

July 1994

26 U.S.C. § 7201

GOVERNMENT PROPOSED JURY INST. NO. ____

Statute Defining Offense

Section 7201 of the Internal Revenue Code provides, in part, that:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title * * * shall * * * be guilty (of an offense against the laws of the United States)

26 U.S.C. § 7201

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.02

GOVERNMENT PROPOSED JURY INST. NO. ____

Elements Of Attempt
To Evade Or Defeat A Tax

To establish the offense of attempting to evade and defeat a tax, the government is required to prove beyond a reasonable doubt the following three elements:

First, a substantial income tax was due and owing from the defendant in addition to that declared in his [her] income tax return;

Second, an affirmative attempt, in any manner, to evade or defeat an income tax, and

Third, the defendant willfully attempted to evade and defeat the tax.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7201

Spies v. United States, 317 U.S. 492 (1943)

Lawn v. United States, 355 U.S. 339, 361 (1958)

Sansone v. United States, 380 U.S. 343, 351 (1965)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

Cheek v. United States, 498 U.S. 192, 195 (1991)

GOVERNMENT PROPOSED JURY INST. NO. ____

Essential Elements of Offense

In order to sustain its burden of proof for the crime of willfully attempting to evade and defeat a tax as charged in Count __ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: A substantial income tax was due from the defendant [*in addition to that declared in the defendant's income tax return*][*in addition to that paid by the defendant*];

Two: The defendant attempted to evade or defeat this [*additional*] tax as described in the indictment; and

Three: In attempting to evade or defeat such [*additional*] tax, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.03

GOVERNMENT PROPOSED JURY INST. NO. ____

Tax Evasion
(26 U.S.C. § 7201)

Title 26, United States Code, Section 7201, makes it a crime for anyone to willfully attempt to evade or defeat the payment of federal income tax. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant owed substantially more tax than he reported on his 19_ income tax return because he [*e.g. failed to report income*];

Second: That when the defendant filed that income tax return he knew that he owed substantially more taxes to the government than he reported on that return; and

Third: That when the defendant filed his 19_ income tax return, he did so with the purpose of evading payment of taxes to the government.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the accused knowingly attempted to evade or defeat some substantial portion of such additional tax.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, § 2.88, p. 201

GOVERNMENT PROPOSED JURY INST. NO. ____

Income Tax Evasion
(26 U.S.C. § 7201)

The defendant is charged in [*Count _ of*] the indictment with income tax evasion in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: The defendant owed more federal income tax for the calendar year 19_ than was declared due on the defendant's income tax return;

Second: the defendant knew that more federal income tax than was declared due on the defendant's income tax return; and

Third: The defendant [*insert what the defendant did as indicated by the evidence*] with the intention of defrauding the government of taxes owed.

GOVERNMENT PROPOSED JURY INST. NO. ____

Tax Evasion (General Charge)
(26 U.S.C. § 7201)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant owed substantial income tax in addition to that declared in his tax return; and

Second: That the defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the defendant had knowledge and an understanding that, during the particular tax year involved, he had income which was taxable, and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which he knew he had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business,

regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common nontaxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1, p. 229

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Tax Deficiency

One element of attempted tax evasion is a substantial tax deficiency or, in other words, a substantial amount of Federal income tax due and owing by the defendant over and above the amount of tax reported in the defendant's return(s). Each year must be considered separately. In other words, the defendant's tax obligation in any one year must be determined separately from his tax obligations in any other year.

The defendant is charged with failing to pay a specific amount of tax due for each of the calendar years alleged in the indictment. The proof need not show, however, the precise amount or all of the additional tax due as alleged. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, **1** whether greater or less than the income tax charged as due in the indictment.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, Instruction No. 2.88, p. 201 (modified)

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Sections 56.08 and 56.23 (modified)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1 (portion)

United States v. Johnson, 319 U.S. 503, 517-518 (1943)

NOTE

1 The tax deficiency need not be "substantial" in the Ninth Circuit. *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990); *Manual of Model Jury Instructions for the Ninth Circuit* (1990 Ed.), Section 9.06A Comment

GOVERNMENT PROPOSED JURY INST. NO. ____

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.24.

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To "Attempt to Evade or Defeat" a Tax -- Explained

The phrase "attempts in any manner to evade or defeat any tax" involves two things: first, the formation of an intent to evade or defeat a tax; and second, willfully performing some act to accomplish the intent to evade or defeat that tax.

The phrase "attempts in any manner to evade or defeat any tax" contemplates and charges that the defendant _____ knew and understood that during the calendar year 19__, he [she] owed [*a substantial federal income tax*] [*substantially more federal income tax than was declared on the defendant's federal income tax for that year*][*substantially more federal income tax than had been paid for that year*] and then tried in some way to avoid that [*additional*] tax.

In order to show an "attempt[s] in any manner to evade or defeat any tax", therefore, the government must prove beyond a reasonable doubt that defendant _____ intended to evade or defeat the tax due, and that the defendant _____ also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.04

Manual of Model Criminal Jury Instructions, Eighth Circuit (1992 Ed.), Section 6.26.7201 (portion)

Spies v. United States, 317 U.S. 492, 500 (1943)

Sansone v. United States, 380 U.S. 343 (1965)

Willfulness

To find the defendant guilty of violating Section 7201, you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g.,*

making false entries or alteration, or false invoices or documents, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

"Willfully" -- To Act or to Omit

An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent, mistaken, or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified).

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive". *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

Knowledge of Falsehood
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

The element of knowledge may be satisfied by inferences drawn from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you to as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of wilfulness or knowledge.

See *United States v. MacKenzie*, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. See, e.g., *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); *United States v. deFranciso-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent

cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g., United States v. Mapelli*, 971 F.2d at 287; *United States v. Barnhart*, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see United States v. Stone*, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in *Cheek v. United States*, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. ____

When the Offense May Be Complete

If you find beyond a reasonable doubt from the evidence in the case that [*a fraudulent return was filed*][*the defendant failed to file a return*] and that this was done willfully as charged in Count _ of the indictment [*information*], then you may find that the offense charged was complete [*when the fraudulent return was filed*][*on the date the return was due.*]

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.23

Failure to Collect or Pay Over Tax -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about the ___ day of _____, 19___, in the _____ District of _____, the defendant, _____, a resident of _____, who conducted a business as a sole proprietorship **1** under the name and style of _____, with its principal place of business in _____, and who, during the ___ quarter **2** of the year 19__, ending _____, 19__, deducted and collected from the total taxable wages of his [her] employees federal income taxes and Federal Insurance Contributions Act taxes in the sum of \$_____, did willfully fail to truthfully account for and pay over to the Internal Revenue Service said federal income taxes withheld and Federal Insurance Contributions Act taxes due and owing to the United States of America for the said quarter ending _____, 19__.

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7202.

NOTES

1 Where the taxpayer is a corporation, the instruction should be modified to follow the wording of the indictment.

2 Designate appropriate quarter.

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26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. ____

Statute Defining Offense -- 26 U.S.C. 7202

Section 7202 of the Internal Revenue Code provides, in part, as follows:

Any person required * * * 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 * * * be guilty [*of an offense against the laws of the United States.*]

26 U.S.C. § 7202

GOVERNMENT PROPOSED JURY INST. NO. ____

Elements of the Offense

In order to establish the offense charged in the indictment, the government must prove the following three elements beyond a reasonable doubt:

First, the defendant was a person who had a duty to collect, truthfully account for, and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____;

Second, the defendant failed to collect or truthfully account for and pay over federal income and social security taxes that the defendant was required to withhold from the wages of employees for the calendar quarter ending _____; and

Third, the defendant acted willfully.

GOVERNMENT PROPOSED JURY INST. NO. ____

Obligation to File

The government must prove that the business in question had employees to whom it paid wages.

The law requires every employer of labor to deduct and withhold income taxes from the wages paid to employees.

The law also imposes on the income of every individual a tax equal to a specified percentage of his or her wages received with respect to employment as a contribution to his or her insurance under Social Security and related programs. The employer is required under the law to collect this tax by deducting the amount of the taxes from the wages as and when paid.

Every employer therefore must deduct withholding taxes and Social Security taxes from the wages of its employees and is required to file for each calendar quarter a Form 941, Employer's Federal Quarterly Tax Return, reflecting such withholding of income and Social Security taxes and said return must be filed on or before the last day of the first calendar month following the period for which it is made. For example, a return for the first calendar quarter of a year would cover the period from January 1 through March 31 and must be filed before April 30.

26 U.S.C. §§ 3101, 3102(a) -- F.I.C.A. taxes; 3402(a) -- Withholding; 3403 -- Employer liable for tax

26 C.F.R. §§ 31.6071(a)- 1, 31.6011(a)-1 (1993)

Slodov v. United States, 436 U.S. 238, 242 (1978)

COMMENT

1 See *United States v. Porth*, 426 F.2d 519, 522 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970), for an explanation of an employer's duty and specifically the meaning of "collect."

GOVERNMENT PROPOSED JURY INST. NO. ____

Person Required To Collect,
Account For, And Pay Over Tax

In order to be found guilty of the offenses charged in the information, the defendant must have been a person required to collect, truthfully account for, and pay over withheld federal income and Social Security (FICA) taxes.

An individual is such a person if he [she] was [*an officer or employee of a corporation*] or [*a member or employee of a partnership*] or [*connected or associated with a business entity*] in a manner such that he [she] was in a decision-making role and had the authority and duty to assure that withholding taxes and social security taxes are paid and when. The test as to who is responsible and who is not ultimately becomes one of who on behalf of the employing entity had significant control over the financial decision-making process within the employment entity as would give him [her] the power and responsibility to determine who would get paid and who would not. An individual may be a responsible person regardless of whether he [she] does the actual mechanical work of keeping records, preparing returns, or writing checks.

26 U.S.C. § 7343 -- Definition of Term "Person"

Slodov v. United States, 436 U.S. 238, 245 (1978)

Caterino v. United States, 794 F.2d 1, 6 n.1 (1st Cir. 1986), *cert. denied*, 480 U.S. 905 (1987)

Godfrey v. United States, 748 F.2d 1568, 1574-75 (Fed. Cir. 1984)

Commonwealth Nat. Bank of Dallas v. United States, 665 F.2d 743, 750-51 (5th Cir. 1982)

United States v. McMullen, 516 F.2d 917, 920 (7th Cir.), *cert. denied*, 423 U.S. 915 (1975)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

Pacific National Insurance v. United States, 422 F.2d 26, 30, 31 (9th Cir.), *cert. denied*, 398 U.S. 937 (1970)

D'Orazi v. United States, 71-1 U.S.T.C., para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868-869 (N.D. Cal. Nov. 5, 1970)

COMMENT

1 In *Datlof v. United States*, 252 F. Supp. 11 (E.D. Pa.), *aff'd*, 370 F.2d 655 (3d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967), the court cites cases for the use of the following criteria in determining whether an individual is a responsible person, (a) contents of corporate by-laws; (b) ability to sign checks on the company's bank account; (c) identity of the individual who signed returns of the firm; (d) the payment of other creditors instead of the United States; (e) the identity of the officers, directors, and principal stockholders in the firm; (f) the identity of the individuals who hired and discharged employees, and (g) in general, the identity of the individual who was in control of the financial officers of the firm in question.

GOVERNMENT PROPOSED JURY INST. NO. ____

More Than One Responsible Person

There may be more than one person connected with a [*specify, corporation, partnership, or business entity*] who is required to collect, account for, and pay over withholding taxes, but the existence of this same duty and responsibility in another individual would not necessarily relieve the defendant of his responsibility.

Godfrey v. United States, 748 F.2d 1568, 1575 (Fed. Cir. 1984)

Monday v. United States, 421 F.2d 1210, 1214 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970)

White v. United States, 372 F.2d 513, 516-520 (Ct. Cl. 1967)

D'Orazi v. United States, 71-1 U.S.T.C. para. 9270, p. 86,048; 27 A.F.T.R.2d 865, 868 (N.D. Cal. Nov. 5, 1970)

Willfulness

The word "willfully" means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited; that is to say, with intent either to disobey or to disregard the law.

An omission or failure to act is "willfully" done, if done voluntarily and intentionally, and with the specific intent to fail to do something the defendant knows the law requires to be done; that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as part of the instructions on 26 U.S.C. § 7201, *supra*.

The Nature of the Offense Charged

Count ____ of the indictment [*information*] charges that the defendant _____ was required by law to file a tax return for the tax year 19__, on or before the ____ day of _____, 19__, and that the defendant willfully failed to file such a return.

If failure to file is being presented to the jury as a lesser included offense, the following may be helpful: **1**

[The law permits the jury to determine whether the government has proven the defendant _____ guilty of any offense that is necessarily included in the crime of willfully attempting to evade or defeat a substantial tax charged in Count ____ of the indictment.

So, if the jury should unanimously find the defendant "not guilty" of the crime of willfully attempting to evade or defeat a substantial tax as charged in Count ____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to the offense of willful failure to file a tax return which is necessarily included in the charge of willfully attempting to evade or defeat any tax.

The nature of the included offense of willful failure to file a tax return is that the defendant _____, was required by law to file an income tax return for the tax year 19__, on or before the ____ day of _____, and that the defendant willfully failed to file such a return.]

NOTE

1 This segment of the instruction conflicts with Tax Division Policy on lesser included offenses which is that *neither* party is entitled to an instruction that a willful failure to file (26 U.S.C. 7203) is a lesser-included offense of a *Spies*-evasion offense. This position reflects the Government's adoption of the "strict elements" test of *Schmuck v. United States*, 489 U.S. 704 (1989). See Tax Division Memoranda dated February 15, and March 15, 1993, respectively, on "Lesser Included Offenses in Tax Cases," published in Chapter 3 of this *Manual*, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure to File -- Statute

Section 7203 of Title 26 of the United States Code provides, in part, that:

Any person required * * * (by law or regulation) * * * to make a return * * * who willfully fails to * * * make such return * * * at the time or times required by law or regulations, * * * shall be guilty [*of an offense against the laws of the United States*].

26 U.S.C. § 7203.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.10 (modified)

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure To File -- The Essential Elements of the

Offense Charged

In order to sustain its burden of proof for the crime of willful failure to file a tax return as charged in Count ____ of the indictment [*information*] [*as the included offense of wilfully attempting to evade or defeat a tax as charged in Count ____ of the indictment*], **1** the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: The defendant _____ was required by law or regulation to file a tax return concerning his [her] income for the taxable year ended December 31, 19__;

Two: The defendant failed to file such a return at the time required by law; **2** and

Three: In failing to file the tax return, the defendant _____ acted willfully.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.11

NOTES

1 This segment of the instruction conflicts with Tax Division Policy on lesser included offenses which is that *neither* party is entitled to an instruction that a willful failure to file (26 U.S.C. 7203) is a lesser-included offense of a *Spies*-evasion offense. This position reflects the Government's adoption of the "strict elements" test of *Schmuck v. United States*, 489 U.S. 704 (1989). See Tax Division Memoranda dated February 15, and March 15, 1993, respectively, on "Lesser Included Offenses in Tax Cases," published in Chapter 3 of this *Manual*, *supra*.

2 If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the indictment or information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. NOTE that the date the return was due should include any authorized extensions of time for filing. 26 U.S.C. § 7503.

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure to File -- Offense Charged

The defendant, _____, is accused of failing to file an income tax return for the year _____.

It is against federal law to fail to file a required income tax return. For you to find _____ guilty of this crime, you must be convinced that the government has proved each of these things beyond a reasonable doubt:

First, that _____ received income of [*state applicable dollar amount*] or more between January 1 and December 31 of [*year*].

Second, that _____ failed to file an income tax return as required by [*April 15, 19__*].

Third, that _____ knew he was required to file a return.

Fourth, that _____ failed to file on purpose, and not as a result of carelessness.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1991 Supp.), Section FJC 115 (modified)

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure to Pay Tax or File Tax Return -- Offense Charged

Title 26, United States Code, Section 7203, makes it a crime for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant received income of [*state applicable dollar amount*] or more between January 1 and December 31 of 19__;

Second: That the defendant failed to file an income tax return as required by [*state applicable deadline date, e.g., April 15, 19__*];

Third: That the defendant knew he was required to file a return; and

Fourth: That the defendant's failure to file was on purpose, and not as a result of accident, negligence or inadvertence.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, No. 2.89

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure to Pay Tax or File Tax Return -- Offense Charged

The defendant is charged in Count _____ of the indictment with failure [*to pay tax*] [*to file a tax return*] _____ in violation of Section 7203 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [*owed income tax*] [*had gross income of more than \$_____*] for the calendar year ending December 31, 19__.

Second, the defendant failed to [*pay the tax*] [*file an income tax return*] _____ by April 15, 19__; and

Third, the defendant acted for the purpose of evading his [her] _____ duty under the tax laws and not as a result of accident or negligence.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1991 Supp.), Section 9-183

GOVERNMENT PROPOSED JURY INST. NO. ____

Failure to File Tax Return -- Offense Charged

Title 26, United States Code, Section 7203, makes it a Federal crime or offense for anyone to willfully fail to file a federal income tax return when he is required to do so by the Internal Revenue laws or regulations.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was required by law or regulation to make a return of his income for the taxable year charged;

Second: That the Defendant failed to make a return at the time required by law; and

Third: That the Defendant's failure to make the return was willful.

A person is required to make a federal income tax return for any tax year in which he has gross income in excess of _____.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1991 Supp.), Section 11-147

GOVERNMENT PROPOSED JURY INST. NO. ____

The Requirement to File a Return--Explained

A person is required to file a federal income tax return for any calendar year in which he [she] has gross income in excess of \$_____. Gross income means the total of all income received before making any deductions allowed by law.

Gross income includes the following: (1) Compensation for services, including fees, commission and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

For the crime of willful failure to file a tax return, the government is not required to show that a tax is due and owing from the defendant. Nor is the government required to prove an intent to evade or defeat any taxes.

A person is required to file a return if his [her] gross income for calendar year 19__ exceeded \$_____, even though that person may be entitled to deductions from that income so that no tax is due.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.12

GOVERNMENT PROPOSED JURY INST. NO. ____

The Requirement to File a Tax Return

A single person [*under*] [*over*] sixty-five years old was required to file a federal income tax return for the year(s) [*insert years charged*] if he [she] had gross income in excess of [*insert amount*].

A married individual was required to file a federal income tax return for the year(s) _____, if he [she] had a separate gross income in excess of \$_____, and a total gross income, when combined with that of his or her spouse, in excess of \$_____ where [*either*] [*both*] [*is*] [*are*] [*over*] [*under*] sixty-five years old. 1

Gross income includes the following: [*Compensation for services, including fees, commissions and similar items*] [*Gross income derived from business*] [*Gains derived from dealings in property*] [*Interest*] [*Rents*] [*Royalties*] [*Dividends*] [*Alimony and separate maintenance payments*] [*Annuities*] [*Income from life insurance and endowment contracts*] [*Pensions*] [*Income from discharge of indebtedness*] [*Distributive share of partnership gross income*] [*Income in respect of a decedent*] and [*Income from an interest in an estate or trust*]. 2

The fact that a person may be entitled to deductions from income in sufficient amount so that no tax is due does not affect that person's obligation to file.

The government is not required to show that a tax was due and owing or that the defendant intended to evade or defeat the payment of taxes, only that he [she] willfully failed to file a return.

If you find beyond a reasonable doubt that the defendant had the required gross income in [*insert year*], then the defendant was required to file a tax return on or before [*insert date, e.g. April 15, 19__*].

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.12 NOTES.

NOTES

1 Where more than one year is charged and the gross income amount requiring that a return be filed differs in amount, it will be necessary to set forth the appropriate gross income for each of the years in issue. Note also that gross income requirements may vary from year to year depending on the amount allowed as an exemption, the age of the defendant, and, in the case of a married defendant, the age of the spouse. 26 U.S.C. § 6012

2 The instruction should be simplified by eliminating sources of income not shown by the evidence.

GOVERNMENT PROPOSED JURY INST. NO. ____

Time Required by Law

The second element of the offense of failure to file is that the defendant failed to file a *timely* income tax return for each of the years charged in the indictment [*information*].

The law provides that a return made on the basis of the calendar year shall be made on or before the 15th day of April, following the close of the calendar year, except that when April 15th falls on a Saturday, Sunday, or legal holiday, returns are due on the first day following April 15th which is not a Saturday, Sunday, or legal holiday. ¹

If you find beyond a reasonable doubt that the defendant had the required gross income in [*Year, e.g., 1993*], then, as a matter of law, the defendant was required to file a tax return on or before [*Date, e.g., April 15, 1994*].

26 U.S.C. §§ 6072, 6081, 7503

NOTE

¹ For the calendar years 1987 and 1990 through 1993, individual income tax returns had to be filed on, or before, April 15th of the next year; for the calendar years 1988 and 1989, returns had to be filed on, or before, April 17, 1989 and April 16, 1990, respectively.

Returns made on the basis of a fiscal year are generally required to be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C., § 6072(a). Calendar year corporate returns are due on or before the 15th day of March following the close of the calendar year; fiscal year corporate returns are due on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C., § 6072(b)

Note that the statutory due dates should be adjusted so as to account for any extensions of time for filing a return.

Willfulness

The third and final element that the government must prove beyond a reasonable doubt in order to establish the offense of willful failure to file income tax returns is that the defendant's failure to file returns was "willful."

The word "willful" means a voluntary, intentional violation of a known legal duty. Willfulness, in the context of a failure to file an income tax return, simply means a voluntary, intentional violation of a known legal duty to make and file a return.

Cheek v. United States, 498 U.S. 192, 201-202 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

Failure To Pay -- Willfulness Defined

The specific intent of willfulness is an essential element of the offense of willful failure to pay one's income taxes. The term willfully used in connection with this offense means a voluntary, intentional violation of a known legal duty.

The failure to pay income taxes is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do what he [she] knew the law requires to be done; that is to say, with intent to disobey or disregard the law that requires him [her] to pay federal income taxes.

On the other hand, the defendant's conduct is not willful if you find that he [she] failed to pay his [her] income taxes because of negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or due to his [her] good faith misunderstanding of the requirements of the law. **1**

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Ausmus, 774 F.2d 722, 725-726 (6th Cir. 1985)

NOTE

1 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

Good Faith Belief Defense -- Failure to File

In the context of Section 7203, the element of willfulness is established by proving that the defendant had knowledge of his [her] legal obligation to file a tax return but, nevertheless, voluntarily and intentionally chose not to do what the law required.

Defendant's conduct is not "willful" if his [her] failure to file a tax return was due to negligence (even gross negligence), inadvertence, accident, mistake, or reckless disregard for the requirements of the law, or was the result of a good faith misunderstanding of the requirement of the law that he [she] file a return.

In this connection, it is for you to decide whether the defendant acted in good faith -- that is, whether he [she] sincerely misunderstood the requirements of the law -- or whether the defendant knew that he [she] was required to file a return and did not do so. **1** This issue of intent, as to whether the defendant willfully failed to file an income tax return, is one which you must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] own belief that such law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.26 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Murdock, 290 U.S. 389, 396 (1933)

United States v. Mueller, 778 F.2d 539, 541 (9th Cir. 1985)

United States v. Aitken, 755 F.2d 188 (1st Cir. 1985)

United States v. Burton, 737 F.2d 439, 442 (5th Cir. 1984)

United States v. Koliboski, 732 F.2d 1328, 1331 (7th Cir. 1984)

United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984)

United States v. Ness, 652 F.2d 890, 893 (9th Cir. 1981)

United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980)

United States v. Ware, 608 F.2d 400, 405 (10th Cir. 1979)

United States v. Edelson, 604 F.2d 232, 235 (3d Cir. 1979)

NOTE

1 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

Willfulness -- Good Faith Belief Defense

The third element which the government must prove beyond a reasonable doubt is that the defendant's failure to make the return in question was willfully committed.

The term willfully for purposes of these instructions means a voluntary, intentional violation of a known legal duty.

The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful and with the specific intent to fail to do that which he [she] knew the law required, that is to say, with the intent to disobey or disregard the law that requires him [her] to make a timely return.

The willfulness which the government must prove beyond a reasonable doubt does not require the government to prove that the defendant had a purpose to evade a tax or to defraud the government.

The failure of a taxpayer to have or keep records adequate to permit him [her] or his [her] agents or employees to prepare accurate tax returns is no legal justification for not filing a timely income tax return.

The only justification for not filing a tax return when the same is required by law to be filed is a good faith misunderstanding by the taxpayer as to his [her] legal obligation to file the return **1** or an accidental, inadvertent, careless, negligent, or even grossly negligent failure to file such return.

United States v. Wilson, 550 F.2d 259, 260 (5th Cir. 1977)

NOTE

1 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

Willfulness -- Failure to File/Good Faith Belief Defense

Willfulness is an essential element of the crime of failure to file an income tax return. The term "willfully" used in connection with this offense means a voluntary, intentional violation of a known legal duty .

Defendant's conduct is not "willful" if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law. **1** However, mere disagreement with the law in and of itself does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Also, a person's belief that the tax laws violate his [her] constitutional rights does not constitute a good faith misunderstanding of the requirements of the law. Furthermore, a person's disagreement with the government's monetary system and policies does not constitute a good faith misunderstanding of the requirements of the law.

[Where appropriate, an explanation of the evidence introduced by the defendant and its place in the jury's deliberations may be included here. For example . . . The defendant has introduced evidence of advice he [she] heard given by speakers at meetings, tape recorded lectures, essays, pamphlets, court opinions, and other material that he [she] testified he [she] relied on in concluding that he [she] was not a person required to file income tax returns for the years _____ and _____.]

This evidence has been admitted solely for the purpose of aiding you in determining whether or not the defendant's failure to timely file tax returns for _____ and _____ was willful and you should not consider it for any other purpose. You are not to consider this evidence as containing any law that you are to apply in reaching your verdicts, because all of the law applicable to this case is set forth in these instructions.

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Miller, 634 F.2d 1134, 1135 (8th Cir. 1980)

NOTE

1 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

Willfulness -- Failure to File/Good Faith Belief Defense

Willfulness is an essential element of the crime of willful failure to file an income tax return. The word "willfully," used in connection with this offense, means a voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful intent not to file a return that defendant was required by law to file and knew he [she] should have filed. There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

Defendant's conduct is not "willful" if he [she] acted through negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the requirements of the law. ¹ It should be pointed out, however, that neither a defendant's disagreement with the law, nor his [her] belief that such law is unconstitutional -- no matter how earnestly held -- constitutes a defense of good faith misunderstanding or mistake. It is the duty of all citizens to obey the law whether they agree with it or not.

The only purpose necessary for the government to prove in this case is the deliberate intention on the part of the defendant not to file tax returns, which he [she] knew he [she] was required to file, at the time he [she] was required by law to file them.

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Ware, 608 F.2d 400, 404-405 (10th Cir. 1979)

NOTE

1 In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

GOVERNMENT PROPOSED JURY INSTRUCTION NO. _____

Fifth Amendment Defense

The defendant has claimed that he [*failed to file a tax return*] [*failed to provide information on his tax return*] because of his Fifth Amendment right against self-incrimination. A valid exercise of the Fifth Amendment privilege against self-incrimination is a complete defense to a section 7203 charge. **1** A taxpayer is not justified in [*failing to file a tax return*] [*failing to answer questions contained on a tax return*] unless the taxpayer shows substantial hazards of self-incrimination that are real and appreciable, and has cause to perceive such danger. **2**

To support a claim of privilege against self-incrimination, the taxpayer cannot make a blanket Fifth Amendment claim concerning a generalized fear of criminal prosecution. **3** Rather, the taxpayer must assert the privilege specifically in response to particular questions and demonstrate real dangers of incrimination. **4** Thus, the Fifth Amendment privilege does not give a person the right to withhold required information when the information sought does not tend to incriminate him [her].

NOTES

1 *Garner v. United States*, 424 U.S. 648, 662-62 (1976); *United States v. Malquist*, 791 F.2d 1399, 1401-02 (9th Cir.), *cert. denied*, 479 U.S. 954 (1986)

2 *Boday v. United States*, 759 F.2d 1472, 1474 (9th Cir. 1985)

3 *Boday v. United States*, 759 F.2d 1472, 1474-75 (9th Cir. 1985)

4 *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972); *accord*, *Heitman v. United States*, 753 F.2d 33, 34-35 (6th Cir. 1984); *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982) (taxpayer needed to show that his invocation of the privilege was based upon a colorable claim that he was involved in activities for which he could be criminally prosecuted and that such activities would be revealed if he supplied data on his [tax] form); *United States v. Leidender*, 779 F.2d 1417, 1418 (9th Cir. 1986); *Stubbs v. United States*, 797 F.2d 936, 983 n. 2, (11th Cir. 1986) (Fifth Amendment does not protect against remote and speculative possibilities). *See also Saussy*, 802 F.2d 849, 855 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987) (citing *United States v. Albertson v. SACB*, 382 U.S. 70 (1965))

GOVERNMENT REQUESTED JURY INSTRUCTION NO. _____

Tax Return Must Contain Sufficient Information

A taxpayer's return which does not disclose sufficient information from which tax liability can be calculated is not a tax return within the meaning of the Internal Revenue Code or the regulations adopted by the Secretary of the Treasury. **1** Therefore, a tax form that contains no information about the defendant's tax status is not a return. **2**

NOTES

1 *United States v. Porth*, 426 F.2d 519, 523 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States v. Vance*, 730 F.2d 736, 738 (11th Cir. 1984); *United States v. Schiff*, 612 F.2d 73, 77 (2d Cir. 1979); *United States v. Edelson*, 604 F.2d 232, 234 (3d Cir. 1979); *United States v. Reed*, 670 F.2d 622, 623-624 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982); *United States v. Mosel*, 738 F.2d 157, 158 (6th Cir. 1984); *United States v. Verkuilen*, 690 F.2d 648, 654 (7th Cir. 1982); *United States v. Green*, 757 F.2d 116, 121 (7th Cir. 1985); *United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986); *United States v. Grabinski*, 727 F.2d 681, 686-87 (8th Cir. 1984); *United States v. Kimball*, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*); *United States v. Malquist*, 791 F.2d 1399, 1401 (9th Cir.), *cert. denied*, 479 F.2d 954 (1986); *United States v. Crowhurst*, 629 F.2d 1297, 1300 (9th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States v. Stillhammer*, 706 F.2d 1072, 1075 (10th Cir. 1983); *United States v. Brown*, 600 F.2d 248, 251-252 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979)

2 *United States v. Klee*, 494 F.2d 394, 397 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). *See also* *United States v. Saussy*, 802 F.2d 849, 854-55 (6th Cir. 1986), *cert. denied*, 480 U.S. 907 (1987)

GOVERNMENT PROPOSED JURY INST. NO. ____

False Withholding Allowance Certificate (Form W-4)
Offense Charged -- False No. of Allowances

The [*information*] or [*indictment*] sets forth ____ counts or charges.

Count I charges that the defendant, [*Defendant's Name*], a resident of [*City*], [*State*], who during the calendar year 19_ was employed by [*Name of Employer*], a resident of [*City*], [*State*], and who was required under the Internal Revenue laws to furnish [*Name of Employer*] with a signed Employee's Withholding Allowance Certificate, Form W-4, setting forth the number of withholding allowances claimed on or about the date of the commencement of employment by [*Name of Employer*], did willfully supply a false and fraudulent Employee's Withholding Allowance Certificate, Form W-4, to [*Name of Employer*], on which he [she] claimed ___ withholding allowances, whereas, as the defendant then and there well knew and believed, he [she] [*was not entitled to claim withholding allowances*] **1** or [*was entitled to claim only _____ withholding allowances*]. **1**

Count II charges that * * * .

All in violation of Title 26, United States Code, Section 7205.

26 U.S.C. § 7205

NOTE

1 The government does not have to prove the number of [*allowances*] [*exemptions*] to which the defendant was entitled. *United States v. McDonough*, 603 F.2d 19, 24 (7th Cir. 1979).

GOVERNMENT PROPOSED JURY INST. NO. ____

Statute Defining Offense

The Internal Revenue Code provides, in part, as follows:

On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

26 U.S.C. § 3402(f)(2)(A)

Section 7205 of the Internal Revenue Code provides, in part, as follows:

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 * * * [*be guilty of an offense against the laws of the United States*].

GOVERNMENT PROPOSED JURY INST. NO. ____

Elements of Offense

To establish a violation of Section 7205 of the Internal Revenue Code, the government must prove beyond a reasonable doubt that:

1. The defendant was required to furnish an employer with a signed withholding exemption certificate, Form W-4, certifying information as to the defendant's tax liability and withholding tax allowances;
2. The defendant did furnish his [her] employer with a signed withholding exemption certificate, Form W-4 [*or failed to supply the employer with a signed withholding exemption certificate*];
3. The information supplied by the defendant was false or fraudulent; and
4. The defendant acted willfully.

26 U.S.C. § 7205

United States v. Bass, 784 F.2d 1282, 1284 (5th Cir. 1986)

United States v. Herzog, 632 F.2d 469, 471-472 (5th Cir. 1980)

United States v. Olson, 576 F.2d 1267, 1271 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978)

GOVERNMENT PROPOSED JURY INST. NO. ____

Withholding Allowances

The law requires an employee to complete an Employee's Withholding Allowance Certificate, Form W-4, so that an employer can withhold Federal income tax from an employee's pay.

Employee's Withholding Allowance Certificate, Form W-4, requires an employee to certify the total number of allowances claimed. For purposes of this case you are instructed that if you find that the defendant was an employee, then the defendant was entitled to claim *[set forth applicable allowances based on the evidence, e.g., one allowance for himself [herself], one allowance for his [her] spouse, one allowance for each dependent, etc.]* **1**

26 U.S.C. § 3402(f)

26 C.F.R. § 31.3402(f)(1)-1 (1993)

NOTE

1 Reference should be made to 26 C.F.R. § 3402(f)(1) and a determination made as to which withholding allowances are applicable based on the evidence in the case.

GOVERNMENT PROPOSED JURY INST. NO. ____

Exempt Status

An exemption from withholding may be claimed by an employee on his [her] Employee's Withholding Allowance Certificate, Form W-4, only if the employee:

- (1) incurred no liability for income tax for the preceding taxable year; *and*
- (2) anticipates that he will incur no liability for income tax for the current taxable year.

26 U.S.C. § 3402(n)

26 C.F.R. § 31.3402(n)-1

GOVERNMENT PROPOSED JURY INST. NO. ____

Withholding Allowances (Exempt Status)

Withholding Allowances. The indictment charges that the defendant submitted false and fraudulent Employee's Withholding Allowance Certificates, Forms W-4, to his [her] employer. In this regard, I charge you that all employees are required by law and regulations to furnish their employer with a signed Employee's Withholding Allowance Certificate, Form W-4, on or before the date of commencement of employment with that employer, indicating the number of withholding allowances which the employee claims. The number of allowances claimed on the Form W-4 may not exceed the number to which the individual is entitled.

A Form W-4 is false and fraudulent if it was used to supply false or fraudulent information regarding the appropriate number of allowances. Thus, if you find that the defendant submitted a Form W-4 to his [her] employer, claiming more allowances than those to which the defendant was entitled by law, then the defendant has filed a false and fraudulent Form W-4.

Exempt Status. Under some circumstances, an individual is entitled to claim total exemption from the withholding of Federal taxes.

To properly claim exempt status, however, the individual must certify in a Form W-4 that no Federal income tax was owed for the tax year prior to the filing of the Form W-4, and that the individual does not expect to owe any Federal income tax for the year of the filing the Form W-4. Thus, if you find that the defendant did owe income tax for the calendar year ***preceding*** the year in which the defendant filed a Form W-4 claiming exempt status, or that the defendant did expect to owe an income tax for the calendar year in which the defendant filed the Form W-4, then you may find that the Form W-4 on which the defendant claimed exempt status was false and fraudulent.

26 U.S.C. §§ 3402, 7205

United States v. Grumka, 728 F.2d 794, 797 (6th Cir. 1984)

United States v. Annunziato, 643 F.2d 676, 677 (9th Cir. 1981)

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26 U.S.C. § 7205

United States v. Shields, 642 F.2d 230, 231 (8th Cir. 1981)

United States v. Herzog, 632 F.2d 469, 473 (5th Cir. 1980)

GOVERNMENT PROPOSED JURY INST. NO. ____

False or Fraudulent

The government charges that the information supplied by the defendant in the Form W-4, filed with his [her] employer was false and fraudulent in that the defendant reported that he [she] was entitled to [*exempt status*] or [*number claimed allowances*].

Information is false if it was untrue when made and was then known to be untrue by the person then supplying the information or causing such information to be supplied. Information is fraudulent if it is supplied or caused to be supplied with the intent to deceive.

It is sufficient if the evidence establishes beyond a reasonable doubt that the information supplied by the defendant in the Form W-4 furnished to his [her] employer was either false or fraudulent. The evidence need not establish that it was both false and fraudulent.

Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1992), Sections 16.06 (False -- Defined); 16.08 (Fraudulent -- Defined); 28.04 (modified)

United States v. Buttorff, 572 F.2d 619, 625 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978)

United States v. Peterson, 548 F.2d 279, 280 (9th Cir. 1977)

United States v. Smith, 484 F.2d 8, 10 (10th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974)

GOVERNMENT PROPOSED JURY INST. NO. ____

Willfulness -- Section 7205

To find the defendant guilty of violating Section 7205, you must not only find that the defendant did the acts of which the defendant stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibits, that is to say, with intent either to disobey or to disregard the law.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Bishop, 412 U.S. 346, 360 (1973)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. ____

Knowledge Of Contents Of Form W-4

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed and submitted a Form W-4, then you may draw the inference and find that the defendant had knowledge of the contents of the Form W-4.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (3d Ed. 1977), Section 35.14 (modified)

United States v. Ruffin, 575 F.2d 346, 354 (2d Cir. 1978)

Offense Charged

The indictment sets forth ___ counts or charges.

Count I charges that on or about the _____ day of _____, 19___, in the _____ District of _____, the defendant, _____, a resident of _____, did willfully make and subscribe [*Describe Document*] , which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at [*City*], [*State*], which said [*Describe Document*] he [she] did not believe to be true and correct as to every material matter in that the said [*Describe Document and False Fact(s)*], whereas, he [she] then and there well knew and believed, [*Describe Correct Fact(s)*].

Count II charges that * * *.

All in violation of Title 26, United States Code, Section 7206(1).

26 U.S.C. § 7206(1)

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.13

GOVERNMENT PROPOSED JURY INST. NO. ____

False Return -- Statute Involved

Section 7206(1) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [w]illfully 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 * * * shall be guilty [*of an offense against the laws of the United States*].

26 U.S.C. § 7206(1)

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.14

GOVERNMENT PROPOSED JURY INST. NO. ____

Elements of Section 7206(1)
(False Income Tax Return)

The gist of the offenses charged in Counts ____ and ____ of the indictment is the willful making and subscribing by the defendant of his [her] [joint] individual income tax return[s] for the years _ _ and ___, which contains [*contain*] a written declaration that it [*they*] was [*were*] made under the penalties of perjury, and which the defendant did not believe to be true and correct as to every material matter. Each year, that is ____ and ___, is to be considered separately by you.

To prove a violation, the government must establish each of the following four (4) elements beyond a reasonable doubt;

1. The defendant made, or caused to be made, and signed (subscribed) an income tax return for the year in question that was false as to a material matter.
2. The return contained a written declaration that it was made under the penalties of perjury.
3. The defendant did not believe the return to be true and correct as to the material matter(s) charged in the indictment; **1** and
4. The defendant made, or caused to be made, and signed (subscribed) the return willfully.

26 U.S.C. § 7206(1)

United States v. Bishop, 412 U.S. 346, 350, 359 (1973)

United States v. Pomponio, 429 U.S. 10 (1976)

United States v. Monteiro, 871 F.2d 204, 208 (1st Cir. 1989)

United States v. Drape, 668 F.2d 22, 25 (1st Cir. 1982)

Hoover v. United States, 358 F.2d 87, 88 (5th Cir. 1966), *cert. denied*, 385 U.S. 822 (1966)

United States v. Sassak, 881 F.2d 276, 278 (6th Cir. 1989)

United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988)

United States v. Gurtunca, 836 F.2d 283, 287 (7th Cir. 1987)

United States v. Whyte, 699 F.2d 375, 381 (7th Cir. 1983)

United States v. Oggoian, 678 F.2d 671, 673 (7th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)

United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980)

United States v. Holland, 880 F.2d 1091, 1096 (9th Cir. 1989)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982)

NOTE

1 It has been held that an instruction can specify the material matters charged in the indictment. Thus, in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982), the court upheld the following instruction given by the trial court:

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

GOVERNMENT PROPOSED JURY INST. NO. ____

False Return -- Essential Elements
(False Income Tax Return)

Now, to prove the charge that is contained in each of these (three) counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.

The first one is that the defendant made, or caused to be made, and that the defendant signed the federal tax return for the year in question, an income tax return.

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

Third, that when the defendant made, or caused to be made, and when the defendant signed the return he did so willfully and knowingly.

Fourth, that the return contained a written declaration that it was made under the penalty of perjury.

It is not enough for the government to prove simply that the tax return is erroneous. If you find from your consideration of all the evidence, that each of the four numbered propositions has been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count.

The above instruction is quoted with approval in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982), with the court "finding that the charge as a whole covered the essential elements of the offense (Sec. 7206(1)), including knowledge of the appellant that the returns were false as to material matters." *Oggoian*, 678 F.2d at 674.

See also Sansone v. United States, 380 U.S. 343, 352 (1965)

GOVERNMENT PROPOSED JURY INST. NO. ____

False Return - Essential Elements
(False Income Tax Return)

The defendant is charged in [*Count* ____ *of*] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant filed a tax return knowing that it contained false information; and

Second, that the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.06D (1989)(modified)

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26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. ____

False Return - Essential Elements
(False Income Tax Return)

Title 26, United States Code, Section 7206(1), makes it a federal crime or offense for anyone to willfully file a Federal income tax return knowing it to be false in some material way.

The Defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt:

First: That the Defendant filed an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully, as charged.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 75 (1985)

GOVERNMENT PROPOSED JURY INST. NO. ____

False Return -- Essential Elements
(False Income Tax Return)

To convict a defendant, the government must prove each of the following three elements beyond a reasonable doubt:

1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;
 2. that the return contained a written declaration that it was made under the penalty of perjury;
- and
3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.

The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The court instructs you that a statement of total income on a tax return is material as a matter of law.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.07D (1989)

The above instruction is quoted in *United States v. Hedman*, 630 F.2d 1184, 1196 n.6 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), with the court commenting: "We therefore conclude that the trial court properly instructed the jury with respect to the tax counts (Sec. 7206(1)) alleged in the indictment." *Hedman*, 450 U.S. at 1196.

COMMENT

1 The opinion in *Hedman* is confusing. In the body of the opinion, the court states that false

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26 U.S.C. § 7206(1)

statements relating to gross income, irrespective of the amount, constitute a material misstatement. But the jury instruction approved by the court requires the government to prove that the understatement was substantial. *Hedman*, 630 F.2d at 1196 & n.6.

GOVERNMENT PROPOSED JURY INST. NO. ____

Documents Within Section 7206(1)
(Income Tax Returns)

I instruct you that the United States Individual Income Tax Returns, Forms 1040, involved in this case are returns or other documents as contemplated by Section 7206(1) of the Internal Revenue Code of 1986. **1**

26 U.S.C. § 7206(1)

NOTE

1 This instruction should not be given in a case where there is a factual issue as to whether the document in question is an income tax return.

GOVERNMENT PROPOSED JURY INST. NO. ____

Subscribed -- Defined
Proof of Signing of Return

The word "subscribe" simply means the signing of one's name to a document.

"The fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him," which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

26 U.S.C. § 6064

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th. Ed. 1990), Section 56.22

Cashio v. United States, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)

United States v. Wainwright, 413 F.2d 796, 802 n.3 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

*United States v. Carrodegua*s, 747 F.2d 1390, 1396 (11th Cir. 1982), *cert. denied*, 474 U.S. 816 (1985)

GOVERNMENT PROPOSED JURY INST. NO. ____

Subscribed-Defined

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit,
Instruction No. 6.26.7201 and 6.26.7206 (1989)

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26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. ____

Material Matter

If you find that the government has proved these things [*elements of (i.e., 26 U.S.C. § 7206(1)*], you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Instruction No. 2.90 (1990)

Materiality of the alleged false statement is a question for the court. *United States v. Taylor*, 574 F.2d 232 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

GOVERNMENT PROPOSED JURY INST. NO. ____

Material Matter

The question of the materiality of the allegedly false statements made in connection with the subscribing or signing of a tax return is a question of law for the court.

The court instructs you that if you find that the defendant [*set forth false item charged in indictment, e.g., understated the gross income reported on his [her] return*], then I instruct you that [*e.g., the understatement of gross income*] is a material matter as contemplated by Section 7206(1).

As the Sixth Circuit has written,

"We note that the materiality of a perjured statement on a tax return is a question of law, and is for the judge, not the jury, to decide. Though this rule has not been announced before today in this Circuit, it is the prevailing rule elsewhere. *United States v. Rogers*, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225, (1985); *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984); *United States v. Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); *United States v. Strand*, 617 F.2d 571, 574 (10th Cir.), *cert. denied*, 449 U.S. 841, (1978); *United States v. Romanow*, 509 F.2d 26, 28-29 (1st Cir. 1975). A ruling apparently to the contrary, *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969), has since been rejected by the Fourth Circuit. *Rogers*, 853 F.2d at 251. And the rule is not only widespread: we believe it is also sound."

United States v. Fawaz, 881 F.2d 259, 261-262 (6th Cir. 1989).

See *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, Instruction No. 6.26.7206 (1989)