, induces or procures its commission; or wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States. Handbook Subsection 122.2 contains the text.

(2) An aider and abettor may be convicted even if the person who commits the offense has not been indicted, tried or convicted.[1] One who causes a criminal act may be convicted even if the performer of the act is acquitted.[2] Acquittal of one mistakenly charged with commission of a crime does not affect the guilt of one proved to have aided and abetted, so long as it is established that the crime was committed by someone.[3]

(3) To aid and abet, a defendant must associate himself with a venture, whether or not there is a conspiracy,

[1] Gray v. U.S., 260 F 2d 483 (CA–D.C., 1958); Beauchamp v. U.S., 154 F 2d 413 (CA–6, 1946), cert. denied, 329 U.S. 723, 67 S. Ct. 66, rehearing denied 329 U.S. 826.

[2] U.S. v. Lester, 363 F 2d 68 (CA–6, 1966).

[3] Von Patzoll v. U.S., 163 F 2d 216 (CA–10), cert. denied, 332 U.S. 809, 68 S. Ct. 110; Legatos v. U.S., 222 F 2d 678 (CA–9), 55–1 USTC 9443.

(222.3 PARTIES TO CRIMINAL OFFENSES—Cont.)

and try to make it succeed. Thus, in United States v. Johnson,[4] where the crime of attempted tax evasion by the main defendant was based on alleged concealment of his interest in, and income from, gambling clubs, his co-defendants were held to be guilty because they consciously were parties to the concealment by pretending to be proprietors even if they did not actually share in the making of false returns. A defendant charged with aiding and abetting in bribery need not have been present when the bribe was paid.[5]

(4) A principal is not liable for a *crime committed by an agent* solely because of the relationship. He will be liable only if the act of the agent is with his knowledge or consent or he otherwise comes within the provisions of section 2 of Title 18. The agent, himself, is criminally responsible for his own actions.

(5) A person becomes *an accessory after the fact*, if, with knowledge of the commission of a crime, he assists in preventing or hindering the apprehension, trial, or punishment of the perpetrator.[6] Suppressing important evidence also comes within this category.[7] A person is guilty of *misprision* of felony if he has knowledge of the actual commission of a felony, conceals it, and does not make this known to a person in authority as soon as possible.[8]

(6) A *corporation* can be prosecuted for the criminal acts of its officers concerning corporate affairs, but the only possible punishment is by fine. However, the officers themselves are also criminally liable for these same acts.[9]

223 Evidence (General Rules)

223.1 DEFINITION OF EVIDENCE

Evidence is all the means by which any alleged matter or fact, the truth of which is submitted to investigation, is established or disproved. Investigators obtain evidentiary facts which by inference tend to prove or disprove the ultimate, main, or principal fact. The latter is a matter for determination by a court or jury. For example, a special agent obtains, in connection with a net worth case, documents and oral statements showing that a taxpayer's bank balance has increased substantially. That is an evidentiary fact from which an *inference* may be drawn relative to the ultimate or principal fact, namely, that the taxpayer wilfully attempted to evade income tax. Legal evidence is such as is admissible in court under the rules of evidence because it tends reasonably and substantially to prove a fact. *Evidence is distinguished from proof* in that the latter is the result or effect of evidence.

223.2 CLASSIFICATIONS OF EVIDENCE

(1) *Direct evidence* is that which, if believed, proves the existence of the principal or ultimate fact without any inference or presumption. It is direct when the very facts in dispute are sworn to by those who have actual knowledge of them by means of their senses. It may take the form of admissions or confessions made in or out of court.

(2) *Circumstantial evidence* is that which tends to prove the existence of the principal fact by inference. The use of circumstantial evidence is recognized by the courts as a legitimate means of proof, and involves proving several material facts which, when considered in their relationship to each other, tend to establish the existence of the principal or ultimate fact. In the absence of a confession of a witness to whom the violator has expressed his intent, violations involving wilful intent are proved by circumstantial evidence. Indeed, it is the only type of evidence generally available to show such elements of a crime as malice, intent, or motive, which exist only in the mind of the perpetrator of the deed. The proof of most Internal Revenue violations, therefore, is based on circumstantial evidence. Circumstantial evidence includes direct testimony as to secondary facts which are relied on to establish the main fact in issue. For example, in a tax evasion case, a taxpayer's customer testifies that he paid $10,000 for merchandise and a Government agent testifies that the payment does not appear on the taxpayer's books and tax returns. Those facts constitute direct evidence of the omission of $10,000 in income but not of the main issue, which is, "Did the defendant wilfully attempt to evade income tax?"

(a) In addition to proving intent, a subject covered in greater detail in Subsection 31(11).2 on wilfulness, circumstantial evidence is also frequently used to prove unreported income as shown by increases in net worth, expenditures, or bank deposits.

(b) Circumstantial evidence may be as cogent and convincing as direct evidence and the jury may properly find that it outweighs conflicting direct evidence. However, the inference must be based on convincing facts and must be a more probable and natural one than other explanations offered. The Supreme Court in the Holland case[1] stated as follows:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances of the evidence's correctly pointing to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

[4] 319 U.S. 503, 63 S. Ct. 1233, 43-1 USTC 9470.
[5] Daniels v. U.S., 17 F 2d 539, cert. denied 274 U.S. 744, 47 S. Ct. 591.
[6] 18 USC 3.
[7] Neal v. U.S., 102 F 2d 643.
[8] 18 USC 4; also Handbook subsection 241.32.
[9] Currier Lumber Co., Inc. v. U.S., 166 F 2d 346 (CA-1), 48-1 USTC 9191.

[1] 348 U.S. 121, 75 S. Ct. 127, 54-2 USTC 9714.

(223.2 CLASSIFICATION OF EVIDENCE—Cont.)

(3) *Evidence may be positive or negative*—Evidence is positive when it relates to proof that a fact did or did not happen or exist. Evidence is negative when a witness states that he does not have knowledge of the happening or existence of a fact or circumstance. Examples of the latter are testimony that the records of a District Director do not show that the taxpayer filed a return and testimony of an agent that he examined records relating to real estate, bank accounts, and other assets in a given area and did not find any additional assets at the starting point. Positive evidence is stronger than negative evidence. In the Holland case[2] the Supreme Court held that proof of a likely source of unreported income was sufficient to convict in a net worth case without negating all possible nontaxable sources of the alleged net worth increases. However, certain facts can be shown only by negative evidence. In the Massei case[3] the Supreme Court held that proof of a likely source of unreported income is not necessary where all possible sources of nontaxable income were negatived.

(4) *Evidence also may be classified as oral, documentary, and real*—Evidence may be presented orally through witnesses, or by the introduction of records or other physical objects. Oral testimony consists of statements made by living witnesses under oath or affirmation. Documentary evidence consists of writings such as judicial and official records, contracts, deeds, and less formal writings such as letters, memorandums, and books and records of private persons and organizations. Maps, diagrams, and photographs are classed as documentary evidence. Real or physical, sometimes called demonstrative evidence, relates to tangible objects or property which are admitted in court or inspected by a trier of facts. More detailed information regarding oral testimony and documentary evidence is presented in Subsections 637 and 250, respectively.

223.3 RELEVANCY, MATERIALITY, AND COMPETENCY

(1) To be admissible evidence must be relevant, material, and competent. If a fact offered in evidence relates in some logical way to the principal fact, it is *relevant*. The word relevant implies a traceable and significant connection. A fact need not bear directly on the principal fact. It is sufficient if it constitutes one link in a chain of evidence or that it relates to facts which would constitute circumstantial evidence that a fact in issue did or did not exist. One fact is logically relevant to another if, taken by itself or in connection with other facts, it proves or tends to prove the existence of the other fact. If the fact is logically relevant, it is also legally relevant unless it is barred by some rule of evidence. Evidence is *material* if it tends to cast light on the subject in dispute, to affect the outcome of the trial, or to help establish the guilt or innocence of the accused. Not all relevant evidence is material, but all material evidence is relevant. For example, where the defendant has already acknowledged his own handwriting in court, proof of his handwriting through an expert would be immaterial because the fact has already been sufficiently proved.

(2) The terms relevant, competent, and material are not synonymous. Evidence must not only be logically relevant and sufficiently persuasive but also legally admissible, in other words, *competent*. Relevant evidence may be incompetent and hence inadmissible because it is hearsay, or not the best evidence.

(3) The words "irrelevant" and "immaterial" usually refer more particularly to the statement sought to be elicited. Although incompentency may relate to documents, in many cases it may go to the person of the witness in that he may be under some disability which prevents him from testifying in the particular case. For example, a person is not competent to testify if he does not understand the nature of an oath or is unable to narrate with understanding the facts he has seen.

(4) As applied to evidence such as documents, evidence is competent if it was obtained in a manner, in a form, and from a source proper under the law. Examples of incompetent evidence are a confession involuntarily obtained or an unsigned carbon copy of a document which is offered without any explanation for the failure to produce the original.

(5) Evidence may have limited admissibility. The fact that certain evidence is not admissible for one purpose, does not preclude its use for another. An evidentiary fact may not be admissible as independent proof of the principal fact, and yet be admitted to corroborate or impeach. To illustrate, tax returns for years prior to those in an indictment may be used to corroborate the starting point for a net worth computation although they would not be admissible as proof of the charge of attempted evasion.

(6) A special agent should obtain and report all facts which logically relate to the subject of his investigation. He should not omit any significant facts because of *doubt* regarding their relevance. There are no absolute and concrete standards for relevancy because the facts vary in each case. Therefore, judges have broad discretion in determining what evidence is relevant. Likewise, the special agent should not omit evidence because of doubt as to its materiality or competency.

223.4 JUDICIAL NOTICE

(1) To save time and expense, a trial judge may accept certain facts without requiring proof, if they are commonly

[2] Id.
[3] 355 U.S. 595, 78 S. Ct. 495, 58-1 USTC 9324.

(223.4 JUDICIAL NOTICE—Cont.)

and generally known, or can be easily discovered.[4] Judicial notice of such facts takes the place of proof and is of equal force. This does not prevent a party from adducing evidence to dispute the matter.[5]

(2) A matter of judical notice may be said to have three material requisites:

(a) It must be a matter of common and general knowledge (or capable of accurate and ready demonstration);[6]

(b) It must be well-settled and not uncertain; and

(c) It must be known to be within the limits of the jurisdiction of the court.[7]

(3) A Federal court must take judicial notice of such matters as the Constitution, statutes of the United States (including legislative history),[8] treaties, contents of the Federal Register, in which the Internal Revenue and other administrative regulations are published,[9] and the laws of each state.[10] Laws of foreign jurisdictions are not judically noticed.

(4) A Federal court will judicially notice its record in the same case.[11] It is not required to notice prior litigation in the same court,[12] but may do so under certain circumstances where the prior proceedings are closely related, as in a contempt proceeding.[13]

(5) Federal courts may also judicially notice such matters as scientific and statistical facts, well-established commercial usages and customs, and historical and geographical facts.

223.5 PRESUMPTIONS

(1) A presumption is a rule of law which permits the drawing of a particular inference as to the existence of one fact not certainly known from the existence of other particular facts. Although it is not evidence, it may be considered as a substitute for evidence. Any inference is a permissible deduction from the evidence and may be accepted or rejected by the trier of fact whether it be the court or a jury. It differs from a presumption in that the latter is a rule of law affecting the duty of proceeding with the evidence. For example, there is a *presumption* in civil cases that the Commissioner's determination of additional income is correct,[14] although he still has the burden of proving intent to evade tax. However, an *inference* of such intent may arise from certain proved facts.

(2) Presumptions may be conclusive or rebuttable. A *conclusive presumption* is binding upon the court and jury and evidence in rebuttal is not permitted. For example, it is generally recognized that an infant under the age of seven is conclusively presumed to be incapable of committing a felony.

(3) A *rebuttable presumption* is one which prevails until it is overcome by evidence to the contrary. Some rebuttable presumptions are:

(a) In criminal cases, a defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt.

(b) A presumption as to authenticity of signatures on Internal Revenue documents is covered by IRC 6064, which provides: "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement or other document was actually signed by him." Presumptions as to the authorization for signing corporation and partnership returns are contained in IRC 6062 and 6063.

(c) It is presumed that public officers perform their duties according to law and do not exceed their authority.

(d) Every person is presumed to know the law, and ignorance of the law is no excuse for its violation. This presumption does not relieve the government proving wilfulness in criminal actions for violation of the Internal Revenue laws. The defendant may show his misconception of the Internal Revenue law as evidence of his lack of wilfulness.[15]

(e) A person signing an instrument is presumed to have knowledge of its contents.

(f) A person of ordinary intelligence is presumed to intend the natural and probable consequences of his voluntary acts. Although this presumption in itself will not relieve the burden of proving wilfulness, it does operate to permit inferences to be drawn from the acts of the defendant which may constitute the circumstantial proof of wilfulness.[16]

(g) The deductions and exclusions appearing on an income tax return are presumed to be all that exist.[17]

(h) Every person is presumed to be sane.

(i) Proof that a letter, properly stamped and addressed, was mailed and not returned to the return address creates a presumption that it was received.

[4] Application of Knapp-Monarch Co., 296 F 2d 230 (Ct. of Customs & Patent Appeals, 1961); Porter v. Sunshine Packing Co., 81 F Supp. 566 (W. D. Pa., 1948).
[5] App. of Knapp-Monarch Co., supra (note 4); 9 Wigmore on Evid. (3rd Ed.) sec. 2567.
[6] App. of Knapp-Monarch Co., supra (note 4).
[7] 20Am. Jurisprudence, Evidence, p. 81, sec. 39.
[8] Alaska v. American Can Co., 358 U.S. 224, 79 S. St. 274 (1958).
[9] 44 USC 307.
[10] Lamar v. Micou, 114 U.S. 218, 5 S. Ct. 857 (1885); Application of Dandridge, 186 F. Supp. 276 (D. N.J., 1960).
[11] U.S. v. Russell, 146, F. Supp. 102 (S.D. N.Y., 1956).
[12] Benetti v. U.S., 97 F 2d 268 (CA-9, 1938).
[13] O'Malley v. U.S., 128 F 2d 676 (CA-8, 1942).
[14] Rule 32, Rules of Practice, Tax Court; Bryant v. U.S., 200 F 2d 822 (A-6), cert. denied 346 U.S., 913; Welch v. Helvering, 290 U.S. 111; Botany Mills v. U.S. 278 U.S. 282; Greenfeld v. Commissioner 166 F 2d 318 (CA-4); Herbert Thompson v. U.S., 59-2 USTC 9647 (D.C. Minn.).
[15] Haigler v. U.S., 172 F 2d 966 (CA-10), 49-1 USTC 9171.
[16] McKenna v. U.S., 282 F 2d 481 (CA-8), 56-1 USTC 9492.
[17] U.S. v. Bender, 216 F 2d 869 (CA-7), 55-1 USTC 9142.

(223.5 PRESUMPTIONS—Cont.)

(j) The flight of a person accused of a crime or an attempt to evade arrest *may* create a presumption of guilt.

(k) The destruction, mutilation, or concealment of books and records or other evidence creates a presumption that the production of the records or evidence would be unfavorable to the person destroying them. A fabricator of evidence also creates a presumption against himself. It is proper for a court to charge the jury that it may consider the taxpayer's refusal to produce his books and records for Internal Revenue inspection, in determining the question of wilfulness.[18]

223.6 BURDEN OF PROOF

(1) Burden of proof is the obligation of the party alleging the affirmative of an issue to prove it. This burden remains on the Government throughout a criminal trial although the burden of going forward with evidence may shift from one side to the other.[19] The doctrine of judicial notice and the operation of presumptions are aids in carrying the burden of proof and in proceeding with evidence. When the party having the burden of proof has produced sufficient evidence for the jury to return a verdict in favor of such party, a *prima facie case* has been established. This does not mean that the jury will render such a verdict, but that they could do so from the standpoint of sufficiency of evidence. At this point the defendant has two choices. He may choose to offer no evidence, relying on the court and jury to decide that the Government has not overcome the presumption of innocence, or he may offer evidence in his defense. If he wishes to introduce new matters by way of denial, explanation, or contradiction, the burden of going forward with evidence is his, although the prosecution still has the burden of proof with respect to the entire case. The court pointed this out to a jury in the Littlefield case[20] in the following language:

> "The burden of proof is not upon the defendant to prove that he did believe that the way in which he computed and returned his income was correct, but the burden is upon the Government to prove beyond a reasonable doubt that the defendant intended to commit a crime and intended wilfully to defraud the Government. If you have a reasonable doubt arising from the evidence as to whether or not in computing and returning his income for the years involved here the defendant acted in good faith according to the best of his knowledge and understanding, even though his method of computation might have been entirely wrong, it is your duty to find him not guilty."

(2) Proof beyond a reasonable doubt of every element of the crime charged is necessary for a conviction. In charging a jury as to the meaning of reasonable doubt, the judge in U.S. v. Sunderland[21] stated:

> "A reasonable doubt, is a doubt founded upon a consideration of all the evidence and must be based on reason. Beyond a reasonable doubt does not mean to a moral certainty or beyond a mere possible doubt or an imaginary doubt. It is such a doubt as would deter a reasonably prudent man or woman from acting or deciding in the more important matters involved in his or her own affairs. Doubts which are not based upon a reasonable and careful consideration of all the evidence, but are purely imaginary, or born of sympathy alone, should not be considered and should not influence your verdict. It is only necessary that you should have that certainty with which you transact the more important concerns in life. If you have that certainty, then you are convinced beyond a reasonable doubt.
> "A defendant may not be convicted upon mere suspicion or conjecture. A defendant should be acquitted if the evidence is equally consistent with innocence as with guilt."

(3) In *civil cases* the burden of proof ordinarily is on the plaintiff to prove his case, without any presumption against him at the outset. In tax cases, however, the burden is upon the plaintiff or petitioner (taxpayer) to overcome the presumption of correctness of the Commissioner's determination of the deficiency.[22] Rule 32 of the Rules of Practice, Tax Court, provides: "The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent." There are four important exceptions to the above rule, namely, fraud cases,[23] where assessment is asserted within the six-year limitation on account of alleged omission of more than 25 percent of gross income stated in the return, other new matters pleaded by the Commissioner, and transferee proceedings.

(a) The Internal Revenue Code provides that the burden of proof is on the Commissioner where fraud is alleged. IRC 7454 states: "In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary or his delegate." As a matter of general law it has always been held that one who alleges fraud must prove it.[24]

(b) Where, under IRC 6501(e), the Commissioner makes an assessment after the three-year limitation period, but within six years after the return is filed, because of omission of more that 25 percent of the amount of gross income shown in the return, the burden of proving the required omission is on him.[25] This is in line with the general rule that one relying on an exception to the statute of limitations must prove the exception.[26]

[18] Louis C. Smith v. U.S., 236 F 2d 260 (CA-8), 56-2 USTC 9830, cert. denied, 352 U.S. 909, 77 S. Ct. 148; Beard v. U.S., 222 F 2d 84 (CA-4), 55-1 USTC 9400, cert. denied, 350 U.S. 846, 76 S. Ct. 48; Olson v. U.S., 191 F 2d 985 (CA-8), 51-2 USTC 9468; Myres v. U.S., 174 F 2d 329 (CA-8), 49-1 USTC 9275, cert. denied, 338 U.S. 849, 70 S. Ct. 91; U.S. v. Milton H. L. Schwartz, 213 F Supp. 306 (E.D. Pa.), 63-1 USTC 9382.
[19] Lisansky v. U.S., 31 F 2d 846 (CA-4), cert. denied, 279 U.S. 873, 49 S. Ct. 514.
[20] U.S. v. Littlefield, 56-2 USTC 10.083 (S.D. Fla.).
[21] U.S. v. Sunderland, 56-2 USTC 9651 (D.C. Colo.).
[22] Avery v. Comm., 1 USTC 254 (CA-5).
[23] Paddock v. U.S., 280 F 2d 563 (CA-2), 60-2 USTC 9571; U.S. v. Cecil Thompson, 279 F 2d 165 (CA-10), 60-2 USTC 9487; Carter v. Campbell, 264 F 2d 930 (CA-5), 59-1 USTC 9306; Budd v. Comm., 43 F 2d 509 (CA-3), 2 USTC 570.
[24] Budd v. Comm., id.
[25] Reis v. Comm., 1TC9; 142 F 2d 900 (CA-6), 44-1 USTC 9347.
[26] Wood v. Comm., 245 F 2d 888 (CA-5), 57-2 USTC 9790.

(223.6 BURDEN OF PROOF—Cont.)

(c) Tax Court Rule 32 provides that the Commissioner has the burden of proving new matters pleaded by him in answer to the petition. This is an application of the general rule of law regarding evidence which places the burden on the party alleging the fact at issue.[27]

(d) The Commissioner has the burden of proof to establish transferee liability. IRC 6902 provides: "In proceedings before the Tax Court the burden of proof shall be upon the Secretary or his delegate to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax." The original tax deficiency is presumed to be correct and the transferee has the burden of establishing its incorrectness.

(4) *The degree of proof required in civil cases* is a "preponderance of evidence," except where fraud is alleged. In the latter case, "clear and convincing evidence" is necessary in order to prevail on the fraud issue.[28]

(a) *Preponderance of evidence* is evidence that will incline an impartial mind to one side rather than the other so as to remove the cause from the realm of speculation. It does not relate merely to the quantity of evidence. In the Wissler case[29] the court's instruction concerning preponderance of evidence was as follows:

> "The terms 'preponderance of evidence' and 'greater weight of evidence' as used in these instructions are terms of practically the same meaning, and when it is said that the burden rests upon either party to establish any particular fact or proposition by a preponderance or greater weight of evidence, it is meant that the evidence offered and introduced in support thereof to entitle said party to a verdict, should when fully and fairly considered produce the stronger impression upon the mind and be more convincing when weighed against the evidence introduced in opposition thereto. Such preponderance is not always to be determined by the number of witnesses on the respective sides, although it may be thus determined all other things being equal."

(b) *Clear and convincing evidence* is that which need not be beyond a reasonable doubt as in a criminal case but must be stronger than a mere preponderance of evidence. In the Gladden case[30] the court instructed the jury on this point as follows:

> "A mere preponderance of the evidence, meaning merely the greater weight of the evidence, is not sufficient to prove fraud. This does not mean that you must be convinced of fraud beyond a reasonable doubt, because this is not a criminal case. However, an allegation of fraud does require a greater degree of proof than is required in most civil cases, and a mere preponderance of the evidence, while enough to incline the mind of an impartial juror to one side of the issue rather than the other, is not enough to prove fraud. Fraud must be established by evidence which is clear, cogent and convincing."

223.7 HEARSAY

(1) Hearsay has been defined as evidence which does not come from the personal knowledge of the witness but from the mere repetition of what he has heard others say. It also relates to the offering by a witness of a document prepared by another person. Hearsay is second-hand evidence and is generally excluded. A special agent's testimony that payees of corporate checks have told him the checks were for personal expenses of the taxpayer, an officer of the corporation, is inadmissible as hearsay.[31] The personal nature of the payments should be proved through the taxpayer's records, testimony of the special agent or others as to his admissions, or testimony of the third parties.

(2) Lack of opportunity for cross-examination is the principal reason for excluding hearsay testimony. As stated in the Papadakis case:[32] "The hearsay rule is concerned only with the reliability of evidence offered to prove a fact, whatever that fact might be. It operates to render inadmissible extrajudicial writings or declarations introduced to prove the truth of what was said or written, on the theory that such evidence, not being subject to the tests of cross-examination is not reliable. 5 Wigmore on Evidence, 1361." Cross-examination is essential as a test of the truth of the facts offered and provides an opportunity to test the credibility of the witness, his observation, memory, bias, prejudice, and possible errors. It also subjects the witness to the penalties of perjury and may eliminate deliberate or unintentional misstatements of what he has been told.

(3) The courts, in the interests of justice, have made certain *exceptions to the hearsay rule.* The exceptions are based on two principal reasons: necessity for use and probability of trustworthiness. The so-called necessity rule usually comes into being from the unavailability of the person who made the statement to appear and testify, and the court would thereby be deprived of evidence that is important in the decision of an issue. In addition to being necessary, the evidence must also have the probability of truthfulness that will substitute for cross-examination. Evidence that meets the above standards is admissible as an exception to the hearsay rule. Some of the more important exceptions are the following:

(a) *Admissions and Confessions*—An admission is an acknowledgment of certain facts by a party to the action which are inconsistent with his position at the trial. A confession is a statement of a person that he is guilty of a crime. This subject is covered in detail in Subsection 245.

(b) *Business Records, Public Records, and Commercial Documents*—Records containing entries made in

[27] Berkshire Cotton Mfg. Co., 5 BTA 1231.
[28] Rodd v. Fahs, 56-2 USTC 9696 (S.D. Fla.).
[29] Wissler v. U.S., 58-1 USTC 9414 (S.D. Fla.).
[30] Gladden v. Self, 55-1 USTC 9227 (E.D. Ark.), Affirmed 224 F 2d 282 (CA-8).
[31] Greenberg v. U.S., 280 F 2d 472 (CA-1), 60-2 USTC 9577, 295 F 2d 903, 61-2 USTC 9727.
[32] Papadakis v. U.S., 208 F 2d 945 (CA-9), 54-1 USTC 9137.

(223.7 HEARSAY—Cont. (1))

the regular course of business are admissible without the testimony of the person who made the entries,[33] if they are properly identified by some witness. Public records made by an officer in the performance of his duties are also admissible after proper authentication.[34] Certain commercial documents, such as stock market reports, may also be admitted into evidence, as discussed in 253.

(c) *Expert and Opinion Testimony*—Expert opinions are the conclusions of a person who has been qualified as an expert in his field and are admitted to aid the jury in its deliberations.[35] Opinions of laymen may also be admitted into evidence under certain circumstances.

(d) *Reputation*—A defendant in a Federal prosecution may offer witnesses to testify to his good reputation in the community where he lives. Such evidence is competent because it may tend to generate a reasonable doubt of his guilt.[36] The evidence should be restricted to the character trait in issue, and bear an analogy to the nature of the charge.[37] For instance, a witness for the defendant in an income tax evasion case may be asked on direct examination if he knows the defendant's general reputation for truth and veracity in the community, whereas a question about his reputation for peaceableness would be improper. The witnesses must confine their testimony to general reputation, and may not testify about their own knowledge or observation of the defendant, or about his specific acts or courses of conduct.[38] Once the defense has raised the issue of character, the prosecution may inquire of the witness on cross examination if he has ever heard charges or rumors of the defendant's previous arrests, since arrests may in themselves bear upon reputation, and answers to such questions may help the jury weigh the value of the character testimony.[39] The prosecution may offer evidence of bad reputation, but not of specific acts of misconduct, in rebuttal of character testimony.[40] (See also 637.41:(3).)

(e) *Mental and Physical Condition*—Contemporaneous or spontaneous declarations of a person may be admissible to prove his mental or physical condition. While such statements carry more weight when made to a physician for purposes of treatment, they may be competent even if made to family members or other persons.[41] Thus, a trial court in a tax case might admit a lay witness's testimony that he heard the defendant complain of severe headaches and inability to concentrate just before preparing his tax return.

(f) *Reported Testimony*—Reported testimony of a previous trial or hearing is admissible provided the witness is unavailable (has died, has disappeared, is mentally or physically incapacitated, or is beyond jurisdiction of the court), if the parties and issues are the same, and an opportunity for cross-examination has been afforded. New trials may result from mistrials, failure of a jury to agree, or reversals after appeal.

(g) *Statements Against Interest*—Statements against interest relate to oral or written declarations *by one not a party to the action* and not available to testify (illness, death, insanity, or absence from the jurisdiction). Such statements must be against the pecuniary or proprietary interest of the declarant and to make the statement trustworthy, the pecuniary interest must be substantial. For example, in order to establish that the defendant paid off a large debt with currency on a certain date, the Government may prove the payment through an entry in the personal diary of the deceased creditor. The diary could be identified by a relative of the deceased as having been found among his papers after his death.

(h) *Dying Declarations* are statements made by the victim of a homicide who believes that death is imminent. To be admissible, such statements must relate only to facts concerning the cause for and circumstances surrounding the homicide charged. They are admitted from the necessities of the case to prevent a failure of justice. Furthermore, the sense of impending death is presumed to remove all temptation of falsehood.

(i) *Spontaneous Declarations (Res Gestae).*

1 Res gestae is a Latin phrase meaning "things done." It refers to spontaneous declarations and acts committed during the event and objects connected with it. The trustworthiness of such statements lies in their spontaneity, for the occurrence must be startling enough to produce a spontaneous and unreflected utterance without time to contrive and misrepresent. They may be made by participants or bystanders, and a person who made or heard such statements may testify about them in court. The trial judge has wide discretion in deciding the admissibility of unsworn statements as part of the res gestae.

2 Evidence of acts committed during the crime and objects connected with it, such as lottery tickets found at the scene of a crime, also may be admissible as part of the res gestae. The circumstances involved in a raid on a bookmaking establishment may be used to illustrate the application of the res gestae rule. One of the persons in the establishment, upon seeing the raiding officers enter the room, says, "I told John Doe he'd be caught if he didn't get a stamp." Even though the speaker is never identified and is not available as a witness, an agent who heard the statement may be permitted to testify about it in a trial of John Doe. Although in most instances the evidence of a crime is admissible under other rules of evi-

[33] 28 USC 1732. See also Handbook Section 250.
[34] Rule 27, Federal Rules of Criminal Procedure (cited FRCP); Rule 44, FRCP 28 USC 1733. See also Handbook Section 250.
[35] Handbook Subsection 687.71; Rule 28 FRCP.
[36] Michelson v. U.S., 335 U.S. 469, 69 S. Ct. 213 (1948); Hawley v. U.S., 133 F 2d 966 (CA-10, 1943).
[37] Id.
[38] Id.
[39] Id.
[40] U.S. v. Bono, 324 F 2d 582 (CA-2, 1963); Sun B. Lee v. U.S., 245 F 2d 322 (CA-9, 1957); Josey v. U.S., 135 F 2d 809 (CA-D.C., 1943).
[41] Travelers' Insurance Company v. Mosley, 75 U.S. 397 (1869); Mabry v. Travelers' Insurance Company, 193 F 2d 497 (CA-5, 1952).

(223.7 HEARSAY—Cont. (2))

dence, some important facts may be admissible only as part of the res gestae. The rule of res gestae also is applicable in continuing crimes. During the continuance of a conspiracy, all of the acts and statements made in furtherance thereof are admissible in evidence as part of the res gestate regardless of the guilt or innocence, or the interest or lack of interest, in the conspiracy of the person who performs such acts or makes such statements.

3 The cost of goods sold and other deductions shown on a tax return have been considered by the courts as admissions of the defendant. They might also be considered to be part of the res gestae, on the theory that they are incidents and part of the transaction of preparing the return.[42] (See also 245.151.)

230 SOURCES OF INFORMATION

231 Introduction

This section concerns sources of investigative information that may be useful to special agents of all districts. Districts offices may prepare an addenda of other sources which are applicable to investigations in the local area. Information regarding any corrections to the material in this section or any additional sources which are of sufficient importance to warrant inclusion in the Handbook may be forwarded to the Director, Intelligence Division, National Office.

232 Confidential Sources of Information

232.1 MANUAL REFERENCES

Procedures for processing information from confidential sources are provided in IRM 9370 through 9373.

232.2 INFORMANTS.

232.21 Definition of Informants

Informants, as distinguished from ordinary witnesses, are those who voluntarily furnish information which otherwise might not be disclosed to, or discovered by, the Govermnent. Such persons include those who furnish leads or bits of information as well as those who submit detailed information regarding alleged violations. A *confidential* informant is one who furnishes information on the expectation that his identity will not be disclosed. However, definite assurance cannot be given the informant for the reasons set forth in 232.23.

232.22 Development of Informants

Many criminal tax cases have originated from information furnished by informants, and many have been successfully completed only because of the use of informants who have supplied information otherwise unavailable. This is especially true with respect to taxpayers engaged in illegal activities. Much valuable information can be obtained by special agents through cultivating acquaintances who are potential sources of information. Examples of such persons are officials or employees of financial institutions and credit agencies; insurance salesmen; mail carriers; other law-enforcement officers; accountants; attorneys; and officers or members of unions and agricultural and professional organizations.

232.23 Protection of Informants

(1) *During Investigations*—Communications of confidential informants are based on the informant's trust that his identity will not be disclosed and that he will not be harmed physically, economically, or otherwise because of his action in furnishing information to the Government. The protection of confidential informants, therefore, is absolutely essential in enforcement activities. Special agents will not divulge either the identity of the informant or the existence of a confidential informant in the case to anyone other than authorized persons. To provide maximum security regarding their identity and existence, confidential informants will not be used as witnesses, placed in a position where they might become witnesses, or unnecessarily identified in court without their consent. Special agents, therefore, should obtain evidence from other sources to the extent that it is unnecessary for unauthorized persons to know that an informant has been involved in the case. Communications of confidential informants should not be attached to income tax returns, associated with workpapers, or included in the exhibits submitted with a report. Further precautions concerning the treatment of confidential sources of information in reports is set forth in 533.1:(1)(e); and IRM 9373.1:(4) provides for the use of assumed names for confidential informants.

(2) *In the Courts*

(a) It is the duty of every citizen to communicate to his Government any information which he has of an offense against its laws. To encourage him in performing his duty, the courts have held such information to be confidential within the discretion of the Government. The courts, on the basis of public policy, will not compel or allow disclosure of an informant's identity without the consent of the Government unless such information is useful evidence to vindicate the accused or lessen the risk of false testimony, or is essential to the proper disposition of the case.[1] Since the privilege exists in behalf of the Government and not the informant, the Government may waive it, and it is deemed to be waived if the informant

[42] 20 Am Jur., Evidence, Sec. 665; Lee v. Mitcham, 98 F 2d 298 (CA–D.C., 1938).

Sec. 232

[1] Rugendorf v. U.S., 376 U.S. 528, 84 S. Ct. 825 (1964); Roviaro v. U.S., 353 U.S. 53, 77 S. Ct. 623 (1957); ...cher v. U.S. 305 U.S. 251, 59 S. Ct. 174 (1938); U.S. v. Hanna, 341 F 2d 906 (CA–6), 65–1 USTC 15,622.

(223.7 HEARSAY—Cont. (2))

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(232.23 PROTECTION OF INFORMANTS—Cont.)

is put on the witness stand.[2] Further discussion of the law regarding privileged communications of informants is contained in Subsection 244.7.

(b) If a special agent, who has promised an informant that he would keep his identity confidential, is asked to disclose such identity on the witness stand and no objection to the question is made or sustained, he should not refuse to answer, but should state that he cannot disclose the information on the ground that it was a privileged communication to an officer of the Government,[3] and that he is bound by instructions not to disclose such information. He should maintain this position pending instructions from his superiors and advice from the United States Attorney. The special agent's failure to disclose this information may have several results:

1 The court may, if he thinks that no harm is done the defendant, uphold the special agent;

2 The court may dismiss the action;

3 The special agent's superiors may release him from his obligation; or

4 If he persists in his refusal to answer, the court may find him in contempt.

232.24 Techniques With Informants

(1) Be fair and truthful with informants. Make no promises that you do not intend to fulfill. Show appreciation for the information furnished but do not let an informant determine the procedure to be used in the investigation or otherwise control it. When talking with or about an informant, avoid offensive terms such as "squealer", or "stool pigeon." A Government officer must not condone any violation of law in order to obtain information. Informants may, through ignorance or zeal, induce a violation. If a defendant can show that the informant who induced him to commit a violation was acting under some arrangement with Government officers, he has a legal defense. Therefore, whenever there appears to be a possibility of entrapment or some other unlawful act by an informant, he should be guided in a manner that will prevent the occurrence of such acts.

(2) Some informants supply only what information they think the officer does not know. The receiver, therefore, should in all instances make every effort to get all facts within the knowledge of the informant. If a telephone call is received from an anonymous source, the receiver should strive to elicit all possible information before the connection is broken because the caller may not offer any further opportunity for communication.

(3) Informants provide information for a variety of reasons, including a sincere interest in enforcement of the law, financial rewards, fear of the law or of his criminal associates, revenge, and personal gain through eliminating competitors. In estimating the reliability of an informant and evaluating the information which he furnished, consideration should be given to his motive.

(4) A special agent who receives information about a taxpayer from an informant should check the Intelligence Division files, inasmuch as the informant may have given an incorrect or incomplete name for the taxpayer. If the original file check discloses no record, and the special agent finds during his investigation that the taxpayer spells his name differently or uses names in addition to the name reported by the informant, the special agent should immediately recheck under the newly discovered name or names.

232.25 Payments to Informants

(1) Instructions concerning rewards and direct purchases of information are provided in IRM 9371 and 9372, respectively. Exhibit 200–1 contains the Bases for Allowance and Rejection of Claims. Negotiations for direct purchases of information are subject to approval of the Chief, Intelligence Division. No payments should be made to informants until their information has been obtained, evaluated, and determined to be worthy of compensation. Advance payments should be avoided at all times. Special agents should be scrupulously exact in all financial transactions with informants. In every instance proof of payment should be obtained, if possible.

(2) Under no circumstances are Internal Revenue employees authorized to assure any person that a reward will be paid in any amount, nor should Internal Revenue personnel indicate to the informant in any manner the amount of the probable tax recovery or whether such recovery is based upon the information submitted by the informant. If inquiry is made as to the amount which may be received, the inquirer should be furnished with a copy of Treasury Decision 6421 pertaining to rewards for information about violations of the Internal Revenue laws.

232.3 FORMS TCR–1, REPORTS OF CURRENCY TRANSACTIONS

(1) Completed Forms TCR–1 contain reports prepared by financial institutions concerning large or unusual transactions in United States currency by individuals or organizations. Such reports are filed with Federal Reserve Banks from which they are obtained by the Intelligence Division. Intelligence Division's district offices maintain alphabetical files of Forms TCR–1 relating to taxpayers who reside in the district or who normally would be expected to file returns therein. Those files are available for scrutiny of personnel of the Intelligence, Audit, Collection, and Appellate Divisions for official purposes. IRM 9373.3 and 9373.4 contain restrictions concerning removal of Forms TCR–1 from the files and from offices wherein they are filed, together with instructions relative to processing such forms.

[2] U.S. v. Schneiderman, et al, 104 F. Supp. 405 (S.D. Calif.); Segurola v. U.S., 16 F 2d 563 (CA–1).

[3] Scher, supra (section 232.23, note 1).

(232.3 FORMS TCR–1, REPORTS OF CURRENCY TRANSACTIONS—Cont.)

(2) Currency reports are communications of a confidential nature subject to the Service policy concerning protection of the identity of those who furnish information regarding possible law violators. This policy is necessary with respect to currency reports to maintain the best relations with the financial institutions and to eliminate the possibility of embarrassment that might come to them through a customer's discovery that he was the subject of currency report. Special agents, therefore, will not disclose the source of information received on a Form TCR–1 to anyone other than their superiors or Service personnel authorized to inspect files of those forms. The source of information shown on a currency report should not be identified in a report: nor should a Form TCR–1 be submitted as an exhibit unless no other record is available and the currency report is considered to be essential evidence in the case. Exceptions may be made when the financial institution releases the information and does not any longer consider it to be of a confidential nature, or when necessary connection with a pending trial.

232.4 SOCIAL SECURITY ADMINISTRATION

(1) The Social Security Administration should be requested to furnish information from its files only when such information is essential to an investigation concerning income or employment taxes and when it is not obtainable from other sources. The disclosure of information thus obtained to any person other than an officer or employee of the Internal Revenue Service engaged in the administration and enforcement of Titles VIII and IX of the Social Security Act, the Federal Insurance Contributions Act, the Federal Unemployment Act, or the income tax laws, and its use for any other purposes, is expressly forbidden. Indentification of a person's employer should be requested on Form 2264. This form should be signed by the Chief, Intelligence Division, or his delegate, following the words "For the District Director". Each request should show the full name and account number of the employee, if known, and the number of the Internal Revenue District originating the request. If the account number is not known, the date and place of birth must be furnished. If available, the names of both parents should also be furnished. The Social Security Administration will bill the Service for requests (Form 2264) processed.

(2) Requests for itemizations of quarterly earnings, which identify employers and taxable wages under the Federal Insurance Contributions Act, are made by memorandum prepared in duplicate plus Intelligence file copies and addressed to the Social Security Administration. Memorandum requests may also be made for copies of Schedule A (Form 941) filed by an employer or Form SS–5 filed by an employee. The memorandum should show:

(a) That the information is to be used in an offical investigation of an income or employment tax matter.

(b) The period(s) for which the itemization of quarterly earnings or the copy of Schedule A (Form 941) is requested.

(c) The person's name and complete social security account number or the employer's identification number, as applicable in each request.

(d) The name, address, and number of the Internal Revenue District originating the request.

(3) The Quarterly Report of Wages Taxable Under the Federal Insurance Contributions Act (For Social Security), Schedule A (Form 941) shows:

(a) Employee's social security account number.

(b) Name of each employee.

(c) Wages taxable under FICA.

(d) State or Possession where employed (or "Outside" U.S.).

(4) The Application for Social Security Account Number (or Replacement of Lost Card), Form SS–5 shows:

(a) Full name of applicant.

(b) Name given at birth.

(c) Place of birth.

(d) Age on last birthday.

(e) Sex.

(f) Color or race.

(g) Mother's full name, at her birth.

(h) Father's full name.

(i) Account number.

(j) Whether employed, self-employed, or unemployed at date of application.

(k) Mailing address.

(l) Date of application.

(m) Signature of applicant.

(5) Forms 2264 and memorandum requests for an itemization of quarterly earnings, a copy of Schedule A (Form 941), or a copy of SS–5 will be routed as follows:

(a) Original: Social Security Administration, Bureau of Date Processing and Accounts, Baltimore, Maryland. 21235.

(b) Duplicate: To office having responsibility for obligating funds for costs involved.

232.5 SELECTIVE SERVICE RECORDS

Selective Service records contain personal and financial data regarding registrants, including family status and dependents. Any requests for information from those records shall be made to the Director, Intelligence Division, National Office. The opinion of the United States Court of Appeals for the Third Circuit in United States v. Caserta[4] indicates that a selective service questionnaire cannot be introduced in evidence other than for an offense against the

[4] 199 F 2d 906, 52-2 USTC 9540.

(232.5 SELECTIVE SERVICE RECORDS—Cont.)

selective service law, and that authority to get information from a questionnaire does not render such document admissible in court. However, this information may lead to other evidence that is admissible.

232.6 BUREAU OF CUSTOMS

(3) The Bureau of Customs has authorized Directors of Customs at Headquarters Ports to furnish Internal Revenue officials with information from Customs' records, such as owners' declarations, manifests and other documents relating to the importation of taxable articles. Customs officials have been instructed to immediately forward to the Bureau for consideration all Service requests for information not covered by prior authorizations. Information obtained from Customs will be treated as being of a confidential nature.

232.7 DEPARTMENT OF LABOR

(1) Under the Labor-Management Reporting and Disclosure Act of 1959,[5] every labor organization engaged in an industry affecting commerce must file annually with the Secretary of Labor on Form LM–2 or LM–3, a financial report, including a Statement of Assets and Liabilities, and a Statement of Receipts and Disbursements.

(2) The Act also requires a report (Form LM–10) from every employer who makes or agrees to make any payment or loan, including reimbursed expenses, to any labor organization, labor relations consultant, or any union officer or employee. It requires as well, a report (Form LM–30) from a labor organization officer or employee who receives payments from an employer.

(3) Every labor relations consultant is required to file annually an Agreement and Activities Report (Form LM–20) detailing the specific activities engaged in, and a Receipts and Disbursements Report (Form LM–21), showing receipts from all employers for labor relations advice or services, and all disbursements by the consultant in connection with such activities. Legal fees received by an attorney in connection with labor relations, legal representation, litigation, or advice are excluded from these reporting requirements.

(4) The Welfare and Pension Disclosure Act[6] directs that the administrator of an employee welfare or pension plan file with the Secretary of Labor a plan description (Form D–1) setting forth the plan benefits, other data, and an annual financial report (Form D–2) showing the amounts contributed by each employer and by the employees; the amount of benefits paid; the number of employees covered; and statements of assets, liabilities, recepits, and disbursements.

(5) Copies of reports filed under the Labor-Management Reporting and Disclosure Act ((1)–(3) above) may be inspected at the National Office of the Department of Labor, Office of Labor-Management Welfare Pension Reports, Washington, D.C., or at its area offices covering the geographical localities where the persons or organizations filing the reports have their principal places of business. Copies of reports filed under the Welfare and Pension Disclosure Act ((4) above) are available for inspection only at its National Office.

233 Business Records

233.1 BANKS

233.11 Function and Organization

(1) A bank is fundamentally an establishment for the custody, loan or exchange of money, and for facilitating the transmission of funds by checks, drafts, and bills of exchange and the like. Its services to customers may include administering estates; storing valuables; purchasing and selling securities; rendering advice concerning business transactions; lending money; collecting notes, drafts, bills, and coupons; furnishing business credit references; preparing tax returns; and many other services.

(2) The principles of bank accounting are basically the same in all parts of the United States. If a special agent understands these principles, he should be able to locate whatever available evidence there is in a bank and be able

[5] 29 USC, Ch. 11.

[6] 29 USC 304, 306, as amended, 1962.

(233.11 FUNCTION AND ORGANIZATION—Cont.)

to trace transactions from one account or bank to another account or bank.

(3) The principal officers of a bank are the president, vice president, secretary, and cashier or treasurer. In many banks, vice presidents act as senior department executives or as loaning officers. The cashier ordinarily is the business manager of the bank and is the one to whom requests for information are usually made. However, there frequently is one other officer or employee of the bank who is most familiar with the accounting systime, or who has been designated by the management to handle requests from the Internal Revenue Service for information. The special agent should learn the identity of that person, and should consult him as a reliable source of information, rather than make indiscriminate inquiries of various officers and employees. A friendly relationship with this bank official will be of great value to the special agent.

(4) The main departments of a bank are commercial, savings, trust, loan and discount, consumer credit, and special services. These are divided into subsidiary departments such as receiving, paying, trust, loan and discount, consumer credit, exchange, collection, and safe deposit, bookkeeping, clearing, transit, statistical and data processing.

(5) The receiving department makes the first entry of all items as they enter the channels of the bank. The paying department takes charge of all the cash in the bank, providing an adequate supply for its needs, paying checks, charging currency to customers, settling clearing house balances, and recording and proving the cash of the bank. The loan department is responsible for the granting and collection of loans and has custody of collateral and the credit and files of a confidential nature relating to the customers. The collection department handles items for collection which may, or may not, go through the commercial deposit accounts. For example, an item may be collected by the bank and the funds turned over to the customer in currency, or in the form of a cashier's check, or be applied direct to the credit of the customer's account in the loan department. The safe deposit department handles all business and records in connection with the rental of, and access to, safe deposit boxes.

(6) The bookkeeping department is responsible for posting to subsidiary ledgers of the deposit liability accounts. The clearing and transit departments look after the collection of items drawn on other banks through the clearing house, by mail or messenger, or through the Federal Reserve system, and the computation of exchange charges when necessary. They route items for collection and prepare cash transit letters describing the items sent for collection. The data processing (ADP) department handles some of the above operations, which are performed by computers rather than manually.

233.12 Bank Records

233.121 CLASSIFICATION OF BANKS

It is impossible to describe all the bank records which might contain information regarding a customer. However, the principal commercial records which are of interest to special agents are: Signature cards: deposit tickets or slips; customer's ledger sheets for checking accounts; savings accounts, special accounts and loan accounts; registers or copies of cashier's checks, bank money orders, bank drafts, letters of credit, and certificates of deposit; teller's proof sheets; copies of settlements with the clearing house; copies of cash transit letters; records of the purchase and sale of securities and Government bonds; collection in and collection out records; customer's unreturned canceled checks; and safe deposit records. Storage considerations have caused many banks to destroy those records not needed for their own use and not required under law to be retained. Therefore, a special agent's success in a bank will depend somewhat on its practice of, and its policy for, retention and destruction of records.

233.122 SIGNATURE CARDS

The signature card shows the signature of the person or persons authorized to sign checks, make withdrawals, or initiate transactions through or against the account of the customer. Usually the signature is executed in the presence of an officer of the bank or of a teller or clerk, and by comparison can be used to prove authenticity of the customer's alleged signature on other papers. A bank teller who has frequently handled the customer's checks would be a competent witness to identify his signature not only on documents normally passing through his hands but also on other papers. If the account is in the name of a corporation, partnership, or association, the signature card will be accompanied by copies of resolutions of the board of directors, or partnership and membership agreements, naming the persons who are to draw checks on the account. A signature card may also contain information concerning the name of the person who introduced the customer, prior banking connections of the customer, the names of institutions in which other accounts may be located, and other departments of the bank with which the customer has had transactions. Banks frequently keep in a central file a master signature card containing detailed information about the customer which may indicate the departments of the bank the customer does business with. Each department where the customer has an account also keeps a card bearing only the signature.

233.123 BANK DEPOSIT TICKETS

The deposit tickets or slips of a customer may be found by reference to the dates shown on the ledger sheets, since the tickets for each day are filed separately. Within this group, they are filed alphabetically or in account number

(233.123 BANK DEPOSIT TICKETS—Cont.)

order. Inspection of a slip may disclose the nature of the items deposited, classified as currency, checks and coupons. Tracing a deposit of currency to its source is, at best, difficult. However, examination of the teller's cash sheets and the records of the currency teller might disclose a transaction in which the customer first cashed a check in order to obtain currency for deposit. Large or unusual currency transactions such as the deposit of a large amount of currency in large or small denominations or the counting of large amounts of currency are noted on the teller's cash sheets so that he can report such information to the bank officers. The same is true of large or unusual currency withdrawals. These large currency transactions are reported to a currency supervisory teller, sometimes called the head teller, to make a record for internal audit purpose. Banks prefer that checks be listed separately on the deposit slip and that they be identified by the name of A.B.A. transit number of the drawee bank. Under a system devised by the American Bankers Association, each bank in the country is identified by a number known as its A.B.A. number (Exhibit 200–2). If the deposit slip does not contain this information, it may be found by examining the proof sheets, the transit letters for foreign (out-of-town) items, and the clearing house settlement for local items. Banks that are members of the Federal Reserve system have another number known as the "routing symbol." If the A.B.A. number cannot be determined (it may be illegible) the routing symbol will indicate the general area in which the bank is located and it is possible to locate the bank by following the amount of the check on cash transit letters. These routing numbers are shown in Exhibit 200–3 and indicate the Federal Reserve District or sub-district in which the bank is located. All banks that are in the area served by a Federal Reserve Bank or Branch carry the routing symbol on their checks right underneath their A.B.A. number as—

14–2—A.B.A. number
650 —Routing symbol

233.124 CUSTOMER'S ACCOUNT RECORDS

(1) Checking Accounts

(a) The fundamental difference between the bookkeeping records under a manual system and an ADP system is that under the manual system a ledger sheet is maintained for each account carried by the customer.

(b) Under an ADP system the daily information is maintained on magnetic tape, which is updated daily. A printout is made of the transactions on a cyclical basis (usually monthly). Many banks retain a copy of this printout. In some systems the statement printout may be either a detailed ledger statement similar to that used under a manual system or a summary or "bobtailed" statement which appears as follows:

Opening Balance	$1,234.56	
Deposits	3,248.12	Number of Items—7
Checks	2,222.22	Number of Items—25
Charges	21.00	Number of Items—4
Ending Balance	$2,239.46	

(c) The banks using an ADP system printout the balances of all accounts on a daily basis. This printout, which may be referred to as a transaction journal or account balance list, will show the following information: account number, date of last activity, type of activity, previous balance, present balance, uncollected funds, and special instructions. By reference to this daily printout it is usually possible to reconstruct the account, particularly when a "bobtailed" statement is used. Most banks using this system also microfilm all items daily so further reference can be made to the microfilm for more detailed information. Some banks again microfilm depositor's checks for the statement period before returning them to the customer.

(d) On the detailed statements under either system, all deposits, withdrawals and daily balances are shown. Symbols may appear opposite various items on the statement signifying something more than a simple deposit or withdrawal. Since banks use different symbols, a bank official or employee should be consulted regarding their meaning.

(e) If the customer deposits a check for a substantial amount drawn on a bank in a distant city, the bookkeeper, under a manual system, or the teller under an ADP system, will code the deposit so as to put a "hold" order on the account. This serves as a warning (Manually) or reject (ADP) so that the deposit cannot be drawn against until the lapse of a specified period of time within which the check will be paid by the bank of origin.

(2) Savings Accounts

(a) Ledger sheets similar to the manual type used in checking accounts are maintained for savings accounts. In an ADP system, the records will be in periodic statement form (usually quarterly). Some banks keep a copy of this statement. If this is done all that is necessary is to obtain a copy of the statement. If statement copies are not available, then it is necessary to reconstruct the account similar to the method used for "bobtailed" statements.

(b) The deposit tickets and withdrawal slips are maintained in separate files similar to the manner described for checking accounts. These documents may show references to drafts, cashier's checks or other accounts.

(3) Loan Records

(a) Banks maintain ledger sheets for loans and separate sheets for the record of collateral used to secure loans. In those banks which use ADP systems to keep their loan records, the reconstruction problem is similar to that involved with checking accounts unless detailed annual statements are printed out and copies of them retained. The availability of the credit or loan file makes reconstruction easier.

(b) Consumer loan records are usually found in a bank department, which is separate from the commerical and mortage loans. The credit files, which may be combined or separate for each department, sometimes contain financial statements and other records such as credit investigations, etc., which may be useful to the agent.

233.125 CERTIFIED CHECK REGISTER

A certified check is a check drawn by a depositor on his account with the bank, across the face of which check a properly authorized bank officer has written the word "Certified," the date, the name of the bank, and his name. The bank has thus contracted to pay the check when presented and has charged the depositor's account. A certified check is not returned to the depositor, but after payment, is retained by the bank in its files. It is recorded in a Certified Check Register which shows at least the amount, the date certified, the depositor who issued it, and the date actually paid. Banks discourage this type of check but perform the service at the insistence of their customers.

233.126 BANK EXCHANGE RECORDS

(1) Bank exchange may be issued by preparing a single copy check, draft, or other document and then recording it in a Register. However, modern practice is to prepare the check, draft, or other document in many copies prepared simultaneously by the use of carbon paper. The original is filed as the bank's copy or register. One copy may be given the customer for his record.

(2) Bank exchange records include cashier's checks, bank drafts (one for each bank on which drawn), and letters of credit, which usually show the purchaser's name. The documents, by endorsement, will show the payees and their locations by the banks where the instruments were cashed or deposited.

233.127 BANK TELLER'S PROOF SHEETS

Each teller prepares daily "teller's proof sheets" on which he shows deposits received balanced against items recieived, divided into currency and coin, check on "us," checks on clearing house banks, checks on out-of-city banks, and coupons. Unusual or large items in any category may be noted and explained on these sheets. These unusual items are reported daily to the head teller or to the officers. Frequently, a record of currency drawn or deposited by a taxpayer can be found on these teller's proof sheets. They are frequently retained for some time to facilitate internal audit by the bank.

233.128 CLEARING HOUSE SETTLEMENT SHEETS

Settlement sheets for clearings are usually maintained for only a short time. Clearing house items are usually not photographed on microfilm. However, they may be photographed by the bank on which they were drawn.

233.129 CASH TRANSIT LETTERS

Copies of cash transit letters have information of varying degrees of completeness. Some small banks record the items sent for collection on out-of-town banks showing amount, bank on which drawn, last endorser, maker, and other information. Other banks merely list the amounts on the letter and then photograph the entire lot. When information is not available from either of the above sources, the bank or Federal Reserve Bank to which the letter was sent may have photographed the items. The date and total amount of the cash letter and the bank to which it was sent should be secured in order to trace the letter at the other end.

233.12(10) SECURITIES BUY AND SELL RECORDS

In small banks, records of purchases and sales of securities may be in correspondence files, but larger banks may have full departments with detailed records. The record of Government bonds may be in the correspondence files with the Federal Reserve Banks or may consist of copies of the manifold bond, particularly Series "E" bonds. The bank's retained copies of "E" bonds issued may be filed in various ways, such as by dates of issue or alphabetically by customers. Bonds that are cashed by banks are frequently photographed just like any other transit items. The same is true of coupons for interest that are detached from customers' bonds and deposited by them for credit to their accounts, or cashed by the bank. These coupons are usually clipped on quarterly or semiannual dates and appear in bank records at more or less regular periods of time.

233.12(11) COLLECTION RECORDS

(1) *Collection out*—Items that are not cash items are not deposited for immediate credit. They are sometimes recorded in the back of the passbook, if such is used, or they may be entered direct on a manifold form and a copy given the customer as a receipt. These are called collection out items and may include drafts with documents attached, checks with special instructions, matured bonds, acceptances, and a wide variety of commercial documents. Some banks use a collection out register, others a copy of the above-described form, and a very few use an individual letter, of which they keep a copy.

(2) *Collection in*—Collection in items are received from other banks and require payment or other action by some customer of the bank. These may likewise be recorded in a register or a manifold form may be prepared and copy sent as a receipt to the bank from which the item came. The required action is taken and the results mailed to the bank from which the item came. These again may be large checks with special instructions; drafts with documents attached; notes for presentation, collection and payment; acceptances; savings account passbooks; or a wide variety of commerical documents.

233.12(12) SAFE DEPOSIT BOX RECORDS

(1) Rental contracts for safe deposit boxes will show who has the right to enter the box, the date of the original renting, various identifying information, and the signature of the renter. Any special instructions will be with the contract, usually on a card.

(2) Access records show date and time of entry and bear the signature of the person entering the box. The frequency of entries may be significant and may correspond in time and date to deposits or withdrawals from other accounts. If the taxpayer agrees to an inspection of the contents of the box, a written inventory showing date of entry, box number, and name of bank, shall be prepared in

(233.12(12) SAFE DEPOSIT BOX RECORDS—Cont.)

the presence of the taxpayer and, if possible, of another agent. The taxpayer should be requested to initial all pages of the inventory and to sign the last page as acknowledgement of ownership of the contents and of the return of all items. Any currency found should be counted, and the inventory should include the quantity of bills in each denomination; any markings on the tie bands around the bundles of currency or packages of coins; and a notation regarding any bills with unusual features, such as the large size in use before 1929, gold certificates, or National Bank Notes. A record should be made of the serial numbers of large bills, and, when advisable, also of a number of the smaller bills. When a special agent finds deeds or other documents pertaining to land, he should make a record, identifying the type of document, such as "Warranty Deed," and show the names of grantor and grantee; legal description of land showing State, County, Range, Township, Section, dates, consideration, revenue stamps, and book and page number where it is recorded. Sealed matter should be opened only with the consent of the box renter. If consent is not secured, the special agent should not open the package, but should note as full a description of it as possible. The special agent should also make careful note of all admissions and other comments made by the box renter to him during the inspection of the box and contents.

233.12(13) CHECKS CASHED

(1) Banks make a distinction between checks cashed and checks paid. Cashing a check means paying out cash for a check drawn on another bank. The paying teller will mark a check of this type by some sign on its face or reverse side. If for any reason the check is returned not paid by the bank on which it was drawn, the teller must know, from the endorsement, who gave it to him in order to get the bank's money back. Paying a check is giving cash for a check on the account of a customer of the bank, or charging a check to his account.

(2) In some areas all checks on which cash is given by the teller are stamped with a code letter or number that indicates which teller and sometimes which bank or branch gave out the cash, regardless of whether the check was on his own bank or some other bank. Also, deposit tickets or withdrawal slips sometimes show denominations of cash deposited or withdrawn.

233.12(14) DEPOSITS

(1) Deposits may be classified as to their basic sources which are:

(a) Receiving Teller
(b) Mail or Special Messenger
(c) Telegraphic Transfers
(d) Other Bank Departments
(e) Night and Lobby Depositories

(2) Deposits may also be classified according to the terms of withdrawal:

(a) *Demand deposits* which are deposits to the usual checking account subject to withdrawal by check on demand.

(b) *Time deposits.*

1 Savings accounts which may be subject to a 30-day notice of withdrawal.

2 Time certificates of deposit which are made by contract to be left with a bank for definite lengths of time, usually six months, and draw a higher rate of interest than the usual savings account.

3 Open account is used by corporations to put idle money to work during slack seasons where it will earn interest. Corporations cannot use savings accounts as they are prohibited from doing so by the rules of the Federal Reserve System.

(3) The Federal Reserve System forbids banks from paying time deposits before the specified date except in an emergency to prevent great hardships to the depositor. The bank is required before making such payment to obtain from the depositor an application describing fully the circumstances constituting the emergency. The application must be approved by an officer of the bank who certifies that, to the best of his knowledge and belief, the statements in the application are true. These applications are retained in the bank's files.

(4) Special agents making inquiries at Federal Reserve System member banks should be alert for Time Deposit accounts and applications relating to the emergency withdrawal of funds of this nature. These applications are an excellent source of information and could be used to help establish cash on hand, lack of beginning cash and other evidence to refute net worth claims by taxpayers.

(5) Examination of deposits and tracing of items may reveal the pattern of transactions of prior periods. That is, interviewing the makers of checks deposited may reveal the source of checks in prior periods. For example, an attempt to trace a transaction that occurred three or four years ago may be blocked because the records for the past period have been destroyed. In that event, the source of checks for prior periods might be found by tracing similar current items.

233.12(15) MICROFILM

Microfilm under various trade names such as "Recordak" may be used by the bank to photograph various records throughout the bank. These pictures are used to keep a permanent record of transactions in limited storage space. Microfilm has been used for a wide variety of purposes and the extent of such use varies from bank to bank. Some banks photograph everything and others photograph only transit letters. If pertinent, inquiry should be made as to when photographing began and what was photographed. The questions apply to both past and present practices.

233.2 BROKERS

233.21 Classification

(1) Brokers are classified according to the transactions they handle. Securities brokers execute orders to buy and sell stocks and bonds; commodity brokers do the same for commodities. Generally, a broker deals only on organized exchanges in which he holds membership. However, many brokers hold memberships in several exchanges and handle various types of transactions.

(2) The broker executes customer buy and sell orders for securities and commodities. These transactions are consummated on either a cash basis or as sales on account, which is more commonly known as on "margin." Margin is the percentage of the purchase price which the customer must pay. The margin requirements for stock are set by the Federal Reserve Board. The balance is a loan by the broker to the customer, secured by the stock purchased.

(3) In "long" commitment the customer purchases stock and hopes to profit by an advance in the market price of the stock. A decrease in price results in a loss.

(4) A "short" commitment is the reverse. The customer sells a security which he does not own at the time of the sale. He hopes to profit by buying the stock (covering the sale) at a lower market price. If the market price of the stock is higher when he buys the stock to cover the sale, he will have a loss.

(5) Commodity brokers sell contracts for future delivery of a specific commodity to their customers. The difference between the purchase price and the sales price of the contract determines the gain or loss.

233.22 Brokers' Records

(1) Brokers' operations are similar throughout the United States. Their office procedures are fairly uniform. The records kept are basically the same regardless of whether the record system is manual or ADP. By becoming familiar with the general procedure and records, the special agent will know what records to look for and how to interpret them.

(2) The purchase and sales department handles customers' buying and selling orders. These orders are recorded on "tickets". The buy orders are printed in black and the sell orders in red. In an ADP system the information on the ticket is keypunched on a punch card, which becomes input to the computer. This department also is responsible for the preparation of the confirmation notice which is sent to the customer notifying him of the purchase or sale. The confirmation in a manual system would be made from the buy and or sell tickets. In an ADP system it would be a printout from the information contained on the punched cards. The branch office would have a copy of these records under either system. The special agent can obtain information of a customer's transactions by examining the ledger sheet or the "confirmation" of the buy or sell order.

(3) The blotter department maintains a chronological record of all transactions. In a manual system this is the basic record from which all postings are made. In an ADP system, the blotter record is no longer in sheet form. Instead, the buy and sell tickets are microfilmed by date. Separate blotter sheets are maintained for recording trades through the clearing corporation, odd-lot trades, trades which do not go through the clearing corporation, etc. The microfilm may be similarly sorted.

(4) The bookeeeping department maintains the customers' ledger accounts and the general ledger accounts of the stock broker. In a manual system the original entries which are on the blotter sheets, go to the bookkeeping department and are posted to the respective customers' ledger accounts. These ledger sheets are a permanent record on which are entered the number of shares, names of the stocks and/or bonds, and the amount of the transactions. The original copy of the ledger is mailed or delivered to the customer each month. In an ADP system the original input information comes from the punched card containing the information of the transactions. This information, together with the master tape file, contains all transactions from the last statement date, and is up-dated daily. The output is a new master tape. At the end of the month, the master tape will be printed out and one copy sent to the customer. Depending upon the system used, one copy of the statement may be kept at the head office and another copy sent to the branch office of the firm which handles the particular customer's account. The branch office also gets a daily and a weekly printout of the transactions affecting its customers.

(5) The cashier's department handles cash transactions. Its records may show the time and form of the payment for purchases in sufficient detail to enable the special agent to trace the payment to its source. In some brokerage houses the cashier's records may be kept on a manual system even though other records are on an ADP system. In those brokerage houses using a more elaborate system, a punched card may be sent with the confirmation notice to the customer. The customer sends the punched card back with his payment, and this document becomes input to the computer to record the payment. This department also maintains safe deposit boxes for keeping the stocks and bonds on hand and a current record of them. It also accounts for and records stock in transfer, stocks they have not delivered, stocks they have not received, stocks borrowed, stocks loaned, bank loans, loans payable, and dividends.

(6) The margin department keeps the records showing the balance of each customer's account. The computations are made frequently to ensure compliance with the requirements of the house, the exchange, and the Securities and Exchange Commission. Computations are made manually unless an ADP system is used. In an ADP system, any accounts which do not meet the margin requirements are automatically printed out for the required action of the broker.

233.22 BROKERS' RECORDS—Cont.)

(7) The stock record department maintains a general ledger of securities which is called a position ledger. It shows the total shares of stock or the amounts of bonds which are being carried on margin for the customers or which are owned by the brokerage firm. It also contains a record of securities representing customer's "short" commitments and other "short" securities, including stocks and bonds in safe deposit boxes and at the transfer agents, and securities held for safekeeping for customers. In a manual system this ledger would be written up from the blotter sheets or day book as they are sometimes called. In a complete ADP system this record could be on magnetic tape, but there would be a printout made to which reference could be made.

(8) The clearing house department acts as an intermediary for the broker's office and a clearing house for the stock exchange. It maintains records which show the amount of money that must be paid for securities purchased or cleared through the clearing house, and the amount of money to be received on account of sales from securities.

(9) Brokers' customers are entitled to credits for dividends declared on stocks which the broker is carrying for them on the date of the dividend declarations. The broker receives the dividend because the stock is registered in his name or in the name of another broker (this is known as a "street name"). If the broker has delivered any of the customer's stock to other brokers after it was transferred to him, he makes a claim against them for the dividend. All brokers maintain complete records of the receipt and distribution of dividends to their customers' accounts. Brokers also maintain records showing monthly debits and credits of interest to their customers' accounts.

(10) Inquiries should be aimed to detect all pertinent records that may be in existence. Often, files relating to credit information of a confidential nature, use of power of attorney, numbered accounts, etc., will be revealed to the special agent only in response to specific questioning. Consideration should be given to interviewing the particular "customer's man" or "account executive" who customarily handled the taxpayer's transactions to determine the taxpayer's objectives, practices, and his use of the various facilities of the broker.

(11) If the special agent suspects that accounts are being carried under fictitious names, or that a person is selling securities under his own name to himself under some other name or "numbered account" to claim an illegal loss, he should examine the blotter records for possible evidence of any subterfuge.

(12) If an effort is being made to check into years for which the broker's records are not available, consideration should be given to the possibility of reconstructing the accounts from workpapers of audits conducted by private accounting firms or by the Securities and Exchange Commission.

233.3 TRANSFER AGENTS

(1) Most large corporations maintain in the City of New York, or some other financial center, an office for a transfer agent, who maintains a stock ledger account for each stockholder in the corporation. This ledger account gives full details regarding the stock certificate number, number of shares represented by the certificate, the date issued, and the name in which issued. If an individual owns more than one certificate, the stock ledger will show the balance and the number of shares outstanding on any given date. The stock ledger will also show the surrender or cancellation date of the stock certificate. The stock ledger contains the name of the transferor and the name of the transferee to whom the stock was delivered. The transfer agent's files have the stock certificates bearing the transferor's endorsement.

(2) If the special agent finds that a person is the owner of any particular stock and suspects that brokerage accounts have been concealed, the records of the transfer agent for that stock would disclose the name of the broker who had the certificate transferred to the stockholder. The transfer agent's records would also disclose the name of the stockholder who delivered the stock for transfer in another name.

(3) The names and addresses of transfer agents may be found in Moody's or Standard and Poor's Manual, or may be obtained from the main offices of the corporations.

233.4 DIVIDEND DISBURSING AGENTS

(1) Most large corporations distribute their dividends through agents known as dividend disbursing agents, who may be located in the city of New York or some other financial center. The dividend disbursing agent maintains a record of dividends paid to each stockholder of record.

(2) The names and addresses of dividend disbursing agents may be found in Moody's or Standard and Poor's, or may be obtained from the main offices of the corporations. Information on dividend payments can usually be

(233.4 DIVIDEND DISBURSING AGENTS—Cont.)

obtained by writing direct to the dividend disbursing agent. The special agent should not ask the transfer agent for dividend information unless he also serves as the corporation's dividend disbursing agent.

233.7 INFORMATION FROM FOREIGN COUNTRIES

233.71 Collateral Requests Regarding Foreign Countries

Collateral requests for information to be obtained in foreign countries shall be handled through the Office of International Operations. (See IRM 9265.1, 9265.2 and 9265.3.)

233.72 Information from Canada

Most travel and direct inquiries in Canada require the prior approval of the Director, Office of International Operations. Collateral requests are also processed through that office. Procedures relating to collateral and other requests are set forth in IRM 9265.2, 9265.3 and 9265.4.

233.8 LIFE INSURANCE COMPANIES

233.(10) ABSTRACT AND TITLE COMPANY RECORDS

(1) Maps and tract books.

(2) Escrow index of purchasers and sellers of real estate—primary source of information.

(3) Escrow files—number obtained from index.

(4) Escrow file containing escrow instructions, agreements, and settlements.

(5) Abstracts and title policies.

(6) Special purpose newspapers published for use by attorneys, real estate brokers, insurance companies and financial institutions. These newspapers contain complete reports on transfers of properties, locations of properties transferred, amounts of mortgages, and releases of mortgages.

233.(11) AGRICULTURE RECORDS

(1) County veterinarians.
(2) Commission merchants.
(3) Insurance companies (insure shipments).
(4) Transportation companies.
(5) Storage companies.
(6) County and State fair boards.
(7) County farm agents.
(8) State cattle control boards (some States maintain records of all cattle brought in and taken out of State).

233.(12) AUTOMOBILE MANUFACTURER AND AGENCY RECORDS

(1) Franchise agreements.
(2) Financial statements of dealers.
(3) New car sales and deliveries—used car purchases, trade-ins, and sales.
(4) Service department—mileage, order and delivery signature to indicate presence in area.

233.(13) BONDING COMPANY RECORDS

(1) Investigative and other records on persons and firms bonded.
(2) Collateral file.
(3) Financial statements and data.
(4) Address of person on bond.

(Amended by MS CR 9903-21)

233.(14) CREDIT AGENCY RECORDS

(1) Local office of National Associations of Retail Credit Men.
(2) Local credit rating and collection agencies.
(3) Retail Credit Company, American Service Bureau, and Hooper Holmes Agency are investigating agencies for insurance companies. Their files contain complete reports on various applicants for insurance and the names of insurance companies involved.

233.(15) DEPARTMENT STORE RECORDS

(1) Charge accounts.
(2) Credit files.

233.(16) DETECTIVE AGENCY RECORDS

(1) Investigative files.
(a) Civil.
(b) Criminal.
(c) Commercial.
(d) Industrial.
(2) Character check.
(3) Fraud investigations.
(4) Blackmail investigations.
(5) Divorce evidence.
(6) Missing persons search.
(7) Security patrols.
(8) Guards.
(9) Undercover agents.
(10) Shadow work.
(11) Lie detector tests.
(12) Employee checking.
(13) Personnel screening.
(14) Fingerprinting.
(15) Service checking.
(a) Restaurants.
(b) Public transportation.
(c) Stores.

233.(17) DISTRIBUTORS RECORDS

(1) Gambling equipment.
(2) Wire service.
(3) Factory, farm, home, office equipment, etc.
(4) Wholesale toiletry—Cash rebates are paid by some toiletry manufacturers. Details of available contracts which pay rebates to wholesale toiletry distributors are contained in publications issued by the Toiletry Merchandisers Association Inc., 230 Park Avenue, New York, New York 10017, and the Druggist Service Council Inc., 1290 Avenue of the Americas, New York, New York 10019.

233.(18) DRUG STORE RECORDS

Prescription records.

233.(19) FRATERNAL, VETERANS, LABOR, SOCIAL, POLITICAL ORGANIZATION RECORDS

(1) Membership and attendance records.
(2) Dues, contributions, payments.
(3) Location and history of members.

233.(20) HOSPITAL RECORDS

(1) Entry and release dates.
(2) Payments made.

233.(21) HOTEL RECORDS

(1) Identity of guests.
(2) Telephone calls made to and from room.
(3) Credit record.
(4) Forwarding address.
(5) Reservations for travel—transportation companies and other hotels.
(6) Payments made by guest.
(7) Freight shipments and luggage—in and out.

233.(22) LAUNDRY AND DRY CLEANING RECORDS

(1) Marks and tags.

(233.(22) LAUNDRY AND DRY CLEANING RECORDS —Cont.)

(2) Files of laundry marks.
(a) New York State Police, White Plains, New York.
(b) Other local or State police departments.
(c) National Institute of Dry Cleaning, Inc., Washington, D.C.

233.(23) INSURANCE COMPANY RECORDS

(1) Life, accident, fire, burglary, automobile and annuity policies—net worth data.
(2) Applications—Background and financial information as well as insurance carried with other companies.
(3) Fur and jewelry floaters—appraised value and description.
(4) Customer's ledger cards.
(5) Policy and mortgage loan accounts.
(6) Dividend payment record.
(7) Payment records on termination (life), losses (casualty), or refunds on cancellations.
(8) Correspondence files.
(9) Payments to doctors, lawyers, appraisers and photographers hired directly by the insurance company to act for the company or as an independent expert.

233.(24) NEWSPAPER RECORDS

Clippings on a given person assembled in one file with photographs, notes, unpublished data, etc.

233.(25) OIL COMPANY RECORDS

Various oil companies publish directories of truck stops which may be useful in diesel fuel excise tax cases in providing leads to retail dealers throughout the country.

233.(26) PHOTOGRAPH RECORDS

(1) Relatives, associates, and friends.
(2) Previous places of employment—employee or company publications.
(3) Police and FBI files.
(4) Schools—yearbooks, school papers, etc.
(5) Nightclub or sidewalk photographers and photography studios.
(6) License bureaus—drivers, chauffeurs, taxis, etc.
(7) Newspaper morgues.
(8) Military departments.
(9) Fraternal organizations.
(10) Church groups.
(11) Race tracks.
(12) Photographs made of checks and persons presenting checks for cashing.

233.(27) PRIVATE BUSINESS RECORDS

(1) Examination of records for transactions with taxpayer.
(2) Canceled checks and taxpayer's endorsement and disposition.
(3) Discovery of other companies with whom taxpayer transacted business.

233.(28) PUBLICATION RECORDS

(1) Professional, trade, and agriculture directories and magazines.
(2) Who's Who of America and various States.
(3) Tax services.
(4) City directories.
(5) Moody's, Standard and Poor's Corporation Record.
(6) Telephone directories.
(7) Billboard Magazine (weekly)—Amusement coin-machine, burlesque, drive-ins, fairs, stage, radio, T.V., magic, music machines, circuses, rinks, vending machines, movies, letter list, obituaries.
(8) Variety (weekly)—Literature, radio, T.V., music, stage, movies, obituaries, and the like.
(10) "Expenses in Retail Business" shows percentage of profits, costs and expenses for various retail businesses. May be obtained, free of charge, from National Cash Register Company offices.

233.(29) PUBLIC UTILITY COMPANY RECORDS

(1) Present and previous address of subscriber.
(2) Payments made for service.
(3) Payments made for "major" purchases.

233.(30) REAL ESTATE AGENCY OR SAVINGS AND LOAN ASSOCIATION RECORDS

(1) Property transactions.
(2) Financial statements.
(3) Loan applications. (Do not contain quite the same information as loan applications given to a bank. A Savings and Loan Association depends primarily upon real estate security rather than upon the other assets and liabilities of a borrower.)
(4) Payments made and received (settlement sheets).
(5) Credit files and files of a confidential nature.

233.(31) TELEPHONE COMPANY RECORDS

(1) Local directories—alphabetical and reverse.

(2) Library of "out of city" directories.

(3) Records of toll calls.

(4) Records of payments for service.

(5) Investigative reports on phones used for illegal purposes.

(6) Message unit detail sheets (in some areas) which list numbers called by a particular telephone.

233.(32) TRANSPORTATION COMPANY RECORDS

(1) Passenger list.

(2) Reservations.

(3) Destinations.

(4) Fares paid.

(5) Freight carrier—shipper, destination, storage points.

(6) Departure and arrival times.

233.(36) Consumer Loan Exchange or Lenders Exchange

(Amended by MS CR 99 G-21)

An organization known as the Consumer Loan Exchange or Lenders Exchange exists in all of the large cities in the United States, as well as in some of the smaller cities. It is a non-profit organization, supported by and for its members. Most of the lending institutions are members of the Exchange. It can supply information concerning open and closed loan accounts with member companies, and is a good source of general background information. These organizations are not listed in directories or telephone books. Their location in a city may be obtained through local lending agencies.

234 Records of Governmental Agencies

234.1 FEDERAL GOVERNMENT RECORDS

234.11 Alcohol, Tobacco and Firearms Division Records

(1) Records of distillers, brewers, and persons or firms who manufacture or handle alcohol as a sideline or main product.

(2) Record of inventory of retail liquor dealers and names of suppliers as well as amounts of liquor purchased by brand.

(3) Names and records of known bootleggers.

(4) Reports of investigations.

(5) Records of firearms registration (alphabetical and numerical) may be obtained from the Director, ATF Division, Washington, D.C. 20225.

(6) Forms 724, Cash status of Individual, financial statement of suspect or defendent forwarded by ATF Division to Intelligence Division.

(7) Referrals of information concerning substantial profits and/or excessive net worths discovered during investigations (see IRM 9378).

234.12 Bureau of Labor Statistics Records

(1) Publication entitled "The Interim City Worker's Family Budget."

(2) Publication entitled "City Worker's Budget Valid Uses and Inherent Limitations."

(3) The above publications are often used as a guide by the Audit Division to determine a realistic estimated living expense figure in computing the understatement of income in net worth and expenditure cases for civil purposes.

234.13 Bureau of Narcotics Records

(1) Record of licensed handlers of narcotics.

(2) Criminal records of users, pushers, and suppliers of narcotics.

234.14 Bureau of the Public Debt Records [1]

(1) Records of U.S. Savings Bonds (registered bonds) purchased and redeemed.

(2) Request for information must be made in the name of the District Director and addressed to:

Director, Division of Loans and Currency
Bureau of the Public Debt
United States Treasury Department
536 South Clark Street
Chicago, Illinois 60605

(3) Request must include:

(a) Surname, given name, middle name or initials of each person in whose name bonds probably were purchased.

(b) Married woman's given name.

(c) Current and former addresses of each person.

(d) Years for which information is desired. Indicate whether issue date, payment date, or both dates are desired.

(e) If known, the series of bonds involved. The following schedule shows the dates when the sale of each series began and ended:

Series	*Dates*
A	March 1935 through December 1935.
B	January 1936 through December 1936.
C	January 1937 through December 1938.
D	January 1939 through April 1941.
E	May 1941 through present, sales continuing.
F	May 1941 through April 1952.
G	May 1941 through April 1952.
H	June 1952 through present, sales continuing.
J	May 1952 through April 1957.
K	May 1952 through April 1957.

(f) A statement that the request has been carefully screened and the information requested is the minimum necessary in the case.

(4) Bureau of the Public Debt provides penciled work sheets showing the complete data with respect to all bonds purchased and/or redeemed. For trial purposes, the special agent should forward the penciled work sheets to the Bureau of the Public Debt with the District Director's request for authenticated certified copies of the records for use as evidence.

234.15 Federal Aviation Agency Records

(1) This agency maintains records reflecting chain of ownership of all civil aircraft in the United States. These records include documents relative to their manufacture, sale (sales contracts, bills of sale, mortages, liens) and transfer, inspection and modification.

(2) Information will be furnished in response to telephone requests. However, certified copies of information or documents will not be issued without an official written request addressed to:

Aircraft Registration Branch AC 350
Federal Aviation Agency
Field Box 1082
Oklahoma City, Oklahoma 73101

234.16 Department of Agriculture Records

(1) Records of licensed meatpackers and food canners.

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[1] Banking institutions generally will handle subscriptions for United States Securities, but only Federal Reserve Banks and Branches and the Treasury Department are authorized to act as official agencies. The Secretary of the Treasury, through the Bureau of the Public Debt, Division of Loans and Currency, Washington, D.C. 20225, conducts transactions in securities after issue and answers inquiries concerning such transactions. However, the agent may find it advantageous to make inquiries of the Federal Reserve Bank and Branches, listed in Exhibit 200–8, which are official agencies for the receipt of securities for transactions after issue, and may be authorized to complete such transactions.

(234.16 DEPARTMENT OF AGRICULTURE RECORDS —Cont.)

(2) Records of inspections made under Pure Food and Drug Act.

(3) Transactions with individuals and businesses—subsidies and adjustments.

234.17 Department of Defense Records

(1) Data concerning the pay, dependents, allotment accounts, soldier's deposits, withholding statements (Form W–2), and any other financial information relative to military personnel is available at one of the following offices, depending upon the branch of the Armed Forces to which the individual was or is presently attached:

(a) *ARMY:*

United States Army Finance Center
Indianapolis, Indiana 46249

Request to include: Complete name and Army serial number.

(b) *AIR FORCE:*

Air Force Finance Center
3800 York Street
Denver, Colorado 80205

(c) *NAVY:*

Director, Bureau of Supplies and Accounts
Department of the Navy
13th and Euclid Streets
Cleveland, Ohio 44115

(2) Requests for information from the sources in (1) above should be forwarded through normal channels to the District Director of Internal Revenue of the area in which the respective finance center is located. It is important that the taxpayer be adequately identified, preferably by name, address, and military serial number. However, if the serial number is unknown or cannot be furnished, the data may be secured if the inquiry includes the serviceman's full name, date of birth, and places of induction and/or discharge from the service.

(3) Addresses of military personnel:

(a) Form 2223, Request for Address of Military Personnel, should be used to obtain from the records of the military services the current or last known address of a taxpayer who is a member of, or who has been recently separated or discharged from, the Armed Forces. All Forms 2223 should be carefully prepared. The full name of the taxpayer should be entered accurately, together with his preservice address and serial number, if known. If available, the last known military address of the taxpayer and the latest date such address was known to be current should be furnished. The correct mailing addresses for the military service branches are printed on the face of Form 2223 and the address corresponding to the member's Branch of service *must* be entered in the space provided therefor. Each Form 2223 should be examined prior to mailing to make certain that the return address of the requestor has been inserted. Otherwise, even though a current address may be available, the military service Branch will be unable to return the completed Form 2223.

(b) Many of the Forms 2223 will have to be forwarded by the military service branch concerned to various record centers located throughout the United States. Therefore, no followup inquiry should be made within ninety days from the date of the original request. If, after ninety days, it is found that a followup inquiry is necessary, a second Form 2223 should be prepared and mailed to the proper military service branch. However, the second Form 2223 should not be identified as a followup request or as a second request, and no reference should be made to the original Form 2223.

(4) Data concerning the personal and medical history of former Army personnel (discharged subsequent to 1912) and former Navy and Marine personnel are located at: Military Personnel Records Center, GSA, 9700 Page Boulevard, St. Louis, Missouri 63132. Requests should include: Complete name, including middle name; Service Serial Number; date and place of birth; dates of service, military organizations or the name of the individual's next of kin.

(5) Records of contracts and all original vouchers covering payments made to persons and firms dealing with the U.S. Air Force are retained at:

U.S. Air Force Accounting and Finance Center
AFO—Accounts and Mail Branch
3800 York Street
Denver, Colorado 80205

(a) Normally, request for such information should be made by collateral to the Denver District.

234.18 Department of State Records

(1) Passport records—date and place of birth required (for recent data, inquiry may be made of the local District Court).

(2) Import and export licenses.

(3) Foreign information.

234.19 District Director of Internal Revenue Records

(1) Tax returns.

(2) Special tax stamps.

(3) Unassociated information forms (Forms 1099 and others).

234.1(10) Examiner of Questioned Documents, Treasury Department

See Handbook Subsection 256.7.

234.1(11) Federal Bureau of Investigation Records

(1) Criminals records and fingerprints.

(234.1(11) FEDERAL BUREAU OF INVESTIGATION RECORDS—Cont.)

(2) National Stolen Property Index—Government property stolen, including military property.

(3) Nonrestricted information pertaining to criminal offenses and subversive activities.

(4) National Fraudulent Check Index.

(5) Anonymous Letter Index.

234.1(12) Federal Courts Records

(1) Records of civil and criminal cases.

(2) Records of parole and probation officers. Many racketeers who will be investigated have served prison terms. Parole and probation reports, therefore, represent a valuable source of information as to the racketeers' associates, business connections, illegal activities, and financial condition. This information can be particularly valuable where the net worth-expenditure approach is being used.

(3) Records of referee in bankruptcy, U.S. Marshal, and U.S. Commissioner.

234.1(13) Federal Housing Administration Records

(1) Complete financial information.

(2) Statements of net worth and earnings.

234.1(14) Federal Records Center

(1) Data concerning former Government employees are on file at:

(a) The Federal Records Center, G.S.A. (Civilian Personnel Records) 111 Winnebago Street, St. Louis, Missouri 63118.

(b) Requests for information from such files should be prepared on GSA Standard Form 127, request for Official Personnel Folder, and mailed direct to the Federal Records Center at St. Louis, Missouri.

234.1(15) Federal Reserve Bank Records

Records of issue of United States Treasury Bonds.

234.1(16) Intelligence Division (Internal Revenue Service) Files

Each Chief, Intelligence Division, maintains a separate alphabetical file of affidavits, (Form 3203 or 3203—A) concerning taxpayers who have allegedly engaged in wagering activities, but have not filed wagering occupational or wagering excise tax returns. These affidavits show that the taxpayer has been informed of the pertinent provisions of the wagering occupational and/or wagering excise tax statutes, as appropriate.

234.1(17) Immigration and Naturalization Service Records

(1) Records of all immigrants and aliens.

(2) Lists of passengers and crews on vessels from foreign ports.

(3) Passenger manifests and declarations—ship, date, and point of entry required.

(4) Naturalization records—names of witnesses to naturalization proceedings and people who know the suspect.

(5) Deportation proceedings.

(6) Financial statements of aliens and persons sponsoring their entry.

234.1(18) Interstate Commerce Commission Records

(1) Section 20(7)(f) of the Interstate Commerce Commission Act prohibits the divulgence of any facts or information which may come to the knowledge of the Commission Agent during the course of his official examination or inspection, except by direction of the Commission or by a court or judge thereof. If, however, it is necessary in connection with the examination of the taxpayer's books and records for a special agent to have access to information or review the files of the Commission, a request for such information in the name of the Commissioner of Internal Revenue may be submitted to the Chairman of the Interstate Commerce Commission.

(2) Requests for information should be submitted by the District Director to the Intelligence Division of the National Office, Attention: CP:I:C. The information desired will be submitted through official channels and when obtained referred promptly to the District Director.

234.1(19) Post Office Department Records

(1) Mail watch or cover. Refer to the instructions found in IRM 9376.4.

(2) Photostats of postal money orders—and requests for such records must be by the Chief, Intelligence Division, and addressed direct to the Money Order Division, Post Office Department, Washington, D.C. (See IRM 9376.)

(3) Addresses of post office box holders—Requests for addresses of post office box holders should be made only when efforts to obtain the information from other available sources have proved unsuccessful. Information can be obtained from Inspector-in-Charge or Post Office Inspectors. Inquiry should be made at local post offices to ascertain the identity of the inspector who can funish the information desired.

234.1(20) Railroad Retirement Board Records

No information will be made available by this Agency. (See Sec. 262.16, Title 20, Code of Federal Regulations).

234.1(21) Secret Service Records

(1) Records pertaining to counterfeit and forgery cases.

(2) Secret Service's central files at Washington contain an estimated 100,000 handwriting specimens of known forgers. An electronic information retrieval system facilitates comparison of questioned handwriting with the specimens on file for identification purposes. This system has been placed at the disposal of the Intelligence Division for

(234.1(21) SECRET SERVICE RECORDS—Cont.)

use in any of our cases requiring identification of persons who may have filed multiple returns or for any other purposes which it might serve. Requests for this type information should be forwarded through channels to the Director, Intelligence Division, Attention: CP:I:C, Washington, D.C. 20225.

(3) The Intelligence Division cooperates with the Secret Service in the forgery aspect of criminal tax investigations involving possible forgery of United States Government checks (see IRM 9379). Exhibit 200-4 contains a list of local Secret Service Offices. This listing is furnished so that Intelligence field personnel can promptly coordinate any forgery violations with the nearest office.

(4) Records pertaining to anonymous letters and background files on persons who write "crank" letters.

234.1(22) Securities and Exchange Commission Records

(1) Record of corporate registrants of securities offered for public sale, which usually shows:

(a) A description of registrant's properties and business.

(b) A description of the significant provisions of the security to be offered for sale and its relationship to the registrant's other capital securities.

(c) Information as to the management of the registrant.

(d) Certified financial statements of the registrants.

(2) Securities and Exchange Commission News Digest (a daily publication giving a brief summary of financial proposals filed with and actions by the SEC).

(3) *Bulletin*—The bulletin is issued quarterly, and contains information of official actions with respect to the preceding month. It also contains a supplement in which are listed the names of individuals reported as being wanted on charges of violations of law in connection with securities transactions. It is available upon request at any of the SEC regional or branch offices in the following cities:

Atlanta, Ga.	Miami, Fla.
Boston, Mass.	New York, N.Y.
Chicago, Ill.	Salt Lake City, Utah
Cleveland, Ohio	San Francisco, Calif.
Denver, Colo.	Seattle, Wash.
Detroit, Mich.	St. Louis, Mo.
Fort Worth, Tex.	St. Paul, Minn.
Houston, Tex.	Washington, D.C.
Los Angeles, Calif.	

(4) *Securities Violations Files*—The Securities Violations Section maintains comprehensive files concerning individuals and firms who have been reported to the Commission as having violated Federal or State securities laws. The information pertains to official actions taken against such persons, including denials, refusals, suspensions and revocations of registrations; injunctions, and fraud orders, stop orders, cease and desist orders; arrests, indictments, convictions, sentences and other official actions. Information in these files with respect to any particular individual or firm is available upon request of Director, Division of Trading and Exchanges, Securities and Exchange Commission, Washington, D.C. 20225.

(5) *Securities and Exchange Commission Official Summary.*—This publication lists the changes in beneficial ownership by officers, directors and principal stockholders of securities listed and registered on a National securities exchange, or securities relating to public utility companies and certain closed-end investment companies.

234.1(23) United States Coast Guard Records

(1) Records of persons serving on United States ships in any capacity.

(2) Records of vessels equipped with permanently installed motors.

(3) Records of vessels over 16 feet equipped with detachable motors.

234.1(24) United States Customs Service Records

(1) Record of importers and exporters.

(2) Record of custom house brokers.

(3) Record of custom house truckers.

(4) List of suspects.

234.1(25) Veterans' Administration Records

(1) Records of loans, tuition payments, insurance payments and nonrestrictive medical data related to disability pensions are available at Veterans' Administration Regional Offices located in a number of large metropolitan areas throughout the Nation. This information, including photostats, may be obtained by direct mail request to the appropriate regional office or, if necessary, by collateral request.

(2) All requests should include a statement covering the need and intended use of the information. The veteran should be clearly identified and, if available, the following information should be furnished about him:

(a) V.A. claim number.

(b) Date of birth.

(c) Branch of service.

(d) Dates of enlistment and discharge.

234.1(26) Deputy Comptroller of Currency (Bank Examiners' Reports)

(1) National bank examinations are made to determine bank financial positions and to evaluate bank assets. Bank examiners' reports contain information about bank records, loans, and operations.

(2) In view of their purpose and the basis on which they are obtained, reports of national bank examinations

(234.1(26) DEPUTY COMPTROLLER OF CURRENCY BANK EXAMINERS' REPORTS—Cont.)

and related correspondence and papers are deemed to be of a confidential nature. If it is necessary, in an examination of a taxpayer's books and records, that a special agent have access to information contained in a National Bank Examiners' report, the request should be submitted by the District Director to the Collection Division of the National Office, Attention: CP:C:D. The request should set forth the taxpayer's name and address, the information desired, the reason it is needed, and the intended use thereof. The National Office will address the request to the Comptroller of the Currency.

234.1(27) Disbursing Offices of the U.S. Government Records

(1) U.S. Government checks are issued by disbursing offices of the following services and departments:

(a) U.S. Army.
(b) U.S. Air Force.
(c) U.S. Navy.
(d) U.S. Marine Corps.
(e) U.S. Post Office Department.
(f) U.S. Treasury Department.

(2) The military services and the U.S. Post Office Department make disbursements relating to their own activities, and the Regional Disbursing Officers, Bureau of Accounts, U.S. Treasury Department, make disbursements for all other U.S. Government activities. These disbursing offices are located at major military installations and in a number of large metropolitan areas throughout the nation. In general, they maintain copies of paid vouchers and check listings or similar type records which identify each check issued for goods or services. In addition, the Regional Disbursing Officers, Bureau of Accounts, U.S. Treasury, microfilm all checks prior to issuance. All canceled U.S. Government checks, from whatever source issued, are processed by the Office of the Treasurer of the United States (see Subsection 234.1(28)).

(3) Disbursing offices of the various military services and departments should be used as follow-up sources, if necessary, only after it has been determined that a subject has received specific payments from a Federal agency. Information from these sources, including photostats, may be obtained by direct mail request to the appropriate office or, if necessary, by collateral request.

234.1(28) Treasurer of the United States Records

(1) Canceled checks paid by the U.S. Treasury are processed through the Office of the Treasurer of the United States. Photostats may be obtained by mail request directed to:

Check Claims Division
Attn: Stop-Pay Branch
Treasurer of the United States
Liberty Loan Building
401 14th St. S.W.
Washington, D.C. 20226

(2) Collateral requests for copies of checks may be sent to the Chief, Intelligence Division, Baltimore, Maryland, only in unusual cases where expeditious completion or special handling is necessary.

(3) All requests should include the name of the payee, date of check, amount of check, check number and disbursing office symbol number. If the requested check is being considered for use in a trial or procedure requiring certification, the request for certification should be included in the original request. Checks and related records are subject to the destruction policy of the Check Claims Division and may not be available for certification at a later date.

(4) Photostats of canceled U.S. Government checks which relate to alleged forgery violations are obtainable through the U.S. Secret Service. (See IRM 9379:(4).)

(5) When information must be obtained from the issuing Disbursing Office regarding a U.S. Treasury check, the investigation may be expedited in some instances by asking that office to obtain the required copy, together with any necessary certification, from the Check Claims Division on behalf of the Internal Revenue Service.

234.1(29) Government Surplus Property Sales

The Director, Directorate of Marketing, Defense Supply Agency, Defense Logistics Services Center, Federal Center, Battle Creek, Michigan, 49016, maintains a master record of all Government surplus items sold through local defense surplus sales offices in the United States. The Center will provide computer printouts from July 1, 1965, forward concerning surplus sales and will identify the local sales office which sold the property and which maintains the original documents relating to the sales.

234.2 STATE, COUNTY, AND MUNICIPAL GOVERNMENT RECORDS

(1) Sale and transfer of property.
(2) Mortgages and releases.
(3) Judgments, garnishments, chattel mortgages and other liens.
(4) Conditional sales contracts.
(5) Births, deaths, marriages, and divorces.
(6) Change of name.
(7) Auto licenses, transfers, and sales of vehicles.
(8) Drivers' licenses.
(9) Hunting and fishing licenses.
(10) Occupancy and business privilege licenses.
(11) Building and other permits.
(12) Police and sheriff records of arrests and commitments.
(13) Court records of civil and criminal cases.
(14) Parole officers' and probation departments' files.

(234.2 STATE, COUNTY AND MUNICIPAL GOVERNMENT RECORDS—Cont.)

(15) Registration of corporate entities and annual reports.
(16) Registration of noncorporate business entities.
(17) Fictitious names index.
(18) School and voter registrations.
(19) Professional registrations.
(20) State income tax returns.
(21) Personal property tax returns.
(22) Real estate tax payments.
(23) Inheritance and gift tax returns.
(24) Wills.
(25) Letters of administration.
(26) Inventories of estates.
(27) Welfare agency records.
(28) Workmen's compensation files.
(29) Bids, purchase orders, contracts and warrants for payment.
(30) Civil Service applications.
(31) Minutes of board and agency proceedings.
(32) Public utilities' records.
(33) Health departments' records.
(34) State Unemployment Compensation records.

240 WITNESSES AND PROSPECTIVE DEFENDANTS

241 Rights and Obligations of Witnesses and Prospective Defendants

241.1 GENERAL

All persons called as witnesses, whether prospective defendants or otherwise, whether natural persons or corporate entities, and whether they appear as witnesses in response to court or grand jury subpoena, Commissioner's summonses, or simple requests to appear for interview, have rights and obligations defined by the United States Constitution, statutes, and court decisions.

241.2 CONSTITUTIONAL LAW

(1) *Constitutional protections* are provided in the Fourth, Fifth and Sixth Amendments, which read as follows:

(a) Fourth Amendment—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(b) Fifth Amendment—

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, on in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(c) Sixth Amendment—

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

241.3 STATUTORY PROVISIONS

241.31 Introduction

Several provisions of the United States Code discussed in following subsections are relevant to the obligations of all witnesses.

241.32 Misprision of Felony

Section 4 of the Criminal Code (18 USC 4) places the general obligation upon all persons to make known to an authorized Government official their knowledge of any felony committed. It has been held that misprision of felony includes two essential elements. There must be a concealment of something such as suppression of the evidence or other positive act; and failure to disclose. Proof of one of the elements only, and not of both, is not enough to support a conviction. Mere failure to inform the Government without an overt act of concealment is insufficient.[1]

241.33 Summons

The authority to examine books and records and to summon persons is provided by IRC 7602. This provision and those relating to enforcement of summons are recited and discussed in Subsections 261 to 268.4.

241.34 Unnecessary Examinations

(1) IRC 7605(b) reads:

"No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

(2) Reference to the taxpayer in this section of the Code is to the taxpayer under investigation (including a partnership).[2] Thus, it has been held that the limitation of inspection of books to one for each taxable year except upon notice from the Commissioner, or upon taxpayer's request, applies only to a person whose return is under investigation, and not a third party.[3] Restrictions upon demands for third-party records are covered in Subsection 243.4.

(3) If, to determine the existence or nonexistence of fraud in the taxpayer's returns, information is needed from his records which is not already in the Commissioner's possession, the examination is not regarded as "unnecessary" within the meaning of this section.[4] Furthermore, the Government is not required to show probable cause to suspect fraud if the years being examined are barred for assessment by the statute of limitations.[5]

(4) The taxes on wagering are excluded from these restrictions. IRC 4401 and Regulations 44 of Title 26 (1954) state that persons subject to wagering tax must keep daily records of wagers for at least three years. Section 4423, Title 26, reads:

"Notwithstanding Section 7605(b), the books of account of any person liable for tax under this chapter (Chapter 35, Taxes on wagering) may be examined and inspected as frequently as may be needful to enforcement of this chapter."

241.4 LEGALITY AND USE OF CERTAIN EVIDENCE AND EQUIPMENT

241.41 Admissibility of Evidence

(1) Evidence obtained by Federal officers in violation of constitutional provisions, at any stage of an investigation or proceeding, will be excluded at the instance of the defendant in the trial of a criminal case.[6] Federal Courts have also excluded such evidence in civil

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[1] Bratton v. U.S., 73 F 2d 795 (CA-10); U.S. v. Farrar, 38 F 2d 515 (D.C. Mass.); Neal v. U.S., 102 F 2d 643 (CA-8).

[2] In re Leonardo, et al., 208 F. Supp. 124 (D.C. Cal.), 62-2 USTC 9614.

[3] Hubner v. Tucker, 245 F 2d 35 (CA-9), 57-1 USTC 9362.

[4] U.S. v. Max Powell, 379 U.S. 48, 85 S. Ct. 248 (1964).

[5] Id.; Bayard Edward Ryan v. U.S., 379 U.S. 61, 85 S. Ct. 232 (1964).

[6] Boyd v. U.S., 116 U.S. 616, 6 S. Ct. 524 (1886); Weeks v. U.S., 232 U.S. 383, 34 S. Ct. 341 (1914); Gouled v. U.S., 255 U.S. 298, 41 S. Ct. 261 (1921); U.S. v. Guerrina, 112 F. Supp. 126 (E.D. Pa.), 53-1 USTC 9369, modified on other grounds, 126 F. Supp. 699, 55-1 USTC 9163.

(241.41 ADMISSIBILITY OF EVIDENCE—Cont.)

cases,[7] including those involving collection of wagering taxes,[8] although it is admissible in a civil wagering case to impeach a person's testimony that he has not engaged in the wagering business.[9]

(2) Evidence obtained by State officers under circumstances which would constitute unreasonable search and seizure under the Fourth Amendment if obtained by Federal officers is equally inadmissible in a Federal criminal trial.[10] This repudiates the former so-called "silver platter" doctrine which had allowed Federal courts to admit evidence illegally obtained by State officers if there had been no collusion by Federal officials. The Federal court must decide for itself if there has been an unreasonable search and seizure by State officers, even though the State court has already considered the question and irrespective of the State court's findings.[11]

(3) A person who has thrown records into a trash can, especially if he shares it with other building tenants, is considered to have abandoned the records, and cannot claim that agents who later take them from the trash can have violated his rights under the Fourth Amendment.[12]

(4) The rule excluding evidence unlawfully taken does not apply where the unlawful taking was by private persons without participation or collusion of law enforcement officers.[13]

(5) The Supreme Court has upheld the use of an informant[14] or an undercover agent[15] to obtain incriminating evidence against a defendant. The Constitution does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

241.42 Use of Investigative Equipment

Special agents will refer to and abide by the restrictions and prohibitions relative to investigative equipment contained in P-9370-6 (same as P-9400-8) and any implementing Internal Revenue Manual issuances.

241.43 Wiretap Evidence

(1) The Federal Communications Act (47 USC 605) provides in part:

"... no person, not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person ..."

(2) Under this statute, evidence resulting from wiretap is inadmissible in a Federal court whether secured by Federal agents[16] or State agents,[17] even where the State constitution or statutes authorize wiretapping by court order. Any party to a telephone conversation has standing to object to evidence which results from a wiretap, on the theory that "sender" means either sender or receiver.[18]

(3) Listening to a telephone conversation on an extension phone with the consent of one party to the conversation is not an unauthorized interception within the prohibition of the Federal Communications Act,[19] even if the conversation is recorded by an electrical or mechanical device attached to the extension phone or telephone wiring of the consenting party.[20] Nor is it an interception for an agent to place a device on his own telephone to make a tape recording of a conversation with a prospective defendant.[21]

(4) A Federal officer executing a search warrant does not violate the Federal Communications Act if he answers a phone on the premises and, with or without impersonating the recipient, accepts calls of persons desiring to place bets.[22]

241.44 Electronic Listening Devices

(1) The legality of evidence obtained through the use of electronic eavesdropping devices, other than wiretaps, depends on whether or not there has been compliance with the Fourth Amendment.[23] The Government's placing a transmitter above a phone booth in order to electronically listen to and record a suspect's words violated the privacy upon which he relied and thus constituted a "search and seizure" within the Fourth Amendment. Failure to obtain a court order prior to the use of the device rendered the evidence obtained inadmissible.[24]

(2) A court may empower a government agent to employ a concealed electronic device for overhearing or recording conversations with the prospective defendant without violating the Fourth Amendment.[25]

[7] Fraternal Order of Eagles v. U.S., 57 F 2d 93 (CA-3, 1932); Schenck ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776 (D.C. Mass., 1938).

[8] Lasoff v. Gray (W.D. Ky.), 62-2 USTC 15,431, 15,431; U.S. v. Four Thousand One Hundred Seventy One Dollars in U.S. Currency, 200 F. Supp. 28 (N.D. Ill., 1961).

[9] Walder v. U.S., 347 U.S. 62, 74 S. Ct. 354 (1954); Lasoff v. Gray, supra (note 8).

[10] Elkins v. U.S., 364 U.S. 206, 80 S. Ct. 1437 (1960).

[11] Ibid; Boyle v. U.S., F 2d (CA-9), 68-1 USTC 9395; U.S. v. Scolnick, 392 F 2d 320 (CA-8).

[12] U.S. v. Minker, 312 F 2d 632 (CA-3), 63-1 USTC 15,658, cert. denied, 372 U.S. 953, 83 S. Ct. 952.

[13] Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1920); U.S. v. Morris C. Goldberg, 330 F 2d 30 (CA-3), 64-1 USTC 9316, cert. denied, 377 U.S. 953, 84 S. Ct. 1630; Geneviva v. Bingler, 206 F. Supp. 81 (W.D. Pa.), 62-2 USTC 9517.

[14] Hoffa v. U.S., 385 U.S. 293, 87 S. Ct. 408 (1966).

[15] Lewis v. U.S., 385 U.S. 206, 87 S. Ct. 424 (1966).

[16] Nardone v. U.S., 302 U.S. 379, 58 S. Ct. 274 (1937); 308 U.S. 338, 60 S. Ct. 266 (1939).

[17] Benanti v. U.S., 355 U.S. 96, 78 S. Ct. 155 (1957).

[18] Tane v. U.S., 329 F 2d 848 (CA-2, 1964).

[19] Rathbun v. U.S., 355 U.S. 107, 78 S. Ct. 161 (1958); Carnes et al. v. U.S., 295 F 2d 598 (CA-5, 1961).

[20] Ferguson v. U.S., 307 F 2d 787 (CA-10, 1962).

[21] Broadus v. U.S., 317 F 2d 212 (CA-5, 1963).

[22] Billeci v. U.S., 184 F 2d 394 (CA-D.C., 1950); U.S. v. Pitler, unreported opinion (W.D. Pa., 1961); U.S. v. Chramek, 331 F 2d 380 (CA-4) 64-1 USTC 15564, cert. denied, 379 U.S., 822, 85 S. Ct. 45; U.S. v. Pasha, 332 F 2d 193 (CA-7, 1964), cert. denied, 379 U.S. 839, 85 S. Ct. 75.

[23] Katz v. U.S., 389 U.S. 347 (1967), 88 S. Ct. 507.

[24] Ibid.

[25] Osborn v. U.S., 385 U.S. 323 (1966), 87 S. Ct. 429.

(241.44 ELECTRONIC LISTENING DEVICES—Cont.)

(3) Subsection 272.3 contains additional information about recording and listening devices.

241.5 RIGHTS TO RECORD REVIEW

(1) An interrogation or conference may be recorded only by a stenographer who is an employee of the Internal Revenue Service. This rule may be waived by the agent's immediate superior. At the request of the Service, a witness, or the principal, the superior may authorize the use of a stenographer employed by the United States Attorney, a court reporter of the United States District Court, a reporter licensed or certified by any state as a court reporter or to take depositions, or an independent reporter known to the Service to be qualified to take depositions for use in a United States District Court. With the express advance consent of all parties to a conversation, mechanical recording devices may be used to record statements when no stenographer is readily available for that purpose. If the witness elects to mechanically record the conversation, the Service should give serious consideration to making its own recording.

(2) A witness or principal is not permitted to have his own private or public stenographer present to take shorthand notes or transcribe testimony except that he may be permitted to engage a qualified reporter as described in IRM 9353:(3) to be present at his expense provided that the Service may secure a copy of the transcript at its expense.

242 Prospective Defendants

242.1 INDIVIDUAL AS A PROSPECTIVE DEFENDANT

242.11 Statements of An Individual

(1) The purpose of the Fifth Amendment provision that no person shall be compelled in any criminal case to be a witness against himself is to ensure that no one will be forced in any manner or at any time to give testimony that may expose him to prosecution for a crime. It applies equally whether incrimination be under Federal or State law, and whether the privilege is invoked in the Federal or State courts.[1] If a witness has been compelled to testify in a State court under a grant of immunity, as to matters which could incriminate him under Federal law, a Federal court cannot later use that testimony or any fruits of it.[2] However, this would not preclude the presentation of independent evidence of the matter in issue.

(2) A defendant's refusal to testify at the trial for a Federal offense cannot raise any presumption against him or be the subject of comment by the prosecution. The right to refuse to answer incriminating questions applies not only to court trials, but to all kinds of criminal or civil proceedings, including administrative investigations.[3] The fear of self-incrimination may be with respect to any criminal offense. For example, in the case of Internal Revenue Agent v. Sullivan (note 3), a taxpayer was upheld in refusing to produce records in a tax matter on the ground that indictment was pending against him for defrauding the Government on certain contracts.

242.12 Books and Records of An Individual

(1) An individual taxpayer may refuse to exhibit his books and records for examination on the ground that compelling him to do so might violate his right against self-incrimination under the Fifth Admendment and constitute an illegal search and seizure under the Fourth Amendment.[4] However, in the absence of such claims, it is not error for a court to charge the jury that it may consider the refusal to produce books and records, in determining wilfulness.[5]

(2) The privilege against self-incrimination does not permit a taxpayer to refuse to obey a summons issued under IRC 7602 or a court order directing his appearance. He is required to appear and cannot use the Fifth Amendment as an excuse for failure to do so, although he may exercise it in connection with specific questions.[6] He cannot refuse to bring his records, but may decline to submit them for inspection on Constitutional grounds. In the Vadner case (note 4), the Government moved to hold a taxpayer in contempt of court for refusal to obey a court order to produce his books and records. He refused to submit them for inspection by the Government, basing his refusal on the Fifth Amendment. The court denied the motion to hold him in contempt, holding that disclosure of his assets would provide a starting point for a tax evasion case.

(3) Where records are required to be kept as an aid to enforcement of certain regulatory functions enacted by Congress, such records have been held public records, whose production may be compelled without violating the Fifth Amendment. This reasoning has also been applied in some income tax evasion cases.[7] Other income tax cases have stated that compulsory production of a taxpayer's books and records for use in a criminal prosecution would violate the constitutional protection against self incrimination (note 3). There has not yet been any Supreme Court decision holding the public records doctrine applicable in income tax cases.

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[1] Murphy v. N.Y. Waterfront Commission, 378 U.S. 52, 84 S. Ct. 1594 (1964); see also Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964).

[2] Murphy v. N.Y. Waterfront Commission, supra (note 1).

[3] George Smith v. U.S., 337 S. Ct. 1000 (1949); McCarthy v. Arndstein, 266 U.S. 34, 45 S. Ct. 16 (1924); Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195 (1892); U.S. v. Harold Gross, 276 F 2d 816 (CA-2), 60-1 USTC 9401; Graham v. U.S., 99 F 2d 746 (CA-9, 1938); Vitello v. Alexander, 59-1 STC 9254 (S.D. Cal.); Internal Revenue Agent v. Sullivan, 287 F 138 (W.D., N.Y., 1923).

[4] Boyd v. U.S., 116 U.S. 616; Internal Revenue Agent v. Sullivan, supra (note 1); U.S. v. Vadner, 119 F. Supp. 330 (E.D. Pa), 54-1 USTC 9178.

[5] Louis C. Smith v. U.S., 286 F 2d 260 (CA-8), 56-2 USTC 9830, cert. denied, 352 U.S. 909, 77 S. Ct. 148; Beard v. U.S., 222 F 2d 84 (CA-4), 55-1 USTC 9400, cert. denied, 350 U.S. 846, 76 S. Ct. 48; Olsen v. U.S., 191 F 2d 985 (CA-8), 51-2 USTC 9468; Myres v. U.S., 174 F 2d 329 (CA-8), 49-1 USTC 9275, cert. denied, 338 U.S. 849, 70 S. Ct. 91; U.S. v. Milton H. L. Schwartz, 213 F. Supp. 306 (E.D. Pa.), 63-1 USTC 9382.

[6] Landy v. U.S., 283 F 2d 303 (CA-5), 60-2 USTC 9765, cert. denied, 365 U.S. 845, 81 S. Ct. 805; In re Burr, 171 F 2d 448 (S.D. N.Y.), 59-1 USTC 9212; In re Reuben Turner, 309 F 2d 69 (S.D. N.Y.), 62-2 USTC 9764.

[7] Falsone v. U.S., 205 F 2d 734 (CA-5), 53-2 USTC 9467, cert. denied on other grounds, 346 U.S. 864, 74 S. Ct. 103; Stillman v. U.S., 177 F 2d 607 (CA-9); Beard v. U.S., supra note 5.

(242.12 BOOKS AND RECORDS OF AN INDIVIDUAL—Cont.)

242.13 Duty to Inform Individual of His Constitutional Rights

242.131 GENERAL

Special agents *must* abide by the instructions of IRM 9384 and any related Manual Supplements relative to advising individuals of their constitutional rights.

242.132 NON-CUSTODIAL INTERROGATIONS

(1) At the outset of the first official interview with the subject of an investigation, the special agent will properly identify himself as a special agent of the Internal Revenue Service and will produce his authorized credentials to the subject for examination. He will also state "As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses."

(2) The special agent will then advise the subject of the investigation substantially as follows:

"In connection with my investigation of your (or another person's) tax liability, I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding."

(3) If the subject requests clarification, either as to his rights or the purpose of the investigation, the special agent will give such explanation as is necessary to clarify the matter for the subject.

(4) If at any stage of an interview the subject indicates that he wishes to exercise his rights to withhold his testimony or records, or to first consult with an attorney, the special agent will terminate the interview.

(5) In each investigation, the special agent will make a contemporaneous memorandum stating when and where the subject was advised of his constitutional rights; what additional explanation, if any, was made; how the subject responded; and who was present at the time.

(6) At any official meeting with any person the special agent will not use trickery, misrepresentation or deception in obtaining any evidence or information, nor will he use language which might constitute a promise of immunity or settlement of the principal's case, or which might constitute intimidation or a threat.

(7) A special agent, to avert any attack upon the admissibility of any statement or documentary evidence furnished by a subject under investigation, will inform him of his constitutional rights at the beginning of a formal question and answer interview, even if the individual was previously advised.

242.133 CUSTODIAL INTERROGATIONS

(1) The Supreme Court has held that when an individual is taken into custody or otherwise deprived of his freedom by the authorities, he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation may be used against him.[8]

(2) To secure the admissibility of statements made during in-custody interrogations, certain procedural safeguards are required. Exhibit 200-5 is a copy of Form 4176, Waiver of Right to Remain Silent and of Right to Advice of Counsel. The statement of rights contained therein sets forth the warning which must be given to a person in custody prior to any interrogation. This statement also appears in Document 5661 in card form. If practicable, the waiver form should be signed by the person to interrogated before the interrogation is initiated. The original Form 4176 is to be attached to and made a part of the case report furnished to the United States Attorney, the first copy given to the person signing the form, the second copy retained by the Chief, Intelligence Division, and the third copy retained by the agent who conducted the interrogation. When it is impossible or impracticable to obtain a signed waiver, an oral waiver may be accepted. In such cases, the warning given and the defendant's waiver should be witnessed by another agent or other credible person, or sound or otherwise recorded. If a written statement is obtained from the person interrogated after he has waived his right to remain silent, either by execution of the waiver agreement, or otherwise, it should

[8] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966); Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964).

(242.133 CUSTODIAL INTERROGATIONS—Cont.)

contain an introductory paragraph which indicates that the person was advised of his right to remain silent and of the right to counsel and that he waived the rights and voluntarily made the statement.

(3) Spontaneous or volunteered statements of any kind are not barred by the Fifth Amendment and are not affected by the Miranda and Escobedo decisions.[9]

(4) In the Mathis case, the Supreme Court held that statements given by a person, who is in custody or otherwise deprived of his freedom, to a revenue agent conducting a tax examination, are inadmissible unless the person has been advised of his constitutional rights. This applies though there is no relationship between the tax examination and the reason for custody.[10]

242.14 Immunity From Prosecution

There is no statute providing immunity from prosecution for Internal Revenue violations. Prior to January 10, 1952, under the so-called "voluntary disclosure policy" then in effect, the Treasury Department refrained from recommending prosecution of persons who made voluntary disclosures of their tax evasion before the beginning of investigation. Although this "policy" has been abandoned and a promise of immunity is not enforceable,[11] some courts have held that taxpayers' rights under the Fifth Amendment may be violated where testimony has been given or records furnished in reliance upon express or implied promises that prosecution will not be undertaken.[12] In the Daniel Smith case (note 12), the defendant had objected to admission into evidence of a net worth statement, on the ground that it had been given by his accountant to the Government agent upon the promise that the case would be closed if the statement and a check for the tax deficiency would be submitted. It was held that the court properly instructed the jury to reject the statement and all evidence obtained through it, if it found that trickery, fraud, or deceit were practiced upon the taxpayer or his accountant.

242.15 Waiver of Constitutional Rights

(1) The privilege against self incrimination must be specifically claimed, or it will be considered to have been waived.[13] In the Nicola case (note 13) the taxpayer permitted a revenue agent to examine his books and records. The taxpayer was indicted for income tax evasion and invoked his constitutional rights under the Fifth Amendment for the first time at the trial, by objecting to the revenue agent's testimony concerning his findings. The court said, on the question of waiver:

> "But he did not refuse to supply the information required. Did he waive his privilege? The constitutional guarantee is for the benefit of the witness and unless invoked is deemed to be waived. Vajtauer v. Commissioner of Immigration (supra). Was it necessary for the defendant to invoke it in the first place before the revenue agent or could he wait until his trial on indictment for attempting to evade a part of his income tax? (Cases cited) * * * it was necesary for him to claim immunity before the Government agent and refuse to produce his books. After the Government had gotten possession of the information with his consent, it was to late for him then to claim constitutional immunity."

(2) A taxpayer who makes verbal statements or gives testimony to agents during an investigation, or at a Tax Court trial, may still rely upon his constitutional privilege and refuse to testify at trial of his indictment for tax evasion.[14] However, any statements inconsistent with his innocence may be used against him as admissions.[15]

(3) If a witness has testified at a trial and voluntarily revealed incriminating facts, he cannot in the same proceeding avoid disclosure of the details.[16] However, waiver of constitutional rights will not lightly be inferred, and no specific language is required in asserting them.[17] In the language of the Quinn case (note 17):

> "It is agreed by all that a claim of privilege does not require any special combination of words. Plainly a witness need not have the skill of a lawyer to invoke the protection of the Self Incrimination Clause. * * * As everyone agrees, no ritualistic formula is necessary in order to invoke the Privilege."

(4) Courts have held in income tax evasion cases that there has been no waiver of constitutional rights where taxpayers have given verbal information or exhibited books and records, during so-called "routine audits," as a result of deception practiced by Government agents.[18] Neither may the Government use information illegally obtained as a wedge for prying incriminating evidence from the taxpayer, or, as a "lever to spring consent."[19]

242.16 Right of Counsel

(1) A defendant's right to counsel in a criminal prosecution is guaranteed by the Sixth Amendment to the United States Constitution.

(2) The Administrative Procedure Act (section 6) provides:

[9] Id.

[10] Mathis v. U.S., 391 U.S. 1, 88 S. Ct. 1503, 68-1 USTC 9357.

[11] U.S. v. Ream (unreported opinion), (E.D., Pa.); In re Liebster, 91 F. Supp. 314 (E.D., Pa.), 50-2 USTC 9357; White v. U.S., 194 F 2d 215 (CA-5), 52-1 USTC 9204, cert. denied, 343 U.S. 920.

[12] Daniel Smith v. U.S., 348 U.S. 147, 75 S. Ct. 194, 54-2 USTC 9715.

[13] Nicola v. U.S., 72 F 2d 780 (CA-3), 4 USTC 1331; Lisansky v. U.S., 31 F 2d 846; Vajtauer v. Commissioner of Immigration, 273 U.S. 103.

[14] U.S. v. Vadner, supra (note 4).

[15] 4 Wigmore, *Evidence*, (3d Ed.), Sec. 1048.

[16] Rogers v. U.S., 340 U.S. 367; U.S. v. St. Pierre, 132 F 2d 837 (CA-2); Ballantyne v. U.S., 237 F 2d 657 (SA-5), 56-2 USTC 9959.

[17] George Smith v. U.S., 377 137; Quinn v. U.S., 349 U.S. 155; Emspak v. U.S., 349 U.S. 190.

[18] U.S. v. Cooper, 238 F. 604 (E.D. Ia.); U.S. v. Lipshitz, 117 F. Supp. 446 (SD. N.Y.), 54-1 USTC 9308; U.S. v. Guerrina, 112 F. Supp. 126, 53-1 USTC 9339, modified on other grounds. 126 F. Supp. 609 (E.D. Pa.), 55-1 USTC 9143; In re Rodkin, 58-2 USTC 9818 (S.D. N.Y.); U.S. v. Dupont, supra (note 3).

[19] U.S. v. Watson A. Young, 215 F. Supp. 202 (E.D. Mich.), 63-1 USTC 9483.

(242.16 RIGHTS OF COUNSEL—Cont.)

> "Any person compelled to appear in person before any agency or representative therof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

(3) Courts have indicated that under the above section persons summoned to appear before special agents of the Intelligence Division may be represented by counsel.[20] However, the courts are in conflict about limitations on the right to counsel. Subsection 243.3 concerns right of a third party to counsel, and furnishes guidelines to follow when this right is invoked.

242.2 PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATION BOOKS AND RECORDS

(1) The original rule regarding compulsory production of partnership records was set forth in the Boyd case,[21] which held that an invoice for merchandise imported by a partnership was the private paper of a defendant partner, and that its production could not be compelled without violating the Fifth Amendment.

(2) Some cases have applied the self incrimination rule without restriction, holding that individual partners may not be compelled to produce partnership records on the ground that they are personal records.[22]

(3) The rule of absolute privilege laid down in the Boyd case has generally been modified to the extent that the courts are apt to consider the actual nature of the partnership in determining whether the privilege against self-incrimination may be claimed by its members. A person who was one of three general partners in several limited partnerships having from 25 to 147 limited partners was required to produce the partnership books and records in his possession.[23] The court asserted the theory that the partnership was like a corporate entity, in which the limited partners stood in the position of stockholders and the general partners were in the nature of corporate officers. Similarly, following the principle that an unincorporated labor union with many members was a large, impersonal partnership with the characteristics of a corporation, the Supreme Court held that an officer could be compelled to produce union records in his possession.[24] The court stated the rule thus:

> "Whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personnal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

(4) On the other hand, criminal cases dealing with small, family type personal partnerships have ruled that production of partnership records cannot be compelled because they are the personal papers of the partners.[25]

(5) Partnership books and records voluntarily submitted by one partner may be used in evidence against the other partners without violating their constitutional rights.

242.3 CORPORATIONS

242.31 Corporation Books and Records

(1) The privilege against self-incrimination under the Fifth Amendment does not apply to corporations.[26] The theory for this is that the State, having created the corporation, has reserved the power to inquire into its activities, and that an inanimate corporate body should not be afforded the same protection as a natural person in avoiding incrimination. A corporate officer may not refuse to produce corporate records held by him in an official capacity, even though their production may incriminate him or the corporation (note 26). Courts have applied the theory that a corporation is a separate person and have maintained that an individual may not withhold the corporate records nor object to their use against him under the self incrimination doctrine, even if he is the only stockholder or the sole director of all the corporate activities.[27] Neither may a corporate officer refuse to identify the corporate records under oath on the ground of possible self-inorimination.[28]

(2) A corporation is protected against illegal searches and seizures under the Fourth Amendment. For example, in the Silverthorne case,[29] although the corporate officers were in custody, a United States Marshal visited the corporation's office without a search warrant and made a clean sweep of all books, papers, and documents. The court held that this was an illegal search and seizure, prohibited by the Fourth Amendment.

242.32 Rights of Corporation Officers

The mere fact that a corporate officer may not refuse to produce corporate records does not take away the constitutional protection which is the right of any individual. He may still refuse to give testimony or exhibit personal

[20] Backer v. Commissioner, 275 F 2d 141 (CA-5), 60-1 USTC 9285; U.S. v. Smith, 87 F. Supp. 293 (D.C. Conn.), 50-1 USTC 9205; Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga.), 52-1 USTC 9362; In re Richards, 60-2 USTC 9694 (N.D. Ill.); In re Danielson, 60-2 USTC 9695 (N.D. Ill.).

[21] Boyd v. U.S. supra (section 241, note 6).

[22] U.S. v. Lawn, 115 F. Supp. 674 (S.D. N.Y.), 53-1 USTC 9288; U.S. v. Linen Service Council, 141 F. Supp. 511 (N.J.).

[23] In re U.S. v. Silverstein, 314 F 2d 789, 63-1 USTC 9346.

[24] U.S. v. White, 322 U.S. 694, 64 S. Ct. 1248 (1944).

[25] U.S. v. Onassis, 125 F. Supp. 190 (D. Ct., Dist. of Col., 1954); In re Subpena Duces Tecum, 81 F. Supp. 418 (N.D. Calif., 1948).

[26] Wilson v. U.S., 221 U.S. 361, 31 S. Ct. 538 (1911); Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370 (1906); Wild v. Brewer, 329 F 2d 924 (CA-9), 64-2 USTC 9535 cert. denied, 379 U.S. 914, 85 S. Ct. 262.

[27] Walter B. Grant v. U.S., 227 U.S. 74, 33 S. Ct. 190 (1913); Fuller v. U.S., 31 F 2d 747 (CA-2, 1929); U.S. v. Hoyt, 53 F 2d 881 (S.D., N.Y., 1931).

[28] Carolene Products Co. v. U.S., 140 F 2d 61 (CA-4, 1944); U.S. v. Austin-Bagley Corporation, 31 F 2d 229 (CA-2, 1929); U.S. v. Lawn, supra (note 22).

[29] Silverthorne Lumber Co. v. U.S., 251 U.S. 385, 40 S. Ct. 182 (1920).

(242.32 RIGHTS OF CORPORATION OFFICERS—Cont.)

records which may tend to incriminate him as an individual,[30] or to testify regarding the whereabouts of corporate records not in his possession.[31] The Lawn case, cited in footnote 22 in connection with partnership records, involved the obligations and rights of corporate officers as well. On this point the court made the following comment:

> "The Government, beyond requiring the production and identification of the corporate records, does not have an unbridled right to interrogate the corporate officer, without his constitutional privilege being available to him."

243 Third Party Witnesses

243.1 COMPELLED TESTIMONY OR PRODUCTION OF RECORDS OF THIRD PARTY WITNESS

As stated in Subsection 241.33, supra, IRC 7602 furnishes the authority to compel testimony of third persons and their production of books and records, by issuance of summonses. Restrictions upon that authority as they apply to third parties will be discussed in the remainder of this subsection and in Subsection 244.

243.2 RIGHTS OF THIRD PARTY WITNESS AGAINST SELF-INCRIMINATION

(1) A third party witness may not refuse to testify but may decline to give answers that may incriminate him[1] under Federal or State law.[2]

(2) The privilege applies not only to answers or documents which would support a conviction. It extends even to those which provide a link in the chain of evidence which could be incriminatory, and is available if there is a reasonable possibility that an answer might tend to incriminate.[3] As stated by the Supreme Court in the Hoffman case (note 1): "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." However, a witness is not justified in refusing to answer questions on the ground of possible self-incrimination where the statute of limitations has barred the possibility of prosecution.[4]

(3) It is improper for the prosecution to ask a witness in a criminal trial any question calculated to bring out the answer that he had refused to incriminate himself in a prior trial or proceeding.[5]

(4) When a witness appears to be implicated in a criminal violation, he should be timely advised of his constitutional rights.

243.3 RIGHT TO COUNSEL OF THIRD PARTY WITNESSES

243.31 Court Decisions Regarding Right to Counsel of Third Party Witnesses

(1) Decisions are in conflict as to whether a third party may appear with the same counsel as the taxpayer. The privilege of being accompanied by the same counsel at a hearing before a special agent has been denied to officers of a corporate taxpayer,[6] to the bookkeeper-secretary of a dentist appearing with the taxpayer's attorney (who was also the taxpayer's brother),[7] and to a person who assisted a taxpayer in preparing an excise tax return.[8] The theory for denying the privilege has been stated:

> "It seems not at all unreasonable to exclude the taxpayer's counsel from the interrogation of a witness about the taxpayer's affairs. The witness' constitutional rights are amply protected so long as he can select counsel from all other attorneys. Under a contrary ruling it is easy to see that the Government's investigation might be seriously prejudiced."[9]

(2) On the other hand, an accountant summoned by a special agent as a witness in a tax investigation was held entitled to be represented by counsel who also represented the taxpayer.[10] The witness had retained the attorney at his own expense and without any suggestion from the taxpayer. The court indicated that a witness' counsel who also represents the taxpayer may be excluded if he obstructs the orderly inquiry process by improper conduct or tactics.[11] A witness' privilege of appearing with the same counsel as the taxpayer has also been granted in some unreported cases.[12]

(3) Special agents confronted with third party requests to use the same counsel as taxpayers, should follow the guidelines set forth in Subsection 243.32 concerning Service practice.

243.32 Service Practice Regarding Right to Counsel of Third Party Witnesses

(1) It is the Service practice that a witness in a tax investigation should be accorded the right to be accom-

[30] U.S. v. Lawn, supra (note 22); Fuller v. U.S., supra (note 27); U.S. v. Daisart Sportswear, Inc., 169 F 2d 656 (CA-2, 1948), rev. on other grounds, 337 U.S. 137, 69 S. Ct. 1000.

[31] Curcio v. U.S., 354 U.S. 118, 77 S. Ct. 1145 (1956); U.S. v. Pollock, 201 F. Supp. 542 (W.D. Ark.), 62-1 USTC 9231.

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[1] Hoffman v. U.S., 341 U.S. 479; U.S. v. Benjamin, 120 F 2d 521 (CA-2); O'Connell v. U.S., 40 F 2d 201 (CA-2); Mulloney v. U.S., 79 F 2d 566 (CA-1); U.S. v. Mangiaracina, 50-2 USTC 9497 (W.D. Mo.), U.S. v. Keenan, 59-1 USTC 9349 (CA-7), cert. denied, 80 S. Ct. 121.

[2] Murphy v. N.Y. Waterfront Commission, supra (subsection 242.11, note 1); also see Malloy v. Hogan, ibid.

[3] Blau v. U.S., 340 U.S. 159; Hoffman v. U.S., supra (note 1).

[4] U.S. v. Goodman, 289 F 2d 255 (CA-4), 61-1 USTC 9373, cert. granted, judgment vacated, and case remanded on issue of fact, 368 U.S. 14, 82 S. Ct. 127 (1961).

[5] U.S. v. Merle Long, 153 F. Supp. 528 (W.D. Pa.), aff. on other grounds, 257 F 2d 340 (CA-3); U.S. v. Harold Gross, supra (section 242, note 3); Grunewald v. U.S., 353 U.S. 391, 77 S. Ct. 963, 57-1 USTC 9693; U.S. v. Tomsfolo, 249 F 2d 633 (CA-2).

[6] U.S. v. Aylmer Smith, supra (subsection 242, note 22).

[7] Torras v. Stradley, supra (subsection 242, note 22).

[8] In re Louis A. Johnson, 62-1 USTC 15,413 (E.D. Ill., unreported opinion).

[9] Torras v. Stradley, supra (subsection 242, note 22).

[10] Backer v. Commissioner, supra (subsection 242, note 22).

[11] Ibid.; see also Torras v. Stradley, supra (subsection 242, note 22).

[12] In re Richards, In re Danielson, supra (subsection 242, note 22); In re Mrs. Rebecca V. Jones, S.D. Tex., 7/3/58 (I.D. Digest, 7/58, p. 51).

(243.32 SERVICE PRACTICE REGARDING RIGHT TO COUNSEL OF THIRD PARTY WITNESSES—Cont.)

panied, represented and advised by counsel. The witness should be informed of this right if he inquires regarding it. However, counsel should not be permitted to control or censor the replies of the witnesses, nor may he attempt to interfere with the examination or impede or delay the progress of the interrogation (see IRM 9352).

(2) In unusual circumstances a witness may be precluded from appearing with the same attorney who represents the principal in a case, if such dual representation might seriously prejudice the Government's case. While it is possible that the witness and the principal may have common interests, where the facts indicate the possibility of conflicting interests between them, such possibility should be brought to the attention of the witness and the attorney seeking to represent both witness and principal. See Section 10.21, 31 C.F.R., Part 10 (Treasury Department Circular 230, Revised) and Canons 6 and 38 of the Canons of Professional Ethics as adopted by the American Bar Association, 62 Reports of the American Bar Association 1105. A record should be made of the circumstances in any instance when counsel for a witness is excluded.[13]

(3) A witness may be permitted to have a person other than his counsel present to assist him, when deemed advisable. For example, if the subject is to be questioned about technical accounting matters as to which he cannot give correct replies without the help of his accountant, the accountant may be admitted during that part of the examination. If the witness cannot speak or understand English, and no Government employee who can act as interpreter is available, the special agent may permit a member of the immediate family of the witness, if qualified, to act as interpreter after being first sworn to translate truly and accurately. In such cases the special agent should be guided by practical considerations and keep in mind how the Government's interests will best be served by establishing the facts.[14]

(4) A special agent should take adequate precautions during interviews with third parties not to violate the statute which prohibits unlawful disclosure of income returns or their contents.[15] It is not unlawful to show a return to a taxpayer's accountant at such an interview and, as necessary, to the accountant's attorney, who does not also represent the taxpayer. When such return is exhibited to the witness and his attorney, their attention should be called to 26 USC 7213(a)(1), prohibiting unlawful disclosure.[16]

243.4 RIGHT OF THIRD PARTY WITNESS TO REFUSE UNREASONABLE REQUEST

(1) Although the restrictions placed upon examination by IRC 7605(b) apply only to the taxpayer under examination, as explained in Subsection 241.34, the courts will also prevent arbitrary, unreasonable, irrelevant, and oppressive demands upon third parties for production of their records.[17]

(2) In the First National Bank of Mobile case, an Internal Revenue agent attempted to have the bank produce any and all books, papers, and records in connection with a tax investigation, *irrespective of whether such records also pertain to similar transactions with other persons or firms during the said years 1940 to 1945, inclusive* (italics by court). The Court of Appeals denied the request, stating:

> "A third party should not be called upon to produce records and give evidence under the statute unless such records and evidence are relevant to, or bear upon, the matter being investigated."

(3) *Hubner* v. *Tucker* (footnote 18) concerned a summons issued by a special agent to a third party in general terms, to produce all books and records relating to transactions with the taxpayer, including miscellaneous records. There was no specification of the particular documents, which precluded a showing, according to the court, that any one of them was relevant to the investigation. The court said:

> ". . . so far as a member of the general public is concerned, not a taxpayer, the privilege against an unreasonable search and seizure should be given great effect. * * * We do not believe that, simply because some taxpayer may have had a grocery account entered upon the books of the grocer, the intention of Congress was to allow The Internal Revenue Service to investigate all the records of the grocer on the theory that some of them might be relevant to the inquiry of the tax status of another person."

243.5 WITNESSES IN FOREIGN COUNTRIES

Non-resident aliens physically present in a foreign country cannot be compelled to appear as witnesses in a United States Court. Since the Constitution requires confrontation of adverse witnesses in criminal prosecutions, the testimony of such aliens may be used in court only if they agree to appear at the trial. However, certain testimony for the admissibility of documents is allowed without a "live" appearance in the United States under 18 U.S.C. 3491. Also, 28 U.S.C. 1783 provides a Federal court with subpoena powers to compel the appearance before it, or before a person or body designated by it, of a United States citizen or resident physically present in a foreign country.

[13] IRM 9352.

[14] Ibid.

[15] 26 USC 7213.

[16] Chief Counsel memo, 8/18/61, CC: E: PHI-65; O: JCG/RCS.

[17] First National Bank of Mobile v. U.S., 160 F 2d 532 (CA-5), 47-1 USTC 9168, 9203, modifying and affirming 67 F. Supp. 616 (S.D. Ala.), 47-1 USTC 9149; Martin v. Chandis Securities Co., 33 F. Supp. 478 (S.D. Cal.), 40-2 USTC 9521, aff'd. 128 F 2d 731 (CA-9), 42-2 USTC 9521; McDonough v. Lambert, 94 F 2d 858 (CA-2), 38-1 USTC 9121 Hubner v. Tucker, 245 F 2d 35 (CA-9) 57-1 USTC 9362.

244 Privileged Communications

244.1 CONDITIONS FOR PRIVILEGED COMMUNICATIONS

(1) There are certain special types of relationships in which information communicated by one person to the other is held confidential and privileged between them. The one to whom the information has been imparted cannot be compelled to divulge it without the consent of the other. There are four fundamental conditions, according to Wigmore:[1]

(a) The communications must originate in a confidence that they will not be disclosed;

(b) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

(c) The relation must be one which in the opinion of the community ought to be sedulously fostered;

(d) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

244.2 ATTORNEY AND CLIENT PRIVILEGE

(1) The attorney-client privilege must be strictly construed. Mere attorney-client relationship does not make every communication by the client to his attorney confidential. The communication must have been made to the attorney in his capacity as such, employed to give legal advice, represent the client in litigation, or perform some other function strictly as an attorney. When it does apply, the privilege covers corporate as well as individual clients.[2] Basically, attorney-client privilege does not include a right to withhold the name of a client.[3] However, an attorney's refusal to furnish a client's name has been upheld where it would indirectly amount to disclosure of communications of a confidential nature, as, where the attorney has delivered a check to the Internal Revenue Service in payment of a client's tax but refuses to name the client.[4] Dates and amounts of legal fees paid by a client to his lawyer do not constitute a privileged communication.[5]

(2) If the attorney is a mere scrivener, or a conduit for handling funds, or the transaction involves a simple transfer of title to real estate, without consultation for legal advice, communications from the client to the attorney are not privileged.[6] Neither are communications privileged which have been made in the course of seeking business rather than legal advice.[7] The privilege is ordinarily inapplicable to communications made to a person who acts as both attorney and accountant, if they have been made solely to enable him to audit the client's books, prepare a Federal income tax return, or otherwise act purely as an accountant.[8] However, some courts have held that a privileged communication can occur between a client and attorney in the process of preparing a tax return.[9] A person who consults an attorney for help or advice in perpetrating a future crime or fraudulent act is not consulting him for the legitimate purposes intended to be protected, and communications by the client or intended client in connection with such consultation are not privileged.[10]

(3) A communication by a client to an attorney in the presence of a third person is no longer privileged, unless that person's presence is indispensable to the communication, e.g., the attorney's secretary.[11] Likewise, a client's communication loses its privilege when the attorney relates it to a third person unless that person's services are necessary to furnishing the legal advice. Thus, the records of a bank from which an attorney has bought a cashier's check for an undisclosed client for delivery to the Internal Revenue Service are not covered by the attorney-client privilege, even if the attorney himself may withhold the client's name. The bank in such case is a third party whose services are not indispensable to communications between client and attorney, and not part of any giving of legal advice.[12] On the same theory, a bank to which an attorney sends his client to work out an estate plan is not essential to communications by the client to the attorney, and information that the client gives the bank is not privileged.[13] Similarly, communications by the client to the attorney are not privileged if the client obviously intended them to be divulged to third persons.[14] This includes the contents of closing statements and sales contracts prepared by the attorney, which the client necessarily expected to divulge to other parties at the closing,[15] or information imparted by the client to include in his tax return[16] or to furnish to the Internal Revenue Service in connection with a proposed civil settlement of tax liability.[17] Likewise, communications from the client to the attorney, which are then disclosed by

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[1] 8 Wigmore (3d Ed.) 2285.

[2] Radiant Burners, Inc. v. American Gas Association, 320 F 2d 314 (CA-7, 1963), cert. denied, 375 U.S. 929, 84 S. Ct. 330.

[3] Colton v. U.S., 306 F 2d 633 (CA-2), 62-2 USTC 9658, cert. denied, 371 U.S. 951, 83 S. Ct. 505; Behrens v. Hironimus, 170 F 2d 627 (CA-4, 1958).

[4] Tillotson v. Boughner, 350 F 2d 663 (CA-7), 65-2 USTC 9548; Baird v. Koerner, 279 F 2d 623 (CA-9), 60-2 USTC 9527; Colton v. U.S., supra (note 3).

[5] In re Wasserman and Carliner, 198 F. Supp. 564 (DC-D.C.), 61-2 USTC 9730.

[6] McFee v. U.S., 206 F 2d 872 (CA-9), 53-2 USTC 9549; Pollock v. U.S., 202 F 2d 281 (CA-5), 53-1 USTC 9229; U.S. v. De Vasto, 52 F 2d 26 (CA-2, 1931).

[7] Toothaker v. Orloff, 59-2 USTC 9604 (Unreported opinion, S.D. Calif.); U.S. v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Ct. Del., 1943).

[8] Olender v. U.S., 210 F 2d 795 (CA-9), 54-1 USTC 9254; U.S. v. Chin Lim Mow, 12 F.R.D. 433 (N.D. Calif., 1952); In re Fisher, 51 F 2d 424 (S.D. N.Y., 1931).

[9] Colton v. U.S., supra (note 3); U.S. v. Kovel, 296 F 2d 918 (CA-2), 62-1 USTC 9111; U.S. v. Summe, 208 F. Supp. 925 (E.D. Ky), 62-2 USTC 9839.

[10] Genevieve A. Clark v. U.S., 289 U.S. 1, 53 S. Ct. 465 (1933); Pollock v. U.S. supra (note 6); U.S. v. De Vasto, supra (note 6); Securities & Exchange Commission v. Harrison, 80 F. Supp. 226 DC-D.C., 1948.

[11] Himmelfarb v. U.S., 175 F 2d 924 (CA-9), 49-1 USTC 9313, cert. denied, 338 U.S. 860, 70 S. Ct. 103.

[12] Schulse v. Rayunec, 350 F 2d 666 (CA-7), 65-2 USTC 9549, cert. denied, Boughner v. Schulse, 382 U.S. 919, 86 S. Ct. 293.

[13] In re Bretto, 231 F. Supp. 529 (D. Ct., Minn.), 64-2 USTC 9590.

[14] U.S. v. Thomas G. McDonald, 313 F 2d 832 (CA-2), 63-1 USTC 9313; U.S. v. Tellier, 255 F 2d 441 (CA-2, 1958); Banks v. U.S., 204 F 2d 666 (CA-8, 1953).

[15] U.S. v. McDonald, supra (note 14).

[16] Colton v. U.S., supra (note 3).

[17] Banks v. U.S., supra (note 14).

(244.2 ATTORNEY AND CLIENT PRIVILEGE—Cont.)

the attorney to an accountant retained by the taxpayer, are not privileged.[18]

(4) Courts disagree as to an attorney's right to refuse production of a taxpayer-client's records in his possession, basing their determination upon whether or not the client himself could have withheld the records.[19] Courts which deny the claim of attorney-client privilege point out that every taxpayer is required to keep records for examination by the Commissioner (26 USC 54),[20] or that persons who engage in the business of wagering are required to keep daily records showing gross amounts of wagers (26 USC 3287).[21] Courts holding the contrary view say that where a taxpayer has already refused to give information on the ground of possible self-incrimination or could have done so, his attorney cannot be compelled to produce the taxpayer's records, or workpapers made from them by the taxpayer's accountant at the attorney's request in connection with a pending tax investigation.[22]

244.3 ACCOUNTANT AND CLIENT PRIVILEGE

(1) There is no privilege between an accountant and his client under common law or Federal law.[23] The accountant's workpapers belong to him, are not privileged, and must be produced.[24] Several cases, however, have held that the taxpayer may successfully refuse to produce them on the grounds of possible self-incrimination if he owns them[25] or he possesses them in a purely personal capacity without the accountant demanding their return.[26] Neither may an attorney refuse to produce workpapers prepared by the taxpayer's accountant (other than at the attorney's request in connection with a pending investigation (see note 22)).

(2) An accountant employed by an attorney,[27] or retained by a taxpayer at the attorney's request to perform services essential to the attorney-client relationship,[28] may be covered by the attorney-client privilege.

[18] Himmelfarb v. U.S., supra (note 11).

[19] U.S. v. Judson, 322 F 2d 460 (CA-9), 63-2 USTC 9658.

[20] Falsone v. U.S., 205 F 2d 734 (CA-5), 53-2 USTC 9467, cert. denied, 346 U.S. 864, 74 S. Ct. 103; U.S. v. Willis, 145 F. Supp. 365 (M.D. Ga., 1955).

[21] U.S. v. Willis, supra (note 20).

[22] U.S. v. Judson, supra (note 19); In re Fahey, 300 F 2d 383 (CA-6), 62-1 USTC 9146; U.S. v. Foster Lewis, 65-1 USTC 9418 (unreported opinion, W.D. Tex.).

[23] Falsone v. U.S., supra (note 20), Lustman v. Commr., 322 F 2d 253 (CA-3), 63-2 USTC 9677; U.S. v. Bowman, 236 F. Supp. 548 (M.D. [illegible], 65-1 USTC 9134.

[24] Deck v. U.S., 339 F 2d 739 (CA-D.C.), 64-2 USTC 9581, cert. denied, 379 U.S. 967, 85 S. Ct. 660; Bouschor v. U.S., 316 F 2d 451 (CA-8), 63-1 USTC 9424; Sale v. U.S., 226 F 2d 682 (CA-8), 56-1 USTC 9223, cert. denied, 350 U.S. 1006, 76 S. Ct. 650; U.S. v. Boccuto, 175 F. Supp. 886 (D. Ct. N.J.), 59-2 USTC 9643.

[25] In re House, 144 F. Supp. 95 (N.D. Cal.), 56-2 USTC 9780.

[26] U.S. v. Levy, 270 F. Supp. 601 (D. Ct., Conn.), 67-2 USTC 9604; U.S. v. Cohen, 388 F 2d 464 (CA-9), 68-1 USTC 9140.

[27] U.S. v. Kovel, supra (note 9).

[28] U.S. v. Judson, supra (note 19).

244.4 HUSBAND AND WIFE PRIVILEGE

(1) Communications between husband and wife, privately made, are generally assumed to have been intended to be of a confidential nature, and are therefore held to be privileged. It is essential, however, that the communications must be, from their nature, fairly intended to be of a confidential nature. If it is obvious from the circumstances or nature of a communication that no confidence was intended, there is no privilege.[29] For example, communications between husband and wife voluntarily made in the presence of their children old enough to understand them, or other members of the family within the intimacy of the family circle, are not privileged.[30] Likewise, communications made in the presence of a third party are usually regarded as not privileged, and this has been held to be so even though the third party was a stenographer for one of the spouses, where the stenographer was not a person essential to the communication.[31]

(2) Privilege is not extended to communications made outside the marriage relations, as, before marriage,[32] or after divorce.[33] Further, the privilege applies only to communications, and not to acts. The mere doing of an act by one spouse in the presence of the other is held not to be a communication.[34] For example, in the Mitchell case (note 29) where a husband induced his wife to participate in a violation of Federal law and took the proceeds from her, it was held that the taking of money was an act, not a communication, and therefore not privileged. It has been held in an income tax case where the taxpayer's wife voluntarily turned over his business records to a revenue agent without his consent, that the records were not a communication between husband and wife, and not confidential between them.[35] It has also been stated that the privilege should not apply to situations where the wife is employed in her husband's business office, and she would learn only what any other secretary would learn.[36]

(3) Communications remain privileged after termination of the marriage by death of one spouse.[37] Likewise, the privilege as to communications made during marriage does not terminate by divorce.[38]

244.5 CLERGYMAN AND PENITENT PRIVILEGE

Privilege between clergman and penitent has been recognized in the Federal courts.[39] This privilege has not been extended to financial matters, such as contributions made through a clergyman.

[29] Wolfle v. U.S., 291 U.S. 7, 54 S. Ct. 279; U.S. v. Mitchell, 137 F 2d 1006 (CA-2); Blau v. U.S., supra (subsection 243, note 3).

[30] Wolfle v. U.S., supra (note 29).

[31] Ibid.

[32] U.S. v. Mitchell, supra (note 29).

[33] Yoder v. U.S., 80 F 2d 665 (CA-10).

[34] 8 Wigmore (3d Ed.) Sec. 2337.

[35] U.S. v. Ashby, 245 F 2d 684 (CA-5), 57-2 USTC 9743.

[36] U.S. v. Nelson E. Jones, unreported opinion, No. 31442R (S.D. Calif.) 1948.

[37] 8 Wigmore (3d Ed.) 2341.

[38] Ibid.; Pereira v. U.S., 202 F 2d 830 (CA-5).

[39] Mullen v. U.S., 263 F 2d 275 (CA-D.C.); Totten v. U.S., 92 U.S. 105; McMann v. Securities and Exchange Commission, 87 F 2d 377 (CA-2), cert. denied 301 U.S. 684; U.S. v. Keeney, 111 F. Supp. 233 (D.C.), rev. on other grounds, 218 F 2d 843 (CA-D.C.).

244.6 PHYSICIAN AND PATIENT PRIVILEGE

(1) The Federal courts have assumed that communications made by a patient to a physician while seeking professional advice are privileged.[40] This privilege has not been extended to financial matters, such as the amount of fees paid for professional services. The privilege has also been denied in connection with summonses issued by special agents for production of hospital records to get names and addresses of patients admitted to the hospital by a certain physician.[41] The cases dealing with hospital records have recognized that a special agent may be barred from using the records to learn the nature of patients' illnesses.[42]

(2) Ordinarily a special agent will not need medical information from a physician or hospital. However, such information may be necessary if a taxpayer raises a defense based on physical or mental condition or if some other issue arises concerning a taxpayers' state of health. If a request is made and if the physician or hospital resists, or is expected to resist furnishing the information, the special agent should obtain a waiver of privilege from the taxpayer. The waiver should protect the physician or hospital from any future claim that the privilege was violated. A copy of the waiver should be retained in the case file. Since the Mayo Clinic, Rochester, Minnesota, requires waivers, collateral requests for medical information should include a signed waiver. A suggested form of waiver is shown in Exhibit 200–18.

244.7 INFORMANT AND GOVERNMENT PRIVILEGE

(1) This privilege allows enforcement agencies to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.[43] The contents of a communication are not privileged unless they tend to reveal the informant's identity.[44]

(2) This privilege differs from all the others in that it is waivable only by the Government whereas the others are essentially for the benefit of the individual and waivable by him. Where disclosure of an informer's identity or the content of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination, the trial court may order disclosure.[45] If the Government then withholds the information, the court may dismiss the indictment.[46]

(3) Generally, if it is shown that the informant participated in the act which is the basis for a criminal prosecution, the court will require disclosure of his identity. For example, where the informant has been used to buy narcotics or counterfeit money from the defendant, the courts have held that nondisclosure was improper.[47] On the other hand, where there is sufficient evidence to establish probable cause independent of the information received from the informant, the Government's claim of privilege has been sustained. As an example, in the Scher case, where the defendant's automobile has been searched without a warrant, partly on the basis of an informant's information that bootleg alcohol was being transported, and partly because of the searching officers' own observation that the automobile with its lights out, was being loaded with packages, the court upheld the privilege.[48] Further discussion relating to protection of informants is contained in 232.23.

244.8 CLAIM AND WAIVER OF PRIVILEGE

(1) Generally, except in the case of the informant-Government relationship, the privileges are for the benefit of the person making the communication, may be invoked only on his behalf, and may be waived only by him.[49] With respect to husband and wife, there is some conflict of authority about who may waive the privilege. Some cases state that the privilege belongs to both spouses and must be waived by both.[50] It has also been held that the privilege is that of the defendant spouse alone, waivable only by him.[51]

(2) There is a distinction which must be emphasized in the husband and wife relationship, between privileged communications and the absolute incompetency of hubsand and wife to testify against each other in Federal criminal trials. The privilege that attaches to a communication made during the marriage relationship may be claimed by a husband or wife in or out of court, or it may be waived. However, in a Federal criminal trial the parties are incompetent to testify against each other except where the offense is one which the husband has committed against his wife.[52] The incompetency applies whether the subject matter of the proposed testimony arose out of the marriage relationship or from any other source.[53]

(3) None of the court cases dealing with privilege or incompetency have prohibited the use of privileged communications as investigative leads. A special agent con-

[40] Mullen v. U.S., (note 39); Totten v. U.S., id.; U.S. v. Kenney, id.
[41] In re Albert Lindley Lee Memorial Hospital, 115 F. Supp. 843 (N.D. N.Y.) aff'd 209 F 2d 122 (CA-2), cert. denied 347 U.S. 960; Gretsky v. Bazzo, 136 F. Supp. 649 (D.C. Mass.), 56-1 USTC 9148.
[42] Ibid.
[43] Roviaro v. U.S., 353 U.S. 53, 77 S. Ct. 623 (1957); U.S. v. Hanna, 341 F 2d 906 (CA-6), 65-1 USTC 15, 622.
[44] Roviaro v. U.S., supra (note 43).
[45] Rugendorf v. U.S., 376 U.S. 528, 84 S. Ct. 825 (1964); Roviaro v. U.S., supra (note 43); Scher v. U.S., 305 U.S. 251, 59 S. Ct. 174 (1938); U.S. v. Hanna, supra (note 43).
[46] Roviaro v U.S., supra (note 43).
[47] Roviaro v. U.S., supra (note 43); Conforti v. U.S., 200 F 2d 365 (CA-7); Portomene v. U.S., 221 F 2d 582 (CA-5).
[48] Scher v. U.S., 305 U.S. 251.
[49] 8 Wigmore (3d Ed.) Secs. 2340, 2341, and 2355.
[50] Olender v. U.S., 210 F 2d 795 (CA-9), 54-1 USTC 9254; U.S. v. Mitchell, supra (note 11); 8 Wigmore (3d Ed.) Sec. 2342.
[51] Fraser v. U.S., 245 F 2d 139 (CA-6), cert. denied 324 U.S. 849, 65 S. Ct. 684.
[52] Hawkins v. U.S., 358 U.S. 74; Wyatt v. U.S., 80 S. Ct. 901.
[53] 8 Wigmore (3d Ed.) 2334.

(244.8 CLAIM AND WAIVER OF PRIVILEGE —Cont.)

ducting an investigation is not prevented by any rule of evidence from interviewing a wife,[54] attorney, or any other person to whom information has been communicated by a taxpayer. The mere fact that such person's testimony may be inadmissible or incompetent because of the privileged relationship does not affect the admissibility of the testimony of any other person, not within the relationship, that results from leads obtained by the special agent.

245 Admissions and Confessions

245.1 ADMISSIONS

245.11 Definition of Admissions

An admission is a prior oral or written statement or act of a party which is inconsistent with his position at the trial. Admissions can be used either as proof of facts or to discredit a party as a witness. They can be used only as to facts, not as to matters of law, opinion, or hearsay.

245.12 Judicial Admissions

A judicial admission is one made in the course of any judicial proceeding, by pleadings, stipulations, affidavits, depositions, or statements made in open court. Such admissions may always be used against a party even in subsequent actions where there is a different adversary. A plea of guilty can be used as an admission in a civil action arising out of the same subject matter. Thus, a taxpayer's plea of guilty to tax fraud can be used as an admission concerning fraud in a civil suit involving the same acts. A plea of nolo contendere however, is not an admission. The entry of a judgment against a party is not an admission by him, since it may have been due to a failure of proof. (223.7:(3) relates to the admissibility of reported testimony of a previous trial.)

245.13 Extra-Judicial Admissions

An extra-judicial admission is anything said outside of court by a party to litigation which is inconsistent with facts asserted in the pleadings or testimony in court. It is not limited to facts which are against interest when made, although the weight of an admission is increased if it is against interest at the time.

[54] U.S. v. Winfree, (E.D. Pa.) 59-1 USTC 9323.

245.14 Implied Admissions

(1) There are certain instances where admissions may be implied from conduct. If something is said by a person which naturally calls for a reply, and if it is heard by a second person who understands it and has the opportunity to, but fails to reply, the failure to reply may constitute an implied admission.[1] Thus, if a special agent discusses his findings with a taxpayer (especially in the presence of a third party who can testify about the matter) failure to object to such findings may be used as an admission. This would not apply where the taxpayer remains silent, claiming his privilege against self-incrimination.

(2) Although there is no question or dispute regarding admissibilty of implied admissions as a rule of law, the facts in every case must be individually applied to this rule to determine if those facts show a duty to reply, as for example, the failure to reply to a letter.[2] It was held in the Leach case (note 2):

> "A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does no make the letter evidence by sending it to the party against whom he wishes to prove the facts. He can no more impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore, a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission."

245.15 Corroboration of Admissions

245.151 CORROBORATION OF ADMISSIONS BEFORE OFFENSE

Competent, material, and relevant statements of fact made by a person prior to his alleged commission of a crime are admissible against him to prove such facts without need for corroborations.[3] Admissions made as part of the act of committing an offense are likewise admissible without corroboration. For example, in a prosecution for income tax evasion based upon understated receipts from business, the cost of goods sold and other deductions shown on the tax return are considered admissions by the taxpayer[4] which need not be corroborated.

245.152 CORROBORATION OF ADMISSIONS AFTER OFFENSE

(1) Unlike admissions made before the offense, extra-judicial admissions made by a person after his alleged commission of a crime require corroboration. The reason

Sec. 245
[1] 4 Wigmore (3d Ed.) Sec. 1071.
[2] Leach & Co. v. Pierson, 275 U.S. 120, 48 S. Ct. 57.
[3] Warszower v. U.S., 312 U.S. 342, 61 S. Ct. 603.
[4] U.S. v. Hornstein, 176 F 2d 217 (CA-7), 49-2 USTC 9326; U.S. v. Stayback, 212 F 2d 313 (CA-8), 54-1 USTC 9345.

(245.152 CORROBORATION OF ADMISSIONS AFTER OFFENSE—Cont.)

for this rule, which applies to confessions as well as admissions, is to exclude the possibility of having a person convicted of a crime he did not commit, as a result of statements after the offense, induced by duress or other improper means.

(2) Evidence corroborating admissions made after the offense need not prove the offense beyond a reasonable doubt, or by a preponderance of the evidence, but there must be substantial evidence and the evidence as a whole must prove the defendant's guilt beyond a reasonable doubt.[5] For example, if a taxpayer admits a substantial amount of unreported sales, his admission may be corroborated by evidence that he has maintained an unreported business bank account in which he has made frequent deposits.

245.16 Post-Indictment Admissions

In the Massiah case, the defendant, who had retained counsel and was free on bail after being indicted for narcotics violations, made certain admissions to a codefendant, not knowing that the codefendant had agreed to be a government witness and that the conversation was being overheard by federal agents who had installed radio equipment in the codefendant's car. The Supreme Court held that admitting into evidence post-indictment conversations betewen the accused and the informant which were caused by federal agents and done in the absence of the accused's attorney, violated the defendant's right to counsel under the Sixth Amendment.[6] Post-indictment admissions made by the defendant to an informant are admissible in a subsequent trial for an unrelated offense.[7]

245.2 CONFESSIONS

245.21 Definition of Confessions

A confession is a statement of a person that he is guilty of a crime. It may be made verbally or in writing, to a court, officer, or to any other person. It may be merely an acknowledgment of guilt, or it may be a full statement of the circumstances.

245.22 Judicial and Extra-Judicial Confessions

A judicial confession is one made before a court in the due course of legal proceedings, including preliminary examinations. An extra-judicial confession is one made elsewhere than in court, and may be made to any person, official or otherwise.

245.23 Admissibility of Confessions

(1) It is essential to the admission of a confession that it be voluntary. An involuntary confession is one which has been obtained by physical or mental coercion, or by threats, or by promises of immunity or reduced sentence made by a person having authority with respect to the prosecution of the accused. The basis for excluding coerced confessions in the Federal courts is that their use violates the due process clause of the Fifth Amendment, which reads:

> ". . . nor be deprived of life, liberty, or property, without due process of law;"

(2) Whether or not a confession is voluntary depends upon the facts of the case.[8] It is not made involuntary and inadmissible because the accused's counsel was not present when it was made, although that fact may be considered.[9] Physical or psychological coercion will invalidate a confession.[10] Falsehood, artifice, or deception may also make it inadmissible.[11] The Supreme Court has held that a confession extracted from the defendant by a boyhood friend who falsely represented that his involvement in the case might make him lose his job as police detective and jeopardize the future of his children and his pregnant wife, was an involuntary confession, especially since it came after continuous all-night questioning.[12] An appeal to a person's religious feelings which induces him to confess does not invalidate the confession. The fact that a person was intoxicated when he confessed does not exclude the confession if he had sufficient mental capacity to know what he was saying. Expressions such as "you had better tell the truth," "better be frank," and "it will be best for you to tell the truth," could create controversy as to whether they constitute implied threats or promises.[13]

(3) Although the Government does not have the burden of proving in the first instance that a confession was voluntarily given,[14] the trial court must ascertain and determine as a preliminary question of fact whether it was freely and voluntarily made, without any sort of coercion or promise of reward or leniency. The accused, if he so indicates, must be permitted to introduce evidence of its involuntary character. He may give his own testmony on this point, or may call and examine third persons, or he may cross-examine the witnesses who are called to testify to the confession or to the circumstances under which it was made. A proper foundation for the admission of a confession is laid where the witness to whom it was made testifies that neither he nor anyone in his hearing made any promises or threats to the defendant.

(4) Rule 5(a) of the Federal Rules of Criminal Procedure provides that an arrested person must be taken before a commissioner or other committing officer without unnecessary delay. Thus, a confession taken from a person whose arraignment has been delayed unneces-

[5] Daniel Smith v. U.S., 348 U.S. 147, 54-2 USTC 9715; U.S. v. Calderon, 348 U.S. 160, 54-2 USTC 9712; Olender v. U.S., 237 F 2d 859, 56-2 USTC 9936, cert. denied 352 U.S. 982, 77 S. Ct. 382.

[6] Massiah v. U.S., 377 U.S. 201, 84 S. Ct. 1199 (1964); also Beatty v. U.S., 389 U.S. 45, 88 S. Ct. 254 (1967).

[7] Hoffa v. U.S., 385 U.S. 293, 87 S. Ct. 408 (1966).

[8] 22 Corpus Juris Secundum, secs. 817 et seq.; Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735; Spano v. N.Y., 360 U.S. 315, 79 S. Ct. 1202.

[9] Spano v. N.Y., Id.

[10] Rogers v. Richmond, Id.

[11] Spano v. N.Y., Id., Rogers v. Richmond, Id.

[12] Ibid.

[13] U.S. v. Abrams, 230 F 313.

[14] Gray v. U.S., 9 F 2d 337 (CA-9); Hartsell v. U.S., 72 F 2d 569 (CA-8); Ah Fook Chang v. U.S., 91 F 2d 305 (CA-9); Rhodes v. U.S., 224 F 2d 348 (CA-5).

(245.23 ADMISSIBILITY OF CONFESSIONS—Cont.)

sarily so that he may be questioned over a period of time is inadmissible.[15] The reasoning involved in declaring such confessions inadmissible is stated by the Supreme Court in the Mallory case (note 15). The defendant, arrested in the early afternoon, was questioned until 9:30 p.m., when he made his confession, at which time an attempt was made by the arresting officers to locate a committing magistrate, before whom the defendant was taken the following morning. The Court held the confession inadmissible and stated:

> "Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

(5) The mere fact that a confession has been obtained after a person has been arrested does not bar its use at trial.[16] It is not made inadmissible unless there has been unnecessary delay. No hard and fast rule can be laid down as to what is unnecessary delay. Each case stands on its own facts.[17] Circumstances will vary from case to case, and from metropolitan areas where there may be several available commissioners to other areas where there may be only one commissioner serving on a part time basis.[18]

(6) It is not unlawful for Federal officers to detain a suspect a short and reasonable time for questioning. A confession obtained during such detention is admissible, providing the purpose of the detention is investigatory and not simply to hold the suspect until he confesses, and the officers have good reason to believe he should be questioned to determine whether he or any other person ought to be arrested.[19]

(7) If any part of a confession is given in evidence, the whole must be given if requested by the defendant. A confession made involuntarily is not admissible evidence, and facts discovered in consequence of such confession are also inadmissible.[20]

(8) A codefendant's extrajudicial confession is inadmissible at a joint trial because of the substantial risks that the jury would look to the statement in determining the defendant's guilt and the defendant is deprived of the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.[21]

(9) The Omnibus Crime Control and Safe Streets Act of 1968 provides:

> "18 U.S.C. 3501. Admissibility of Confessions
>
> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> "(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> "(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, that the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.
>
> "(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person made or gave such confession was not under arrest or other detention.
>
> "(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

245.24 Corroboration of Confessions

As with an admission, and for the same reasons, it is necessary that a confession be corroborated by independent evidence before it may be admitted.[22]

[15] McNabb v. U.S., 318 U.S. 332, 63 S. Ct. 608, rehearing denied, 319 U.S. 784, 63 S. Ct. 1322; Upshaw v. U.S., 335 U.S. 410, 69 S. Ct. 176; U.S. v. Carignan, 342 U.S. 36, 72 S. Ct. 97; Mallory v. U.S., 354 U.S. 449, 77 S. Ct. 1356.

[16] U.S. v. James Mitchell, 332 U.S. 65, 64 S. Ct. 896; U.S. v. Vita 294 F 2d 524 (CA-2).

[17] Holt v. U.S., 280 F 2d 273 (CA-8); Williams v. U.S., 273 F 2d 798 (CA-9).

[18] Williams v. U.S., Ibid.

[19] U.S. v. Vita, supra (note 14); Warren Goldsmith v. U.S., 277 F 2d 834 (CA-D.C.), cert. denied, 364 U.S. 863, 81 S. Ct. 106.

[20] Wong Sun v. U.S., 371 U.S. 471, 83 S. Ct. 407 (1963).

[21] Bruton v. U.S., —U.S. —, —S. Ct. — (1968).

[22] Daniel Smith v. U.S., supra (note 5).

246 Techniques of Interviewing and Interrogating

246.1 DEFINITION AND PURPOSE OF INTERVIEWING AND INTERROGATING

(1) An interview is defined as a meeting between two persons to talk over something special. In investigations it usually includes visiting and holding a formal consultation for the purpose of resolving or exploring issues. An interrogation is defined as questioning, especially, to examine by asking questions. For the purpose of this subsection, however, "interview" is used to mean interrogation as well, since questioning is an important part of many interviews.

(2) Interviews are used to obtain leads, develop information, and establish evidence. The testimony of witnesses and the confessions or admissions of violators are major factors in solving tax cases, and convicting violators. Cases are presented to a jury through the testimony of witnesses. Therefore, it is the special agent's duty to interview the taxpayer and every witness connected with the case. The record of such interviews will usually take one of the following forms: Transcript of interrogation or question and answer statement, affidavit, memorandum of interview, and recording (wire, tape, wax, etc.).

246.2 AUTHORITY FOR INTERVIEWING AND INTERROGATING

(1) *IRC 7602.*—Authorizes the Secretary or his delegate to examine books and records and to take testimony under oath.

(2) *Delegation Order No. 4 (Revised), dated May 21, 1957.*[1]—Authorizes the special agent to issue and serve a summons, to examine books and records, to question witnesses, and to take testimony under oath.

(3) *Delegation Order No. 37 (Revised), dated September 3, 1957.*[2]—Authorizes the special agent to administer oaths and to certify such papers as may be necessary under the internal revenue laws and regulations.

(4) A further discussion of the special agent's authority is contained in Subsection 262.

246.3 PREPARATION AND PLANNING FOR INTERVIEWING AND INTERROGATING

(1) *Timing*—Proper timing of the interview is essential in obtaining admissions and information that are material in proving a criminal case.

(a) Prompt Interview

1 A prompt interview sometimes establishes evidence that cannot be developed from books, records, or documents. Admissions and confessions establish the value of such items as: Currency on hand, contents of safe deposit boxes or similar depositories, and personal expenditures of the taxpayer. They also serve to prove knowledge and intent, the important elements of wilfulness.

2 The subject's admissions and oral statements can be used to support the evidence on hand and to broaden the scope of the investigation. A prompt interview usually provides the agent with information about other witnesses, books, records, assets, liabilities, and the subject's personal expenditures.

3 A prompt interview may result in admissions and confessions from a prospective defendant. In some cases the agent can obtain information in the early stage of the investigation that may not be available after the investigation has progressed.

4 The violator's fear may diminish as he becomes aware of the progress of the case and learns some of the details of the Government's investigation. The more the subject knows of the inquiries, the greater is his opportunity to fabricate an explanation. He, therefore, should be interviewed as soon as it is feasible.

5 The criminal who has been investigated a number of times and has developed some degree of immunity to any fear engendered by an investigation, will probably be unaffected by any attempts of the agent to capitalize on any psychological advantages of a prompt interview. However, in dealing with this type of suspect, a prompt interview is generally warranted, since it will establish for the record the subject's degree of cooperation. If he voluntarily consents to furnishing information, he should be thoroughly questioned about his entire financial history and relevant personal background. His refusals, denials or untrue statements may later be material in proving wilfulness.

(b) Delayed Interview

1 Certain advantages can sometimes be derived by delaying an interview until the agent is able to assemble and to verify pertinent information. This provides the agent with a working knowledge of the facts of the case enabling him to refute or correct any false or misleading statements by the subject.

2 The accumulated data may also provide the agent with information that can be used to surprise the subject. If a violator is suddenly confronted with incriminating evidence, he may make disclosures that will help solve the case. However, the longer the interview is delayed, the greater is the subject's opportunity of learning who has been interviewed, and what information was disclosed to the agent.

(2) *Review Available Information*—Prior to any interview the agent should review all the information and data he possesses relating to the case. Such information may then be divided into three general categories: information which can be documented, and need not be discussed; information which may be documented, but needs to be discussed; information that must be developed by testimony. The interview file should contain only data or information arranged in the order it is to be discussed or covered in the interview. The less data the agent has to cope with during the interview, the easier it will be for him to vary his line of questioning. It is very distracting, and may even cause some confusion, for the agent to de-

Sec. 246

[1] Published in the Federal Register on June 4, 1957 (22 FR 3894).

[2] Published in the Federal Register on September 14, 1957 (22 FR 7382).

(246.3 PREPARATION AND PLANNING FOR INTERVIEWING AND INTERROGATING—Cont.)

lay the interrogation to find a document or an item in a voluminous file. However, the files should contain sufficient data to cover all the matters under discussion, provided it isn't unwieldy.

(3) *Prepare Outline*—Before the interview, the agent should determine the goal of, or purpose for, questioning the subject. The topics that will enable the agent to accomplish this goal should be outlined in more or less detail, depending upon his experience and the complexity of the case. The outline should contain only information which is relevant and material (including hearsay). Extraneous matter should be excluded because it may be confusing and may adversely affect the end sought. Important topics should be set off or underscored and related topics listed in their proper sequence. A portion of a suggested outline is shown in Exhibit 200–6 (Suggested Outline for Questioning Person Who Prepared Returns, If Other Than Taxpayer). Specific questions should be kept to a minimum, since they tend to reduce the flexibility of the questioner. In addition to the topics to be discussed, the outline should include the following, if applicable:

(a) Identification of the subject.

(b) Information to be given the subject about his constitutional rights, if it is known or suspected that he may be a defendant in a criminal case.

(c) The administration of the oath.

(d) The purpose of the interview or interrogation.

(e) Questions showing that the subject was not threatened or intimidated in any manner, and that his statements were made freely and voluntarily without duress or any promises whatsoever.

(4) *Provide Suitable Surroundings*

(a) The agent should attempt to control the physical conditions where the interview or interrogation is to be held. The subject's feeling of security and any belligerent or pretentious attitude, brought about by the presence of members of his family, friends, or neighbors, can be materially reduced by removing him from familiar surroundings. However, this should not be done in an initial interview with a taxpayer where the initiative may be lost by having him report to a predetermined location. A taxpayer is more apt to make admissions or confessions during an informal interview held at his home or office. Each case should be considered in light of all the circumstances as to which procedure should be followed. Friendly witnesses may also be interviewed in their homes or offices, if there are no disturbing factors present.

(b) The agent should consider the following factors, in addition to any others he deems important, when selecting the place for interrogation:

1 *Noises*—A quiet area both inside and outside the room is necessary.

2 *Unnecessary activity*—No activity other than that necessary to conduct the interview should be permitted in the area. There should be no telephone in the room. If there is one, it should be made inactive during the interview.

3 *Distracting surroundings*—Remove pictures and other objects that are considered to be distracting.

4 *Convenient location*—Select an area that is readily accessible to all parties involved. Do not make the subject travel any distance, if he lives near a suitable area. It is an imposition to make a person spend time and money for unnecessary travel.

5 *Comfortable quarters*—The area should be comfortably heated and ventilated. Physical discomfort can cause the subject to become so concerned about his well being and health, that he may deliberately withhold information to shorten the interview.

6 *Adequate lighting*—Proper lighting is necessary for the recorder and for examining books, records, or documents. Indirect lighting is preferable.

7 *Sufficient facilities*—A chair should be provided for each person present. A desk, table, or other equipment that can be used for displaying workpapers, books and records, or any other pertinent material should also be provided, if necessary. Arrange furniture in a neat orderly manner so that there is no obstruction between the interrogator and the subject. Remove all unnecessary furniture from the formal conference room.

8 *Aids and auxiliaries*—Blackboards, charts, paper and pencil, pads, and any other aids or supplies that are necessary should be readily available. The material should be so placed that the questioner may use it without disturbing any of the persons present.

9 *Shielded from public*—The area should be shielded from public view. Entrances and exits to the room should be situated so as to provide the subject with the maximum amount of privacy in entering or leaving the area.

10 *Acoustically controlled*—All precautions should be taken to prevent anyone from overhearing the interview. This is of prime importance when one considers the nature of a tax investigation and the secrecy involved. Windows, doors, transoms, and like structures should be checked to determine whether an outsider can overhear the conversation. In an area where the acoustics cannot be adequately controlled, the agent should conduct the interview in a voice level that will assure the greatest privacy possible under the circumstances.

246.4 CONDUCT OF INTERVIEW

(1) While conducting the interview, the agent's attitude can have a significant influence upon the subject's response to questions. Ordinarily, the agent should be affable and ask questions that will put the subject at ease. Although the agent's demeanor in interviewing a witness is somewhat different from that in interviewing a principal, there are certain principles that must be observed in all cases.

(2) *Be Adaptable and Flexible*—The agent should

(246.4 CONDUCT OF INTERVIEW—Cont.(1))

keep an open mind that is receptive to all information regardless of the nature, and be prepared to develop it. If he is not flexible, he may waste a great deal of time and ask unnecessary questions, resulting in a voluminous statement of little or no value. Although the agent may find it easier to adhere to a fixed pattern of interviewing, or to rely upon a series of questions or topics, rigid adherence to any notes or outline will seriously handicap his flexibility. The outline and data should serve only as aids and not as substitutes for original and spontaneous questioning. A carefully planned outline will provide enough leeway to allow the agent to better cope with any situation that may occur and permit him to develop leads that may arise.

(3) *Follow Through*—Incomplete and irresponsive answers have little or no probative value. Any answer, apparently relative to a pertinent matter, that is not complete and to the point should be followed up by questioning the subject about all knowledge he has concerning every facet of the topic. This will minimize the possibility of a witness presenting, during a trial, testimony that will surprise the Government. The agent should follow through on every pertinent lead and incomplete answer. He should continue asking questions until he has all the information he can reasonably expect to get.

(4) The following suggestions will help the agent to follow through, and to obtain answers that are complete and accurate:

(a) Use short questions confined to one topic which can be clearly and easily understood.

(b) Ask questions that require narrative answers; avoid "yes" and "no" answers, whenever possible.

(c) Whenever possible avoid questions that suggest part of the answer, i.e., "leading questions." Occasionally leading questions may be used to obtain information from a hostile witness or to refresh the recollection of a witness.

(d) Question the subject about how he learned what he states to be fact. He should also be required to give the factual basis for any conclusions he states.

(e) Be alert so as to prevent the subject from aimlessly wandering. Where possible, require a direct response.

(f) Prevent the subject from leading the agent far afield. He should not be allowed to confuse the issue and leave basic questions unanswered.

(g) Concentrate more on the answers of the witness than on the next question.

(h) To avoid an unrelated and incomplete chronology, the agent should clearly understand each answer and ensure that any lack of clarity is eliminated before continuing.

(i) When all important points have been resolved, terminate the interview; if possible, leave the door open for further meetings with the subject.

(5) The subject should completely answer the following basic questions:

(a) *Who?*—Complete identification should be made of all persons referred to. This includes: Description, address, alias, "trading as," "also known as," citizenship, reputation, and associates. If the person cannot be identified by name, a physical description should be requested and should include: Age, height, weight, color of eyes, hair, skin, description of build, clothing, unusual markings, scars, mental or physical defects. Questions should also cover any aids worn by the individual, such as glasses, hearing aid, wig or toupee, cane, braces and other items.

(b) *What?*—Complete details as to what happened. Questions should relate to events and methods and systems. A complete answer should be developed. Trace the event from its inception to its ultimate termination. For example, a sale starts with a customer placing an order, either orally or in writing, and terminates when the cash receipt is ultimately placed in some depository. Every detail concerning what happened to that sale and what happened to every book, record, document, or person connected with it should be determined.

(c) *Where?*—Complete details regarding the location of books, records, assets, bank and brokerage accounts, witnesses, clients, customers, safe deposit boxes, safes, and the like. A description of the location should include the general area, as well as the identification of the person who has custody and control of the item. A complete description of the place should include the size, shape, color, and location.

(d) *When?*—The time can be established by direct questioning, by relating the incident to some known event, or by associating the event to some person, place, or thing.

(e) *How?*—Complete details about how the event occurred, or how the operation was conducted. How did the subject acquire knowledge? Was it through seeing, hearing, feeling, or smelling, or performing duties? How were transactions recorded: written, typed, matching entries, others?

(f) *Why?*—Everything is done for a reason. Determine the motive by questioning the subject about his actions. What caused him to act? Who caused him to act? How was he motivated? Since these are the most important questions, especially when relating to or reflecting an evil purpose, they should receive special consideration.

(6) *Maintain Control*

(a) The agent should maintain full control of the interview. He usually can accomplish this by limiting each participant to the rights, duties, and privileges he is entitled to at the interview. Any deviation should be corrected immediately by informing the individual of his role, and by not allowing him to go beyond it. If the agent cannot maintain complete control of the interview, he should end it and arrange to continue when the situation is corrected. The record should show all the agent's attempts to correct the individual's improper conduct,

(246.4 CONDUCT OF INTERVIEW—Cont.(2))

as well as the agent's reason for terminating the interview before it is completed.

(b) After all persons are informed of why they are present at the interview, the agent should confine their activities to the roles indicated:

1 *Principal*—The principal is called upon to answer questions, and he should be permitted to make any explanations in any reasonable manner he may desire. Often, incriminating statements are made under such circumstances. Therefore, he should be encouraged to tell his side of the case, without interruption. He has a right to refuse to answer any question that he feels will incriminate him. This is a personal right and can be invoked only by the subject. However, information or evidence furnished voluntarily by the taxpayer who has been summoned may be used even though it is of an incriminatory nature.

2 *Witness*—The witness must comply with every request made by the agent that is both legal and reasonable. However, the witness has a right to refuse the request, if he feels that the information may be incriminating. This right cannot be invoked on the ground that the information will incriminate the defendant or someone else.

3 *Special agent*—The special agent should question the taxpayer about any matters he deems relevant to the tax case, unless the agent feels that it would be to the government's disadvantage to ask questions that would reveal particular information. Since the special agent is responsible for the development of evidence, it is his obligation to conduct the interview in any manner he deems appropriate. If he grants permission to a cooperating officer to question the subject, he should instruct the officer in the method and technique to be used.

4 *Cooperating Officer*—The revenue agent or revenue officer may assist the special agent whenever any tax or technical accounting problems occur during the interview. He should not question the subject until he has discussed the matter with the special agent.

5 *Accountant representative*—The accountant's duty is to assist his client in all bookkeeping and accounting matters.

6 *Legal representative*—The attorney has a duty to furnish legal advice to his client relating to any matter discussed. This is the attorney's principal function at an interview.

7 *Recorder*—The recorder's function is to prepare a permanent record of the interview. A mechanical recording device may be used in conjunction with the recorder or in lieu of a recorder, where necessary, provided all parties to the proceeding consent thereto.

(7) The aforementioned rights, duties, and privileges are subject to changes by the courts, legislatures, and the policy of the Service. (See Subsections 241 through 245.)

246.5 RECORD OF INTERVIEW

246.51 Introduction

(1) The principal purpose of interviews is to obtain all the facts helpful in solving the case. Therefore, it is necessary to prepare a permanent record of every interview or interrogation to be preserved for future use. It is usually prepared on one of the following forms:

Form	Exhibit No.
(a) Affidavit	200–7
(b) Statement	200–8
(c) Question and answer statement	200–9
(d) Memorandum of interview	200–10
(e) Informal notes or diary entries	200–11 and 200–12

246.52 Affidavit

An affidavit is a written or printed declaration or statement of facts made voluntarily, and confirmed by the oath or affirmation of the party making it, before an officer having authority to administer such oath. No particular form of affidavit is required at common law. It is customary that affidavits have a caption or title, the judicial district in which given, the signature of the affiant, and the jurat, which properly includes authentication. Exhibit 200–7 is a suggested format containing all these characteristics which add to the dignity and usefulness of the affidavit.

246.53 Statement

A statement in a general sense is a declaration of matters of fact. Although the term has come to be used for a variety of formal narratives of facts required by law, it is in a limited sense, a formal, exact, detailed presentation of the facts. The statement may be prepared in any form and should be signed and dated by the person preparing it. If possible, the subject should also sign the statement and signify that he read and understood it or that it was read to him. A statement (Exhibit 200–8) generally contains the comments and remarks of the subject, and is used whenever it is not feasible to place the subject under oath; e.g., a so-called "affidavit," without the affiant's oath is in effect a statement.

246.54 Question and Answer Statement

246.541 ELEMENTS

(1) A question and answer statement is a transcript of the questions, answers, and statements made by each participant at an interview. It may be prepared from the recorder's notes or from a mechanical recording device. A mechanical recording device may be used to record statements when no stenographer is readily available for that purpose, with the express advance consent of all parties to the conversation. The source used to prepare the transcript should be preserved and associated with the case file because it may be needed in court to

(246.54 QUESTIONS AND ANSWER STATEMENT—Cont.)

establish what was said. The transcript (suggested format shown in Exhibit 200–9) should be prepared on standard size (8″x10½″) plain bond paper with each question consecutively numbered and should contain the following:

(a) The time and place where the testimony is obtained.

(b) Name and address of person giving testimony.

(c) The matter the testimony relates to.

(d) Name and title of person asking questions and person giving answers.

(e) The names and titles of all persons present, including attorney or accountant present to assist the subject. Also the reason for each person being present, if not self-evident.

(f) Generally, the purpose for the interview should be stated.

(g) Information given to the subject concerning his rights relating to self-incrimination and counsel, if appropriate.

(h) Administration of oath.

(i) Questions and answers establishing that the statement was made freely and voluntarily, without duress, and that no promises or commitments were made by the agents.

(j) Offer to allow subject to make any statment for the record, and, if advisable, an opportunity to examine and to sign the transcript.

(k) Jurat: The officer who administers the oath should complete the jurat. It is preferable, but not essential, to have the same officer who interviewed the taxpayer complete the jurat.

(l) Signatures of any Government witnesses present.

(m) Signature and certificate of person preparing the statement, showing the source of the original information used to prepare it.

246.542 OFF-RECORD DISCUSSIONS

Off-record discussions should not be permitted during a recorded interrogation of a taxpayer, and kept to a minimum during a recorded interrogation of a witness.

246.55 Memorandum of Interview

(1) A memorandum of interview is an informal note or instrument embodying something that the person desires to fix in memory by the aid of written record. It is a record of what occurred at the interview and usually is in the format shown in Exhibit 200–10. The memorandum shows the date, time, place, and persons present as well as what transpired. It should be promptly signed and dated by the agents present. (See IRM 9353:(27).) If the subject is advised of his constitutional rights during the interview, this fact should be noted in the memorandum.

(2) Since the person interviewed may be a Government witness in a criminal trial, the special agent should bear in mind that 18 USC 3500 provides for defense inspection of any pre-trial statement about whose subject matter the witness has testified on direct examination. Case interpretation of this subsection covers substantially verbatim recitals of witnesses' oral statements which are contemporaneously recorded. This includes memorandums of interview.[3] Handwritten notes made by an agent during an interview and used as the basis for a more detailed memorandum or report which was made available to the defense, need not be produced for defense examination, and destruction of the notes would not invalidate the memorandum.[4] Trial courts have substantial discretionary authority in interpreting the statute. Special agents, therefore, should confine memorandums to the facts developed in their interviews, and should avoid opinions, conclusions, and other extraneous matters.

(3) Subsection 637.82 contains a discussion of 18 USC 3500 and cases determining when defense inspection of memorandums of interview will be permitted in a criminal trial.

246.56 Informal Notes or Diary Entries of Interview

Informal notes should contain sufficient details to permit the agent to refresh his memory as to what transpired at the interview. Any method of recording the entries is sufficient, if it shows the time, place, persons present, and what occurred. Details of interviews should not be entered in the diary, but rather a memorandum should be made and kept in the case file (see Exhibit 200–11). A note should be made in the diary of the time, place, and persons interviewed (see Exhibit 200–12).

246.6 PROCEDURE

(1) *Review and corrections*—Every record of an interview should be carefully reviewed for any typographical errors, and for accuracy of context. If the statement is to be examined by the subject, he may be permitted to correct typographical errors or to make minor modifications of his testimony. The subject should never be permitted to alter the record, or to delete any of his testimony. He may, however, submit an affidavit or give testimony modifying his original statements.

(2) *Execution*—Every document made under oath should have a simple certificate evidencing the fact that it was properly executed before a duly authorized officer. The usual and proper form, referred to as the "jurat," is "Subscribed and sworn to before me at (*address*)," followed by the date, signature and title of the officer. If the jurat shows an affirmation, the word "affirmed" will be sufficient. The agent usually administers the oath by having the subject stand, raise his right hand, and make a declaration to God, that the document is true and correct.

[3] Anthony M. Palermo v. U.S., 360 U.S. 343, 79 S. Ct. 1217; U.S. v. Papworth, 156 F. Supp. 642 (N.D. Tex.).

[4] U.S. v. Greco, 298 F 2d 247, cert. denied, 369 U.S. 820, 82 S. Ct. 831.

(246.6 PROCEDURES—Cont.)

(3) *Persons entitled to copies*—Upon request, a copy of an affidavit or transcript of a question and answer statement will be furnished a witness promptly, except in circumstances deemed by the Regional Commissioner to necessitate temporarily withholding a copy. (See Policy Statement P–9350–1.)

(4) *Subsequent use by special agent*—The record of interview generally is not admissible as evidence at the trial, but may be used to refresh the memory of a witness or to discourage a witness from changing his testimony. It may also be used to impeach a witness on the stand when his previous statements are inconsistent with his testimony, or to furnish a basis for prosecution of a witness who testifies falsely at the trial. If the statement constitutes a confession or an admission against interest, the pertinent parts may be used as such in evidence at the trial. The record also serves as a valuable source of information for subsequent examinations if it contains the personal and financial history of the taxpayer. It may be used to establish a starting point or "cut-off" for a subsequent net worth case, or to provide leads to other violations by the subject or other individuals.

246.7 APPLICATION

All techniques outlined in Subsection 246 are subject to IRM 9384 and any related Manual Supplements.

247 Circular Form Letters

247.1 GENERAL

Mail circularization to obtain third party evidence may be, under certain circumstances, the most practical means of obtaining documentary evidence in an investigation when a large number of persons, widely scattered geographically, need to be reached. If not judiciously used, mail circularization may result in unwarranted embarrassment to the taxpayer or cause unfavorable public reaction, thus subjecting the Service to criticism.

247.2 PROCEDURE

To ensure proper use of this technique, mail circularization will not be undertaken in any case without the prior approval of the Chief, Intelligence Division, including approval of the letters to be sent out. Extreme care must be exercised in approving mail circularization to ensure that: Mail inquiries are sent only to third parties who are a likely source of information; the information sought is vital to the investigation; the information cannot be obtained by any other practical means; the format of the proposed letter is discreetly worded, is neither offensive nor suggestive of any wrongdoing by the taxpayer; and the taxpayer's reputation will not be unduly affected by the form letter. When mail circularization is used, all such letters will be sent in the name of the Chief, Intelligence Division.

250 DOCUMENTARY EVIDENCE

251 Definition of Documentary Evidence

Documentary evidence is evidence consisting of writings and documents as distinguished from parol, that is, oral evidence.

252 Best Evidence Rule

252.1 DEFINITION OF BEST EVIDENCE RULE

(1) The best evidence rule, which applies only to documentary evidence, is that the best proof of the contents of a document is the document itself.

(2) The best evidence rule, requiring production of the original document, is confined to cases where it is sought to prove the contents of the document. Production consists of either making the writing available to the judge and counsel for the adversary, or having it read aloud in open court. Facts about a document other than its contents are provable without its production.[1] For example, the fact that a sales contract was made is a fact separate from the actual terms of the contract and may be proved by testimony alone.

(3) Certain documents, such as leases, contracts or even letters, which are executed (signed) in more than one copy are all considered originals and any one of the copies may be produced as an original.

252.2 APPLICATION OF BEST EVIDENCE RULE

(1) When an original document is not produced, secondary evidence, which could consist of testimony of witnesses or a copy of the writing, will be received to prove its contents if its absence is satisfactorily explained. Unavailability of the original document is a question to be decided by the trial judge, just as he decides all questions regarding admissibility of evidence.

(2) The reason for the rule is to prevent fraud, mistake, or error. For example, the testimony of a special agent as to the contents of a sales invoice will be excluded unless it is shown that the invoice itself is unavailable. However, in that event, the special agent's testimony is admissible even though the person who prepared the invoice is available to testify. The best evidence rule will not be invoked to exclude oral testimony of one witness merely because another witness could give more conclusive testimony.

252.3 SECONDARY EVIDENCE

(1) All evidence falling short of the standard for best evidence is classed as secondary evidence and is a substitute for better evidence. Stated in another way, when it is shown from the face of the evidence itself or by other proof that better evidence was or is available, the evidence is classified as secondary evidence.

(2) Secondary evidence may be either the testimony of witnesses or a copy of the writing. There is no settled

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[1] Kurzawski v. Malaga, 338 Ill. App. 162, 86 N.E. 2d 698; Hancock v. Kelly, 81 Ala. 368, 2 So. 281; Snodgrass v. Branch Bank, 25 Ala. 161, 60 Am. Dec. 505; 32 C.J.S. 791; 4 Wigmore (3d Ed.) 1268.

(252.3 SECONDARY EVIDENCE—Cont.)

Federal rule stating which of these is a higher degree of secondary evidence.

(3) Before secondary evidence of any nature may be admitted, there must be satisfactory evidence of the present or former existence of an original document,[2] properly executed and genuine.[3] It must be established that the original has been destroyed, lost, stolen, or is otherwise unavailable. In all cases, except destruction provable by an eyewitness, the party proving the document must have used all reasonable means to obtain the original, i.e., he must have made such diligent search as was reasonable under the facts.[4] Some cases have specifically set the rule that search must be made in the place where the document was last known to be, or that inquiry must be made of the person who last had custody of it. In every case, the sufficiency of the search is a matter to be determined by the court.[5] If a document is offered as secondary evidence it must be shown to be a correct copy of the original.

(4) When the original document has been destroyed by the party attempting to prove its contents, secondary evidence of the contents will be admitted, if the destruction was in the ordinary course of business, or by mistake, or even intentionally, provided it was not done for any fraudulent purpose.[6] In the Granquist case (note 6) the defendant's income tax returns had been destroyed pursuant to Executive Order and statutory authority. At the trial, secondary evidence in the form of oral testimony and State returns was admitted to establish the contents of the missing income tax returns.

(5) In a civil case, secondary evidence of the contents of a document may be introduced if the original is in the possession of the opponent in the case, provided the party attempting to introduce the copy has first served a notice upon his opponent to produce the original, and the opponent has failed to do so. In a criminal case not involving corporate records, the Government may introduce secondary evidence of the defendant's records without showing prior notice to produce.[7]

(6) The Lisansky case (note 7) presents a full statement of this rule and illustrates its application. The defendants in the case, on trial for income tax evasion, argued that the court, in allowing Government agents to testify about the contents of the defendant's books and records and permitting photostatic pages of the books to be introduced in evidence, violated the best evidence rule. The Court of Appeals held:

> "So far as the best evidence rule is concerned, the government complied with this rule, in that it produced the best proof which could be produced under the circumstances of the case. The books were shown to be in possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. (Boyd v. U.S. cited). * * * But evidence as to the contents of books and papers is not lost to the government because the defendant has them in his possession and their production cannot be ordered or the usual basis laid for the introduction of secondary evidence. In such cases, the rule is that, when they are traced to his possession, the government, without more ado, may offer secondary evidence of their contents."

253 Admissibility of Specific Forms of Documentary Evidence

253.1 STATUTORY PROVISIONS

Admissibility in the Federal courts of various forms of documentary evidence is covered principally in sections 1731 through 1745 of Title 28, United States Code.

253.2 BUSINESS RECORDS

253.21 Federal Shop Book Rule

(1) Records made in the regular course of business may be admissible under the Federal statute which states:[1]

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

(2) The above statute permits showing that an entry was made in a book maintained in the regular course of business without producing the particular person who made the entry and having him identify it.[2] For example, in proving a sale, an employee of the customer may appear with the original purchase journal and cash disbursements book of the customer, to testify that these were books of original entry showing purchases by the customer and payments by him to a taxpayer for these purchases, even though the witness is not the person who made the entries.

(3) The essence of the "regular course of business" rule is the reliance on records made under circumstances showing no reason or motive to misrepresent the facts. As

[2] Fidelity Trust Co. v. Mayhugh, 268 F 712 (CA-5); Canister Co. v. U.S., 70 F. Supp. 904, 108 Ct. Cl. 558, cert. denied 332 U.S. 830, 68 S. Ct. 207.
[3] O'Donnell v. U.S., 91 F 2d 14 (CA-9), cert. granted, U.S. v. O'Donnell, 302 U.S. 677, 58 S. Ct. 146, rev. on other grounds, 303 U.S. 501, 58 S. Ct. 708; Foamite-Childs Corp. v. Pyrene Mfg. Co., 288 F 417 (D.C. Del.).
[4] Klein v. U.S., 176 F 2d 184 (CA-8).
[5] Sellmayer Packing Co. v. Commissioner of Int. Rev., 146 F 2d 707 (CA-4); Fogel v. U.S., 162 F 2d 54 (CA-5); O'Donnell v. U.S., supra (note 3).
[6] Riggs v. Taylor, 9 Wheaton (U.S.), 483; McDonald v. U.S., 89 F 2d (CA-8); Granquist v. Harvey, 58-2 USTC 9722 (CA-9).
[7] Lisansky v. U.S., 31 F 2d 846 (CA-4); U.S. v. Reyburn, 31 U.S. (6 Peters) 352; McKnight v. U.S., 115 Fed. 972 (CA-6).

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[1] 28 USC 1732(a).
[2] Hoffman v. Palmer, 129 F 2d 976 (CA-2), Aff'd 318 U.S. 109, 63 S. Ct. 477, rehearing denied 318 U.S. 800, 63 S. Ct. 757.

(253.21 FEDERAL SHOP BOOK RULE—Cont.)

stated in the Clainos case:[3] "The rule contemplates that certain events are regularly recorded as 'routine reflections of the day to day operations of a business' so that 'the character of the records and their earmarks of reliability' import trustworthiness." For example, the rule is applied to bank records under the theory that the accuracy of the records is essential to the very life of the bank's business.[4]

(4) The mere fact that a record has been kept in the regular course of business is not of itself enough to make it admissible. The rules of competency and relevancy must still be applied, the same as for any other evidence.[5] If a ledger is offered in evidence to prove entries posted from a journal which is available, the journal itself, as the book of original entry, should be produced.

(5) When in the regular course of business it is the practice to photograph, photostat, or microfilm the business records mentioned above, such reproductions when satisfactorily identified are made as admissible as the originals by statute.[6] Similarly, enlargements of the original reproductions are admissible if the original reproduction is in existence and available for inspection under the direction of the court. This rule is particularly helpful in connection with bank records because of the common practice of microfilming ledger sheets, deposit tickets, and checks.

253.22 Photographs, Photostats, and Microfilmed Copies

(1) Photographs, photostats, and microfilmed copies of writings not made in the regular course of business are considered secondary evidence of the contents, inadmissible if the original can be produced and no reason is given for failure to produce it. The same rule is usually applied where the original is already in evidence and no reason has been given for offering the copy.[7] The practice has sometimes been followed in income tax cases, of placing the original return in evidence and then substituting a photostat with permission of the court where there has been no defense objection. IRC 7513 as amended provides for reproduction of returns and other documents, and covers use of the reproductions as follows:

> "In General.—The Secretary or his delegate is authorized to have any Federal agency or person process films or other photo-impressions of any return, document, or other matter, and make reproductions from films or photo-impressions of any return, document, or other matter.
> "*Use of Reproductions.*—Any reproduction of any return, document, or other matter made in accordance with this section shall have the same legal status as the original; and any such reproduction shall, if properly authenticated, be admissible in evidence in any judicial or administrative proceeding, as if it were the original, whether or not the original is in existence."

(2) A photographic or photostatic reproduction of a document may be admitted after evidence has been produced that the original cannot be obtained and that the reproduction is an exact and accurate copy. This principle has been followed where the original was in the hands of the defendant and its production could not be compelled by the Government.[8] It has further been held that a photograph of a promissory note taken because the writing was becoming faded and illegible was admissible in place of the illegible original.[9]

(3) When photostats of documents are obtained during an investigation they shall be initialed on the back, after comparison with the original, by the one who made the photostat or by the agent who obtained the document which was photostated. The date of such comparison shall be noted following the initial. The source of the original document shall be set out on the reverse of the photostat or on an initialed attachment or memorandum relating to each photostat or group of photostats covered by the one memorandum. This procedure will ensure proper authentication at a trial.

253.23 Transcripts

Transcripts are copies of writings and are admissible under the same principles governing the admission of photographs or photostatic reproductions (Subsection 253.22). A special agent shall take certain precautions in the preparation of transcripts to ensure proper authentication for their admission at a trial when the original documents are unavailable. He shall carefully compare the transcript with the original and certify that it is a correct transcript. The certification shall show the date that the transcript was made, by whom and where it was made, and the source from which it was taken. Each page shall be identified by the special agent to show that it forms part of the whole. A good practice is to show the total number of pages involved, as, page 1 of 5 pages. When a partial transcript is made it should be so indicated, for example, "excerpt from page 5 of the cash receipts book." In the Zacher case[10] a Government agent was allowed to identify a transcript of the taxpayer's bank records, which he testified had been prepared by fellow agents under his direction, control, and supervision.

253.24 Charts, Schedules, and Summaries

Charts, schedules, and summaries prepared by examining agents may be placed in evidence at the discretion of the court if they are summaries of evidence previously admitted in a case.[11] This is permitted as a matter of con-

[3] Clainos v. U.S., 163 F 2d 593 (CA-Dist. of Col.).
[4] U.S. v. Cotter, 60 F 2d 689 (CA-2); U.S. v. Manton, 107 F 2d 834 (CA-2).
[5] Schmeller v. U.S., 143 F 2d 544 (CA-6).
[6] 28 USC 1732(b).
[7] People v. Wells, 380 Ill. 347, 44 N.E. 2d 32.
[8] Zap v. U.S., 328 U.S. 624, 66 S. Ct. 1277; Lisansky v. U.S., supra (subsection 252, note 7).
[9] Duffin v. People, 107 Ill., 113.
[10] Zacher v. U.S., 227 F 2d 219 (CA-8), 55-2 USTC 9745.
[11] Conford v. U.S., 336 F 2d 285 (CA-10), 64-2 USTC 9752; U.S. v. Doyle, 234 F 2d 788 (CA-7), 56-1 USTC 9553.

(253.24 CHARTS, SCHEDULES, AND SUMMARIES—Cont.)

venience to the court and jury.[12] At times such charts, summaries, and schedules have been permitted in the jury room to aid in the jury's deliberations.[13] Charts are particularly effective in net worth cases to summarize the details of the various items and computations upon which the additional income is based.[14] Schedules are frequently used to simplify the presentation of a great number of transactions upon which a specific item case is based. For example, in the Eggleton case,[15] involving the purchase and resale of 202 used automobiles, a schedule of those items showing the details of the transactions was admitted into evidence after the introduction of the pertinent records and testimony. However, care should be exercised in the preparation of charts, summaries, and schedules to avoid prejudicial headings or titles. For example, a chart listing a series of unreported sales should not be entitled "Fraudulently Omitted Sales."

253.25 Notes, Diaries, Workpapers, and Memorandums

Notes, diaries, workpapers, and memorandums made by examining agents during an investigation ordinarily are not considered evidence.[15] However, they may be used on the witness stand or prior to testifying as an aid to recollection or may be introduced into evidence by the adverse party if they constitute impeaching evidence. Any documents used by a witness while on the stand are subject to inspection by the defense. They should always be carefully prepared to ensure that the whole truth is reflected because of their possible use in court. A further discussion of this subject is contained in Subsection 637.–6–637.63.

253.26 Proving Specific Transactions

(1) In proving specific transactions such as purchases and sales of real and personal property loans, encumbrances, and other commercial events, it is not enough for the special agent to obtain the written record of those transactions. Documents and recorded entries, no matter how honestly made, are not in themselves facts. They are written descriptions of events but are not in themselves proof of the events. Consequently, witnesses should be produced who will testify about the transactions and authenticate the documents. During the investigation, parties to the transactions should be questioned to determine whether the documents or entries truthfully relate all the facts, and that there are no additional facts or circumstances which have not been recorded. The following examples illustrate this principle:

(a) In the case of alleged unreported sales, the vendees should be interviewed to determine whether checks and invoices represent all the transactions with the taxpayer, whether the documents truthfully record the events, whether additional sums might have been paid or refunded, whether there were any other methods of payment or other parties to the transaction, and whether there is other relevant information.

(b) A contract of sale, settlement sheet, closing statement or recorded deed does not necessarily reflect all the facts involved in a real estate transaction. Currency payments over and above those shown in the instrument and nominees or other "straw parties" may be revealed through questioning the parties to the transaction. Mortgages and other encumbrances may not actually exist although recorded documents seem to evidence such facts. Proof of real estate transactions should therefore include the testimony of the parties involved.

(2) No question of admissibility is involved when different items of documentary evidence may be used to prove a fact. The only thing involved in such case is the weight of the evidence, which is determined by the jury in the same way as the weight of any other evidence placed before it. Thus, where the Government is trying to prove that a third party made purchases from the taxpayer, a canceled check of the third party to the order of the taxpayer will not be excluded from evidence merely because purchase invoices, purchase journals, or cash disbursements books of the party, although available, have not been produced. The fact that the check itself may not be the best proof of payment for a purchase is a factual question for the jury. However, complete documentation of every transaction should be obtained whenever possible.

253.3 OFFICIAL RECORDS

253.31 Statutory Provisions Regarding Official Records

The admissibility of official records and copies or transcripts thereof in Federal proceedings is covered by provisions of the United States Code and by rules of criminal and civil procedure.

253.32 Authentication of Official Records

(1) The admissibility of official records and copies or transcripts thereof is provided for by the United States Code[17] as follows:

> "(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
> "(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

[12] Schenck v. U.S., 126 F 2d 702 (CA–2), 42–1 USTC 9363; U.S. v. Dave Beck, 59–2 USTC 9586.
[13] Beaty v. U.S., 213 F 2d 712 (CA–4), 54–2 USTC 9466; but see Steele v. U.S., 222 F 2d 628 (CA–5), 55–1 USTC 9438.
[14] Holland v. U.S., 209 F 2d 516 (CA–10), 54–1 USTC 9177, Aff. 75 S. Ct. 127, 54–2 USTC 9714.
[15] Eggleton v. U.S., 227 F 2d 493 (CA–6), 56–1 USTC 9108.
[15] See subsection 223.7:(1), supra.
[17] 28 USC 1733.

(253.32 AUTHENTICATION OF OFFICIAL RECORDS—Cont.)

(2) The method of authentication of copies of Federal records is set forth in the Federal Rules of Civil Procedure[18] which is made applicable to criminal cases by Rule 27 of the Federal Rules of Criminal Procedure. Authentication of a copy of a Government record under these rules would consist of a certification by the officer having custody of the records and verification of the official status of the certifying officer by a Federal district judge over the seal of the court. Verification of the official status of District Directors is not required on authenticated copies of Internal Revenue Service documents certified to by District Directors over their seal of office.[19]

(3) Tax returns which have been filed, or certified copies of them, are admissible under Title 28, section 1733 as official records of the Internal Revenue Service.[20] Procedures and types of forms for the certification of tax returns or other official records by District Directors are set forth in IRM 247. Although tax returns or other official records are usually offered in evidence through a Service representative, authenticated copies are generally admissible without a representative.

(4) A Certificate of Assessments and payments (Form 4340, for non-ADP returns) or a Computer Transcript (Form 4303, for ADP returns) is customarily offered in evidence through a representative of the Internal Revenue Service as a transcript of the records to which it relates.[21] These forms, properly authenticated in accordance with Rule 44 (note 18, supra), are admissible without the presence of an Internal Revenue Service representative.

253.33 Proof of Lack of Record

(1) It is sometimes desirable or necessary to prove that a search of official files has resulted in a finding that there is no record of a certain document. For example, in a prosecution for failure to file an income tax return, the Government, in addition to such oral testimony as it may introduce, may desire some documentary certification that a search had disclosed no record of such return. Rule 44(b) of the Federal Rules of Civil Procedure makes the following provision for this:

> *"Proof of Lack of Record.* A written staetment signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry."

(2) Procedures and a standard form for the certification of a lack of records by District and Service Center Directors are set forth in IRM 247.

253.34 State and Territorial Statutes and Proceedings

(1) The admissibility of copies of legislative acts of any State, Territory, or Possession of the United States and of court records and judicial proceedings, is provided for in the United States Code as follows:[22]

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(2) The procedures for authentication of the above records are recited in the same section of the Code.

(3) Nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, are made admissible by the United States Code[23] and given full faith and credit upon proper authentication.

254 Receipt for Records and Documents

(1) It is sometimes desirable or necessary to examine a taxpayer's or witness' books, records, canceled checks, and other documents at the Intelligence or other Internal Revenue office. The determining factors are the cooperation of the person submitting the records, the volume of documents, the need for photostats or transcripts, and other considerations depending on the individual case.

(2) A receipt must be issued in all instances where a special agent removes records or documents from the premises of a principal or witness by either legal process or agreement (See IRM 9383.3:(7).) Form 2725 is a document receipt used for this purpose. A specimen document receipt and the general instructions for its preparation are contained in Exhibit 200–13. The hypothetical facts in Exhibit 200–13 coincide with those appearing in a summons illustration (Exhibit 200–15).

(3) The document receipt form assembly consists of two parts. The original, Form 2725, is issued to the person submitting the records, and the copy is retained in the special agent's case file. The substitution of a makeshift receipt may convey an impression of carelessness on the part of the issuing officer. Particularly in dealing with principals, an incomplete or improperly prepared receipt may lead to allegations that records were lost, mishandled, or obtained under improper circumstances. The consistent use and careful preparation of Form 2725 should reduce any possible areas of criticism arising from inadequate receipts. It should also help the issuing officer identify and authenticate records or documents during an investigation and any subsequent court proceedings.

(4) The reverse of the document receipt copy contains a history and custody of documents section. The completion of this section is not required for all documents received by special agents. It need only be prepared when a receipt is issued for records or other documents of a possible defendant.

(5) Many cases call for the circularization of a taxpayer's customers or suppliers by mail. The written re-

[18] 28 USC Rule 44.
[19] 26 USC 7515.
[20] 26 USC 6103.
[21] Vloutis v. U.S., 219 F 2d 782 (CA–5), 55–1 USTC 9262.
[22] 28 USC 1738.
[23] 28 USC 1739.

(254 RECEIPT FOR RECORDS AND DOCUMENTS—Cont.)

quests generally involve a few, easily identified records or documents. Unless required by local instructions or individual circumstances, a receipt need not be issued to a witness who transmits the records or documents through the mail. Since an adequate record of the request for and return of the documents should appear in the correspondence file for each case, it would be impracticable and a duplication of effort to issue a receipt for every document received under circularization procedures. Although a receipt may not be necessary under these circumstances, proper identification and authentication of any photostats or transcripts should not be overlooked by the special agent. (See IRM 9383.4:(2).)

255 "Chain of Custody"

255.1 LEGAL REQUIREMENTS FOR "CHAIN OF CUSTODY"

"Chain of custody" is an expression usually applied to the preservation by its successive custodians of the instrument of a crime or any relevant writing in its original condition. Documents or other physical objects may be the instrumentalities used to commit a crime and are generally admissible as such. However, the trial judge must be satisfied that the writing or other physical object is in the same condition as it was when the crime was committed. Consequently, the witness through whom the instrument is sought to be introduced must be able to identify it as being in the same condition as when it was recovered. Special agents must therefore promptly identify and preserve in original condition all evidentiary matter that may be offered into evidence. This would particularly apply to lottery tickets, rundown sheets, records and other paraphernalia seized in a gambling raid.

255.2 IDENTIFICATION OF SEIZED DOCUMENTARY EVIDENCE

(1) In order that a seized document may be admissible as evidence, it is necessary to prove that it is the document that was seized and that it is in the same condition as it was when seized. Since several persons may handle it in the interval between the seizure and the trial of the case, it should be adequately marked at the time of seizure for later identification, and its custody must be shown from that time until it is introduced in court.

(2) A special agent who seizes documents should at once identify them by some marking so that he can later testify that they are the documents seized, and that they are in the same condition as they were when seized. He may, for instance, put his initials and the date of seizure on the margin, in a corner or some other inconspicuous place on the front, or on the back of each document. If circumstances indicate that such marking may render the document subject to attack on the ground that it has been defaced or it is not in the same condition as when seized, the special agent may, after making a photostat or other copy for comparison or for use as an exhibit to his report, put the document into an envelope and write a description and any other identifying information on the face of the envelope.

256 Questioned Documents

256.1 USE AND APPLICATION OF QUESTIONED DOCUMENTS

The identification of handwriting and typewriting is frequently of great importance in the investigation of cases. This is especially true when the case involves an anonymous letter, or when a successful solution depends upon determining whether a typewritten document was or was not prepared in a particular office and on a certain machine. Both handwriting and typewriting reflect individual characteristics under the precision instruments of the experts and are susceptible of definite identification and proof.

256.2 DEFINITION OF QUESTIONED DOCUMENT

A questioned document is one that has been questioned in whole or part with respect to its authenticity, identity, or origin. It may involve handwriting or typewriting comparison, determination of the age of documents and inks, and examination of erasures, obliterations, and overwriting.

256.3 STANDARDS FOR COMPARISON WITH QUESTIONED DOCUMENTS

(1) In addition to the questioned document, and in order that its authenticity, identity, origin, or relationship to some matter at issue may be determined, the special agent should secure and submit as many known samples, called exemplars, of the handwriting of the suspected person or the typewriting of the suspected machines, as may be needed for comparison purposes. These are referred to as standards for comparison.

(2) The Federal statutes provide for comparison of handwriting standards, as follows:[1]

> "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

(3) Admissibility of handwriting specimens is determined in the first instance by the trial court,[2] although the ultimate comparison is made by the jury. Little or no limitation has been placed by courts upon the nature of documents which may be admitted for this purpose. For instance, the signature of a defendant on a stipulation waiving jury trial was admitted for comparison of the signature with that which appeared on a document offered in evidence, in order to authenticate the document.[3] In another case,[4] where a defendant was on trial for theft of money and travelers' checks from a bank, the Government

Sec. 256
[1] 28 USC 1731.
[2] U.S. v. Angelo, 153 F 2d 247 (CA-3).
[3] Desimone v. U.S., 227 F 2d 864 (CA-9).
[4] Hardy v. U.S., 199 F 2d 704 (CA-8).

(256.3 STANDARDS FOR COMPARISON WITH QUESTIONED DOCUMENTS—Cont.)

was permitted (after concealment of prejudicial portions) to introduce for comparison with his alleged endorsements of the traveler's checks, an instrument executed by him while an inmate at a Federal penitentiary.

(4) Generally, persons who have seen the defendant write, one or more times, or who are familiar with his handwriting from carrying on correspondence with him or from handling writings known to have been written by him, are competent as nonexperts to give opinions about the genuineness of a writing purported to be that of the defendant.[5]

(5) However, in a case where the Government attempted to introduce a bank signature card as a comparison specimen, the court held it to be a properly admissible basis for comparison, even though the witness who identified it was a bank clerk who had not seen the defendant sign the card nor even seen him write his name, but testified that the bank referred to the signature card when presented with checks drawn in the defendant's name.[6]

(6) Although the statute does not cover comparison of typewriting standards, it would follow logically that any rule respecting handwriting standards would cover typewriting standards as well, and that known specimens would be admissible for such purpose.

256.4 HANDWRITING EXEMPLARS

(1) Handwriting exemplars may consist of previous writings of the subject if they are available and have either been admitted by him or can be proved to be his. At other times it may be necessary to secure them during talks or interviews with the subject, by having him write down memorandums or other information he can be asked to furnish. The more numerous and lengthy the specimens, the better will be the opportunity for accurate comparison, and the less likely the possibility that he will succeed in disguising his writing if inclined to do so. It may therefore be advisable to obtain several specimens over a period of days and to have them include some of the more common words and expressions used in the questioned writing. For the best effect, the exemplar should duplicate the questioned document. It should be made with a similar writing instrument, on similar paper, and should include, as nearly as possible, the full content or text of the questioned writing.

(2) The agent should be alert to the possibility of disguises in handwriting. The most used forms of disguise are: Writing unusually large or small; writing at extreme speed or with painstaking slowness; backhand or other extreme changes in slant; or complicated embellishments or greatly simplified forms in a disconnected printed style. Requesting the subject to write at normal speed from dictation may be effective for elimination of disguise. If the questioned writing itself is disguised in whole or in part, specimens in a disguised hand may be useful.

(3) In a wagering raid it may become necessary to establish proof as to whose handwriting, printing, or numerals appear on the betting slips, tally sheets, and other records. The agent should try to obtain from the appropriate persons samples of writing, printing, and numerals which would provide an adequate basis for comparison.

(4) The taking of handwriting exemplars does not violate a person's constitutional rights. The Fifth Amendment privilege against self-incrimination reaches compulsory communications, but a mere handwriting exemplar, in contrast with the content of what is written, is an identifying physical characteristic outside its protection.[7] A person can be cited for contempt if he refuses to provide an exemplar to a grand jury.[7a]

(5) Whenever an agent becomes aware that the authenticity or origin of a document may be questioned, he should attempt to obtain handwriting exemplars of the parties involved. One method of obtaining such an exemplar would be by getting an affidavit in a suspect's handwriting.

256.5 TYPEWRITING EXEMPLARS

(1) With respect to typewriting, it is advisable to furnish sets of impressions of all the characters on the keyboard, typed with light, medium, and heavy touch, and at varying rates of speed, to bring out the technical irregularities. The various manufacturers of typewriters have aimed at a certain individuality in their machines and from time to time have made changes in the design, size and proportions of the type and spacing. These serve not only to identify the make of machine used, but to determine that its serial number falls within a certain series. In the ordinary course of use, each machine undergoes deterioration. The type bars lose their vertical and horizontal relationship to each other. Defects and imperfections appear in the type faces as the result of collisions and wear. The spacing mechanism may develop irregularities. These factors impart to each typewriter an individualily which serves to distinguish it from all others and makes positive identification possible.

(2) Exemplars should be made with the ribbon found on the machine and should repeat the complete text of the questioned matter. If the text is extensive, enough of it should be repeated to give all the important letters, figures, and the ribbon adjustment set on stencil, in order to get impressions of type with smallest possible masking. The presence of type scar observed in ribbon specimens should be confirmed by carbon specimens.

256.6 OTHER EXEMPLARS

In proving erasures, alterations, overwritings, blotter impressions, or determining the age of a questioned writing or document, exemplars ordinarily are not involved.

[5] Idem; Murray v. U.S., 247 F 874 (CA-4); Rinker v. U.S., 151 F 755 (CA-8); Rogers v. Ritter, 12 Wall. (79 U.S.) 317.
[6] Wolitz v. U.S., 19 F 2d 506 (CA-9).
[7] Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967).
[7a] U.S. v. Doe, F 2d (CA-2, 1968).

(256.6 OTHER EXEMPLARS—Cont.)

Through the use of infrared light technique, microscopes, ultraviolet light, and chemicals the laboratory can resolve many questions about a document. However, exemplars have on occasion been used to aid in the determination of the age of documents. Standards for comparison consisted of documents allegedly existing at the time of the questioned document. Comparison of inks, water marks, condition of paper, and other characteristics provides clues to the age of the questioned document. Although pencil notations cannot ordinarily be examined for age, the condition of the material upon which the notations were made might be indicative of the time of writing.

256.7 IDENTIFYING EXEMPLARS AND QUESTIONED DOCUMENTS

(1) Having obtained the necessary numbers and kinds of exemplars, the special agent should initial and date them on the back so that he can identify them for use at a trial. He must secure the questioned documents, care for it properly, transmit it along with the exemplars to the expert, and maintain the chain of custody until it is produced in court. Subsection 271 covers the procedure for the utilizations of crime laboratories in proving questioned documents.

(2) The Examiner of Questioned Documents, Treasury Department, Washington, D.C., makes examinations and analyses of documents to detect spuriousness or to give assurance of genuineness, to detect evidence of erasure, alterations, addition, interpolation, forgery of signature, identity of handwriting and typewriting, and to develop information concerning inks, paper, writing instruments, and other materials involved in these problems. The Examiner and his associates prepare reports of their observations and conclusions and from time to time testify in court as expert witnesses. Requests for the examination of documents by the Examiner should be sent to the Director, Intelligence Division, National Office. (See IRM 9264.2.)

(3) In some geographic areas use is made of a qualified expert from the Post Office Department, the Federal Bureau of Investigation, the Alcohol and Tobacco Tax Division of the Internal Revenue Service, and other Government agencies. This does not conflict with any Service policy, provided there is no unauthorized disclosure of information in violation of IRC 6103 (Publicity of Returns) and 7213 (Unauthorized Disclosure of Information).

(4) Whenever possible, a special agent desiring examination and analysis of a document should send the original rather than a photostat. This is to make sure that the examiner can properly analyze all characteristics of the document, including the writing, the instrument used, and the paper upon which the writing was done.

257 Record Retention Requirements

257.1 GENERAL

(1) Except for farmers and wage-earners, any person subject to income tax or required to file an information return of income must keep permanent books of account or records, including inventories, to establish his gross income, deductions, credits or other matters for tax or information return purposes. Farmers and wage-earners whose gross income includes salaries, wages or similar compensation are required to keep records which will enable the District Director to determine the correct amount of such income subject to tax. They need not keep the permanent books of account or records required of others.[1]

(2) Required books or records should be available at all times for inspection by authorized internal revenue officers or employees and should be retained as long as the contents may become material in administering any internal revenue law. Employment tax records must be kept for four years after the due date of such tax or the date such tax is paid, whichever is later.[2]

257.2 RECORD REQUIREMENT GUIDELINES FOR ADP SYSTEMS

(1) Taxpayers who maintain their records on an automated accounting system are required to provide for a program which:[3]

(a) Writes out general and subsidiary ledger balances (such as accounts receivable, accounts payable, inventories and fixed assets) at regular intervals.

(b) Makes supporting documents, including invoices vouchers and general journal vouchers, readily available to the Internal Revenue Service upon request.

(c) Makes clear and concise logical procedural directives available for examination, including procedural audit trails, up-to-date operation logs and flow charts and block diagrams of all equipment operations.

(d) Provides adequate record retention facilities for storing tapes, print-outs and supporting documents for the time required for record retention in accordance with IRC of 1954 and current regulations. Such facilities also should allow reasonably easy access to listings and records required for examination purposes.

(2) Taxpayers who cannot provide for the above records within their ADP system must provide sufficient records outside the system to meet the Internal Revenue Service requirements.

260 SUMMONS

261 Provisions of Law

(1) The Internal Revenue Code of 1954 contains six sections concerning the use and enforcement of a summons. Five are set forth, in part, on Summons Form 2039 (7603—Service of Summons) and Form 2039A (7602—Examination of Books and Witnesses; 7604—Enforcement of Summons; 7605—Time and Place of Examination; and 7210—Failure to Obey Summons).[1] Further reference to those forms is in Subsection 264.

(2) The Federal law prevails over State law, statutory or constitutional, and the State law, if in conflict, must yield.[2] The words in the statute must be interpreted liberally to fulfill the purpose for which it was enacted.[3] The power granted by the statute is inquisitorial in character and is comparable to that vested in grand juries.[4]

Sec. 257
[1] 26 USC 6001.
[2] Id.
[3] Rev. Proc. 64-12 I.R.B. 1964-8, 19.

(261 PROVISIONS OF LAW—Cont.)

262 Authority to Issue Summons

The authority to issue a summons, examine records, and take testimony granted to the Secretary or his delegate by IRC 7602 has been granted to the Commissioner of Internal Revenue by T.D. 6118, approved December 30, 1954, published in the Federal Register on December 31, 1954 (19 FR 9896), and in turn granted to special agents as well as various other Service employees by Delegation Order No. 4 (Revised), dated May 21, 1957 (Exhibit 200–14), published in the Federal Register on June 4, 1957 (22 FR 3894). Administrative regulations published in the Federal Register must be judicially noticed. (See Subsection 223.4.)

263 Considerations Regarding Issuance of Summons

(1) A special agent should use his best efforts to obtain information voluntarily from taxpayers and witnesses. If a person is uncertain that he should comply with the agent's oral request, his consent may often be obtained by acquainting him with the provisions of the Internal Revenue Code as printed on the reverse side of Form 2039A.

(2) When a taxpayer or a witness refuses to submit requested information, all surrounding circumstances should be fully considered before a summons is issued. The likely importance of the desired information should be carefully weighed against the time and expense of obtaining it, the probability of having to institute court action, and the adverse effect on voluntary compliance by others if the enforcement efforts are not successful.

(3) No set of specific, all-inclusive guidelines can be prescribed to be followed in all instances. Each situation must be analyzed in the light of its particular and peculiar facts and circumstances. In this, there is no substitute for good judgment. Consideration must be given to the legal problems of enforcement, the public relations problem of future cooperation of others, and the practical problem of obtaining the desired information and using the person summoned as a witness in subsequent criminal or civil proceedings.

(4) If the special agent believes that the person from whom information is sought will refuse to comply with a summons, he should consult with his supervisors about the advisability of issuing one. Once issued, a summons should not be abandoned. The issuing officer should be prepared to assist the United States attorney in prosecuting the matter further.

(5) A summons may be served upon a cooperative witness who requests it as evidence of his legal duty to furnish the requested information.

(6) Pertinent law to be considered respecting the issuance of a summons to an individual taxpayer or member of a partnership are covered in Subsections 242.1–242.21.

264 Preparation of Summons

(1) A summons is a formal document. It should be prepared with special care since legal action may have to be taken in a U.S. District Court for its enforcement. Forms 2039 and 2039A and instructions for their preparation are contained in Exhibit 200–15.

(2) The address of a summons to a corporation should include the name of the corporation and also the name and title of one of the officers.

(3) A summons need not describe in detail every document the agent desires to inspect but must describe them specifically enough to enable the person summoned to produce them. The agent may obtain pertinent information for use in the preparation of a summons by questioning the witness concerning what documents he has reflecting transactions with the taxpayer under investigation.[1]

(4) Comments on the time and place of appearance are in Subsection 266.

Sec. 261
[1] See also sec. 7402(b).
[2] Falsone v. U.S., 205 F 2d 734 (CA-5), 53-2 USTC 9467, cert. denied 346 U.S. 864, 74 S. Ct. 103.
[3] U.S. v. Third Northwestern National Bank, 102 F. Supp. 879 (D.C. Minn.), 52-1 USTC 9302.
[4] Falsone v. U.S., supra (note 2).

Sec. 264
[1] First National Bank of Mobile v. U.S., 160 F 2d 532 (CA-5), 47-1 USTC 9203; Hubner v. Tucker, 245 F 2d 35 (CA-9), 57-1 USTC 9362.

272 Special Equipment

272.1 PROPER USE AND LIMITATIONS ON SPECIAL EQUIPMENT

Special agents *must* refer to and abide by the restrictions and prohibitions relative to investigative equipment contained in P–9370–6 (same as P–9400–8) and any implementing Internal Revenue Manual issuances.

272.2 RADIOS

(1) Investigation of wagering tax and coin-operated gaming device violations frequently require the special agent to maintain surveillances of violators and localities to obtain probable cause for arrest and search warrants. Under certain circumstances taxpayers under investigation for income or excise tax violations will be placed under surveillance when it is suspected that they are attempting to leave the country prior to indictment, or to dispose of or conceal liquid assets.

(2) Mobile and/or portable two-way radios are essential to surveillance involving the use of vehicles. The special agent should use coded signals or words whenever possible in radio transmitting and should talk "in the

(272.2 RADIOS—Cont.)

clear" only when absolutely necessary because violators also use all types of radio equipment.

(3) Pools of radio equipment are maintained in the offices of the Assistant Regional Commissioners (Intelligence) and in some offices of the Chiefs, Intelligence Division, for use by special agents when needed. Normally the special agent should be able to operate this equipment himself. If he cannot, another special agent or other officer of the Internal Revenue Service experienced in the use of radio equipment may be assigned to instruct him or work with him.

(4) Certain types of highly specialized radio equipment are available for use by special agents when authorized in specific investigations. This equipment may be obtained through the Director, Intelligence Division, or by loan from other Government agencies such as the Office of Naval Intelligence, the Counter Intelligence Corps, and the Office of Special Investigation. Prior approval of the Chief, Intelligence Division, should be obtained before requesting or using this equipment.

272.3 RECORDING AND LISTENING DEVICES

Recording and listening devices are available in some of the offices of the Assistant Regional Commissioners (Intelligence) and of the Chief, Intelligence Division. The installation and operation of these devices require a high degree of skill and experience to produce the best results. When authorized to use them it is generally the practice to utilize the services of a specialist from within the Intelligence Division or from other Treasury enforcement agencies. Arrangements for the service of these specialists can be made through the Chief, Intelligence Division, and the Assistant Regional Commissioner (Intelligence).

272.4 BINOCULARS AND TELESCOPES

The use of binoculars and telescopes in wagering tax cases, coin-operated gaming device cases, and in surveillances is self-evident. However, the special agent should exercise care while using them. Binoculars and telescopes may be obtained either from the Chief, Intelligence Division, or from the offices of the Assistant Regional Commissioners (Intelligence).

272.5 CAMERAS AND PHOTOCOPIERS

(1) Photographic equipment such as cameras, photocopiers, and photostat machines are normally available in the offices of the Chief, Intelligence Division, District Director, or the Assistant Regional Commissioner (Intelligence).

(2) In the investigation of income tax cases, considerable time can often be saved by photographing documents to be used as evidence or leads rather than preparing transcripts of the documents. These photographs or photostats can under certain circumstances be introduced in court in the trial of the case should the original document be destroyed or lost.

(3) In wagering tax cases photographs of defendants taken while they are engaged in their illegal activities are admissible in court, when properly identified, and in many instances are excellent evidence.

272.6 FIREARMS

Revolvers and ammunition are available to special agents whose particular assignment requires their use. All agents should be proficient in their use and must use them only in self-defense or defense of others.

272.7 HANDCUFFS

Handcuffs are available to the special agent in the offices of the Chief, Intelligence Division, or the Assistant Regional Commissioner (Intelligence). They should be issued to special agents on wagering tax assignments, and particularly when raids are being contemplated. Use of handcuffs should be restricted to the securing of persons arrested and care must be exercised in their use to avoid injuring wrist and ankles of violators.

272.8 SIRENS, WARNING LIGHTS, AND SPECIAL AUTOMOTIVE EQUIPMENT

Vehicles used in enforcement of the wagering tax laws should be equipped with sirens and warning lights. In some instances special equipment such as locked hoods and lock-type gasoline filler caps should be installed, since violators on occasions have sabotaged Government vehicles by putting emery dust, sugar, and similar substances in the crankcase or gasoline tank. However, special agents must have the prior approval of the Chief, Intelligence Division, or of the Assistant Regional Commissioner (Intelligence) before obtaining this equipment.

280 SURVEILLANCE, SEARCHES AND SEIZURES, RAIDS AND FORFEITURES

281 Surveillance (Reserved)

282 Undercover Work (Reserved)

283 Searches and Seizures

283.1 INTRODUCTION

The purpose of this subsection is to set forth the procedures governing the applications, issuance, execution, and return of search warrants and the techniques used in making wagering tax and gaming device raids.

283.2 AUTHORITY AND PROCEDURE

283.21 Constitutional Authority

The basic authority for making searches and seizures is in the Fourth Article of Amendment to the Constitution of the United States which states:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

283.22 Statutory Authority

18 U.S.C. 3105 and 3109, Rule 41 of the Federal Rules of Criminal Procedure, and 26 U.S.C. 7302, 7321, and 7608 contain the statutory authority pertinent to searches and seizures by special agents. Pertinent parts of Rule 41 that a special agent should know before attempting to make a search and seizure are quoted below:

> "(a) *Authority to Issue Warrant.*—A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth, or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.
>
> "(b) *Ground for Issuance.*—A warrant may be issued under this rule to search for and seize any property.
>
> "1 Stolen or embezzled in violation of the laws of the United States; or
>
> "2 Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
>
> "3 Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18 U.S.C. 957; or
>
> "4 Constituting evidence of a criminal offense in violation of the laws of the United States.
>
> "(c) *Issuance and Contents.*—A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States (this includes special agents) authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or commissioner to whom it shall be returned.
>
> "(d) *Execution and Return with Inventory.*— The warrant may be executed and returned only within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.
>
> "(e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before the trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the ground for the motion, but the court in its discretion may entertain the motion at the trial or hearing.
>
> "(f) *Return of Papers to Clerk.*—The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.
>
> "(g) *Scope and Definition.*—This rule does not modify any act, inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers, and any other tangible objects."

283.3 UNREASONABLE SEARCHES AND SEIZURES

(1) The definition of unreasonable searches and seizures as used in the Fourth Amendment has not been expressed in a concrete rule. The various courts have had different opinions of what constitutes the basis for a legal search and seizure. In fact the Supreme Court has varied its opinions so often on this subject there can be but one firm conclusion: Namely, that reasonableness is determined in each case based upon the facts and circumstances of the particular case. This is not to say that special agents cannot learn some guidelines to follow and conversely some pitfalls to avoid by studying the court rulings and by learning the procedures that will be discussed in this section. *Essentially any search and seizure without a warrant is automatically unreasonable unless:*

(a) It is made incident to an arrest for a crime committed in the officer's presence,[1] or

(b) the occupant of the premises who has authority understandingly consents.

(2) Anyone legitimately on premises where a search occurs may challenge its legality, when its fruits are proposed to be used against him.[2] It is not necessary for him to show ownership, right to possession, or dominion over the premises. Entering a house with permission of the occupant's landlord,[3] or a hotel room with consent of the management or a desk clerk[4] is insufficient, and a search

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[1] Draper v. U.S., 358 U.S. 307, 79 S. Ct. 329.

[2] Cecil Jones v. U.S., 362 U.S. 257, 80 S. Ct. 725 (1960).

[3] Elmer S. Chapman v. U.S., 365 U.S. 610, 81 S. Ct. 776 (1961).

[4] Stoner v. California, 376 U.S. 483, 84 S. Ct. 889 (1964); U.S. v. Jeffers, 342 U.S. 48, 72 S. Ct. 93 (1951); Lustig v. U.S., 338 U.S. 74, 69 S. Ct. 1372 (1949).

(283.3 UNREASONABLE SEARCHES AND SEIZURES—Cont.)

and seizure resulting from such entry is illegal. The Supreme Court has refused to rule specifically on whether a wife may, in her husband's absence, waive his constitutional rights by consenting to a search of their home.[5] Some lower courts have held that a wife has implied authority to consent to the search.[6] Others have declared that she does not have such authority.[7] A search has been deemed reasonable where a partner[8] or office manager[9] consented to it, but not where the consent was that of a handyman in a defendant's store.[10] One who shares a desk with fellow employees on business premises of their employer may move to suppress evidence against him obtained from a search of the desk without his consent.[11]

(3) An unreasonable search and seizure, in the sense of the Fourth Amendment, does not necessarily involve the employment of force or coercion, but may be committed when a representative of any branch or sub-division of the Government, by stealth, through social acquaintance, or in the guise of a business call, gains entrance to the house or office of a person suspected of a crime, whether in the presence or absence of the owner, and searches for and abstracts his papers without his consent.[12]

(4) The exclusionary rule suppressing evidence seized in violation of the Fourth Amendment applies to State, as well as Federal, officers in any criminal case.[13] Where the State and Federal officers have an understanding that the latter may prosecute in Federal courts offenses which the former discover in the course of their operations, and where the Federal officers adopt a prosecution originated by State officers as a result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the Federal officers themselves or under their direction.[14] These decisions and others in the same vein are of particular importance since the Intelligence Division in some instances adopts wagering tax cases from State officers.

(5) In the Clay case[15] special agents conducted a two-months' surveillance which indicated that Clay was operating a lottery business involving a pattern requiring him to be at certain places at certain times during the day. He used various automobiles during the period of surveillance and was observed passing and receiving articles common to a lottery business. Based upon this surveillance, Clay was stopped on a highway by special agents and his automobile searched. Clay was arrested after a special agent observed a lottery booklet on his person. The court held that it was an unreasonable search and seizure without the proper search warrant. The "mere act of a known gambler driving an automobile on a public highway will not justify an officer forcing him to stop to be searched or arrested for a suspected violation." Further, "nothing discernible to the senses taught reasonably that crime was then being done until the agent saw, and demanded, the lottery booklet. But this was too late, for the strong arm of the law had peremptorily stopped this traveler and placed him under evident immediate command of Government officers." The court pointed out there was insufficient evidence indicating affirmative acts for the agents to reasonably believe that a felony had been committed. Therefore, it was essential that the agents discern some evidence by their senses to induce a belief in them that a misdemeanor was being committed in their presence.

(6) Unreasonable search and seizure cases usually result from a lack of understanding of the law and the failure to state in sufficient detail the actual known or available facts, either in applications for warrants or while testifying to the facts. Another cause of illegal searches has been over-zealousness on the part of the officers.[16] This is something to guard against especially when the search is made as a result of an arrest and the agent must act without a search warrant, because the agent must determine by himself whether grounds for a search exist and to what extent the search can be made. As a general rule, special agents will find it necessary to secure search warrants in wagering tax cases, since very seldom will a crime be committed in their presence which would give them sufficient probable cause to arrest and then make a search incident to the arrest.

(7) In determining the question of reasonableness, the best rule of procedure is to operate as far away from the dividing line, and on the legal side thereof, as the available facts of the case will permit. In addition to learning as much of the law as possible and how to relate the facts in all of their details, the special agent should constantly ask himself the question, "Are my actions reasonable in the eyes of the courts?"

283.4 PROBABLE CAUSE AND PREPARATION OF SEARCH WARRANT

(1) A warrant must be based upon probable cause to be valid. Probable cause consists of facts or circumstances which would lead a reasonably cautious and prudent man to believe that:

(a) The person to be arrested is committing a crime or has committed a felony, or

(b) Property subject to seizure is on the premises to be searched and an offense involving it has been or is being committed.

(2) The terms "reasonable search" and "search based upon probable cause" are not synonymous expressions.

[5] Amos v. U.S., 255 U.S. 313, 41 S. Ct. 266 (1921).
[6] Stein v. U.S., 166 F 2d 851 (CA-9, 1948); U.S. v. Pugliese, 153 F 2d 497 (CA-2, 1945); U.S. v. Sergio, 21 F. Supp. 553 (E.D. N.Y., 1937).
[7] Cofer v. U.S., 37 F 2d 677 (CA-5, 1930); U.S. v. Rykowski, 267 F 866 (S.D. Ohio, 1920).
[8] U.S. v. Sierra, 210 F 2d 69 (CA-7, 1954).
[9] U.S. v. Antonelli Fireworks Co., 155 F 2d 631 (CA-2, 1946).
[10] U.S. v. Joseph Harry Block, 202 F. Supp. 705 (S.D. N.Y., 1962).
[11] Villano v. U.S., 310 F 2d 680 (CA-10, 1962).
[12] Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261.
[13] Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961).
[14] Sutherland v. U.S., 32 F 2d 305.
[15] Will F. Clay v. U.S., 239 F 2d 195, 57-2 USTC 9800.
[16] Trupiano v. U.S., 334 U.S. 699, 68 S. Ct. 1229.

(283.4 PROBABLE CAUSE AND PREPARATION OF SEARCH WARRANT—Cont. (1))

"Probable Cause" is just one element of reasonableness, Officers may have probable cause to search a house and still conduct an unreasonable search of that house.

(3) In determining what is probable cause we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question of whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched. If the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charaged, there is probable cause justifying the issuance of the warrant.[17] Courts are required to interpret the affidavits in a commonsense rather than hypertechnical manner.[18] The Supreme Court has stated:

> "This Court is . . . concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. . . . It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and the rights of the community." [19]

(4) The affidavit may be based on hearsay so long as it gives a reason for crediting the source of the information.[20] The officer executing the affidavit may rely on information received through an informant if the informant's statement is reasonably corroborated by other matters within the officer's knowledge.[21] The affidavit need not be confined to the direct personal observations of the affiant.[22] However, it should at least relate some of the facts from which the officer has concluded the informant was credible or his information was reliable.[23] For example, it may state that the informant has given correct information in the past, and that the present information is confirmed by other sources.[24] Observations of fellow officers engaged in a common investigation are also a reliable basis for a warrant.[25]

(5) The first thing that a special agent must do is to determine by investigation that one of the three grounds for obtaining a search warrant exists. (Subsection 283.22) In applying this to Intelligence Division work, the special agent will usually find that a wagering or gaming device violation is involved and that certain gambling paraphernalia and property are being used as the means of committing the criminal offense. The next step is to prepare an affidavit stating facts that will establish grounds for issuing the warrant and convince the issuing authority that such grounds exist, or at least convince him that there is probable cause to believe that the facts exist.

(6) Affidavits submitted by special agents to establish grounds for the issuance of a search warrant in a wagering tax case should include, but not be limited to, the following items:

(a) Exact description and location of premises to be searched.

(b) Name of owner or person occupying the premises.

(c) Description of wagering paraphernalia and property being used to violate the wagering tax laws.

(d) Internal Revenue Code sections being violated: 4401; 4411; 4412; 7203.

(e) Chronological detailed statement of facts obtained by surveillance and examination of third party records. In preparation of this part of the affidavit, the special agent should make sure that he expresses his facts in clear and unmistakable words, because the validity of the search warrant will stand or fall depending upon what appears within the four corners of the affidavit. The facts set forth need not be sufficient to support a verdict of guilt beyond a reasonable doubt.[26] They must establish, however, something more than mere suspicion or possibility of criminal activity. It may be said as a general proposition, that mere conclusions of the affiant unsupported by concrete facts, or facts alleged upon bare belief or information, unsupported by other reliable facts affirmatively averred, are inadequate in the eyes of the law to save the affidavit and the warrant based upon it from condemnation by the courts, if genuine probable cause is not shown. Probable cause must exist at the time of the issuance of the warrant. An affidavit is defective which relates to prior observations and does not allege that there is reason to believe the condition still exists.[27]

(f) Statement of facts obtained from confidential sources, if applicable to the case although this in itself is not sufficient for probable cause.

(g) Statement of fact that the records of the District Director have been personally examined by the special agent on a recent date and that the examination disclosed the violator and premises to be searched were not registered as required by IRC 4412 and the violator had not paid the special occupational tax imposed by IRC 4411.[28]

(7) At some stage before applying for a search warrant, the special agent should, if feasible, consult with the United States attorney and obtain advice as to whether sufficient probable cause has been established. Arrangements can be made at that time for representation in the event a formal hearing is requested by the arrested persons at the hearing before the United States Magistrate.

(8) The special agent should prepare his own affidavit rather than depend upon the issuing authority for search

[17] Beal v. U.S., 79 F 2d 135.
[18] U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965).
[19] Ibid.
[20] Cecil Jones v. U.S., supra (note 2).
[21] Ibid; Draper v. U.S., supra (note 1).
[22] Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964).
[23] Ibid.
[24] Ibid.; Cecil Jones v. U.S., supra (note 2).
[25] U.S. v. Ventresca, supra (note 18); Rugendorf v. U.S., 376 U.S. 528, 84 S. Ct. 825 (1964); Chin Kay v. U.S., 311 F 2d 317 (CA-9, 1962).
[26] Washington v. U.S., 202 F 2d 214, U.S. App. D.C. 31, cert. denied 345 U.S. 956, 73 S. Ct. 938.
[27] U.S. v. Sawyer, 213 F. Supp. 38 (E.D. Pa. 1963).
[28] U.S. v. premises identified as office no. 508 Ricou-Brewster Building, 425 Milan Street, Shreveport, La., 119 F. Supp. 24, 54-2 USTC 49,048.

(283.4 PROBABLE CAUSE AND PREPARATION OF SEARCH WARRANT—Cont. (2))

warrants to prepare it for him. In a case involving testimony of several special agents to establish probable cause, each agent should prepare a separate affidavit.[29] An affidavit is not invalidated if, due to lack of space, material facts are set forth on unsworn attachments stapled to the affidavit at the time it was sworn to.[30] However, all pages of the affidavit should be associated by reference, for example, page 1 of 3 pages, and each page should contain the signature of the special agent and the date.

(9) After preparation of the affidavit, the special agent's next step is to make application for a search warrant before one of the issuing authorities. Ordinarily, this person will be a United States Magistrate who will, after review of the affidavit, place the special agent under oath and have him sign it. (If necessary the special agent should tactfully insist that he be sworn.) The Magistrate will then prepare a search warrant based upon information and probable cause contained in the affidavit. Each special agent who submits an affidavit should appear in person before the issuing authority and execute his affidavit.[31] The warrant must state the names of persons whose affidavits support it.[32] A warrant is invalid if the affidavit is made by a person in a false name.[33]

(10) The search warrant should be directed to a special agent or other civil officer of the United States authorized to enforce or assist in enforcing the law. Some courts permit the search warrant to be directed to the Chief, Intelligence Division, or any of the special agents under his jurisdiction, while others object to the class identification and require specific persons be named. It is advisable to name more than one person to permit service by any of the named persons in the event of multiple places to be searched, sickness of an agent, etc. It will describe the premises and/or person to be searched, the gambling paraphernalia and property used to violate the wagering laws, and a list of the Internal Revenue Code sections being violated. It will make reference to the affidavits attached to support the grounds and probable cause for issuance of the search warrant. Sample search warrant and affidavits for search warrant are included with Exhibit 500–6.

283.5 PREPARATION FOR THE SEARCH

(1) A raid leader should be designated to organize the searching party and to be charged with the responsibility of conducting the search. The leader will determine and secure the number of agents and equipment needed to make the raid. He will make specific assignments to each agent and decide the appropriate time to start the search. A map and diagram of location and buildings should be prepared.

(2) The leader will brief the searching party on the duties of each agent, acquaint them with the map and diagram, describe the individuals and wagering paraphernalia expected to be in the premises, discuss with the party protective measures for personal safety of agents and violators, tell them the time when the search will start and the methods of communication between members of the party, and furnish the members of the party with necessary equipment to conduct the search.

283.6 THE APPROACH AND SEARCH

(1) Ordinarily, wagering and gaming device violators will not offer resistance to the raiding party. However, to ensure the greatest factor of safety to everyone involved, all raids should be conducted on the assumption that the individuals sought are on the alert and possess the same type of weapons as the raiding party and under the pressure of the search may attempt to use them. Badges should be worn conspicuously when entering the premises.

(2) The exact manner in which the raiding party should approach the premises to be searched will depend upon the type of place and its surroundings. In most wagering tax raids special agents will find it possible to approach the premises in question from different directions so as to cover each exit. In raids on more or less isolated houses which require agents to cover considerable open territory before getting to their posts and where roads lead to the place from only one direction, it is not ordinarily prudent to drive directly to the place with automobiles because this will warn the occupants of the house and enable them to escape from the other side. In such cases automobiles should be left at a distance and the raiding party should proceed on foot to their respective stations. Usually each agent will proceed separately so that suspicion will not be aroused. When the place to be raided is in a city or is a room or apartment, it may be desirable to drive to within a short distance of the place to be raided and to have the agents immediately proceed to their respective posts. In any approach in connection with a wagering tax raid, the main consideration to keep in mind is that entrance should be gained before the occupants have time to destroy the gambling paraphernalia.

(3) The special agent charged with the responsibility of serving the search warrant and at least one other agent should ordinarily go to the front door of the premises, identify themselves, and ask for admittance. If admitted, they will state their reason for being there, read the search warrant to the person in control of the premises, and serve him with a copy of the warrant. If the occupants are attempting to destroy the gambling paraphernalia when the agents gain entrance, steps should immediately be taken to prevent this before the search warrant is read.

(4) Sometimes it is necessary to force entrance if the occupants refuse to answer or open the door. An officer is allowed to break open any door or window of a

[29] Regina Merritt et al. v. U.S., 249 F 2d 19 (CA–6), 57–2 USTC 10,000.
[30] Brooks v. U.S., 303 F 2d 851 (CA6), cert. denied, 371 U.S. 889, 88 S. Ct. 184.
[31] Will P. Clay v. U.S., supra (note 15).
[32] Rule 41 (c), FRCP.
[33] King v. U.S., 282 F 2d 398 (CA–4).

(283.6 THE APPROACH AND SEARCH—Cont.)

house to execute a search warrant, if after notice of his authority and purpose, he is refused admittance, or when necessary, to liberate himself or anyone helping him execute the warrant.[34] It may also be advisable to use subterfuge to gain entrance if it is suspected or known that the premises are protected by steel doors or bars that would delay the agent to such an extent that the gambling paraphernalia could be destroyed. Although a special agent has authority to use either force or subterfuge, he should be careful not to give the violator a basis for claiming an unreasonable search.

(5) After gaining entrance and serving the search warrant, the special agents should assemble all occupants of the premises in one room and place them under control of at least two agents. If sufficient evidence is observed immediately to indicate a wagering or gaming device violation, the violators should be arrested, their persons searched, and any wagering paraphernalia or firearms seized. At this time questioning of violators, if practicable, should be started by agents assigned to this duty.

(6) A thorough search should be made of the premises to find and seize all wagering paraphernalia and property used or intended to be used in the commission of the crime. Each room should be searched completely before moving to another and at least two agents should be present at all times. All articles which may be of evidentiary value should be carefully marked for identification. These markings should be of such a character as to not injure the evidence itself, yet not be subject to obliteration. The identification should contain information as to the agent or agents who found the item, date, time, and exact spot where it was located. The identification of documents and chain of custody are discussed in Subsection 255. It may be desirable to take photographs or make diagrams of the entire crime scene and the wagering paraphernalia and property, such as adding machines, telephones, etc., while it is still at the place where it was discovered. In raids on lottery headquarters where the final checkup takes place, it is not unusual to find most of the wagering records and equipment used in the checkup in one room. Photographs made in a situation like this are very effective to refresh the memory of the agents and to show the court and jury.

(7) After proper identification of each item, the best method of maintaining the chain of custody is to appoint one special agent to have continuous control of all evidence until he produces it at the trial of the case.

283.7 SEIZURES UNDER WARRANT

283.71 Wagering Seizures Under Warrant

Wagering paraphernalia and property used or intended to be used in violation of the wagering and gaming device laws can be seized by special agents.[35] When a valid search is made pursuant to a warrant, property related to another crime may be legally seized.[36]

283.72 Inventory of Seized Property Under Warrant

After proper identification, an inventory of all property seized should be made in the presence of the applicant for the warrant and the person in control of the property, if they are present. If the person in control of the premises is not present, the inventory should be made in the presence of at least one credible person besides the applicant for the warrant. Those items named in the search warrant and seized must be listed on the back of the warrant. Those articles seized but not named in the warrant should be listed in a separate inventory. The applicant for the warrant should sign a receipt and deliver it and a copy of the warrant to the person in control of the property, unless there is no one present, in which case he will leave a copy of the warrant and receipt in the place where the property was seized. When contraband articles such as counterfeit equipment, nontaxpaid liquor, narcotics, or illegal firearms are seized the special agent should immediately notify the appropriate enforcement agency.

283.73 Return of Search Warrant

The statute states that the warrant shall be returned within ten days to the issuing authority. Although this provision is directory and failure to comply will not void the warrant, special agents are cautioned to make the return within the ten-day period.

283.8 SEARCHES AND SEIZURES WITHOUT WARRANT

283.81 Searches Incident to Arrest

(1) As an incident to a lawful arrest, special agents may contemporaneously search the person arrested and the premises under his immediate custody and control.[37] However, an arrest warrant gives no greater authority to search than a search warrant does. Since an agent has no authority to break in without notice merely to seize evidence,[38] he cannot circumvent the law on search warrants by breaking in on an arrest warrant and making an incident search for evidence.[39]

(2) The premises searched must be the premises on which the arrest was made and must be under the control of the person arrested. If a man lives several blocks from the point of arrest, his residence may not be searched. A search of the premises is not necessarily limited to the room where the arrest occurred.[40]

(3) If property is seized as an incident to a lawful arrest, it is admissible even if not described in the search warrant and the warrant is otherwise defective. [41] To be

[34] 18 USC 3109.
[35] 26 USC 7302, Handbook subsection 283.22.
[36] U.S. v. Eisner, 297 F 2d 595 (CA–6, 1962).
[37] Carroll v. U.S., 267 U.S. 132, 45 S. Ct. 280.
[38] 18 USC 3109.
[39] U.S. v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420; U.S. v. Macri, 185 F. Supp. 144 (D.C. Conn.) 60–2 USTC 15,308.
[40] Agnello v. U.S., 269 U.S. 20, 46 S. Ct. 4; Harris v. U.S., 331 U.S. 145, 67 S. Ct. 1098, U.S. v. Macri, supra (note 39).
[41] Marron v. U.S., 275 U.S. 192, 48 S. Ct. 74.

(283.81 SEARCHES INCIDENT TO ARREST—Cont.)

legally seized, the property must be includable in one of the following categories: Means and instruments of committing a crime; fruits of a crime; weapons of escape; contraband[42] and evidence.[43] It may be seized though unrelated to the crime for which the person is arrested.[44]

(4) The intensity of a search made incident to arrest is determined by the nature and size of the object of the search. Under this rule, objects which are small and easily concealed i.e., lottery tickets and bet slips, could be searched for very thoroughly whereas the search for a slot machine or other gambling device would be limited to areas where such an object could be concealed.[45]

(5) Although the Supreme Court has apparently repudiated the *time factor* in requiring a search warrant to be obtained in making a search incident to an arrest,[46] the decisions of the lower courts have continued to require an emergency situation before dispensing with the necessity of obtaining a search warrant. As a practical matter, special agents will find few instances where they can make searches without a search warrant.

283.82 Searches Made With Consent

(1) A special agent can make a search at the request or with the consent of the occupant of the premises.[47] However, a search made with permission of the occupant's landlord, and without consent of the occupant, is illegal.[48]

(2) In all cases the person who consents to the search must be the one who has such right or a person authorized to act for him. A wife may not ordinarily waive the rights of her husband unless he has authorized her to do so. An employee has no authority to waive the constitutional rights of his employer unless he is authorized to act as an agent for his employer.

(3) The following warning should be given when any person is requested to waive service of a search warrant and to voluntarily consent to a search of his person or premises: "Before we search your premises (or person) it is my duty to advise you of your rights under the Fourth Amendment to the Constitution. You have the right to refuse to permit us to enter your premises (or search your person). If you voluntarily permit us to enter and search your premises (or to search your person) any incriminating evidence that we find may be used against you in court, or other proceedings. Prior to permitting us to search, you have the right to require us to secure a search warrant."

(4) Giving the above warning does not eliminate the necessity for also giving the *Miranda* statement of rights outlined in Document 5661 when a person in custody is to be questioned on matters other than the request for consent to search. Exhibit 200–5 contains the statement of rights.

(5) Whenever practicable, a written waiver of his Fourth Amendment rights should be obtained from the person granting consent in order to help establish that his consent was specific and clear and that he made the waiver voluntarily with knowledge and understanding of his constitutional rights.

(6) The guidelines contained in (3) to (5) above are not applicable to situations in which consent to search or service of search warrants are not required under existing law, such as searches of persons lawfully arrested, searches of premises under the immediate custody and control of a person lawfully arrested, lawful searches of conveyances or frisking for weapons for an officer's protection if the officer has reason to believe that he is dealing with an armed and dangerous individual.

283.83 Searches of Vehicles and Vessels

The right to search conveyances without search warrants arises from their mobile character. Special agents must be able to show probable cause and the impracticability of obtaining a search warrant to search a conveyance without a warrant.[49]

283.9 SEIZURES OF RECORDS

(1) Papers and records, like other forms of property, are subject to seizure and the fact that they possess no pecuniary value is of no significance in determining whether they may be seized.[50] Documents which are the means and instruments or fruits of the crime may be seized in the course of a legal search.[51]

(2) Papers and records have been excluded as evidence on the grounds that they were not specifically described in the search warrant[52] or the supporting affidavit failed to show probable cause that they were at the premises to be searched.[53] In other cases, the courts have admitted property not described in the search warrant when it bears a reasonable relationship to the purpose of the search. Because of this relationship, a court approved the seizure of money in a wagering raid even though the search warrant described the property to be seized as "betting slips, rundown sheets, records and other paraphernalia and equipment."[54]

[42] Harris v. U.S., 331 U.S. 145, 67 S. Ct. 1098 (1947).
[43] Warden, Md. Pen. v. Hayden, 387 U.S. 294, 87 S. Ct. 1642 (1967).
[44] Harris v. U.S., supra (note 43); Abel v. U.S., 326 U.S. 217, 80 S. Ct. 383 (1960).
[45] U.S. v. Lefkowitz, supra (note 39).
[46] U.S. v. Rabinowitz, 339 U.S. 56, 70 S. Ct. 430.
[47] 18 USC 2236(c).
[48] Chapman, Elmer S. v. U.S., 365 U.S. 610, 81 S. Ct. 776.
[49] U.S. v. Stoffey, 279 F 2d 924, 60–2 USTC 15, 303; Clay v. U.S., supra (subsection 283.3, note 15).
[50] Gouled v. U.S., Supra (note 12).
[51] Id.
[52] Alloto v. U.S., 216 F. Supp. 48, 63–1 USTC 9552 (E.D. Wis.).
[53] Id.
[54] U.S. v. Joseph, 174 F. Supp. 539 (E.D. Pa., 1960); aff'd. 278 F. 2d 504; cert. den. 364 U.S. 823.

283.(10) DUTIES OF SPECIAL AGENT AFTER ARREST, SEARCH, AND SEIZURE

(1) The prisoners should be escorted without unnecessary delay before the nearest United States Magistrate (or other nearby officer empowered to commit Federal prisoners). (See Subsection 623.)

(2) A Form 1327A, Arrest Report, as required by IRM 9614.2 will be prepared by the special agent not later than the close of the next business day following the arrest.

(3) Each special agent who participated in an arrest, search, and seizure should prepare a detailed memorandum as soon as possible after the raid setting forth information concerning what he saw, the duties he performed, and any statements made by the persons arrested. This memorandum will refresh the agent's memory when he has to testify during the trial of the case and will help prevent conflict between the various agents' testimony.

(4) Property seized during a raid should be inventoried, stored, and appraised in accordance with the requirement contained in Subsection 284 on forfeiture procedures.

(5) If the raid involved a wagering tax violation, a detailed analysis should be made of all wagering paraphernalia to determine the period involved, amount of wagers and excise tax liability, and names of bettors to be interviewed for supporting testimony.

(6) A final case report and a seizure report, if applicable, will be prepared by the special agent. Exhibits 500–6 and 500–9 contain sample wagering tax and seizure reports.

284 Forfeiture Procedures

284.1 INTRODUCTION

This subsection covers the internal revenue laws and the Service procedures relating to forfeitures. Special agents are most likely to encounter forfeiture situations in wagering and coin-operated device investigations. Detailed information concerning forfeiture procedures is set forth in IRM 7400, Forfeiture and Disposition of Seized Personal Property.

284.2 AUTHORITY TO SEIZE PROPERTY FOR FORFEITURE

(1) It is unlawful to have or possess any property intended for use of which has been used in violation of the internal revenue laws or regulations prescribed under them, and no property rights exist in any such property.[1] The Secretary or his delegate is authorized by statute to seize such property.[2]

(2) Forfeiture is strictly limited to personal property, and is not authorized as to real property.[3] A motor vehicle used or intended for use,[4] or containing property used or intended for use in connection with operation in violation of the wagering tax laws[5] is subject to seizure for forfeiture. Currency shown to bear a relationship to the offense comes within the definition of property intended for use in violating the internal revenue laws and is likewise subject to forfeiture.[6] Failure to pay the special tax on coin-operated gaming devices before they are used in trade or business subjects them to seizure and forfeiture, regardless of the operator's future intent to pay the tax.[7]

(3) A search warrant may be issued for seizure of property used or intended for use in violation of Internal Revenue laws.[8] A seizure in violation of the Fourth Amendment will not sustain a forfeiture,[9] unless the property seized is contraband per se.[10]

284.3 METHODS OF FORFEITURE

284.31 Administrative Forfeiture

Administrative forfeiture procedures, as shown in IRC 7325, are followed when the seized property has an appraised value of $2,500 or less and no proper claim and cost bond has been filed by a claimant generally within thirty days of the first date notice of seizure is published. The property is forfeited to the United States by the Secretary of the Treasury, or his delegate, based upon evidence showing that it was used or intended to be used in violating the internal revenue laws. Alcohol, Tobacco and Firearms does the administrative work for both administrative and judicial forfeiture of property seized by the Intelligence Division. The seizure report and seizure forms are forwarded to the Chief, Special Investigator, Alcohol, Tobacco and Firearms by the Chief, Intelligence Division.

284.32 Judicial Forfeiture

Judicial forfeiture procedures are employed when the seized property has an appraised value in excess of $2,500 or a claim and cost bond has been timely filed by a claimant concerning property valued at $2,500 or less. A libel petition is filed in the judicial district where the property was seized. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem (against the property itself) in the United States District Court for the district where such seizure is made.[11]

Sec. 284
[1] 26 USC 7302.
[2] 26 USC 7321.
[3] U.S. v. One 1958 Glider Trailer, 120 F. Supp. 504 (E.D. N.C., 1954); Chief Counsel's Memorandum 6/6/61, CC:E:E-40.
[4] U.S. v. General Motors Acceptance Corporation, 289 F 2d 102 (CA-5), 57–1 USTC 9205; U.S. v. One 1958 Oldsmobile Sedan, 132 F. Supp. 14 (W.D. Ark.), 55–1 USTC 9510.
[5] Rev. Rul. 264, 1953–2 C. B. 379.
[6] U.S. v. Leveson, 282 F 2d 659 (CA-5), 59–1 USTC 15,212; U.S. v. $1,058.00 in Currency, 328 F 2d 211 (CA-3), 63–2 USTC 15,526; U.S. v. $1,117.41 in Currency 218 F. Supp. 351 (W.D. Mo.), 63–2 USTC 15,528.
[7] U.S. v. Five Coin-Operated Gaming Devices, 154 F. Supp. 781 (D. Md.), 57–2 USTC 10,017.
[8] Rule 41(b), Federal Rules of Criminal Procedure.
[9] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S. Ct. 1246 (1965).
[10] Id.; U.S. v. Jeffers, 342 U.S. 48, 72 S. Ct. 93 (1951); Trupiano v. U.S., 334 U.S. 699, 68 S. Ct. 1229 (1948).
[11] 26 USC 7323 (a).

284.4 ESSENTIAL ELEMENT TO EFFECT FORFEITURE

284.41 Burden of Proof in Forfeitures

The Government must establish by the preponderance of the evidence that the seized property was used or intended to be used in violating the wagering tax or coin-operated gaming device laws.

284.42 Evidence to Support Forfeitures

(1) The special agent should submit all available evidence which indicates relationship between the seized property and the violation. Some of the means by which this may be done are set out below:

(a) In a wagering tax case this is usually accomplished by first proving that the person or persons using the property are liable for the special tax on wagers and engaged in the wagering business without first paying the special tax required by IRC 4411. Then direct evidence is presented to connect the property to the wagering violation. An example would be an adding machine found at a lottery headquarters being used by the violator in tabulating the bets accepted.

(b) Where moneys are seized in cases wherein bets have been placed by special agents to obtain evidence of wagering tax violations, the reports should show what disposition was made of the bets received by the person conducting the wagering business, i.e., whether he put the money in the cash register, in a cigar box, in his pocket, etc. Likewise, where special agents received "payment" for winning bets so placed, it is important that their reports show whether the person making the disbursement used funds from his pocket, from the cash register, or from some other receptacle. In addition, if the seized funds contain paper money identifiable through the serial numbers or by other means such as bills used by special agents to place bets, the report should contain the full particulars.

(c) In many instances bet slips or other records are seized in wagering tax raids from which the amount of known wagers can be tabulated or computed. The relationship between the known amount of wagers and the amount of money seized may be a significant factor in connecting the seized funds with the wagering business, i.e., the operator's maximum liability for "paying-off" winning bets and the necessity for him to have cash readily available to meet such contingency.

(d) Available witnesses (especially those persons known to have placed bets) may be in a position to state they observed the operator taking money to pay-off wagers from the place or receptacle from which money was seized, or placing money from accepted wagers into such places or receptacles.

(e) When a seizure of money is made the operator should be promptly asked to identify the source of funds, because admissions against interest on his part or exculpatory statements by him that are susceptible of effective rebuttal will militate against a subsequently "manufactured" defense and may be the determining factor in establishing a basis for forfeiture.

(f) When a legitimate business, as well as a wagering operation, is being conducted on the same premises where seizure is made, the report should describe the nature and size of the legitimate business and include information as to whether such business is a mere "front" or cloak of respectability.

284.5 DUTIES OF SPECIAL AGENT IN SEIZURE AND FORFEITURE CASES

284.51 Use of Raid Kits

(1) Wagering tax and gaming device raid kits have been used in the past with considerable success to aid special agents in completing the documents and reports which are required in wagering tax and gaming device investigations. The necessary forms for use in such kits have been developed to ensure uniformity of reporting and to eliminate confusion and delays which may arise when special agents attempt to improvise forms to meet the circumstances of the raid. The forms are adaptable for use in either wagering tax or gaming device investigations.

(2) The kits should contain the following as appropriate:

(a) Search warrant, original and one copy.

(b) Arrest warrant original and one copy.

(c) A memorandum setting forth the plan for the raid, responsibilities of each assigned special agent, and description of suspected violators.

(d) A detailed map showing the relative location and interior layout of the place to be raided.

(e) Form 3389, Seized Property Notice and Identification Tag.

(f) Form 181, Inventory Record of Seized Vessel, Vehicle or Aircraft.

(g) Form 141–A, Special Moneys Report.

(h) Form 226–A, Appraisement List (Seized Personal Property).

(i) Form SF 1034, Public Voucher for Purchases and Services Other Than Personal.

(j) Form 4008, Seized Property Report.

(k) Forms 2311 and 2311A, Affidavits.

(l) Forms 2039 and 2039A, Summons.

(m) Masking tape or Scotch type tape to seal entry and discharge chambers of gaming devices and for other possible uses.

(n) Pencils, writing pads, paper sacks, and handstapler.

(o) Money wrappers.

(3) Sufficient copies of all forms should be included to meet the anticipated needs of the special agents. Although some forms may not be required on the day of the raid, all materials should be assembled in advance to ensure a more efficient operation.

284.52 Custody and Storage of Seized Property

(1) All property of any nature seized by a special agent shall remain under the jurisdiction of the United States District Court in the judicial district where seizure was made[12] until such time as forfeiture action has been completed or terminated. Special agents should not seize items that are not directly related to the wagering activity or other crime.

(2) Seized vehicles, coin-operated gaming devices and other personal property (except moneys) of more than nominal value will be stored at the earliest practicable date in the nearest suitable Alcohol, Tobacco and Firearms contract garage, or other place of storage designated by the local Chief, Special Investigator, Alcohol, Tobacco and Firearms. The nature of the property to be stored shall be considered in determining whether a garage or other more appropriate storage facility shall be used.

(3) Special moneys seized by a special agent shall be stored in a secure depository at the earliest practicable time after seizure. Special moneys include currency, coins, checks, jewelry, negotiable instruments and other articles of comparatively great value but small in physical size. A separate container or package will be used for the coin content sized from each gaming device, or in a wagering tax case, the special moneys seized from each person at each location. Normally, moneys will be placed in a container or package which cannot be opened without obvious break and the container or package will be delivered to the teller of a District Area or Zone office, if one is located within the judicial district where seizure was made.

(4) When authorized by the District Director as being in the best interest of Service (because of lack of adequate or secure Service facilities or other good reason), the special agent may rent a safe deposit box in a commercial depository, such as a bank, and store therein moneys seized by him. The seizing officer and at least one other officer who can identify the moneys shall have access to the box and should be present at each entry into the box.

(5) The seizing officers may store the containers or packages in the common storage facilities consisting of one or more safe deposit boxes which may have been authorized by the District Director. Such boxes are rented in the name, "District Director of Internal Revenue," with only two Intelligence officers (special agent, group supervisor, staff assistant, Assistant Chief, or Chief) having access thereto as custodians. These officers act as safekeepers in the same capacity as the district teller. Constructive custody, however, still remains with the seizing officer as long as he is available within the district and he is reponsible for reporting the disposition of moneys.

(6) As soon as practicable after seizure of a coin-operated gaming device, the seizing officer shall open, or cause to be opened, the coin receptacle or receptacles of the device, and remove and count the money contents of each device separately, in the presence of at least one other special agent who can be a witness. The special agents who conducted the seizure shall deliver the coin-operated gaming device, minus its contents and at the earliest practicable date, to the nearest suitable Alcohol, Tobacco and Firearms contract garage or other designated place of storage located within the judicial district where the seizure was made. The appraisal of seized coin-operated gaming devices will be made as outlined in Subsection 284.53: (1)(e). After forfeiture, gaming devices per se will be destroyed, or otherwise disposed of according to instructions of the Secretary of the Treasury or his delegate.[13] All forms (except Form 181), distributions, and procedures specified in Subsection 284.53 shall be used to the extent applicable in seizures of coin-operated gaming devices and their contents.

284.53 Preparation of Seizure Forms

(1) Before or incidental to the storage of property, the special agent will prepare and execute the following seizure forms to the extent applicable in each case:

(a) *Seized Property Notice and Identification Tag, Form 3389*—This tag is used as a seizure notice and identification tag and is attached to the item seized. It need not be prepared for seized vehicles, vessels or aricraft since Form 181 will serve its purpose for this type of property. The chain of custody portion need not be prepared with respect to seized moneys because this information is shown on Form 141–A. Form 3389 will be prepared in an original only. Where appropriate, a stamped impression, gummed label, printed "Evidence" envelope, or similar seizure notice may be used in lieu of this form provided such notice shows the same basic information required on the front of the Form 3389 and that it also shows the chain of custody when necessary.

(b) *Receipts for Storage of Seized Property in Public Facilities*—Special agents will obtain receipts when seized property is stored in any public facility (except safety deposit boxes). Since the type of receipt to be obtained in storing certain personal property will depend upon the circumstances involved, no receipt form is provided. Where the storage facility provides no form receipt, the special agent should prepare a receipt similar to that furnished to the owner of seized property upon original seizure.

(c) *Form 141–A, Special Moneys Report*—

1 This form will be used: To report the acquisition or disposition of special moneys to Fiscal Management, which is charged with the responsibility of maintaining an accounting control of such funds; as a chain of custody and control document for special moneys; and as a receipt form for use when special moneys are stored with or reclaimed from a safekeeper. Form 141–A is a six-part snapout assembly with a worksheet copy. In most

[12] Rank v. U.S., 356 F 2d 961 (CA-10); Garth v. U.S., 152 F. Supp. 894 (D.C. Cal.)

[13] 26 USC 7326.

(284.53 PREPARATION OF SEIZURE FORMS—Cont.(1))

instances, only one assembly will be necessary to report the acquisition and disposition of seized money. Item instructions for preparing this form are included in Exhibit 500-9.

2 When moneys are seized, Items 1 through 12 (except Items 4 and 6) of the 141–A assembly will be completed. If moneys are stored with a safekeeper, the safekeeper's copy (Part 3) will be removed from the assembly and furnished to the safekeeper with the seized funds. If it is not necessary to maintain an unbroken chain of custody, the teller may examine the seized moneys and verify the count rather than accept a sealed container or package. When such a procedure is followed, the receipt portion of Form 141–A (Item 12) should be altered to show that the receipt covers a specified sum rather than a sealed container or package. The original (Part 1) will then be certified by the seizing officer and the assembly (except for the safekeeper's copy) will be forwarded to the Chief, Intelligence Division, for assignment of a control number. After assignment of a control number, the Chief, Intelligence Division, will forward the original (Part 1) to the Assistant Regional Commissioner (Administration), Attention: Chief, Fiscal Management Branch; Part 2 will be retained by the Chief, Intelligence Division, for his use; and the remaining portion of the assembly (Parts 4, 5 and 6) will be forwarded to the seizing officer. The seizing officer will use Part 4 as his control copy and retain Parts 5 and 6 for later submission to the Chief, Intelligence Division, and to Fiscal Management to report final disposition.

3 Interim movements of seized moneys between the safekeeper and the seizing officer or deposits in and withdrawals from the safe deposit box will not be reported to Fiscal Management if the seized moneys do not leave the constructive custody of the seizing officer. These movements will generally occur where the moneys are withdrawn for purposes of testifying. Each time the moneys are transferred to or from the safekeeper, a receipt should be reflected on Item 12 of Form 141–A on the seizing officer's copy (Part 4) and on the safekeeper's copy (Part 3). Since a receipt is not normally obtained when the moneys are withdrawn from or deposited in an Intelligence office safe or a safe deposit box, such movements should be recorded by the special agent in Item 12 of Form 141–A in lieu of the receipt.

4 Upon final disposition of seized moneys, Items 6, 13, and 14 will be completed on Part 4. The receipt will thus be duplicated on Parts 5 and 6. Item 15 (certification) will then be completed by the seizing officer either by inserting a carbon after Parts 4 and 5 or by original signature on Parts 4, 5 and 6. Part 4 will be retained by the special agent; Part 5 will be forwarded to the Fiscal Management Branch; and Part 6 will be forwarded to the Chief, Intelligence Division. Final disposition means any transfer which places the moneys beyond the constructive custody of the Intelligence Division. Such action will usually occur when forfeiture proceedings are consummated and the moneys are delivered to the teller for deposit to the United States Treasury; when the moneys are relinquished to the District Court for judicial forfeiture proceedings; or when the moneys are returned to the owner. In each such instance, a Form 141–A must be forwarded to Fiscal Management to report the final disposition.

5 The situation may arise where only a portion of seized moneys is declared forfeited; where a portion is ordered returned to the owner; or where the entire seizure is forfeited but a portion of the moneys is retained as evidence. In any such situation, where a portion of the seizure is subject to final disposition and a balance remains under the constructive custody of the seizing officer, a supplemental Form 141–A will be prepared. Parts 4, 5 and 6 of a new 141–A assembly will be utilized in preparing a supplemental report. This is necessary because the last three parts of the assembly are the only parts utilized to report dispositions. In preparing a supplemental report, the seizing officer will complete Items 1 through 9 and Items 13, 14, and 15. The word "Supplemental" will be written at the top immediately following the title of Form 141–A. The amount in Items 3 and 10 will be the same, and will be that portion of the seizure which is being reported as a final disposition. In Item 4, the seizing officer will insert the same control number as used to report the originial seizure except the letter "A" will be added to the control number to designate the first supplemental, "B" to designate a second supplemental, etc. The seizing officer will associate Part 4 of the supplemental 141–A with Parts 4, 5 and 6 of the original 141–A assembly; forward Part 5 to Fiscal Management, and forward Part 6 to the Chief, Intelligence Division. The parts of the original Form 141–A assembly being held by the seizing officer (Parts 4, 5 and 6) will be utilized to record interim movements of the remaining portion of the seized moneys and to report the disposition of the final portion of the seizure. In this respect, it will be necessary to change the description of the container or package in Item 11 if the container or package which is redelivered to the safekeeper differs from that described in Item 11. Disposition of the final portion of the seizure will be reported by completing Items 6, 13, 14 and 15 of Parts 4, 5 and 6 of the original 141–A assembly. This procedure serves to notify the Chief, Intelligence Division, and Fiscal Management that all moneys involved in the seizure have been disposed of.

6 If winnings are to be held for use as evidence the special agent will follow the same procedures set out above for safekeeping, custody and disposition of seized moneys except that the word "Winnings" should be added to the title of the form; the term "seizing officer" should be changed to "special agent"; and all other references to "seizure" should be changed to show that winnings rather than seized moneys are involved.

7 A quarterly report of special moneys on hand will be obtained by the Chief, Intelligence Division, from each special agent for forwarding to Fiscal Management as prescribed in IRM 9456.1:(13).

(284.53 PREPARATION OF SEIZURE FORMS—Cont.(2))

(d) *Inventory Record of Seized Vehicle, Vessel, or Aircraft, Form 181*—This form will be used as an inventory report and a seizure notice for seized vehicles, vessels, or aircraft. Form 181 is a four-part assembly with a worksheet copy. It will be necessary to reproduce one copy for forwarding to the ARC (Intelligence) to conform with the following distribution pattern:

1 Original and one copy to Supervisor in Charge, Alcohol, Tobacco and Firearms, with Seizure Report, Form 4008.

2 One copy will be delivered to the representative of the designated place of storage.

3 One copy will be attached to the windshield of the vehicle or otherwise firmly affixed to the vehicle.

4 One copy will be forward to the ARC (Intelligence).

5 The worksheet copy will be retained in the case file.

(e) *Appraisement List (Seized Personal Property), Form 226–A*—An official appraisal of all property seized from each person at each location is required in every instance when such property, in toto, does not have an obvious value in excess of $2,500.00. If the special agent is of the opinion that the property involved in the seizure is of an appraised value of $2,500.00 or less, he shall select three disinterested sworn appraisers.[14] The value determined by the appraisers should be the amount that would probably be derived from a competitive bid. However, the special agent should not suggest, request, or direct the valuation to be placed on the property. As soon as possible after the seizure, the required appraisement will be made on Form 226–A in an original and four copies. No additional copies are required when payment is requested for appraisement. The following guidelines shall be followed in the appraisement of seized property:

1 Form 226–A will not be required when the total value of property seized from each person at each location is obviously in excess of $2,500.00.

2 Although the coin contents are not includible in determining the appraised value of seized coin-operated gaming devices, they are taken into account in determining whether administrative or judicial forfeiture procedure will be followed. If the total value, including the coin contents, does not exceed $2,500.00, the results of an official appraisal must be reported on Form 226–A. Ordinarily the Forms 226–A will be prepared in the Intelligence Division to the extent of filling in the heading and listing each item of personal property seized from each owner at each location, leaving blank the space in the column headed "Appraised Value" for insertion following the offical appraisal of the amount at which each item is actually appraised by the three "outside" appraisers. In those instances in which moneys have been seized in addition to other items of personal property, a separate entry will be made in the "Description of Property" section of the form to describe and identify the seized moneys, and to enter the actual amount or value thereof in the "Appraised Value" column. The seized moneys should be made available to the "outside" appraisers at the time they are requested to sign the Forms 226–A in order that they may confirm the amounts of the seized moneys item as entered.

3 In those instances in which moneys only, having a value of $2,500.00 or less, are seized by special agents and the moneys are deposited for safekeeping with a cashier in a District Director's office, or Area office, the money count will be confirmed by three employees in the office of the cashier; however, if the press of current activities prevents regular cashier employees from verifying the count of money or if no regular cashier employees are available the District Director will designate employees to perform this task and they will sign the Form 226–A as the official appraisers in lieu of the three "outside" appraisers referred to in 2 above.

4 Forms 226–A will be prepared in an original and four copies.

5 The property of each person at each location must be appraised on separate Forms 226–A.

6 Appraisers should, if possible be used to appraise two or more lots of seized property.

7 The property seized from each person at each location should, if possible, be appraised and included on one Form 226–A. If separate appraisals are necessary because of the nature of the property, all Forms 226–A relating to one owner should be associated for transmittal with the seizure report.

8 Each appraiser may be allowed a fee of $3.00 per day.

9 Form 226–A should fully describe the property appraised so that the description can be used in the libel, advertisement, bill of sale, or accounting voucher. The case number or numbers should also be shown on the form as well as the authority (26 USC 7302) for seizure.

(f) *Public Voucher for Purchases and Services Other Than Personal, Standard Form 1034.*—This form must be obtained to cover hauling, towing, transporting, and/or appraisal charges when the person or firm rendering such service prefers to obtain reimbursement through this means rather than by submitting a bill. The description of each piece of property, seizure date, name of person from whom seized, Code section violated, and case number should be shown under "Articles of Services." The original and five copies, prepared on SF–1034, will be required. Although special agents are not responsible for the preparation of bills covering incurred seizure and/or appraisal expense, they must obtain and promptly forward each such bill

[14] 26 USC 7325.

(284.53 PREPARATION OF SEIZURE FORMS—Cont.(3))

when SF–1034 is not employed for this purpose. Each bill and public voucher must clearly identify the services upon which the charges are based and the case to which the services relate.

(2) Sample copies of seizure forms are included with the sample seizure report, Exhibit 500–9.

(3) The case number used on the seizure report shall be shown on all copies of the forms and other documents relating to the seizure.

284.54 Seizure Report

A seizure report, Form 4008, bearing the same number as the related case report, will be prepared as soon as practicable by the special agent in accordance with the procedure outlined in Subsection 534.2. Exhibit 500–9 contains a sample seizure report.

284.55 Supplemental Investigations and Reports

The seizing special agent will make, as requested, any necessary supplemental investigations and reports relating to the seizure, including investigations relating to the merits of a petition for remission or mitigation of forfeiture or of an offer in compromise. Exhibit 500–10 contains the format and instructions for a report relating to investigations of a petition for remission or mitigation of forfeiture and shall be followed insofar as applicable.

284.56 Assisting Revenue Officers in Seizures

There is no authority under the internal revenue laws for a revenue officer to effect a seizure of property by the use of force. Such officials are only authorized to use force in resisting attacks upon themselves. If the revenue officer has determined in the course of a seizure that further action on his part will likely result in violence, he should retire, report the matter to his supervisor, and, if deemed appropriate, return with a special agent or an Alcohol, Tobacco and Firearms investigator. The escort should display his badge to the taxpayer and state: "My name is _____. I am a federal law enforcement officer and my purpose here is to see that Revenue Officer _____is permitted peacefully and lawfully to seize your property (describe, if possible) without any interference." The escort's participation is limited to making this statement unless he is called upon to intervene in case of force, violence or interference on the part of the taxpayer or other persons. In such instances he may arrest the offender since the action constitutes a violation of 18 U.S.C. 111 and/or 26 U.S.C. 7212(a) (impeding, assaulting or threatening a federal officer.) If the person attempts to rescue the property after it has been seized, he may be arrested under 18 U.S.C. 2233 and/or 26 U.S.C. 7212(b) (rescue of seized property).

EXHIBIT 200–1

Handbook Reference: Subsection 232.25

BASES FOR ALLOWANCE AND REJECTION OF INFORMANTS' CLAIMS

Bases for Allowance and Rejection of Claims

(1) Rewards are paid only with respect to taxes and administrative and judicial fines and penalties (but not interest) collected. The value of the information furnished in relation to the facts developed by the investigation is taken into account in determining whether a reward shall be paid, and, if so, the amount thereof. No reward is payable with respect to interest collected. Information must be voluntarily given and upon the informant's own initiative to warrant the allowance of a reward. Information secured by representatives of the Service from witnesses and others in the course of their investigative activities does not constitute a basis for reward.

(2) Where a portion of the assessed taxes, penalties and interest remains unpaid and there is little probability of collection, a waiver may be secured from the informant waiving any reward applicable to the uncollected portion and the claim processed at that time in accordance with the usual procedure. Waivers may be secured also where the uncollected amount is relatively small and payment may be spread over several future years, and the informant is pressing for payment.

(3) In determining whether a reward should be allowed, and, if so, the amount thereof, careful consideration should be given to adjustment in the years under consideration which will result in potential tax savings to the taxpayer for subsequent years or to a related taxpayer for any year. Examples of such adjustments are: Increase in closing inventory; transfer of income from one year to another or from one taxpayer to another; capitalization of a claimed expense; and depreciation, depletion or amortization adjustments. Rewards otherwise allowable should be reduced or rejected by reason of such offsetting adjustments. Where, however, due to the effect of the variance in tax brackets or a change in the tax rate, there is a net recovery to the Government such recovery should be evaluated under the general rule.

(4) Partial allowance of a reward claim should not be made except in unusual circumstances. Where a fine has been imposed and the conviction was directly or indirectly attributable to the informant's information, an allowance based on the fine when paid may be made as a partial allowance prior to the civil settlement of the tax liability.

(5) If several claims filed by one informat are considered in one recommendation, the reward, if any, may be allowed on one claim and the others may be closed by reference.

(6) Ordinarily, where the information furnished with respect to one taxpayer leads to investigations of "related taxpayers" and recoveries from such related taxpayers, the reward should be based on the amount recovered from all of the taxpayers. "Related taxpayers," as used in connection with the reward program, has reference to those taxpayers who are in fact jointly involved in a scheme to defraud or evade; those who with knowledge are beneficiaries of the scheme; those who as a group have adopted the same scheme, etc. Although a single claim for reward may be filed naming more than one related taxpayer, separate claims should be filed for each unrelated taxpayer.

(7) The circumstances surrounding the filing of the delinquent or amended return should be carefully reviewed to ascertain if such filing in any way resulted from the fact that information concerning the taxpayer had been furnished. If it is determined that the filing of the delinquent or amended return was a direct or indirect result of the fact that information had been furnished, the amounts recovered due to the filing of such returns should be given consideration in establishing the value of the informant's information.

(8) Where information has been furnished and claim for reward filed with respect to the returns of one taxpayer for several years and one of the years has been closed with the assessment and payment of a deficiency, but the other years are still under examination, no reward should be granted with respect to the year which has been closed until examination of all years involved has been completed. Since there exists the possibility that adjustments made to the returns for the open years may result in offsetting adjustments, no reward should be allowed until the over-all results of the information furnished are evaluated.

Bases for Rejections of Claims

Claims for reward will be rejected for the following reasons:

(a) Information furnished by informant was of no value,

(b) Information furnished by informant was already known to the Service or available in accessible public records,

(c) Where payment of a reward would be inappropriate, for example, when the informant participated in the evasion scheme or prepared the return for the taxpayer with the knowledge that taxes were being evaded,

(d) Informant obtained, or furnished, the information while a Treasury Department Employee,

(e) Informant obtained the information as part of his official duties as an employee of any other Federal agency,

EXHIBIT 200–1—*Cont.*

(f) Informant obtained or furnished the information while a State officer or member of a State body or commission having access to Federal returns, copies or abstracts,

(g) Payment would be contrary to State or local law.

The Allowance Computation

The amount of the reward will be computed in accordance with policy statement P–9370–1.

EXHIBIT 200–2

Handbook Reference: Subsection 233.123

THE NUMERICAL SYSTEM
of
The American Bankers Association

Index to Prefix Numbers of Cities and States

Numbers 1 to 49 inclusive are Prefixes for Cities

Numbers 50 to 99 inclusive are Prefixes for States

Prefix Numbers 50 to 58 are Eastern States
Prefix Number 59 is Alaska, American Samoa, Guam, Hawaii, Puerto Rico, and Virgin Islands
Prefix Numbers 60 to 69 are Southeastern States
Prefix Numbers 70 to 79 are Central States
Prefix Numbers 80 to 88 are Southwestern States
Prefix Numbers 90 to 99 are Western States

Prefix Numbers of Cities in Numerical Order

1	New York, N. Y.	18	Kansas City, Mo.	34	Tacoma, Wash.
2	Chicago, Ill.	19	Seattle, Wash.	35	Houston, Texas
3	Philadelphia, Pa.	20	Indianapolis, Ind.	36	St. Joseph, Mo.
4	St. Louis, Mo.	21	Louisville, Ky.	37	Fort Worth, Texas
5	Boston, Mass.	22	St. Paul, Minn.	38	Savannah, Ga.
6	Cleveland, Ohio	23	Denver, Colo.	39	Oklahoma City, Okla.
7	Baltimore, Md.	24	Portland, Ore.	40	Wichita, Kan.
8	Pittsburgh, Pa.	25	Columbus, Ohio	41	Sioux City, Iowa
9	Detroit, Mich.	26	Memphis, Tenn.	42	Pueblo, Colo.
10	Buffalo, N. Y.	27	Omaha, Neb.	43	Lincoln, Neb.
11	San Francisco, Calif.	28	Spokane, Wash.	44	Topeka, Kan.
12	Milwaukee, Wis.	29	Albany, N. Y.	45	Dubuque, Iowa
13	Cincinnati, Ohio	30	San Antonio, Texas	46	Galveston, Texas
14	New Orleans, La.	31	Salt Lake City, Utah	47	Cedar Rapids, Iowa
15	Washington, D. C.	32	Dallas, Texas	48	Waco, Texas
16	Los Angeles, Calif.	33	Des Moines, Iowa	49	Muskogee, Okla.
17	Minneapolis, Minn.				

Prefix Numbers of States in Numerical Order

50	New York	65	Maryland	83	Kansas
51	Connecticut	66	North Carolina	84	Louisiana
52	Maine	67	South Carolina	85	Mississippi
53	Massachusetts	68	Virginia	86	Oklahoma
54	New Hampshire	69	West Virginia	87	Tennessee
55	New Jersey	70	Illinois	88	Texas
56	Ohio	71	Indiana	89	.....
57	Rhode Island	72	Iowa	90	California
58	Vermont	73	Kentucky	91	Arizona
59	Alaska, American Samoa, Guam, Hawaii, Puerto Rico, and Virgin Islands	74	Michigan	92	Idaho
		75	Minnesota	93	Montana
		76	Nebraska	94	Nevada
		77	North Dakota	95	New Mexico
60	Pennsylvania	78	South Dakota	96	Oregon
61	Alabama	79	Wisconsin	97	Utah
62	Delaware	80	Missouri	98	Washington
63	Florida	81	Arkansas	99	Wyoming
64	Georgia	82	Colorado		

EXHIBIT 200-3

Handbook Reference: Subsection 233.123

ROUTING SYMBOLS (IN ITALICS) OF BANKS THAT ARE MEMBERS OF THE FEDERAL RESERVE SYSTEM

ALL BANKS IN AREA SERVED BY A FEDERAL RESERVE BANK OR BRANCH CARRY THE ROUTING SYMBOL OF THE FEDERAL RESERVE BANK OR BRANCH

FEDERAL RESERVE BANKS AND BRANCHES	
1. Federal Reserve Bank of Boston Head Office	5-1 / 110
2. Federal Reserve Bank of New York Head Office	1-120 / 210
Buffalo Branch	10-26 / 220
3. Federal Reserve Bank of Philadelphia Head Office	3-4 / 310
4. Federal Reserve Bank of Cleveland Head Office	0-1 / 410
Cincinnati Branch	13-43 / 420
Pittsburgh Branch	8-30 / 430
5. Federal Reserve Bank of Richmond Head Office	68-3 / 510
Baltimore Branch	7-27 / 520
Charlotte Branch	66-20 / 530
6. Federal Reserve Bank of Atlanta Head Office	64-14 / 610
Birmingham Branch	61-19 / 620
Jacksonville Branch	63-19 / 630
Nashville Branch	87-10 / 640
New Orleans Branch	14-21 / 650
7. Federal Reserve Bank of Chicago Head Office	2-30 / 710
Detroit Branch	9-29 / 720
8. Federal Reserve Bank of St. Louis Head Office	4-4 / 810
Little Rock Branch	81-13 / 820
Louisville Branch	21-59 / 830
Memphis Branch	26-3 / 840
9. Federal Reserve Bank of Minneapolis Head Office	17-8 / 910
Helena Branch	93-26 / 920
10. Federal Reserve Bank of Kansas City Head Office	18-4 / 1010
Denver Branch	23-19 / 1020
Oklahoma City Branch	39-24 / 1030
Omaha Branch	27-12 / 1040
11. Federal Reserve Bank of Dallas Head Office	32-3 / 1110
El Paso Branch	88-1 / 1120
Houston Branch	35-4 / 1130
San Antonio Branch	30-72 / 1140
12. Federal Reserve Bank of San Francisco Head Office	11-37 / 1210
Los Angeles Branch	16-16 / 1220
Portland Branch	24-1 / 1230
Salt Lake City Branch	31-31 / 1240
Seattle Branch	19-1 / 1250

EXHIBIT 200-4

Handbook Reference: Subsection 234.1(21)

UNITED STATES SECRET SERVICE

Offices and Resident Agencies

CITY	ADDRESS	TELEPHONE
Aberdeen, S.D.	Post Office and Customhouse	225-0250
Albany, N.Y.	Federal Building	472-2884
Albuquerque, N.M.	Federal Office Building	843-2243
Anchorage, Alaska	U.S. Post Office and Courthouse Bldg.	272-8631
Atlanta, Georgia	Old Post Office Building	523-1652
Austin, Texas	Federal Office Building	475-5103
Baltimore, Md.	Federal Building	962-2200
Birmingham, Ala.	2121 Building	325-3148
Boston, Mass.	U.S. Post Office and Court House	223-2728
Buffalo, N.Y.	U.S. Courthouse	842-3542
Charleston, W. Va.	New Federal Building	343-6181
Charlotte, N.C.	U.S. Post Office and Court House Bldg.	372-0711
Chattanooga, Tenn.	Post Office Building	266-3151
Chicago, Ill.	219 South Dearborn Street	353-5431
Cincinnati, Ohio	Federal Office Building	684-3448
Cleveland, Ohio	518 U.S. Court and Customs House	522-4365
Columbia, S.C.	U.S. Courthouse	253-8371
Columbus, Ohio	U.S. Court House & Federal Office Bldg.	469-7370
Dallas, Tex.	505 North Ervay Building	749-3461
Denver, Colo.	New Custom House	297-3027
Detroit, Mich.	Federal Building and U.S. Courthouse	226-6100
El Paso, Texas	U.S. Court House Building	533-5200
Fort Worth, Texas	U.S. Court House	334-2015
Fresno, Calif.	Federal and U.S. Court House	485-5454
Gettysburg, Pa.	Post Office Building	334-7173
Grand Rapids, Mich.	Federal Building	456-2276
Great Falls, Mont.	Post Office Building	452-1212
Honolulu, Hawaii	244 Federal Building	546-5639
Houston, Tex.	Federal Office and Courts Building	226-4328
Indianapolis, Ind.	Federal Building	633-7681
Jackson, Miss.	U.S. Post Office and Court House	948-7821
Jacksonville, Fla.	Post Office Building	791-2777
Kansas City, Mo.	U.S. Court House	374-5021
Knoxville, Tenn.	U.S. Court House Building	524-4011
Little Rock, Ark.	U.S. Post Office and Court House	372-4361
Los Angeles, Calif.	U.S. Court House	688-4830
Louisville, Ky.	Post Office Building	582-5171
Lubbock, Tex.	Old Post Office and Court House Bldg.	765-8541
Memphis, Tenn.	Federal Office Building	534-3568
Miami, Fla.	Ainsley Building	350-5961

EXHIBIT 200-4 Cont.

Handbook Reference: Subsection 234.1(21)

UNITED STATES SECRET SERVICE

Offices and Resident Agencies

CITY	ADDRESS	TELEPHONE
Milwaukee, Wisc.	Federal Building	272-8600
Minneapolis, Minn.	396 Federal Building, U.S. Court House	334-3371
Mobile, Ala.	U.S. Court House	433-3581
Nashville, Tenn.	U.S. Court House	242-8321
Newark, N.J.	970 Broad Street	645-2334
New Haven, Conn.	157 Church Street	865-2449
New Orleans, La.	Federal Building South	527-2219
New York, N.Y.	Federal Office Building	264-7204
Norfolk, Va.	U.S. Post Office and Court House	627-7471
Oklahoma City, Okla.	5415 Federal Building	236-2311
Omaha, Nebr.	U.S. Post Office and Court House	221-4671
Paris, France	American Embassy	265-7400
Philadelphia, Pa.	U.S. Custom House	597-4320
Phoenix, Ariz.	Federal Building	261-3556
Pittsburgh, Pa.	U.S. Post Office and Courts Building	644-3384
Portland, Ore.	U.S. Court House	226-3361
Providence, R.I.	Federal Building and U.S. Court House	331-6456
Richmond, Va.	Federal Building	649-3611
Sacramento, Calif.	Federal Building—U.S. Court House	449-2413
St. Louis, Mo.	U.S. Courts and Customs House	622-4238
Salt Lake City, Utah	Post Office and Court House Building (421)	524-5910
San Antonio, Tex.	Federal Building	225-5511
San Diego, Calif.	FCC Building	293-5640
San Francisco, Calif.	450 Golden Gate Avenue	556-6800
San Juan, P.R.	Pan American Building	765-0404
Scranton, Pa.	Post Office Building	344-7111
Seattle, Wash.	U.S. Courthouse	583-5495
Spokane, Wash.	883 U.S. Court House	838-4611
Springfield, Ill.	Federal Building	525-4033
Syracuse, N.Y.	Main Post Office Building	473-6680
Tampa, Fla.	U.S. Post Office & Court House Building	228-7711
Toledo, Ohio	U.S. Court House and Customhouse	259-6434
Washington, D.C.	1825 H Street, N.W.	964-8063
Wichita, Kansas	Brown Building	267-6311
White House Detail	The White House	456-1414

EXHIBIT 200-5

Handbook Reference: Subsection 242.133

WAIVER OF RIGHT TO REMAIN SILENT AND OF RIGHT TO ADVICE OF COUNSEL

STATEMENT OF RIGHTS

Before we ask you any questions, it is my duty to advise you of your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or other proceedings.

You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

You may have an attorney appointed by the U.S. Commissioner or the court to represent you if you cannot afford or otherwise obtain one.

If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

HOWEVER —

You may waive the right to advice of counsel and your right to remain silent, and you may answer questions or make a statement without consulting a lawyer if you so desire.

WAIVER

I have had the above statements of my rights read and explained to me and fully understanding these rights I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity. I was taken into custody at _____(time), on _____(date), and have signed this document at _____(time), on _____(date).

_____
(Name)

Witnesses:

_____
(Name)

_____
(Name)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE FORM 4526 (1-69)

EXHIBIT 200–6

Handbook Reference: Subsection 246.3:(3)

SUGGESTED OUTLINE FOR QUESTIONING PERSON WHO PREPARED RETURNS, IF OTHER THAN TAXPAYER

(This is not intended to be inclusive)

I. Occupation and qualifications of preparer
   - A. Education
   - B. Experience
   - C. Enrolled

II. Description of all books and records in detail
   - A. Primary records
     1. Cash receipts and disbursements book
     2. Journals: sales, purchases, cash
     3. Invoices and other original documents
   - B. Secondary Records
     1. Ledgers: general and subsidiary
     2. Trial balance books, and records of financial statements
   - C. Extent of witness' audit of books and records

III. Source of all information on returns
   - A. Books and records (tie in with return)
   - B. No records (obtain information in detailed form)
   - C. Oral information
   - D. Records and books of other third parties

IV. Items not shown on books or records (including income, assets, etc.)

V. Instructions and data received from taxpayer and any other persons

VI. Information as to whether returns were explained to taxpayer, and to what extent

VII. Copies of workpapers used in preparation of returns and copies of returns
   - A. Tie in with return
   - B. Supporting data
   - C. Arrange to inspect the workpapers and copies of returns

VIII. Conversations regarding tax matters with:
   - A. Taxpayer
   - B. Taxpayer's agent or other persons

IX. Details about witness' and taxpayer's knowledge concerning the signing and filing of each return, including
   - A. Identification of each return prepared by witness

EXHIBIT 200–7

Handbook Reference: Subsection 246.52

AFFIDAVIT

United States of America _____)
_____ District of _____) ss

I, _____, state that:

I reside at _____.

I have read the foregoing statement consisting of this page only. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily, without any threats or rewards, or promises of reward having been made to me in return for it.

_____
(Signature of affiant)

Subscribed and sworn to before me this _____
day of _____, 19_____,
at _____

_____
(Signature)

_____
(Title)

Internal Revenue Service

_____
(Signature of witness, if any)

DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE — FORM 2311 (REV. 9-69)

NOTE: When practicable, have each paragraph in the statement contain information relating to one topic only. Number each paragraph. If applicable (see Handbook Subsection 242.13), use the following statement:

"I fully understand that I have the right under the United States Constitution to decline to make any statements, answer any questions, or present any data or evidence which may tend to incriminate me and I am aware that anything I say or any evidence I present may be used against me. I also understand that I have the right to counsel."

EXHIBIT 200–8

Handbook Reference: 246.53

SUGGESTED FORMAT FOR STATEMENT

In re: Name and address of subject

Time: Date and hour of interview

Place: Location of interview

On _____ 19___, I, Special Agent _____ questioned Mr. _____ about _____. Mr. _____ stated _____ _____.

Note: If feasible, the subject should be requested to examine and sign it. If he refuses, the following legend will be inserted at the end of the statement when applicable. "This statement was read by Mr. _____ (the subject), on _____ 19__ who stated that it was true and correct, but refused to be placed under oath or to sign it.

_____ Date and Time

_____ Special Agent Internal Revenue Service

_____ Date and Time

_____ Witness

_____ Date and Time

_____ Witness

EXHIBIT 200–9

Handbook Reference: 246.54

SUGGESTED FORMAT FOR QUESTION AND ANSWER STATEMENT

Testimony of John J. Jones, 115 South Street, Chester, Pennsylvania 19013, given in the office of the Intelligence Division, Internal Revenue Service Room _____, United States Courthouse, 401 N. Broad Street, Philadelphia, Pennsylvania, at 9:30 a.m., on Tuesday, September 7, 19_____, about his Federal income tax.

Present: Mr. John J. Jones, Taxpayer
Adam Adams, Attorney
John Smith, Special Agent
Alexander White, Revenue Agent
Evelyn Green, Reporter

(Questions were asked by Special Agent Smith and answers were given by Mr. Jones unless otherwise specified).

(Mr. Jones, this interview is being recorded, as we agreed, by means of the tape recorder on your left).

1. Q. Mr. Jones, you were requested to appear at this office to answer questions concerning your Federal income tax for the years 19___ to 19___, inclusive. First, I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything you say and any information you submit may be used against you in any criminal proceeding which may be undertaken. Do you fully understand this? (If the taxpayer requests clarification, either as to his rights or the purpose of the investigation, the special agent will give such explanation as is necessary to clarify the matter. If the taxpayer appears without an attorney, the special agent will advise him that he may, if he wishes, seek the counsel of an attorney before responding to questions).

2. Q. Please stand and raise you hand. Do you, John J. Jones, solemnly swear that the answers you are about to give to the questions asked will be the truth, so help you God? (The special agent will stand while administering the oath).

(Note: After the questioning is concluded the meeting is brought to a close with the following questions.)

---

270. Q. Mr. Jones, have I, or has any other Federal agent, threatened or intimidated you in any manner?
A. No.

271. Q. Have I, or any other Federal agent, offered you any rewards, or promises of reward or immunity, in return for this statement?
A. No.

272. Q. Have you given this statement freely and voluntarily?
Yes.

273. Q. Is there anything further you care to add for the record?
A. No.
(After this statement has been transcribed, you will be given an opportunity to read it, correct any typographical errors, and sign it.)

United States of America
Eastern Judicial District of Pennsylvania } SS

I have carefully read the foregoing statement consisting of pages 1 to ____, inclusive, which is a correct transcript of my answers to the questions asked me on the ____ day of _____, 19__, at the offices of the Intelligence Division, Internal Revenue Service, Philadelphia, Pennsylvania, relative to my Federal income tax. I hereby certify that the foregoing answers are true and correct, that I have made the corrections shown and have placed my initials opposite each correction, and that I have initialed each page of the statement.

EXHIBIT 200–9—*Cont.*

_____

Subscribed and sworn to before me at _____ m, this _____ day of _____ 19 _____, at _____

_____

_____

_____

Special Agent

_____, Reporter, do hereby certify that I took the foregoing statement of _____ _____ in shorthand, personally transcribed it from my shorthand pages, and initialed each page.

/s/

_____

EXHIBIT 200–10

Handbook Reference: Subsection 246.55

EXAMPLE OF MEMORANDUM OF INTERVIEW

In re: Name and address of subject(s) being investigated

Date and time of interview: Tuesday, July 19_____

_____ a.m. to _____ p.m.

Place: Location of interview

Present: _____ _____ (Taxpayer, witness, etc.)

_____ _____ Internal Revenue Agent

_____ _____ Special Agent

Interview conducted by Special Agent _____

Note: All pertinent information relating to the interview should be in the memorandum in some logical manner, either in order of topics discussed, importance, chronological, or any other appropriate order.

_____ _____

Date and Time — Special Agent

_____ _____

Place — Internal Revenue Agent

•_____ _____

Date and Time

• When applicable

If pertinent the following may be included:

I (prepared) (dictated) this memorandum on _____, 19___, after refreshing my memory from notes made during and immediately after the interview with the taxpayer.

_____

Special Agent

I certify that this memorandum has recorded in it a summary of all pertinent matters discussed with the taxpayer on _____, 19___

_____

Internal Revenue Agent

EXHIBIT 200–11

Handbook Reference: Subsection 246.56

EXAMPLE OF INFORMAL NOTES

On Wednesday July - 19 - at 10:00 am., I questioned Tom Brown of 1124 Euclid Street N. W., Washington, D. C. 20017 in his office, 117 Elm Street, Washington, D. C., about his purchase of a 1965 Ford Station Wagon from Smith Motors Inc. He stated that he purchased the Ford Station Wagon, bearing serial number 1173945, for $3,250.00 from Joseph Smith, President of Smith Motors, and that he gave Mr. Smith his personal check number 117, dated _____ 19_____ for $3,250.00. He agreed to submit an affidavit relating to his purchase. Internal Revenue Agent King, of Baltimore, Maryland, witnessed the interview which was concluded at 10:47 a.m.

/S/ William Penn
Special Agent

EXHIBIT 200–12

Handbook Reference: Subsection 246.56

SUGGESTED DIARY ENTRY

WEDNESDAY, JULY 9, 19–

Re: Brown Company

Interviewed Tom Brown, President of the Brown Company, *(52-82-491-1-1) on this date between 10:00 a.m. and 10:47 a.m. Internal Revenue Agent Edward King was present during the interview. Memorandum of interview in case file.

* When applicable

EXHIBIT 200–13

Handbook Reference: Subsection 254

Form 2725 (JAN. 1969)

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

DOCUMENT RECEIPT

1. DOCUMENTS SUBMITTED IN RE:

Harrison Sales Co., Inc. 718 Rand Street, Houston, Texas 77015

2. DISTRICT: Southern District of Texas

3. DATE: August 6, 1968

4. SUBMITTED BY: Mr. J. C. Harrison, President

5. PLACE OF SUBMISSION: Harrison Sales Co., Inc. Houston, Texas

6. I ACKNOWLEDGE RECEIPT OF THE FOLLOWING DOCUMENTS SUBMITTED IN AN OFFICIAL MATTER:

Forty-two customers' files for the years 1964, 1965, and 1966 containing the following data:

(1) The customer's accounts receivable account cards reflecting installment payments on these sales.
(2) Retained copies of the customer's invoices on charge sales made in the years 1964, 1965, and 1966.
(3) Delivery receipts on these sales.

6A. NO. CONTINUATION SHEETS ATTACHED: None

7A. RECEIVED BY (Signature): Norman A. Stone

7B. ADDRESS: 210 Federal Building, Houston, Texas

7C. TITLE: Special Agent

7D. PHONE NO.: PI 8-8386

8A. ACCOMPANIED BY (Signature): A Joseph Howe

8B. TITLE: Internal Revenue Agent

9. Acknowledgment of return of documents

The above documents were returned to me as indicated at right

9A. DATE RETURNED: 8/21/68

9B. PLACE AT WHICH RETURNED: Harrison Sales Co., Inc.

9C. NAME OF PERSON RETURNING DOCUMENTS: Special Agent Norman A. Stone

10. SIGNATURE OF PERSON TO WHOM DOCUMENTS WERE RETURNED: J C Harrison, President

FORM 2725 (1-69)

COPY

FORM 2725 (1-69)

EXHIBIT 200–13—*Cont.* (1)

HISTORY AND CUSTODY OF DOCUMENTS

12. HOW DOCUMENTS WERE OBTAINED *(Check one)*

☐ BY CONSENT *(Note any significant comments of the principal or third-party witness and any unusual circumstances which occurred)*

☒ BY LEGAL PROCESS *(Describe)* Mr. J. C. Harrison failed to comply with a summons served upon him on July 18, 1968. A court order directing compliance was issued in the U. S. District Court, Southern District of Texas, on August 5, 1968.

13. RELATIONSHIP BETWEEN DOCUMENTS AND PERSON SUBMITTING THEM

Mr. J. C. Harrison is custodian of the records for the Harrison Sales Co., Inc.

14A. WERE MANUAL TRANSCRIPTS OR FACSIMILE COPIES MADE OF ANY OF THE DOCUMENTS EITHER IN WHOLE OR IN PART?

☒ YES ☐ NO

14B. Documents Copied	Manner of Reproduction
1. All customers' accounts receivable cards	Photostated
2. All retained copies of invoices	Photostated
3. Delivery receipts (Receipt number, customer name, and date of delivery)	Transcribed

15. HAVE ALL COPIES BEEN COMPARED WITH THE ORIGINAL DOCUMENTS AND IDENTIFIED?

☒ YES ☐ NO *(Mention reason for any exceptions)*

16. WERE THE ORIGINAL DOCUMENTS DESCRIBED HEREIN UNDER YOUR CONTROL OR SUPERVISION AT ALL TIMES PRIOR TO THEIR RETURN TO THE PRINCIPAL, THIRD-PARTY WITNESS, OR REPRESENTATIVE?

☒ YES ☐ NO *(Set forth circumstances of any transfer in control)*

17. DID THE PRINCIPAL, THIRD-PARTY WITNESS, OR A REPRESENTATIVE REQUEST ACCESS TO THE DOCUMENTS DURING YOUR CUSTODY?

☒ YES ☐ NO *(What action was taken?)* Mr. F. J. Black, an attorney and representative of the Harrison Sales Co., Inc., examined the records in my presence on August 10, 1968.

18A. SIGNATURE: Norman A. Stone

18B. TITLE: Special Agent

U.S. GOVERNMENT PRINTING OFFICE: 1969 O-346247

FORM 2725 (1-69)

EXHIBIT 200–13—*Cont.*(2)

GENERAL INSTRUCTIONS FOR FORM 2725

(1) Indicate the full name and address, including the street number, city and State of the principal whose tax liability or other alleged violation is being investigated.

(2) The Internal Revenue or the Judicial District having jurisdiction over the matter under investigation should appear after the word "District".

(3) Insert the date on which the document receipt was executed by the issuing officer. This date should correspond with the date the documents were actually submitted by the principal, third-party witness, or a representative.

(4) Set forth the full name of the individual from whom the documents were received. If the records were obtained from the principal, his name should appear in this space as well as in the space provided for the subject (Item 1). If the documents were received from an officer or employee of a corporation, his full name and title should be shown. List the name of the corporation involved and its location, where applicable, as the place of submission.

(5) Designate the actual address where the documents were obtained. If the records were delivered, note the place of delivery in this space.

(6) Itemize the documents in sufficient detail so that the identity of the books, records, or other data may be ascertained at all times. A separate sheet of paper prepared in duplicate may be used as a continuation sheet where the items are numerous. The continuation sheets should be clearly identified and associated with the document receipt form.

(7) The officer receiving the documents shall sign the receipt and enter his address, official title, and phone number in the spaces provided.

(8) If the person receiving the documents is accompanied by another officer, the accompanying officer should sign the document receipt and enter his official title.

(9) An acknowledgment shall be obtained on the original copy of the receipt form showing the return of the documents.

(10) The principal, third-party witness, or a representative should fill in the date the documents were returned, the address at which the items were returned, and the full name and title of the person returning the records.

(11) Whenever conveniently possible the documents should be returned to the principal, third-party witness, or the respective representative who originally submitted the items. His signature should be obtained acknowledging the return of the records. If that person is not available, the acknowledgment may be executed by a clearly authorized employee, representative, or replacement. When the officer is unable to obtain the original of the document receipt which he issued, the acknowledgment should be solicited on the retained copy in his possession. The agent or other officer should exercise special care to prevent the disclosure of any information appearing in the history and custody of documents section whenever the acknowledgment is obtained on the retained copy of the document receipt. Each piecemeal return of records may be accomplished by preparing a document receipt form showing the items returned, and obtaining the acknowledgment. Items 7A through 8B should be left blank in such instances. If the person to whom the receipt was issued refuses to execute an acknowledgment for any reason, cross out the words "to me" and complete items 10A through 10C.

EXHIBIT 200–13—*Cont.*(3)

GENERAL INSTRUCTIONS FOR FORM 2725--Cont.

(12) Show the manner in which the documents were obtained by checking one of the squares and comment briefly regarding any unusual circumstances or remarks occurring at the time the records were submitted on a voluntary basis. A principal may give the reason for his voluntary action at this time or make other statements relating to the completeness or incompleteness of the documents. If there are extended conversations relating to the records, it will suffice to refer to a memorandum of such discussions. Where the records were secured by means of a summons or other legal process, an account of the action should be shown. A typical situation may be as follows: "I issued a summons for the documents on November 3, 1959".

(13) Note whether the person submitting the records prepared the documents, holds the documents as custodian, owns the documents, or has some other basis for possessing them.

(14) Indicate whether all or any parts of the documents were copied for possible future use, and follow with a list of documents copied and the manner of reproduction. An example would be: Bank statements--Photostated, Cancelled checks--Columnar analysis prepared, Patient account cards--Transcribed all cards and photostated representative group, Disbursement records--Summaries prepared.

(15) Check whether manual transcripts or facsimile copies were compared with original documents and identified. Set forth the reason for any exceptions.

(16) The person receiving the documents should exercise adequate care to safeguard the items in his custody and any transfer of control should be outlined in this section. The administrative procedure of securing photostats or other reproductions of documents should not be construed as a loss or transfer of control. However, the transfer of a case to another agent, the transfer of documents to the jurisdiction of the court, or any analogous situation should be explained.

(17) Any requests for access to or the return of documents by the principal, third-party witness, or a representative should be outlined briefly.

(18) The person having knowledge of the history and custody of the documents should sign the statement and enter his official title.

EXHIBIT 200–14

Handbook Reference: Subsection 262

U. S. TREASURY DEPARTMENT INTERNAL REVENUE SERVICE	Order No. 4 (Revised)	
DELEGATION ORDER	DATE OF ISSUE: May 21, 1957	EFFECTIVE DATE: May 21, 1957
SUBJECT: Authority to Issue Summonses and to Perform Other Functions		

1. All the functions which Sections 7602, 7603, 7604 and 7605(a) of the Internal Revenue Code of 1954 specify shall be performed by the Secretary or his delegate are delegated to the following officers and employees of the Internal Revenue Service:

   (a) Regional Commissioners and District Directors.
   (b) Inspection: Assistant Commissioner; Director and Assistant Directors, Internal Security Division; Regional Inspectors; and all Internal Security Inspectors.
   (c) Alcohol and Tobacco Tax: Assistant Regional Commissioners.
   (d) Intelligence: Director; Assistant Director; Assistant Regional Commissioners; Executive Assistants to Assistant Regional Commissioner; Chiefs, Review and Conference Staff; Reviewer-Conferees; and all Chiefs and Assistant Chiefs of Divisions, Branches and Sections, Group Supervisors, and Special Agents, of the National, regional and district offices.
   (e) International Operations: Director; Assistant Director; Chiefs of Branches; Special Agents; Internal Revenue Agents; Estate Tax Examiners; and Officers in Charge.
   (f) Collection: Chiefs and Assistant Chiefs of the Collection Divisions; Chiefs and Assistant Chiefs of the Delinquent Accounts and Returns Branches; Group Supervisors; and Collection Officers.
   (g) Audit: Chiefs of Divisions and Branches; Group Supervisors; Internal Revenue Agents; and Estate Tax Examiners.

2. Each of the officers and employees referred to in paragraph 1 of this order may designate any other employee of the Internal Revenue Service as the individual before whom a person summoned pursuant to section 7602 of the Internal Revenue Code of 1954 shall appear. Any such other employee of the Internal Revenue Service, when so designated in a summons, is authorized to take testimony under oath of the person summoned and to receive and examine books, papers, records, or other data produced in compliance with the summons.

3. The authority herein delegated to issue a summons and the authority to enforce such summons as provided for in sections 7602 and 7604, respectively, of the Internal Revenue Code of 1954 may not be redelegated.

EXHIBIT 200–14—*Cont.*

Delegation Order No. 4 (Revised)

The remaining authorities herein delegated may be redelegated only by the Assistant Commissioner (Inspection), each Regional Commissioner, each District Director of Internal Revenue and the Director of International Operations to officers and employees within their jurisdiction.

4. This Order supersedes Delegation Order No. 4 issued June 7, 1955.

Russell C. Harrington
Commissioner

EXHIBIT 200–15

Handbook Reference: 264 and 265

Form 2039–A
(Rev. Sept. 1969)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of
Harrison Sales Co., Inc.
718 Rand Street
Houston, Texas 77015 ← (1)

Internal Revenue District of Austin, Texas ← (2)

Period(s) 1964, 1965, 1966 ← (3)

The Commissioner of Internal Revenue

To Mr. J. C. Harrison, as President of
Harrison Sales Co., Inc. ← (4)

At 718 Rand Street, Houston, Texas 77015 ← (5)

Greetings: You are hereby summoned and required to appear before

Norman A. Stone ← (6)

an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

The following records of Harrison Sales Co., Inc.
Customer's files for the years 1964, 1965, and 1966 containing the following data:

(1) Retained copy of customer's invoices on charge sales made in the years 1964, 1965 and 1966.
(2) Delivery receipts on these sales.
(3) Customers' accounts receivable account cards reflecting installment payments made on these sales.

Customers' account cards for accounts to whom sales were made in 1964, 1965 and 1966 on which current payments are still being made are excepted from the requirement for production at the time and place shown, provided that access to such of these records as is required will be granted at a mutually appointed time at the company's office, to be agreed upon at this appearance. ← (7)

Place and time for appearance:

at 210 Federal Land Bank Building, 430 Lamar Avenue, Houston, Texas ← (8)

on the 29th day of July, 19 68 at 10:00 o'clock A. M. ← (9) (10)

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 18th day of July, 19 68 ← (11)

Original

Norman A. Stone ← (12)
Signature

Special Agent
Title

Form 2039-A (Rev. 9-69)

EXHIBIT 200–15–*Cont.* (1)

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date: 18th day of July, 1969 ← (13)

Time: 11:30 a.m. ← (13)

(14) How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed,
718 Rand Street, Houston, Texas ← (15)

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed ← (16)

Signature: Norman A. Stone

Title: Special Agent ← (17)

Sec. 7603
Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 2039 (Rev. 10-69)

EXHIBIT 200–15—*Cont.* (2)

Excerpts From the Internal Revenue Code

Sec. 7602

Examination of Books and Witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 6420

Gasoline Used on Farms

* * *

(e) Applicable Laws—

* * *

(2) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6421

Gasoline Used for Certain Nonhighway Purposes or by Local Transit Systems

* * *

(f) Applicable Laws—

* * *

(2) Examination of books and witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 6424

Lubricating Oil Not Used in Highway Motor Vehicles

* * *

(d) Applicable Laws—

* * *

(2) Examination of Books and Witnesses.—For the purpose of ascertaining the correctness of any claim made under this section, or the correctness of any payment made in respect of any such claim, the Secretary or his delegate shall have the authority granted by paragraphs (1), (2), and (3) of section 7602 (relating to examination of books and witnesses) as if the claimant were the person liable for tax.

* * *

Sec. 7605

Time and Place of Examination

(a) Time and place.—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2), 6421(f)(2), or 6424(d)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

* * *

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Sec. 7604

Enforcement of Summons

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner[1] for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner[1] to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner[1] shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

[1] Or United States magistrate, pursuant to P.L. 90-578.

* * *

Sec. 7210

Failure To Obey Summons

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6424(d)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

Form 2039-A (Rev. 10-69)

EXHIBIT 200–15—*Cont.* (3)

General Instructions

(1) The name and address, including street number, city and State of the taxpayer whose tax liability is being investigated or collected shall be inserted in the space provided. If returns are under investigation and bear different addresses, or if the taxpayer during the periods resided at several addresses, and his present address is still another place, show all of the addresses known.

(2) The Internal Revenue District in which the returns were filed or should have been filed or the district where the assessment for collection is outstanding will be inserted by showing the city designation or subdivision thereof in the space provided. For example, "Internal Revenue District of Los Angeles." If returns under investigation were filed in various districts, the name of each district shall be shown.

(3) In the space provided for "Period(s)" shall be inserted the calendar years, fiscal years, quarterly or monthly periods involved in the examination or investigation.

(4) Following the word "To" shall be inserted the correct name of the person summoned or the name by which he is customarily known, it being immaterial whether that is his true and legal name. If it is desired to obtain testimony or records from a person in his capacity as trustee, receiver, custodian, corporate or public official, his title or official status should be added to his name.

(5) Following the word "At:" shall be inserted the correct address of the person summoned which may be either the street and number of a place of business, the place of residence, or the location of the place where the person is found.

(6) Insert in the blank space provided following "to appear before" the name of the officer who is to take the testimony and/or examine the books and records. If the officer authorized to issue a summons desires the person summoned to appear before another employee, the name of that employee will be inserted.

(7) When the summons requires the production of books and records, papers, or other data, if is important that they be properly designated and described with reasonable certainty, that is, that they be specified with sufficient precision for their identification. If the witness is not required to produce books and records, papers or other data, the phrase "and to bring with you and produce for examination the following books, records and papers" shall be stricken.

(8) Space to insert the place and time for the witness' appearance is provided in the summons. Following the word "At" under "Place and time for appearance" should be inserted the complete address including the room number of the building at which the person is required to appear. The place of appearance shall be one reasonable under the circumstances of the case.

(9) Following the place of appearance should be inserted the date and time the witness is to appear. Section 7605, Internal Revenue Code of 1954, provides that the date and time fixed for the appearance shall be such as are reasonable under the circumstances and shall not be less than 10 calendar days from the date of the summons. In computing the ten-day period, the date of service should be excluded and the date of appearance should not be prior to the day after the tenth day following service of the summons. Strict compliance with this provision is necessary in the preparation and issuance of a summons in order to enable the enforcement of obedience to its requirements when the person refuses to comply. "Date of summons" is the date on which it is legally *served*. The date set for appearance of the person summoned shall be on a work day and not on Sunday or legal holiday.

(10) If a witness indicates a willingness to comply with the requirements of the summons by the delivery of books or records for immediate examination or on a date earlier than that required by statute, the time for his appearance should, nevertheless, be inserted in compliance with the statute. This will not preclude the officer, if agreeable to the person summoned, from making an earlier or immediate examination of the records or the earlier taking of testimony.

(11) Insert in the space provided the date the summons is signed by the issuing

EXHIBIT 200–15—*Cont.*(4)

General Instructions--Cont.

officer. This date is not to be considered as the "date of the summons" in setting the date for appearance pursuant to section 7605, Internal Revenue Code of 1954. (See item 9 above.)

(12) The authorized issuing officer will manually sign the summons in the space labeled "Signature" and insert his official title in the space labeled "Title" following the word "Original" on the first sheet and following the words "Attested Copy" on the second sheet.

(13) Insert in the spaces provided the date and the time of day on which the summons was served.

(14) Show the manner in which the summons was served by checking one of the squares provided.

(15) Insert the address of the place or the location where the attested copy of the summons was delivered to the person summoned.

(16) If the summons is served by leaving an attested copy with a person at the last and usual place of abode of the party summoned, the name and address of the person to whom it is handed will be entered in the space following the word "directed." If the summons is merely left at the witness' last and usual place of abode, only the address will be stated, and the phrase "with the following person" shall be stricken from the printed sentence above the space for entering the name of the person.

(17) The officer serving the summons will sign the certificate of service in the space provided for "Signature" and enter his official title in the space designated "Title."

EXHIBIT 200–16

Handbook Reference: Subsection 268.3

AFFIDAVIT

UNITED STATES OF AMERICA)
) SS
SOUTHERN DISTRICT OF TEXAS)

I, Norman A. Stone, Special Agent, being first duly sworn, depose and say: I executed an Internal Revenue Summons (Form 2039) and served it on Mr. J. C. Harrison, President of Harrison Sales Co., Inc., 718 Rand St., Houston, Texas 77015, on July 18, 1968, at 11:30 A.M. I handed the Attested Copy of the summons (Form 2039A) to Mr. J. C. Harrison in accordance with Section 7603, Internal Revenue Code. This summons required Mr. J. C. Harrison to appear before me and to produce certain corporate records on July 29, 1968, at 10:00 A.M., at the office of the Intelligence Division, 210 Federal Building, Houston, Texas.

Mr. J. C. Harrison failed to comply with this summons. He did not appear at the scheduled time and place, and has since failed to appear or produce the corporate records designated in the summons.

Norman A. Stone
Special Agent

SUBSCRIBED AND SWORN TO BEFORE ME THIS 29th DAY OF JULY, 1968.

Notary Public

EXHIBIT 200–18

Handbook Reference: 244.6:(2)

WAIVER OF PRIVILEGE AND AUTHORIZATION
FOR RELEASE OF MEDICAL INFORMATION

Date_____

To:_____

_____

I hereby waive any and all patient-physician privilege I may have, and authorize you to release to Special Agent of the Internal Revenue Service all information you may possess relating to my illnesses, medical examinations, diagnoses, results of tests and treatments, as well as any psychiatric and psychological information made a part of my medical record.

(Signed) _____

Address _____

Witness: _____

Address: _____

310 LAW AND ELEMENTS OF OFFENSES

311 Civil and Criminal Sanctions Distinguished

(1) The Internal Revenue Code provides civil and criminal sanctions for violations of the internal revenue laws.

(2) The civil sanctions, generally assessed as additions to the tax and also referred to as ad valorem penalties, are covered in Chapter 68 of the Code. Some of these penalties are: the delinquency penalty (not exceeding 25 percent) for failure to file a return or a timely return;[1] the 5 percent negligence penalty for negligence or intentional disregard of rules and regulations (without intent to defraud);[2] and the 50 percent fraud penalty on an underpayment any part of which is due to fraud;[3] but the fraud and delinquency penalties cannot be asserted with respect to the same underpayment.[4] Handbook Subsections 152 to 161 contain other information covering ad valorem penalties.

(3) The criminal sanctions, generally involving imprisonment and fines, are covered in Chapter 75 of the Code. In addition, some of the criminal sanctions in Title 18, United States Code, also apply to internal revenue matters. See Handbook Subsections 121 to 131.2 for the criminal penalties under the Internal Revenue Code and Title 18, U.S.C.

(4) Both civil and criminal sanctions may be imposed for the same offense. Although criminal sanctions provide punishment for offenses, the fraud penalty is a remedial civil sanction to safeguard and protect the revenue and to reimburse the Government for the heavy expense of investigation and loss resulting from the taxpayer's fraud.[5]

(5) Acquittal in a criminal case is not decisive of the civil fraud issue.[6] However, a criminal conviction for income tax evasion does decide the fraud issue and the taxpayer is collaterally estopped from raising it in the civil proceedings.[7] The relationship between civil and criminal cases is also discussed in Subsection 662:(3).

(6) The burden and measure of proof differs in civil and criminal cases. In the latter, the Government must prove every facet of the offense and show guilt beyond a reasonable doubt. In civil cases, the Commissioner's determination of the deficiency is presumptively correct and the burden is placed on the taxpayer to overcome this presumption. When fraud is alleged the Government has the burden of establishing such fraud by clear and convincing evidence. Subsection 223.6 contains further information on the burden of proof.

(7) The tax computation in a particular case may differ for civil and criminal purposes since the evidence relating to certain of the income adjustments may not meet the criteria of proof necessary in a criminal case although it may be adequate for the civil case. There also may be adjustments of a controversial or off-setting nature which are allowed in the criminal tax computation to remove controversial issues from the criminal action, as well as additional adjustments or disallowances of a minor, technical, and non-fraudulent nature which are considered solely for civil purposes.

(8) The civil liability and the ad valorem penalties are generally assessed against the taxpayer, whereas *any person* who partakes in the commission of an offense is subject to the criminal sanctions of the law. For example, any person who wilfully attempts to evade or defeat any tax or the payment thereof, even though it is not his own tax liability, could be charged with this offense. Thus, A can be charged with evading B's tax; a husband can be charged with evading his wife's tax; and corporate officers in addition to the corporation can be charged with evading the corporation's tax.[8] Participation in the commission of an offenses includes the faiure of a person to perform a required act. A *person* is defined in IRC 7343 as follows:

> "The term 'person' as used in this chapter includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

(9) Further information on parties to criminal offenses is set forth in Subsection 222.3:

312 Avoidance Distinguished From Evasion

Avoidance of taxes is not a criminal offense. Any attempt to reduce, avoid, minimize, or alleviate taxes by legitimate means is permissible. The distinction between avoidance and evasion is fine yet definite. One who avoids tax does not conceal or misrepresent. He shapes events to reduce or eliminate tax liability and, upon the happening of the events, makes a complete disclosure. Evasion on the other hand involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events, or making things seem other than they are. For example, the creation of a bona fide partnership to reduce the tax liability of a business by dividing the income among several individual partners is tax avoidance. However, the facts of a particular case may show that an alleged partnership was not in fact established and that one or more of the alleged partners secretly returned his share of the profits to the real owner of the business, who in turn did

Sec. 311
[1] 26 IRC 6651.
[2] 26 IRC 6653 (a).
[3] 26 IRC 6653 (b).
[4] 26 IRC 6653 (d).
[5] Helvering v. Mitchell, 303 U.S. 391, 38-1 USTC 9152.
[6] Helvering v. Mitchell, supra (note 5).
[7] Tomlinson v. Lefkowitz, 334 F 2d 262 (CA-5), 64-2 USTC 9623; In re Amos, (CA-4), 66-1 USTC 9130, Jerome H. Moore v. U.S., (CA-4), 66-1 USTC 9131.
[8] U.S. v. Troy, 293 U.S. 58, 35-1 USTC 9002; U.S. v. Augustine, 188 F 2d 359 (CA-3), 51-1 USTC 9247.

(312 AVOIDANCE DISTINGUISHED FROM EVASION—Cont.)

not report this income. This would be an instance of attempted evasion.

313 Attempted Evasion of Tax or Payment Thereof (IRC 7201)

313.1 STATUTORY PROVISIONS

The wilful attempt in any manner to evade or defeat any tax and the wilful attempt in any manner to evade or defeat the payment of any tax constitute criminal offenses. The statutory provisions covering these offenses are set forth in IRC 7201 and are quoted in full in Subsection 121.2.

313.2 ELEMENTS OF THE OFFENSES

(1) *The elements of the offense of wilfully attempting in any manner to evade or defeat any tax are*: Additional tax due and owing; an attempt in any manner to evade or defeat any tax; and wilfulness.

(a) *Additional tax due and owing*—The Government must establish that at the time the offense was committed an additional tax was due and owing; that the taxpayer "owed more tax than he reported."[1] However, it is not necessary to prove evasion of the full amount alleged in the indictment. It would be sufficient to show that a substantial amount of the tax was evaded,[2] and this need not be measured in terms of gross and net income or by any particular percentage of the tax shown to be due and payable.[3] Carryback losses are technically no legal impediment to prosecution for years in which they eliminate the tax liability.[4] However, the probability of conviction could be lessened where it is shown that a tax deficiency does not exist by operation of law. Likewise, the acceptance by Government agents of agreement Forms 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) does not bar prosecution.[5] However, it is the policy of the Internal Revenue Service not to authorize assessment of additional taxes and penalties during the time criminal aspects are pending, and to preclude discussion or negotiation looking toward settlement of the civil liability. An exception to this rule is made in potential jeopardy cases and in cases where issuance of the statutory notice is necessary to protect the assessment of the civil liability without prejudice to a criminal case. Acceptance of Form 870 prior to final disposition of the criminal aspects of a case could raise a question of implied promises and an inference of weakness in the Government's case. The payment of tax deficiencies and the filing of amended returns are discussed in Subsection 31(11).31:(2).

(b) *Attempt to evade or defeat any tax.*

1 The substance of the offense under IRC 7201 is the term "*attempt* in any manner." Attempt does not mean that one whose efforts are successful cannot commit the crime of wilful *attempt*. The crime is complete when the attempt is made and nothing is added to its criminality by success or consummation, as would be the case with respect to attempted murder. It has been held that "attempts cover both successful and unsuccessful endeavors or efforts" and that "a wilful attempt to evade or defeat an income tax includes successful, as well as futile endeavors."[6] As the courts have stated, "The real character of the offense lies, not in the failure to file a return or in the filing of a false return, but rather in the attempt" to evade any tax.[7] The statute does not define attempt, nor does it limit or define the means or methods by which the attempt to evade or defeat any tax may be accomplished. However, it has been judicially determined that *the term "attempt" implies some affirmative action or the commission of some overt act.*[8] The actual filing of a false or fraudulent return is not requisite for the commission of the offense[9] though the filing of such a return is the usual attempt to evade or defeat the tax.[10] A false statement made to Treasury agents for the purpose of concealing unreported income has also been judicially determined to be an attempt to evade or defeat the tax.[11]

2 The wilful omission of a duty or the wilful failure to perform a duty imposed by statute does not per se constitute an attempt to evade or defeat. However, a wilful omission or failure (such as a wilful failure to make and file a return) when coupled with affirmative acts or conduct from which an attempt may be inferred would constitute an attempt. In the case of Spies v. United States,[12] the Supreme Court gave certain illustrations from which acts or conduct the attempt to evade or defeat any tax may be inferred; such as keeping a double set of books;[13] making false entries, alterations, invoices, or documents;[14] destruction of books or records;[15] concealment of assets or covering up sources of income;[16] handling of one's affairs to avoid making the records usual in transactions of the kind;[17] and any conduct, the likely

Sec. 313

[1] U.S. v. Schenck, 126 F 2d 702 (CA-2), 42-1 USTC 9363, cert. denied 316 U.S. 705; Gleckman v. U.S., 80 F 2d 394 (CA-8), 35-2 USTC 9645; Tinkoff v. U.S., 86 F 2d 868 (CA-7), 36-2 USTC 9487.

[2] U.S. v. Schenck, supra; Tinkoff v. U.S., supra.

[3] U.S. v Nunan, 236 F 2d 576 (CA-2), 56-2 USTC 9876, cert. denied 355 U.S. 912.

[4] Willingham v. U.S., 289 F 2d 283 (CA-5), 61-1 USTC 9401.

[5] Clark v. U.S., 211 F 2d 100 (CA-8), 54-1 USTC 9291.

[6] O'Brien v. U.S. 51 F 2d 193 (CA-7), 1931 CCH 9474 cert. denied 284 U.S. 673, 52 S. Ct. 129.

[7] Emmich v. U.S., 298 F 5 (CA-8), 1924 CCH 3481.

[8] Spies v. U.S., (1943) 317 U.S. 492, 63 S. Ct. 56, 43-1 USTC 9243.

[9] U.S. v. Albanese, 224 F 2d 879 (CA-2), 55-1 USTC 9494, cert. denied 350 U.S. 845.

[10] Cave v. U.S., 159 F 2d 464 (CA-8), 47-1 USTC 9171, cert. denied 331 U.S. 847; Myres v. U.S. 174 F 2d 329 (CA-8), 49-1 USTC 9275, cert. denied 338 U.S. 849; U.S. v. Yeoman-Henderson, 193 F 2d 647 (CA-7), 52-1 USTC 9155; Gunik v. U.S., 54 F 2d 618 (CA-7).

[11] U.S. v. Beacon Brass Co., 344 U.S. 43, 73 S. Ct. 77, 52-2 USTC 9528; Canton v. U.S., 226 F 2d 313 (CA-8), 55-2 USTC 9788.

[12] Supra (note 8).

[13] Noro v. U.S., 148 F 2d 696 (CA-5), 45-1 USTC 9272, cert. denied 326 U.S. 720.

[14] U.S. v. Lange, 161 F 2d 699 (CA-7), 47-1 USTC 9249; Gariepy v. U.S., 220 F 2d 252 (CA-6), 55-1 USTC 9267, cert. denied 350 U.S. 825.

[15] Yoffe v. U.S., 153 F 2d 570 (CA-1), 46-1 USTC 9171; Gariepy v. U.S., supra (note 14).

[16] Gendelman v. U.S., 191 F 2d 998 (CA-9), 51-2 USTC 9474.

[17] Gleckman v. U.S., supra (note 1); U.S. v. Hornstein, 176 F 2d 217 (CA-7), 49-2 USTC 9326.

(313.2 ELEMENTS OF THE OFFENSES—Cont.)

effect of which would be to mislead or to conceal; in other words, *in any manner*. Subsection 323.2 contains a list of the more common tax evasion schemes.

3 It is well settled that a separate offense may be committed with respect to each year. Therefore, an attempt for one year is a separate offense from an attempt for a different year.[19]

4 There may also be more than one violation in one year resulting from the same acts such as the wilful attempt to evade the payment of tax and the wilful attempt to evade tax.[19] Likewise there may be charged a wilful attempt to evade tax and a wilful failure to file a return for the same year.[20]

(c) *Wilfulness*—The attempt in any manner to evade or defeat any tax must be wilful, and wilfulness has been defined as an act or conduct done with a bad or evil purpose.[21] Mere understatement of income and the filing of an incorrect return does not in itself constitute wilful attempted tax evasion.[22] The offense is made out when conduct such as exemplified in the Spies case (supra) is present. Subsection 31(11) contains a further discussion of wilfulness.

(2) *The elements of the offense of wilfully attempting in any manner to evade or defeat the payment of any tax are:* A tax due and owing; an attempt to evade or defeat the *payment* of any tax; and wilfulness.

(a) *A tax due and owing*—The Government must establish that a tax is due and owing at the time the offense is committed. This amount need not be any additional tax or deficiency but could *be the amount of tax shown on the original return which had not been paid.*

(b) *Attempt to evade or defeat the payment of any tax*—The mere failure or wilful failure to pay any tax does not constitute an attempt to evade or defeat the payment of any tax. The comments set out in Subsection (1) (b) above with respect to attempts also apply to this offense. The attempt implies some affirmative action or the commission of some overt act. Examples of such action or conduct relating to the attempted evasion of the payment of the tax are found in the Giglio case.[23] These are concealing assets; reporting income through others; misappropriating, converting, and diverting corporate assets; together with filing late return, failing to withhold taxes as required by law, filing false declarations of estimated taxes, and filing false tentative corporate returns.

(c) *Wilfulness.*—The comments set forth in (1)(c) above and in Subsection 31(11) on wilfulness apply equally to this offense. Courts have held that disbursement of available funds to creditors other than the Government,[24] or to corporate stockholders [25] is not of itself an attempt to evade or defeat payment of taxes.

(3) *Venue and Statute of Limitations*—Venue for these offenses lies in the judicial district in which the return is filed or other overt acts are committed. A further discussion of this subject is in Subsection 627. The statutory period of limitations for these offenses is six years. A more complete discussion of this subject is in Subsection 319.

314 Failure to Collect, Account for, and Pay Over Tax

314.1 WILFUL FAILURE TO COLLECT, ACCOUNT FOR, AND PAY OVER TAX (IRC 7202)

314.11 Statutory Provisions

It is a criminal offense if any person required to collect, account for, and pay over any tax wilfully fails to collect or truthfully account for and pay over such tax. The statutory provisions covering this violation are set forth in full in Subsection 121.3. Information showing the applicable civil penalty is set forth in Subsection 152.5.

314.12 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) One or both of the following:

1 A duty to collect any tax.

2 A duty to account for and pay over any tax.

(b) One or both of the following:

1 Failure to collect any tax.

2 Failure to truthfully account for and pay over any tax.

(c) Wilfulness. (The subject of wilfulness is covered in Subsection 31(11).)

(2) Venue lies in the judicial district where the act should have been performed [1] and a three-year period of limitations is applicable to this offense, which is a felony. Further information concerning the statute of limitations is contained in Subsection 319.

(3) Section 406.603, Code of Federal Regulations, states, "The return shall be signed and verified by . . . (2) the President, Vice-President, or other principal officer, if the employer is a corporation." However, considerable difficulty has been encountered in determining the "person" charged with the duty of collecting, accounting for and paying over taxes, especially in cases involving small corporations where the precise duties of the officers are not clearly defined or rigidly carried out. For example, in the

[18] U.S. v. Sullivan, 98 F 2d 79 (CA-2), 38-2 USTC 9429; U.S. v. Wm. R. Johnson, 123 F 2d 111 (CA-7), 41-2 USTC 9677, but reversed on other grounds, 319 U.S. 503, 43-1 USTC 9470; U.S. v. Stoehr, 196 F 2d 276 (CA-3), 52-1 USTC 9299, affirming 100 F. Supp. 148 (D.C. Pa.) 52-1 USTC 9119.

[19] U.S. v. Bardin, 224 F 2d 255 (CA-7), 55-1 USTC 9488.

[20] U.S. v. Kafes, 214 F 2d 887 (CA-3), 54-2 USTC 9492.

[21] U.S. v. Murdock, 290 U.S. 389, 8 USTC 1194.

[22] Holland v. U.S., 348 U.S. 121, 54-2 USTC 9714.

[23] U.S. v. Giglio, 232 F 2d 589 (CA-3), 56-1 USTC 9484, Aff'd Lawn v. U.S., 355 U.S. 339, 58-1 USTC 9189; Capone v. U.S., 51 F 2d 609 (CA-7), 3 USTC 786, cert. denied 248 U.S. 660; U.S. v. Bardin, 224 F 2d 255 (CA-7), 55-1 USTC 9488, cert. denied 350 U.S. 838, 76 S. Ct. 124.

[24] Wilson v. U.S., 250 F 2d 312 (CA-9), 57-2 USTC 10,040, petition for rehearing denied, 254 F 2d 74, 58-1 USTC 9463.

[25] U.S. v. Jannuzzio, 154 F. Supp. 460 (D.C. Del.), 60-2 USTC 9512.

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[1] U.S. v. *Commerford*, 64 F 2d 28 (CA-2), (1933).

(314.12 ELEMENTS OF OFFENSE—Cont.)

case of U.S. v. Fargo,[2] it was determined that although the president of the corporation was the dominating force in the management of the firm, the fact that there were other officers who signed some returns and engaged in financial activities on behalf of the corporation made it doubtful whether the president was the officer under a duty to perform the required acts, and the indictment was dismissed. On the other hand, there is a reported decision [3] which holds that the term "person" includes a chief executive officer of a corporation who possesses the authority to determine how corporate funds should be expended. Accordingly, it is imperative to ascertain the various activities and responsibilities of all officers of a corporation before recommending prosecution against any one of them as the "person" defined in IRC 7343.

(4) Wilfulness under this Code section refers to motive or purpose and includes some element of an evil motive and want of justification in view of all the financial circumstances of the taxpayer. It is not enough merely to prove that the acts were knowingly and intentionally committed.[4] For example, a successful prosecution under this section was based upon the following facts: The taxpayer filed timely employment tax returns but habitually failed to pay the amount of tax shown to be due thereon. He willingly signed agreements for partial payments, made the first payment, and then ignored further requests for payments. When his bank accounts were levied upon, he closed the accounts and made arrangements with his customers to receive future payments in cash. All his assets were then transferred to the names of others. His only defense was that he used the money withheld from his employees to meet current operating expenses. An analysis of his bank accounts and records of personal expenditures showed that, contrary to his contentions, a profit was realized from the business in all years and funds were available to pay the taxes shown on the returns.

(5) Violations under this section usually involve failure to truthfully account for and pay over withholding, social security, and excise taxes with the exception of wagering excise taxes. Failure to file returns would involve violations of IRC 7203 (Subsection 315) and filing false and fraudulent returns would constitute violations under IRC 7201 (Subsection 313).

(6) Wilful failure to truthfully account for and pay over is considered to be an inseparable dual obligation.[5] Failure to pay, even though an accounting is made in the sense of a return filed, leaves the duty as a whole unfulfilled.

314.2 FAILURE TO COLLECT AND ACCOUNT FOR CERTAIN COLLECTED TAXES (NONWILFUL VIOLATION) (IRC 7215)

314.21 Statutory Provisions

It is a criminal offense to fail, after due notice,[6] to collect and deposit, in a special trust account for the United States, employment, withholding, and certain excise taxes [7] and to keep the funds in the account until payment over to the United States. The statutory provisions covering this violation are set forth in full in Subsection 121.(12).

314.22 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) One or more of the following:

1 A duty to collect employment taxes or certain miscellaneous excise taxes.

2 A duty to account for and pay over employment taxes or certain miscellaneous excise taxes.

(b) One or more of the following:

1 Failure to collect employment taxes or certain miscellaneous excise taxes.

2 Failure to truthfully account for and pay over employment taxes or certain miscellaneous excise taxes.

(c) Notice, delivered in hand, instructing the taxpayer to collect and deposit employment tax or certain miscellaneous excise taxes in a separate bank account designated as a special fund in trust for the United States and to keep the taxes so collected in the account until payment over to the United States.

(d) One or more of the following with respect to taxes *collectible after the receipt of notice:*

1 Failure to collect employment tax or certain excise taxes;

2 Failure to deposit employment tax or certain excise taxes in a special trust account for the United States;

3 Failure to keep the collected taxes in a special trust account until payment over to the United States.

(e) One or more of the following:

1 Absence of information showing that the person had reasonable doubt as to whether the law required the collection of the tax, or that he had reasonable doubt that he was the one who was required by law to collect the tax;

2 Absence of information showing that the failure to collect, deposit and to keep the tax in a separate account was due to circumstances beyond the control of the taxpayer.

(2) Venue lies in the judicial district where the act should have been performed [8] and a three-year period of limitations [9] is applicable to this offense, which is a misdemeanor. Further information concerning statute of limitations is contained in Subsection 319.

(3) In the case of a corporation, partnership or trust, notice delivered in hand to an officer, partner, or trustee is deemed to be notice delivered in hand to the corporation, partnership, or trust and to all officers, partners, trustees and employees thereof.

[2] 58-2 USTC 9830.
[3] Wilson v. U.S., supra (section 313, note 24).
[4] Paddock v. Siemonelt, 49-1 USTC 9202.
[5] Chief Counsel memo, 5-8-64, CC:E-172.
[6] 26 USC 7512.
[7] Employment Taxes imposed by Subtitle C and Miscellaneous Excise Taxes imposed by Chapter 33 which pertain to Communications and Transportation of persons by air-see Subsection 343.2.
[8] U.S. v. Commerford, supra (note 1).
[9] 26 USC 6531.

(314.12 ELEMENTS OF OFFENSE—Cont.)

case of U.S. v. Fargo,[2] it was determined that although the president of the corporation was the dominating force in the management of the firm, the fact that there were other officers who signed some returns and engaged in financial activities on behalf of the corporation made it doubtful whether the president was the officer under a duty to perform the required acts, and the indictment was dismissed. On the other hand, there is a reported decision [3] which holds that the term "person" includes a chief executive officer of a corporation who possesses the authority to determine how corporate funds should be expended. Accordingly, it is imperative to ascertain the various activities and responsibilities of all officers of a corporation before recommending prosecution against any one of them as the "person" defined in IRC 7343.

(4) Wilfulness under this Code section refers to motive or purpose and includes some element of an evil motive and want of justification in view of all the financial circumstances of the taxpayer. It is not enough merely to prove that the acts were knowingly and intentionally committed.[4] For example, a successful prosecution under this section was based upon the following facts: The taxpayer filed timely employment tax returns but habitually failed to pay the amount of tax shown to be due thereon. He willingly signed agreements for partial payments, made the first payment, and then ignored further requests for payments. When his bank accounts were levied upon, he closed the accounts and made arrangements with his customers to receive future payments in cash. All his assets were then transferred to the names of others. His only defense was that he used the money withheld from his employees to meet current operating expenses. An analysis of his bank accounts and records of personal expenditures showed that, contrary to his contentions, a profit was realized from the business in all years and funds were available to pay the taxes shown on the returns.

(5) Violations under this section usually involve failure to truthfully account for and pay over withholding, social security, and excise taxes with the exception of wagering excise taxes. Failure to file returns would involve violations of IRC 7203 (Subsection 315) and filing false and fraudulent returns would constitute violations under IRC 7201 (Subsection 313).

(6) Wilful failure to truthfully account for and pay over is considered to be an inseparable dual obligation.[5] Failure to pay, even though an accounting is made in the sense of a return filed, leaves the duty as a whole unfulfilled.

314.2 FAILURE TO COLLECT AND ACCOUNT FOR CERTAIN COLLECTED TAXES (NONWILFUL VIOLATION) (IRC 7215)

314.21 Statutory Provisions

It is a criminal offense to fail, after due notice,[6] to collect and deposit, in a special trust account for the United States, employment, withholding, and certain excise taxes [7] and to keep the funds in the account until payment over to the United States. The statutory provisions covering this violation are set forth in full in Subsection 121.(12).

314.22 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) One or more of the following:

1 A duty to collect employment taxes or certain miscellaneous excise taxes.

2 A duty to account for and pay over employment taxes or certain miscellaneous excise taxes.

(b) One or more of the following:

1 Failure to collect employment taxes or certain miscellaneous excise taxes.

2 Failure to truthfully account for and pay over employment taxes or certain miscellaneous excise taxes.

(c) Notice, delivered in hand, instructing the taxpayer to collect and deposit employment tax or certain miscellaneous excise taxes in a separate bank account designated as a special fund in trust for the United States and to keep the taxes so collected in the account until payment over to the United States.

(d) One or more of the following with respect to taxes *collectible after the receipt of notice:*

1 Failure to collect employment tax or certain excise taxes;

2 Failure to deposit employment tax or certain excise taxes in a special trust account for the United States;

3 Failure to keep the collected taxes in a special trust account until payment over to the United States.

(e) One or more of the following:

1 Absence of information showing that the person had reasonable doubt as to whether the law required the collection of the tax, or that he had reasonable doubt that he was the one who was required by law to collect the tax;

2 Absence of information showing that the failure to collect, deposit and to keep the tax in a separate account was due to circumstances beyond the control of the taxpayer.

(2) Venue lies in the judicial district where the act should have been performed [8] and a three-year period of limitations [9] is applicable to this offense, which is a misdemeanor. Further information concerning statute of limitations is contained in Subsection 319.

(3) In the case of a corporation, partnership or trust, notice delivered in hand to an officer, partner, or trustee is deemed to be notice delivered in hand to the corporation, partnership, or trust and to all officers, partners, trustees and employees thereof.

[2] 58-1 USTC 9820.
[3] Wilson v. U.S., supra (section 313, note 24).
[4] Paddock v. Siemonett, 49-1 USTC 9202.
[5] Chief Counsel memo, 5-8-64, CC:E-172.

[6] 26 USC 7512.
[7] Employment Taxes imposed by Subtitle C and Miscellaneous Excise Taxes imposed by Chapter 33 which pertain to Communications and Transportation of persons by air-see Subsection 343.2.
[8] U.S. v. Commerford, supra (note 1).
[9] 26 USC 6531.

(314.22 ELEMENTS OF OFFENSE—Cont.)

(4) A lack of funds immediately after the payment of wages (whether or not resulting from the payment of wages) is not considered a circumstance beyond a person's control. For example, if an employer received the required notice and had gross payroll requirements of $1,000.00 with respect to which he was required to withhold $100.00 of income tax and if he had on hand only $90.00 and paid out the entire amount in wages, withholding nothing, the fact that the net wages due equaled that amount would not relieve him of the penalty imposed by this Code section.[10]

(5) Circumstances causing a lack of funds after the payment of wages (but not immediately after) which are considered beyond a taxpayer's control include: Theft, embezzlement, or destruction of the business by fire, flood, or other casualty, occurring within the period before which the person was required to deposit the funds; or the failure of the bank in which the person deposited the funds prior to transferring them to the Government's trust account. A lack of funds due to the payment of creditors would not be considered such a circumstance.[11]

315 Wilful Failure to File Returns, Supply Information, or Pay Tax (IRC 7203)

315.1 STATUTORY PROVISIONS

The wilful failure to make any return (other than a declaration of estimated tax); or to pay any estimated tax or tax; or to keep records; or to supply information, at the time or times required by law or regulation, constitutes a criminal offense. Any one of the above violations is a separate offense. The statutory provisions covering these offenses are set forth in IRC 7203 and are quoted in full in Subsection 121.4.

315.2 ELEMENTS OF THE OFFENSES

315.21 Wilful Failure to Make a Return

(1) This offense applies to the wilful failure to make any type of required return, except declarations of estimated tax. The following elements of the offense must be established to sustain a conviction: The person was under a duty, as required by law or regulations, to make a return for the year or period involved; he failed to file a return for such year or period at the time required by law or regulation; and the failure to file such return was wilful.[1]

(a) *A duty to make a return*—The general requirements for making a return are set forth in IRC 6012 to 6046. Persons liable under IRC 7203 include those described in IRC 7343, quoted in Subsection 311:(8). In corporate cases the person responsible for filing corporate returns may be any of several officials and it will be a matter of fact to be developed by competent evidence as to which one has the duty. This evidence may be proof of signing past Federal returns or any State returns, or it may be in the corporate bylaws or minutes of directors' meetings.[2] A further discussion of this point is contained in Subsection 314.12:(3).

(b) *Failure to make a return when due.*

1 The Government must establish that a return was due within the time provided by law or regulations and that there was a failure to file such return within such time. The time within which a return must be filed has been held to be the date set out in the Code or under regulations prescribed by the Secretary plus that last date covered in any extension of time granted by the Secretary or his delegate.[3] The date when a return is due under the Code or regulations varies, depending upon the type of tax involved or the type of return required to be filed. Thus, individual income tax returns, self-employment tax returns, and partnership returns made on the basis of the calendar year shall be filed on or before the 15th day of April following the close of the calendar year; or, if made on a fiscal year basis, the return shall be filed on the 15th day of the 4th month following the close of the fiscal year.[4] Corporate returns for calendar years are due on the 15th day of March; or, if on a fiscal year basis, returns are due on the 15th day of the 3d month following the close of the fiscal year.[5] IRC 6075 relates to the time for filing estate and gift tax returns, and IRC 6071 and the regulations promulgated thereunder to the time for filing excise tax returns and other forms of returns required under the particular type of tax involved.

2 In addition to showing that a return was due, the Government must establish that the person did not file a required return on the due date. Usually this is accomplished by proving that the defendant did not file a return in the district of his legal residence or principal place of business,[6] or service center.

(c) *The failure to file a return was wilful*—The Government must establish wilfulness in the failure to file a return. However, as distinguished from wilfulness in a tax evasion case, the Government need not prove a tax evasion motive. Wilfulness connotes something "done with a bad purpose, or done without justifiable excuse, or done stubbornly or obstinately or perversely, or with bad motive." [7] As applied to this offense wilful means voluntary, purposeful, deliberate, and intentional, as distinguished from accidental, inadvertent, or negligent; and the only bad purpose or bad motive which the Government must prove is the deliberate intention not to file returns, which such person knew ought to have been filed, so that

[10] Senate Committee on Finance Report (No. 1182, 85th Congress) (Jan. 22, 1958) 3 U.S. Cong. News '58, Page 256.
[11] Id.: U.S. v. Plotkin, 226 F. Supp. 129 (E.D. Wis.), 65-1 USTC 9461.
See. 313
[1] U.S. v. McCormick, 67 F 2d 947 (CA-3), 3 USTC 1127, cert. denied 291 U.S. 662.

[2] U.S. v. Page, supra (sub-section 314, note 3).
[3] U.S. v. Habig, 390 U.S., 222 (1968), 88 S. Ct. 926; Haskell v. U.S., 241 F 2d 790 (CA-10), 57-1 USTC 9553, cert. denied 354 U.S. 921, 77 S. Ct. 1379.
[4] 26 USC 6072 (a).
[5] 26 USC 6072 (b).
[6] Jury charge in Haskell v. U.S., 56-2 USTC 9855, Aff'd supra (note 3).
[7] U.S. v. Cirillo, 251 F 2d 428 (CA-2), 58-1 USTC 9164.

(315.21 WILFUL FAILURE TO MAKE A RETURN—Cont.)

the Government would not know the extent of his liability.[8] Although an additional tax due is not an essential element of the offense, wilfulness is difficult to establish without proof of a substantial tax liability.

315.22 Wilful Failure to Pay Tax

(1) This offense applies to the wilful failure to pay any type of tax, including estimated taxes. The elements of this offense are that the person was under a duty to pay a tax which was due and owing; that he failed to pay such tax at the time or times required by law or regulations; and that the failure to pay was wilful. The mere failure to pay the tax is not a crime; it must be wilful. Some evil motive or bad purpose must be shown. The Supreme Court stated:[9]

> "In view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestion of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no wilful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect wilfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

(2) Repeated failure to pay taxes coupled with large expenditures for luxuries when taxes were owing *may* be wilful within the meaning of the statute.[10]

315.23 Wilful Failure to Supply Information

This offense applies to the wilful failure to supply information at the time or times required by law or regulations. The elements of this offense are that the person was under a duty to supply the information; that he failed to supply such information at the time required by law or regulations; and that the failure to supply such information was wilful. The wilfulness required to be shown under this offense would be the deliberate and intentional withholding and failing to supply the required information with the evil and bad purpose of concealing income, property, or other required or requested information.[11] For example, the intentional and deliberate failure and refusal to furnish a schedule of the partnership assets and liabilities as required on the partnership return, was held to be wilful. Disclosure of such information revealed considerable cash on hand.[12]

315.24 Wilful Failure to Keep Records

(1) This offense applies to the wilful failure to keep records. The elements of this offense are that the person was under a duty to keep records; that he failed to keep such records; and that the failure to keep records was wilful. The general requirement to keep records is provided for in IRC 6001. However, the types of records kept by various individuals are not alike, and neither the statute nor the regulations defines minimum standards for specific transactions or for types of business. For example, a showing that his returns were prepared from third-party records (banks, brokers, employers) may obviate the necessity for a taxpayer to keep his own records. IRM 4297 provides for the service of a notice (Form 7020 or 7021) and the procedure to be followed where taxpayers have failed to maintain proper records. The deliberate, intentional, and utter disregard of this notice with evil intent and a bad purpose may be deemed a circumstance from which wilfulness may be inferred. Wilfulness will also be inferred if the concealment motive plays any part of the failure to keep records. However, an important factor in the probability of conviction in these cases may be a substantial deficieny attributable to the failure to keep records.

(2) Specific record keeping requirements involving wagering taxes are covered in Subsection 351.3.

315.3 VENUE AND STATUTE OF LIMITATIONS

Venue for the above offenses lies in the judical district in which the required acts should have been performed. Subsection 627 contains a further discussion of venue. The statutory period of limitations for wilful failure to file returns (other than information returns) or to pay tax is six years. A three-year period of limitations applies to wilful failure to file information returns such as partnership returns, and to wilful failure to keep records or supply information. Subsection 319 contains further information on the statute of limitations.

316 Fraudulent Statement or Failure to Make Statement to Employees (IRC 7204)

316.1 STATUTORY PROVISIONS

It is a criminal offense to wilfully furnish an employee a false or fraudulent wage withholding receipt or to wilfully fail to furnish a receipt in the appropriate manner or at the appropriate time. The statutory provisions covering this violation are set forth in full in Subsection 121.5. Information showing the applicable civil penalty is set forth in Subsection 152.5.

316.2 ELEMENTS OF OFFENSE

(1) The elements of a criminal violation under this Code section are:

(a) A duty to deduct employment tax or to withhold income tax;[1]

(b) A duty to timely furnish to the employee a written statement showing specified information concerning the deductions;[2]

[8] Yarborough v. U.S., 229 F 2d 53 (CA-4), 56-1 USTC 9295; U.S. v. DiSilvestro, 147 F. Supp. 859 (E.D. Pa.), 57-1 USTC 9424; U.S. v. Hayes, 60-2 USTC 9782 (E.D. Wis.); U.S. v. Fullerton, 61-1 USTC 9145 (D.C. Md.).
[9] Spies v. U.S., supra (subsection 315, note 8).
[10] U.S. v. Frank Palmero, 152 F Supp. 825 (E.D. Pa.), 58-1 USTC 9137, Rev'd in part 58-2 USTC 9959.
[11] U.S. v. Murdock, supra (subsection 313.2, note 21).
[12] Pappas v. U.S., 216 F 2d 515 (CA-10), 54-2 USTC 9537.

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[1] 26 USC 3102 (a), 3402 (a).
[2] 26 USC 6051.

(316.2 ELEMENTS OF OFFENSE—Cont.)

(c) Furnishing a false or fraudulent statement to an employee, or the failure to furnish a statement to an employee at the required time and in the required manner;

(d) Wilfulness. (The subject of wilfulness is covered in Subsection 311(1).)

(2) Venue lies in the judicial district where the employer was required to perform[3] and a three-year period of limitations is applicable to this offense[4] which is a misdemeanor. Further information concerning statute of limitations is contained in Subsection 319.

(3) A successful prosecution under this Code section was based upon the following facts. In order to attract and hold scarce workers, a taxpayer put into effect a scheme whereby actual weekly wages paid were recorded on regular weekly payroll sheets, the sum total of which was deducted for income tax purposes. Individual payroll sheets were also maintained for most of the employees, but the amounts of gross wages shown on the sheets were understated to accommodate the employees so that they would not have to report their entire wages for income tax purposes. The tax withheld from the wages was based upon the understated figure. In some instances individual payroll sheets were not maintained for employees. At the end of the year the employees whose names were shown on individual payroll sheets were furnished false and fraudulent withholding statements, Forms W-2, based upon the false payroll sheets and the employees whose names did not appear on payroll sheets did not at any time receive withholding statements. The failure to furnish withholding statements to some employees and the furnishing of false and fraudulent statements to other employees constitute separate violations under this Code section.

317 Fraudulent Withholding Exemption Certificate or Failure to Supply Information (IRC 7205)

317.1 STATUTORY PROVISIONS

An employee who wilfully supplies false or fraudulent information, in connection with his withholding exemption status, to his employer; or who wilfully fails to supply information which would require an increase in the tax to be withheld, commits a criminal offense. The statutory provisions covering this violation are quoted in full in Subsection 121.6. There is no civil penalty specifically applicable to this offense.

317.2 ELEMENTS OF OFFENSE

(1) The elements of a criminal violation under this Code section are:

(a) A duty to supply information to employer;[1]

(b) Furnishing false or fraudulent information or failure to supply information which would require an increase in tax to be withheld;

(c) Wilfulness. The subject of wilfulness is covered in Subsection 311(1).

(2) Venue lies in the judicial district where the offense has been committed. A three-year period of limitations is applicable,[2] and the offense is a misdemeanor. In a case which involves furnishing false or fraudulent information, the offense is committed and the period of limitations begins the date the document is filed. No known reported case has stated whether wilful failure to supply information to an employer is a continuing offense for purposes of determining the date from which the period of limitations is to run. The safe practice is to assume that it is not continuing, and that the offense is committed and statute begins to run on the date when it becomes a duty for the employee to supply information, which he wilfully fails to do. However, if all other facts indicate that prosecution should be recommended for this offense, the continuing offense theory may be employed. Further information concerning the statute of limitations is contained in Subsection 319.

(3) The employee is required to notify his employer within ten days of a change in his withholding exemption status which would require an increase in tax to be withheld.

(4) There is no penalty for failing to file an original certificate (Form W-4) or for failure to supply information which would require a decrease in tax to be withheld, and a certificate is not considered false or fraudulent if it contains information showing fewer exemptions than the employee is entitled to claim.

318 False and Fraudulent Statements

318.1 FALSE OR FRAUDULENT RETURN, STATEMENT, OR OTHER DOCUMENT MADE UNDER PENALTY OF PERJURY (IRC 7206(1))

318.11 Statutory Provisions

A person who wilfully makes and subscribes, under penalty of perjury, any return, statement, or other document which he does not believe to be true and correct, as to every material matter, commits a criminal offense. The statutory provisions covering this violation are set forth in full in Subsection 121.7.

318.12 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) Making and subscribing a return, statement or other document under penalty of perjury;

(b) Knowledge that it is not true and correct as to every material matter;

[3] U.S. v. Andersen, 328 U.S. 699; U.S. v. Commerford, 64 F 2d 28 (CA-2), (1933).
[4] 26 USC 6531.

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[1] 26 USC 3402 (f) (2).

[2] 26 USC 6531.

(318.12 ELEMENTS OF OFFENSE—Cont.)

(c) Wilfulness. (The subject of wilfulness is covered in Subsection 31(11).)

(2) Venue may lie in the judicial district in which the document is prepared, signed or filed. There has been little litigation of the venue issue. In the majority of cases, prosecution is had in the district in which the return is subscribed. A court has limited venue to that district.[1] Other cases have considered the place or date of *filing* the return to be determinative and not the place or date of *signing*, on the theory that the document is not a return until filed.[2] Section 3237 of Title 18, United States Code, which is captioned "Offenses begun in one district and completed in another," provides that any offense involving the use of mails is a continuing offense and may be prosecuted in any district in which the offense was begun, continued, or completed. In specifically providing that IRC 7206(1) prosecutions may be transferred to the district of residency, this statute tends to support a position that the offense may be prosecuted where the return is made, subscribed, or filed.

(3) A six-year period of limitations is applicable to this offense, which is a felony. Further information covering statute of limitations is contained in Subsection 319.

(4) This Code section imposes the penalty of perjury upon a person who wilfully falsifies a return as to a material matter, whether or not his purpose was to evade or defeat the payment of taxes.[3] Prosecution is appropriate when the Government is able to prove falsity of a partnership return, the issue being falsity rather than evasion.[4] The test of materiality is whether the false statement was material to the contents of the return. It is not necessary that the government actually rely on the statement. It is sufficient that it be made with the intention of inducing such reliance.[5] Although the offense is complete upon signing the statement or document, prosecutions under this Code section should involve only false returns or statements presented to or filed with the Internal Revenue Service. This sanction is appropriate when it is possible to prove falsity of a return but difficult to establish evasion of an ascertainable amount of tax, or, when the falsification results in a relatively small amount of tax evasion.

(5) If an individual files a false and fraudulent return, it is possible for him to incur criminal liability for attempting to defeat and evade the payment of tax and for making a false and fraudulent statement under the penalty of perjury even though both offenses relate to the same return and the making of the false statement is an incidental step in the consummation of the completed offense of attempting to defeat and evade taxes.[6]

318.2 AID OR ASSISTANCE IN PREPARATION OR PRESENTATION OF FALSE OR FRAUDULENT RETURN, AFFIDAVIT, CLAIM OR OTHER DOCUMENT (IRC 7206(2))

318.21 Statutory Provisions

Any person who wilfully aids or assists or procures, counsels, or advises in the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim or other document, commits a criminal offense under this Code section, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or other document. The statutory provisions covering this violation are set forth in full in Subsection 121.7:(2).

318.22 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) Aid, assist, counsel, advise or procure the preparation or presentation of a false or fraudulent document;

(b) A matter under, or in connection with any material matter arising under, the internal revenue laws;

(c) Wilfulness. (The subject of wilfulness is discussed in Subsection 31(11).)

(2) Venue lies in the judicial district where the criminal acts were committed, or if the acts were committed in one district and the return was filed in another district, venue lies in either district. The period of limitations applicable to this offense, which is a felony, is six years. Further information concerning the statute of limitations is contained in Subsection 319.

(3) The false document must be filed with the Internal Revenue Service in order for the crime to be complete but pecuniary loss to the Government is not necessary. Any impairment of its governmental function is sufficient.[7]

(4) The crime is complete on the submission of the false document notwithstanding the fact that had he filed a different and truthful document the defendant or his principal might have been entitled to equivalent relief or benefit.[8]

(5) Generally, income tax returns or partnership information returns are involved but any document required or authorized to be filed can give rise to this offense.

(6) If two partners execute a false partnership return and file it, they may each commit a criminal offense, but if there is evidence that only one of the partners wilfully aided, assisted, procured, counseled or advised the preparation or the presentation of such return, then only he could be held liable for this offense.[9]

(7) The aiding and assisting in the preparation of a false return, and the subscribing of a false return are two separate offenses.[10] A defendant can, therefore, be prosecuted under IRC 7206(1) for subscribing a false return

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[1] U.S. v. Wyman, 125 F. Supp. 276 (W.D. Mo.), 54-2 USTC 9564.
[2] U.S. v. Horwitz, 247 F Supp. 412 (N.D. Ill.), 66-1 USTC 9112; U.S. v. Plumeri, unreported opinion, S.D.N.Y., 63 Cr. 902, 1965.
[3] Gaunt v. U.S., 184 F 2d 284 (CA-1), 50-2 USTC 9412.
[4] Goldbaum v. U.S., 204 F 2d 74 (CA-9), 53-1 USTC 9342.
[5] Genstil v. U.S., 326 F 2d 243 (CA-1), 64-1 USTC 9187, cert. denied, 377 U.S. 916, 84 S. Ct. 1179; U.S. v. Rayor, 204 F. Supp. 486 (S.D. Cal.), 62-2 USTC 9607.
[6] Gaunt v. U.S., supra (note 3).
[7] Butzman v. U.S., 205 F 2d 343 (CA-6), 53-2 USTC 9450; U.S. v. Potsada, 206 F. Supp. 792 (N.D. Cal.), 62-2 USTC 12, 117.
[8] Ibid.
[9] U.S. v. Wyman, supra (note 1).
[10] Ibid.

(318.22 ELEMENTS OF OFFENSE—Cont.)

and under this Code section for aiding and assisting in the preparation of the same false return.

(8) It is sufficient to establish that the defendant wilfully and knowingly prepared false and fraudulent income tax returns for another although the fraud involved was without the knowledge and consent of the person required to make the return.[11] For example, in the case of U.S. v. Herskovitz, et al.,[12] the defendants, who conducted a "refund factory," interviewed taxpayers for ten or fifteen minutes and obtained information which was written on worksheets. Signed blank income tax returns were then obtained from the taxpayers and they were told the amounts of the refunds allegedly due, but they were not furnished any of the details relative to the deductions to be claimed on the returns, which were prepared at later dates. At the trial the clients testified that they did not furnish the defendants the information relating to deductions shown on their completed returns and that the information was placed on the returns without their knowledge or consent. On the other hand, if the taxpayers who testify against the defendant are shown to have had knowledge that their returns were false, resulting in fraud penalties or successful prosecutions for evasion, the defendant is entitled to have the court caution the jury to weigh accomplice testimony carefully.[13]

(9) In all race track payoff cases IRC 7206(2) should be used either as the primary statutory provision or, at least, as a supplement to 18 U.S.C. 1001, when prosecuting either the "ten percenter" or the true winner.[14]

318.3 FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS (IRC 7207)

(1) It is a criminal offense to wilfully deliver or disclose to the Secretary or his delegate any list, return, account, statement, or other document known to be fraudulent or to be false as to any material matter. The statutory provisions covering this violation are set forth in Subsection 121.8.

(2) This Code section was derived from section 3616 (a) of the 1939 Code, with some language changes. Courts have held that the predecessor Code section was impliedly repealed in income tax cases.[15] The Supreme Court has stated, in dealing with IRC 7207, that it does apply in income tax cases, in view of the language changes, as well as legislative history showing that Congress intended this new enactment to cover income tax.[16] In spite of this distinction by the Supreme Court, the Department of Justice is not authorizing income tax prosecutions under IRC 7207.

318.4 FALSE STATEMENTS OF ENTRIES GENERALLY (Section 1001, Title 18)

318.41 Statutory Provisions

In connection with any matter within the jurisdiction of any department or agency of the United States, it is a criminal offense to wilfully falsify, conceal or cover up by trick, scheme, or device a material fact or to make any false, fictitious, or fraudulent statements or representations or to make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry. The statutory provisions covering this violation are set forth in Subsection 122.(15).

318.42 Elements of Offense

(1) The elements of a criminal violation under this USC section are:

(a) A matter within the jurisdiction of a department or agency of the United States;

(b) One or more of the following:

1 Falsification or concealment by trick, scheme or device, of a material fact;

2 The making of false, fictitious or fraudulent statements or representations;

3 The making or using of any false writing or document;

(c) Knowledge of the falsity by the party charged;

(d) Wilfulness. (The subject of wilfulness is covered in Subsection 33(11).)

(2) Venue lies in the judicial district where the concealment of fact occurred, the false statement was communicated, or the false writing was made or used. A five-year period of limitations is applicable to this offense, which is a felony. Further informations concerning statutes of limitations is in Subsection 319.

(3) The term "jurisdiction" means the power to deal with a subject matter[17] and the term "department" includes the United States Treasury Department.[18]

(4) It is not necessary that the statement be required to be made by some regulation or law.[19] For example, a taxpayer could commit a violation under this USC section by voluntarily furnishing a false and fraudulent net worth statement during an official investigation of his income tax liability, provided all other necessary elements of the offense were present.

(5) The weight of authority requires proof of materiality in any prosecution under this USC section.[20] However, some jurisdictions do not require it in prosecutions for making false statements or submitting false documents, as opposed to falsifying, concealing or covering up material facts by trick, scheme or device.[21] The argument for this

[11] U.S. v. Kelley, 105 F 2d 912 (CA-2), 39-2 USTC 9621; U.S. v. Borgis, 182 F 2d 274 (CA-7), 50-1 USTC 9330.
[12] 209 F 2d 881 (CA-2), 54-1 USTC 9182.
[13] Hull v. U.S., 324 F 2d 817 (CA-5), 63-2 USTC 9821.
[14] Chief Counsel's Memorandum 7-31-67, CC:E-MA 1589; see Int. Digest, 11-67, p. 41.
[15] Achilli v. U.S., 234 F 2d 797 (CA-7), 56-2 USTC 9638, Aff'd 353 U.S. 373, 57-1 USTC 9692; U.S. v. Nicastro, 143 F. Supp. 756 (E.D., N.Y.), 56-2 USTC 9942.
[16] Sansone v. U.S., 380 U.S. 343, 85 S. Ct. 1004, 65-1 USTC 9307.
[17] U.S. v. Sanders, 42 F. Supp. 346 (S.D. Texas).
[18] 5 USC 1.
[19] Cohen v. U.S., 201 F 2d 386 (CA-9), 53-1 USTC 9165.
[20] Poonian v. U.S., 294 F 2d 74 (CA-9), 61-2 USTC 9667; U.S. v. Zambito, 315 F 2d 266 (CA-4), 1963), cert. denied, 373 U.S. 924, 83 S. Ct. 1524; Gonzales v. U.S., 286 F 2d 118 (CA-10, 1960), cert. denied, 365 U.S. 878, 81 S. Ct. 1028; Freidus v. U.S., 228 F 2d 598 (CA-D.C., 1955); Rolland v. U.S., 200 F 2d 678 (CA-5, 1953), cert. denied, 345 U.S. 964, 73 S. Ct. 950.
[21] U.S. v. Silver, 235 F 2d 375 (CA-2, 1956), cert. denied, 352 U.S. 860, 77 S. Ct. 102; U.S. v. Grossman, 154 F. Supp. 813 (D. N.J., 1957); U.S. v. Varano, 118 F. Supp. 867 (M.D. Pa., 1953).

(318.42 ELEMENTS OF OFFENSE—Cont.)

distinction is that the statute has two parts, of which the first, relating to falsification or concealment by trick, scheme or device, includes the word "material", whereas the second, relating to false statements, does not.[22] However, it must be borne in mind even in the jurisdictions making this distinction, that it is difficult to prove wilfulness of false statements unless they are material.[23]

(6) The violation may involve formal or informal records, forms and instruments, and even oral statements.[24] It is not essential that the statements be under oath, and the perjury corroboration rule does not apply.[25]

(7) It is possible for a defendant to be charged with a violation under this USC section and also to be charged with an attempt to defeat or evade the payment of tax [26] in connection with the same return.[27]

(8) Knowledge cannot be imputed to a corporate officer merely because he appears to be active in corporate affairs.[28]

(9) The statute is concerned with false statements which might impede the exercise of Federal authority.[29] Pecuniary loss to the Government is not necessary. Any impairment of administration of its governmental functions is sufficient and the commission of the crime is not dependent upon the success of the fraudulent intent.[30] However, mere negative, exculpatory "no" answers in a question and answer interview are held not to pervert the investigative function, and are not considered statements within the meaning of this statute.[31] Prosecution may lie under this statute, as well as under 18 USC 1503 (obstruction of justice), against persons summoned to produce records in their possession, who falsely state that the records have been stolen from them, and conspire together to conceal them.[32]

318.5 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS (Section 287, Title 18)

318.51 Statutory Provisions

It is a criminal offense to make or present a claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent. The statutory provisions covering this violation are set forth in Subsection 122.(10).

[22] U.S. v. Silver, supra (note 21).
[23] Chief Counsel Memorandum, 11-8-62, CC:E-235 (I.D. Digest, 12-62, p. 23).
[24] Neely v. U.S., 300 F 2d 67 (CA-9), 62-1 USTC 9297.
[25] Ibid; U.S. v. McCue, 301 F 2d 452 (CA-2), 62-1 USTC 9359, cert. denied, 370 U.S. 939, 82 S. Ct. 1586.
[26] 26 USC 7201.
[27] Gaunt v. U.S., supra (note 8).
[28] Freidus v. U.S., supra (note 20).
[29] U.S. v. Leviton, 193 F 2d 848 (CA-2), (1951).
[30] Butzman v. U.S., supra (note 7); U.S. v. Mellon, 96 F 2d 462 (CA-2), (1938); U.S. v. J. Greenbaum & Sons, Inc., 123 F 2d 770 (CA-2), (1941); U.S. v. Goldsmith, 108 F 2d 917 (CA-2), (1940).
[31] Paternostro v. U.S., 311 F 2d 298 (CA-5), 62-2 USTC 9808; U.S. v. Philippe, 173 F. Supp. 582 (S.D., N.Y.) 59-2 USTC 9654; U.S. v. Stark, 131 F. Supp. 190 (D. Md., 1955).
[32] U.S. v. Curico, 279 F 2d 681 (CA-2), 60-2 USTC 9514.

318.52 Elements of Offense

(1) The elements of a criminal violation under this USC section are:

(a) Making or presenting a claim upon or against the United States;

(b) Knowledge that the claim is false, fictitious or fraudulent.

(2) Venue lies in the judicial district where the false claim is presented or filed or where it is to be acted upon.[33] A five-year period of limitations is applicable to this offense, which is a felony. Further information concerning statute of limitations will be found in Subsection 319.

(3) The term "false" means unfounded or unjust; "fictitious" means not real; and "fraudulent" means wrong or deceitful. These terms have no special legal significance in their use in this statute but are to be taken in their ordinary and well understood sense.[34]

(4) Fraud within this USC section includes any conduct calculated to obstruct or impair the efficiency of the United States and to destroy the value of its operations.[35] Actual pecuniary loss to the Government is not an essential element of this offense.

(5) Whether the claim is false, fictitious, or fraudulent must be determined in view of all of the facts and circumstances surrounding it and it is not essential that the bill, voucher, or other things used as the basis for the claim should in and of itself contain fraudulent or fictitious statements or entries.[36] For example, an income tax return, correct on its face, would still constitute a false claim if the taxpayer filing the return knew that the refund shown to be due had already been paid to him as the result of the filing of a prior return.

(6) An income tax return claiming a refund of withheld taxes represents a false claim in spite of the fact that the amount claimed represents an overpayment of withholding taxes resulting from a fraud perpetrated on the employer. For example, if an individual arranges with a paymaster to defraud an employer by having his name entered on a payroll without performing any work or receiving any wages and withholding tax is then paid to the Government based on the amount of the alleged wages, the filing of a final income tax return by the phantom employee, showing the alleged wages and claiming a refund of the withheld tax, constitutes the filing of a false claim under this USC section.[37]

(7) This USC section is particularly appropriate in instances where a false claim for refund has been filed. It is only necessary to prove that the defendant made a claim for refund taxes against the Government and that he knew that he was not entitled to receive it.[38]

[33] Fuller v. U.S., 110 F 2d 815 (CA-9).
[34] U.S. v. Bittinger, 21 Int. Rev. Rec. 342, 24 Fed. Cases No. 14,599, (W.D. Mo.), (1875).
[35] Haas v. Henkle, 216 U.S. 462, 479 (1909); U.S. v. Gottfried, 165 F 2d 360 (CA-2, 1948).
[36] Dimmick v. U.S., 116 F 825 (CA-9, 1902).
[37] U.S. v. Mandile, 119 F. Supp. 266 (E.D. N.Y.) 54-1 USTC 9277.
[38] Ibid.

318.6 REMOVAL OR CONCEALMENT WITH INTENT TO DEFRAUD (IRC 7206(4))

318.61 Statutory Provisions.

Any person who removes, deposits, or conceals property upon which any tax is or shall be imposed, or upon which levy is authorized by IRC 6331, with intent to evade or defeat the assessment or collection of any tax, commits a criminal offense under this Code section. The statutory provisions covering this violation are set forth in Subsection 121.7.

318.62 Elements of Offense

(1) The elements of a criminal violation under this Code section are:

(a) Tax imposed on the property, or

(b) Property upon which tax is imposed or levy is authorized;

(c) Removal or concealment

(d) With intent to evade or defeat assessment or collection of any tax.

(2) "Concealment" under this Code section does not mean merely to secrete or hide away, but includes also "to prevent the discovery or to withhold knowledge of." Thus, it is not necessary for the Government to prove a physical removal, concealment or transfer from one place to another. A violation of this Code section may be committed by making false book entries indicating transfer of property rights.[39]

(3) It is probable that the period of limitations for this offense is six years. However, since this has not been determined by case law, prosecution should be instituted within three years, to avoid unnecessary controversy.

319 Statute of Limitations

319.1 INTRODUCTION

Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the Government to explode only after witnesses and proof necessary to the protection of the accused have by sheer lapse of time passed beyond availability.[1] They amount to legislative restraints on the executive power to punish wrongdoers, which grant malefactors complete immunity from prosecution after stated periods of time Subsections 141 through 143 contain information showing the specific statutory provisions [2] relating to the time limit within which prosecutions may be instituted against persons charged with violations of the internal revenue laws and the applicable sections of the United States Criminal Code.

[39] U.S. v. Bregman, 306 F 2d 653 (CA-3, 62-2 USTC 9589.

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[1] U.S. v. Eliopoulos, 45 F. Supp. 777 (N.J.), (1942).
[2] 26 USC 6531.

319.2 STATUTE OF LIMITATIONS STATUTORY PROVISIONS

319.21 Statute of Limitations on Criminal Violations

(1) The Internal Revenue Code provides a three-year limitation period for criminal violations with the exception of the following described offenses investigated by the Intelligence Division, which fall within a six-year limitation period:

(a) Those Code sections in which defrauding or attempting to defraud the United States is an ingredient of the offense.

(b) 7201—Wilfully attempting in any manner to evade or defeat any tax or the payment thereof.

(c) 7206 (2)—Wilfully aiding, assisting, counseling, procuring or advising the preparation or presentation of a false return or other document.

(d) 7203 (in part)—Wifully failing to timely pay any tax or make any return (other than declaration of estimated tax, partnership returns or other information returns).

(e) 7206 (1)—Wilfully making and subscribing a false return under penalty of perjury.

(f) 7207—Wilfully delivering or disclosing to the Secretary a fraudulent return, statement or other document.

(g) 7212 (a)—Corruptly or forcibly attempting to interfere with the administration of the internal revenue laws.

(h) 371, Title 18—Conspiracy in connection with an attempt to defeat or evade any tax or the payment thereof.

(2) The limitation period under the Under States Criminal Code is generally five years for offenses other than capital.[3]

319.22 Statute of Limitations on Civil Assessments

(1) Generally, taxes must be assessed within three years after they become due. However, IRC 6501 provides that a six-year limitation period is applicable where an amount in excess of 25 percent of gross income has been omitted from the return, and that there is no limitation on assessment when:

(a) A false or fraudulent return has been filed with intent to evade tax;

(b) No return has been filed; or----

(c) There has been a wilful attempt to defeat or evade a tax (other than income, estate and gift taxes.)

319.3 CONSTRUCTION OF STATUTE OF LIMITATIONS PROVISIONS

(1) *Interpretation generally*—"The statute (of limitations) is not a statute of process to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense." [4] In other words, the statute is liberally interpreted in favor of the accused.

[3] 18 USC 3282.

(319.3 CONSTRUCTION OF STATUTE OF LIMITATIONS PROVISIONS—Cont.)

(2) *Toll*—To toll the statute of limitations means to show facts which remove its bar of the action.[5] Thus, to toll the statute is to suspend the running of the statute for a period of time. The tolling of the statute of limiations should not be confused with the expiration date of the period of limitations.

(3) *Running of the statute*—The limitation period begins to run from the day on which the offense is committed. The day following is the first day of the period.[6] For example, if a false and fraudulent income tax return is filed on April 20, 1958, the period of limitations begins to run on April 21, 1958, and, provided there are no circumstances to toll the statute, it will operate to bar prosecution on April 21, 1964.

(4) *Wilful failure to perform*—Offenses relating to the wilful failure to perform certain acts are not complete until the failure becomes wilful.[7] Usually it is possible to prove that wilfulness was present on the date the return was due. An exception would be a situation where an individual failed to pay his tax on the due date and continued in this failure until three month later, at which time he stated that he was not going to pay the tax because he did not want the Government to spend his money. Under such circumstances, the statute may be interpreted as running from the date he made the latter statement.[8]

(5) *Continuing offense*—In the case of instantaneous crimes, the statute of limitations begins to run with the consummation of the crime whereas in the case of a continuing offense, such as conspiracy, the statute of limitations does not begin to run until the criminal conduct ceases.

(6) *Attempt to defeat and evade*—Violations involving wilful attempts to defeat and evade taxes are complete on the date of the occurrence alleged as a means of attempted evasion. Usually, the filing of the return marks the climax of the wilful attempt and the period of limitations begins to run from the filing date or the due date. However, an attempt to evade tax, or attempt to evade payment, may occur at a later date. A false statement by a taxpayer during a conference several months after a return was filed was determined to be a wilful attempt to evade tax for which the period of limitations began on the date of the false statement.[9] False statements made in 1955, 1956, and 1957 in offers to compromise tax liabilities for 1941 through 1946 constituted wilful attempt to evade payment, on which the periods of limitation began when the statements were made.[10]

(7) *Conspiracy*—The crucial question in determining whether the period of limitations has run in a conspiracy charge "is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." [11] For example, if the central objective of a conspiracy was to protect taxpayers from tax evasion prosecutions on which the statute of limitations did not bar prosecution until 1952 and if nonprosecution rulings were obtained in 1949 as an installment of what the conspirators aimed to accomplish, then the period of limitations on the conspiracy would not begin to run until 1952 when the objective of the conspiracy was entirely accomplished. If the conspiracy is limited to an attempt to defeat and evade taxes by filing a false and fraudulent return, the conspiracy ends at the time the return is filed and the statute of limitations begins to run from that date.[12]

(8) *Statutory filing date*—IRC 6531 states, among other things, "For the purpose of determining the periods of limitation on criminal prosecutions, the rules of Section 6513 shall be applicable." The pertinent portion of IRC 6513 provides that ". . . any return filed thereof shall be considered as filed on such last day." This language from IRC 6513 has been judicially approved, on the theory that Congress has the right to legislate concerning periods of limitations.[13] In order to avoid controversial issues, a conservative approach would be to measure the limitation period from the date on which the return was actually filed or the last overt act was committed. The statutory filing date should be used when the conservative approach would bar prosecution.

(9) *Extension of time*—Under the Internal Revenue Code of 1954, where an extension is granted and the return is thereafter filed, the statute of limitations begins to run from the date of filing.[14]

319.4 TOLLING OF THE STATUTE OF LIMITATIONS

(1) IRC 6531 provides:

(a) That the statute of limitations will be inoperative during the time an offender is outside the United States or is a fugitive from justice; and

(b) That where a complaint is instituted before a Commissioner of the United States within the limitation period, the time is extended until nine months after the date of the making of the complaint.

(2) *Absence from the United States*—Taxpayer absence from the United States tolls the statute of limitations for that period regardless of the reason for the absence.[15]

(3) *Fugitive from justice*—"The essential characteristic of fleeing from justice is leaving one's residence or usual place of abode or resort, or concealing one's self, with the intent to avoid punishment." [16] A flight to escape

[5] Wharton, Criminal Procedure, 415 (10th Ed. 1918).
[6] Black's Law Dictionary.
[7] Rule 45, Federal Rules of Criminal Procedure; 18 USC; Burnet v. Willingham Loan and Trust Co., 282 U.S. 437; Pendergast v. U.S., 317 U.S. 412; Wiggins v. U.S., 64 F 2d 950 (CA-9), (1933).
[8] Arnold v. U.S., 75 F 2d 144 (CA-9), 35-1 USTC 9056.
[9] Capone v. U.S., 51 F 2d 609 (CA-7), 2 USTC 786.
[10] U.S. v. The Beacon Brass Co., Inc., 344 U.S. 43, 73 S. Ct. 77, 52-2 USTC 9528.
[11] Grunewald v. U.S., 353 U.S. 391, 57-1 USTC 9693; Forman v. U.S., 361 U.S. 416, 60-2 USTC 9287.
[12] U.S. v. Rosenblum, et al., 176 F 2d 321 (CA-7), 49-1 USTC 9214.
[13] U.S. v. Black, 216 F. Supp. 645, (W.D. Mo.), 63-2 USTC 9564; U.S. v. George Homer Wolf, unpublished opinion No. 2294 (N.D. Ind.), 1962.
[14] U.S. v. Habig, 390 U.S. 222 (1968), 88 S. Ct. 926.
[15] U.S. v. Myerson, 249 F 2d 294 (CA-2), 66-2 USTC 9753.
[16] Browne v. U.S., 68 F 2d 294 (CA-1), (1933).

(319.4 TOLLING OF THE STATUTE OF LIMITATIONS —Cont.)

an anticipated prosecution is sufficient and it does not have to be made after an indictment has been brought.[17] The intent is indispensable and thus the withdrawal or concealment must be voluntary.[18] Moreover, if one voluntarily flees with the requisite intent, he cannot later successfully contend that his absence was prolonged against his will and that the statute should have commenced running again when he would have returned had he been free to do so.[19] The character of the original flight colors the absence so as to render the defendant a fugitive from justice throughout the period of absence.

(4) *Complaint*—The extension applies if the complaint filed with the Commissioner contains probable cause that an offense has been committed and that the defendant committed it. The defendant must be given notice by service of a summons or an arrest warrant. A preliminary hearing is held within reasonable time unless waived by the defendant or superseded by an indictment. If the complaint does not support a finding of probable cause, the tolling of the statute of limitations is invalidated. This provision relates to situations in which the Government cannot obtain an indictment within the normal limitation period because of the grand jury schedule and is not intended to provide the Government additional time to conduct its investigation.[20]

(5) Further discussion of complaints is in Subsection 621.

31(10) Conspiracy (Title 18, Section 371)

31(10).1 STATUTORY PROVISIONS

It is a criminal offense for two or more persons to conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner for any purpose, if one or more of such persons do any act to effect the object of the conspiracy. The statutory provisions covering this violation are set forth in full in Subsection 122.(11). There is no civil penalty specifically applicable to this offense.

31(10).2 ELEMENTS OF OFFENSE OF CONSPIRACY

(1) The elements of a criminal violation under this USC section are:

(a) A combination of two or more persons.

(b) An agreement to accomplish the purpose of the conspiracy.

(c) An overt act to effect the objective of the agreement.

(2) Venue lies in any judicial district where an overt act was committed [1] and a six-year period of limitations is applicable if the conspiracy is to defraud or attempt to defraud the United States, or any agency thereof, or to attempt in any manner to evade or defeat any tax or the paymen thereof.[2] All other conspiracies fall within a five-year period of limitations.[3]

31(10).3 APPLICATION OF CONSPIRACY STATUTE

(1) A practice of self-restraint has been applied with respect to the use of the conspiracy statute. As a rule conspiracy charges have not been instituted when evidence was available to make out charges of violations of substantive statutes. If proof exists to support substantive charges, the addition of conspiracy counts would involve needless duplications. Judge Learned Hand stated:[4] ". . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

(2) The Supreme Court has also warned that it will "view with disfavor attempts to broaden the already pervasive and wide-spreading nets of conspiracy prosecutions." [5]

(3) An acquittal on a criminal charge does not preclude a prosecution of a conspiracy to commit the same criminal violation.[6] It has also been held that the same overt acts charged in a conspiracy count may also be charged and proved as separate criminal violations since the agreement to do the act is distinct from the act itself.[7]

31(10).4 CONSTRUCTION OF CONSPIRACY PROVISIONS

31(10).41 Definition

Conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.[8] The crime is not complete until an overt act is done by at least one of the conspirators to effect the object of the conspiracy.[9] The purpose of requiring an overt act is to confirm the seriousness of the participants in the agreement. It affords an opportunity for one or all of the parties to abandon their design before the act is done, and thus avoid the penalty prescribed by the statute.[10]

[17] Strapp v. U.S., 160 U.S. 128.
[18] U.S. v. Hewecker, 79 F 59 (S.D. N.Y.), (1896).
[19] McGowen v. U.S., 105 F 2d 791 (CA-D.C.), (1944).
[20] Jaben v. U.S., 381 U.S. 214, 65-1 USTC 9408.

See, 31(10)
[1] Diehl v. U.S., 98 F 2d 545 (CA-8); Tillinghast v Richards, 238 F. 710 (D.C., R.I.); U.S. v. Elipoulos, 46 F. Supp. 777 (D.C., N.J.).

[2] 26 USC 6531.
[3] 18 USC 3282.
[4] U.S. v. Falcone, 109 F 2d 579, 581 (CA-2).
[5] Grunewald v. U.S., 353 U.S. 391, 57-1 USTC 9693.
[6] U.S. v. Waldin, 149 F. Supp. 912 (E.D. Pa.) 57-1 USTC 9672.
[7] U.S. v. Bayer, 331 U.S. 532, 67 S. Ct. 1394; U.S. v. Mandile, 119 F. Supp. 266 (E.D. N.Y.), 54-1 USTC 9277.
[8] Marino v. U.S., 91 F 2d 691 (CA-9).
[9] Ibid.
[10] U.S. v. Britton, 108 U.S. 199; U.S. v. Halbrook, 36 F. Supp. 848 (E.D. N.Y.).

31(10).42 Parties in Conspiracy

It is necessary that the conspirator intend to be a party to the conspiracy and one who pretends to join a conspiracy in order to trap the criminals is not a conspirator. There must be *intentional participation* in the transaction with the view of furthering the common purpose, but the mere knowledge, acquiescence, or approval of an act without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy.[11] Thus, if an officer knew that several other officers of a company were meeting at a particular place to fraudulently rewrite a set of business records in an attempt to mislead an internal revenue agent who was planning to audit the return filed by the company and did not participate in any way to further the plan, he would not become a conspirator. When a conspiracy exists, the joining of new members thereafter does not create a new conspiracy.[12] Conversely, if one or more of the conspirators withdraw, such withdrawal neither creates a new conspiracy nor changes the status of the remaining members.[13] A person may become a conspirator by joining in an existing agreement or by knowing of its existence and committing an overt act in furtherance thereof.[14] After he joins, he becomes responsible for all acts and all statements of all participants which are committed in connection with the plan and common object of the conspiracy [15] whether done before or after he joins the conspiracy.[16] A conspirator may withdraw by an affirmative and effective act that disavows or defeats the purposes of the conspiracy.[17] He is not liable for the subsequent acts of his former associates and the statute of limitations commences to run, as to him, upon his withdrawal.[18] He may avoid guilt completely by withdrawing prior to the commission of the first overt act that furthers the conspiracy.[19] When only two persons are charged with conspiracy and there is no evidence implicating anyone else, an acquittal or reversal as to one is acquittal or reversal as to the other.[20] However, if the indictment charges two named conspirators and persons unknown as co-conspirators, and there is evidence to support the charge that one of the two defendants conspired with the unknown persons, that defendant's convictions may stand in spite of the fact that the other named defendant is acquitted.[21] The rule that acquittal of all alleged conspirators except one results in acquittal of all applies only to acquittals on the merits.[22] Thus, if the charge against one of two conspirators is dismissed as the result of a nolle prosequi, it would not affect the case against the other since a nolle prosequi does not amount to a dismissa on the merits. All acts and statements in furtherance of the conspiracy may be introduced in evidence against the conspirators on trial regardless of whether the person who committed such act or made such statement is on trial.[23] A person's involvement in a conspiracy cannot be established through his alleged co-conspirator's acts or declarations done or made in his absence without proof from another source of his connection with the conspiracy.[24] A corporation can be a conspirator with other corporations, or with natural persons including its own officers, employees, or stockholders. It is responsible for the acts of its agents which are performed within the scope of their authority.[25] Partners may be prosecuted for conspiracy to defraud the Government of income taxes by making false and fraudulent partnership and individual returns.[26] A husband and wife may be found guilty of conspiracy, being considered separate persons under the conspiracy statute.[27] All conspirators need not be defendants. Should the prosecution require the testimony of one of the conspirators to prove the conspiracy, he could be named in the indictment as a co-conspirator even though he is not named as a defendant.[28]

31(10).43 Nature of Conspiracy Agreement

Conspirators usually do not put their agreements into writing nor do they make public their plans. Hence, a conspiracy is rarely susceptible of proof by direct evidence and must usually be deduced from the conduct of the parties and the attending circumstances.[29] It is sufficient to show that the minds of the parties met in an understanding way so as to bring about an intelligent and deliberate agreement to do the act or acts charged, although such an agreement is not manifested by any formal words.[30] It is not necessary that each conspirator know or see the others, [31] but it is necessary to prove that each person charged in the conspiracy knew of the agreement and had a corrupt motive or evil intent.[32] The conspiracy is distinct from the crime contemplated and one may be convicted of both the completed crime and the conspiracy, even though the completed crime was alleged as the overt act necessary to convict for conspiracy.[33] After the central purposes of a conspiracy have been attained, a subsidiary agreement to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept secret and that

[11] U.S. v. Thomas, 52 F. Supp. 571 (Wash.) (1953).
[12] U.S. v. Marino, supra (note 8); Hagen v. U.S. 288 F 344 (CA-9).
[13] Graham Johnson v. U.S., 62 F 2d 32 (CA-9); Craig v. U.S., 81 F 2d 816 (CA-8), cert. denied, 298 U.S. 690.
[14] Craig v. U.S., supra (note 13); U.S. v. Olmstead 5 F 22d 712.
[15] Connelly v. U.S., 249 F 2d 576, 57-2 USTC 10,029, cert. denied 356 U.S. 921, pet. for rehearing den. 356 U.S. 964.
[16] Baker v. U.S., 21 F 2d 903 (CA-4), cert. denied, 276 U.S. 621; Coates v. U.S. 59 F 2d 173 (CA-9).
[17] Blue v. U.S., 186 F 2d 351 (CA-6, 1948), cert. denied, 322 U.S. 736, 64 S. Ct. 1046; U.S. v. Christian W. Beck, 118 F 2d 178 (CA-7, 1941), cert. denied, 313 U.S. 587, 61 S. Ct. 1121.
[18] Hyde v. U.S., 225 U.S. 347, 32 S. Ct. 793 (1911); Eldredge v. U.S., 62 F 2d 449 (CA-10, 1932).
[19] Marino v. U.S., supra (note 8).
[20] U.S. v. Fox, 130 F 2d 66 (CA-3), cert. denied, 317 U.S. 666 (1942).
[21] Pomerantz v. U.S., 51 F 2d 911 (CA-3); U.S. v. Gordon, 242 F 2d 122 (CA-2) 57-1 USTC 9448, cert denied, 354 U.S. 921.
[22] U.S. v. Fox, supra (note 20).

[23] Lewis v. U.S., 11 F 2d 745 (CA-8).
[24] Glasser v. U.S., 315 U.S. 60, 62 S. Ct. 457 (1942); U.S. v. Wortman, 328 F 2d 717 (CA-7), 64-1 USTC 9201; Tripp v. U.S., 295 F 2d 418 (CA-10, 1961).
[25] Old Monastery Company v. U.S., 147 F 2d 905.
[26] Lisansky v. U.S., 31 F 2d 846 (CA-4), cert. denied, 279 U.S. 873.
[27] U.S. v. Doge, 264 U.S. 52, 30 S. Ct. 1539.
[28] U.S. v. Gordon, supra (note 21).
[29] Cruz v. U.S., 106 F 2d 328 (CA-10); Telman v. U.S., 67 F 2d 716 (CA-10) cert. denied 292 U.S. 650.
[30] Telman v. U.S., supra (note 29).
[31] Blumenthal v. U.S. 332 U.S. 539; Martin v. U.S., 100 F 2d 490 (CA-10).
[32] Cruz v. U.S., supra (note 29).
[33] Pinkerton v. U.S., 328 U.S. 640.

(31(10).43 NATURE OF CONSPIRACY AGREEMENT—Cont.)

the conspirators took care to cover up their crime in order to escape detection and punishment.[34]

31(10).44 Overt Act in Conspiracy

An overt act is any act or statement designed to advance, aid, or assist in accomplishing the object of the conspiracy agreement. It need not be a violation of the law within itself and may be as innocent as calling at the office of the District Director of Internal Revenue in order to obtain a blank claim form. It is not necessary that each conspirator commit an overt act [35] and, therefore, a party to a conspiracy agreement may become guilty of conspiracy without any knowledge that one of his co-conspirators actually committed an overt act.[36] Preparing, signing, and filing a false return are appropriate overt acts in a conspiracy to attempt to defeat and evade the payment of tax by filing a false and fraudulent return.

31(10).45 Defraud in Conspiracy

The word "defraud" as used in this USC section is broad enough to include anything which interferes with or hampers the United States in the successful prosecution of any policy, as well as the ordinary common law meaning of the word.[37] For example, a conspiracy to cause Government officers to neglect their duties would be a conspiracy to defraud the United States of their honest and effective services.

31(10).46 Duration of Conspiracy

(1) Conspiracy is a continuing crime [38] first complete upon the performance of the first overt act in furtherance of the conspiracy agreement, and it continues until the completion of the last overt act, including the division of the fruits of the crime, if any. The terminal date of the conspiratorial relationship is particularly important in settling problems relating to the admissibility of evidence, prosecution of later joining conspirators, and the running of the period of limitations. In determining the termination date, it is necessary to consider carefully the terms of the agreement. The Supreme Court has stated that:[39]

> ". . . the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy."

(2) If the conspiracy involves an attempt to defeat and evade the payment of income tax by filing a false and fraudulent income tax return, the conspiracy ordinarily terminates at the time the return is filed.[40] However, a conspiracy to evade taxes by making false statements to conceal unreported income was held to continue through the making of such statements.[41]

31(11) Wilfulness

31(11).1 DEFINITION OF WILFULNESS

(1) Wilfulness is an essential element of proof with respect to most criminal violations investigated by special agents. The term "wilful" however, is not defined by statute; thus for its definition we must rely on precedent established by court decisions. In commenting on this statutory omission the Supreme Court in the Spies Case [1] stated that:

> "Congress did not define or limit the methods by which a wilful attempt to defeat and evade might be accomplished and perhaps did not define lest its efforts to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'."

(2) Wilfulness has been interpreted in many ways with respect to the various statutes. It may mean one thing in civil cases and quite another thing in criminal prosecutions.

(a) Usually, where civil penalties are involved, wilfulness means actions "knowingly," "consciously," or "intentionally" taken. A voluntary course of action as distinguished from accidental would seem to satifsy the civil requirements.[2]

(b) When used in criminal revenue statutes, the word "wilful" generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely.[3] As stated by the Supreme Court in the Murdock case:

> "The word is also employed to characterize a thing done without ground for believing it is lawful . . . or conduct marked by careless disregard whether or not one has the right so to act. . . .
>
> "This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a wilful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime.
>
> * * * * *
>
> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct."

[34] Grunewald v. U.S. supra (note 5); Forman v. U.S., 259 F 2d 128 (CA-9) 58-2 USTC 9950; but see Forman v. U.S., 261 F 2d 181 (CA-9), 58-2 USTC 9950; Krulewitch v. U.S., 336 U.S. 440; Lutwak v. U.S., 344 U.S. 604.
[35] Braverman v. U.S., 317 U.S. 49, 42-2 USTC 9731; U.S. v. Donald Johnson, 165 F 2d 42 (CA-3) cert. denied 332 U.S. 852.
[36] Brock v. Hudspeth, 111 F 2d 447 (CA-10).
[37] U.S. v. Slater, 278 F 266 (E.D. Pa.).
[38] Ryan v. U.S., 216 F 13 (CA-7), cert denied 232 U.S. 726.
[39] Grunewald v. U.S., supra (note 5).
[40] U.S. v. Rosenblum, 176 F 2d 321 (CA-7) 49-1 USTC 9314, cert. denied 338 U.S. 893.
[41] Forman v. U.S., 261 F 2d 181 (CA-9) 58-2 USTC 9950.

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[1] Spies v. U.S. 317 U.S. 492, 63 S. Ct. 364, 43-1 USTC 9248.
[2] Paddock v. Siemonsit, 218 S.W. 2d 428, 49-1 USTC 9202; Levy v. U.S., 140 F. Supp. 884, (W.D. La.), 56-2 USTC 9681; Wilson v. U.S., 250 F 2d 312 (CA-9), 57-2 USTC 10,040.
[3] U.S. v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 3 USTC 1194.

(31(11).1 DEFINITION OF WILFULNESS—Cont.)

(3) Knowledge, specific intent, and bad purpose are necessary elements of criminal wilfulness. They are to be distinguished from motive, which is the reason or inducement for committing an act. For example, an individual may deliberately understate his income in order to have sufficient funds to support invalid parents. While his motive may be admirable, he had a specific intent to evade payment of his income taxes. It has been stated that: [4]

> "Motive is not an essential element of a crime. The most laudable motive is no defense where the act committed is a crime in contemplation of law. . . . Proof as to motive may be of assistance in throwing light on the intent with which the act was committed. . . ."

(4) The Supreme Court in the Spies case [5] enunciated the same principle in a different fashion. The court stated:

> "If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

31(11).2 PROOF OF WILFULNESS

(1) Wilfulness is a state of mind which is rarely susceptible of direct proof. It involves a mental process which is usually proved through circumstantial evidence.[6] Direct evidence of wilfulness can only be accomplished through an admission or a confession.

(2) In the Spies case, supra, the court enumerated certain conduct which may create inferences of wilful attempted evasion of income taxes:

> "by way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and *any conduct, the likely effect of which would be to mislead or to conceal.*" (Italics supplied.
>
> (a) Subsection 323.2 contains examples of methods of evasion.

(3) Frequently, circumstantial evidence of wilfulness will consist of acts *subsequent* to the filing of a false income tax return. For example, attempted bribery of a revenue agent during an investigation;[7] visits to undisclosed safe deposit boxes after having been questioned about assets;[8] making false statements;[9] withholding records during the investigation [10] and influencing the testimony of prospective witnesses.[11]

(4) Furthermore, in proving wilfulness, evidence of other similar offenses and like conduct at time proximate to the offense charged may be admitted.[12] This type of evidence does not prove the particular crime charged but tends to show a continuity of unlawful intent and is an exception to the general rule that evidence of another crime unconnected with the one on trial is inadmissible. Cases contain numerous instances of this principle. For example, admitted into evidence was testimony concerning the failure to file returns in prior years; [13] also the filing of a fraudulent return for a prior year; [14] and the failure to supply information for many prior years.[15]

(5) The determination of wilfulness of a criminal act is the function of the jury under proper instructions from the court.[16] Usually, the jury will be told that direct proof of wilful or wrongful intent or knowledge is not necessary; that it is not possible to look into a man's mind to see what went on; that intent can only be determined from all the facts and circumstances; that intent and knowledge may be inferred from various acts.[17] The instruction may include the comment that the jury may consider the taxpayer's refusal to produce his books and records for inspection by the Internal Revenue Service.[18] However, it has been held improper for a judge to instruct the jury that it may consider attempts to impede in determining intent, where a corporate officer-taxpayer has resisted, on purely technical rather than self-incrimination grounds, the legality of a summons served on his corporation. Unsuccessful resistance does not create any different connotation than successful resistance.[19]

(6) It is error to instruct the jury that every citizen is presumed to know the law, and that ignorance of the law is no excuse or justification for its violation. Guilty knowledge of the consequences of the act done is the essence of the offense, and evidence which may support or detract from such guilty knowledge is admissible.[20]

31(11).3 DEFENSES BEARING UPON WILFULNESS

31(11).31 Defenses of Wilfulness

(1) *Advice of counsel,* [21] *accountant,* [22] *or Government agent,*[23] if relied upon by the defendant, may be a valid defense to a wilful violation. However, if it can be shown that the defendant did not act in good faith upon such advice by not following it,[24] or that he did not fully inform

[4] Kobey v. U.S., 208 F 2d 583 (CA-9), 54-1 USTC 9106.
[5] Spies v. U.S., supra. (note 1).
[6] Paschen v. U.S., 70 F 2d 491 (CA-7).
[7] Barcott v. U.S., 169 F 2d 929 (CA-9), 48-2 USTC 9377.
[8] Barcott, ibid.
[9] U.S. v. Beacon Brass Co., 344 U.S. 43, 73 S. Ct. 77, 52-2 USTC 9528.
[10] U.S. v. Glascott, 216 F 487 (CA-7), 54-2 USTC 9652.
[11] Myers v. Comm., 21 TC 321.
[12] Weiss v. U.S., 122 F 2d 675 (CA-5).
[13] U.S. v. Johnson, 386 F 2d 830 (CA-3), 67-2 USTC 9750; Ayash v. U.S. 352 F 2d 1009 (CA-10), 65-2 USTC 9739; U.S. v. Gannon, 244 F 2d 841 (CA-2), 57-2 USTC 9701; but see U.S. v. Merle Long, 58-2 USTC 9621 (CA-3).
[14] Hoyer v. U.S., 223 F 2d 184 (CA-8), 55-1 USTC 9518; Morrison v. U.S., 270 F 2d 1 (CA-4). 59-2 USTC 9657.
[15] Pappas v. U.S., 216 F 2d 515 (CA-10), 54-2 USTC 9687.
[16] Morissette v. U.S., 342 U.S. 246.
[17] U.S. v. Swidler, 55-1 USTC 9319 (E.D. Pa.), aff'd 220 F 2d 351 (CA-3), 55-1 USTC 9320, cert. denied, 346 U.S. 915.
[18] Louis C. Smith v. U.S., 236 F 2d 260 (CA-8), 56-2 USTC 9830, cert. denied, 352 U.S. 909, 77 S. Ct. 148; Beard v. U.S., 222 F 2d 84 (CA-4), 55-1 USTC 9400, cert. denied, 350 U.S. 846, 76 S. Ct. 48; Olsen v. U.S., 191 F 2d 985 (CA-8), 51-2 USTC 9468; Myres v. U.S., 174 F 2d 329 (CA-6), 49-1 USTC 9275, cert. denied, 338 U.S. 849, 70 S. Ct. 91; U.S. v. Milton H. L. Schwartz, 218 F Supp. 806 (E.D. Pa.), 63-1 USTC 9382.
[19] U.S. v. Grant Foster, 309 F 2d 8 (CA-4), 62-2 USTC 9775.
[20] Haigler v. U.S., 172 F 2d 986 (CA-10), 49-1 USTC 9171.
[21] U.S. v. Phillips, 217 F 2d 435 (CA-7), 54-2 USTC 9707.
[22] Samiah v. U.S., 223 F 2d 358 (CA-9), 55-1 USTC 9499.
[23] Benetti v. U.S., 97 F 2d 263 (CA-9), 38-2 USTC 9358.
[24] Barrow v. U.S., 171 F 2d 256 (CA-5), 49-1 USTC 9112.

(31(11).31 DEFENSES OF WILFULNESS—Cont.)

his advisor of all the facts,[25] or that he sought advice from one not qualified to give it,[26] or from one who he had reason to believe was not qualified, the defense is vitiated. An attempt by the defendant to shift responsibility for a fraudulent return to the person who made out the return or kept the books can be met with proof, direct or circumstantial, that the defendant knew or should have known the return was false.[27] Such proof may take the form of testimony by bookkeepers or other office help about the defendant's knowledge of the book entries or lack of entries.

(2) *Disclosures, amended returns, and payments of tax* after the filing of fraudulent returns may have probative value in establishing the state of mind at the time of the alleged criminal acts.[28] Most courts have regarded the prompt filing of amended returns and payment of delinquent tax as admissible evidence to show lack of wilfulness.[29] However, evidence that such disclosure and delinquent payment was prompted by a fraud investigation could serve as an incriminating admission of the defendant's culpability.[30] Accordingly, intensive investigation of the circumstances attending the preparation and filing of amended returns in such instances is imperative.

(3) *Cooperation* of the taxpayer at the start of the investigation is sometimes claimed to be indicative of his innocence. The contention is that had he wilfully defrauded the revenue he would continue to conceal the truth from the investigators. This defense is rarely persuasive if the facts and circumstances attending the commission of the alleged offense create an inference of wilfulness.[31] Subsequent cooperation during the investigation may only serve to mitigate the penalty.

(4) *Lack of education and business experience* are used as defenses to criminal intent. Ignorance of internal revenue requirements and unfamiliarity with business practices may be urged as the reasons for alleged violations. Taxpayers faced with conclusive evidence of substantial amounts of unreported income will frequently claim that it resulted from mistake caused by their lowly educational background or inexperience in financial affairs. For example, a successful shoe manufacturer may claim that he is an expert shoe fabricator but that he can hardly read or write, while a prominent physician may contend that he was never good at figures and was too busy caring for the ill to keep accurate records of his earnings. These defenses may be argued to the jury, but their effect would depend, as in the case of cooperation, upon all the facts and circumstances surrounding the commission of the offense.[32]

(5) *Poor health, good character, and integrity* are also resorted to as exculpatory factors. Whether the mental and physical condition of the defendant at the time of the alleged offense was such as to deprive him of his sense of reason is one more fact to be determined by the jury. The defense is made that wilfulness cannot be present when the defendant did not know what he was doing or was so incapacitated as to be unable to attend to his financial affairs properly.[33] Closely connected with this defense is the claim that the defendant was a person of such good character and integrity he could not reasonably have intended to defraud the United States. The courts have held that the jury may consider good reputation in itself sufficient to raise a reasonable doubt of the defendant's guilt.[34]

(6) The defendant may utilize any other defense which might have a bearing on wilfulness. The validity of the contention is determined by the jury. All defenses are usually rebutted with evidence of specific acts which create an inference of intentional violation.

31(11).32 Entrapment

(1) Entrapment may be used as a defense against the allegation of wilfulness, if a Government agent induces a person to commit a crime he would not otherwise have committed. To constitute entrapment it must be shown that the agent originated and implanted the intent in the mind of the violator. If the agent merely offers the opportunity for a person to commit a crime he already intended, or if a person already engaged in the violation is simply awaiting an opportunity to continue with it, which the agent furnishes, there is no entrapment.[35]

(2) Government undercover agents or informants may present themselves to violators in disguise, as long as the disguise does not motivate an otherwise innocent person to commit a crime. It is not entrapment to use an informant or decoy to obtain evidence of the commission of a crime, even though the informant participates in the violation, so long as it is not instigated by the Government agent.[36] However, a contingent fee arrangement for an informant to produce evidence against a particular person, of a crime not yet committed, is improper unless the agent has prior certain knowledge that the person is already engaged in illegal activity, and specifically instructs the informant not to induce commission of the offense, but merely to offer opportunity to continue with it.[37]

(3) If a person offers a Government agent a bribe, which the agent has not solicited, it is not improper to set a trap to apprehend the bribe offeror.[38]

[25] U.S. v. McCormick, 67 F 2d 857 (CA-2), 3 USTC 1187; Clark v. U.S., 211 F 2d 100 (CA-8), 54-1 USTC 9291.
[26] Pottash Bros. v. Comm., 50 F 2d 317 (CA-DC 1931).
[27] Lurding v. U.S., 179 F 2d 419 (CA-6), 50-1 USTC 9159.
[28] Heindel v. U.S., 150 F 2d 493 (CA-6), 45-2 USTC 9372.
[29] Ibid; Berkovitz v. U.S., 213 F 2d 488 (CA-5), 54-1 USTC 9425; U.S. v. Stoehr, 196 F 2d 276 (CA-3), 52-1 USTC 9299.
[30] Emmich v. U.S., 298 F 5 (CA-8), cert. denied 266 U.S. 608.
[31] U.S. v. Swidler, supra (note 17).
[32] Fischer v. U.S., 212 F 2d 441 (CA-10), 54-1 USTC 9370; U.S. v. Glascott, 216 F 2d 487 (CA-7), 54-2 USTC 9652.
[33] Collins v. Comm., 7 BTA 913; Glascott, ibid.
[34] U.S. v. Wicoff, 187 F 2d 886 (CA-7, 1951).
[35] Sorrels v. U.S., 287 U.S. 435, 53 S. Ct. 210 (1932); Sherman v. U.S., 356 U.S. 369, 78 S. Ct. 819 (1958); Butts v. U.S., 273 F 35 (CA-8, 1921); Newman v. U.S., 299 F 128 (CA-4, 1924); U.S. v. De Marie, 226 F 2d 783 (CA-7), 56-2 USTC 9755, cert denied 350 U.S. 966, 76 S. Ct. 436; Kivette v. U.S., 230 F 2d 749 (CA-5, 1956); Gorin v. U.S., 313 F 2d 641 (CA-1), 63-1 USTC 9295, cert. denied, 374 U.S. 829, 83 S. Ct. 1870.
[36] U.S. v. Roett, 172 F 2d 879 (CA-8, 1949), cert. denied, 336 U.S. 960, 69 S. Ct. 859; Papadakis v. U.S., 208 F 2d 944 (CA-9), 54-1 USTC 9137; U.S. v. De Marie, supra (note 35); Kivette v. U.S., supra (note 35); U.S. v. Brandenberg, 162 F 2d 980 (CA-3, 1947).
[37] Williamson v. U.S., 311 F 2d 441 (CA-5, 1962).
[38] Lopez v. U.S., 373 U.S. 427, 83 S. Ct. 1381 (1963); U.S. v. Kabot, 295 F 2d 848 (CA-2), 61-2 USTC 9746, cert. denied, 369 U.S. 803, 82 S. Ct. 641; Todisco v. U.S., 298 F 2d 208 (CA-9), 61-2 USTC 9749, cert. denied, 368 U.S. 989, 82 S. Ct. 602.

(31(11).32 ENTRAPMENT—Cont.)

(4) When a principal claims entrapment, evidence should be obtained of his past record, including his reputation for committing similar acts, to combat his claim.

(5) A defense of entrapment is rarely raised where the alleged violation consists of filing a fraudulent return, since the violation would usually occur before an investigation has been initiated.

31(11).33 Embezzled Funds and Other Illegally Obtained Income

(1) In the past some taxpayers have successfully met allegations of understated income with the defense that it was not income because it constituted embezzled funds. The theory for nontaxability of such funds was: Absence of a claim of right to the alleged gain; and a definite unconditional obligation to repay.[39] This theory was under constant attack almost from the time that the landmark Wilcox case (note 39) was decided. Courts weakened the theory by including as taxable income, money acquired by swindling or through fraudulent representations,[40] extortion, [41] kickbacks [42] or larceny.[43] In holding the proceeds of extortion taxable, the Supreme Court said,[44] "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." Lower courts confronted with embezzlement-like situations went to great lengths to distinguish their facts from Wilcox, using the reasoning plainly stated in Rutkin (note 41): "We limit that case (Wilcox) to its facts."

(2) Finally, confronted squarely in an income tax evasion case with taxability of embezzled funds, the Supreme Court [45] on May 15, 1951, on the authority of Rutkin, reversed Wilcox, using this language: "We believe that Wilcox was wrongly decided . . . . Thus, we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it."

(3) Thus, although reversing Wilcox and making embezzled funds taxable, the James opinion (note 45) reversed the defendant's conviction, on the theory that wilfulness could not be proved because he might have relied on Wilcox in failing to include embezzled funds in gross income. The same theory has since been followed in a Court of Appeals case.[46]

[39] Wilcox v. Commissioner, 327 U.S. 404, 66 S. Ct. 546.
[40] Rollinger v. U.S., 208 F 2d 109 (CA-8).
[41] Rutkin v. U.S., 343 U.S. 130, 72 S. Ct. 571, 52-1, USTC 9260.
[42] U.S. v. Wyss, 239 F 2d 658 (CA-7); Berra v. U.S., 221 F 2d 590 (CA-8).
[43] U.S. v. Iozia, 104 F. supp. 846 (S.D., N.Y.).
[44] Rutkin v. U.S., supra (note 41).
[45] James v. U.S., 366 U.S. 213, 81 S. Ct. 1052.
[46] Beck v. U.S., 298 F 2d 622 (CA-9), 62-1 USTC 9227.

320 METHODS OF PROVING INCOME

321 Introduction

(1) In order to establish a criminal offense under IRC 7201, the special agent must develop evidence to prove a substantial amount of additional tax due and a wilful attempt to evade it. To prove the first element of his offense, it is necessary to establish that the correct taxable income is in excess of that reported.

(2) Taxable income may be established by the direct or indirect approach. The former consists of the specific item method which involves proof of transactions (sales, expenses, etc.) affecting taxable income. The latter approach relies upon circumstantial proof of income by use of such methods as net worth, expenditures, and bank deposits. Usually, taxable income can be established with less difficulty by the direct approach and for this reason it should be used whenever possible.

(3) Taxpayers, almost without exception, report their income by the specific items or specific transactions method; that is, the computations which are reflected in their income tax returns are based upon the sum total of the transactions they engaged in during the taxable period. Most taxpayers maintain books and records in which these various transactions are recorded as they occur. In a specific transactions case, the Government endeavors to prove that the transactions in which the taxpayer engaged during the year were not completely or accurately reflected in his income tax return, with the result that his income tax liability was understated, and that such result was wilful.

(4) In numerous cases the courts have approved the use of the following indirect methods of determining income: Net worth; [1] expenditures; [2] and bank deposits.[3] Although these methods are considered circumstantial proof of taxable income, the courts have approved them for use in determining taxable income for criminal prosecution on the theory that proof of unexpended funds or property in the hands of a taxpayer may establish a prima facie understatment of income requiring a taxpayer to overcome the logical inference drawn from the provable facts. In one income tax case, [4] the Government employed all three methods—net worth, expenditures, and bank deposits—to show corrected income. With respect to the establishment of a prima facie case by such evidence, the Court stated:

> "In these (and other similar) cases, the Courts have been careful to point out that findings of fraud have been sustained if, but only if, the taxpayer has offered no explanation, or no adequate explanation, of the discrepancies between (on the one hand) expenditures and/or bank deposits and/or increases in net worth and (on the other hand) the amount of income reported by the taxpayer."

Sec. 321
[1] Holland v. U.S., 348 U.S. 121, 75 S. Ct. 127, 54-2 USTC 9714; Friedberg v. U.S., 348 U.S. 142, 75 S. Ct. 138, 54-2 USTC 9718; Daniel Smith v. U.S., 348 U.S. 147, 75 S. Ct. 194, 54-2 USTC 9715; U.S. v. Calderon, 348 U.S. 160, 75 S. Ct. 186, 54-2 USTC 9712.
[2] U.S. v. William R. Johnson, 319 U.S. 503, 63 S. Ct. 1233, 43-1 USTC 9470.
[3] Gleckman v. U.S., 80 F 2d 394 (CA-8), 35-2 USTC 9645, cert. denied 297 U.S. 709, 56 S. Ct. 501.
[4] Jelaza v. U.S., 179 F 2d 202 (CA-4), 50-1 USTC 9149.

(321 INTRODUCTION—Cont.)

(5) Another indirect method of proof is percentage mark-up.[5] This method is sometimes used to corroborate other methods used in criminal cases and has been used as the method of proof in civil cases.

322 Distinguishing Between Accounting Systems, Accounting Methods, and Methods of Proving Income

(1) For many years there has been much confusion regarding the synonymous use of the terms "accounting system," "accounting methods," and "methods of proving or determining income." It is not unusual to hear reference made to the net worth and expenditures method as a method of accounting when in fact it is a method of proving income by circumstantial or indirect evidence.[1]

(2) There are two *basic* accounting *systems*, the *single* entry and the *double* entry system, but there are *various methods of accounting*, such as cash, accrual, hybrid, installment, and long-term or completed contract methods. The usual *methods of determining or proving income* are specific items, net worth, expenditures, bank deposits, and percentage methods.

(3) Taxable income must be computed, for purposes of criminal prosecution, under the accounting method by which the taxpayer regularly computes his income.[2] The reason for this is given in the Morrison case (note 2):

> "In this criminal proceeding it was necessary to establish not only that the tax liabilities here were understated, but that the understatement was attributable, at least in part, to the fact that the taxpayer's returns were not honestly prepared. Proof of the latter fact could only be accomplished by adopting and consistently applying the taxpayer's own method of accounting."

(4) If no method of accounting has been regularly employed or if the method employed does not clearly reflect income, the computation shall be made in accordance with such method as, in the opinion of the Commissioner, does clearly reflect income.[3]

323 Specific Item Method of Proving Income

323.1 GENERAL

(1) In a specific item case, the Government tries to prove that the specific transactions in which the taxpayer engaged during the year were not completely or accurately reflected in his income tax return, with the result that his income tax liability was understated, and that such understatement was wilfully made. This method offers the most direct method of proving unreported income. It is easier than other methods to present in court and is readily understood by jurors.

[5] Omelian 12 TCM 806, CCH Dec. 19, 581 (M).

Sec. 322
[1] Holland v. U.S., supra (section 321, note 1).
[2] Morrison v. U.S., 279 F 2d 1 (CA-4), 59-2 USTC 9457.
[3] 26 USC 446.

(2) Omitted income, fictitious deductions, false exemptions, or false tax credits in their broadest concept are the means whereby taxes may be evaded.

(3) Omitted income results from failure to report any of the numerous items of taxable income expressed and implied in the Internal Revenue Code. In the examination of merchant taxpayers the item of omitted income most frequently encountered is sales revenue and, in the case of individuals, salaries, dividends, commissions, gains from the sale of property, and fees. Omission of the last-named item is most prevalent with respect to professional men.

(4) Usually a deduction which is considered fraudulent takes the guise of a fictitious purchase of merchandise or a fictitious expense. However, it could be any fictitious deduction or exemption fraudulently claimed as allowable under the authority of the Internal Revenue Code.

323.2 TAX EVASION SCHEMES

323.21 Introduction

Tax evasion schemes usually fall in one or more of six categories. Some of the more common variations are listed below.

323.22 Unreported Income

(1) No income reported.

(2) Particular sources or types of income (often of illegal origin) not reported.

323.27 Other Evasion Schemes

False statement of assets or liabilities on an offer in compromise, return, or other document submitted to the Service with an intent to mislead or deceive.

324 Net Worth Method of Proving Income

324.1 INTRODUCTION

Next to the specific item method, the net worth method is probably the most frequently used way of proving taxable income in civil and criminal income tax cases. There

(324.1 INTRODUCTION—Cont.)

is nothing complex in the theory of the method. It involves a determination of the taxpayer's net worth (assets less liabilities) at the beginning and end of a taxable year, computing the increase or decrease in net worth, and then adusting this amount for nondeductible and nontaxable items. The amount resulting from application of this theory is taxable income. By comparing it with income reported, the special agent may determine whether taxable income has been correctly reported.

324.2 AUTHORITY FOR NET WORTH METHOD

There is no statutory provision defining the net worth method and specifically authorizing its use by the Commissioner. However, in numerous cases courts have approved the use of this method. Perhaps the leading case in this respect is Holland v. United States[1] handed down in 1954 by the Supreme Court along with three companion cases,[2] wherein is outlined the broad principles governing the trial and review of cases based on the net worth method of proving income. With reference to the use of the net worth technique, the court stated that:

> "To protect the revenue from those who do not 'render true accounts,' the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflect his financial history."

324.3 WHEN AND HOW NET WORTH METHOD USED

(1) The net worth method is most often used when one or more of the following conditions prevail:

(a) Taxpayer maintains no books and records.

(b) Taxpayer's books and records are not available.

(c) Taxpayer's books and records are inadequate.[3]

(d) Taxpayer withholds books and records on constitutional grounds.

(2) The fact that the taxpayer's books and records accurately reflect the figures on his return does not prevent the use of the net worth theory of proof. The Government can look beyond the "self serving declarations" in the taxpayer's books and records and use any evidence available to contravene their accuracy.[4]

(3) In addition to being used as a primary method of proving taxable income in civil and criminal income tax cases, it has been relied upon:

(a) To corroborate other methods of proving income.[5]

(b) To test-check accuracy of reported taxable income.

324.4 ESTABLISHING THE STARTING POINT

(1) In the Holland case[6] the Supreme Court said that an essential condition in a net worth determination of income is the establishment, "with reasonable certainty," of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's net worth. The wisdom of this statement is apparent since an inaccurate beginning net worth will affect the accuracy of the determination of income subsequent to the base point. For instance, if a taxpayer's beginning net worth is understated, taxable income for the period under consideration will be overstated.

(2) Proof of visible assets and liabilities comprising beginning net worth is usually easily established by such means as bank records; county real estate records; brokerage records; Bureau of Public Debt records; Federal and State income, inheritance, and gift tax returns and records; and books and records of the taxpayer. The item difficult to prove is cash on hand, which is usually claimed by defendants in sufficient amount to account for part or all of the deficiency in taxable income. To establish a firm starting point, it is necessary to show that the defendant had no large sum of cash for which he was not given credit. This is usually done by offering evidence which negates the existence of a cash hoard, for example:

(a) Written or oral admissions of the taxpayer to the investigating officers concerning his net worth.[7] Examples are: Signed net worth statement, oral statement as to cash on hand.

(b) Failure by defendant to file returns for years prior to indictment period.[8]

(c) Returns filed by the taxpayer for years prior to prosecution years reflecting income reported[9] that is inconsistent with existence of a cash hoard. This would also apply to copies retained by the taxpayer.

(d) Low earnings for years prior to prosecution years as shown by records of the Social Security Administration and former employers.

(e) Net worth as established by books and records of the taxpayer.[10]

(f) Certificate of Assessments and Payments showing tax assessed for years prior to the prosecution period.[11] With this information and tables showing tax rates and the amount allowed for exemptions and dependents, it *may* be possible to calculate income reported by a taxpayer for the years in question. The certificate will not show amount of withholding, capital gains or nontaxable income.

(g) Financial statement presented for credit or other purposes at a time prior to or during the prosecution period.[12] Banks, loan companies, bonding companies, and Internal Revenue Service (offers in compromise) are some

[1] Holland v. U.S., supra (subsection 321, note 1).
[2] Smith v. U.S., supra (subsection 321, note 1), Friedberg v. U.S., supra (subsection 321, note 1), U.S. v. Calderon, supra (subsection 321, note 1).
[3] Holland v. U.S. supra (subsection 321, note 1).
[4] Holland v. U.S., supra (subsection 321, note 1).
[5] Eggleton v. U.S., 227 F 2d 493 (CA-6) 56-1 USTC 9108, cert. denied 863, U.S. 826, 77 S. Ct. 38, Corroboration of specific item case.
[6] Holland v. U.S., supra (subsection 321, note 1).
[7] U.S. v. Calderon, supra (subsection 321, note 1). During investigation respondent made an oral admission as to amount ($500) of cash on hand at the starting point. He also signed a written statement containing the overall net worth computation, including the $500, relied upon by the Government at the trial.
[8] Smith v. U.S., supra (subsection 321, note 1).
[9] Ibid.
[10] U.S. v. Chapman, 168 F 2d 997 (CA-7), 48-1 USTC 9312, cert. denied 335 U.S. 853, 69 S. Ct. 82.
[11] Vloutis v. U.S., 219 F 2d 782 (CA-5), 55-1 USTC 9262.
[12] Friedberg v. U.S., supra (subsection 321, note 1).

(324.4 ESTABLISHING THE STARTING POINT—Cont.)

of the better sources from which to obtain this type of document.

(h) Bankruptcy prior to prosecution periods.[13]

(i) Prior indebtedness, compromise of overdue debts, avoidance of bankruptcy.[14]

(j) Installment buying.[15]

(k) History of prior low earnings and expenditures, and checks returned for insufficient funds.[16] (A financial history covering members of the taxpayer's family may also be helpful.)

(l) Loss of furniture and business because of financial reasons.[17]

324.5 TAXABLE SOURCE OF INCOME

(1) In order for income to be taxable, it must come from a taxable source.[18] In the Holland case [19] The Supreme Court said: "Increase in net worth, standing alone, can not be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient. . . ."

(2) On the basis of the Holland decision, it appeared to many that proof of a likely source was necessary in every net worth case. This was clarified by the Massei case [20] in which the Supreme Court said: "In Holland we held that proof of a likely source was 'sufficient' to convict in a net worth case where the Government did not negative all the possible non-taxable sources of the alleged net worth increases. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of non-taxable income be negatived, there would be no necessity for proof of a likely source."

(3) In view of the two decisions cited above, it appears that the Government must either prove a likely source of taxable income, or negate all nontaxable sources of income. In cases where the Government resorts to the latter type of proof, it is even more important than otherwise to establish a firm starting point, particularly with reference to cash on hand. Any doubt concerning the starting cash would create a doubt as to the years in which the omission occurred and the jury might conclude that the omission of income took place in some prior year rather than during the years under indictment.

(4) Proof of a likely taxable source of income has been found sufficient in a number of criminal income tax cases by:

(a) Showing that defendant did not report certain income on his tax returns.[21]

(b) Showing that defendant did not report certain income for years prior to indictment period.[22]

(c) Comparison of business operations and profits of defendant for indictment years with profits or prior operations for a comparable period. In the Holland case [23] the Supreme Court pointed out that the business of the defendant, a hotel, apparently increased during the years in question, whereas the reported profits fell to approximately one quarter of the amount declared by the previous management in a comparable period.

(d) Effectively contradicting defendant's assertions as to nontaxable sources. *In United States* v. *Adonis*,[24] the salaried defendant had asserted in a prior unrelated judicial proceeding that the $44,000 he used to purchase a house had come from loans and gifts. The Government proved that the alleged donor was supported by her family, that the supposed creditors were dummies or of such financial condition as to imply that they had no available assets to loan. The court considered the conduct of the defendant "an effort to conceal . . . the real sources of taxable gain."

(e) Opportunities of defendant to receive graft. In *United States v. Bryan Ford*,[25] the taxpayer was a policeman and a member of the vice squad. The Court held that evidence admitted to show opportunity to receive graft, not the actual receipt of graft, was sufficient to show a possible source of income. (The Supreme Court remanded the case to the District Court to vacate judgment and dismiss the indictment on account of the death of the taxpayer.) However, in *Fred M. Ford* v. *United States*,[26] the court said: "The evidence sufficiently disclosed that in the defendant's office of Chief of Police, he had opportunities of receiving income from graft, payoffs or other illegal sources. There can, of course, be no presumption that the defendant was guilty of such gross misconduct as to be the recipient of such ill gotten gains. The presumption is to the contrary . . . the testimony of this woman as to payoffs with which the defendant was not shown to be connected was both erroneous and highly prejudical." Upon retrial,[27] a conviction was sustained after the same witness testified that the defendant had acknowledged the receipt of graft payments.

(f) The character of the business has the capacity to produce income in amounts determined by the net worth method.[28]

(5) A likely source is established in most net worth cases by showing that the source reported by the taxpayer had the potentiality of producing income substantially in excess of that reported.

[13] U.S. v. Vassallo, 321 F 2d 1006 (CA-3), 50-1 USTC 9320.
[14] Holland v. U.S., supra (subsection 322, note 1).
[15] Barcott v. U.S., 189 F 2d 929 (CA-9), 48-2 USTC 9377, cert. denied 336 U.S. 912, 69 S. Ct. 602.
[16] McFee v. U.S., 205 F 2d 872 (CA-3), 53-2 USTC 9549.
[17] Holland v. U.S., supra (subsection 321, note 1).
[18] Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 75 S. Ct. 473, 55-1 USTC 9308. The term "taxable source" is used to mean all those sources which are not expressly exempted by the Internal Revenue Code.
[19] Holland v. U.S., supra (subsection 321, note 1).
[20] U.S. v. Massei, 355 U.S. 595, 78 S. Ct. 495, 58-1 USTC 9326.
[21] U.S. v. Chapman, supra (note 10). The income omitted was from over-ceiling payments for meat.
[22] U.S. v. Skidmore, 128 F 2d 604 (CA-7), 41-2 USTC 9716, cert. denied 315 U.S. 800, 62 S. Ct. 626.
[23] Holland v. U.S., supra (subsection 321, note 1).
[24] U.S. v. Adonis, 221 F 2d 717 (CA-3), 55-1 USTC 9310.
[25] 237 F 2d 57 (CA-2), 56-2 USTC 9828.
[26] 216 F 2d 313 (CA-5), 54-1 USTC 9288.
[27] 233 F 2d 56 (CA-5), 56-1 USTC 9478, cert. denied 352 U.S. 833, 77 S. Ct. 49.
[28] Costello v. U.S., 321 F 2d 668 (CA-2), 55-1 USTC 9342. The court noted that "gambling is an occupation with indeterminate possibilities."

(324.5 TAXABLE SOURCE OF INCOME—Cont.)

(6) Negating nontaxable sources of income may be accomplished by providing nonreceipt of loans, gifts, and inheritances by taxpayer's admissions, Federal gift tax returns filed by alleged donor, or probate records of deceased relatives' estates. If the taxpayer advances a specific explanation of the sources of funds expended, the Government does not have to pursue possible nontaxable sources when the one given is proven false.[29]

324.6 CORROBORATION OF EXTRA-JUDICIAL ADMISSIONS

(1) During the course of many income tax investigations involving the net worth method of proof, the taxpayer will make admissions which the Government will use in evidence against him during trial of the case. Admissions may relate to all facets of a case, although in many instances they pertain to the starting point, items of living expenses, source of income, and wilfulness.

(2) Admissions after the commission of the crime must be corroborated. if they embrace an element vital to the Government case.[30]

(3) The degree and types of corroboration, along with other aspects of the subject of admissions, are discussed in 245.

324.7 INVESTIGATION OF LEADS

When a taxpayer offers leads or information during a net worth investigation which, if true, would establish his innocence, the special agent must investigate the leads if they are reasonably susceptible of being checked.[31] This also applies if a taxpayer offers leads or information after completion of an investigation, but within a sufficient time before trial.[32] If the Government fails during the trial of the case to show an investigation into the validity of the data furnished, the trial judge may consider the information as true and the Government's case insufficient to go to the jury.[33] Most leads refer to cash hoards, gifts, inheritances, and loans. These are well known to the special agent and should be checked during the normal routine of his investigation. The courts have held that the Government does not have to investigate leads which are not within the category of reasonable verification.[34] This is a question of judgment and in the final analysis, is always a matter for the court to determine.

324.8 SUMMARIES PREPARED BY GOVERNMENT AGENTS

(1) During a trial of an income tax case involving use of the net worth method of proving taxable income there may be admitted in evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking these exhibits are not evidence, but are admitted as summaries of other evidence in the case only for the assistance and convenience of the jury in considering the evidence which they purport to summarize. The admissibility and use of summaries are discussed in 253.

(2) The summary which the special agent should become most familiar with is the one showing the computation of taxable income, an example of which is set forth in Exhibit 300–1.

(3) During trials the net worth computation also has been shown by other means, such as blackboards and charts.

(4) Perhaps the most difficult phase of preparing a net worth statement or summary for use in a criminal case is in making adjustments to the net worth increases and decreases for the nondeductible and nontaxable items. The most frequently encountered adjustments involving individual taxpayers and the way of handling them are as follows:

(a) Add to net worth increases or decreases:

1 Personal living expenses. (See 324.8(5)(b).)
2 Federal income tax payments.
3 Nondeductible portion of capital loss.
4 Losses on sale of personal assets.
5 Gifts (made).
6 Life insurance premiums.

(b) Deduct from networth increases or decreases:

1 50% of the excess of net long-term capital again over net short-term capital loss.[35]
2 Gifts (received).
3 Inheritances.
4 Nontaxable pensions.
5 Veteran's benefits.
6 Dividend exclusions.
7 Tax exempt interest.
8 Proceeds from life insurance.
9 Errors in taxpayer's records (in his favor).[36]
10 Gains on sale of personal residence (assuming funds are to be invested within the statutory period).
11 Net operating loss carryback and carry-forward. In criminal income tax cases there is judicial authority to ignore net operating loss carrybacks. (See 313.2:(1) and (2).)
12 *Allowed* capital loss carry-over (note 35).
13 50% of net long-term capital gain when there is both a net long-term capital gain and a net short-term capital gain (note 35).
14 Income tax refunds.

(c) No adjustment necessary to net worth increase or decrease for:

[29] Feichtmeir v. U.S., 389 F 2d 498 (CA-9), 68-1 USTC 9217; U.S. v. Holovachka, 314 F 22d 345 (CA-7), 63-1 USTC 9291, cert. denied 374. U.S. 809.
[30] Daniel Smith v. U.S., supra (subsection 321, note 1).
[31] Holland v. U.S., supra (subsection 321, note 1); Condor Merritt v. U.S., 3 F 2d 820 (CA-5), 64-1 USTC 9226, rehearing den., 329 F. 2d 757, 64-1 USTC 933.
[32] U.S. v. Vardine, 305 F 2d 60 (CA-2), 62-2 USTC 9624.
[33] Holland v. Holland., supra (subsection 321, note 1).
[34] Mighell v. U.S., 233 F 2d 731 (CA-10), 56-2 USTC 9630, cert. denied 352 U.S. 832, 77 S. Ct. 47; Louis Smith v. U.S., 236 F 2d 260 (CA-8), 56-2 USTC 9830, cert. denied 352 U.S. 909, 77 S. Ct. 148; U.S. v. Bryan Ford, supra (note 25).
[35] If a capital loss carryover is involved, the amount allowed in determining capital gain or loss must be deducted in the net worth computation.
[36] This adjustment relates to honest mathematical and bookkeeping errors found in books and record of the taxpayer which tend to account for part of understated income.

(324.8 SUMMARIES PREPARED BY GOVERNMENT AGENTS—Cont.)

1 Net short-term capital gain (note 35).

2 Deductible portion of net short-term capital loss (note 34).

3 Deductible portion of net long-term capital loss.

4 Excess of net short-term capital gain over net long-term capital loss (note 34).

(5) The net worth statement may reflect taxable income by whichever method of accounting (cash, accrual, etc.) is appropriate. Reflecting a certain accounting method in the net worth computation is accomplished by including certain accounts in the net worth statement and omitting others. For instance, where it is desired to compute income of a physician on the cash basis, his patient accounts receivable and business accounts payable at the beginning and end of each year would be omitted. If the accrual method were used, these accounts would be included in the net worth computation.

(6) In preparing a net worth statement or summary for use in a criminal case, the special agent should see that:

(a) It follows the taxpayer's method of accounting. In Scanlon v. United States,[37] the defendant, who reported his income on the cash basis, contended that the Government's proof of net worth did not include the liabilities of his enterprise. The appeals court held that it was proper to exclude accounts payable (and accounts receivable) since to include them would not accurately reflect defendant's income.

(b) The cost of assets and actual amounts of liabilities are used. The value (such as market, reproduction, and the like) of these two items is not considered. Normally, unless the taxpayer agrees to an estimate, estimated nondeductible expenditures are eliminated from the net worth computation, although in some cases it has appeared proper to include some minimum estimated living expense figures.

(c) Good accounting principles are followed. For example, bank balances should be adjusted for outstanding checks and cash in transit.

(d) Technical adjustments that increase income have been eliminated (for example, unintentional errors or omissions relating to capitalized expenses, depreciation, revaluation of the basis of property, and changing inventory basis; or doubtful items such as unidentifiable commingled funds).

324.9 COMMON DEFENSES IN NET WORTH CASES

(1) *Lack of Wilfulness.*—Defense counsel usually contends that there is no evidence of wilfulness. This contention may be overcome by evidence outlined in 31(11).

(2) *Cash on hand.*

(a) To support this allegation, the taxpayer usually alleges that he had a large amount of cash on hand which the Government has not considered in his beginning net worth. He also may allege that cash balances are wrong for years subsequent to the base point. In all cases where the net worth method is the primary method of proving income, the special agent should anticipate this defense and attempt to get evidence to negate it. Admissions of the taxpayer are most effective to pin down the cash asset, and, if possible, should be obtained at the initial interview or early in the investigation. The line of interrogation should be directed toward developing:

1 The amount of cash on hand (undeposited currency and coin) at the starting point and at the end of each prosecution year.

2 The amount of cash on hand at the date of the interview. (This data is sometimes useful in computing cash on hand for earlier years.)

3 The source of cash referred to in 1 and 2 above.

4 Where the cash was kept.

5 Who knew about the cash.

6 Whether anyone ever counted it.

7 When and on what was any cash spent.

8 Whether any record is available with respect to the alleged cash on hand.

9 The denominations of the cash on hand.

(b) In most cases the spouse should also be questioned about cash on hand as well as other matters. In order to avoid any misunderstanding by the taxpayer, it is suggested that the meaning of cash on hand be explained to him prior to discussing the matter. The taxpayer (and spouse) also should be questioned regarding his financial history from the time he was first gainfully employed—whom he worked for, his salary, etc. This information will serve in many cases to check the accuracy of the taxpayer's statements about cash on hand.

(c) In addition to admissions, such evidence as is used to establish the starting point will most often be sufficient to refute the defense of cash on hand.

(3) *Failure to Adjust for Nontaxable Income*—The usual sources of nontaxable income claimed by the taxpayer are gifts, loans, and inheritances. Negating evidence of the type described in 324.5 will most often be sufficient to prove the falsity of his claims.

(4) *Inventories Overstated*—In some net worth cases the Government has relied upon inventory figures shown by the taxpayer's returns as prima facie evidence to establish the values of this asset in the net worth computation. In some of those cases it was alleged that the taxpayer, either through ignorance or for other reasons, reported his inventory at retail value instead of at cost or some other value. (In a net worth computation where the inventory used exceeds cost and is larger at the end of the prosecution period than the beginning, income will be overstated.) To thwart this defense, the investigating officers should try to corroborate the inventory figures shown on the taxpayer's returns by admissions of the taxpayer, statements of his

[37] 213 F 2d 382 (CA-1), 55-1 USTC 9508; see Leeby v. U.S., 192 F 2d 321 (CA-8), 51-2 USTC 9497, for a cash basis taxpayer where bills receivable and payable were excluded from the net worth statement; and Stratch v. U.S., 213 F 2d 805 (CA-6), 54-1 USTC 9416, for same treatment of inventory. But see Dawley v. U.S., 186 F 2' 978 (CA-4), 51-1 USTC 9165, where the Government used a method different from the one defendant was properly using and conviction was affirmed because exact amounts are not necessary.

(324.9 COMMON DEFENSES IN NET WORTH CASES —Cont.)

employees who took the inventory, copies of inventory records, etc.

(5) *Holding Funds or Other Assets as Nominee*—In certain cases the taxpayer has falsely claimed that he was holding, as nominee of some individual, funds or other assets which the Government had included in the net worth computation of his income. Interrogating the taxpayer about this matter in the early stages of the investigation before he has thought of this defense is one suggested solution.

(6) *Net Operating Loss Carry-forward*—This defense is usually predicated on a net worth computation of taxable income made by the taxpayer's accountant for years prior to the starting point which will show an operating loss. Defense strategy is to carry the loss forward to the prosecution years and reduce the alleged tax deficiency as much as possible. The key to combating this defense is to make a net worth determination of income for several years prior to the prosecution period and then on the basis of this computation either:

(a) Allow the carry-forward loss or

(b) Show the incorrectness of the accountants' determination.

(7) *False Loans*—The objective of this defense is to reduce taxable income by claiming nonexistent loans, usually from friends or relatives of the taxpayer. Often this defense may be overcome by showing that the alleged lender was financially unable to lend the amount claimed. In any case the matter of loans should always be covered during the initial interview with the taxpayer.

(8) *Jointly Held Assets of the Taxpayer and Spouse*—In some cases the taxpayer and spouse may report income on separate returns, but assets they acquired are held in joint title. If the jointly held assets are included in the net worth computation, the claim may be made that they were acquired with income of the spouse. Usually this defense can be overcome by tracing the invested funds to the taxpayer and by showing the disposition of the spouse's income. Cases may be encountered where funds of the taxpayer and spouse are so intermingled that it is not possible to trace the invested or applied funds to either party. In such cases the net worth computation may be made by including assets, liabilities, and other pertinent items of both and deducting the taxable income of the spouse to arrive at the taxable income of the one to be charged.

325 Expenditures Method of Proving Income

325.1 INTRODUCTION

(1) The expenditures method is, in theory, closely related to, if not identical with, the net worth method of proving income. The method is based on the theory that if the taxpayer's expenditures during a given year exceed his reported income, and the source of such expenditures is unexplained, it may be inferred that such expenditures represent unreported income. One court noted the similarity of the net worth and the expenditures methods by the following statement:

> ". . . The two computations are merely accounting variations of the same basic method, the expenditure theory being an outgrowth of the net worth method. . . ."[1]

(2) The similarity is further indicated by the fact that the same items or accounts used in determining taxable income by the net worth method are also considered when the expenditures method is employed.

325.2 AUTHORITY FOR USING EXPENDITURES METHOD

Like the net worth method, there is no statutory provision expressly authorizing use of the expenditures method by the Commissioner. There are, however, many cases in which the courts have approved the use of this method.[2]

325.3 WHEN AND HOW EXPENDITURES METHOD USED

(1) The statements made in discussing the net worth method with regard to when and how that method is used are equally applicable to the expenditures method. In cases where the taxpayer has several assets (and liabilities) whose cost bases remain the same throughout the prosecution period, the expenditures method may be preferred over the net worth method because a more laconic presentation can be made of the computation of taxable income. This is true because assets and liabilities which do not change during the prosecution period may be omitted from the expenditures statement. The expenditures method probably is used most often in cases where the taxpayer spends his income on lavish living and has little, if any, net worth.

(2) In an expenditures case it is always desirable and usually necessary to prepare a complete net worth statement which may be required to rebut a defense that the funds used came from the conversion of some asset not considered in the expenditures computation. With rare exceptions, the Department of Justice prefers the net worth method. Therefore in submitting an expenditures case the special agent should consider the desirability of also including in his report proof of taxable income by the net worth method. If both methods are shown, the trial attorney can make the final decision and present the case by the method he prefers.

325.4 ESTABLISHING THE STARTING POINT

In employing either the expenditures method or the net worth method, the Government must determine with reasonable certainty the taxpayer's beginning net worth.[3] The approach to this matter is the same irrespective of which method is used. For additional information see Subsection

[1] McFee v. U.S., supra (subsection 324, note 16).
[2] U.S. v. Wm. R. Johnson, supra (subsection 321, note 2). This is the leading expenditures method case.
[3] McFee v. U.S. supra (Subsection 324, note 16).

(325.4 ESTABLISHING THE STARTING POINT—Cont.)

324.4, which relates to establishing the starting point in net worth cases.

325.5 TAXABLE SOURCE OF INCOME—CORROBORATION OF EXTRA-JUDICIAL ADMISSIONS—INVESTIGATION OF LEADS

Subsections 324.5, 324.6, and 324.7 relating to net worth are applicable to these three topics.

325.6 EXPENDITURES SUMMARIES PREPARED BY GOVERNMENT AGENTS

(1) Exhibit 300-2 is an expenditures statement which may be used to summarize the evidence relating to the computation of taxable income.

(2) An approach which has been found helpful in the preparation of an expenditures statement is as follows:

(a) First, prepare a net worth statement.

(b) Next, determine the amount of increase or decrease in each asset and liability appearing on the net worth statement in each taxable year. For instance, if the beginning and ending bank balances for a taxable year were $4,500 and $150, respectively, it would be determined that this asset has decreased by $4,350. The amounts so determined and the amounts appearing as adjustments to net worth increases or decreases are then posted to the expenditures statement.

(3) For guidance in posting to the appropriate section of the aforementioned statement, the following information is offered:

(a) Money spent or applied on nondeductible items:

1 Increase in assets.

2 Decrease in liabilities.

3 Nondeductible items (living expenses, income tax payments, and the like).

(b) Nontaxable sources:

1 Decrease in assets.

2 Increase in liabilities.

3 Nontaxable items (gifts, inheritances, and the like received by taxpayer).

325.7 DEFENSES IN EXPENDITURES METHOD CASES

Defenses discussed in Subsection 324.9 regarding the net worth method of determining income are equally applicable to the expenditures method.

326 Bank Deposits Method of Proving Income

326.1 FORMULA FOR BANK DEPOSITS METHOD

326.11 Introduction

The bank deposits method is another means of proving income by indirect or circumstantial evidence. By this method, taxable income is proved through analysis of deposits in all bank accounts; canceled checks, if available; and currency transactions of the taxpayer. Very often it will be found that the taxpayer has made cash payments from currency receipts not deposited. Such cash receipts or cash expenditures must be taken into account in computing additional gross income. If the taxpayer reported his income on the accrual basis, adjustments should be made in the bank deposits method to reflect accrued income and expenses. The usual formula for determining taxable income by the bank deposits method of a taxpayer, whose only source of income is from a business operation, is as follows:

Line No.	
1. Total deposits	$_____
2. Add: Payments made in cash	$_____
3. Subtotal	$_____
4. Less: Nonincome deposits and items	$_____
5. Total receipts	$_____
6. Less: Business expense and costs	$_____
7. Net income from business	$_____
8. Less: Deductions and exemptions	$_____
9. Taxable income	$_____

326.12 Total Deposits

(1) Total deposits of a taxpayer (line 1, formula, Subsection 326.11) consist of not only amounts deposited to all bank accounts maintained or controlled by him, but also deposits made to accounts in savings and loan companies, investment trusts, brokerage houses, etc. Since some taxpayers have bank accounts in fictitious names or under special titles such as "Special Account No. 1," "Trustee Account," "Trading Account," etc., the special agent should inquire about this during his investigation. If a taxpayer lists checks on a deposit and deducts therefrom an amount to be paid to him in cash, only the net amount of the deposit should be used in computing total deposits.

(2) The deposits involved in the Gleckman case,[1] one of the leading bank deposits cases, were for the most part derived from wholly unidentified source. The usual case is one in which a number of specific omitted sales are traced to the bank accounts, but other deposits remain unidentified. The fact that some suppressed sales are traced to the bank accounts obviously strengthens the Government's case immeasurably and lends credence to the allegation that the unidentified deposits also represent omitted income.

326.13 Payments Made in Cash

All provable payments made in cash (line 2, formula, Subsection 326.11), including business expenses, personal expenses, investments, etc., should be added to total bank deposits. Since adjustments will be made in the section below for nonincome deposits and items, it is immaterial whether the cash used was derived from a taxable or nontaxable source.

[1] Sec. 326 Gleckman v. U.S., supra (subsection 321, note 3).

326.14 Nonincome Deposits and Items

Generally all nontaxable income received by a taxpayer will be deducted as a nonincome deposit or item in the bank deposit computation. Examples of nonincome deposits and items are proceeds of loans, redeposits, gifts, and inheritances. (For other examples see Exhibits 300-3 and 500-5.) Failure to eliminate any nonincome deposit or item would result in an overstatement of income and might be fatal to a criminal case.

326.15 Business Expenses and Costs

(1) All business expenses and costs which are found to be deductible must be allowed, whether paid by check or in cash (line 6, formula, Subsection 326.11). Where an analysis of the checks or other evidence of the disbursements leaves some doubt about the deductibility of some of the disbursements, it is preferable for the prosecution case to allow all except those items definitely provable as being nondeductible, such as personal expenses, investments, and gifts. Whether or not canceled checks are available for analysis and classification, every effort should be made to arrive at all items constituting allowable expense that might have been paid from the bank accounts, or from undeposited cash. The allowable depreciation on all known depreciable assets must be deducted as in any other type of case.

(2) Frequently it will be realized that the taxpayer must have paid out funds for expenses obviously incurred, but for which no checks or evidences of specific cash disbursements have been found. In such instances the amount claimed therefor by the taxpayer (or if not claimed, a reasonable amount) should be allowed, in line 6 (formula, Subsection 326.11), and a corresponding amount of additional income should be set up in line 2.

326.16 Deductions and Exemptions

All allowable personal deductions, itemized or standard, and exemptions (line 8, formula, Subsection 326.11) must be deducted from net business income in order to arrive at taxable income.

326.2 USE OF BANK DEPOSITS METHOD

Bank deposits have been a factor in the determination of the additional taxable income involved in many criminal tax cases and may be used if no books or records of the taxpayer are available; if the taxpayer invokes constitutional privilege and will not allow an examination of his books and records: if his records are not complete and do not adequately reflect his correct taxable income; or if the taxpayer uses the bank deposits method in preparing his tax return. However, the courts have held that there is no necessity to disprove the accuracy of the taxpayer's books and records as a prerequisite to the use of the bank deposits method.[2]

[2] Boatwick v. U.S., 215 F 2d 790 (CA-5), 55-1 USTC 9170; Canton v. U.S., 226 F 2d 312 (CA-6), 55-2 USTC 9705, cert. denied 350 U.S. 945, 76 S. Ct. 432.

326.3 AUTHORITY FOR BANK DEPOSITS METHOD

There is no statutory provision defining the bank deposits method of proving income and specifically authorizing its use by the Commissioner. As previously noted, there are numerous reported criminal cases[3] in which bank deposits have been a factor in the determination of the additional taxable income involved.

326.4 PROOF OF TAXABLE INCOME IN BANK DEPOSITS CASE

(1) The bank deposits theory assumes that under certain circumstances proof of deposits is substantial evidence of taxable receipts. The circumstances are the existence of a business or calling of a lucrative nature and proof that during the prosecution years the taxpayer made periodic deposits to accounts in his own name or accounts over which he exercised dominion and control. The Government must establish that the deposits reflect *income* which is *current*. This may be accomplished by showing that the taxpayer was engaged in an income-producing business, that he made periodic deposits to his bank account, that the deposits have been analyzed to eliminate nonincome items such as loans or gifts, and income items which may be duplications of amounts actually accounted for and reported or, amounts which have been earned in prior years. The analysis may indicate that certain withdrawals from the bank account represent business expenditures. If these were not claimed by the taxpayer as deductions, they will nevertheless be allowed for prosecution purposes.

(2) In Gleckman v. U.S.,[4] the Government proved that in each of the indictment years, 1929 and 1930, the taxpayer had gross deposits (minus certain nontaxable items) exceeding $90,000. There was evidence that he was engaged in illegal liquor transactions. There was also testimony that in each of the indictment years the taxpayer had expended substantial amounts of money. The taxpayer claimed that his bank deposit slips were erroneously admitted in evidence because the Government did not prove that they reflected specific amounts of taxable income. Hence, it was

[3] Gleckman v. U.S., supra (subsection 321, note 3); Stinnett v. U.S., 173 F 2d 129 (CA-4), 49-1 USTC 9217, cert. denied 337 U.S. 937, 69 S. Ct. 1531; U.S. v. Venuto, 182 F 2d 519 (CA-3), 50-1 USTC 9253; Kirsch v. U.S., 174 F 2d 595 (CA-8), 49-1 USTC 9274; Buttermore v. U.S., 193 F 2d 358 (CA-6), 50-1 USTC 9228; U.S. v. Miro, 50 F 2d 58 (CA-2); Oliver v. U.S., 54 F 2d 38 (CA-7), cert. denied 285 U.S. 548, 52 S. Ct. 395; Gusik v. U.S., 54 F 2d 618 (CA-7), cert. denied 285 U.S. 545, 52 S. Ct. 395; Capone v. U.S., 51 F 2d 609 (CA-7), 2 USTC 788 cert. denied, 284 U.S. 669, 52 S. Ct. 44; Orzechowski v. U.S., 87 F 2d 715 (CA-3); Malone v. U.S., 94 F 2d 281 (CA-7), 38-1 USTC 9032, cert. denied 304 U.S. 562, 58 S. Ct. 944; Paschen v. U.S., 70 F 2d 491 (CA-7); Singer v. U.S., 58 F 2d 74 (CA-3); U.S. v. Zimmerman, 108 F 2nd 370 (CA-7), 40-1 USTC 9102; Chadick v. U.S., 77 F 2d 961 (CA-5), 35-2 USTC 9416, cert. denied 296 U.S. 609, 56 S. Ct. 126; Kitrell v. U.S., 79 F 2d 259 (CA-10), 35-2 USTC 9548, cert. denied 296 U.S. 648, 56 S. Ct. 249; Cooley v. Bergin, 27 F 2d 930 (D.C. Mass.), 1 USTC 321; Boatwick v. U.S. supra (note 2); Canton v. U.S., supra (note 2); U.S. v. Doyle, 234 F 2d 786 (CA-7), 56-1 USTC 9553, cert. denied 352 U.S. 895, 77 S. Ct. 132; Holbrook v. U.S., 216 F 2d 235 (CA-5), 54-2 USTC 9540, cert. denied 349 U.S. 915, 75 S. Ct. 605; U.S. v. Joseph Frank, 245 F 2d 284 (CA-39), 57-1 USTC 9675; Morrison v. U.S., 270 F 2d 1 (CA-4), 59-2 USTC 9657.

[4] Supra (subsection 321, note 3).

(326.4 PROOF OF TAXABLE INCOME IN BANK DEPOSITS CASE—Cont.)

argued, it was improper for the Government's expert witnesses to testify that there was additional tax owing, based on consideration of the deposits as income. The Court of Appeals overruled this contention, employing the now classic language:

> ". . . if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable. . . .
> "The bank deposits and large items of receipts by Mr. Gleckman do not, therefore, stand entirely alone as the sole proof of the existence of a tax due from him, but they are identified with business carried on by him and so, are sufficiently shown to be of a taxable nature."

(3) By way of contrast, occasional or irregular deposits are not necessarily ruled out; they may, if properly analyzed, be considered as income.[5] Also, bank deposits proof alone will suffice to support a conviction, and it is not a mere form of corroboration for other kinds of evidence.[6]

(4) In Stinnett v. U.S.,[7] the defendant argued that under the *Gleckman* case the bank deposits theory required not only a showing of periodic bank deposits but some further corroboration (in Gleckman there was a corroborative net worth analysis). The Government, however, contended that the net worth proof in Gleckman did not add to or detract from the bank deposits rule and that proof of periodic bank deposits and of an income producing business alone warranted a finding that the deposits reflected current business receipts. The Stinnett opinion refers to the existence of corroborative evidence in the record (Stinnett's purchase of bonds and cashier's checks in amounts exceeding reported net income for certain years). Although there was corroboration, the court stated that "a gross discrepancy between bank deposits and gross receipts without any adequate explanation by the taxpayer is . . . sufficient in itself to take the case to the jury . . ." This would appear to indicate that corroboration of bank deposits proof is not a legal requirement in a tax evasion prosecution.

(5) In U.S. v. Venuto,[8] there was evidence that the defendant had regularly and currently deposited in four Philadelphia banks the receipts of his slaughterhouse, meat store, and rentals, and that expenses were paid by checks drawn on the accounts. Government agents testified that they had reconstructed the defendant's income by analyzing his bank accounts and disbursements. They determined that the bank deposits constituted business receipts, except for some $18,000 of nonincome items for the period from 1942 through 1945. For each year the nonincome items were deducted from the respective annual deposits. The balance was considered gross business receipts from which the actual purchases (stipulated by defendant) were deducted. The defendant was given full credit for the expense deductions claimed in his returns. The defendant testified that his sole source of income was from the meat businesses and rental of properties and that all receipts from those enterprises went into the bank accounts. A new trial was ordered because the defendant had been deprived at trial of his constitutional right to consult with counsel. The Third Circuit, however, made it clear that it considered the bank deposits evidence legally sufficient:

> "Suffice it to say that this record contains evidence from which a jury could conclude beyond a reasonable doubt that during the prosecution years defendant had businesses of a lucrative nature, that he made periodic deposits in, and withdrawals from, bank accounts, that the difference between such deposits and withdrawals reflected current income, and that there was a substantial understatement in reporting income. Such proof meets the requirement of the so-called bank deposit method of reconstructing a taxpayer's income picture, and would be legally sufficient to support a verdict finding that there was a substantial tax deficiency for each of the prosecution years, which defendant knowingly and willfully attempted to defeat and evade."

326.5 DEFENSES IN BANK DEPOSITS CASE

(1) The chief defense contentions in bank deposits cases (other than lack of criminal intent) are: That the spasmodic nature or unconventional amounts of the deposits indicate that prior accumulated funds, not current receipts, are involved; that the deposits reflect, in whole or in substantial part, nonincome items, income items attributable to other years, or duplication of current income items already accounted for by the taxpayer.

(2) In Kirsch v. U.S.,[9] a conviction based chiefly on bank deposits evidence was reversed because the Government's own testimony showed that the deposits could not be identified as income. The court quoted the *Gleckman* case, "that the bare fact standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount." The assumption of the Government's expert witness that the deposits in this case represented income was:

> ". . . not only without evidentiary support even from permissible inference from proven facts, but was definitely disproved by the Government's own evidence. It is one thing for . . . (the Government's witness) to say in effect, as was done in the Gleckman case, that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all that he could determine was not income, and was therefore assuming for the purpose of calculating taxes due that the remainder was income, and quite another and different thing to say in effect, as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter procedure cannot be approved."

[5] U.S. v. Doyle, supra (note 3).
[6] Holbrook v. U.S., supra (note 3).
[7] Supra (note 3).
[8] Supra (note 3).
[9] Supra (note 3).

(326.5 DEFENSES IN BANK DEPOSITS CASE—Cont.)

(3) In Buttermore v. U.S.,[10] the defendant asserted that the Government agents had failed to make reasonable determination concerning the sources of certain unidentified deposits and that a reasonable investigation of the facts would have disclosed that many of the deposits did not constitute taxable income. The defendant relied upon the Kirsch decision but the court held that what constitutes a reasonable effort to establish the facts, and what facts and circumstances will constitute a proper foundation for an assumption that deposits represent income, must be left to a considerable extent to the discretion of the trial court.

(4) The proof concerning what cash a taxpayer had on hand at the beginning of the taxable year in question is relevant to the bank deposits method of proof of income. If the deposits or expenditures came from funds accumulated in prior years, obviously they do not represent current income. However, if all the requirements set forth in 326.4:(1) are met, the lack of proof of the amount of cash on hand would not be fatal to the case.

326.6 SCHEDULES AND SUMMARIES IN BANK DEPOSITS CASE

(1) The schedules and summaries in Exhibits 300–3 through 300–6 are illustrative of those which may be submitted during trials where the bank deposits method of proving income is used. Exhibit 300–3 shows the computation of taxable income of John and Mary Roe for the year 1967. The computation of this same income by the net worth method was previously shown in Exhibit 300–1. Comparison and study of these two schedules will be beneficial since many times in criminal tax cases taxable income will be evidenced before the court by two methods of proof, one tending to corroborate the other.

(2) Exhibit 300–4 shows a computation which may be used to determine the amount of currency disbursements to be added to total deposits. (See line 2, payments made in cash, 326.11.)

(3) Exhibit 300–5 is a summary analysis of disbursements made by check and by currency during 1967. This schedule should be studied together with the net worth statement and the bank deposits schedule.

(4) The analysis of deposits is the vital part of a bank deposits case and too much importance cannot be placed upon its accuracy. Exhibit 300–6 is illustrative of a schedule which may be used to show the results of this analysis.

327 Other Methods

327.1 PERCENTAGE METHOD

327.11 Use of Percentage Method

The percentage method is not a prime method of proof and by itself would be of very little value in criminal cases. However, there have been cases in which taxes and penalties based on this kind of circumstantial evidence have been sustained by the tax court. The percentage method is very useful for test checking; for corroborating the results obtained by some other means of proof such as specific items, net worth, expenditures, and bank deposits; and for evaluating allegations from informants regarding unreported profits or income of others.

327.12 Application of Percentage Method

(1) This method is a computation whereby determinations are made by the use of percentages or ratios considered typical of the business under investigation. By reference to similar businesses or situations, percentage computations are secured to determine sales, cost of sales, gross profit, or even net profit. Likewise, by the use of some known base and the typical percentage applicable, individual items of income or expense may be determined.

(2) These percentages may be externally dervied or they may in some instances be internally derived from the taxpayer's accounts for other periods or from an analysis of subsidiary records; however, many percentages may be secured from the examination of the taxpayer's records even though only part of the records are available. Gross profit percentages may be determined by comparing purchase invoices with sales invoices, price lists, and other similar data. Also other years not covered by the investigation or portions of years under investigation may indicate typical percentages applicable to the entire year or years under current investigation.

327.13 Limitations on Percentage Method

(1) Although the percentage method may be a useful method of determining or verifying income, especially when the books and records are inadequate, the special agent should make sure that the comparisons are made with situations that are similar to those under investigation. Some of the factors to be considered are as follows:

(a) *Type of merchandise handled*—In order that a proper comparison may be made, the businesses must be dealing in the same type of merchandise or service. Comparison of the gross profit of a restaurant with that of a grocery store would be of little value and should not be used.

(b) *Size of operation*—In many instances gross profit, cost of doing business, and net profit percentage on sales will vary according to the size of a business. This is especially true with respect to expense items and the net profit as compared with sales. The percentage of net profit to sales of a large department store might vary considerably from the small independently owned general store.

(c) *Locality*—Mark-ups and costs of operations will normally vary with the size of the city or the location of the businesses in the locality. As an example, a small business in a community of 5,000 may use newspapers as a means of advertising, whereas a business doing the same volume in a

[10] Supra (note 3).

(327.13 LIMITATIONS ON PERCENTAGE METHOD —Cont.)

city of 500,000 will normally find the cost prohibitive and confine advertising to some other medium.

(d) *Period covered*—Since gross profit ratios and expense ratios will tend to vary year by year with economic conditions, the comparison should normally be made with similar periods covered by the investigation.

(e) *General merchandising policy*—Comparison should not be made between businesses having different merchandising policies. Some businesses may work on large volume with small mark-up, offering the customer little service; others may operate on the reverse policy. In situations of this kind, comparisons should be made only with those businesses having similar merchandising policies.

327.14 Examples of Percentage Method

(1) The following examples are illustrative of the percentage method of computation. The percentages used are arbitrary and are not necessarily applicable to the businesses mentioned.

(a) Gross Profit on Sales:

Retail sporting goods store:	
Net sales (determined from books or by other means)	$50,000.00
Gross profit percentage	28.6%
Gross profit as computed	$14,300.00

(b) Sales on Cost of Sales:

Bar and tavern:	
Cost of liquor	$20,000.00
Cost of beer	15,000.00
Cost of food (determined from books or by other means)	5,000.00
	40,000.00
Costs of sales—liquor	33⅓%
Costs of sales—beer	66⅔%
Costs of sales—food	50%
Sale of liquor	$60,000.00
Sale of beer	22,500.00
Sale of food	10,000.00
Total sales as computed	92,500.00

(c) Net Profit on Sales:

Filling station:	
Net sales (determined from books or by other means)	$30,000.00
Net profit percentage	8%
Net profit as computed	$2,400.00

(d) Miscellaneous Ratios:

Waitress:	
Sales by restaurant	$30,000.00
Number of waitresses employed	3
Average sales handled by waitress	$10,000.00
Percentage of tips received	10%
Income from tips as computed	$1,000.00

327.2 UNIT AND VOLUME METHODS

(1) In many instances the determination or verification of gross receipts may be computed by applying price and profit figures to the known or ascertainable quantity of business done by the taxpayer. This method is feasible when the special agent can ascertain the number of units handled by the taxpayer and also when he knows the price or profit charged per unit. The number of units sold or quantity of business done by the taxpayer may be determined in certain instances from the taxpayer's books, since the records may be adequate with respect to cost of goods sold or expenses, but inadequate only as to sales.

(2) There may be a regulatory body to which the taxpayer reports units of production or service. A funeral director is required to report each burial to the city or town where such burial takes place. A garment manufacturer with union employees buys union labels to be sewed into the garments manufactured. He may also be required to report his production and payroll to a trade association allied with the labor union. There are also instances where the royalty paid for leased machinery is based upon the units of production. A piecework system of wages for production workers might also give an accurate measure of units produced.

(3) The use of this method lends itself to those businesses in which only a few types of items are handled or there is little variation in the type of service performed, with the charges made by the taxpayer for the merchandise or services being relatively the same throughout the taxable period.

(4) The following example and Exhibit 300–7 are illustrative of the unit and volume method of computation:

Volume of Merchandise (manufacturer):	
Number of machines manufactured	92
Average sales price	$1,100.00
Computed total sales	$101,200.00
Sales reported	$93,500.00
Omitted sales	$7,700.00

342.4 COURT APPEALS

Income tax cases may be appealed to the Tax Court of the United States without prepayment of the taxes, but excise tax cases cannot be appealed to the Tax Court. All court appeals by excise tax litigants must be made to either the U.S. Court of Claims or to the U.S. District Court, and then only upon prepayment of the taxes.

343 Excise Tax Reduction Bill of 1965

343.1 STATUTORY PROVISIONS

The Excise Tax Reduction Bill of 1965 (P.L. 89-44) lowered or removed most of the excise taxes. Consequently, the potential of criminal prosecution cases involving excise tax violations has been greatly diminished.

343.2 EXCISE TAXES REMAINING IN EFFECT

(1) The following excise taxes remain in effect after the scheduled reductions and repeals:

(a) Retailers' excise taxes; Diesel fuel and special motor fuels.

(b) Manufacturers' excise taxes: Automobiles, truck parts and accessories, trucks, buses, trailers, tires and inner tubes, gasoline, lubricating oil (used in motor vehicles), fishing equipment, and guns and ammunition.

(c) Miscellaneous excise taxes: Air transportation of persons, foreign insurance policies, wagering-occupational stamp and gross wagers, coin-operated gaming devices, highway vehicle usage, sugar and imported oleomargarine, and interest equalization, and local and long-distance telephone service.

(d) Regulatory taxes: White phosphorus matches, adulterated butter, processed butter, filled cheese, cotton futures, bank circulations (other than national banks), opium and marihuana.

(e) Alcohol and tobacco taxes (cigars and cigarettes).

(f) Machineguns.

344 Occupational Stamps

344.1 OCCUPATIONS SUBJECT TO TAX

Various occupations are subject to special (occupational) taxes. Many of these taxes are regulatory in nature. Those of chief interest to the Intelligence Division relate to persons engaged in wagering (Section 350) and those who maintain coin-operated gaming devices on their premises.

344.2 COIN-OPERATED GAMING DEVICES

344.21 Definition of Coin-operated Gaming Devices

Coin-operated gaming devices are designed to invite use on the chance of reward. They include slot machines, pinball machines, and similar devices which tempt the user to pay for a chance to win cash, premiums, merchandise or tokens. The term "coin-operated gaming device" includes devices which can be operated either by the insertion of coins, tokens or similar objects therein, or by the payment of money in lieu thereof. The terms does not include bona fide vending or amusement machines in which gaming features are not incorporated.

344.22 Basis of Coin-Operated Gaming Device Tax

The tax is computed on the basis of the number of coin-operated gaming devices maintained for use on the taxpayer's premises between July 1 and June 30 of each fiscal year.

344.23 Liability for Coin-Operated Gaming Tax

The tax is imposed on the person who maintains the devices for use on his premises. IRC 4461 (a) (1) provides for a tax of $250 per year with respect to each device.

344.24 Techniques and Procedures

Criminal violations in connection with the operation of coin-operated gaming devices may exist under certain flagrant situations, such as observed payoffs, misrepresentations of facts, and repeated refusals to file returns or pay the tax after notice of liability. Techniques and procedures applicable to investigations involving coin-operated gaming devices are discussed in Subsections 270, 281, 282, 283, 284, and 290 and Exhibits 500–6, 500–7, 500–8 and 500–9.

345 Civil Penalties and Jeopardy Assessments

345.1 CIVIL PENALTIES

345.11 Delinquency Penalty (IRC 6651(a))

An ad valorem delinquency penalty of 5 percent a month may be asserted when an excise tax return is filed delinquently without reasonable cause, or when a taxpayer fails to file a return without fraudulent intent. The penalty, limited to 25 percent, is imposed on the net amount due. It is not imposed, however, if the 50 percent civil fraud penalty is assessed under IRC 6653(b).[1]

345.12 Fraud Penalty Applicable to Returns (IRC 6653(b)

A 50 percent civil fraud penalty may be imposed under IRC 6653(b) on the underpaid excise tax on "noncollected taxes," such as, manufacturers' or retailers' taxes.[2] The test for the application of the fraud penalty in an excise tax case is the same as it is for any other type of fraud penalty case; The Government must prove that a wilful fraudulent act was committed. With respect to excise taxes, the 50 percent civil fraud penalty applies to "noncollected taxes" only. "Collected taxes" levied on the purchaser or user, such as transportation and withholding

Sec. 345
[1] Handbook subsection 152.1.
[2] Handbook subsection 152.8.

(345.12 FRAUD PENALTY APPLICABLE TO RETURNS (IRC 6653(b)—Cont.)

taxes are subject to the 100 percent penalty, under IRC 6672.

345.13 Fraud Penalty Applicable to Documentary Stamps (IRC 6653(e))

A 50 percent civil fraud penalty may be asserted under IRC 6653(e) against anyone who wilfully fails to pay or attempts to evade or defeat any tax imposed by means of a stamp, coupon, ticket, book, or other device.[5]

345.14 One Hundred Percent Penalty (IRC 6672)

A 100 percent penalty may be imposed on any person required to collect, truthfully account for and pay over any tax who wilfully evades, or fails to collect or account for and pay over such tax. This relates to *"collected" and "withheld"* taxes only and serves merely as a device whereby the collecting agent is made liable for the unpaid portion of the tax. The penalty under this IRC section is limited to this amount and is not in addition to it.[4]

345.15 Other Civil Penalties

In addition to the general civil penalties previously mentioned, the 1954 Code provides for various penalties applicable to specific types of excise taxes. Such penalties are included in those enumerated in Subsection 152.

345.2 JEOPARDY ASSESSMENT IN EXCISE TAX CASES

IRC 6862 provides that when the collection of the excise tax is deemed in jeopardy, it may be immediately assessed.

346 Criminal Penalties for Excise Tax Violations

Criminal penalties for most violations of excise taxes are imposed by the same 1954 Code sections as relate to income taxes, which, in general, cover offenses such as wilful failure to file a return, pay tax, supply information, or keep records; wilful failure to account for, collect and pay over a particular tax; and wilful attempts to defeat the tax in any manner. The 1954 Code also provides specific penalties which have a limited application to the various excise taxes. (The various criminal penalties are enumerated in Subsection 121.) For example, IRC 7215 and 7512, which relate to Offenses With Respect to Collected Taxes, cover noncompliance with an official notice to collect and deposit "trust fund" taxes.

347 Excise Tax Investigations

347.1 ORIGIN OF EXCISE TAX CASES

(1) Excise tax returns, unlike those for income taxes, do not admit of ready analysis to determine the possible existence of tax violations. The information contained in quarterly excise tax returns on Form 720 is limited to the kind of tax, the gross tax, the credit for overpaid tax in prior returns, and the net tax due. Hence, excise tax investigations which relate to false or fraudulent returns usually result from referrals following field audit of taxpayers' books and records. As violations applicable to excise taxes often occur simultaneously with income tax offenses, field audits conducted by the Audit Division in income tax matters often disclose violations with respect to excise taxes. Therefore, referrals in such cases often relate to both excise and income tax violations. Investigations of offenses involving wilful failure to file excise tax returns, of wilful failure to collect and pay over excise tax, are usually based upon referrals from the Collection or Audit Division.

(2) Some excise tax investigations result from information furnished by informants. As excise tax violations are not easily detected by those not familiar with the operations of the taxpayer, most informants in excise tax matters consist of employees and business associates of the taxpayer.

(3) Excise tax violations also are disclosed through surveys conducted by the Intelligence Division, and by information obtained by special agents during their investigation of income tax offenses. As most excise tax offenses are committed in conjunction with income tax violations, investigation of both types of cases usually arise from the same sources.

347.2 TECHNIQUES OF EXCISE AND INCOME TAX INVESTIGATIONS COMPARED

Although the criminal penalties for most violations of the excise taxes are imposed by the same 1954 Code sections as relate to income taxes, the nature of the evidence to sustain prosecution of excise tax cases differs in many respects from that required in income tax cases. Excise tax is based on specifically enumerated articles or services, whereas income tax is based strictly on income. For this reason, the established methods of determination of income in income tax cases may be inadequate to sustain criminal prosecution for evasion of the excise tax on specifically enumerated articles or services. Under certain circumstances the specific items method of proving income may be effectively used in excise tax cases, especially if an adequate breakdown of records is maintained by the taxpayer. Furthermore, any other method of proving income may be used if the circumstances are such that the evidence thus developed will serve to establish or buttress proof of violation of the excise tax on the specifically enumerated articles or services involved. In general, the investigative techniques applicable to income tax cases may be used in excise tax investigations.

350 WAGERING TAX

351 Law Relating to Wagering Tax

351.1 EXCISE TAX ON WAGERING

351.11 Statutory Provisions

IRC 4401 imposes a 10 percent excise tax on wagers. This tax is distinct from the $50 annual occupational tax

[5] Ibid.
[4] Chief Counsel Memorandum, 6/11/64, CC:CL-2284.

(351.11 STATUTORY PROVISIONS—Cont.)

imposed by IRC 4411, although every person who is liable for the excise tax is also liable for the occupational tax.

351.12 Definitions of Wagering Terms

351.121 WAGER

"The term 'wager' means (a) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (b) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (c) any wager placed in a lottery conducted for profit."[1]

351.122 LOTTERY

"The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (1) any game of a type in which usually (a) the wagers are placed, (b) the winners are determined, and (c) the distribution of prizes or other property is made in the presence of all persons placing wagers in such game, and (2) any drawing conducted by an organization exempt from tax under code sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual."[2]

351.13 Amount of Wager

In determining the amount of any wager, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.[3]

351.14 Persons Liable for Wagering Excise Tax

(1) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax on all wagers placed with him. Each person who conducts any wagers pool or lottery shall be liable for and shall pay the tax on all wagers placed in such pool or lottery.[4]

(2) A person is engaged in the business of accepting wagers if he makes it a practice to accept wagers with respect to which he assumes the risk of profit or loss depending upon the outcome of the event or the contest with respect to which the wager is accepted. It is not intended that to be engaged in the business of accepting wagers a person must be either so engaged to the exclusion of all other activities or even primarily so engaged. Thus, for example, an individual may be primarily engaged in business as a salesman, and also for the purpose of the tax be engaged in the business of accepting wagers. The courts have ruled that a single transaction without additional evidence so indicating does not constitute engaging in the business. However, a single wagering transaction made under circumstances that indicate that it is made in the usual course of business may make the person liable for the special tax. The chance for successful prosecution is better where there is evidence that the person accepted several wagers and competent witnesses are available to testify as to the passage of money and its acceptance as wagers.

(3) The 10 percent excise tax is applicable to the acceptor of wagers (principal), while the $50 special tax applies to both the acceptor and the receiver of wages (agent).[5] In addition, under IRC 4401(c), any person who as agent for a principal is liable under IRC 4411 for the special $50 tax and who fails to disclose his principal, becomes liable himself for the excise tax imposed by IRC 4401.

351.15 Exclusions From Wagering Excise Tax

"No 10 percent excise tax shall be imposed (1) on any wager placed with, or any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law, and (2) on any wager placed in a coin-operated device with respect to which an occupational tax is imposed by code section 4461."[6]

351.16 Territorial Extent of Wagering Excise Tax

"The tax imposed by code section 4401 shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (a) with a person who is a citizen or resident of the United States, or (b) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States."[7]

351.2 WAGERING OCCUPATIONAL TAX

351.21 Statutory Provisions

(1) IRC 4411 imposes a special tax of $50 per year to be paid by each person who is liable for tax under IRC 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. The application of IRC 4411 may be illustrated by the following examples:[8]

(a) A, who is engaged in the business of accepting horse race bets, employs ten persons to receive on his behalf wagers which are transmitted by telephone. A also employs a secretary and a bookkeeper. A and each of the ten persons who receive wagers by telephone on behalf of A are liable for special tax. The secretary and bookkeeper

Sec. 351
[1] 26 USC 4421 (1).
[2] 26 USC 4421 (2).
[3] 26 USC 4401 (b).
[4] 26 USC 4401 (c).

[5] U.S. v. Pepe, 198 F. Supp. 226 (D.C. Del.), 61-2 USTC 15,367.
[6] 26 USC 4402.
[7] 26 USC 4404.
[8] Regulations, Part 44 of Title 26 (1954).

339-145 O - 68 - 4

(351.21 STATUTORY PROVISIONS—Cont.)

are not liable for the special tax unless they also receive wagers for A.

(b) B operates a numbers game and has an arrangement with ten persons, who are employed in various capacities, such as bootblacks, elevator operators, news dealers, etc., to receive wagers from the public on his behalf. B also employs C to collect from the ten persons referred to the wagers received by them on B's behalf and to deliver such wagers to B. C performs no other services for B. B and the ten persons who receive wagers on his behalf are liable for the special tax. C is not liable for the special tax since he is not engaged in receiving wagers for B.[9]

351.22 Registration

IRC 4412 provides that each person required to pay a special tax under IRC 4411 shall register with the District Director in charge of the Internal Revenue District where the wagering business is conducted. Form 11C is used for the registration and requires: The name and place of residence of taxpayer; if he is liable for the 10 percent excise tax, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; if he is engaged in receiving wagers for or on behalf of any person subject to the 10 percent excise tax, the name and place of residence of each such person. In the event a firm or company conducts the wagering business, the names and places of residence of the several persons constituting the firm or company shall be registered.

351.3 RECORD REQUIREMENTS

Every person required to pay the excise tax imposed by IRC 4401, shall keep a daily record showing the gross amount of all wagers on which he is liable in addition to all other records required pursuant to IRC 6001.[10] An agent or employee who received wagers for or on behalf of another person shall keep a daily record of bets received, commissions retained, and amount turned over to his principal. The records required to be maintained by principal and agent shall at all times be open for inspection by revenue officers, and they shall be maintained for a period of at least three years [11] from the date the wager was received.

351.4 PAYMENT OF SPECIAL TAX BEFORE ENGAGING IN WAGERING BUSINESS

IRC 4901 requires that the special tax imposed by IRC 4411 be paid before an individual or firm engages in accepting wagers. The special tax is computed as of the first day of July in each year, or the first day that wagers are accepted. In the former case the special tax shall be computed for one year, i.e., $50, and in the latter case it shall be prorated from the first day of the month in which wagers were accepted, to and including the 30th day of June following.

351.5 WAGERING EXCISE TAX RETURNS

Monthly returns of the 10 percent excise tax on wagers must be filed on Form 730. The taxes are due and payable to the District Director, without notice from the director, on or before the last day of the month following that for which it is made.

351.6 CRIMINAL VIOLATIONS FOR WAGERING TAXES

(1) Wilful attempt to evade or defeat the payment of wagering tax, wilful failure to file return or supply information, and failure to pay special wagering tax incur the penalties prescribed in IRC 7201, 7203, and 7262 respectively. Collateral violations, such as filing false claims, conspiracy, and false statements, may also incur penalties prescribed by sections 287, 371, and 1001 of Title 18, U.S. Criminal Code.[12]

(2) The Supreme Court has held that, although the U.S. has the right to collect taxes from unlawful activities, it can't require a gambler to admit in a registration form that he's engaged in such activities. This violates the constitutional privilege against self-incrimination under the Fifth Amendment. The privilege is a complete defense to a criminal charge of failure to comply with the wagering stamp tax [13] and excise tax [14] requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, he is susceptible to the criminal penalties prescribed by the wagering tax statutes.[15]

352 Elements of Wagering Tax Violations

The elements of a wagering tax violation subject to the criminal sanctions of IRC 7203 are: The wagering activity must be subject to the wagering tax laws (IRC 4421); failure of the person to register and pay the special tax before accepting the wager and/or failure of the person to file wagering excise tax returns and pay tax; and evidence to prove that the person willfully failed to comply with the law. In addition to proving the above elements the Government must prove affirmative acts which indicate a willful intent to evade or defeat the tax in order to sustain a violation of IRC 7201. No proof of willfulness is required for a violation under IRC 7262, which provides a $1,000 to $5,000 fine for doing an act which makes a person liable for the special tax without having paid such tax.

[9] U.S. v. Victor Calzararo, 354 U.S. 351, 77 S. Ct. 1138, 57-2 USTC 9750.
[10] 26 USC 4403.
[11] Regulations, Part 44 of Title 26 (1954), Section 6001-1.

[12] Handbook subsections 121.2, 121.4, 181.1, 122.(10), 122.(11), and 122.(15).
[13] Marchetti v. U.S., 390 U.S. 39 (1968), 88 S. Ct. 697.
[14] Grosso v. U.S., 390 U.S. 62 (1968), 88 S. Ct. 709.
[15] Marchetti v. U.S., supra (note 13).

353 Techniques of Wagering Investigation

(1) Familiarity with the following investigative techniques is essential in wagering tax investigations:

(a) Conducting surveillance and undercover work.

(b) Employing radios, cameras, firearms, and authorized recording and listening devices. (Section 270.)

(c) Conducting searches, seizures, and arrests. (Subsections 283 and 290.)

(d) Securing and preserving evidence discovered during searches. (Subsection 283.6–283.9.)

(e) Obtaining statements from violators and witnesses. (Section 240.)

(f) Obtaining handwriting exemplars from violators whenever necessary. (Subsection 256.4.)

(g) Knowing how bookmaking and lottery operations are conducted.

(h) Recognizing and analyzing gambling records.

(i) Developing and using informants. (Subsection 232.2.)

(2) A Criminal Identification Book, consisting of mug shots and arrest records of all local bookmakers and policy operators, may be effectively utilized in those posts of duty where it is feasible and where arrangements can be made with local law enforcement agencies to cooperate in furnishing the information. A book of this type should be kept current. It can be used for reports, as background information, and for possible identification of subjects and suspects in raids, surveillances and undercover work.

354 Venue in Wagering Investigations

Subsection 627 covers the question of venue as it pertains to IRC 7201 and 7203, and the comments made in Subsection 627 are applicable to wagering tax cases. Violation of IRC 7262, which provides a maximum penalty of $5,000 for not paying the special tax imposed by IRC 4411, is committed in the judicial district where the wager was accepted. Therefore, venue lies in the judicial district where the wager was accepted without regard to the location of the District Directors' office.[1]

355 Statute of Limitations on Wagering Taxes

The statute of limitations with regard to both excise and occupational wagering taxes (IRC 7201 or 7203) begins to run on the day following the last overt act and ends six years from that date. For an example, see Exhibit 500-6 (Sample Report Wagering Tax Case).

Sec. 354
[1] Greene v. U.S., 141 F Supp. 856 (D.C. Dist. Col.); Beach v. U.S., 240 F 2d 888 (CA-D.C.); Reynolds v. U.S., 225 F 2d 123 (CA-5).

356 Civil Penalties on Wagering Taxes

The 50 percent civil fraud penalty provided by IRC 6653(b), is applicable to both the excise and the occupational wagering taxes.[1] Application of the 50 percent penalty precludes imposing the 25 percent delinquency penalty. Since this is not a "collected tax," IRC 6653(e) is not applicable.

360 INTEREST EQUALIZATION TAX

361 Statutory Provisions

361.1 APPLICATION OF INTEREST EQUALIZATION TAX

IRC 4911 imposes an excise tax on the acquisition by a U.S. person of certain foreign securities from a foreign person. It also imposes an excise tax on the acquisition by a U.S. person of certain debt obligations from a foreign obligor. The tax is equal to a percentage of the actual value of the debt obligation determined by the period remaining to its maturity. The tax rates are contained in IRC 4911.

361.2 EFFECTIVE DATE AND TERMINATION DATE OF INTEREST EQUILIZATION TAX

The interest equalization tax was enacted into law on September 2, 1965, and made retroactive to July 19, 1963. For purposes of criminal sanctions, the effective date is September 2, 1964. The tax has been extended continuously since its original expiration date of December 31, 1965.

361.3 ACQUISITIONS, LIMITATIONS, EXCLUSIONS, DEFINITIONS, RULES AND FORMS

IRC 4911 through 4920 explain the various definitions, rules and exceptions to interest equalization tax. Reference should be made to these Code sections before undertaking any investigation.

361.4 PENALTY PROVISIONS FOR INTEREST EQUALIZATION TAX

Our present criminal and civil sanctions are applicable to interest equalization tax. The only additional criminal sanction provided for by the interest equalization act is IRC 7241. It provides for a $1,000 fine or imprisonment of not more than 1 year, or both, for wilful execution of a false or fraudulent certificate of American ownership or certificate of sales to foreign persons. There are several civil penalties provided in IRC 6680 and 6681(a) through (d). These involve assessable penalties of $10 to $1,000 or 125 percent of the tax involved.

Sec. 356
[1] G.C.M. 29647.

EXHIBIT 300–1

Handbook Reference: Subsection 324.8

NET WORTH STATEMENT
John and Mary Roe
Dayton, Ohio

	ASSETS	12-31-65	12-31-66	12-31-67
1.	Cash - First National Bank	$ 4,500.00	$ 150.00	$ 2,500.00
2.	Cash on hand	25.00	25.00	25.00
3.	Inventory, Liquor Store	4,800.00	13,000.00	29,000.00
4.	U. S. Savings Bonds	-0-	3,750.00	-0-
5.	Note Receivable, Frank Roe	-0-	-0-	300.00
6.	Note Receivable, Roger Jones	-0-	-0-	16,000.00
7.	Accounts Receivable, Doc's Market	-0-	1,600.00	-0-
8.	Lot on Dayton Road	1,000.00	1,000.00	1,000.00
9.	Ohio Tourist Camp	12,000.00	12,000.00	12,000.00
10.	Residence, 1100 Vine Street	2,800.00	2,800.00	-0-
11.	30 Acre Farm, East Dayton	-0-	7,400.00	7,400.00
12.	150 Acre Farm, North Dayton	-0-	-0-	7,000.00
13.	Equipment - Liquor Store	800.00	800.00	800.00
14.	Buick Automobile	2,800.00	2,800.00	2,800.00
15.	Farm Truck	-0-	-0-	800.00
16.	Farm Equipment	-0-	1,250.00	2,250.00
17.	Livestock on Farm	-0-	900.00	1,300.00
	Total Assets	$28,725.00	$47,475.00	$83,175.00
	LIABILITIES			
18.	First Federal Savings & Loan Assn	$2,400.00	$ 1,800.00	$ -0-
19.	First National Bank	2,900.00	2,700.00	-0-
20.	Depreciation Reserve	2,500.00	3,200.00	4,300.00
	Total Liabilities	$7,800.00	$ 7,700.00	$ 4,300.00
	NET WORTH	$20,925.00	$39,775.00	$78,875.00
	Less: Net Worth of Prior Year		20,925.00	39,775.00
	Increase in Net Worth		$18,850.00	$39,100.00
	ADJUSTMENTS			
	Add:			
21.	Living Expenses		$ 2,500.00	$ 2,500.00
22.	Life Insurance Premium		300.00	500.00
23.	Federal Income Taxes Paid		750.00	900.00
	Less:			
24.	Long-Term Capital Gain on Sale of Residence (50%)		-0-	(500.00)
25.	Inheritance		-0-	(10,000.00)
	Adjusted Gross Income		$22,400.00	$32,500.00
	Less: Standard Deduction		1,000.00	1,000.00
	Balance		$21,400.00	$31,500.00
	Less: Exemptions (4)		2,400.00	2,400.00
	Taxable Income		$19,000.00	$29,100.00
	Less: Taxable Income Reported		6,100.00	6,400.00
	Taxable Income Not Reported		$12,900.00	$22,700.00

EXHIBIT 300–2

Handbook Reference: Subsection 325.6

EXPENDITURES STATEMENT
John and Mary Roe
Dayton, Ohio

Item No.	Money Spent or Applied on Nondeductible Items	1966	1967
1.	Cash - First National Bank (increase)	-0-	$ 2,350.00
3.	Inventories	$ 8,200.00	16,000.00
4.	U. S. Savings Bonds	3,750.00	-0-
5.	Note Receivable, Frank Roe	-0-	300.00
6.	Note Receivable, Roger Jones	-0-	16,000.00
7.	Accounts Receivable, Doc's Market	1,600.00	-0-
11.	30 Acre Farm, East Dayton	7,400.00	-0-
12.	150 Acre Farm, North Dayton	-0-	7,000.00
15.	Farm Truck	-0-	800.00
16.	Farm Equipment	1,250.00	1,000.00
17.	Livestock on Farm	900.00	400.00
	Payments on Loan:		
18.	First Federal Savings & Loan Assn	600.00	1,800.00
19.	First National Bank	200.00	2,700.00
21.	Living Expense	2,500.00	2,500.00
22.	Life Insurance Premium	300.00	500.00
23.	Federal Income Taxes Paid	750.00	900.00
	TOTAL:	$27,450.00	$52,250.00
	Nontaxable Sources of Funds		
1.	Cash - First National Bank (decrease)	$ 4,350.00	-0-
4.	U. S. Saving Bonds	-0-	$ 3,750.00
7.	Accounts Receivable, Doc's Market	-0-	1,600.00
10.	Sale of Residence, 1100 Vine Street (cost)	-0-	2,800.00
20.	Depreciation reserve	700.00	1,100.00
24.	Capital Gain on Sale of Residence, 1100 Vine Street (50%)	-0-	500.00
25.	Inheritance	-0-	10,000.00
	TOTAL:	$ 5,050.00	$19,750.00
	Adjusted Gross Income	$22,400.00	$32,500.00
	Less: Standard Deduction	1,000.00	1,000.00
	Balance	$21,400.00	$31,500.00
	Less: Exemptions (4)	2,400.00	2,400.00
	Taxable Income	$19,000.00	$29,100.00
	Less: Taxable Income Reported	6,100.00	6,400.00
	Taxable Income Not Reported	$12,900.00	$22,700.00

EXHIBIT 300–3

Handbook Reference: Subsection 326.6

SCHEDULE - A

COMPUTATION OF TAXABLE INCOME BY BANK DEPOSITS METHOD

John and Mary Roe

Dayton, Ohio

For the Year Ended December 31, 1967

Total Deposits - First National Bank			$163,015.00
Currency Disbursements (see schedule B)			2,900.00
Subtotal			$165,915.00
Less: Nonincome Deposits and Items:			
(1) U. S. Savings Bonds Redeemed	$ 3,750.00		
(2) Notes Receivable, Doc's Market Collected	1,600.00		
(3) Sale of Residence at 1100 Vine St.	3,800.00		
(4) Inheritance	10,000.00		19,150.00
Gross Receipts from Business			$146,765.00
Less: Cost of Goods Sold:			
Inventory 1-1-67	$ 13,000.00		
Purchases - 1967	124,000.00		
Goods Available for Sale	$137,000.00		
Less - Inventory 12-31-67	29,000.00		
Cost of Goods Sold			108,000.00
Gross Profit from Business			$ 38,765.00
Less: Business Expenses			
Interest	$ 150.00		
Salaries	4,200.00		
Rent	1,200.00		
Material and Supplies	115.00		
Depreciation	1,100.00		
Total Business Expense			6,765.00
Net Profit from Business			$ 32,000.00
Add: Long-Term Capital Gain on Sale of Residence (50%)			500.00
Adjusted Gross Income			$ 32,500.00
Less: Standard Deduction			1,000.00
Balance			$ 31,500.00
Less: Exemptions (4)			2,400.00
Taxable Income			$ 29,100.00
Less: Taxable Income Reported			6,400.00
Taxable Income not Reported			$ 22,700.00

EXHIBIT 300–4

Handbook Reference: Subsection 326.6

SCHEDULE - B

COMPUTATION OF CURRENCY DISBURSEMENTS

John and Mary Roe

Dayton, Ohio

For the Year Ended December 31, 1967

Purchases	$124,000.00
Interest	150.00
Salaries	4,200.00
Rent	1,200.00
Materials & Supplies	115.00
Loan to Frank Roe	300.00
Loan to Roger Jones	16,000.00
Purchase 134 Acre Farm, North Dayton	7,000.00
Purchase Farm Truck	800.00
Purchase Farm Equipment	1,000.00
Purchase of Livestock	400.00
Payments on Loan - First Federal Savings & Loan	1,800.00
Payments on Loan - First National Bank	2,700.00
Living Expense	2,500.00
Life Insurance Premiums	500.00
Federal Income Taxes Paid	900.00
Total Disbursements	$163,565.00

Bank Balance 1-1-67	$ 150.00	
Total Deposits	163,015.00	
Funds Available to Spend	$163,165.00	
Bank Balance 12-31-67	2,500.00	
Bank Disbursements		160,665.00
Currency Disbursements		$ 2,900.00

Note: This computation may be made when canceled checks are incomplete or not available from which to make an analysis as shown in Exhibit 300-5. Data necessary to make such a computation is usually obtainable from income tax returns of the taxpayer and third-party sources.

EXHIBIT 300-5

Handbook Reference: Subsection 326.6

SUMMARY-ANALYSIS OF CHECKS AND CURRENCY DISBURSEMENTS

John and Mary Roe, Dayton, Ohio
For The Year Ended December 31, 1967

Disbursements for Business Expenses:

Accounts	Check	Currency	Total
Purchases	$123,465	$535	$124,000
Interest	100	50	150
Salaries	4,000	200	4,200
Rent	1,200		1,200
Materials		115	115
Total	$128,765	$900	*$129,665

Disbursements for Net Worth Items:

Loan to Frank Roe	$ 300		$ 300
Loan to Roger Jones	16,000		16,000
Purchase of 134 Acre Farm, North Dayton	6,000	$1,000	7,000
Purchase of Farm Truck	800		800
Purchase of Farm Equipment	1,000		1,000
Purchase of Livestock	400		400
Payments on Loan, First Federal Savings	1,800		1,800
Payments on Loan, First National Bank	2,700		2,700
Living Expense	1,500	1,000	2,500
Life Insurance Premiums	500		500
Federal Income Taxes Paid	900		900
Total	$ 31,900	$ 2,000	$ 33,900
Total Disbursements, Business Expenses and Net Worth Items	$160,665	$2,900	$163,565

* The business expenses of $129,665 are the same as amounts claimed on Form 1040

EXHIBIT 300-6

Handbook Reference: Subsection 326.6

ANALYSIS OF DEPOSITS TO CHECKING ACCOUNT

John and Mary Roe
First National Bank of Dayton, Ohio

Date	Total Deposit	Gross Receipts Deposited			Loans, Transfers, etc.	Report Exhibit No.	Source
		Currency	Checks Identified	Checks Unidentified			
1967							
1-3	$2,400	$100					Unidentified
					$1,600	6	Loan—Doc's Market
			$500			7	Sale to Elk's Club
			$100			8	Sale to John Smith
				$100			Unidentified
1-4	$1,200	$400					Unidentified
			$800			9	Sale to Frank Lee
1-5	$10,500	$200					Unidentified
					$10,000	10	Inheritance
			$300			11	Sale to John Smith
1-6	$3,750				$3,750	12	U. S. Savings Bonds Redeemed
Bal. of Year	$145,165	$40,300	$72,300	$28,765	$3,800		
Total	$163,015	$41,000	$74,000	$28,865	$19,150		

EXHIBIT 300–7

Handbook Reference: Subsection 327.2

UNIT PRICES ON BEER AND LIQUOR

Revenue Received From Sale of Beer
One Barrel—31 gallons or 3,968 ounces

Size of glass	Glasses per barrel	Price per Glass 5¢	10¢	15¢	20¢	25¢
20 oz.	198	$9.90	$19.80	$29.70	$39.60	$49.50
18 oz.	220	11.00	22.00	33.00	44.00	55.00
16 oz.	248	12.40	24.80	37.20	49.60	62.00
14 oz.	283	14.15	28.30	42.45	56.60	70.75
13 oz.	305	15.25	30.50	45.75	61.00	76.25
12 oz.	330	16.50	33.00	49.50	66.00	82.50
11 oz.	360	18.00	36.00	54.00	72.00	90.00
10 oz.	396	19.80	39.60	59.40	79.20	99.00
9 oz.	440	22.00	44.00	66.00	88.00	110.00
8 oz.	496	24.80	49.60	74.40	99.20	124.00
7 oz.	567	28.35	56.70	85.05	113.40	141.75
6 oz.	661	33.05	66.10	99.15	132.20	165.25
5 oz.	793	39.65	79.30	118.95	158.60	198.25

Revenue Received From Sale of Spirituous Liquor
Fifths (12 bottles per case)

Size of glass	Drinks per case	Price per shot 15¢	20¢	25¢	30¢	35¢	40¢	45¢
¾ oz.	410	$61.50	$82.00	$102.50	$123.00	$143.50	$164.00	$184.50
⅞ oz.	351	52.65	70.20	87.75	105.30	122.85	140.40	157.95
1 oz.	307	46.05	61.20	76.75	92.10	107.25	122.40	138.15
1⅛ oz.	273	40.95	54.60	68.25	81.90	95.55	109.20	122.85
1¼ oz.	246	36.90	49.20	61.25	73.80	86.10	98.40	110.70
1⅜ oz.	223	33.45	44.75	55.75	66.90	78.20	89.50	100.35
1½ oz.	205	30.75	41.00	51.25	61.50	71.75	82.00	92.25
1¾ oz.	175	26.25	35.00	43.75	52.50	61.25	70.00	78.75
Quarts (12 bottles per case)								
¾ oz.	512	$76.80	$102.40	$128.00	$153.60	$179.20	$204.80	$230.40
⅞ oz.	439	66.85	87.80	109.75	133.70	154.65	175.60	200.55
1 oz.	384	57.60	76.80	96.00	115.20	134.40	153.60	172.80
1⅛ oz.	341	51.15	68.20	85.25	102.30	119.35	136.40	153.45
1¼ oz.	307	46.05	61.40	76.75	93.10	107.45	122.80	138.15
1⅜ oz.	280	42.00	56.00	70.00	84.00	98.00	112.00	126.00
1½ oz.	256	38.40	51.20	64.00	76.80	89.60	102.40	115.20
1¾ oz.	219	32.85	43.80	54.75	65.70	76.65	87.60	98.55

424 Investigation of Offer of Bribe

(2) If during a raid the bribe offer is made by someone other than a person under arrest, the individual making the offer should also be placed under arrest and charged with offer of a bribe. If the offer is made by someone already under arrest additional charges for offering the bribe should be placed against him. If money has been handed to the government officer he should be careful to make a list of the serial numbers and denominations in the presence of at least one other Government Officer and note any other distinguishing features. He should then put the money in an envelope or in some other suitable container and seal it in such manner that he can later identify the seal and that it will have to be broken to get at the contents. Thereupon he shall deliver the container for safekeeping to the district office cashier or his representative. The container shall be held by the cashier or his representative in safe custody in its exact state of condition on delivery, and the special agent should exercise due care in issuing such other instructions relative to the conditions of custody that the chain of evidence will be preserved.

(3) This technique of investigation requires the greatest expertness and discretion to obviate a defense of entrapment. The Government officer should be extremely circumspect about what he says and does after the offer of bribe has been made.

430 PERJURY

431 Reference

The text of 18 U.S.C. 1621, relating to perjuy, is set forth in Subsection 122.(22).

432 Elements of Perjury

(1) *Oath.*

(a) The oath must be solemnly administered by a duly authorized officer, but it is immaterial in what form it is given if the party at the time professes such form to be binding on his conscience.[1] However, a special agent, when administering an oath, should follow the language in section 1621 as a guide and call upon the witness to testify truly, and the special agent's demeanor should be such as to impress upon the witness the solemnity of the oath and the need for his telling the truth.

(b) In order to constitute perjury under the laws of the United States, the officer administering the oath must be authorized so to do by the laws of the United States. The source of a special agent's authority to administer an oath is stated in Subsection 246.2 and Exhibit 200–13. Notaries public can administer oaths and take affidavits on which perjury can be predicated in Federal courts only in cases and to the extent authorized by Federal statutes.[2]

(2) *False statement.*—In order to constitute perjury, the matter sworn to must be a material matter that the deponent knows or believes to be false.[3] The essence of perjury is the false assertion of knowledge or belief, rather than the truth or falsity of the statement itself. Thus, perjury may be committed as to a statement which is true in fact, if the deponent falsely asserts it to be true to his knowledge or belief, when he really believes it to be false or lacks any knowledge of its truth or falsity. It is as perjurious for a person knowingly and corruptly to swear that he is ignorant of a fact of which he is actually aware [4] as it is to swear that he knows something to be a fact when he is actually ignorant of it.

(3) *Materiality.*

(a) Any statement which is relevant to the matter under investigation is sufficiently material to form the basis of a perjury charge. The question of materiality is one of law for the court.[5] The test of materiality is whether the false statement can influence, impede, or dissuage the tribunal or the Government officer.[6] Materiality is not a matter of degree. It is sufficient if the false statement is collaterally, remotely, corroboratively, or circumstantially material or has a legitimate tendency to prove or disprove a fact in the chain of evidence.[7]

(b) A special agent's principal consideration in determining whether a false statement given to him in the course of an official investigation is material and perjurious is: Can the statement affect his investigation?

(4) *Wilfulness, Knowledge, and Intent.*—In order to constitute perjury, the false statement must be made with criminal intent, that is, it must be made with intent to deceive, and must be wilfully, deliberately, knowingly and corruptly false.[8] The subject of wilfulness is discussed in Subsection 31(11). The crime of perjury in an affidavit is complete when the oath is taken with the necessary intent,

Sec. 430
[1] People v. Parent, 139 Cal. 600, 73 P. 423.
[2] U.S. v. Curtis, 107 U.S. 671,25 S. Ct. 507.
[3] State v. Doto, 16 N.J. 397, 109 Atl 2d 9, cert. denied, 349 U.S. 912.
[4] People v. Moretti, 349 Ill. App .67, 109 N.E. 2d 915.
[5] Beckanstin v. U.S., 232 F 2d 1 (CA-5); U.S. v. Moran, 194 F 2d 623 (CA-2), cert. denied, 343 U.S. 965.
[6] Boehm v. U.S., 123 F 2d 791 (CA-8), cert. denied, 315 U.S. 800, rehearing denied, 315 U.S. 828, 62 S. Ct. 794; U.S. v. Parker, 244 F 2d 943 (CA-7); Blackmon v. U.S., 108 F 2d 572 (CA-5); Wooley v. U.S., 97 F 2d 258 (CA-9), cert. denied, 305 U.S. 614, 59 S. Ct. 73.
[7] U.S. v. Weiler, 143 F 2d 204 (CA-3), rev. on other grounds, 323 U.S. 606, 65 S. Ct. 546.
[8] Beckanstin v. U.S., supra (note 5); Butler v. McKay, 138 F 2d 373 (CA-9), cert. denied, 321 U.S. 780, 64 S. Ct. 636; U.S. v. Parker, supra (note 6).

(432 ELEMENTS OF PERJURY—Cont.)

but it is immaterial and irrelevant that the false affidavit is never used.[9]

(5) Prefatory Statement: To convict of perjury the prosecution must produce testimony of a more direct and positive type than is required to justify a verdict of guilty in other offenses.[10]

433 Establishing Elements of Perjury

(1) *Establishing Authority to Administer Oath.*—Since the burden of proof is on the prosecution to establish the false swearing before an officer or tribunal having authority to administer the oath, the prosecution must adduce sufficient evidence to establish such authority. The Government shall therefore be prepared to present as evidence the required copies of those instruments or the official record establishing the authority of the officer administering the oath. The fact that the oath was administered must be proved beyond a reasonable doubt.

(2) *Establishing That a Statement Was Made.*—The prosecution must show beyond a reasonable doubt that the accused made the statement assigned as perjury. The special agent shall therefore obtain authenticated copies of the record of proceedings wherein the alleged statement was made, or be prepared to produce:

(a) The document embodying the perjurious statement.

(b) The officer who administered the oath in connection therewith, and

(c) Any witnesses who were present when the document was signed.

(3) *Establishing Falsity of Statement.*

(a) The burden of proof is upon the prosecution to establish that the deponent knew or believed that the statement to which he testified was false. This must be established by testimony of two witnesses, or by one witness and written documents or strong corroborating circumstances proved by independent testimony of witnesses.[1]

(b) The mere fact that a prior statement was inconsistent with a later statement does not satisfy the elements of perjury.[2] The prosecution must adduce sufficient evidence of the circumstances under which each statement was made for the jury to determine if one of them was false. Mere showing that the accused later denied the truth of an earlier statement is insufficient, even if the denial is established by testimony of more than one witness. There must still be strong, clear evidence to establish the falsity of the earlier statement.[3]

(c) There can be no conviction for perjury if the defense can show that the statements or answers are literally accurate, technically responsive, and legally truthful.[4] Mere showing of rash or reckless statements under oath will not support a charge of perjury, since the wilful intent to mislead or deceive is lacking.[5] However, proof that a person gave testimony under oath in reckless disregard of its truth or falsity would be equivalent to proof that he gave testimony with knowledge of its falsity.

(d) The special agent in the interrogation of the witness must be sure that the questions put to the witness are specific and couched in terms which are understandable to such witness, and that his answers thereto are specific, since the proof must be of a specific false statement or statements.[6] Questions put to the witness must search for the truth.[7] If it appears that he is tending to deviate from the truth, the special agent may remind him that he is testifying under oath. This should not be done in a threatening manner, but rather in the spirit of emphasizing the gravity of the situation and the importance of the witness' telling the truth. The entire proceedings should be recorded.

(4) *Establishment of Materiality.*—The special agent should be prepared to adduce testimony and/or other competent evidence concerning the purpose of information sought from the witness and the place it takes in the chain of evidence sufficient to convince the court of its materiality. The materiality of the false testimony may be shown by the record of the proceedings in which it was given or by other competent evidence.[8]

440 ANTI-GAMBLING STATUTES

441 Transmission of Wagering Information

(1) The text of 18 U.S.C. 1084, relating to the transmission of wagering information is set forth in 122(17).

(2) The Federal Bureau of Investigation has primary jurisdiction for investigations of violations of this act.

(3) Venue is governed by 18 U.S.C. 3237 which states that any offense against the United States begun in one district and completed is another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

(4) This law provides that wire communications may not be transmitted if they are bets or wagers, and entitle recipients to receive either money or credit as the result of bets or wagers, or information assisting in the placing of bets and wagers. The term "wire communication facility" means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writing, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission. The person who sends telegraphic money orders to betting commis-

[9] Steinberg v. U.S., 14 F 2d 564 (CA-2).
[10] Hart v. U.S., 131 F 2d 59 (CA-9); Allen v. U.S., 194 F 664 (CA-4).
Sec. 433
[1] Phair v. U.S., 60 F 2d 953 (CA-3); Allen, supra (subsection 432, note 10).
[2] U.S. v. Letchos, 316 F 2d 481 (CA-7), 63-1 USTC 9451, cert. denied, 375 U.S. 824, 84 S. Ct. 65.
[3] Phair v. U.S., supra (note 1).
[4] J. Robt. Smith v. U.S., 169 F 2d 118 (CA-6); Hart v. U.S., supra (subsection 432, note 10).
[5] U.S. v. Edwards, 43 F 67 (Circuit Ct., S.D. Ala.).
[6] Galanos v. U.S., 49 F 2d 898 (CA-6).
[7] U.S. v. Slutsky, 79 F 2d (CA-3).
[8] U.S. v. Weber, 197 F 2d 237 (CA-2), cert. denied, 344 U.S. 834, 73 S. Ct. 42; U.S. v. Moran, supra (subsection 432, note 5).

(441 TRANSMISSION OF WAGERING INFORMATION—Cont.)

sioners, wire services and other will be the primary violator. However, bona fide news reporting of sports events and contests are exempt from these provisions. It also exempts the transmission of gambling information from a state where the placing of bets on a particular event is legal to a state where such betting is legal. For example, parimutuel betting at a race track is legal in New York. In Nevada, where off-track betting is lawful, information may be properly received from New York to assist in Nevada. Conversely, it would be unlawful under this statute to transmit information to New York which would assist in placing bets or wagers on a race being run in Nevada, since Nevada is the only state which has legalized off-track betting.

(5) Subsection (d) of 18 U.S.C. 1084 provides for the removal of phones when a common carrier is notified in writing that its facility is being used or will be used for the purpose of transmitting gambling information in interstate and foreign commerce in violation of Federal, State or local law. Because the Department of Justice reserves the responsibility of requesting discontinuance or refusal of telephones or other service, special agents will not make such requests of telephone companies or other common carriers.

442 Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises

(1) The text of 18 U.S.C. 1952, relating to interstate and foreign travel or transportation in aid of racketeering enterprises is set forth in 122.(24).

(2) Venue for offenses of this statute is governed by 18 U.S.C. 3237.

(3) The Federal Bureau of Investigation has primary jurisdiction for investigations of violation of this act except in the case of liquor and narcotics violations where jurisdiction is assigned to the Secretary of the Treasury.

(4) There must be an "unlawful activity" which is defined in the statute as a business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which the offense is committed or of the United States. This concept of a business enterprise requires a continuing course of conduct in violation of State or Federal laws. Individual or isolated acts do not come within the scope of a business enterprise.

(5) This law requires that the travel, or the use of the facility, be undertaken with the defined intent of promoting the "unlawful activity" directly. For example, if an illegal gambling casino is run in conjunction with a legitimate supper club, travel (or the use of an interestate or foreign commerce facility) to obtain entertainment, food, etc., for the supper club would not ordinarily be a violation of this law.

(6) "Unlawful activity" also includes extortion or bribery in violation of the laws of the state in which committed or of the United States. A single isolated act, if the other requirements of the statute are met, is sufficient under this part of the definition.

443 Interstate Transportation of Wagering Paraphernalia

(1) The text of 18 U.S.C. 1953 relating to the interstate transportation of wagering paraphernalia is set forth in 122.(25).

(2) The Federal Bureau of Investigation has primary jurisdiction for investigation of violations of this act. The Post Office Department has jurisdiction over wagering paraphernalia being deposited in, sent or delivered by mail.

(3) Venue for offenses of this statute is governed by 18 U.S.C. 3237.

(4) The purpose of this law is to prohibit the transportation in interstate or foreign commerce, except by common carrier in the usual course of its business, of any record, paraphernalia, ticket, certificate, bills, slips, token, paper, writing or other device used, to be used, adapted, devised, or designed for use in: bookmaking; or wagering pools with respect to a sporting event, or in a numbers, policy, bolita, or similar game.

(5) This section prohibits interstate transportation of betting notations, result sheets, tallies and anything else which is used, intended for use, devised or designed for use in a bookmaking enterprise. The prohibition covers flash paper intended for use to record bets, and pads of paper, adding machines and similar material where it can be shown that the material had been used, or was intended or adapted for such use.

(6) The interstate transportation of sweepstakes tickets, parimutuel tickets (except for use at rack tracks or other sporting events where betting is legal under the applicable State law), football, basketball, and baseball pool cards and similar material as well as any other objects which may be used in carrying on wagering pools or numbers, policy, bolita and similar games (such as Treasury balance lotteries) is also prohibited. This includes slips on which numbers are recorded, tally slips, adding machine paper, printing plates, presses, and the like. However, the provisions of this statute do not apply to games such as "bingo" and punchboards.

(7) Since the purpose of this statute is to deny the channels of interstate commerce to the operators of illegal wagering enterprises, investigations of the casual violator of this statute ordinarily will not be undertaken. The investigative emphasis will be placed on the operators of wagering enterprises, their employees and their suppliers.

444 Intelligence Division Responsibility

(1) Special agents should be alert for any violations of these laws, and report to the Chief, Intelligence Division, any information they obtain regarding possible violations. Procedures have been worked out between the Federal Bureau of Investigation and the Internal Revenue Service to

(Supplemented by MS-99G-22)

510 PURPOSE AND IMPORTANCE OF REPORTS

The result of all the work done by a special agent, together with his conclusions and recommendations, is finally expressed in some form of written report. The purpose of a report is to present in suitable form all the pertinent facts relating to a matter in order that appropriate action may be taken. To have value, a report must be so written that the reader comprehends the full significance of its contents, is convinced of its thoroughness, and is willing to take action based on the facts set forth. A report constitutes a measure of a special agent's ability and worth. It is an official document and may not be furnished to any person outside the Service without proper authorization. In a criminal case, a report ultimately serves as the basis for the preparation and presentation of the case for trial.

520 PLANNING AND WRITING REPORTS

521 Essentials of a Good Report

521.1 INTRODUCTION

It is not an easy matter to write a report which will convey to the mind of the reader with accuracy and clearness the essential facts disclosed as the result of an investigation. Report writing is an art which requires study, practice, and persistent effort. Since the art of report writing admits of no hard and fast rules applicable to all cases at all times, it must be based primarily on the broad ground of experience and common sense. The essentials of a good report are fairness, accuracy, completeness, uniformity, conciseness, and logical presentation.

521.2 FAIRNESS

Reporting the facts with fairness is as important as procuring them with impartiality. A special agent should always be an unbiased fact-finder, not a partisan to a particular cause of action. He should report all material facts and evidence in such manner that they speak for themselves and require little or no explanation of their significance. Any distortion of the significance of evidence reacts against the report writer and materially diminishes the value of the report. The taxpayer's explanation should be presented fairly. When a special agent quotes, he should quote exactly, if possible, or, if it is not possible, he should say so. Hearsay, and rumors, properly identified as such, may be included in the report, but only if relevant and material to the matter being discussed. Reports should reflect an impersonal attitude and should contain no offensive remarks regarding the race, religion, and political affiliations of the taxpayer.

521.3 ACCURACY

(1) Reports are the basis for administrative and legal actions of the utmost importance, including the assessment of substantial amounts of tax and penalties and criminal action which may result in imprisonment. Accuracy in every particular, therefore, is essential. Facts must be reported with exactness. The report writer should aim to present the facts in such manner that he will not have to state opinions and conclusions except in the portion of the report provided for that purpose. The distinction between fact and opinion should be clearly shown, when it is necessary to explain the theory of cases based largely on circumstantial evidence. Avoid using statements such as: "The taxpayer could give no plausible explanation." That is a conclusion, and others may find that the explanation is plausible. State what the taxpayer said and let the evidence show whether his statement is worthy of belief. Avoid the phrase "conclusively proved." Do not allow conclusions to surpass the evidence. A conservative statement that is consistent with the facts is stronger than an exaggeration. Exaggerations tend to raise doubt against all the evidence presented in the report. Inaccuracies, carelessness in detail, errors in computation, and incorrect dates materially affect them value of a report. Discrimination in the choice of words, punctuation which clarifies the meaning, and a correct application of the rules of grammar are essential to accurate reports. Errors in those essentials have an unfavorable effect on the mind of the reader.

(2) Avoid using slang and technical terms including those used in accounting. However, in some instances slang terms may be necessary for clarity in reporting the results of investigations, particularly those involving taxpayers in illegal pursuits. In such instances the meaning of the term should be explained when it is first used in the report. For example, it may be advantageous in a report concerning a numbers lottery to describe the nature of operation, including the slang terms used therein, before presenting evidence of the violation. If numerous slang or technical terms are necessary, it may be advisable to prepare a glossary.

521.4 COMPLETENESS

(1) A special agent should consider the material in his report from the viewpoint of a reader having no knowledge of the case. He must exercise good judgment in selecting the facts that are material to the matter and take care that nothing essential to a complete understanding of the case will be omitted. Every statement of material fact bearing on the proof of the allegation of violation should be documented to the extent necessary and possible to establish its truth and accuracy, and the source of the evidence should be reported.

(2) Likewise, explanations of taxpayers and important *facts* developed by the investigation that point to weaknesses in the case should not be omitted. Subsequent disclosure of facts indicating weaknesses that were known to the report writer reflects unfavorably on him. Moreover, any weaknesses in a case should be made known before action is taken relative to criminal prosecution or settlement of the civil liability in order to prevent surprise in the course of conferences or legal actions and to give re-

(521.4 COMPLETENESS—Cont.)

viewers an opportunity to suggest means of overcoming the weak points. However, speculation and conjecture of agents concerning possible defense theories have no place in a factual report. The reader primarily is interested in knowing what happened and how the events can be proved. He is not interested in the difficulties met by the special agent in securing the information, or in the ingenuity used in making the investigation. The writer should always remember that the report is about a violation or other obscured situation and not about the investigation. However, where certain pertinent evidence was not obtained, the special agent should state the avenues of inquiry pursued in attempting to procure the evidence in order that no doubts may arise in the reader's mind regarding whether the investigation was thorough. Important matters in exhibits generally should be narrated briefly in the report unless the exhibit is adequately described in an appendix and does not require any further explanation. The use of an appendix is discussed in Subsection 525. Finally, in order to ensure completeness, the report should be read and revised as often as necessary before it is submitted for review. A special agent should strive to submit his report in final form for initial review. He should not rely upon reviewers to complete the report by resolving the difficulties he encountered.

521.5 UNIFORMITY

Reports should be as uniform as possible for each type of case investigated by the Intelligence Division. A special agent in one division should report the results of an investigation in the same sequence as a special agent in another division who has conducted an investigation of the same type. In order to promote uniformity, outlines for the various types of cases are furnished in IRM 9500; and Section 530 contains suggestions and sample reports for guides in report writing.

521.6 CONCISENESS

(1) Conciseness suggests the removal of all that is elaborate or not essential. If a report contains a mass of irrelevant data, the important matters will not be clear to the reader. There is force in brevity. When you have something to say, say it in as few words as you can; then hold your tongue. The rule of conciseness applies to individual sentence construction as well as to the whole report. Repetition and unnecessarily lengthy descriptions of documents should be avoided. It is not necessary to copy into the report entire statements, letters, and exhibits when concise reference to the principal points and brief explanation will suffice. Tabulations and schedules in the form of appendices to the report frequently may be used to reduce narrative and emphasize important facts relative to matters such as summaries of net worth or omitted sales and analyses of bank accounts.

(2) A special agent should not indulge in attempts to wit or sarcasm; neither should he refer to himself as the "undersigned," the "writer," or "your agent." Do not hesitate to state "the taxpayer informed *me*," or "The taxpayer gave *me* (documents or books)," if that information is material. However, in view of the necessity for maintaining an impersonal attitude, the personal pronouns "I" and "we" should be used sparingly. Avoid superfluous statements such as: "the following report is submitted," or "as the result of investigation, I have to report as follows." The phrase "This case relates to an investigation of an alleged evasion of income tax by ----------" may be better stated as, "This report relates to the alleged evasion of income tax by----------." The statement "Attached hereto as Exhibit 6 is a sworn affidavit of John Jones wherein he testified . . ." contains unnecessary words. Merely say, "John Jones stated (Exhibit 6, affidavit) that . . ." Avoid trite phrases and superlatives, and use the word "very" only on rare occasions. Use of the active voice promotes conciseness and accuracy in writing. It also is more forceful. For example, the statement, "Information obtained from Mr. Witness disclosed that the proceeds of the sale were given by him to the taxpayer on May 14, 1968," may be reduced in length and made more forceful by revision to, "Mr. Witness said that he gave the proceeds of the sale to the taxpayer on May 14, 1968." Use of the active voice also will eliminate the possibility that the report writer will omit stating who gave the proceeds to the taxpayer.

521.7 LOGICAL PRESENTATION

(1) A report otherwise well written may lose its effectiveness for want of logical arrangement. A mass of data thrown promiscuously into the report is an imposition on the reader and an adverse reflection upon the writer. Effective presentation is largely dependent upon adherence to the principles of style, namely: Unity, coherence, and emphasis.

(2) *The principle of unity* requires adherence to the single main idea or proposition and exclusion of all matter that does not tend to prove that idea or proposition. Each sentence, paragraph, and division should help to establish the main point of the report.

(3) *Coherence* is defined as sticking together. This principle counsels logical sequence of thought. No one is likely to achieve coherence by chance or inspiration. It demands careful planning, critical review, and frequent revision by the report writer. Words, phrases, and clauses should be so placed in a sentence that their relationship is clear and the meaning of the sentence is obvious. Sentences should be so arranged that the progress of thought is clear and continuous from beginning to end. Each paragraph must bear an unmistakable relation to the whole composition, especially to the paragraph immediately preceding it. The most common fault in the presentation of evidence is the failure to show precisely what part it plays in the whole argument. This failure is sometimes due to the fact that secondary matters are not properly subordinate to the principal facts. Much evi-

(521.7 LOGICAL PRESENTATION—Cont.)

dence has only a casual connection with the main proposition, but the connection must be made evident. If the bearing of the evidence is not felt at the point [illegible] it is presented, it usually is not felt at all. Each violation, event, or circumstance, and all facts in support thereof, should be narrated in full before passing on to the next feature of the report. Phrases and sentences which merely introduce an exhibit may interrupt the reader's train of thought. In many instances that difficulty may be avoided by parenthetical insertion of exhibit numbers during discussion of the contents of the exhibit. Insofar as possible, references to other sections of the report should be avoided because the arrangement of the report will show the relationship between the various facts and events.

(4) *Emphasis* requires careful placement of words, phrases, and sentences for the purpose of calling attention to the important facts. If the writer does not emphasize the more significant information he cannot be certain that the reader will retain the essential facts. Important words or phrases should be placed in important positions—usually at the beginning of a clause or sentence, or at the end. The same rule applies to the arrangement of sentences within a paragraph. A new topic or idea should be the subject of a new paragraph. A sentence or short passage requiring special emphasis may be paragraphed separately. Important matters can be emphasized by using concrete terms and terse sentences, by numbering and indenting a series of important and related facts, and by using schedules and tabulations. The last mentioned technique is particularly valuable in showing comparisons.

522 Planning the Report

(1) Before starting to write a report, the special agent should have in mind a definite outline of the arrangement in which the facts and evidence may be presented in the most effective manner. The best arrangement rarely is the order in which the facts were developed during the investigation. A good general plan is to state the problem, present the results of the investigation, and set forth the conclusions and recommendations. The outlines in the IR–Manual and this Handbook are guides for uniform arrangement of data in the report. Details under the various headings should be arranged in paragraphs each confined to a particular topic. Each special agent may use that method of assembling the facts and evidence into a coherent and logical presentation which he finds most effective. Keep in mind the witness who will produce, identify, and/or testify about each item of evidence. The use of either an outline or an arrangement based on appendices and exhibits is suggested to assist in assembling material for the report.

(a) In using the former method, prepare an outline of the topics or events considered essential to proof of the violation, or, with respect to reports not relating to violations, to accomplishment of the purpose of the report. List under each topic the pertinent facts and evidence. New agents may find it helpful to list the evidence in detail. The amount of detail can be reduced with the acquisition of experience and facility in writing reports. When the outline is finished, study it and make any revisions necessary to ensure compliance with the principles of completeness, conciseness, unity, coherence, and emphasis. Since each topic ordinarily will be the subject of a paragraph, the special agent can direct his attention to the writing of each paragraph on the basis of the topical outline.

(b) In lieu of an outline, effective presentation can be accomplished by arranging appendices, exhibits, and workpapers in logical order based on the above-mentioned principles of good writing, and discussing each fact and event in that order. Consideration also should be given to the order desirable for presentation of the evidence in court.

(2) One of the first steps in making ready to write a report regarding a fraud case is to prepare the summaries of income, tax, penalties, and adjustments. In cases based on specific items, the criminal items should be segregated from the civil items. The civil items are technical adjustments based upon: Mere clerical errors; mistaken ideas relative to some regulation or requirement of the Internal Revenue Service; adverse decisions on controversial questions; erroneous legal or accounting advice on which the taxpayer honestly relied; and items which the taxpayer is unable to substantiate. The civil items should also include unreported income and other adjustments which pertain to a year or years for which prosecution is not being recommended. When appropriate, technical adjustments should be grouped into summary topics. With respect to criminal cases, the special agent should determine before beginning his report which criminal items are to be proposed for use in the criminal proceedings, and whether there are any technical adjustments favoring the taxpayer that should be offset against the additional income.

523 Reports on Related Cases

(1) As a general rule, a separate report shall be written for each case. However, if the facts and events concerning two or more related taxpayers or case classifications are the same or are intermingled, the results of the related investigations shall be set forth in the report regarding the principal violator or classification. For example, when an investigation discloses evidence of tax evasion by a corporation and its principal officers, the report on the president of the corporation may serve as the focal point for assembling and presenting the facts and evidence regarding all taxpayers involved including the corporation. Similarly, violations of the excise and occupational taxes on wagering involving one taxpayer or several closely related taxpayers should be discussed in one report. Regional guidelines will be followed in all cases in which there is any uncertainty as to the need for separate reports.

(2) Notations shall be made on the Forms 7691 and the index cards pertaining to the related cases to show the number of the case file containing the report, and a cross-reference sheet shall be placed in each of the related case files.

(523 REPORTS ON RELATED CASES—Cont.)

(3) When consolidating two or more defendants in one report, consideration should be given to ensuring that a sound basis for a joint trial exists. The absence of evidence of a conspiracy to violate tax laws, lack of a common violation to be charged, problems of venue, or other factors may indicate that the defendants are entitled to separate trials. If so, separate reports should be written with duplication of exhibits where appropriate.

524 Format of Reports

524.1 ADDRESS

Reports shall be addressed as follows:
District Director, Internal Revenue Service
Attention: Chief, Intelligence Division
Name of District (city and State)

524.2 SUBJECT

The subject of the report consists of the name and current address of the principal person or legal entity in which name the case was concerned. The address will consist of the street number, city and State where an individual resides or a corporation has its principal office. If the facts and evidence concerning related cases are included in one report, the subjects of the related cases, properly identified as such, shall be shown below the subject of the principal case. Related cases not discussed in the report will be mentioned in the introduction but will not be included in the subject. It is not necessary that the subject include the type of violation or the years involved, since that information is set forth in the opening paragraph of the report and the general classification of the violation is indicated by the case number. Subsection 524.4 and the sample reports contain suggested forms for presenting the subject of a report. The name and current address (including street number, city, State and zip code) of the taxpayer's representative should be listed below the subject.

524.3 CASE NUMBER AND DESIGNATION

In order to provide uniformity, the case number should be typed a single space below the subject on the first page of all reports and intra-Service communications relative to numbered cases. The case number also should be typed in the upper left corner of each succeeding page of a report. When a report covers more than one person or classification, only the number relating to the principal violator will appear on the succeeding pages. A designation indicating the nature of the report should be placed on the initial page immediately under the case number. Reports should bear a designation of "Preliminary" for those written before the case is closed, "Final" for those closing a case, and "Supplemental" for those submitted after the case is closed. The designations "Parole," "Jeopardy Assessment," "Inadequate Records," "Arrest," "Legal Action," "Claim for Reward," and "Special Investigation" should be used where appropriate. The types of reports included in the terms "Special Investigation" and "Legal Action" are set forth in IRM 9500. Correspondence relating to collateral inquiries should bear the designation "Collateral Request" or "Collateral Reply" below the case number.

524.4 SAMPLE SUBJECTS AND DESIGNATIONS

(1) Assume that an investigation disclosed evidence of tax evasion by a corporation and two of its officers, and that the evidence is to be presented in the report relative to the president, who is the principal violator. The subject should be shown as follows:

In re: I. M. BIG
1010 Blank Street
Chicago, Illinois 60647
36-81-023-1-1
Final

Related Cases:
JOHN R. MINUTE
4321 South Quincy Street
Chicago, Illinois 60635
36-81-022-1-1
BIG CORPORATION, INC.
4354 North State Street
Chicago, Illinois 60632
36-81-021-1-1

(2) Assume that an investigation of an individual disclosed violations of the occupational and excise taxes on wagering. The subject should be shown as follows:

In re: I. M. BIG
1010 Blank Street
Chicago, Illinois 60647
36-81-060-4-1
36-81-061-5-1
Final

(3) Assume that an investigation disclosed evidence of tax evasion by three individuals who reside and conduct business as a partnership in Boston, Massachusetts, and that John Doe, the partner who is responsible for maintenance of the records, is the principal violator. The subject of the report should be shown as follows:

In re: JOHN DOE
4533 High Street
Boston, Massachusetts 02135
04-81-052-1-1
Final

Related Cases:
JAMES ROE
8346 Main Street
Boston, Massachusetts 02164
04-81-052-1-1
JOSEPH MOE
2538 Elm Street
Boston, Massachusetts 02134
04-81-053-1-1

(4) The name and address of the taxpayer's representative should be shown as follows:

(524.4 SAMPLE SUBJECTS AND DESIGNATIONS—Cont.)

Representative:
C. W. LAW, Attorney
100 Ewe Street
Chicago, Illinois 60651

524.5 APPROVAL STAMPS

Approval stamps should be placed on the signature page of a report, thus providing a uniform location for information regarding approvals and improving the appearance of the first page of the report.

524.6 ASSEMBLY OF A REPORT

(1) A report should be assembled in the following manner, although it is recognized that all reports will not include each of the listed parts.

(a) Table of Contents.
(b) Body of Report.
(c) List of Exhibits.
(d) List of Witnesses.
(e) Appendices.
(f) Exhibits.

(2) The page number shall be in the center at the bottom of each page, preceded and followed by a hyphen, i.e., -6-.

524.7 IDENTIFICATION OF PRINCIPALS, WITNESSES, ETC.

The names of individuals, corporations, partnerships, and other business and taxable entities will be typed in capital letters when and wherever used in reports of investigations as well as in correspondence between Intelligence Division offices relating to investigations. (See IRM 9515.)

525 Appendices and Exhibits

525.1 GENERAL

(1) In cases involving a detailed computation of net worth, bank deposits, or expenditures, or numerous fraudulent items, clarity in reporting may best be accomplished by presenting the details in appendices and including in the body of the report only brief summaries thereof, together with a general discussion of the related evidence. Narrative in the report may be reduced by including on the appendix, in addition to the pertinent figures, a brief description of each item, a reference to exhibits containing the documents supporting each item, and the name of any witness who will produce documents and testify regarding each item. It is not necessary to discuss in the body of the report each item on the appendix. However, the report shall contain a description of the appendix; a brief summary or restatement of totals, if such is applicable; and an explanation of any significant particulars or details that are not made evident by inspection of the appendix. Since appendices are essential to a complete understanding of any case wherein they are used, they shall be typed or reproduced in sufficient quantities for inclusion with each copy of the report. With respect to cases involving the tabulation of numerous items which can be assembled into groups, a clear and concise presentation may require placing on the basic appendix only the total amount for each group and tabulating the items comprising the group on supporting appendices or schedules. For example, in a net worth case embracing numerous bank accounts and holdings of stocks and real estate, the computation of net worth on the basic appendix should show the aggregate cost or other value of the bank accounts, the stocks, and the real estate, and the various items included in each total should be set forth on separate appendices or schedules. Samples of appendices are provided in Exhibits 500–2 through 500–6.

(2) Exhibits are an essential part of a report. They may consist of originals or copies of statements and documents, such as affidavits, transcripts of interviews, contemporaneous memorandums, canceled checks, invoices, bank records, books of account, and transcripts or analyses of accounts and records and related workpapers. It generally is not feasible to provide extra copies of exhibits consisting of checks, invoices, bank records, account books, long detailed transcripts, and similar documents. However, the copy of the report which is retained at the office having responsibility for the conduct of the investigation should include a copy of each exhibit if such is available. The latter suggestion particularly applies to affidavits, memorandums or transcripts of interviews, and workpapers.

(3) The body of the report should contain reference to the exhibits and appendices, and the appendices should contain reference to exhibits which consist of supporting documents. Such reference may be to individual exhibits or groups of related exhibits. For example, the report may state: "Appendix A is a summary of the unreported receipts from sales, and Exhibits 8 through 25 are copies of documents in support thereof, including canceled checks, invoices and affidavits." Important matters in exhibits generally should be explained in the report. However, in many instances documents, such as invoices, checks, and bills of lading require only a brief description. If a document of that nature is adequately described on an appendix, no further explanation may be necessary. When mentioning or referring to a document that is submitted as an exhibit, including the written statement of a witness, insert the exhibit number in parentheses immediately following the reference. In most instances it is unnecessary to state that the document is submitted as Exhibit 1. If an exhibit is underlined the first time (only) it is mentioned in the report, the reader will know when he sees an exhibit number whether it is being discussed for the first time or has previously been referred to.

(525.1 GENERAL—Cont.)

(4) It is suggested in Subsection 522 that the special agent, before beginning his report, arrange the proposed appendices and exhibits in the order of his planned presentation of facts and evidence, and that he prepare his report by discussing the appendices and exhibits in that order. In many instances he will find it necessary to rearrange those documents for more effective presentation. When the report is completed, the exhibits should be assembled in the order in which they are originally mentioned in the report, and they should be numbered for easy reference. If a number of documents such as canceled checks are included in one exhibit, give each document a sub-exhibit number. For example, if Exhibit 11 consists of 16 canceled checks, the checks should be numbered from 11–1 to 11–16. Each exhibit should be examined to determine whether it is properly identified. The source of the exhibit should be shown, especially if it consists of a transcript or summary. If the exhibits are numerous they should be bound separately from the report. Index tabs may be used to facilitate reference.

(5) The report should include a list of exhibits containing the number and a description of each exhibit. The content and arrangement of a list of exhibits is illustrated in the sample report on a specific item case (Exhibit 500–2). It is suggested that a copy of the list of exhibits be mounted immediately under the cover sheet for the exhibit file itself. This will eliminate having to use the special agent's report as the index.

(6) The appendices should be attached as part of the report and should be listed in the table of contents.

(7) Where the statement of a witness or subject is lengthy it may be helpful to prepare a synopsis of the important answers and attach this as a cover sheet to the exhibit. The summary should be quite brief, desirably not more than one line for each point, and should be referenced to appropriate question or page and line numbers.

525.2 EXHIBITS—SUPPLEMENTAL REPORTS

Exhibits submitted with original and supplemental reports should be numbered in continuous sequence. This procedure is desirable in order to clearly identify which exhibits were submitted with each report. Thus, if the last exhibit to the special agent's final report is numbered 51, the first exhibit with the supplemental report will be numbered 52.

525.3 DOCUMENTS SUBMITTED WITH COLLATERAL REPORTS

Documents submitted with a collateral report should not be marked as exhibits, because they may later be submitted with the special agent's final report at which time they will be assigned a number. If only a few documents are transmitted as enclosures with a collateral report, it usually is unnecessary to assign any numbers to them. However, if, for reasons such as the volume of documents to be transmitted, it is desirable to identify the enclosures by number, such identification should be made either by attaching a paper tag to the document or by enclosing the document in a marked envelope.

526 List of Witnesses

(1) The list of witnesses is an essential part of a report on a criminal case. It is especially important to the United States Attorney and to any agent who assists in the preparation of the case for trial, particularly in instances where the special agent who had conducted the investigation and had written the report is not available. The list of witnesses frequently is used by the United States Attorney as the basis for issuing subpoenas.

(2) The witnesses may be listed in alphabetical order, in the order in which they are mentioned in the report, or in the probable order of their appearance in the trial. If the last-named procedure is used, consideration should be given to an arrangement which will provide for the introduction of documents required in the testimony of subsequent witnesses. The name, address, and title or other identification of each witness should be set forth, together with a reference to any exhibit or appendix that is pertinent to his testimony and to the records and other evidence he may be expected to produce or identify. The use of such references will eliminate the need for a summary of each witness' probable testimony as part of the list of witnesses.

(3) However, the list of witnesses should include a summary of the testimony of the special agent, cooperating officer, and other key witnesses. This description should be a brief outline or statement concerning all matters about which the witness can be expected to testify. If those matters are set forth in exhibits consisting of workpapers or records of interviews, such as memorandums, transcripts, and affidavits, a brief identification together with reference to the appropriate exhibit numbers, is sufficient. If reference is made to a detailed transcript of an interview, the numbers of the specific pages or answers that contain important statements of the taxpayer or the witness should be mentioned. Reference also should be made to appendices that contain descriptions of evidence that will be presented by a special agent. For example, assuming that Appendix A is a net worth statement and that the special agent's testimony is required to establish the cost of certain assets, the description of the special agent's testimony in the list of witnesses should include a statement that he can testify regarding the cost of the properties at Columbus, Ohio, and the automobile (Appendix A, items 4, 6, and 10). The sample report on a specific item case (Exhibit 500–2) contains a sample list of witnesses, which provides an illustration of the procedure for describing the testimony of key witnesses.

(4) In some instances it may be necessary to list one witness who will produce and identify certain records and another who will testify relative thereto. Listing the name

(526 LIST OF WITNESSES—Cont.)

of a person who can be expected to appear as a witness is preferable to showing only the name of a corporation, bank, or other organization, especially where an individual has custody of records or has an intimate knowledge of the records and transactions involved. In cases where evidence is available to rebut a probable defense, it may be advisable to list the witnesses who will testify in the event that the principal presents the anticipated defense. Witnesses of that nature should be identified as rebuttal witnesses.

(5) The special agent may prepare the list of witnesses as he writes the report. The use of appendices containing names of witnesses and the procedure of capitalizing names of witnesses, as explained in Subsection 524.7, will assist in the preparation of a complete list of witnesses. When the report has been written, the special agent should review the facts and evidence to determine whether he has listed a witness for each item of evidence.

527 Table of Contents

A table of contents showing subject matter and page numbers should be submitted with any report exceeding ten pages. It should be designed to provide quick reference to important features of the case, and the amount of detail will be determined by the length of the report and the circumstances of the case. Any appendices to the report should be listed in the table of contents.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1976—210-063/543

(REPRINT) IR MANUAL, MT 9900-25 (11-15-72)

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