CRIMINAL TAX - AN OVERVIEW

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TABLE OF CONTENTS

CHAPTER FIVE

CRIMINAL TAX - AN OVERVIEW

Robert M. McCallum

I. TAX CRIMES 1

A. TITLE 26 OFFENSES - THE TRADITIONAL TAX OFFENSES 1

Section 7201 - Attempt to Evade or Defeat Tax 1
Section 7202 - Willful Failure to Collect or Pay Over Tax 1
Section 7203 - Willful Failure to File a Return, Supply Information or Pay Tax 1
Section 7205 - Fraudulent Withholding Exemption Certificate or Failure to Supply Information 2
Section 7206(1) - Fraud and False Statements 2
Section 7206(2) - Aiding or Assisting False or Fraudulent Document 2
Section 7212(a) - Attempts to Interfere with the Administration of the Internal Revenue Laws 2

B. TITLE 18 OFFENSES 3

Title 18, § 287 - False, Fictitious or Fraudulent Claims 3
Title 18, § 371 - Conspiracy 3
Title 18, § 1001 - False Statements 4

C. TITLE 31 OFFENSES 4

D. GENERAL CONSIDERATIONS 4

Venue 4
Statute of Limitations 5
Willfulness 5

II. SOURCES OF CRIMINAL INVESTIGATIONS 5

TABLE OF CONTENTS (continued)

III. INVESTIGATIVE TOOLS UTILIZED BY THE INTERNAL REVENUE SERVICE 6

A. SUMMONS 6
B. THIRD-PARTY RECORDKEEPER SUMMONS 7
C. JOHN DOE SUMMONSES 8
D. OBJECTIONS AND/OR LEGAL DEFENSES TO SUMMONSES 8
E. GRAND JURY 9
F. REPRESENTING AN INDIVIDUAL BEFORE A GRAND JURY 11
G. SEARCH WARRANTS 12
H. CHALLENGES TO SEARCH WARRANTS 13
I. WIRE TAPS 13
J. MAIL COVERS 13
K. PRIVILEGES 14

IV. METHODS OF PROOF 16

A. DIRECT/SPECIFIC ITEMS 16
B. INDIRECT ITEMS 17

V. REVIEW PROCESS FOR A CRIMINAL TAX CASE 18

A. SPECIAL AGENT'S REPORT 18
B. DISTRICT COUNSEL REVIEW 18
C. CRIMINAL TAX SECTION, DEPARTMENT OF JUSTICE 19
D. EARLY PLEA PROGRAM 20

VI. VOLUNTARY DISCLOSURE 20

VII. SENTENCING 21

A. OVERVIEW 21
B. PROBATION OFFICER 21
C. WHAT GUIDELINES APPLY 22
D. BASE OFFENSE LEVEL 22
E. SPECIFIC OFFENSE CHARACTERISTICS 23
F. OTHER ADJUSTMENTS 23
G. DEPARTURES 24
H. SENTENCING OPTIONS 26

I. TAX CRIMES

A. TITLE 26 OFFENSES: THE TRADITIONAL TAX OFFENSES

Section 7201 - Attempt to Evade or Defeat Tax

Section 7201 includes two offenses: (1) the willful intent to evade or defeat the assessment of a tax; and (2) the willful attempt to evade or defeat the payment of a tax. The elements of the crime are: (1) an attempt to evade or defeat a tax or the payment thereof; (2) an additional tax due and owing; and (3) willfulness. *See*, *Sansone v. United States*, 380 U.S. 343 (1965). This crime is a felony punishable by a fine of not more than $100,000 ($500,000 for a corporation) or imprisonment for not more than five years, or both.[1]

Section 7202 - Willful Failure to Collect or Pay Over Tax

Section 7202 includes two offenses: (1) a willful failure to collect; and (2) a willful failure to truthfully account for and pay over. This statute was enacted primarily to insure compliance with Federal Employment Tax Withholding requirements, however, the government rarely prosecutes such cases. To establish a violation of § 7202, the following elements must be prove beyond a reasonable doubt: (1) duty to collect, and/or to truthfully account for and pay over; (2) failure to collect, or truthfully account for and pay over; and (3) willfulness. This crime is a felony and is punishable by a fine of not more than $10,000 or imprisonment of not more than five years, or both.

Section 7203 - Willful Failure to File a Return, Supply Information or Pay Tax

Section 7203 includes four types of conduct: (1) a failure to pay an estimated tax or tax; (2) failure to file a return; (3) failure to keep records; and (4) failure to supply information. This statute is most commonly used to prosecute the offense of failure to file a return. The government must prove the following elements: (1) a requirement to file a return; (2) a failure to file at the time required by law; and (3) willfulness. *See*, *United States v. Buras*, 633 F.2d 1356, 1358 (9th Cir. 1980). This offense is a misdemeanor and is punishable by a fine of not more than $25,000 ($100,000 in the case of a corporation), or imprisonment of not more than one year, or both.[2]

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[1] 18 U.S.C. §§ 3623 and 3571 increased the maximum permissible fine for felony tax offenses committed after December 31, 1984 to $250,000 for individuals and $500,000 for corporations.

[2] 18 U.S.C. §§ 3623 and 3571 increased the maximum permissible fine for misdemeanor offenses committed after December 31, 1984 to $100,000 for individuals and $200,000 for corporations.

Section 7205 - Fraudulent Withholding Exemption Certificate or Failure to Supply Information

Section 7205(a) is utilized when employees attempt to circumvent the income tax wage withholding system by submitting false Forms W-4. The elements of § 7205(a) are as follows: (1) requirement to furnish a signed withholding exemption certificate to employer; (2) the taxpayer supplied the employer with a signed withholding statement; (3) the information supplied to the employer was false or fraudulent; and (4) the taxpayer acted willfully. *See, United States v. Herzog*, 632 F.2d 469 (5th Cir. 1980). This crime is a misdemeanor an dis punishable by a fine of not more than $1,000 or imprisonment of not more than one year, or both.

Section 7206(1) - Fraud and False Statements

Section 7206(1) is used by the government when a false document, including a tax return, is signed under penalties of perjury. Since it is not necessary to require proof of a tax deficiency, this statute is used when there is a small tax deficiency or a tax deficiency would be difficult to prove under Section 7201. The elements of the offense are as follows: (1) making and subscribing a return, statement or other document which was false as to a material matter; (2) under penalties of perjury; and (3) the taxpayer did not believe to be true and correct as to every material matter; and (4) the taxpayer falsely subscribed to willfully, with the specific intent to violate the law. *See*, *United States v. Brooksby*, 668 F.2d 1102 (9th Cir. 1982). This crime is a felony and is punishable by a fine of not more than $100,000 ($500,000 in the case of a corporation) or imprisonment of not more than three years, or both.

Section 7206(2) - Aiding or Assisting False or Fraudulent Document

Section 7206(2) is often used by the government to prosecute individuals who are involved in aiding or assisting in the preparation of false returns, e.g., return preparers. The elements of § 7206(2) are: (1) aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the Internal Revenue laws; (2) the document was false as to a material matter; and (3) willfulness. *See*, *United States v. Salerno*, 902 F.2d 1429 (9th Cir. 1990). The penalty for a violation of § 7206(2) is the same as that found under § 7206(1).

Section 7212(a) - Attempts to Interfere with the Administration of the Internal Revenue Laws

Section 7212(a) deals with two types of conduct: (1) threats or forcible endeavors designed to interfere with United States Agents acting pursuant to Titles 26; and (2) known as the omnibus clause, prohibits any act that either corruptly obstructs or impedes, or endeavors to obstruct or impede, the due administration of the Internal Revenue Code. The government has been using this statute with more frequency in past years. The elements of § 7212(a) are as follows: the government must prove (1) whoever in any way corruptly, (2) endeavored, (3) to

obstruct or impede the due administration of the Internal Revenue Code. *United States v. Williams*, 644 F.2d 696 (8th Cir.) *cert. denied* 454 U.S. 841 (1981). A conviction under this section may result in a fine of not more than $5,000 or imprisonment of not more than three years, or both.

B. TITLE 18 OFFENSES

Title 18, § 287 - False, Fictitious or Fraudulent Claims

Title 18, § 287 is utilized by the government to prosecute false, fictitious or fraudulent claims. This section is normally used when one or more false claims for refund are made on income tax returns. It is commonly used in connection with electronic return filing fraud involving multiple claims for refund. In order to establish a violation of 18 U.S.C. 287, the government must prove (1) a claim was presented to a department or agency of the United States for money or property; (2) the claim was false, fictitious or fraudulent (and material); and (3) the taxpayer knew at the time that the claim was false, fictitious or fraudulent. *See, United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976), *cert. denied* 430 U.S. 930 (1977). A violation of this section provides for a penalty of not more than a $10,000 fine or imprisonment of not more than five years, or both.

Section 371: Conspiracy

The statute requires proof of the following elements; (1) a conspiracy by two or more persons to commit an offense against the United States or to defraud the united States (2) an act in the furtherance of the object of the conspiracy and (3) intent and knowledge. If convicted, a defendant is punishable by a fine of $10,000 and/or imprisonment for not more than five years. If the object of the conspiracy is the submission of false documents to the Service in violation of § 7207 or some other misdemeanor, then the punishment for the conspiracy cannot exceed the maximum punishment provided for under the misdemeanor statute.

There is no conspiracy if the defendant and an undercover agent are the only parties involved. *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984). Since *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied* 355 U.S. 924 (1958), a conspiracy to impede the administration of the internal revenue laws has been known as a Klein conspiracy.

Title 18, § 1001 - False Statements

This statute is normally used in connection with false documents or statements submitted to an Internal Revenue Agent during the course of an audit or investigation. The following elements must be proven: (1) the taxpayer made a false statement or representation, or made or used a false document; (2) in a matter within the jurisdiction of a department or agency of the United States; (3) the false statement or representation, or false document related to a material matter; and (4) that the taxpayer acted willfully and with knowledge of the falsity. *See*, *United States v. Barr*, 963 F.2d 641 (3rd Cir.) *cert. denied* 113 Sup.Ct. 811 (1992).

A violation of § 1001 is punishable by a fine of not more than $10,000 or imprisonment of not more than five years, or both.

C. TITLE 31 OFFENSES

Subchapter II of Chapter 53 of Title 31 requires the filing of reports for transactions involving domestic coins and currency, § 5313, foreign currency, § 5315, and monetary instruments, § 5316. Structuring currency transactions to avoid the reporting requirements is specifically prescribed. § 5324. The willful violation of the currency reporting requirements except those of §5315 regarding foreign currency, is punishable by a fine of not more than $250,000 and/or imprisonment for not more than five years. 31 U.S.C. § 5322(a). The criminal sanctions are in addition to any applicable civil penalty under § 5321 or forfeiture under § 5317.

If the willful violation of the currency reporting requirements occurs while the defendant is violating another law of the United States or as part of a pattern of illegal activity involving more than $100,000 in any 12-month period, the fine may be as much as $500,000 and/or a prison sentence of 10 years may be imposed. 31 U.S. C. § 5322(b).

A bank or other financial institution who fails or refuses to adopt and maintain procedures to ensure compliance with the currency reporting statutes, as required by § 5318(a)(2), is guilty of a separate violation for each day the violation continues and at each office, branch or place of business at which the violation occurs or continues. 31 U.S.C. § 5322(c).

D. GENERAL CONSIDERATIONS

Venue

Venue in most tax cases will lie in any judicial district in which the offense is begun, continued or completed. Offenses involving the mailing of a return or other documentation may be prosecuted in any district from, through or into which the mailed material passes. 18 U.S.C. §3237(a); *United States v. Clinton*, 574 F.2d 464 (9th Cir. 1978). The defendant in a failure to file, attempted evasion or false documents case based solely on a mailing to the Service

may elect within twenty days of arraignment to be tried in the district in which he resides. 18 U.S.C. §3237(b).

Statute of Limitations

A six-year statute of limitations applies to tax offenses under Title 26. 26 U.S.C. §6531(2). A five-year statute applies to tax offenses charged under the more general crimes of Title 18. 18 U.S.C. § 3282. The five- and six- year limitations are deceptive, however, because, unlike the period of limitations for assessment of a deficiency, the period of limitations does not necessarily begin to run on the due date for the return.

For example, the period of limitations begins to run on attempted evasion when the last affirmative act constituting the attempted evasion has occurred. This last affirmative act need not occur when or before the return is filed, but may be the making of false statement to a special agent years later, *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952), or even after the usual six year statute has run regarding the filing of the original return. *United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981).

Willfulness

The element of willfulness is common among the Title 26 offenses. The definition of willfulness is "a voluntary, intentional violation of a known legal duty." *United States v. Bishop*, 412 U.S. 346 (1973). Although many earlier cases defined willfulness to encompass a motive or element of evil intent, later decision make it clear that no such motive is necessary. *United States v. Pomponio* 429 U.S. 10, 12 (1976).

In *Check v United States*, 498 U.S. 192 (1991), the Supreme Court further clarified the definition of willfulness in criminal tax cases and held that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness even if the asserted belief or misunderstanding is not objectively reasonable. A good-faith belief that the tax laws are unconstitutional, however, does not negate willfulness.

II. SOURCES OF CRIMINAL INVESTIGATIONS

An investigation by the Criminal Investigation Division of the Internal Revenue Service may have numerous sources. Until recently, approximately fifty percent of the cases investigated by the Criminal Investigation Division were the result of referrals by the Examination Division and the Collection Division. In recent years, however, the number of referrals from the Examination and Collection Divisions have decreased primarily because the Criminal Investigation Division is investigating more non-Title 26 cases such as money laundering and currency transaction reporting violations.

Information items, which are tax related communications and other information indicating the commission of a tax crime, are also a major source of criminal investigations. These types of items include currency transaction reports, Forms 8300, and newspaper and media reports concerning such items as embezzlement, fraud or theft. The Internal Revenue Service's information matching system, which matches income information records such as Forms W-2 and 1099 against taxpayer accounts, is also a source of nonfiler cases for the Criminal Investigation Division.

The Criminal Investigation Division also receives referrals from other law enforcement agencies, such as the Drug Enforcement Agency, Federal Bureau of Investigation and the Securities & Exchange Commission. Finally, information furnished by informants also are a source of criminal investigations. Many times, the informant is a hostile ex-spouse, an ex-employee or a business competitor.

III. INVESTIGATIVE TOOLS UTILIZED BY THE INTERNAL REVENUE SERVICE

A. SUMMONS

Traditionally the Internal Revenue Service's most powerful investigative tool, civilly or criminally, has been the summons. Section 7602 of the Internal Revenue Code gives authority to the Internal Revenue Service to summons the appearance of a taxpayer or a witness to testify and also confers authority to examine books and records for the purpose of ascertaining the correctness of any return, making a return where none has been made, determining a tax liability, collecting any such liability, and inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws.

1. A third-party served with a summons is under no legal obligation to inform a taxpayer that a summons has been served and, in most instances, to make any objections to the summons.

2. A summons must be issued in good faith. The Internal Revenue Service must demonstrate: (1) the investigation will be conducted for a legitimate purpose, (2) the inquiry must be relevant to that purpose, (3) the information sought is not already in the Internal Revenue Service's possession, and (4) the Internal Revenue Code's administrative steps have been followed. However, a Court may not allow its process to be abused. *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

3. "Bright Line Test" - Internal Revenue Code § 7602(c) provides that a summons may not be issued, nor any enforcement action commenced, with respect to any person if a Justice Department referral is in effect with respect to such person.

a. A Justice Department referral is in effect if the Internal Revenue Service has recommended to the Department of Justice a grand jury investigation of, or the criminal prosecution of, a taxpayer for any Internal Revenue connected offense, or the Department of Justice has requested disclosure of a return or return information for purposes of administration under Internal Revenue Code § 6103(h)(3)(B).

b. A Department of Justice referral terminates when the Justice Department declines prosecution, states that it will not authorize a grand jury investigation or states it will discontinue a grand jury investigation.

4. The Internal Revenue Service may summons any person liable for the tax or any other person deemed proper. Such person can be required to appear before the Internal Revenue Service and to produce such records and give such testimony, under oath, that is relevant and material to the inquiry.

a. Section 7605(a) of the Internal Revenue Code provides that the place for compliance with the summons must be reasonable.

b. The date of appearance must be not less than ten days from the date of the summons. Internal Revenue Code § 7605(a).

B. THIRD-PARTY RECORDKEEPER SUMMONS

Internal Revenue Code § 7609 provides that the Internal Revenue Service must follow certain special rules in the case of a summons issued under § 7602(2) that provides for the general examination of books and records and is directed to certain persons (third-party recordkeepers) engaged in making or keeping of records involving the transactions of others.

1. Third-party recordkeepers are (1) any consumer reporting agency, (2) any banks and savings and loans institutions, (3) any person extending credit through the use of credit cards or similar devices, (4) any securities broker, (5) any attorney, and (6) any accountant.

2. When a summons calling for the production of business records pertaining to an identified person (whether or not the taxpayer) is served on a "third-party recordkeeper" the Service must give notice of the summons to the person affected.

a. Notice of the third-party summons must be given within three days after the summons is served, but not later than twenty-three days before the return date of the summons.

3. Under Internal Revenue Code § 7609(b), any person entitled to such notice has a right to stay compliance by the third-party recordkeeper by instituting a proceeding to quash the summons in federal district court.

4. In the case of any summons issued under § 7609, the notice provisions do not apply if the Internal Revenue Service petitions the federal district court and the court determines that to require notice would result in (1) concealment, alteration or destruction of records, (2) intimidation or bribery of witnesses, or collusion, (3) flight to avoid prosecution, testifying or production of records.

C. JOHN DOE SUMMONSES

Section 7609(f) defines a John Doe summons as one in which the taxpayer with respect to whose liability the summons is issued is not specifically identified.

1. The Internal Revenue Service is authorized to serve a John Doe summons following an ex parte proceeding in federal district court in which it establishes to the court's satisfaction that (1) the summons relates to the investigation of a particular person or group, (2) there is a reasonable basis for believing that this person or group has failed (or may fail in the case of a current transaction) to comply with the internal revenue laws, and (3) the information sought under the summons is not readily available from other sources and information concerning the identity of the person or group involved is also not readily available. *United States v. Duke*, 379 F. Supp. 545 (N.D. Ill. 1974).

D. OBJECTIONS AND/OR LEGAL DEFENSES TO SUMMONSES

1. Procedural Defects. The Internal Revenue Service has failed to comply with formal statutory requirements regarding service, time and place of examination, and a description of the records to be produced as discussed above for summonses under § 7602, and third-party recordkeepers and John Doe summonses under § 7609.

2. Relevancy. The information sought must be relevant and material to the tax investigation. An Internal Revenue Service summons is not to be judged by the relevancy standards used in deciding whether to admit evidence in federal court. Instead, relevancy has been broadly defined as whether the document at issue might throw light upon the correctness of the return or illuminate any aspect of the return. *See, United States v. Arthur Young & Co.*, 84-1 U.S.T.C. Para. 9305 (S. Ct. 1984).

3. Unnecessary Second Examination. Internal Revenue Code § 7605(b) provides that no taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year (1) unless the taxpayers request otherwise or (2) unless the secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. *See, United States v. Kendrick*, 518 F.2d 842 (7th Cir. 1975), *cert. denied,* 423 U.S. 1016 (1975).

4. Improper Purpose/Bad Faith Use. When the Internal Revenue Service uses its summons power for an unauthorized purpose or for any purpose reflecting on the good faith use

of its power, the summons will not be enforced. *See, Reisman v. Caplin*, 375 U.S. 440 (1964); *United States v. Powell*, 379 U.S. 48 (1964).

5. The Fifth Amendment. An individual shall not be compelled in any criminal case to be a witness against himself. However, note that the Fifth Amendment does not apply to a corporation or corporate records. *Wilson v. United States*, 221 U.S. 361 (1911). Nor can the privilege be claimed as to partnership records or the records of any "collective entity". *Bellis v. United States*, 417 U.S. 85 (1974). Furthermore, in *United States v. Doe*, 465 U.S. 605 (1984), the Supreme Court held that the contents of an individual proprietor's business records are not privileged. Regardless, the Supreme Court recognized in *Doe* that the act of producing them may be privileged. The Supreme Court has not extended the *Doe* rationale to the custodian of corporate records , and held in *Braswell v. United States*, 487 U.S. 99 (1988), that a custodian of corporate records is not entitled to refuse to produce corporate records on the ground that the act of production will incriminate him in violation of the Fifth Amendment because the custodian acts as a representative of the corporation.

6. Fourth Amendment. Although an administrative summons is not a search warrant, it must contain a "specification of the documents to be produced adequate, but not excessive, for the purpose of the relevant inquiry". *See, Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946).

7. Privilege From Disclosure. An individual may refuse to answer questions or produce a writing and prevent another from doing so on the ground that the answer or writing is privileged from disclosure. These privileges include the attorney-client, marital, physician-patient and attorney work product. *See,* § K *infra* for a detailed discussion of privileges.

8. Other Considerations. No agent of the Internal Revenue Service has the power or right to speak to any individual, either the taxpayer or a witness, unless the agent properly serves upon the individual a summons. Furthermore, the agent has no right to see, duplicate, or take any books, records, or other documents unless the production of such documents is properly called for in a valid summons.

E. GRAND JURY

A grand jury's investigative powers are far greater than those provided by a summons, and the government is utilizing the grand jury with increasing frequency to investigate criminal tax matters.

Unlike an administrative investigation by the Internal Revenue Service involving summonses, there are very few procedural safeguards available in a grand jury investigation. An attorney may not be present in the grand jury room during the questioning of a witness, *United*

States v. Mandujano, 425 U.S. 564, 581 (1976), however, the witness may consult with an attorney during the questioning. *In re Taylor*, 567 F.2d 1183, 1186 n. 1 (2d Cir. 1977).

1. Situations in Which a Grand Jury Is Used. There are generally three situations in which a grand jury will be used in a criminal tax investigation.

a. During the course of a grand jury investigation involving criminal violations unrelated to tax, the prosecutor uncovers evidence indicating that tax violations may have been committed. In such a situation, the prosecutor will seek approval from the Tax Division of the Department of Justice to expand the grand jury investigation to include tax violations.

b. The grand jury may also be used where the Internal Revenue Service has determined that the use of the administrative investigation is not adequate to develop evidence regarding the alleged criminal tax violations, and requests approval to use the grand jury to investigate such violations.

c. The grand jury is also utilized when the Internal Revenue Service refers a case to the Department of Justice recommending prosecution, and the Department of Justice determines that additional grand jury work is needed to develop the evidence in the case to determine whether sufficient grounds exist to warrant prosecution.

2. Authorization to Use Grand Jury and Standard of Review.

a. Although the Federal Grand Jury is empowered to investigate both tax and non-tax crimes, use of the grand jury to investigate criminal tax violations must first be authorized by the Tax Division of the Department of Justice. 28 C.F.R. § 0.70; Internal Revenue Code § 6103(h).

b. The standard of review for the initiation of a grand jury investigation into criminal tax matters is whether there are facts supporting a reasonable belief that a tax crime is being or has been committed. U.S. Attorney's Manual, § 6-2.213(A)(2).

3. The grand jury subpoena power is extremely broad. A grand jury subpoena may be served anywhere in the United States for testimony or the production of documents. Fed. R. Crim. P. 17(e)(1).

4. Generally, the Fourth Amendment does not restrict the grand jury subpoena power and there is no requirement that the government have "probable cause" before issuing a subpoena for documents or any other items. *See, Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946).

F. REPRESENTING AN INDIVIDUAL BEFORE A GRAND JURY

1. Fifth Amendment. Any witness may claim the Fifth Amendment privilege against self-incrimination with respect to testimonial evidence if his testimony would provide evidence to convict him of a crime. *Schmerber v. California*, 384 U.S. 757 (1966).

a. A defense attorney should always consider negotiating for immunity for his client where he has been subpoenaed to testify before the grand jury.

2. Grand Jury Abuse. On occasion, courts have dismissed indictments, enjoined the presentment of indictments, or terminated grand jury proceedings as a result of abuse of the grand jury process. *See, United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977). This includes such situations as presenting an indictment based on testimony known by the government to be perjurious, prosecutorial misconduct and violations of grand jury secrecy rules under Fed. R. Crim. P. 6(e).

3. Lack of Authority. A grand jury investigation conducting an open-ended tax investigation must have approval from the Tax Division of the Department of Justice and without this, the investigation by the government should be enjoined.

4. Improper Civil Purpose. The grand jury must pursue a bona fide inquiry into possible criminal tax violations, it may not pursue the gathering of evidence for a civil case. *See, In re April, 1956, Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956).

5. Motion to Quash. In order to challenge a grand jury subpoena on the grounds that it seeks irrelevant documents or testimony, or that it would be unduly burdensome, an extraordinary showing must be made. *See, United States v. Dionisio*, 410 U.S. 1, 11-12 (1973).

6. Privileges from Disclosure. See, § K *infra* for a detailed discussion of privileges.

7. An attorney should always be aware of potential conflicts of interest in representing more than one witness in a grand jury investigation.

8. In producing documents, only those documents specifically, requested in the grand jury subpoena should be produced and the attorney should maintain copies of all documents furnished to the grand jury.

9. If possible, always debrief witnesses immediately after their grand jury testimony.

G. SEARCH WARRANTS

1. Search warrants are being used with increasing frequency in the investigation of criminal tax cases. The Internal Revenue Service is authorized to use search warrants to search for and seize books and records of a taxpayer. Internal Revenue Code, §§ 7302 and 7608(b). Use of search warrants by the Internal Revenue Service is established in *Warden v. Hayden*, 387 U.S. 294 (1967), where the Supreme Court held that the government could seize "mere evidence" pursuant to a search warrant. *See also,* Fed. R. Crim. P. 41(b).

2. However, the Internal Revenue Service utilizes administrative summonses in an investigation far more frequently as a search warrant cannot be issued by the Special Agent and it is necessary to go before a magistrate to make a necessary showing before any warrant will be issued. However, from a tactical standpoint, a search warrant is sometimes more advantageous than an administrative summons since it in many instances allows for the seizure of records before they can be altered, removed from the premises or destroyed.

3. Prior to 1984, search warrants could only be utilized in tax cases if advance approval of the Tax Division of the Department of Justice was obtained, regardless of whether the investigation was the result of a referral from the Tax Division or the United States Attorney's office.

a. Pursuant to Tax Division Directive No. 49, effective October 1, 1984, authority with respect to approving the execution of Title 26 or tax related Title 18 search warrants directed at offices, structures, premises, etc., owned, controlled, or under the dominion of the subject or target of a criminal investigation has been conferred upon the United States Attorney in each Judicial District or the Chief of the Criminal Division within the United States Attorney's office.

b. The Tax Division has retained exclusive authority to seek and execute a search warrant directed at the offices, structures, or premises owned, controlled, or under the dominion of a subject or target of an investigation who is: (1) an accountant, (2) a lawyer, (3) a physician, (4) a public official or political candidate, (5) clergy, (6) news media member, (7) labor union official, or (8) an official of an exempt charitable organization.

c. However, search warrants are available for currency/monetary instruments under Title 31 cases without Tax Division approval.

H. CHALLENGES TO SEARCH WARRANTS

The taxpayer has few grounds on which to contest seizure of his records by search warrant.

1. A search warrant can be challenged on the grounds that probable cause was lacking and the warrant was over broad. The Internal Revenue Service must present evidence establishing the probability that (1) the items sought are connected with criminal activity, and (2) the items will be found in the place to be searched.

2. If a search warrant has been executed, the attorney representing the individual who is the subject of the search warrant should consider filing a motion for return of property pursuant to Fed. R. Crim. P. 41(e), or wait to file a motion to suppress prior to trial if your client is indicted.

a. The attorney should make sure he obtains a copy of the affidavit given in support of the search warrant and the list of items seized by the Internal Revenue Service which is filed with the court after execution of the search warrant. Be advised, in certain instances, the government will attempt to seal such information.

I. WIRE TAPS

1. The Internal Revenue Service is prohibited from conducting non-consensual monitoring of telephone and non-telephone conversations. Non-consensual monitoring may only be authorized by court order in order to investigate criminal offenses specified in Title 18, United States Code, § 2516. Tax offenses are not enumerated in this section. However, the Internal Revenue Service can receive wire tap information from another federal or state agency which is lawfully conducting the non-consensual monitoring. *See*, Title 18, United States Code, § 2517(1).

2. Consensual Monitoring (where at least one of the parties to the conversation consents), is permitted, however, special authorization is required. Telephone consensual monitoring requires National Office authorization. Consensual monitoring of non-telephone conversations requires the advance written authorization of the Attorney General or the Assistant Attorney General (or his Deputy).

J. MAIL COVERS

Although not commonly used, the Internal Revenue Service may also utilize mail covers in tax investigations. In doing so, the Internal Revenue Service requests the postal service to make a record of all data appearing on the outside of mail in addition to checking the contents of second, third or fourth class mail.

In *United States v. Choate*, 576 F.2d 165 (9th Cir. 1978), it was held that mail covers did not violate the Fourth Amendment privacy right in the sender because the information was voluntarily conveyed to the postal service and its employees and there was no reasonable expectation of privacy.

K. PRIVILEGES

1. Attorney-Client Privilege

a. The attorney-client privilege protects confidential attorney-client communications from disclosure. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer, (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceedings and not (d) for the purpose of committing a crime or tort, and (4) the privilege has been (a) claimed and (b) not waived by the client.

b. When a communication is made to an accountant who is assisting an attorney and providing legal service with a client, the communication is within the attorney-client privilege. *United States v. Colhole*, 296 F.2d 918, 921 (2d Cir. 1961); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972).

c. No attorney-client or work product privilege attaches to accountant's work performed by one who is an attorney. *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 345 U.S. 864 (1954).

d. Communications between an attorney as an income tax return preparer and his client may not be protected by the attorney-client privilege. *See, United States v. Lawless*, 709 F.2d 485 (7th Cir. 1983). However, legal advice concerning the preparation of an income tax return is distinguishable. *United States v. Colhole*, *supra*.

e. Accordingly, the role of the investigative accountant in a criminal tax case should be in support of counsel, and should be memorialized by an agreement in writing between them. It is advisable that the accountant retain the postmarked envelope transmitting the

retainer letter in the event an issue is subsequently raised as to when the agreement was entered into.

The written agreement memorializing the relationship between the accountant and the lawyer should include: (1) the engagement of the accountant by the lawyer to assist the lawyer in rendering legal advice to the client by performing analyses of records, (2) the ownership by the lawyer of any workpapers prepared by the accountant, and (3) provision for the payment of the accountant by the lawyer.

2. Work Product Privilege

a. The work product of an attorney prepared by him or his staff in anticipation of litigation is protected from disclosure by work product immunity. *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Crim. P. 16(b)(2); Fed. R. Civ. P. 26(b)(3).

b. Work product immunity is not absolute and certain types of work product may be obtained by an adverse party upon a showing of substantial need. *Upjohn Company v. United States*, 449 U.S. 383 (1981).

c. There is generally no privilege for an accountant's work product and any privilege for the work product of the investigative accountant must be derived from the attorney's work product privilege. *United States v. Arthur Young & Company*, 496 F. Supp. 1152 (S.D.N.Y. 1980), *rev'd on other grounds*, 677 Fed.2d 211 (2d Cir. 1982), *aff'd in part and rev'd in part*, 79 L. Ed. 2d 826 (1984).

3. Extension of Attorney-Client Privilege

a. I.R.C. § 7525(a)(1), in limited circumstances, extends the attorney-client privilege to communications between a taxpayer and any "federally authorized tax practitioner" with respect to "tax advice" if the communication would have been privileged if made between a taxpayer and an attorney.

b. The limited circumstances in which the extended privilege may be asserted are:

(i) in any non-criminal tax matter before the IRS. I.R.C. § 7525(a)(2)(A); and

(ii) in any non-criminal tax proceeding in federal court, by or against the U. S. I.R.C. § 7525(a)(2)(B).

c. Exceptions. I.R.C. § 7525(b) excepts from application of the privilege any written communication between a "federally authorized tax practitioner" and a director, shareholder, officer, employee, etc. of a corporation in connection with the promotion of the corporation in any tax shelter.

d. Definitions

(i) "Federally authorized tax practitioner" includes attorneys, CPAs, enrolled agents, and enrolled actuaries.

(ii) "Tax advice" means advice with respect to a matter within the scope of the advisor's authority to practice before the IRS.

e. Comments. The Committee Report provides:

(i) That the law is not intended to modify the attorney-client privilege itself, but merely to extend it to certain practitioners other than attorneys. Therefore, if the communication would not have been privileged if made between the taxpayer and an attorney, the privilege does not apply, and if the information is disclosed to an authorized practitioner acting beyond his capacity, it will not be privileged.

(ii) That the privilege created by I.R.C. § 7525 may be waived in the same manner as the attorney-client privilege, i.e., disclosure to third parties.

(iii) That there is to be no inference as to whether the aspects of federal tax practice covered by the extended privilege constitute the unauthorized practice of law under state law.

(iv) That the privilege may only be asserted "in noncriminal tax proceedings before the Internal Revenue Service and in the Federal Courts with regard to such noncriminal tax matters in proceedings where the IRS is a party."

IV. METHODS OF PROOF

A. DIRECT/SPECIFIC ITEMS

In order to establish a criminal offense, generally the government must show that the taxpayer underreported income or overstated deductions. To establish this element of the offense, the government may utilize either direct or indirect methods of proof. The direct or specific item method, requires proving specific transactions, such as sales of property or the receipt of income from an employer. If a taxpayer or third parties have maintained books and records in which these various transactions are reported, the Internal Revenue Service will utilize

the specific items of proof. Under the specific items method, the government must produce evidence of the receipt of specific items of reportable income in connection with a failure to file case. *U.S. v. Bell*, 734 F.2d 1315 (8th 1984). Proof of specific items of omitted income may be corroborated by an indirect method of proof. *U.S. v. Tafoya*, 757 F.2d 1522 (5th Cir. 1985). In such cases, the government may not be required to follow all of the requirements necessary for an indirect method. *U.S. v. Cramer*, 447 F.2d 210 (2d Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972).

B. INDIRECT METHODS

When direct proof does not exist to reconstruct a taxpayer's financial transactions, indirect methods of proof my be used to determine income. *See, e.g., Holland v. United States*, 348 U.S. 121, 125, *rehearing denied* 348 U.S. 932 (1954) (net worth analysis); *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984) (bank deposits method); *U.S. v. Johnson*, 319 U.S. 503 (1942) (expenditures method).

1. Net Worth Method. The net worth method is one of the most commonly used methods of reconstructing taxable income in criminal tax cases. The Internal Revenue Service uses this method when the taxpayer does not have adequate books and records to reconstruct income.

To use the net worth method, the Internal Revenue Service must (1) establish an opening net worth with reasonable certainty, (2) establish the taxpayer's net worth at the end of the tax year with any excess over opening net worth representing the net worth increase, (3) establish a likely source of income from which the net worth increase arose, or negate any nontaxable sources of income, and (4) negate any reasonable leads furnished by the taxpayer. *Holland v. United States*, 348 U.S. 121 (1954).

2. Bank Deposit Method. The bank deposit method of proof involves a reconstruction of all deposits made in bank accounts, canceled checks and currency transactions. All deposits made into bank accounts and similar accounts are totaled while eliminating transfers of monies between accounts and redeposits of cash previously withdrawn. In addition, all payments made in cash are added to total bank deposits. *Greenburg v. U.S.*, 295 F.2d 903 (1st Cir. 1961). Finally, all non-income deposit items such as loans, gifts and inheritances are deducted. In order to use this method of proof, the government must establish a likely taxable source for unreported income and that the deposits do not come from a pre-existing cash hoard. *Gleckman v. U.S.*, 80 F.2d 934 (8th Cir. 1935) *cert. denied,* 297 U.S. 709 (1936).

Finally, the government must establish with reasonable certainty the amount of cash on hand at the beginning of the year and must investigate any leads supplied by the taxpayers which are reasonably susceptible to being checked. *U.S. v. Slutsky*, 47 F.2d 832 (2d Cir. 1973).

3. Expenditures Method. The expenditures method is also known as the source and applications of funds method. *Taglianetti v. United States*, 398 F.2d 558, 562 (1st Cir. 1968), *affirmed on other grounds* 394 U.S. 316 (1969). The expenditures method is closely related to the net worth method but involves a situation where the taxpayer has consumed his income as opposed to channelling his income into investments or durable property. The same issues arise with the expenditures method as with the net worth method in that the government must establish an opening net worth, must show a likely source of taxable income and must investigate leads.

V. REVIEW PROCESS FOR A CRIMINAL TAX CASE

A. SPECIAL AGENT'S REPORT

After the Special Agent completes his investigation, a Special Agent's Report (SAR) will be prepared, outlining the evidence supporting the Special Agent's conclusions and recommendations and setting forth the evidence, including exhibits, in support thereof. The Special Agent's Report will be reviewed within the Criminal Investigation Division, and ultimately the Chief of the Criminal Investigation Division will make the final determination as to whether charges should be authorized. Depending upon the nature of the case, it may be advisable to request a conference with the Special Agent prior to completing the SAR or after completion of the SAR and before the Chief of the Criminal Investigation Division makes a final recommendation. Generally, if the Criminal Investigation Division decides to allow you the opportunity to participate in a conference, this will only be done in an administrative investigation rather than a grand jury investigation.

If the taxpayer's representative requests a conference with the Special Agent, normally the Agent's Group Manager will also attend. At the conference, the Special Agent will provide the taxpayer's representative with information as to the tax years in issue, charges, method of proof, and the alleged tax deficiency.

This may be the first opportunity to learn the nature of the government's case. It also provides an opportunity to present exculpatory information to the Internal Revenue Service. The taxpayer's representative should be aware, however, that factual representations he makes at the conference are considered "vicarious admissions" that may be introduced at trial. *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976); Fed. R. Evid. 801(d)(2)(C) and (D).

B. DISTRICT COUNSEL REVIEW

After the Special Agent has completed his investigation and the Criminal Investigation Division has reviewed the report internally, if it is recommended that the taxpayer be prosecuted, the SAR is forwarded to the Internal Revenue Service District Counsel's office for review. An attorney in the District Counsel's office assigned to handle criminal tax matters will

review the case to determine whether the evidence is sufficient to establish guilt beyond a reasonable doubt and whether a reasonable probability of conviction exists.

Normally, unless the case is the result of a grand jury investigation, the taxpayer's counsel will receive notice of the fact that the case has been transferred from the Criminal Investigation Division to the District Counsel attorney. Accordingly, a conference should be requested by the taxpayer's representative on learning of the referral. If the taxpayer or his representative has already held a conference with the Criminal Investigation Division, normally the taxpayer will be advised by letter that the case has been transmitted to District Counsel.

Upon reviewing the Special Agent's Report and holding a conference with the taxpayer's representative, if requested, the IRS District Counsel attorney will prepare a Criminal Reference Letter (CRL) recommending or declining prosecution. In the event the District Counsel attorney recommends prosecution, the case will be forwarded to the Criminal Tax Section of the Department of Justice in Washington, D.C., for further review. The District Counsel's office will designate the case as either "complex" or "non-complex" at the time of the referral to the Department of Justice.

The taxpayer's representative can always make a request for a conference in cases that have been investigated by the grand jury, but the general rule is that one will not be provided. Accordingly, as soon as the taxpayer's representative finds out that a criminal tax investigation is being conducted by the grand jury, a request should be sent to the Criminal Tax Section of the Department of Justice, in Washington, D.C.

The "vicarious admissions" policy applies at the District Counsel's conference so the taxpayer's representative should as a general rule limit his presentation to legal arguments and technical defenses rather than factual. To the extent factual representations are made, the representative should couch them in hypothetical terms.

C. CRIMINAL TAX SECTION, DEPARTMENT OF JUSTICE

Cases resulting from administrative (non-grand jury) investigations are classified as either "complex" or "non-complex" at the time of referral to the Criminal Tax Section of the Department of Justice in Washington, D.C.

Complex matters are cases which utilize an indirect method of proof, are factually or legally complex, contain technical and/or sensitive tax issues, or involve a policy issue. These matters are reviewed by a trial attorney in the Criminal Tax Section and a Prosecution Memorandum is prepared recommending or declining prosecution. These matters are further reviewed by senior attorneys in the Criminal Tax Section prior to a final decision being made as to whether or not to recommend or decline prosecution.

Non-complex matters are primarily those which are referred by the District Counsel office in which the specific items method of proof is used or involve matters which are not considered complex legal or enforcement issues. Generally, non-complex cases are not reviewed in depth by a trial attorney but are screened by senior Criminal Tax Section attorneys to ensure that no issues requiring an in-depth review are present. Assuming that the senior trial attorney does not find any issues which would require in-depth review, the matter will be referred to the appropriate United States Attorney's office for an information to be filed or an indictment returned with respect to the charges authorized by the Criminal Tax Section.

In 1986, the Department of Justice established a new policy with respect to vicarious admissions. The policy provides that statements made by the taxpayer's lawyer at a conference before the Criminal Tax Section will no longer be used as vicarious admissions except where the lawyer authenticates a written instrument. Dept. of Just. Tax Div. Directive No. 86-58. However, there are no limitations on the use of statements by a witness who attends the conference.

The taxpayer's representative should also request a pre-indictment conference with the Assistant United States Attorney assigned to the case if the Criminal Tax Section recommends prosecution.

D. EARLY PLEA PROGRAM.

Effective March 1, 1986, the Internal Revenue Service and the Tax Division Department of Justice established an early plea program. The program is designed to expedite the handling of criminal cases where the taxpayer, through counsel, seeks to plead early in an administrative investigation conducted by the Criminal Investigation Division. The Program is limited to general enforcement cases which involve legitimate sources of income.

Since cases which are resolved through the early plea program do not require the same degree of preparation by the government, you may be able to reduce your client's exposure. In order to take advantage of the program, counsel must notify the Special Agent and District Counsel of their desire to plead. Provided there is sufficient information to lay a foundation for a plea, the case will be transmitted simultaneously to the Department of Justice and the United States Attorney's office for plea purposes.

VI. VOLUNTARY DISCLOSURE

Current Policy. Until 1952, the Internal Revenue Service had a written policy that it would not prosecute taxpayers who voluntarily brought past tax crimes to the attention of the Internal Revenue Service. Although this policy was abandoned in 1952, the Internal Revenue Service continued to follow an unwritten policy of considering voluntary disclosures. However, even if a voluntary disclosure is made, in certain circumstances, a taxpayer could be prosecuted.

United States v. Hebel, 668 F.2d 995, 997 (8th Cir.) *cert. denied,* 456 U.S. 946 (1982); Internal Revenue Manual § (31)330.

A disclosure is voluntary if the Internal Revenue Service has not already initiated an investigation, the taxpayer has not come forward as a result of some other event which would bring the violation to the attention of the Internal Revenue Service, and the taxpayer cooperates in determining the amount of tax due and paying the tax.

VII. SENTENCING

A. OVERVIEW

All federal crimes, including tax offenses, committed on or after November 1, 1987, are subject to the Sentencing Guidelines promulgated by the United States Sentencing Commission. 28 U.S.C. § 994(a). The determination of a sentencing range under the Sentencing Guidelines involve the following two factors: (1) the appropriate offense level, and (2) the criminal history category. There are forty-three offense levels and six criminal history categories. The sentence imposed must fall within the guideline range.

The sentencing judge may impose a sentence outside of this range if aggravating or mitigating circumstances of any kind exist which were not adequately taken into consideration by the Commission in formulating the Guidelines. 18 U.S.C. § 3553(b). In such a case, the judge must state for the record the specific reasons for departure from the Guidelines. 18 U.S.C. § 3742. In the event the judge departs upward from the applicable Guideline range, advance notice of the intent to depart must be provided to both parties setting forth the grounds for departure. *Burns v. U.S.*, 111 Sup.Ct. 2182 (1991).

The Sentencing Commission has set forth certain factors that it considers appropriate to justify departure from the calculated sentencing range, including substantial assistance to authorities and diminished capacity. *See,* U.S.S.G. § 5K. The Guidelines Manual also provides that certain facts are not relevant in the determination of a sentence including race, sex, and social-economic status. U.S.S.G. § 5H1.10. In certain extraordinary circumstances, other factors may be relevant in determining whether to depart from the Guidelines: age, § 5H1.1; education and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition, including drug dependance and alcohol abuse, § 5H1.4; and family ties, § 5H1.6.

B. PROBATION OFFICER

The probation officer conducts a presentence investigation and files a presentence report with the court. *See*, Exhibit A. The presentence report sets forth the facts the probation officer relies on in calculating the appropriate offense level and criminal history category for purposes of determining the Guideline range. Accordingly, counsel should play an active role in

this phase of the case and present mitigating information with respect to the sentence. It is important to provide this information on a timely basis to the probation officer to have it included in the presentence report provided to the court. In the event counsel disagrees with the presentence report, Rule 32, Federal Rules of Criminal Procedures, provides that all objections to the presentence report need to be submitted to the Probation Officer within 14 days after receiving the presentence report.

C. WHAT GUIDELINES APPLY

Generally, U.S.S.G. § 1B1.11 provides that the court must use the sentencing manual in effect on the date of sentencing. However, if the court finds that use of the sentencing guidelines would violate the *ex post facto* clause, the policy statement directs the court to use the manual in effect on the date of the offense. *See*, § 1B1.11(b)(1). Section 1B1.11(b)(2) provides that once the election is made as to which sentencing manual applies, the manual must be used in its entirety, and the court cannot apply portions of different guideline manuals at sentencing. However, if the date of the offense guideline manual is used, clarifying rather than substantive amendments in effect at sentencing should be considered by the court. *See,* Policy Statement at §1B1.11(b)(2).

D. BASE OFFENSE LEVEL

The base offense level for a tax crime is arrived at from a tax table which sets forth the level based on the amount of tax loss. *See*, Exhibit B. The tax loss is defined in several different ways depending upon the offense which the defendant has been convicted of. U.S.S.G. 2T1.1(c) provides that if the offense involved is tax evasion or a false return, the tax loss is the total amount of loss that was the object of the offense. Section 2T1.1(c) further defines tax loss as follows:

> (A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28 percent of the unreported gross income (34 percent if the taxpayer is a corporation) plus 100 percent of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.
>
> (B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28 percent of the amount of the improperly claimed deduction or exemption (34 percent if the taxpayer is a corporation) plus 100 percent of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

E. SPECIFIC OFFENSE CHARACTERISTICS

After the base offense level is determined, additional points may be added for specific offense characteristics. For instance, if the offense involves tax evasion or a false return, the following specific offense characteristics apply: (1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, the base offense level is increased by two levels; and (2) if sophisticated means were used to impede discovery of the existence or extent of the offense, the base offense level is increased by two levels.

F. OTHER ADJUSTMENTS

In addition to specific adjustments, Chapter 3 of the Guidelines provides adjustments to the offense level based on the defendant's role in the offense and any subsequent concealment of the crime.

1. Role in the Offense. Where the offense involves the participation of more than one person, the Guidelines provide that the offense level for such person should be adjusted upward. The adjustment varies anywhere from two to four levels depending on the role of the defendant and the nature of the criminal activity.

Furthermore, where an individual is clearly less culpable than other defendants, the Guidelines provide for a downward departure. Section 3B1.2. The departure is generally used only when a defendant is substantially less culpable than other participants and the departure may vary from two to four levels. [Section 3B1.3]

Finally, of significant interest in a tax case is the upward adjustment for abuse of a position of trust or use of a special skill. If the defendant abused a position of public or private trust, or used a special skill, to facilitate the commission or the concealment of the offense, a two level upward adjustment may be appropriate. In tax cases, many times special skills are involved since the special skills referred to are those not possessed by members of the general public, but those requiring substantial training, education or licenses, e.g., lawyers or accountants. Section 3B1.3.

2. Obstruction. The Guidelines also provide for an upward adjustment if the defendant willfully obstructed, impeded or attempted to obstruct or impede the administration of justice during the investigation, prosecution or sentencing of the offense. Section 3C1.1. In such a case, the Guidelines provide for an upward adjustment of two levels. This adjustment is of particular concern in a tax case since many times false statements are made, or false or altered documents are submitted.

3. Multiple Counts. The Guidelines provide for adjustments when a defendant is found guilty or pleads to multiple counts. For instance, if an individual is convicted of failure to

file returns and a more severe offense, the Guidelines would provide that the offense level for the more serious offense would control, since that would produce a higher offense level. In addition, certain upward adjustments can be made up to five levels as a result of the multiple offenses. Section 3D1.4.

4. Acceptance of Responsibility. Perhaps the most common adjustment made for sentences under the Guideline involves a two level reduction for acceptance of responsibility. Section 3E1.1(a). A defendant is entitled to a two level reduction if he clearly demonstrations acceptance of responsibility for criminal conduct. In addition, a further one level decrease is permitted if the offense level is sixteen or greater, and the defendant also assists authorities in the investigation or prosecution of his own misconduct by timely providing complete information to the government concerning his own involvement in the offense, or timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and preventing the court to allocate its resources efficiently. Section 3E1.1(b). This section is effective November 1, 1992.

G. DEPARTURES

1. Substantial Assistance. If the defendant provides substantial assistance in the investigation or prosecution of another person, the Guidelines provide for a downward departure. However, the downward departure for such assistance is not available unless the government makes a motion. Section 5K1.1. *See, U.S. v. Doe*, 934 F.2d 353 (D.C. 1991). If such a motion is made, the court has wide latitude to reduce a sentence.

2. Downward Departure Under *Koon v. United States*. Under 18 U.S.C. § 3553(b), the Court has the authority to depart from the sentencing Guideline range. Section 3553(b) provides:

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating circumstance or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

The leading case construing Section 3553(b) is *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). In *Koon*, the Supreme Court reviewed an *en banc* decision of the Ninth Circuit that had reversed downward departures granted by the trial judge in the Rodney King beating case. The trial court had departed downward on the basis of five factors: (1) the behavior of Rodney King in provoking the attack, (2) the likelihood that, as a result of high levels of publicity about the case, defendants would be abused in prison, (3) the burden imposed on defendants in defending against successive state and federal prosecutions, (4) the loss of defendants' careers in law enforcement and (5) the fact that defendants posed a low risk

of recidivism. *United States v. Koon*, 833 F.Supp. 769, 787-90 (C.D. Cal. 1993). The trial court decided that the first factor – victim provocation – merited a downward departure of five levels; the trial court found that the other four factors, taken in tandem, merited a downward departure of three levels.

On appeal, the Ninth Circuit reversed the departure decisions. *Koon v. United States*, 34 F.3d 1416 (1994). The court concluded that victim provocation, while recognized as a basis for departure, was present in nearly all cases of police abuse; therefore, it was already considered within the applicable guideline. *Koon*, 34 F.3d at 1460. As to the other four factors, the court concluded that none was a valid basis for departure. *Koon*, 34 F.3d at 1455-56.

The Supreme Court reversed. *Koon*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392. The Court concluded that the Ninth Circuit had applied an erroneous standard of review and had committed legal error in disapproving departure grounds (2) and (3) – susceptibility to abuse and the burden of successive prosecutions. The Court, in *Koon*, emphasized the importance of individualization in the sentencing process:

> . . . the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of review we adopt.

Koon, 518 U.S. at 113, 116 S.Ct. at 2053, 135 L.Ed.2d 392.

In exercising discretion, the trial court "must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 82, 16 S.Ct. at 2039, 135 L.Ed.2d 392. Unless the Sentencing Commission has foreclosed a ground for departure on the district court has discretion to rely upon it. *Koon*, 518 U.S. at 95-96, 116 S.Ct. at 2045, 135 L.Ed.2d 392.

3. Family Circumstances is a Basis for Departure. The Court has the authority to depart downward because of the family responsibilities of the defendant. *United States v. Mondello*, 927 F.2d 1463, 1470 (9th Cir. 1991); *United States v. Owen*, 145 F.3d 923, 929 (7th Cir. 1998); U.S.S.G. § 5H1.6.

4. Impact on Defendant's Employees. The Court also has the authority to grant a downward departure based on the impact of a defendant's incarceration on his or her employees. *See, United States v. Milikowsky*, 65 F.3d 4, 9 (2d Cir. 1995). In *Milikowsky*, the Court affirmed a downward departure to avoid imposing a prison sentence based on the fact that the defendant had the unique knowledge, skills and relationships necessary to run his businesses and that the business was in an extremely precarious financial condition which would be worsened if he were not personally involved in the day-to-day operations. As a result, the Court concluded that imprisonment of the defendant would impose an extraordinary hardship on the employees of the business because the business would likely suffer or perhaps be forced into bankruptcy if the defendant were absent from the business.

H. SENTENCING OPTIONS

The sentencing table is divided into four zones which provide the appropriate sentencing ranges. *See*, Exhibit C. Straight probation is authorized for the applicable Guideline range is in Zone A. The minimum term of imprisonment in the range specified by the sentencing table must be zero months to fall within Zone A. Section 5B1.1(a). A defendant is eligible for probation with some confinement if the applicable Guideline range is in Zone B. This zone provides that the minimum term of imprisonment specified in the Guideline range is at least one but not more than six months. If this is the case, the court may impose probation only if it imposes a period of confinement such as a community treatment center or home detention. Section 5B1.1. If the applicable Guideline range is in Zone C or Zone D, the Guidelines do not authorize a sentence of probation. This involves situations where the minimum term of imprisonment specified in the Guideline range is at least eight months or more. However, the Guidelines provide for the imposition of a split sentence where the applicable Guideline range is in Zone C, that is, the minimum term of imprisonment in the Guideline's range is eight, nine or ten months. The Guidelines provide that at least one-half of the minimum term must be served in prison. Section 5C1.1.

If the defendant receives probation, in addition to the standard conditions of probation, in tax cases the court will usually order special conditions. The special conditions of probation normally provide that a defendant will cooperate with the Internal Revenue Service in determining the correct tax liability and making arrangements for payment.

In addition, the court is required to make a mandatory assessment on convicted defendants to fund the Crime Victims Fund. 18 U.S.C. § 3013. The assessment for individuals ranges from $5 to $50 for each offense. Pursuant to 18 U.S.C. § 3663, the court may also order restitution. And finally, a fine may be imposed pursuant to 18 U.S.C. § 3571 and U.S.S.G. § 5E1.2.