

# **Criminal Tax Investigations: Civil and Criminal Tax Fraud**

The 2014 New England IRS Representation Conference  
Presented at Foxwoods Resort and Casino

November 21, 2014

Moderator: Frank Agostino, Esq., *Agostino & Associates, P.C.*  
Panelists: Megan L. Brackney, Esq., *Kostelanetz & Fink, LLP*  
Caroline D. Ciraolo, Esq., *Rosenberg Martin Greenberg, LLP*  
Barbara T. Kaplan, Esq., *Greenberg Traurig, LLP*  
Christine A. Puglisi, Special Agent, *Internal Revenue Service, CI Division*

## **Table of Contents**

- I. Tax Fraud/Tax Evasion – Various Definitions
  - A. Criminal Tax Evasion
  - B. Civil Tax Fraud
  - C. Fraud Under the IRM
  - D. The Fine Line Between Tax Avoidance and Tax Evasion
  
- II. Selected Statutes Relevant to Criminal and Civil Tax Fraud
  - A. Overview
    - 1. In General
    - 2. Criminal Tax Fraud
    - 3. Civil Tax Fraud
  - B. Tax Crimes and Selected Statutes
    - 1. IRC § 7201. Attempt to evade or defeat tax.
    - 2. IRC § 7202. Willful failure to collect or pay tax.
    - 3. IRC § 7203. Willful failure to file return, supply information, or pay tax.
    - 4. IRC § 7204. Fraudulent statement or failure to make statement to employees.
    - 5. IRC § 7205. Fraudulent withholding exemption certificate or failure to supply information.
    - 6. IRC § 7206. Fraud and false statements.
    - 7. IRC § 7207. Fraudulent returns, statements, or other documents.
    - 8. IRC § 7212. Attempts to interfere with administration of internal revenue laws.
    - 9. 18 U.S.C. § 2. Principals.
    - 10. 18 U.S.C. § 4. Misprision of Felony.
    - 10. 18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery.
    - 11. 18 U.S.C. § 287. False, fictitious or fraudulent claims.
    - 12. 18 U.S.C. § 371. Conspiracy to commit offense or defraud United States.
    - 13. 18 U.S.C. § 1001. Statements or entries generally.



**No representation or warranty is made as to the accuracy of these materials. Readers should check primary sources where appropriate and use the traditional legal research techniques to make sure that the information has not been affected or changed by recent developments.**

**In addition, nothing in these materials constitutes legal advice. Client situations are almost always fact-specific. These materials are simply to provide basic information, and practitioners need to consult legal sources and use them to make a determination for their client based upon their own research and their client's particular situation.**

- C Civil Tax Fraud and Selected Statutes
    - 1. Note
    - 2. IRC § 6663. Imposition of fraud penalty.
    - 3. IRC § 6651(f). Failure to file tax return or to pay tax.
- III. Differences and Similarities Between Criminal and Civil Fraud
- A. Criminal Fraud v. Civil Fraud: An Overview
    - 1. Results
    - 2. Imposition
  - B. Burden of Proof
    - 1. Overview
    - 2. Criminal Tax Fraud
    - 3. Civil Tax Fraud
  - C. Privileges
    - 1. Attorney Client Privilege Generally Extends to Federally Authorized Practitioners in Civil Cases
    - 2. State Accountant-Client Privileges
  - D. Double Jeopardy
  - E. Criminal Tax Fraud
    - 1. IRC § 7201. Attempt to evade or defeat tax.
    - 2. IRC § 7202. Willful failure to collect or pay tax.
    - 3. IRC § 7203. Willful failure to file return, supply information, or pay tax.
  - F. Civil Tax Fraud Penalties and Additions to Tax
    - 1. Selected Cases
- IV. Criminal Investigation and Criminal Prosecution
- A. Frontline Fraud Detection: The IRS Fraud Program
    - 1. Purpose
    - 2. Specific Training in Fraud
    - 3. Fraud Detection Begins During the Audit
  - B. Badges of Fraud
    - 1. Categories of Badges of Fraud
    - 2. Internal Processes for Determining Fraud
    - 3. Considerations to Prosecute Criminally or Civilly
    - 4. What the IRM Directs Compliance to Do
  - C. How Do Criminal Investigations Begin At the IRS?
    - 1. Criminal Investigations (“CI”) generally categorizes its compliance strategies and activities into three components
    - 2. Agency Referrals
    - 3. Financial Reporting Forms
    - 4. Administrative vs. Grand Jury Investigations
  - D. Approaches to Monitor Civil Cases That May Turn Criminal
    - 1. Statute of Limitations
    - 2. FOIA Requests May Allow the Taxpayer to Monitor Case Development
  - D. Summons Authority
    - 1. Summons Authority

2. The Statute
  3. Summons Able to be Challenged Via *Powell*
  4. Third-Party Summons
  5. IRS Summons of Records Related to Foreign Banks
  6. Defenses to Summons Enforcement
  - F. Criminal Investigations May Not be Cloaked in a Civil Audit
    1. Parallel Investigations Permissible
    2. Civil Action Not to be Used Solely to Obtain Evidence for Criminal Prosecution
    3. Gray Areas Creates Risks for Taxpayers: *Tweel* and its Progeny
  - G. Referral to the DOJ
    1. Taxpayer Conference
    2. DOJ Referral
  - H. Information, Forensic Accounting, and the Use of *Kovel*
    1. Requests for Information
    2. The Importance of Obtaining Information About a Client's Tax Liability
    3. Who Makes a Good Forensic Accountant?
    4. The *Kovel* Doctrine
  - I. Sentencing Guidelines
    1. In General
    2. Federal Sentencing Guidelines Increases Likelihood of Incarceration for Tax Crimes
    3. *United States v. Booker*
    4. Guidelines Significant
    5. Version of Guidelines to be Used
    6. Procedure for Calculating Range
- V. Forfeitures
- A. In General
    1. Forfeitures Generally
    2. Statutory Authority for Forfeitures
  - B. Asset Forfeitures Under the Code
    1. Authority to Seize and Forfeit Assets
    2. IRC § 7301 (Property Subject to Tax)
    3. IRC § 7302 (Property Used in Violation of Internal Revenue Laws)
    4. Burden of Proof
  - C. Asset Forfeitures Under Title 18
    1. Historically Limited to Criminal Context
    2. The Statute
    3. The Wegelin Asset Forfeiture
    4. U.S. v. \$12,000,000 in United States Currency
- VI. Fraudulent Acts of Preparers: *Allen* and *BASR Pship*
- A. Statute of Limitations
    1. General Rule
    2. Exception for False or Fraudulent Returns

- B. The *Allen* Issue
  - 1. Issue
  - 2. Split Between Tax Court and Court of Federal Claims
  
- VII. Civil Consequences of a Criminal Prosecution
  - A. Restitution
    - 1. In General
    - 2. Criminal Restitution Collectible as a Tax Under Code or Under Title 18
    - 3. Criminal Restitution and Civil Tax Liability as Separate But Related Concepts
    - 4. IRS May Not Double Collect
    - 5. Assessment Immediate
  - B. Deportation
    - 1. Deportation Available for Certain Tax Crimes
    - 2. Criminal Preparation of a Tax Return as an Aggravated Felony?
    - 3. Passport Revocation Previously Sought
  - C. The Civil Exam
    - 1. The Referral Back to Civil
  - D. Civil Tax Fraud
    - 1. Doctrine of Collateral Estoppel May Be Used to Establish Fraudulent Intent in Civil Tax Fraud Case
    - 2. Collateral Estoppel in the Tax Fraud Context
    - 3. Effect of Conviction Under IRC § 7201
  
- VIII. International Aspects of Criminal and Civil Tax Fraud
  - A. FBAR Penalties
    - 1. FinCEN's Delegation of Authority to the IRS
    - 2. When FBAR Required
    - 3. How Filed
    - 4. FBAR Reports
    - 5. Civil and Criminal Penalties May Apply to FBARs
    - 6. Recent Revisions
  
- IV. Appendices
  - A. Appendix A: Summary of Criminal Violations

## I. TAX FRAUD/TAX EVASION – VARIOUS DEFINITIONS

### A. Criminal Tax Evasion

1. Criminal Offenses Generally: The Internal Revenue Code (“Code” or “IRC”) makes criminal at least 15 offenses for violating the internal revenue laws.
  - a. A summary of various tax crimes under the Code, as well as the elements for proving a prima facie case for each crime, is attached as Appendix A.
2. Tax Evasion: Tax evasion, the most well known crime under the Code, is defined in IRC § 7201 as the willful attempt to evade or defeat any tax imposed by the Code.
3. Elements of Tax Evasion: “The elements of an IRC § 7201 offense are willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax.” *United States v. Kim*, 884 F.2d 189 (5th Cir. 1989) (citing *Sansone v. United States*, 380 U.S. 343, 351 (1965)).
  - a. Willfulness Defined: Willfulness is the “voluntary, intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192, 193 (1991); *United States v. Pomponio*, 429 U.S. 10, 13 (1976).
    - (1) The government must establish that the defendant was aware of their legal obligations under the tax laws. *United States v. Bishop*, 412 U.S. 346, 358-59 (1973).
    - (2) Subjective test. A defendant’s good faith belief that he is not violating the tax laws, no matter how objectively unreasonable the belief may be, is a defense in a tax prosecution. *Cheek v. United States*, 498 U.S. 192, 199-201 (1991).
      - (a) Disagreement with the constitutionality of the tax law is not a defense to willfulness. *Cheek*, 498 U.S. at 206-08.
      - (b) Recent cases have shown that some courts are unwilling to permit defendants from even introducing evidence in support of an unconstitutionality defense. *See United States v. McBride*, 2014 U.S. Dist. LEXIS 126876 (D. Ut. 2014). There the government preemptively moved the court to exclude such evidence to which the court acquiesced.
  - (3) Unclear Law
    - (a) A defendant cannot be found guilty if the law they are charged with breaking is unclear.
      - (1) If two co-ordinate branches of government come to two opposite conclusions as to the applicability of the law, then the defendant cannot willfully break it. *United States v. Critzer*, 498 F.2d 1160 (4th

Cir. 1974).

(2) “Criminal prosecutions are no place for the government to try out pioneering interpretations of tax law.” *United States v. Heller*, 830 F.2d 150, 151, 154-55 (11th Cir. 1987).

(b) If the law is unknowable in an objective legal sense, there can be no intent to violate the duty that would permit conviction, regardless of a defendant’s actual intent. *James v. United States*, 366 U.S. 213 (1961).

(1) The issue was whether embezzled funds were taxable income. At the time of the ruling, the jurisprudence on the issue created confusion as to whether they were, in fact, taxable income.

(2) Although the Court concluded that the embezzled funds were taxable income, James could not be convicted as a matter of law because uncertain legal duties cannot be the subject of criminal evasion.

(c) When ambiguity of the law is raised in a tax evasion case, the question presented is whether by virtue of the statutes, regulations or their construction or by force of common sense, the defendant had fair warning that his alleged conduct constituted tax evasion. *U.S. v. Brodник*, 710 F.Supp.2d 526 (S.D.W.V. 2010).

(4) Examples of Willfulness:

(a) Evidence of a consistent pattern of underreporting large amounts of income. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001).

(b) Providing accountant or return preparer with inaccurate or incomplete information. *Bishop*, at 552.

(c) False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. *Id.*

(d) Keeping a double set of books. *Id.*

(e) Hiding, destroying, throwing away, or losing books and records. *Id.*

(f) Making or using false documents, false entries in books and records, false invoices. *Id.*

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

(h) Use of nominees. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Daniel*, 956 F.d2 540, 542-43 (6th Cir. 1992).

- (i) Extensive use of currency or cashier's checks. *United States v. Daniel*, 956 F.2d 540, 542-43 (6th Cir. 1992).
  - (j) Spending large amounts of cash which could not be reconciled with the amount of income reported. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001).
- b. Deficiency Required: A defendant cannot be convicted of tax evasion unless there is a deficiency of tax proven beyond a reasonable doubt. *Boulware v. United States*, 552 U.S. 421, 424-425 (2008).
- (1) A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return; (2) plus the amount of any previously assessed deficiency; (3) minus any rebate previously received. *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001).
    - (a) The tax deficiency does not need to be for taxes due and owing from the defendant. Attempt to evade the assessment or payment of taxes of another. *United States v. Wilson*, 118 F.3d 228, 231, 236 (4th Cir. 1997).
  - (2) The IRS does not need to make an assessment of tax or demand for payment in order to bring tax evasion charges. The government does not need to civilly or administratively determine a tax liability prior to bringing a tax evasion charge. *United States v. Ellett*, 527 F.3d 38, 40 (2d Cir. 2008).
    - (a) A tax deficiency arises by operation of law on the date the return was due if the taxpayer fails to file and the government can show a tax liability. *United States v. Voorhies*, 658 F.2d 710, 714-15 (9th Cir. 1981).
  - (3) Method of Accounting:
    - (a) When using the net worth method of proof to show income, the government must follow the same method of accounting as the taxpayer. *Fowler v. United States*, 352 F.2d 100, 103 (8th Cir. 1965).
    - (b) If a defendant uses a particular method of accounting, they cannot recalculate their tax using a difference method during trial. *See United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991).
      - (1) A taxpayer cannot report on the cash basis and then argue at trial that the accrual basis would yield a lower tax. *Clark v. United States*, 211 F.2d 100, 105 (8th Cir. 1954).
  - (4) Lucky Loser Argument
    - (a) A defendant cannot argue that a subsequent loss can be carried back to eliminate the tax from a prosecution year. *Willingham v. United States*, 289 F.2d 283, 287-88 (5th Cir. 1961). The crime is complete when with



willful intent, a false return was filed.

c. Affirmative Act: Failing to file a return coupled with an affirmative act of evasion is commonly referred to as a “Spies evasion.” Spies set forth the following examples of conduct which can constitute affirmative acts of evasion:

- (a) Keeping a double set of books;
  - (b) Making false or altered entries;
  - (c) Concealing sources of income;
  - (d) Destruction of records;
  - (e) Handling transactions to avoid usual records;
  - (f) Any other conduct likely to conceal or mislead.
- (2) Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax.
- (a) Taxpayer’s entry into an “independent contractor agreement,” although a legal activity in and of itself, satisfied the “affirmative act” element of Section 7201. *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990).
    - (1) *See also United States v. Conley*, 826 F.2d 551, 559-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).
- (3) *Spies*-evasion can extend to false statements made to I.R.S. agents. *United States v. Hogan*, 861 F.2d 312, 315 (1st Cir. 1988).
- (a) Proof of false statements on an application for an extension of time to file a tax return, that no tax is owed for the year is sufficient to meet the affirmative act requirement. *United States v. Klausner*, 80 F.3d 55, 62 (2d Cir. 1996).
  - (b) Filing false Form W-4 may constitute an act of evasion. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 497-99 (1943)
- (4) A false return does not need to be signed to be treated as an affirmative act of evasion, as long as it is identified as the defendant’s return. *United States v. Robinson*, 974 F.2d 575, 578 (5th Cir. 1992).
- (a) The fact that a return was signed by someone other than the defendant does not preclude a finding that the defendant knew of its falsity and had it filed in an attempt to evade. *United States v. Fawaz*, 881 F.2d 259, 265 (6th Cir. 1989).

(b) Note that the fact that a return or other tax document is signed with the defendant's name is prima facie evidence that the defendant signed the document. *I.R.C. § 6064*.

(1) I.R.C. § 6064 does NOT create a rebuttable presumption that the defendant knew the contents of the document. *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005).

(2) Knowledge may be inferred from the facts and circumstances and signature is prima facie evidence that the signor knows the contents of the return. *United States v. Bass*, 425 F.2d 161, 163 (7th Cir. 1970).

#### 4. Statute of Limitations

a. I.R.C. §6531(2) provides that the statutes of limitations for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof is six years.

(1) General rule is the statute of limitations begins to run from the latter of the due date of the return or the last affirmative act of evasion.

(a) If the delinquent filing of a false return is the method of attempting to evade, the statute will begin to run on the date the return is filed. *United States v. Habig*, 390 U.S. 222, 225 (1968).

b. Continuing Offense Doctrine – the Last Act of Evasion

(1) The date of filing a fraudulent return, while normally the date from which to measure the start of the statute of limitations for criminal prosecution for evasion, is not necessarily the last act in furtherance of the evasion. Any subsequent act -- such as making false statements to an agent in an audit in order to further hide the evasion in the return -- can refresh the statute of limitations on the original evasion (as well as constitute a separate crime under 18 USC 1001). *United States v. Beacon Brass Co., Inc.*, 344 U.S. 43 (1952).

#### B. Civil Tax Fraud

1. Civil Tax Fraud Defined: “‘Fraud’ ... means intentional wrongdoing on the part of a taxpayer motivated by a specific purpose to evade a tax known or believed to be owing.” *Stoltzfus v. United States*, 398 F.2d 1002, 1004 (3d Cir. 1968); *Gagliardi v. United States*, 81 Fed. Cl. 772 (Fed. Cl. 2008) (“The term ‘fraud,’ as used in the statutory provisions authorizing the assessment of civil fraud penalties against taxpayers, means intentional wrongdoing on the part of a taxpayer motivated by a specific purpose to evade a tax known or believed to be owing.” [Internal citations omitted.]

#### C. Fraud Under the IRM

1. Fraud Defined: The Internal Revenue Manual (the “IRM”) defines the term “fraud” as “deception by misrepresentation of material facts, or silence when good faith requires expression, resulting in material damage to one who relies on it and has the right to rely on it. Simply stated, it is obtaining something of value from someone else through deceit.” IRM, pt. 25.1.2 (July 18, 2008).
2. Tax fraud is often defined as an intentional wrongdoing on the part of a taxpayer, with the specific purpose of evading a tax known or believed to be owed. Tax fraud requires each of the following:
  - a. A tax due and owing; and
  - b. Fraudulent intent.
3. Purpose of the IRS Fraud Program: The IRS has adopted a National Fraud Program. The primary purpose of the IRS fraud program is to foster voluntary compliance through the recommendation of criminal prosecutions and/or civil penalties against taxpayers who evade the assessment and/or payment of taxes known to be due and owing. IRM, pt. 25.1.1.1(3) (Dec. 26, 2011).
4. Fraud Determinations at the Compliance Level: Generally, for fraud to be considered, the compliance employee must show:
  - a. An additional tax due and owing due to a deliberate intent to evade tax; or
  - b. The willful and material submission for false statements or false documents in connection with an application and/or return. I.R.M., pt. 25.1.1.1(5) (Dec. 16, 2011).

#### D. The Fine Line Between Tax Avoidance and Tax Evasion

1. Tax Avoidance Not Criminal: Tax avoidance is not a crime. *Gregory v. Helvering*, 293 U.S. 465 (1935) (“The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”); *see also* IRM, pt. 25.1.1.2.4(1) (Dec. 16, 2011).
2. Tax Evasion Criminal: Tax evasion is a crime. Evasion involves some affirmative acts to evade or defeat tax or payment of tax. Examples of affirmative acts are deceit, subterfuge, camouflage, concealment, attempts to color or obscure events, or make things seem other than they are. IRM, pt. 25.1.1.2.4(2).
  - a. Common evasion schemes include intentional understatement or omission of income, claiming fictitious or improper deductions, false allocation of income, improper claims, credits or exemptions, and/or concealment of assets. IRM, pt. 25.1.1.2.4(3) (Dec. 16, 2011).

## II. SELECTED STATUTES RELEVANT TO CRIMINAL AND CIVIL TAX FRAUD

### A. Overview

1. In General: The Code includes provisions for civil and criminal tax fraud.
  - a. Civil tax fraud is addressed in IRC §§ 6663 and 6651(f).
  - b. Criminal violations of the internal revenue laws are set forth in various provisions throughout the Code and in Title 18 of the U.S. Code (not to be confused with the Internal Revenue Code).
2. Criminal Tax Fraud: The Code makes criminal at least 15 offenses for violating the internal revenue laws.
  - a. A summary chart of the tax crimes under the Code, as well as the elements required to prove a prima facie case of each crime, is attached as Appendix A.
3. Civil Tax Fraud:
  - a. Fraud Penalty: The Code imposes a 75% penalty on the portion of any underpayment of tax attributable to fraud.
  - b. Addition to Tax for Fraudulent Failure to File: The Code imposes an addition to tax of up to 75% of the amount required to be shown on the tax return when the failure to file a Federal tax return is due to fraud.

### B. Tax Crimes and Selected Statutes

1. 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 \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

2. 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.

3. 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, 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 \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting “felony” for “misdemeanor” and “5 years” for “1 year”.

4. IRC § 7204. Fraudulent statement or failure to make statement to employees.

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.

5. IRC § 7205. Fraudulent withholding exemption certificate or failure to supply information.

(a) Withholding on wages. Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

(b) Backup withholding on interest and dividends. If any individual willfully makes a false certification under paragraph (1) or (2) (C) of section 3406 (d), then such individual shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

6. 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

(4) Removal of 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 \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

7. IRC § 7207. Fraudulent returns, statements, or other documents.

Any person who willfully delivers or discloses to the Secretary 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 \$10,000 (\$50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. Any person required pursuant to section 6047 (b), section 6104(d), or subsection (i) or (j) of section 527 to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than \$10,000 (\$50,000 in the case of a corporation), or imprisoned not more than 1 year, or both.

8. 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.

9. 18 U.S.C. § 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.

10. 18 U.S.C. § 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 under this title or imprisoned not more than three years, or both.

11. 18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery.

A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or



makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined under this title, imprisoned not more than 5 years, or both.

12. 18 U.S.C. § 287. False, fictitious or fraudulent claims.

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

13. 18 U.S.C. § 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 under this title 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.

14. 18 U.S.C. § 1001. Statements or entries generally.

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

\* \* \* \* \*

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch \* \* \*.

### C. Civil Tax Fraud and Selected Statutes

1. Note: The following sections are excerpts from the Code or Title 18 of the U.S. Code.

2. IRC § 6663. Imposition of fraud penalty.

a. (a) Imposition of penalty. If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

(b) Determination of portion attributable to fraud. If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes (by a preponderance of the evidence) is not attributable to fraud.

(c) Special rule for joint returns. In the case of a joint return, this section shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse.

3. IRC § 6651(f). Failure to file tax return or to pay tax.

a. (a) Addition to the tax. In case of failure –

(1) (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

prescribed therefore (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;

\* \* \* \* \*

(f) Increase in penalty for fraudulent failure to file. If any failure to file any return is fraudulent, paragraph (1) of subsection (a) shall be applied –

- (1) by substituting “15 percent” for “5 percent” each place it appears, and
- (2) by substituting “75 percent” for “25 percent.”

### **III. DIFFERENCES AND SIMILARITIES BETWEEN CRIMINAL AND CIVIL TAX FRAUD**

#### A. Criminal Fraud v. Civil Fraud: An Overview

##### 1. Results:

- a. Criminal Tax Fraud: Criminal fraud results in a punitive action with penalties consisting of fines and/or imprisonment. Criminal penalties (1) are enforced only by prosecution, (2) are provided to punish the taxpayer's wrongdoing, and (3) serve as a deterrent to other taxpayers. IRM, pt. 25.1.1.2.3(2) (May 19, 1999).
  - (1) Willfulness Required: Willfulness is a common element of tax crimes. Willfulness is defined as a voluntary, intentional violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192, 201 (1991).
  - (2) Good Faith May Negate Willfulness: A good faith misunderstanding of the law or a good faith belief that one is not violating the law negates the willfulness element. *Id.* at 196.
- b. Civil Tax Fraud: Civil tax fraud results in a remedial action taken by the Government such as assessing the correct tax and imposing civil penalties as an addition to tax, as well as retrieving transferred assets. IRM, pt. 25.1.1.2.3(1) (May 19, 1999). Civil penalties are assessed and collected administratively as a part of the tax.
- c. Duality of Civil and Criminal Tax Frauds: A tax fraud offense may result in both civil and criminal penalties.

##### 2. Imposition:

- a. Civil Tax Fraud: Civil penalties are assessed and collected administratively as a part of the tax. Thus, if the IRS determines a tax fraud liability is due from a taxpayer, the IRS must issue a notice of deficiency. *See* IRC § 6212(a).
  - (1) Restriction on Assessment: Except in the case of certain jeopardy or termination assessments, the IRS may not assess a deficiency until (i) a notice of deficiency has been mailed to the taxpayer, and (ii) the time for filing a petition with the Tax Court has expired (i.e., 90 days generally or 150 days if addressed to a person outside the United States). If a petition with the Tax Court is filed, then the IRS may not assess the deficiency until 60 days after the Tax Court decision has become final. (i.e., for 150 days if no appeal has been filed).
  - (2) Forums for Litigation: The taxpayer facing a civil fraud tax penalty can:
    - (a) Petition the United States Tax Court within 90 days (or 150 days if

addressed to a taxpayer outside the United States) without paying the penalty. *See* IRC § 6213; or

(b) Pay the penalty and sue for a refund in the U.S. Court of Federal Claims, *see* 28 U.S.C. § 1491, or the U.S. district courts, *see* 28 U.S.C. § 1346.

b. Criminal Tax Fraud: Again, criminal penalties (1) are enforced only by prosecution, (2) are provided to punish the taxpayer's wrongdoing, and (3) serve as a deterrent to other taxpayers. IRM, pt. 25.1.1.2.3(2) (May 19, 1999).

## B. Burden of Proof

1. Overview: The Government bears the burden of proving fraud in civil and criminal tax cases.

### 2. Criminal Tax Fraud:

a. Beyond a Reasonable Doubt: In criminal cases the government must prove tax evasion beyond a reasonable doubt.

(1) The Fifth Amendment Due Process Clause and the Sixth Amendment jury trial right together require "criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Jinwright*, 683 F.3d 471, 477 (4th Cir. 2012) (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

### 3. Civil Tax Fraud:

a. Clear and Convincing Evidence: In civil cases the government must prove fraud with intent to evade taxes by "clear and convincing evidence." IRC § 7454(a); Tax Court Rule 142(b); *Morse v. Comm'r*, 419 F.3d 829, 832 (8th Cir. 2005) ("The Commissioner has the burden to prove fraud by clear and convincing evidence.").

(1) Clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Ohio v. Akron Ctr. For Reprod. Health*, 497 U.S. 502, 516 (1990) (quoting *Cross v. Ledford*, 120 N.E.2d 118, 123 (Ohio 1954)).

b. Circumstantial Evidence Typical: Fraud is rarely admitted, and as such, tax fraud may be proven by circumstantial evidence that is "so strong that no other conclusion can be reached." *Richardson v. Comm'r*, 509 F.3d 736, 743 (6th Cir. 2007). Courts may infer fraud from "any conduct, the likely effect of which would be to mislead or conceal." *United States v. Walton*, 909 F.2d 915, 926 (6th

Cir. 1990).

- c. Badges of Fraud: Because fraud is rarely admitted, courts typically rely upon certain badges of fraud as to whether a taxpayer had the requisite fraudulent intent to support a civil fraud penalty. These badges of fraud include: (1) understating income, (2) maintaining inadequate records or destroying records, (3) implausible or inconsistent explanations of behavior, (4) concealment of income or assets, (5) failing to cooperate with tax authorities, (6) engaging in illegal activities, (7) intent to mislead which may be inferred from a pattern of conduct, (8) lack of credibility of the taxpayer's testimony, (9) filing false documents, (10) failing to file tax returns, and (11) dealing in cash. *Aston v. Comm'r*, T.C. Memo. 2003-128; *Garavaglia v. Comm'r*, T.C. Memo. 2011-228, *aff'd* 521 Fed. Appx. 476 (6th Cir. 2013).

### C. Privileges

1. Attorney Client Privilege Generally Extends to Federally Authorized Practitioners in Civil Cases: With certain exceptions, in civil cases the common law attorney client privilege extends to federally authorized tax practitioners. *See* IRC § 7525. IRC § 7525 does not apply in criminal cases. *See* IRC § 7525(a)(2) (privilege “may only be asserted in \* \* \* (A) any noncriminal tax matters before the Internal Revenue Service, and (B) any noncriminal tax proceeding in Federal court brought by or against the United States.”)
2. State Accountant-Client Privileges: Most states do not recognize an accountant-client privilege. Information created by state-created accountant-client privileges generally will not withstand an IRS summons. *See, e.g., Couch v. United States*, 409 U.S. 322, 335 (1973) (“no state-created [accountant-client] privilege has been recognized in federal cases.”).

### D. Double Jeopardy

1. Double jeopardy does not apply to civil fraud penalties.
  - a. Taxpayers can be prosecuted criminally and later have civil tax fraud penalties assessed against them.
  - b. “We believe § 6663 is remedial, rather than punitive, in nature and therefore should not be regarded as a criminal penalty for double jeopardy purposes.” *Morse v. Comm'r*, 419 F.3d 829, 835 (8th Cir. 2005).
  - c. “Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.” *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).
  - d. “For over fifty years, the addition to tax [for fraud] has been regarded as remedial, rather than punitive, in nature.” *Thomas v. Comm'r*, 62 F.3d 97, 100 (4th

Cir.1995).

## E. Criminal Tax Fraud

### 1. IRC § 7201. Attempt to evade or defeat tax.

#### a. Recall the Statute:

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

b. What Does Evade or Defeat Mean? The terms “evade” and “defeat”, as used in IRC § 7201, contemplate an escape from tax and not merely a postponement of disclosure or payment. *Edwards v. United States*, 375 F.2d 862 (9th Cir. 1969).

c. Lesser Included Offenses: When the charge is filing false and fraudulent tax returns, IRC § 7207 misdemeanor is not an offense necessarily included under IRC § 7201. *Berra v. United States*, 351 U.S. 131 (1956).

#### d. Difference Between Felony and Misdemeanor Cases

(1) The difference between misdemeanor offense for willful failure to pay taxes when due and felony offense for willful attempt to evade or defeat taxes is that the felony offense involves some commission in addition to willful omission. *Sansone v. United States*, 380 U.S. 343 (1965).

(2) The difference between misdemeanor and felony is in affirmative “attempt,” so that willful but passive neglect may constitute lesser offense. *Spies v. United States*, 317 U.S. 492 (1943).

(3) The difference between misdemeanor and felony tax evasion is not standard of willfulness, but the distinct forms of conduct. *United States v. Platt*, 435 F.2d 789 (2d Cir. 1970).

(4) If willfulness, a tax deficiency, and intent to defeat the tax could be proved beyond a reasonable doubt, then the offense should be prosecuted as a felony, but if the proof is only sufficient to show delivery of a return and knowledge that it is material false, then the tax evasion should be prosecuted as a misdemeanor. *United States v. Coppola*, 300 F.Supp. 932 (D. Conn. 1969), *aff'd*, 425 F.2d 660 (2d Cir. 1969).

#### e. Selected Cases

(1) A defendant’s willful failure to file returns for two years and filing of two

false withholding certificates with his employer for same two years constituted willful attempts to evade. *United States v. Copeland*, 786 F.2d 768 (7th Cir. 1985).

- (2) In criminal cases, exact amount of tax evaded is not important, since it is enough that tax on some income has been fraudulently evaded, but in a civil proceeding an accurate determination is necessary in order to determine amount of tax liability. *Simon v. Comm’r*, 248 F.2d 869 (8th Cir. 1957).
- (3) Embezzled funds were “income,” and failure to report the same constituted tax evasion, though taxpayer never used such funds, but kept them intact, and alleged that he had not taken the same for his personal use but because of hatred of his cousins, from whose company he embezzled the funds. *United States v. Milder*, 459 F.2d 801 (8th Cir. 1972).
- (4) Voluntary Disclosure Policy was not an invitation aimed at extracting confessions of guilt from known or suspected delinquent taxpayers, and it did not amount to a promise of immunity or leniency in return for a statement by taxpayer. *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), *reh’g denied*, 372 U.S. 950 (1963).
- (5) Taxpayer’s filing of accurate tax returns did not preclude his prosecution for his subsequent willful acts attempting to evade payment of the taxes that he computed on those returns. *United States v. Schoppert*, 362 F.3d 451 (8th Cir. 2004), *cert. denied*, 543 U.S. 911 (2004).

## 2. IRC § 7202. Willful failure to collect or pay over tax.

### a. Recall the Statute

- (1) “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.”

- b. What Does Willful Mean? The meaning of the word “willfully” as used in IRC § 7202 with respect to failure to pay taxes, means with respect to felonies; with a bad purpose or evil motive. *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958).

### c. Selected Cases

- (1) The criminal provisions of the Code impose dual obligation to truthfully account for and pay over trust fund taxes that is satisfied only by fulfilling both separate requirements; thus, command of statute is violated by one who willfully fails either to account for or to pay over necessary funds. *United States v. Evangelista*, 122 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S.



1114 (1998).

- (2) The government is not required to provide notice to a taxpayer pursuant to the statute imposing a civil penalty for failure to collect, truthfully account for, and pay over taxes before proceeding under the statute imposing a criminal penalty for willful failure to collect, truthfully account for, and pay over taxes. *United States v. McLain*, 597 F.Supp.2d 987 (D.Minn. 2009), *aff'd*, 646 F.3d 599 (8th Cir. 2011).
- (3) Charges of willful failure to account for and “pay over” withheld employment taxes were subject to six-year statute of limitations for willfully failing to “pay” any tax, rather than to three-year residual statute of limitations for tax offenses. *United States v. Gollapudi*, 130 F.3d 66 (3d Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998).
- (4) Six-year limitations period for offense of “willfully failing to pay any tax, or make any return,” did not apply to offense of failing to “collect, account for, and pay over” taxes to the Internal Revenue Service (the “IRS”), and therefore general three-year limitations period applied. *United States v. Brennick*, 908 F.Supp. 1004 (D. Mass. 1995).
- (5) District court’s error at tax evasion sentencing of imposing two-level enhancement for abuse of position of trust was not harmless, even though sentence imposed fell within the correct Sentencing Guideline range, where there was no indication in record that court would not have made similar downward variance if abuse of position of trust enhancement had not applied. *United States v. DeMuro*, 677 F.3d 550 (3d Cir. 2012).
- (6) Funds on which defendant failed to pay taxes were only subject to being taxed once, and thus aggregation of tax losses caused by defendant’s evasion of personal income tax liability and his failure to account for and pay over payroll taxes in his role as president of financial advisory company was impermissible for purposes of computing defendant’s base offense level. *United States v. May*, 568 F.3d 597 (6th Cir. 2009).

3. IRC § 7203. Willful failure to file return, supply information, or pay tax.

a. Recall the Statute

- (1) “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, 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 \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect

to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting “felony” for “misdemeanor” and ‘5 years’ for ‘1 year’.”

- b. Difference Between IRC §§ 7201 and 7203: Section 7201 requires affirmative act of evasion while section 7203 is an omission of a duty to make return. *United States v. Ming*, 466 F.2d 1000 (7th Cir. 1972), *cert. denied*, 409 U.S. 915 (1972), *reh’g denied*, 409 U.S. 1051 (1972).
- c. Charges Under IRC §§ 7201 and 7203 Allowable: The government could charge the defendant with violations of IRC §§ 7201 (making it a felony to willfully evade any tax) and 7203 (making it a misdemeanor to willfully fail to file return) as separate counts of same indictment, although IRC § 7203 count was lesser included offense of IRC § 7201 count IRC §§ 7201, 7203. *United States v. Overton*, 617 F.Supp. 5 (W.D. Mich 1985).
- d. Lesser Included Offenses: Offense of attempt to evade tax did not merge with offense of failing to pay tax, and same acts or omissions of taxpayer, who was obligated to pay gambler’s tax, subjected him to prosecution for (1) willful attempt to evade or defeat tax, and (2) willful failure to pay over tax. *Reynolds v. United States*, 288 F.2d 78 (5th Cir. 1961), *cert. denied* 368 U.S. 883 (1961), *reh’g denied*, 368 U.S. 917 (1961).
- e. Selected Cases
  - (1) Constitutional privilege against self-incrimination did not excuse a taxpayer’s blanket refusal to answer any questions on his returns relating to his income or expenses for years in question absent a reasonable showing as to how disclosure of amount of legal fees received by him during such years could possibly incriminate him. *United States v. Daly*, 481 F.2d 28 (8th Cir. 1973), *cert. denied* 414 U.S. 1064 (1973).
  - (2) A signed but otherwise blank Form 1040 is not a “return” precluding assessment of penalties for failing to meet this section’s obligation to file income tax returns. *Knighten v. Comm’r*, 702 F.2d 59 (5th Cir. 1983), *reh’g denied*, 705 F.2d 777 (5th Cir. 1983), *cert. denied*, 464 U.S. 897 (1983).
  - (3) Government is not required to show that federal income tax is due or an intent to evade tax to obtain conviction of willful failure to file return, and thus, district court could exclude as irrelevant defendant’s proffered testimony as to whether he would have received a refund had he timely filed a tax return in year in which he was charged with willfully failing to file.

## F. Civil Tax Fraud Penalties and Additions to Tax

1. Selected Cases:

- a. Fraudulent intent was clearly and convincingly shown, warranting imposition of the civil fraud penalty for underpayment of taxes, where the taxpayer consistently understated income over a three-year period, was convicted criminally of filing false federal income tax returns, made false statement on student loan application, interfered with the IRS's investigation by trying to prevent the IRS from obtaining information from the tax preparer, did not submit any books or records to the IRS during the course of its examination of his returns, failed to maintain adequate books and records, and devised scheme to conceal income by diverting it to his children. *Hoover v. Comm'r*, T.C. Memo. 2006-82.
- b. Underpayment of taxes was due to fraud, as would support civil tax fraud penalty, where the taxpayer failed to report amounts received in numerous withdrawals from bank accounts of his businesses; the taxpayer was convicted of criminal fraud and false statements for years surrounding the tax year at issue in the civil case, which evinced a pattern of consistent understatement, the taxpayer extensively dealt in cash and cashier's checks by conducting 52 separate transactions in which he withdrew over \$500,000 in cash and cashier's checks, the taxpayer maintained no books for any companies in which he had an ownership or management interest, and the taxpayer conceded at trial that he structured the transactions to intentionally avoid federal reporting requirements for cash transactions of \$10,000 or more. *Hamilton v. Comm'r*, T.C. Memo. 2004-66.
- c. Taxpayers were collaterally estopped from asserting that underpayment of their income tax was not due to civil fraud, as would warrant additions to tax, for the taxable year for which, pursuant to guilty pleas, taxpayers were convicted for criminal tax evasion. *Moore v. Comm'r*, T.C. Memo. 2001-77.
- d. Taxpayer was liable for addition to tax for fraud and fraud penalty for four taxable years in which he underreported his income, since reconstruction of the taxpayer's income revealed that he underpaid his taxes and each underpayment was attributable to fraud; taxpayer's conduct provided a strong inference of fraud where he engaged in illegal drug sales, established a clear pattern of underreporting taxable income, failed to maintain adequate records of his income, and engaged in substantial cash transactions, which supported a particularly strong inference of fraud, and taxpayer pleaded guilty to criminal tax evasion for one taxable year. *Piole v. Comm'r*, T.C. Memo. 2001-4.
- e. Government took no position in prior criminal prosecution of taxpayer contrary to its subsequent position in taxpayer's suit challenging deficiencies, as required for application of judicial estoppel. *Bussell v. Comm'r*, T.C. Memo. 2005-77, *aff'd*, 262 Fed. Appx. 770 (9th Cir. 2007).
- f. Civil tax penalty for fraud was remedial, rather than punitive, and thus was not a criminal penalty for purposes of the Double Jeopardy Clause of the Fifth Amendment. *Morse v. Comm'r*, 419 F.3d 829 (8th Cir. 2005).

- g. Taxpayer's acquittal on criminal fraud charge did not preclude the IRS from litigating the taxpayer's civil liability for fraud, negligence, or an addition to tax for fraudulent failure to file under doctrines of double jeopardy, *res judicata*, or collateral estoppel. The Court reasoned that since there was a higher standard of proof in criminal proceedings than in civil proceedings, the failure of proof in the criminal proceeding did not necessarily lead to conclusion that there would be failure of proof in civil action. *McGee v. Comm'r*, T.C. Memo. 2000-308.
- h. The IRS established by clear and convincing evidence the taxpayer's fraudulent state of mind with respect to underpaid income taxes, as required to permit both imposition of civil fraud penalty and assessment of taxes at any time under false-or-fraudulent-return exception to three-year limitations period; the taxpayer consistently underreported income, he failed to maintain adequate records to support his defense that certain bank deposits were from nontaxable sources such as loans, gifts, or cash hoard, he did not cooperate with IRS examinations and investigations, and he reported income on loan applications, under penalty of perjury, that was much higher than he reported on his tax returns. *Scott v. Comm'r*, T.C. Memo. 2012-65.
- i. The IRS proved fraud by clear and convincing evidence where a taxpayer-owner of employee-leasing companies consistently underreported income, destroyed records, forming successor companies to avoid workers' compensation premiums, understated payrolls by 75% to understate workers' compensation premiums and employment taxes, concealed income, encouraged his accountants to destroy evidence, and agreed as part of plea colloquy that he had engaged in a scheme to defraud insurance companies and the United States. *Garavaglia v. Comm'r*, T.C. Memo. 2011-228, *aff'd* 521 Fed. Appx. 476 (6th Cir. 2013).
- j. The IRS proved fraud by clear and convincing evidence where the taxpayer and various business entities in his control failed to file tax returns for the years at issue, underreported income when returns were filed, engaged in evasive and litigious behavior intended to conceal the real nature of his business dealings, conducted all financial transactions through offshore business or credit accounts, withdrew large sums of cash from his businesses to pay expenses incurred through the offshore credit cards, and was evasive at trial. *Scharringhausen v. Comm'r*, T.C. Memo. 2012-350.

#### IV. CRIMINAL INVESTIGATION AND CRIMINAL PROSECUTION

##### A. Frontline Fraud Detection: The IRS Fraud Program

1. Purpose: The IRS Fraud Program is designed to encourage voluntary compliance through the imposition of civil penalties and, as appropriate, criminal prosecution of taxpayers who willfully and intentionally evade tax reporting and/or payment obligations. IRM, pt. 25.1.3.1 (Oct. 30, 2009).
2. Specific Training in Fraud: The IRS specifically trains its revenue officers, agents, and other employees in fraud detection. These employees are trained to identify signs or badges of fraud.
3. Fraud Detection Begins During the Audit: Many of the criminal prosecutions start as IRS examinations (aka audits) and IRS collections.
  - a. “When affirmative acts (firm indications) of fraud/willfulness exist and criminal criteria are met, the compliance employee will refer the case through the Fraud Technical Advisor (FTA) to Criminal Investigation (CI) via Form 2797, *Referral Report of Potential Criminal Fraud Cases*. IRM, pt. 25.1.3.1 (Oct. 30, 2009).

##### B. Badges of Fraud

1. Categories of Badges of Fraud: As noted above, the IRS typically looks for fraud in the context of certain badges of fraud. The IRS has categorized the badges of fraud into five categories.
  - a. Affirmative Acts of Fraud: Affirmative acts of fraud are actions taken by the taxpayer, return preparer and/or promoter to deceive or defraud. IRM, pt. 25.1.2.1 (Jan 11, 2013).
  - b. Indicators of Fraud – Income: Per IRM, pt. 25.1.2.3(2) (Jan. 11, 2013), the indicators of fraud with respect to income are as follows:
    - (1) Omissions of specific items where similar items are included.
    - (2) Omissions of entire sources of income.
    - (3) Unexplained failure to report substantial amounts of income identified as received.
    - (4) Substantial unexplained increases in net worth, especially over a period of years.
    - (5) Substantial personal expenditures exceeding reported available resources.
    - (6) Bank deposits from unexplained sources substantially exceeding reported income.

- (7) Concealment of bank accounts, brokerage accounts, and other property.
  - (8) Inadequate explanation for dealing in large sums of currency, or the unexplained expenditure of currency.
  - (9) Consistent concealment of unexplained currency, especially in a business not routinely requiring large cash transactions.
  - (10) Failure to deposit receipts in a business account, contrary to established practices.
  - (11) Failure to file a tax return, especially for a period of several years, despite substantial amounts of taxable income received.
  - (12) Cashing checks, representing income, at check cashing services and at banks where the taxpayer does not maintain an account.
  - (13) Concealing sources of receipts by false description of the source(s) of disclosed income, and/or nontaxable receipts.
- c. Indicators of Fraud – Expenses or Deductions: Per IRM, pt. 25.1.2.3(3) (Jan. 11, 2013), the indicators of fraud with respect to expenses or deductions are as follows:
- (1) Substantial overstatement of deductions.
  - (2) Substantial amounts of personal expenditures deducted as business expenses.
  - (3) Claiming fictitious deductions.
  - (4) Dependency exemption claimed for nonexistent, deceased, or self-supporting persons. Providing false or altered documents, such as birth certificates, lease documents, school/medical records, for the purpose of claiming the education credit, additional child tax credit, earned income tax credit (EITC), or other refundable credits.
  - (5) Trust fund loans disguised as expenses or deductions.
- d. Indicators of Fraud – Books and Records: Per IRM, pt. 25.1.2.3(4) (Jan. 11, 2013), the indicators of fraud with respect to books and records are as follows:
- (1) Maintaining multiple sets of books or no records.
  - (2) False entries, or alterations made on the books and records; back-dated or post-dated documents; false invoices, false applications, false statements, or other false documents or applications.
  - (3) Invoices are irregularly numbered, unnumbered or altered.

- (4) Checks made payable to third parties that are endorsed back to the taxpayer. Checks made payable to vendors and other business payees that are cashed by the taxpayer.
  - (5) Failure to keep adequate records, concealment of records, or refusal to make records available.
  - (6) Variances between treatment of questionable items as reflected on the tax return, and representations within the books.
  - (7) Intentional under or over footing of columns in journal or ledger.
  - (8) Amounts on tax return not in agreement with amounts in books.
  - (9) Amounts posted to ledger accounts not in agreement with source books or records.
  - (10) Journalizing of questionable items out of correct account.
  - (11) Recording income items in suspense or asset accounts.
  - (12) False receipts to donors by exempt organizations.
- e. Indicators of Fraud – Allocations of Income: Per IRM, pt. 25.1.2.3(5) (Jan. 11, 2013), the indicators of fraud with respect to allocations of income are as follows:
- (1) Distribution of profits to fictitious partners.
  - (2) Inclusion of income or deductions in the tax return of a related taxpayer, when difference in tax rates is a factor.
- f. Indicators of Fraud – Conduct of Taxpayer: Per IRM, pt. 25.1.2.3(6) (Jan. 11, 2013), the indicators of fraud with respect to the conduct of the taxpayer are as follows:
- (1) False statement about a material fact pertaining to the examination.
  - (2) Attempts to hinder or obstruct the examination. For example, failure to answer questions; repeated cancelled or rescheduled appointments; refusal to provide records; threatening potential witnesses, including the examiner; or assaulting the examiner.
  - (3) Failure to follow the advice of accountant, attorney, or return preparer.
  - (4) Failure to make full disclosure of relevant facts to the accountant, attorney, or return preparer.
  - (5) The taxpayer's knowledge of taxes and business practices where numerous questionable items appear on the tax returns.

- (6) Testimony of employees concerning irregular business practices by the taxpayer.
  - (7) Destruction of books and records, especially if just after examination was started.
  - (8) Transfer of assets for purposes of concealment, or diversion of funds and/or assets by officials or trustees.
  - (9) Patterns of consistent failure over several years to report income fully.
  - (10) Proof that the tax return was incorrect to such an extent and in respect to items of such magnitude and character as to compel the conclusion that the falsity was known and deliberate.
  - (11) Payment of improper expenses by or for officials or trustees.
  - (12) Willful and intentional failure to execute pension plan amendments
  - (13) Backdating applications and related documents.
  - (14) Making false statements on Tax Exempt/Government Entity (TE/GE) determination letter applications.
  - (15) Use of false social security numbers.
  - (16) Submission of false Form W-4.
  - (17) Submitting a false affidavit.
  - (18) Attempts to bribe the examiner.
  - (19) Submission of tax returns with false claims of withholding (Form 1099-OID, Form W-2) or refundable credits (Form 4136, Form 2439) resulting in a substantial refund.
  - (20) Intentional submission of a bad check resulting in erroneous refunds and releases of liens.
  - (21) Submission of false Form W-7 information to secure Individual Taxpayer Identification Number (ITIN) for self and dependants.
- g. Indicators of Fraud – Method of Concealment: Per IRM, pt. 25.1.2.3(7) (Jan. 11, 2013), the indicators of fraud with respect to methods of concealment are as follows:
- (1) Inadequacy of consideration.
  - (2) Insolvency of transferor.



- (3) Asset ownership placed in other names.
  - (4) Transfer of all or nearly all of debtor's property.
  - (5) Close relationship between parties to the transfer.
  - (6) Transfer made in anticipation of a tax assessment or while the investigation of a deficiency is pending.
  - (7) Reservation of any interest in the property transferred.
  - (8) Transaction not in the usual course of business.
  - (9) Retention of possession or continued use of asset.
  - (10) Transactions surrounded by secrecy.
  - (11) False entries in books of transferor or transferee.
  - (12) Unusual disposition of the consideration received for the property.
  - (13) Use of secret bank accounts for income.
  - (14) Deposits into bank accounts under nominee names.
  - (15) Conduct of business transactions in false names.
2. Internal Processes for Determining Fraud: When indicators (badges) of fraud are uncovered, the compliance employee must clearly document the potential fraud indicators and initiate a discussion with the compliance employee's group manager. If the compliance employee's group manager concurs there are indicators of fraud warranting fraud development, the compliance employee must contact the fraud technical advisor (FTA) assigned to that area.
  3. Considerations to Prosecute Criminally or Civilly: Among the issues considered in determining whether to make a criminal referral are the following factors:
    - a. Amount of tax;
    - b. Targeted areas/industries (e.g., tax shelters, international issues);
    - c. The flagrancy of the conduct; and
    - d. Publicity.
  4. What the IRM Directs Compliance To Do:
    - a. I.R.M. § 25.1.3.2 (12-27-2011) provides:

- (1) If after consultation with the FTA, it is determined that a potential fraud case has firm indications of fraud or willfulness and meets criminal criteria, the compliance employee will suspend the examination/collection activity without disclosing to the taxpayer or representative the reason for the suspension. When the taxpayer asks if a fraud referral is being considered or whether CI is involved, the examiner or revenue officer must not give a false or deceitful response. Guidance from the courts provides that compliance employees:
  - (a) May decline to answer questions about criminal potential,
  - (b) May not deceive taxpayers when asked specifically about the character or nature of an investigation,
  - (c) Are not required to initiate disclosure about developing indicators of fraud or a potential referral to CI, or
  - (d) May simply advise that when firm indicators of fraud are present, a referral to CI is required.

#### C. How Do Criminal Investigations Begin At the IRS?

1. Criminal Investigations (“CI”) generally categorizes its compliance strategies and activities into three components:
  - a. Legal source investigations;
    - (1) The legal source investigations involve legal source income in which the primary motive is the violation of tax statutes.
  - b. Illegal source investigations, and
  - c. Narcotics related.
2. CI’s 2013 investigative priorities included:
  - a. Identity Theft Fraud
  - b. Return Preparer Fraud & Questionable Refund Fraud
  - c. International Tax Fraud
  - d. Fraud Referral Program
  - e. Political/Public Corruption
  - f. Organized Crime Drug Enforcement Task Force (OCDETF)
  - g. Asset Forfeiture

- h. Voluntary Disclosure Program
  - i. Counterterrorism and Sovereign Citizens
3. CI reports that they initiated 5,314 investigations in FY 2013, a 12.5% increase over 2012.
    - a. Prosecution recommendations for FY 2013 were 4,364, an increase of 17.9% over 2012.
    - b. Convictions totaled 3,311 in FY 2013, an increase of 2537% over 2012.
    - c. Of most importance, the conviction rate for FY 2013 was 93.1%, an increase of 0.1% over 2012.
    - d. Note that CI had a 5.4% decrease in the number of Special Agents in 2013 from 2012.
  4. Agency Referrals – Law enforcement agencies, federal or state agencies, or other divisions of the Internal Revenue Service (“IRS”) provide information to the Criminal Investigation Division (“CI”) that lead to criminal tax investigations.
  5. Financial Reporting Forms - The filing or the failure to file financial forms such as currency transaction reports (“CTR”); suspicious activity reports (“SARs”); Forms 8300, which report receipt of more than \$10,000.00 received in a trade or business, or Forms 90.22.1 “Report of Foreign Bank and Financial Accounts” and other foreign financial transaction forms have triggered many criminal investigations.
  6. Administrative vs. Grand Jury Investigations
    - a. Administrative – The IRS conducts the investigation on its own, using the administrative summons to compel the production of documents and testimony.
      - (1) After an administrative investigation is completed, the special agent must prepare a special agent's report (SAR), together with exhibits, in order to recommend that the Government prosecute the matter. The SAR contains a detailed account of the investigation and the special agent's recommendations, and is reviewed by both the special agent's supervisors and the Chief Counsel, Criminal Tax Division (CT). CT then prepares a Criminal Enforcement Memorandum (CEM) that discusses the nature of the crime(s) for which the agent recommends prosecution, the evidence relied upon to prove the crime(s), technical or legal issues, anticipated difficulties in prosecution, and the special agent's specific recommendation. Thereafter, if CI concludes that the Government should prosecute the matter, the CI Special Agent-in-Charge (SAC) refers the matter to the Tax Division or, in some cases, the United States Attorney. *United States Attorney Manual* § 6-4.110.
      - (2) During an administrative investigation of a criminal tax case, the IRS may

refer the case directly and simultaneously to both the United States Attorney and the Tax Division for an expedited guilty plea, if only legal source income is involved (i.e., neither narcotics nor organized crime), and the taxpayer's counsel states that the taxpayer wishes to enter such a guilty plea. The plea must be consistent with the Tax Division's major count policy. *Id.*

(a) When the IRS refers a criminal matter to the Department of Justice, it may share returns or return information with the Department of Justice. *I.R.C. § 6103(h)(2)*.

(b) Once a criminal referral is made, the IRS, including CI, may not issue or commence an action to enforce an administrative summons with respect to the taxpayer for the same tax and the same taxable period. *I.R.C. § 7602(d)*.

b. Grand Jury Investigations – The Special Agents work in conjunction with the local U.S. Attorney's Office and/or the Department of Justice Tax Division, and use grand jury subpoenas to obtain the documents and testimony they seek.

(1) The Tax Division must first approve and authorize the United States Attorney's use of a grand jury to investigate criminal tax violations. *See 28 C.F.R. § 0.70*.

(2) The Tax Division has delegated to the United States Attorneys the authority to approve grand jury investigations of certain false and fictitious claims for tax refunds in violation of 18 U.S.C. § 286 and 18 U.S.C. § 287 (other than those investigations involving a professional tax return preparer). *See Tax Division Directive No. 96* (December 31, 1991).

#### D. Approaches to Monitor Civil Cases That May Turn Criminal

1. Statute of Limitations: During the criminal investigation, the revenue agent should closely monitor the statute of limitations and request extensions. It is a rare case in which it is a good approach to agree to the statute of limitations in a potentially criminal case.

2. FOIA Requests May Allow the Taxpayer to Monitor Case Development: The attorney should make regular FOIA requests to the United States and request that third parties to whom summonses have been issued to provide a copy of all records produced to the IRS. This will allow the attorney to monitor the case and ensures that the attorney has all information in the possession of the United States.

#### E. Summons Authority

1. Summons Authority: Congress has empowered the IRS to examine any books, records, or other data relevant to the investigation of a taxpayer's civil or criminal tax liability. *IRC § 7602(a)(1)*.

2. The Statute: IRC § 7602 provides as follows:
  - a. “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 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 may deem proper, to appear before the Secretary 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.”
3. Summons Able to be Challenged Via Powell: The IRS may obtain this information by serving a summons on the subject of the investigation or on any third party who may possess relevant information. An individual who has a summons served on him or her may challenge its legality in a court if the Government petitions the court to enforce the summons. After the Government establishes that certain threshold requirements have been met, the taxpayer bears a heavy burden of proving that enforcement of the summons is an unenforceable abuse of process.
  - a. Burden on Government: Before a summons will be enforced, the Government must prove that:
    - (1) The investigation is conducted for a legitimate purpose;
    - (2) The information sought is relevant to the purpose of the investigation;
    - (3) The IRS must not already possess the information sought; and
    - (4) All required administrative steps have been taken. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).
4. Third-Party Summons
  - a. IRC § 7609(a) requires that the taxpayer identified in a third-party summons be notified as to whether the summons seeks information, “with respect to,” that taxpayer (e.g. when a third party such as a bank is summoned to produce a taxpayer’s bank statements).

- b. Notice must be provided in person or by certified or registered mail and must be served at least 23 days before the compliance date set in the summons.
  - (1) As recently as April 28, 2014, the Tenth Circuit decided *Jewell v. United States* (Docket No. 13-6069), in which the Court quashed third-party summonses because the IRS failed to notify the taxpayer with 23 days' advance notice.
- c. The summonsed party, whether the taxpayer him or herself or a third-party, never has the right to move to quash a summons. A taxpayer, however, has the right to *intervene* in a summons enforcement proceeding commenced by the United States. *I.R.C. § 7609(b)(2)*.

## 5. IRS Summons of Records Related to Foreign Banks

- a. U.S. District Judge Kimba M. Wood of the Southern District of New York entered an order on Nov. 7, 2013, authorizing the IRS to issue summonses requiring Bank of New York Mellon (Mellon) and Citibank NA (Citibank) to produce information about U.S. taxpayers who may be evading or have evaded federal taxes by holding interests in undisclosed accounts at Zurcher Kantonalbank and its affiliates (collectively, ZKB) in Switzerland.
- b. U.S. District Judge Richard M. Berman of the Southern District of New York entered an order on November 7, 2013 authorizing the IRS to issue summonses requiring Mellon, Citibank, JPMorgan Chase Bank NA (JPMorgan), HSBC Bank USA NA (HSBC), and Bank of America NA (Bank of America) to produce similar information in connection with undisclosed accounts at The Bank of N.T. Butterfield & Son Limited and its affiliates (collectively, Butterfield) in the Bahamas, Barbados, Cayman Islands, Guernsey, Hong Kong, Malta, Switzerland, and the United Kingdom.

(1) The Court granted the IRS permission to serve “John Doe” summonses.

(a) “John Doe” summonses are used to obtain information about possible tax fraud by individuals whose identities are unknown.

(b) “John Doe” summons procedure requires the IRS to convince a court that (1) the investigation relates to a particular person or ascertainable group of persons; (2) there is reasonable cause to believe that the person or persons identified may not have complied with the tax laws; and (3) the information sought is not readily available from other sources. *I.R.S. §7602(f)*.

## 6. Defenses to Summons Enforcement

### a. Fifth Amendment

(1) A summonsed party is certainly entitled to assert the Fifth Amendment

privilege against self-incrimination. This privilege is limited to protect the witness against real dangers, and it is up to a court of law to determine whether invocation is justified. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

(a) The protection is not available to avoid the production of records of a collective entity (e.g., a corporation, partnership, or LLC) held by the summonsed party in a representative capacity. *Braswell v. United States*, 487 U.S. 99, 104 (1988).

#### F. Criminal Investigations May Not be Cloaked in a Civil Audit

1. Parallel Investigations Permissible: The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. *United States v. Kordel*, 397 U.S. 1, 11 (1970).
2. Civil Action Not to be Used Solely to Obtain Evidence for Criminal Prosecution: The Government may not use a civil action solely for the purpose of obtaining evidence for a criminal prosecution. *See, e.g., id.* at 12–13; *United States v. Rand*, 308 F.Supp. 1231 (D.C. Ohio 1970).
3. Gray Area Creates Risk for Taxpayers: Tweel and its Progeny: There is a vast gray area between permissible parallel investigations and impermissible criminal investigations cloaked in civil audits. The *Tweel* doctrine seeks to address this problem with the belief that: “[o]ur revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.” *United States v. Tweel*, 550 F.2d 297, 300 (5th Cir. 1977).
  - a. Tweel Violations: A *Tweel* violation occurs when the IRS improperly obtains information from a taxpayer for a criminal matter by deceiving him or her into believing that the materials will only be used for civil audit purposes. *See United States v. Tweel*, 550 F.2d. 297 (5th Cir. 1977).
    - (1) United States v. Tweel: A Special Agent investigates Nicholas Tweel’s income tax returns for 1959 through 1963. Immediately after the criminal investigation, a Revenue Agent begins the audit of Tweel’s returns for 1966 through 1968 at the request of Organized Crime and Racketeering Section of the Department of Justice (“DOJ”). Mr. Tweel is represented by the same accountant for both the civil and criminal audit. The accountant specifically asked the revenue agent if there was a special agent involved, to which the revenue agent replied that there was not. Under the belief that there was no criminal investigation, the accountant Bagby voluntarily turned over Mr. Tweel’s records. The records were then used to convict Mr. Tweel criminally.
    - (2) The Court stated: From the facts we find that the agent’s failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky

deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material. *Tweel*, 550 F.2d at 299.

- (3) The Court went on to note: We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities. *Tweel*, 550 F.2d at 300.
- b. *United States v. Toussaint*: Shortly after *Tweel* was decided, a Texas District Court decided *United States v. Toussaint*, 456 F.Supp. 1069 (S.D. Tex. 1978). *Toussaint* does not mention *Tweel*, but extends the requirements of good faith in *Tweel*. Hence, the cases were typically mentioned together when asserting a *Tweel* violation.
- c. *Caceres*: In 1979, the Supreme Court decided *United States v. Caceres*, 440 U.S. 741, 754 (1979). The Supreme Court held that, absent any statutory or Constitutional violation, the exclusionary rule is inapplicable where evidence is obtained solely in violation of an IRS regulation. Since *Caceres*, the majority of published cases have refused to find a *Tweel* violation. Instead, they stress that *Tweel* is a three-part test in which the following factors are balanced:
  - (1) The IRS had firm indications of fraud by the defendant,
  - (2) There is clear and convincing evidence that the IRS affirmatively and intentionally misled the defendant, and
  - (3) The IRS's conduct resulted in prejudice to defendant's constitutional rights. *See, e.g., United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Rosenblum*, 2007 WL 4969140 (D.Minn. Dec. 21, 2007).
- d. *Tweel* and its Progeny Adopted Into IRM: IRM, pt. 25.1.2.2(6) (July 12, 2013) provides that if, during the course of an examination, a revenue agent discovers indications of fraud, he shall suspend his activities at the earliest opportunity without disclosing to the taxpayer, his representative or employees, the reason for such suspension.
- e. Modified Miranda Warnings: Usually, CI Special Agents give modified Miranda warnings, so the Government will not be required to argue *Caceres* in the normal criminal investigation.
- f. Practice Point: Most taxpayers litigating *Tweel* issues lose. The issue is best raised, if at all, during conferences with the IRS and the DOJ.

#### G. Referral to the DOJ

1. Taxpayer Conference: Before a case is transferred to the DOJ for prosecution, the taxpayer will be offered a taxpayer conference with the special agent in charge as a



matter of course. IRM, pt. 9.5.12.3 (July 25, 2007).

- a. The taxpayer conference will not be held if the taxpayer is the subject of a grand jury investigation or if the special agent in charge determines that such a conference would not be in the best interest of the government.
2. DOJ Referral: Once the IRS Criminal Investigation unit finishes its work it may refer the case to the DOJ for prosecution. Generally, criminal tax cases are referred to the DOJ for prosecution. However, if the Justice department has a grand jury investigation a referral may not be necessary.

#### H. Information, Forensic Accounting, and the Use of *Kovel*

##### 1. Requests for Information:

- a. IRC § 7521(c) provides as follows:

(1) “Any attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer may be authorized by such taxpayer to represent the taxpayer in any interview [which will be recorded]. An officer or employee of the Internal Revenue Service may not require a taxpayer to accompany the representative in the absence of an administrative summons issued to the taxpayer under subchapter A of chapter 78. Such an officer or employee, with the consent of the immediate supervisor of such officer or employee, may notify the taxpayer directly that such officer or employee believes such representative is responsible for unreasonable delay or hindrance of an Internal Revenue Service examination or investigation of the taxpayer.”

- b. Bypass of the Representative: The IRS may, in limited circumstances, bypass the taxpayer’s representative in obtaining information. In this regard, the IRM provides as follows:

(1) “Where a recognized representative has unreasonably delayed or hindered an examination, collection, or investigation by failing to furnish, after repeated requests, nonprivileged information necessary to the examination, collection or investigation, the Internal Revenue Service employee conducting the examination, collection, or investigation may request permission from his/her immediate supervisor to by-pass the representative and contact the taxpayer directly for such information.” IRM, pt. 5.1.23.5 (Oct. 30, 2012).

##### 2. The Importance of Obtaining Information About a Client’s Tax Liability:

- a. Information is Critical: Practitioners need to know at least as much and preferably more than the government about the client’s tax liability.

- b. Consider a Forensic Accountant: It may be helpful, especially in a criminal case, to hire a forensic accountant to review the client's financial records, to help build a defense, and to potentially testify at trial.
  - c. Hiring an Accountant to Preserve Privilege: As noted below, once the attorney has been retained, he or she should prepare a *Kovel* letter which formally retains the accountant to assist the lawyer in the taxpayer's legal representations.
3. Who Makes a Good Forensic Accountant? The forensic accountant should **not** also be the return preparer because the return preparer is a potential fact witness. If the case proceeds to trial, the return preparer will be deemed an interested witness whose usefulness as an expert witness may be compromised. This fact also makes the forensic accountant subject to a *Daubert* challenge by the opposing party. Further, a forensic accountant who is also the return preparer will face the practical difficulty of knowing which facts were learned in a privileged context, as part of forensics, and facts which were learned in a nonprivileged context, as the return preparer.

#### 4. The *Kovel* Doctrine

a. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)

(1) Facts: A law firm that employed an accountant on its own staff represented a taxpayer who was the target of a grand jury investigation focusing on whether he had committed various income tax offenses. To assist the law firm in advising the taxpayer, the taxpayer communicated information to the in house accountant who, in turn, helped explain the client's business and tax reporting to a lawyer in the firm. The government subpoenaed the law firm's files on the ground that the communications involving the accountant were not protected by the attorney-client privilege.

(a) The law firm responded that the use of the accountant was indistinguishable from the use of a foreign language interpreter because the tax and accounting concepts that the accountant communicated to the lawyer were every bit as 'foreign' to the lawyer as a language that he did not speak.

(2) Court's Opinion: The court stated that "[T]he complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others." *U.S. v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (quoting 8 Wigmore, Evidence, § 2290).

(3) Legal Rule: The attorney client privilege extends to non-lawyers employees who perform "a menial or ministerial responsibility that involves relating communications to an attorney." *Kovel*, 296 F.2d at 921.

b. Limitations to the *Kovel* Privilege

(1) Under *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), the Court held

that attorney-client privilege did not apply because the evidence indicated the taxpayer, a Corporation, consulted an accounting firm for tax advice rather than in-house counsel receiving accounting advice to assist him in rendering legal advice. The Court noted that the taxpayer did not produce adequate documentation, such as a separate retainer agreement or itemized billings, for the accounting firm's tax advice, to support a claim of privilege.

c. Practice to Protect the *Kovel* Privilege

(1) The client's existing accountant should not be hired to perform forensic accounting services (unless absolutely necessary) because use of the existing accountant makes it more difficult to establish that the accountant was hired primarily to help the attorney render legal advice.

(2) A forensic accountant engagement letter should state that all documents, including working papers, are the property of the lawyer, and are to be returned at the lawyer's request.

d. The forensic accountant's work should be labeled "protected by the attorney-client and work product privileges." See Pacini, Carl; Hillison, William; and Thompson, Steven. *Chapter 11: Forensic Accountants and Attorney-Client Privilege*. Pagano, Walter and Buckoff, Thomas A., *Expert Witnessing in Forensic Accounting*. 2005 R.T. Edwards.

I. Sentencing Guidelines

1. In General: An entire class could be conducted on sentencing guidelines. The following discussion is intended to provide the reader with an overview of the determination of sentence, and does not by any means address the many nuances of sentencing.
2. Federal Sentencing Guidelines Increases Likelihood of Incarceration for Tax Crimes: The introduction of the Federal Sentencing Guidelines in 1987 increased the likelihood of incarceration or community confinement following the conviction of a tax crime. From 1987 through 2005, federal sentencing had been governed by the mandatory application of the United States Sentencing Guidelines (the "Guidelines").
3. General deterrence has been codified in the Guidelines in the Introductory Comment to the Tax Section: The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators. U.S.S.G. §2T.1 (2013).
4. United States v. Booker: In *United States v. Booker*, 543 U.S. 220 (2005), the

Supreme Court held that mandatory application of the Guidelines violated the Sixth Amendment, and as such, deemed the Guidelines sentencing requirements advisory rather than mandatory.

- a. *Booker* has given judge considerably more discretion. Consider the case of Ty Warner. The Beanie Babies founder was found guilty of failing to disclose his Swiss bank accounts in addition to evasion of millions of dollars in tax. Although facing a 46-57 month Guidelines ranges, he received a probationary sentence.
  - (1) The Court noted that he paid a \$53 million FBAR penalty as a result his prosecution.
  - (2) Predictably the government appealed.
5. Guidelines Significant: District courts must consider the applicable United States Sentencing Guidelines (the “Guidelines”) range at sentencing. *See* 18 U.S.C. § 3553(a)(4); *Booker*, 543 U.S. at 245-246; *see also Gall v. United States*, 552 U.S. 38, 49 (2007) (“the Guidelines should be the starting point and the initial benchmark.”). In calculating the advisory Guidelines range, the sentencing judge must make factual findings using the preponderance of the evidence standard. *Rita v. United States*, 551 U.S. 338, 349-351 (2007). Thus, although the Guidelines are advisory, calculating the Guidelines’ range is a significant part of federal sentencing.
6. Version of Guidelines to be Used: Court will use the Guidelines Manual in effect on the date that the defendant is sentenced.
7. Procedure for Calculating Range: The appropriate Guidelines range is determined as follows:
  - a. Step 1: Determine the applicable offense guideline from Chapter Two (the statutory index provides a listing to assist in the determination). The starting point for this is typically the dollar amount of the tax loss attributable to the defendant (as charged and not necessarily pleaded, and generally without regard to interest). Once the total tax loss attributable to the defendant is known, the tax table in § 2T4.1 provides the base offense level for the defendant.
  - b. Step 2: Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guidelines in Chapter Two in the order listed. Enhanced sentencing may appropriate for, in addition to other facts, the use of shell corporations, the use of cash transactions, the failure to record income or inventory, destruction of records, the use of offshore bank accounts, etc.
  - c. Step 3: Apply the adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
  - d. Step 4: If there are multiple counts of conviction, repeat Steps 1 through 3 for each court. Apply Part D of Chapter Three to group the various counts and adjust

the offense level accordingly.

- e. Step 5: Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
- f. Step 6: Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
- g. Step 7: Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
- h. Step 8: For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- i. Step 9: Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

## V. FORFEITURES

### A. In General

1. Forfeitures Generally: Forfeiture is the government's seizure of property pursuant to law. Forfeiture has long been used as a law enforcement tool, typically to confiscate instrumentalities of crimes, though the United States has recently begun using forfeiture in civil tax cases.
  - a. Recent Rise in Asset Forfeitures: According to the DOJ, civil asset net forfeitures surged to approximately \$4.3 billion in 2012 from \$1.7 billion in 2011. Department of Justice, 2012 Asset Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statement, p. 58 (Jan. 2013). This was an increase of more than 150% year over year.
2. Statutory Authority for Forfeitures: Asset forfeitures are sanctioned under the Code and Title 18 of the U.S. Code.

### B. Asset Forfeitures Under the Code

1. Authority to Seize and Forfeit Assets: IRC § 7321 authorizes the Secretary of the Treasury to seize property subject to forfeiture. The two primary Code provisions making property subject to forfeiture are IRC §§ 7301 and 7302, with the latter the more regularly used of the two.
2. IRC § 7301 (Property Subject to Tax):
  - a. Overview: IRC § 7301 provides for the forfeiture of property which is in the custody of any person intending that the property be sold, removed, concealed, or deposited to defraud the United States of the tax associated therewith.
  - b. The Statute: IRC § 7301 provides as follows:
    - (1) "(a) Taxable articles. Any property on which, or for or in respect whereof, any tax is imposed by this title which shall be found in the possession or custody or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of such tax, or which is removed, deposited, or concealed, with intent to defraud the United States of such tax or any part thereof, may be seized, and shall be forfeited to the United States.
    - (b) Raw materials. All property found in the possession of any person intending to manufacture the same into property of a kind subject to tax for the purpose of selling such taxable property in fraud of the internal revenue laws, or with design to evade the payment of such tax, may also be seized, and shall be forfeited to the United States.

(c) Equipment. All property whatsoever, in the place or building, or any yard or enclosure, where the property described in subsection (a) or (b) is found, or which is intended to be used in the making of property described in subsection (a), with intent to defraud the United States of tax or any part thereof, on the property described in subsection (a) may also be seized, and shall be forfeited to the United States.

(d) Packages. All property used as a container for, or which shall have contained, property described in subsection (a) or (b) may also be seized, and shall be forfeited to the United States.

(e) Conveyances. Any property (including aircraft, vehicles, vessels, or draft animals) used to transport or for the deposit or concealment of property described in subsection (a) or (b), or any property used to transport or for the deposit or concealment of property which is intended to be used in the making or packaging of property described in subsection (a), may also be seized, and shall be forfeited to the United States.”

3. IRC § 7302 (Property Used in Violation of Internal Revenue Laws):

a. Overview: IRC § 7302 broadly provides for the forfeiture of any property used or intended for use in violation of the internal revenue laws. Despite the breadth of the language used in IRC § 7302, that section is not to be used as a substitute to the collection of taxes. *See* IRM, pt. 9.7.13.2.2 (May 5, 2012).

b. The Statute: IRC § 7302 provides as follows:

(1) “It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.”

4. Burden of Proof: The burden of proof to seize property under the Code is probable cause (i.e., a reasonable ground for belief that there was an illegal activity to which

the property had a substantial connection).

C. Asset Forfeitures Under Title 18

1. Historically Limited to the Criminal Context: Asset forfeiture has historically been limited to criminal cases. Congress recently broadened the scope of civil forfeiture to the civil sphere through enactment of 18 U.S.C. § 5317(c)(2). The IRS, in turn, has broadly interpreted this section to seize approximately \$16.2 million held through “correspondent accounts” of the private Swiss Bank, Wegelin & Co.
2. The Statute: 18 U.S.C. § 5317(c)(2) provides as follows:
  - a. “Any property involved in a violation of section 5313 \* \* \* or 5324 of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.”
3. The Wegelin Asset Forfeiture: The Government used 18 U.S.C. § 981(a)(1)(A) to seize approximately \$16.2 million held through the correspondent accounts of Wegelin bank.
  - a. Wegelin and at least two other Swiss banks used Wegelin’s Correspondent Account to launder U.S. taxpayers’ funds from their undeclared accounts in Switzerland. As set forth in papers filed with the district court, the IRS had reason to believe that these funds were transferred in a manner designed to reduce the risk of detection by U.S. authorities, so that the account holders could continue to avoid paying taxes due and owing to the United States.
  - b. The Court granted the IRS permission to serve a “John Doe” summons on UBS. The IRS uses John Doe summonses to obtain information about possible tax fraud by individuals whose identities are unknown. The John Doe summons directed UBS to produce records identifying U.S. taxpayers with accounts at Wegelin and other Swiss banks that used Wegelin’s Correspondent Account. Wegelin had admitted that certain of its U.S. taxpayer clients were maintaining accounts at Wegelin in order to evade their U.S. tax obligations.
  - c. Wegelin agreed to pay approximately \$20 million in restitution to the United States and pay a \$22.05 million fine. Wegelin also agreed to the civil forfeiture of an additional \$15.8 million, representing the gross fees earned by the bank on the undeclared accounts. Most importantly, the IRS seized approximately \$16.2 million from Wegelin’s correspondent bank account.
  - d. A copy of the forfeiture Complaint filed in *United States v. Wegelin & Co.* is available at:



(1) <http://www.justice.gov/usao/nys/pressreleases/January13/WegelinSummonsPR.php>.

4. United States v. Approximately \$12,000,000 in United States Currency

- a. The Defendant Currency was previously held in two accounts at a bank located in Zurich, Switzerland. These Swiss bank accounts were nominally held in the names of entities but the Complaint alleges that the assets in the accounts were, in fact, beneficially owned by U.S. citizens. The government's theory is that because the taxpayer concealed his interest in and any income earned from the account from the IRS, the currency is subject to forfeiture under 18 U.S.C. §981(a)(1)(A).

## VI. FRAUDULENT ACTS OF PREPARERS: ALLEN AND BASR PSHIP

### A. Statute of Limitations

1. General Rule: Tax must be assessed within three years after a return is filed or the due date for filing the return, whichever is later. IRC § 6501.
2. Exception for False or Fraudulent Returns: The IRS may assess the tax, or a court proceeding for the collection of such tax may be brought at any time in the case of:
  - a. A false or fraudulent return with the intent to evade tax (IRC § 6501(c)(1));
  - b. A willful attempt to evade tax (IRC § 6501(c)(2)); or
  - c. The failure to file a return (IRC § 6501(c)(3)).

### B. The *Allen* Issue

1. Issue: Whether the fraud of the return preparer, without regard to the fraud of the taxpayer, extends the three-year period of limitations on assessment under IRC § 6501(a).
2. Split Between Tax Court and Court of Federal Claims: Court take varying views as to whether the fraud of the return preparer extends the statute of limitations.
  - a. The Tax Court's *Allen* Rule: In *Allen v. Comm'r*, 128 T.C. 37 (2007), the Tax Court held that a preparer's fraudulent intent to evade taxes was sufficient to indefinitely extend the period of limitations on assessment under IRC § 6501(c).
    - (1) *Allen* Recently Confirmed by Second Circuit: The U.S. Court of Appeals for the Second Circuit adheres to the view set forth in *Allen* that the fraudulent intent of a preparer is sufficient to keep the statute open under IRC § 6501(c). See *City Wide Transit, Inc. v. Comm'r*, 709 F.3d 102 (2d Cir. 2013).
    - (2) *Allen* Recently Reconfirmed by the Tax Court: The Tax Court likewise confirmed the continuing validity of the *Allen* doctrine in *Eriksen v. Commissioner*, T.C. Memo. 2012-194. In that case, however, the Court held the IRS did not prove the preparer's fraud with respect to all but one of the litigants.
  - b. The Court of Federal Claim's View in *BASR*: In *BASR Pship v. United States*, the Court of Federal Claims held that that the IRC § 6501(c) provision extending the statute of limitations for an unlimited time in fraud cases required an "intent to evade tax" by the taxpayer, and was not extended to fraudulent behavior by a third party.

3. Practitioners facing this issue should be mindful of the split in the court's decisions when selecting the litigation forum. They should also check to see whether *BASR* was appealed to the Federal Circuit (at the time of this writing, no appeal has been taken).

## VII. CIVIL CONSEQUENCES OF A CRIMINAL PROSECUTION

### A. Restitution

1. In General: Restitution is typically ordered in criminal tax cases pursuant to a plea agreement or following a conviction. Restitution may also be required as a condition of probation.
2. Criminal Restitution Collectible as a Tax Under the Code or Under Title 18:
  - a. Congress has enabled non-exclusive parallel means by which the amount of restitution may be collected.
  - b. IRC § 6201(a)(4) provides for the assessment and collection of the amount of restitution ordered in a Federal criminal case for failure to pay any tax due under the internal revenue laws.
  - c. The DOJ likewise has authority to collect the restitution under Title 18.
3. Criminal Restitution and Civil Tax Liability: Criminal restitution and civil tax liability are separate and distinct concepts, though they are related in many significant respects. The assessment of restitution under IRC § 6201(a)(4) is not a determination of the actual civil tax liability for the tax period to which it relates. Rather, the restitution is assessable “as if such amount were such tax.”
4. IRS May Not Double Collect: The IRS may not collect both restitution and a civil tax liability for the same period because this would amount to impermissible double collection. Thus, any payments made to satisfy the restitution-based assessment must also be applied by the IRS to satisfy the related civil tax liability for the same tax period.
5. Assessment Immediate:
  - a. Generally, a tax deficiency may not be assessed until a notice of deficiency has been issued and the time to petition the Tax Court has expired or until the decision of the Tax Court has become final. IRC § 6213(a).
  - b. The Code authorizes various exceptions to the general restriction on assessment. *See generally* IRC § 6213(b).
  - c. As relevant to criminal prosecutions, amounts imposed as restitution for tax in a criminal case may be assessed despite the general prohibition on assessments without the issuance of a notice of deficiency contained in IRC § 6213. *See* IRC § 6214(b)(5).

### B. Deportation

1. Deportation Available for Certain Tax Crimes: Federal immigration law allows an alien convicted of an aggravated felony to be deported at any time after admission or determination of guilt. 8 U.S.C. § 1227(a)(2)(A).
  - a. Aggravated Felony Defined: The term “aggravated felony” includes an offense that involves (i) fraud or deceit in which the loss to the victim exceeds \$10,000, or (ii) the willful attempt to evade or defeat Federal taxes or the payment thereof in which the revenue loss to the Government exceeds \$10,000 (i.e., criminal tax evasion). 8 U.S.C. § 1101(a)(43)(M); IRC § 7201. Taxpayers may likewise be held criminally liable for willfully preparing or assisting in the preparation of a false Federal tax return (i.e., criminal preparation of a false tax return); a crime similar to yet distinguishable from criminal tax evasion. *See* IRC § 7206(1), (2).
2. Criminal Preparation of a Tax Return as an Aggravated Felony?
  - a. The Issue: In view of the fact that criminal preparation of a false tax return is not the same as criminal tax evasion, and is therefore not a listed deportable aggravated felony, the Government has argued that criminal preparation of a false tax return is an offense involving fraud or deceit that is a deportable offense.
  - b. Taxpayers’ Response: Taxpayers have responded that criminal preparation of a false tax return does not involve fraud or deceit, and is therefore not a deportable aggravated felony.
  - c. Criminal Preparation of a False Return May be a Deportable Offense: The Supreme Court, in *Kawashima v. Holder*, 565 U.S. \_\_\_, 132 S. Ct. 1166 (2012), rejected the taxpayers’ argument that criminal preparation of a tax return was not a deportable felony involving fraud or deceit. The taxpayers in *Kawashima*, a husband and wife, were Japanese citizens and lawful permanent residents of the United States. The Kawashimas were each convicted of willfully preparing or assisting in the preparation of false Federal income tax returns that had caused the Government a loss of more than \$10,000. An immigration judge ordered them deported because, the judge found, their crimes qualified as aggravated felonies involving fraud or deceit. The Supreme Court held that pleading guilty to the criminal preparation of a false tax return that resulted in a loss to the Government of more than \$10,000 is an aggregated felony involving fraud or deceit, thereby subjecting the taxpayer immigrants to deportation. The Supreme Court reasoned that criminal preparation of tax returns necessarily entails fraudulent or deceitful conduct that is a deportable offense.
3. Passport Revocation Previously Sought: Congress has considered whether to pass a law requiring revocation of the passports for individuals who owe the United States more than \$50,000 in back taxes. *See* S. 1813, 112th Cong. § 40304 (this bill, which passed the Senate but died in the House, provided for the revocation or denial for “seriously delinquent tax debt[s]” in an amount of more than \$50,000).

## C. The Civil Exam

1. The Referral Back to Civil: After the criminal case has concluded, whether the taxpayer should win or lose, the case will almost certainly be referred back to the IRS examination division. The IRS may very well determine deficiencies greater than the amount of tax loss determined in the criminal case.
  - a. Doctrine of collateral estoppel: once an issue of fact or law is “actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a difference cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)).

## D. Civil Tax Fraud

1. Doctrine of Collateral Estoppel May Be Used to Establish Fraudulent Intent in Civil Tax Fraud Case: The doctrine of collateral estoppel may prevent a taxpayer from claiming he or she is not liable for the civil tax fraud penalty if the taxpayer has been adjudged liable for criminal tax evasion, either through a guilty plea or a jury verdict. “A conviction for federal income tax evasion, either upon a plea of guilty, or upon a jury verdict of guilty, conclusively establishes fraud in a subsequent civil proceeding through application of the doctrine of collateral estoppel. *Gray v. Comm’r*, 708 F.2d 243, 246 (6th Cir. 1983).
2. Collateral Estoppel in the Tax Fraud Context: Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153-154 (1979); *Amos v. Comm’r*, 43 T.C. 50, 54-56 (1964), *aff’d* 360 F.2d 358 (4th Cir. 1965).
3. Effect of Conviction Under IRC § 7201: A conviction under IRC § 7201 (criminal tax evasion) satisfies the fraudulent intent requirement of IRC § 6663 (civil fraud). See *Brennan v. Comm’r*, T.C. Memo. 2009-77; *Wallace v. Comm’r*, 2000-49.

## VIII. INTERNATIONAL ASPECTS OF CRIMINAL AND CIVIL TAX FRAUD

### A. FBAR Penalties

1. FinCEN's Delegation of Authority to the IRS: The Financial Crimes Enforcement Network ("FinCEN") delegated to the IRS its enforcement authority for imposition of penalties for failure to file Form 114, Report of Foreign Bank and Financial Accounts ("FBAR").
2. When FBAR Required: An FBAR must be filed by U.S. persons with a financial interest in or signatory authority over one or more financial accounts in foreign countries with an aggregate value exceeding \$10,000 at any time during the taxable year.
3. How Filed: Starting July 1, 2013, filers must file the FBAR electronically through the Bank Secrecy Act E-File System, *available at* <http://bsaefiling.fincen.treas.gov/main.html>.
4. FBAR Reports: FBAR filings can be researched on the Currency and Banking Retrieval System (CBRS) or on Integrated Data Retrieval System (IDRS) using the command code "IRPTRO". Penalty cases, assessments, and payments are recorded on a separate FBAR database maintained by the Enterprise Computing Center (ECC).
5. Civil and Criminal Penalties May Apply to FBARs: The failure to file an FBAR may result in civil or criminal penalties.
  - a. Civil FBAR Penalties: The Code exacts hefty civil penalties for failing to file an FBAR.
    - (1) The maximum civil penalty for willful violators is, *for each year that the FBAR is not filed*, capped at \$100,000 or 50% of the balance of the account at the time of the violation. 31 U.S.C. § 5321(a)(5).
    - (2) The maximum civil penalty for non-willful violators is, *for each bank account that is not listed on the FBAR and for each year that the FBAR is not filed*, capped at \$10,000 per violation.
    - (3) The penalty can be waived if the taxpayer can persuade the IRS that the failure to file an FBAR was due to reasonable cause. It will be a rare case when the taxpayer can successfully demonstrate reasonable cause for failure to file an FBAR.
    - (4) Civil FBAR penalties are proposed on Letter 3709, FBAR 30-Day Letter. Civil FBAR penalties can be appealed to the IRS Office of Appeals and, depending upon the amount at issue and when the appeal is made, may be available for fast-track mediation.

- (5) Pre-Assessed FBAR Penalties and Fast Track Settlement: Pre-assessed FBAR penalties of \$100,000 or less are eligible for Fast Track Settlement if the FBAR 30-day letter has not been issued to the taxpayer. In Fast Track Settlement, the Appeals officer (acting as a mediator) uses mediation techniques to focus issues and lead the examiner and the taxpayer to determine the outcome of the dispute. If resolution is not reached through the mediation process, then the Appeals officer (acting as a mediator) will propose a resolution which is nonbinding on either party. IRM, pt. 8.11.6.1(7) (Oct. 28, 2013).
  - (6) Pre-Assessed FBAR Penalties and Fast Track Mediation: Pre-assessed FBAR penalties of \$100,000 or less are eligible for Fast Track Mediation regardless of whether the 30-day letter was issued to the taxpayer. In Fast Track Mediation, the Appeals officer (acting as a mediator) again helps the examiner and the taxpayer to discuss the issues in dispute and potential ways to resolve those issues. The goal is again to reach a mutually agreeable outcome. IRM, pt. 8.11.6.1(8) (Oct. 28, 2013).
  - (7) Post-Assessed FBAR Penalties: Post-assessed FBAR penalties do not have alternative dispute resolution rights. IRM, pt. 8.11.6.1(9) (Oct. 28, 2013). Post-assessment FBAR penalty cases are deemed priority cases and must be completed and approved within 120 days of assignment. IRM, pt. 8.11.6.1(18) (Oct. 28, 2013).
  - (8) Post-Assessed FBAR Penalties of More Than \$100,000: Post-assessed FBAR penalties of more than \$100,000 cannot be compromised by Appeals without the approval of the DOJ. *See* 31 U.S.C. § 3711(a)(12); IRM, pt. 8.11.6.1 (6) (Oct. 28, 2013).
  - (9) Joint and Several Liability: There is no joint and several liability with FBAR penalties because there are no joint FBARs. IRM, pt. 8.11.6.1(12) (Oct. 28, 2013).
  - (10) Litigated in District Court: FBAR penalties are challenged in U.S. district court.
- b. Criminal FBAR Penalties: Criminal FBAR penalties can result in a fine of not more than \$250,000, or five years in prison, or both. 31 U.S.C. § 5322(a). The best way to avoid criminal prosecution is to make a voluntary disclosure to the IRS ***before the IRS finds out about the taxpayer's bank account.*** This disclosure is most typically done through the IRS's Offshore Voluntary Disclosure Program, a full discussion of which is outside the scope of these materials.



- (1) The Uphill Criminal Battle: According to statistics compiled by Professor Jack Townsend of the University of Houston School of Law, 94 individuals have been charged with maintaining and failing to report offshore bank accounts. These charges, in turn, have led to 72 guilty pleas and 12 guilty verdicts following trial. Only one individual has been acquitted of the charged crime. Jack Townsend, Federal Tax Crimes Blog, “Offshore Charges/Convictions Spreadsheet”, *available at* <http://federaltaxcrimes.blogspot.com/p/offshore-charges-convictions.html> (last visited Dec. 12, 2013).
6. Recent Revisions: As noted above, on October 28, 2013, the IRS revised the IRM to provide guidance and clarify administrative review of FBAR penalties by the IRS’s Office of Appeals. As to FBAR penalties being considered for resolution by the IRS, the following additional points are noteworthy:
    - a. IRS FBAR Administrative File: The IRS will provide Appeals with an administrative file that should contain a brief summary memorandum explaining the FBAR violations containing statistical information which includes:
      - (1) A discussion of the FBAR violations,
      - (2) The number of penalty assessments,
      - (3) The dollar amounts involved, and
      - (4) The FBAR case disposition.
    - (5) The administrative file will also include Form 13535, Foreign Bank and Financial Accounts Report Related Statute Memorandum, affirming that the information shows that the FBAR violations were committed in furtherance of income tax violations, when appropriate; a copy of any delinquent FBAR(s) secured during the examination; FBAR issue workpapers; the FBAR 30-Day Letter (i.e., Letter 3709 for pre-assessment and Letter 3708 for post-assessment); the Taxpayer’s protest; the representatives power of attorney, if applicable; and an IRS Counsel Opinion memo for FBAR penalties larger than \$10,000 (for willful penalties only). IRM, pt. 8.11.6.2(3) (Oct. 28, 2013).
    - (6) *Practice Point*: Before attending a conference with Appeals, all practitioners should submit a Freedom of Information Request Act (FOIA) to the IRS Disclosure Office requesting a copy of the IRS administrative file.

- b. Limited Jurisdiction: As noted above, post-assessed FBAR penalties in excess of \$100,000 cannot be compromised by Appeals without approval of the DOJ. *See* 31 U.S.C. § 3711(a)(12); IRM, pt. 8.11.6.1 (6) (Oct. 28, 2013). Once assessed, the FBAR penalty becomes a claim of the United States Government, and as such, litigation occurs in the district courts. The FBAR penalty case will usually be received in Appeals pre-assessment. However, upon request, Appeals will also conduct post-assessment hearings to consider FBAR penalty liability and collection issues.
- c. Continuing Validity of Mitigation: The revised sections of the IRM concerning FBAR penalties continue to recognize the penalty mitigation provisions of IRM, pt. 4.26.16.4(6) (July 1, 2008). That provision recognizes that FBA civil penalties have varying upper limits, but no floor. Examiners are expected to exercise discretion, taking into account the facts and circumstances of each case. The IRS has developed penalty mitigation guidelines to assist examiners in the exercise of their discretion in applying these principles.
  - (1) Practice Point: For smaller foreign financial accounts, the mitigation guidelines might offer relief from the assessment of otherwise significant FBAR penalties.
- d. Statute of Limitations: The statute of limitations on assessment and collection of FBAR penalties are defined under the Bank Secrecy Act, 31 U.S.C. 5311, et seq.
  - (1) Statute of Limitations on Assessment: The failure to file an FBAR report, whether willfully or nonwillfully, is six years from the due date of the FBAR report. The failure to maintain required records, whether willfully or nonwillfully, is six years from the date the IRS first asks for these records.
  - (2) Statute of Limitations on Collection: The Government has two years in which to file a civil action to recover an FBAR penalty. The Government has ten years in which to obtain payment of the FBAR by offsetting payments.
- e. Interest Accruals: Interest on FBAR penalties does not accrue until the IRS actually assesses the penalty. IRM, pt. 8.11.6.1(13) (Oct. 28, 2013).
  - (1) Practice Point: Practitioners should consider consenting to extend the FBAR statute of limitations to avoid premature assessment of an FBAR penalty with an accompanying interest accrual.
- f. Unagreed Cases: If the Appeals officer and the taxpayer cannot agree to a resolution of the FBAR penalty, then assessment is to occur immediately without the issuance of a notice of deficiency. IRM, pt. 8.11.6.1(14) (Oct. 28, 2013).
- g. No Relief in Bankruptcy: Title 11 of the Bankruptcy Code does not provide relief from an assessed FBAR penalty.

- h. FBAR Penalties are an Appeals Coordinated Issues: FBAR penalties are an Appeals Coordinated Issue and require a referral to International Operations prior to holding the first conference. The purpose behind making FBAR penalties a coordinated issue is to ensure consistency nationwide. IRM, pt. 8.11.6.1(17) (Oct. 28, 2013).
- i. Counsel Memo Needed: A Counsel Memo is needed for willful FBAR penalties of more than \$10,000. IRM, pt. 8.11.6.2 (Oct. 28, 2013).

B. *Zwerner* Case

- 1. The government successfully sought to collect multiple 50% FBAR penalties against the taxpayer. In 2008, Zwerner authorized his attorney to pursue a voluntary disclosure. Unfortunately for Mr. Zwerner, this did not actually protect him from prosecution. The case settled before any determination could be made under the Eighth Amended Excessive Fines Clause.

C. Recent Developments with respect to off-shore trusts

- 1. The District Court in the Southern District of New York recently ordered defendants in an SEC enforcement proceeding to disgorge the amount of tax calculated by the SEC to have been avoided by the use of off-shore trusts. Although the disgorgement was calculated based on unreported tax, the Court held that the action was not actually the collection of tax. *See S.E.C. v. Wylly*, Opinion and Order, Docket No. 10-cv-5760(SAS) (9/25/14).
  - a. The SEC initially brought the action for filing of false disclosure forms.
  - b. Although the Court held that any disgorgement *SHOULD* be credited against any tax that may become due, it did not require it.
  - c. The Court ordered the payment of interest on the *tax*.

**Appendix A: Summary of Criminal Violations (Adapted From IRM, Pt. 25.1)**

<b><u>Statutory Authority and Offense</u></b>	<b><u>Classification of Offense</u></b>	<b><u>Elements for Prosecution</u></b>
26 U.S.C. § 7201 (Evasion)	Felony	(1) Willfulness; (2) Attempt to evade or defeat (usually involves concealment or deception) tax or payment thereof; and (3) Tax deficiency.
26 U.S.C. § 7202 (Trust Fund Violation – Failure to Collect or Park Over Tax)	Felony	(1) Willfulness; (2) Requirement to collect, truthfully account for, and pay over employment taxes; and (3) Either failure to collect any tax or failure to truthfully account for and pay over any tax or both.
26 U.S.C. § 7203 (Failure to File or Failure to Pay)	Misdemeanor	(1) Willfulness; (2) Requirement to file a return, pay an estimated tax or tax, maintain records, or supply information; and (3) Failure to file a return, pay an estimated tax or tax, maintain records, or supply information.
26 U.S.C. § 6050I (Trade or Business Required to File a Form 8300 for Receiving More Than \$10,000 Cash)	Felony	(1) Willfulness; (2) Subject to reporting requirement relating to cash of more than \$10,000 received in trade or business; and (3) Evasion of reporting requirement by: a. Causing a trade or business to fail to file report, or b. Causing a trade or business to file false report, or c. Structuring transactions to avoid report.
26 U.S.C. § 7204 (Employee Wage Statements)	Misdemeanor	(1) Duty to deduct and withhold employment tax or

		<p>income tax (IRC §§ 3102(a), 3402(a));</p> <p>(2) Duty to timely furnish to the employee a written statement showing specified information concerning the deductions (IRC § 6051);</p> <p>(3) 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; and</p> <p>(4) Willfulness.</p>
26 U.S.C. § 7205 (False-W-4)	Misdemeanor	<p>(1) Duty to supply information to employer regarding income tax withholding (IRC § 3402(f)(2));</p> <p>(2) Furnishing false or fraudulent information or failure to supply information which would require an increase in tax to be withheld; and</p> <p>(3) Willfulness.</p>
26 U.S.C. § 7206(1) (False Return)	Felony	<p>(1) Making and subscribing a return, statement or other document under penalties of perjury;</p> <p>(2) Knowledge that it is not true and correct as to every material matter; and</p> <p>(3) Willfulness.</p>
26 U.S.C. § 7206(2) (Assisting in Preparation of False Return)	Felony	<p>(1) Aiding or assisting in, procuring, counseling, or advising the preparation or presentation of a document in connection with matters arising under the internal revenue laws;</p> <p>(2) Document was false as to a material matter; and</p> <p>(3) Willfulness.</p>
26 U.S.C. § 7206(4) (Removal or	Felony	<p>(1) Tax imposed on property;</p>

Concealment With Intent to Defraud)		(2) Property on which tax is imposed or will be imposed or levy is authorized; (3) Removal or concealment; and (4) Intent to evade or defeat assessment or collection of tax.
26 U.S.C. § 7206(5) (Compromises and Closing Agreements)	Felony	(1) Willful concealment of property; or (2) Willful withholding, falsifying and destroying records; and (3) Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement.
26 U.S.C. § 7207 (Submission of False Documents)	Felony	(1) Willfulness; (2) Delivery or disclosure to any officer or employee of the IRS of any list, return, account, statement, or other document; (3) Return, statement, or other document is false or fraudulent as to a material matter; and (4) Knowledge of material falsity.
26 U.S.C. § 7212(a) (Omnibus Clause)	Felony	(1) Corrupt effort, endeavor, or attempt; (2) To impede, obstruct or interfere with; and (3) Due administration of the Code.
26 U.S.C. § 7212(a) (Corrupt or Forcible Interference)	Felony or Misdemeanor	(1) Use of force or threats; (2) To intimidate, impede or obstruct; and (3) An officer or employee of the U.S. acting in official capacity under the Code.
26 U.S.C. § 7212(b) (Forcible Rescue of Seized Property)	Felony	(1) Forcible rescue or attempt to forcibly rescue; (2) Seized property; and (3) Knowledge of seizure.

26 U.S.C. § 7215 (Collecting and Paying Tax)	Misdemeanor	(1) Taxpayer was a person required to collect, account for, and pay over income tax withholding on wages and FICA taxes; (2) Taxpayer was notified of the failure to collect, account for, and pay over; and (3) Taxpayer failed to collect, account for, and pay over the taxes, while not entertaining a reasonable doubt as to whether the law required the taxpayer to do so, and the failure was not due to circumstances beyond the taxpayer's control.
26 U.S.C. § 7232 (Failure to Register)	Felony	(1) Fails to register in connection with taxable purchase — diesel fuel and special motor fuels; or (2) Falsely represents that he is registered; or (3) Willfully makes false statement in an application for registration.
18 U.S.C. § 2 (Aiding and Abetting)	Felony or Misdemeanor	(1) Taxpayer associated with the criminal venture; (2) Taxpayer knowingly participated in the venture; and (3) Taxpayer sought by his or her actions to make the venture succeed.
18 U.S.C. § 152(1) (Concealment of Property)	Felony	(1) Bankruptcy proceeding was in existence; (2) Individual fraudulently concealed the property from the custodian; and (3) Property belonged to the bankruptcy estate.
18 U.S.C. § 152(2) (False Oath or Account)	Felony	(1) Existence of a bankruptcy proceeding; (2) Statement under oath; (3) Statement must be material;

		(4) Statement must be false; and (5) Statement was made knowingly and fraudulently.
18 U.S.C. § 152(3) (False Declarations)	Felony	(1) Existence of a bankruptcy proceeding; (2) Individual made a false declaration, certificate, verification, or other statement in relation to the bankruptcy proceeding; (3) Statement was material; and (4) Statement was known to be false.
18 U.S.C. § 152(4) (False Claims)	Felony	(1) Bankruptcy proceedings have commenced; (2) Individual presented or caused to be presented a proof of claim in the bankruptcy; (3) Proof of claim was false as to a material matter; and (4) Individual knew the proof of claim was false and acted knowingly and fraudulently.
18 U.S.C. § 152(5) (Fraudulent Receipt of Property)	Felony	(1) Individual receives a material amount of property from a debtor; (2) Such transfer occurred after the filing of a case under Title 11; and (3) Acts were done with the intent to defeat the provisions of Title 11.
18 U.S.C. § 152(6) (Extortion and Bribery)	Felony	(1) Individual gives, offers, receives, or attempts to obtain money or property, remuneration, compensation, reward, advantage, or promise for acting or forbearing to act in any case under Title 11; and (2) Action was made knowingly and fraudulently.
18 U.S.C. § 152(7) (Fraudulent Transfer)	Felony	(1) Individual fraudulently



or Concealment)		transferred or concealed the defendant's property or the property of another; and (2) Such act of transfer or concealment was done with the intent to defeat the provisions of Title 11, or in contemplation of a case under Title 11.
18 U.S.C. § 152(8) (Destruction or Alteration of Recorded Information)	Felony	(1) Bankruptcy proceeding existed; (2) Individual concealed, destroyed, or mutilated the documents; (3) Such documents related to the property or financial affairs of the debtor; and (4) Individual acted knowingly and fraudulently.
18 U.S.C. § 152(9) (Withholding of Recorded Information)	Felony	(1) Bankruptcy proceeding existed; (2) Individual withheld from the trustee entitled to its possession; books, documents, records, or papers; (3) Such documents related to the property or financial affairs of the debtor; and (4) Individual withheld the documents knowingly and fraudulently.
18 U.S.C. § 157 (Bankruptcy Fraud)	Felony	(1) Defendant devised or intended to devise a scheme or artifice to defraud; and (2) For the purpose of executing or concealing such scheme or artifice or attempting to do so; (3) Files a petition under Title 11; or (4) Files a document in a proceeding under Title 11; or (5) Makes a false or fraudulent representation, claim, or promise concerning

		or in relation to a proceeding under Title 11.
18 U.S.C. § 286 (Conspiracy to Defraud the Government With Respect to Claims)	Felony	(1) An agreement, combination, or conspiracy to defraud the United States (2) By obtaining or aiding to obtain the payment of any false, fictitious or fraudulent claim.
18 U.S.C. § 287 (False Fictitious or Fraudulent Claims)	Felony	(1) Knowingly makes or presents (statute does not require that person providing false information to return discounter who filed return actually file return to be guilty under 18 U.S.C. § 287); (2) False, fictitious or fraudulent claim; and (3) Knowing that claim filed is false, fictitious or fraudulent.
18 U.S.C. § 371 (Conspiracy)	Felony	(1) The general conspiracy statute encompasses two distinct types of conspiracies; a. Conspiracy to commit any federal offense b. Conspiracy to defraud the United States or any agency thereof, which includes the Service (2) Essential elements of a 18 U.S.C. § 371 offense are: a. Agreement by two or more parties b. To commit an offense against the United States; or, to defraud the United States or one of its agencies c. Overt act by one or more of the parties in furtherance of the agreement; and (3) Requisite intent to defraud or to commit the substantive offense.
18 U.S.C. § 1001 (False Statements)	Felony	(1) Either:

		<p>a. Falsifying, concealing or covering up any material fact by any trick, scheme, or device; or</p> <p>b. Making false, fictitious or fraudulent statements or representations; or</p> <p>c. Making or using any false writing or document.</p> <p>(2) Knowingly and willfully.</p> <p>(3) In a matter within the jurisdiction of a department or agency of the United States.</p> <p>(4) False matter was of a material nature</p>
<p>18 U.S.C. § 1956 (Laundering of Monetary Instruments)</p>	<p>Felony</p>	<p>(1) Whoever knowing that property involved is proceeds from a specified unlawful activity (“SUA”).</p> <p>(2) Person knew that proceeds was from some activity that constitutes a felony under state, federal or international law;</p> <p>a. Conducts or attempts to conduct a financial activity involving proceeds of a SUA</p> <p>b. With intent to promote the SUA or</p> <p>c. With intent to engage in conduct in violation of 7201 or 7206 or whoever knowing the transaction is</p> <p>i. Designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the SUA or</p> <p>ii. To avoid a transaction reporting requirement under a State or Federal law</p>