Collection-Based Tax Crimes

American Bar Association
Section of Taxation

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DISCLAIMER

This presentation and the views expressed therein reflect the unofficial, individual views of the individual speakers, and do not necessarily represent the policies of the U.S. Department of Justice or the IRS.
### Table 6. Gross Collections, by Type of Tax, Fiscal Years 2008–2017

[Money amounts are in thousands of dollars]

<table>
<thead>
<tr>
<th>Fiscal year</th>
<th>Total Internal Revenue collections [1]</th>
<th>Income taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>2009</td>
<td>2,345,337,177</td>
<td>1,415,864,347</td>
</tr>
<tr>
<td>2010</td>
<td>2,345,055,978</td>
<td>1,453,926,748</td>
</tr>
<tr>
<td>2012</td>
<td>2,524,320,134</td>
<td>1,669,298,095</td>
</tr>
<tr>
<td>2013</td>
<td>2,855,059,420</td>
<td>1,876,348,448</td>
</tr>
<tr>
<td>2014</td>
<td>3,064,301,358</td>
<td>1,996,765,080</td>
</tr>
<tr>
<td>2015</td>
<td>3,302,677,258</td>
<td>2,183,074,421</td>
</tr>
<tr>
<td>2016</td>
<td>3,333,449,083</td>
<td>2,161,371,562</td>
</tr>
<tr>
<td>2017</td>
<td>3,416,714,139</td>
<td>2,205,956,951</td>
</tr>
</tbody>
</table>
### IRS – Collections FY 2017

Civil Penalties Assessed and Abated, by Type of Tax, Penalty, FY 2017

[Money amounts are in thousands of dollars]

<table>
<thead>
<tr>
<th>Type of tax and type of penalty</th>
<th>Civil penalties assessed</th>
<th>Civil penalties abated</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Amount</td>
</tr>
<tr>
<td>Civil penalties, total</td>
<td>38,871,235</td>
<td>26,515,093</td>
</tr>
<tr>
<td>Individual and E&amp;T income taxes:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civil penalties, total</td>
<td>31,194,792</td>
<td>11,013,679</td>
</tr>
<tr>
<td>Accuracy</td>
<td>557,147</td>
<td>1,078,288</td>
</tr>
<tr>
<td>Bad check</td>
<td>655,971</td>
<td>60,375</td>
</tr>
<tr>
<td>Delinquency</td>
<td>2,546,262</td>
<td>3,045,682</td>
</tr>
<tr>
<td>Estimated tax</td>
<td>9,803,675</td>
<td>1,534,350</td>
</tr>
<tr>
<td>Failure to pay</td>
<td>17,624,080</td>
<td>5,080,546</td>
</tr>
<tr>
<td>Fraud</td>
<td>2,533</td>
<td>156,950</td>
</tr>
<tr>
<td>Other</td>
<td>5,124</td>
<td>57,489</td>
</tr>
</tbody>
</table>

[Image 0x0 to 960x540]
### IRS – Collections Highlights FY 2016/2017

**Offers in compromise (thousands):**

<table>
<thead>
<tr>
<th>Description</th>
<th>FY 2016</th>
<th>FY 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of offers received</td>
<td>63</td>
<td>62</td>
</tr>
<tr>
<td>Number of offers accepted</td>
<td>27</td>
<td>25</td>
</tr>
<tr>
<td>Amount of offers accepted</td>
<td>$225,946</td>
<td>$255,862</td>
</tr>
</tbody>
</table>

**Enforcement activity:**

<table>
<thead>
<tr>
<th>Description</th>
<th>FY 2016</th>
<th>FY 2017</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of notices of Federal tax liens filed</td>
<td>470,602</td>
<td>446,378</td>
</tr>
<tr>
<td>Number of notices of levy requested on third parties (ACS and Field Collection)</td>
<td>869,196</td>
<td>590,249</td>
</tr>
<tr>
<td>Number of seizures (Field Collection)</td>
<td>436</td>
<td>323</td>
</tr>
</tbody>
</table>
Beware Parallel Proceedings....

Justice Manual 6-4.400:

Consistent with the Department’s policies for coordinating criminal, civil, and administrative actions, the Tax Division uses all available judicial remedies and procedures to enforce the tax laws. These actions include criminal prosecutions, civil injunction actions, summons enforcement actions, collection actions, and the defense of civil refund suits. The Government may take these actions simultaneously or sequentially.
Sources of IRS Criminal Referrals

- IRS Civil – 7% (Criminal Fraud Referrals – 73% acceptance rate)
- U.S. Attorney Offices – 26%
- Other Federal Agencies – 29%
- IRS Criminal Investigation – 14%
- FinCEN – 13%
- Public – 6%
- State and Local Government – 5%
IRS Fraud Referrals

• Revenue Agent/Revenue Officer identifies affirmative acts of fraud/willfulness
• Consultation with Fraud Technical Advisor (FTA)
• Confirmation of firm indicia of fraud and criminal criteria
• Suspension of examination/collection activity
• BOD refers case through FTA to CI via Form 2797, Referral Report to Potential Criminal Fraud Cases
• CI considers and either accepts or declines the referral
## IRS Criminal Investigation - Statistics

<table>
<thead>
<tr>
<th></th>
<th>FY2015</th>
<th>FY2016</th>
<th>FY2017</th>
<th>FY2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigations initiated</td>
<td>3853</td>
<td>3395</td>
<td>3019</td>
<td>2886</td>
</tr>
<tr>
<td>Pros Recommendations</td>
<td>3289</td>
<td>2744</td>
<td>2251</td>
<td>2130</td>
</tr>
<tr>
<td>Indictments/Informations</td>
<td>3208</td>
<td>2761</td>
<td>2294</td>
<td>2011</td>
</tr>
<tr>
<td>Conviction Rate</td>
<td>93.2%</td>
<td>92.1%</td>
<td>91.5%</td>
<td>91.7%</td>
</tr>
<tr>
<td>Sentenced</td>
<td>3092</td>
<td>2699</td>
<td>2549</td>
<td>2111</td>
</tr>
<tr>
<td>Incarceration Rate</td>
<td>80.8%</td>
<td>79.9%</td>
<td>80.2%</td>
<td>82%</td>
</tr>
<tr>
<td>Average Months to Serve</td>
<td>40</td>
<td>41</td>
<td>42</td>
<td>45</td>
</tr>
<tr>
<td>Special Agents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017:</td>
<td>2,159</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2018:</td>
<td>2,019</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Staff</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017:</td>
<td>789</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2018:</td>
<td>840</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### IRS Criminal Investigation - Statistics

#### Table 18. Criminal Investigation Program, by Status or Disposition, FY2017

<table>
<thead>
<tr>
<th>Status or disposition</th>
<th>Total</th>
<th>Legal source tax crimes</th>
<th>Illegal source financial crimes</th>
<th>Narcotics-related financial crimes</th>
<th>Identity theft</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
<td>(3)</td>
<td>(4)</td>
<td>(5)</td>
</tr>
<tr>
<td>Investigations initiated</td>
<td>3,019</td>
<td>1,188</td>
<td>1,096</td>
<td>735</td>
<td>374</td>
</tr>
<tr>
<td>Investigations completed</td>
<td>3,089</td>
<td>1,235</td>
<td>1,162</td>
<td>692</td>
<td>524</td>
</tr>
<tr>
<td>Referrals for prosecution</td>
<td>2,251</td>
<td>795</td>
<td>875</td>
<td>581</td>
<td>403</td>
</tr>
<tr>
<td>Investigations completed without prosecution</td>
<td>838</td>
<td>440</td>
<td>287</td>
<td>111</td>
<td>121</td>
</tr>
<tr>
<td>Indictments and informations</td>
<td>2,294</td>
<td>827</td>
<td>882</td>
<td>585</td>
<td>484</td>
</tr>
<tr>
<td>Convictions</td>
<td>2,300</td>
<td>927</td>
<td>822</td>
<td>551</td>
<td>n.a</td>
</tr>
<tr>
<td>Sentenced</td>
<td>2,549</td>
<td>1,062</td>
<td>872</td>
<td>615</td>
<td>550</td>
</tr>
<tr>
<td>Incarcerated</td>
<td>2,043</td>
<td>852</td>
<td>656</td>
<td>535</td>
<td>481</td>
</tr>
<tr>
<td>Percentage of those sentenced who were incarcerated</td>
<td>80.1</td>
<td>80.2</td>
<td>75.2</td>
<td>87.0</td>
<td>87.5</td>
</tr>
</tbody>
</table>
Criminal Tax: Government Priorities

• International Tax Fraud
• Refund Crimes – QRP, RPP and ID theft
• Abusive Tax Schemes
• **Employment Tax**
• Frivolous Arguments Program – Non-filers
• Money Laundering/Bank Secrecy Act (BSA)
• Political/Public Corruption
• Cyber Crimes (including Virtual Currency)
• Organized Crime Drug Enforcement Task Force (OCDETF)
• Fraud Referral Program
IRS CI Nationally Coordinated Investigation Unit

• Formed 5.1.2017 as part of the Future State initiative for IRS-CI
• Formed strong partnerships within IRS and external stakeholders
• Uses data driven case selection (with Research, Applied Analytics & Statistics (RAAS))
• Focuses on developing investigative strategy that impacts and proactively addresses nationwide key noncompliance areas and emerging threats
• Serves as a continual resource to Field Offices
• Provides training and oversight for large, complex investigations
IRS CI Nationally Coordinated Investigation Unit

Current Priorities:

- **Employment Tax**
- International Tax and Significant Money Laundering
- Virtual Currency

Future initiatives being evaluated by executive leadership team

In its first 20 months, NCIU referred 55 cases (involving $68M in criminal tax deficiencies) to all 25 CI field offices

- **Employment tax**: 36 (22 elevated to Subject Criminal Investigation)
- International tax: 5 (2 elevated to SCI)
- Microcap stock: 12 (8 elevated to SCI)
- Biofuels credit: 1
Commonly Charged Collection-Based Tax Crimes
**Tax Evasion**

26 U.S.C. 7201

**Attempt to evade or defeat tax**

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

*For offenses committed after December 31, 1984, 18 U.S.C. 3623 [now 18 U.S.C. 3571] increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7201, the maximum permissible fine is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.*
Evasion of Payment

• TP attempts to prevent IRS from obtaining payment of a tax owed
• Occurs after a tax becomes due and owing, typically after:
  • Self-assessment: taxpayer reports taxes due on return
  • IRS examination or audit, and assessment (i.e., income tax, employment tax, trust fund recovery penalties, etc.)
  • Operation of law: After return is due, TP fails to file and the Government can prove that there was a tax deficiency on that date
    • Neither formal assessment nor demand for payment is required: US v. Daniel, 956 F.2d 540 (6th Cir. 1992)
• After knowing what tax is due, TP does something to evade
  • Conceal ability to pay
  • Remove assets from reach of IRS
Defining an Attempt to Evade or Defeat

• General rule: any conduct, the likely effect of which would be to mislead or conceal, can be an affirmative act of evasion. *Spies v. US*, 317 US 492 (1943)

• “In any manner” = unlimited ways to attempt to commit tax evasion

• Otherwise legal activity can be affirmative act if carried out with intent to evade tax

• Failing to act is not an attempt; merely failing to pay assessed taxes coupled with possession of the funds needed to pay the taxes, without more, does not meet the affirmative act requirement. *US v. McGill*, 964 F.2d 222, 231 (3d Cir. 1992)

• *Spies* evasion: where TP fails to file a tax return, but that omission is coupled with an affirmative act of evasion.

• Can face evasion charges for evading someone else’s taxes. *US v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997)
Affirmative Acts - Evasion of Payment

- Filing False Forms W-4
- Causing receipts to be paid through and in the name of others
- Causing debts to be paid through and in the name of others
- Placing assets and accounts in names of nominees
- Removal of assets from reach of IRS
- Dealing in currency
- Paying creditors instead of IRS
- Filing a false tax return which omits income or overstates deductions
- Lying to the IRS during audit or investigation (i.e., Form 4180)
- Signing and submitting false financial statements (i.e., Forms 433)
Willful Failure to Collect or Pay Over Tax

26 U.S.C. 7202

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

See United States v. Houser, 754 F.3d 1335, 1350 (11th Cir. 2014). Notwithstanding the statutory language, the court may impose a fine up to $250,000 pursuant to the federal fine statute at 18 U.S.C. § 3571(e).
Ability to Pay

• Government is *not required* to prove that the defendant had any ability to pay the tax on the date the tax offense.

• Defendant not entitled to a jury instruction requiring the government to prove an ability to pay on the date the tax is due.

• Responsible person is obligated to use after-acquired unencumbered funds to pay the delinquent trust fund tax, even as to the taxes which accrued prior to his knowing of the delinquency.
Some Evidence to Prove Willfulness

Admissions (written and oral)

Letters and Warnings from the IRS
  • Interaction with Civil Includes: Case History
  • Collection activity (ICS)
  • Revenue Officer interactions and Notes

Letter 903 – “You Haven’t Deposited Federal Employment Taxes”
  • Explains the employer’s obligation to remit payroll taxes on a timely basis and
    warns that continued non-compliance can lead to criminal charges.
  • Demonstrates knowledge of the unpaid taxes and the requirements in a later
    criminal proceeding
Dear

Our records show that you haven't deposited federal employment taxes as required by law (Treasury Regulation Section 31.6302). If you do not bring your account current with the required deposits within 30 days of the date of this letter, we will consider stricter civil or criminal enforcement procedures.

We may:

Section 31.6302). If you do not bring your account current with the required deposits within 30 days of the date of this letter, we will consider stricter civil or criminal enforcement procedures.

- Assess a trust fund recovery penalty under Internal Revenue Code Section 6672 for the unpaid trust fund taxes

We can assess a trust fund recovery penalty against anyone who is responsible for, and willfully fails to, collect, account for, or pay to the IRS income and employment taxes the law requires to be withheld. Willfulness exists if a person allows payment of net wages when the employer has insufficient funds to pay the taxes or uses withheld taxes for other purposes. Willfulness also exists if a person who knows of a previous failure to pay taxes allows payments to others (including payment of additional wages) rather than using available funds to pay the tax delinquency.

- Refer the matter to the Department of Justice (DOJ) to institute a civil suit or to seek criminal prosecution

In a civil suit, the DOJ can seek an injunction that requires the employer to comply with the federal employment tax laws and prohibits the employer from paying any amounts until the employer pays the correct amounts to the IRS. The DOJ may also ask the court to appoint a receiver to take control of the business to ensure tax compliance.
The DOJ can also pursue criminal charges based on the willful failure to report and pay over withheld taxes (Section 7202 of the Internal Revenue Code). Willfulness is evident if an employer paid net wages and didn’t leave enough funds to make the required tax payments or used withheld trust fund taxes for other purposes. Convictions may result in imprisonment and other penalties. Other criminal statutes may also apply.

Enclosure:
Notice 931
**Section II - Responsibilities**

1. State whether you performed any of the duties / functions listed below for the business and the time periods during which you performed these duties.

<table>
<thead>
<tr>
<th>Did you...</th>
<th>Yes</th>
<th>No</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Determine financial policy for the business?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>b. Direct or authorize payments of bills/creditors?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>c. Prepare, review, sign, or authorize transmit payroll tax returns?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>d. Have knowledge withheld taxes were not paid?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>e. Authorize payroll?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>f. Authorize or make Federal Tax Deposits?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>g. Authorize the assignment of any EFTPS or electronic banking PINS/passwords?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>h. Could other individuals do any of the above? (Complete Section IV and V)</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Contact Number</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>i. Have signature authority or PIN assignment on business bank accounts?</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Bank Name(s)</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
<tr>
<td>Account Number(s)</td>
<td>☐</td>
<td>☐</td>
<td></td>
</tr>
</tbody>
</table>

**Signature of Interviewer**

Date

Date copy of completed interview form given to person interviewed

Taxpayer Statement on Page 4: ☐ Yes ☐ No

Interview Continued on subsequent pages? ☐ Yes ☐ No

Interview Handouts: ☐ Notice 609, Privacy Act Notice ☐ Notice 784, Could You Be Personally Liable for Certain Unpaid Federal Taxes?

Catalog Number 22719P

www.irs.gov Form 4180 (Rev. 8-2012)
## Section V - Business Information

1. List corporate positions below, identifying the persons who occupied them and their dates of service.

<table>
<thead>
<tr>
<th>Position</th>
<th>Name</th>
<th>Address</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Section V - Knowledge / Willfulness

1. During the time the delinquent taxes were increasing, or at any time thereafter, were any financial obligations of the business paid?
   (such as rent, mortgage, utilities, vehicle or equipment loans, or payments to vendors)
   - [ ] No
   - [ ] Yes
   - Which obligations were paid?
   - Who authorized them to be paid?

2. Were all or a portion of the payrolls met?
   - [ ] No
   - [ ] Yes
   - Who authorized

3. Did any person or organization provide funds to pay net corporate payroll?
   - [ ] No
   - [ ] Yes (explain in detail and provide name)

4. When and how did you first become aware of the unpaid taxes?

5. What actions did you attempt to see that the taxes were paid?

6. Were discussions ever held by stockholders, officers, or other interested parties regarding nonpayment of the taxes?
   - [ ] No
   - [ ] Yes
   - Identify who attended, dates, any decisions reached, and whether any documentation is available.

7. Who handled IRS contacts such as phone calls, correspondence, or visits by IRS personnel?

   - [ ] No
   - [ ] Yes

   - When did these contacts take place, and what were the results of these contacts?
## IRS CI Employment Tax Statistics

<table>
<thead>
<tr>
<th></th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>FY 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investigations Initiated</td>
<td>137</td>
<td>162</td>
<td>207</td>
</tr>
<tr>
<td>Prosecution Recommendations</td>
<td>77</td>
<td>59</td>
<td>81</td>
</tr>
<tr>
<td>Informations/Indictments</td>
<td>71</td>
<td>60</td>
<td>64</td>
</tr>
<tr>
<td>Sentenced</td>
<td>87</td>
<td>77</td>
<td>48</td>
</tr>
<tr>
<td>Incarceration Rate</td>
<td>70.1%</td>
<td>77.9%</td>
<td>77.1%</td>
</tr>
<tr>
<td>Average Months to Serve</td>
<td>14</td>
<td>21</td>
<td>21</td>
</tr>
<tr>
<td>% Direct Investigative Time</td>
<td>4.2</td>
<td>5.4</td>
<td>7.4</td>
</tr>
</tbody>
</table>
Recent Employment Tax Prosecutions

- **U.S. v. Kae Wood Lee, E.D.NY** (owner of Queens karaoke bar sentenced on 4/25/2019 to a year and a day for failing to collect and pay employment tax; restitution of $612,500)
- **U.S. v. Walter and Amy Williams, N.D.AL** (husband and wife indicted on 3/28/2019 for failing to pay over employment tax from their construction business)
- **U.S. v. Sainte Deon Robinson, E.D.NC** (mental health executive sentenced on 3/22/2019 to 30 months for failing to report and pay employment tax; restitution of $1,686,360)
- **U.S. v Jerry R. Harper, Jr., W.D. VA** (pharmacist sentenced on 11/16/18 to 41 months for failing to account for and pay over employment tax, liabilities of over $5 million)
- **U.S. v. John Herzer, W.D. TX** (CFO of staff leasing company pled guilty on 10/22/18 to failing to pay over employment tax, causing of tax loss of more than $13 million)
IRS highlights importance of payroll tax compliance in two-week campaign focused on legal actions, education visits (IR-2019-71)

• IRS revenue officers visited nearly 100 businesses around the country suspected of having serious issues with employment tax compliance.

• Business owners were informed about ways to catch up with back payroll taxes, how to stay current and the potential for civil and criminal penalties.

• On the criminal enforcement side, IRS CI worked with the Department of Justice Tax Division and U.S. attorneys around the nation to focus on about 50 law enforcement actions related to employment tax crimes.

• During the two weeks:
  - 12 individuals indicted
  - 4 search warrants executed
  - 6 individuals or businesses sentenced

• Roughly two dozen more enforcement actions are planned in coming weeks
Willful Failure to File, Supply Information, Pay, Etc.

26 U.S.C. 7203

Any person **required** under this title **to pay any estimated tax or tax**, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who **willfully fails to pay such estimated tax or tax**, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a **misdemeanor** and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting “felony” for “misdemeanor” and “5 years” for “1 year.”
Fraud and False Statements

26 U.S.C. 7206

- Any person who—
  - (1) Declaration under penalties of perjury: Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
  - (2) Aid or assistance: Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
- shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.
Fraudulent Returns, Statements or Other Documents

26 U.S.C. 7207

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

26 U.S.C. 7212

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

18 U.S.C. 1001

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

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

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

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism ...., imprisoned not more than 8 years, or both. ....
Conspiracy to Commit Offense
to Defraud the United States

18 U.S.C. 371

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

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

Statute of Limitations

• 6 years from the date of the last affirmative act. 26 USC 6531(2)
• If false return filed before the due date, the SOL begins to run on statutory due date. US v. Habig, 390 US 222, 225 (1968)
• When an affirmative act occurs before a tax deficiency is incurred, the SOL begins to run when the tax deficiency arises. US v. Carlson, 235 F.3d 466, 470 (9th Cir. 2000)

Venue

• Any district where an affirmative act of evasion was committed. This would include districts where the return was prepared, signed, mailed or filed. US v. Felak, 831 F.2d 794, 799 (8th Cir. 1987)
• Continuing Offense – 18 USC 3237(a)
2T1.1. **Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

(a) **Base Offense Level:**
   (1) Level from 2T4.1 (Tax Table) corresponding to the tax loss; or
   (2) 6, if there is no tax loss.

(b) **Specific Offense Characteristics**
   (1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
   (2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(c) **Special Instructions**
   For the purposes of this guideline— (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)
<table>
<thead>
<tr>
<th>TAX LOSS (APPLY THE GREATEST)</th>
<th>OFFENSE LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>$2,500 OR LESS</td>
<td>6</td>
</tr>
<tr>
<td>MORE THAN $2,500</td>
<td>8</td>
</tr>
<tr>
<td>MORE THAN $6,500</td>
<td>10</td>
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<tr>
<td>MORE THAN $15,000</td>
<td>12</td>
</tr>
<tr>
<td>MORE THAN $40,000</td>
<td>14</td>
</tr>
<tr>
<td>MORE THAN $100,000</td>
<td>16</td>
</tr>
<tr>
<td>MORE THAN $250,000</td>
<td>18</td>
</tr>
<tr>
<td>MORE THAN $550,000</td>
<td>20</td>
</tr>
<tr>
<td>MORE THAN $1,500,000</td>
<td>22</td>
</tr>
<tr>
<td>MORE THAN $3,500,000</td>
<td>24</td>
</tr>
<tr>
<td>MORE THAN $9,500,000</td>
<td>26</td>
</tr>
<tr>
<td>MORE THAN $25,000,000</td>
<td>28</td>
</tr>
</tbody>
</table>
Tax Loss

• Object of the offense – USSG 2T1.1(c)(1)
• Government bears the burden – preponderance of evidence
• Tax loss need not be determined with precision
• Court needs only to make a “reasonable estimate” of loss defendant intended to inflict, not actual loss
• Tax loss does not include interest or penalties, except in willful evasion of payment under IRC 7201 and willful failure to pay under IRC 7203
• In the face of a disagreement regarding tax loss, the court must allow for an evidentiary hearing unless the court presided over a trial and the record supports a calculation of tax loss. Criminal Tax Manual, 43.03[1] (citing U.S. v. Marshall, 92 F.3d 758, 760 (8th Cir. 1996))
• Tax loss includes the tax associated with offense of conviction and any relevant conduct. USSG 1B1.3(a)(2)
Relevant Conduct

- Same course of criminal conduct or common scheme or plan
- Substantially connected by at least one common factor: victims, accomplices, or purpose, or similar *modus operandi*
- “all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated.” USSG 1B1.3(a)(2), 2T1.1 comment. (n. 2)

**Includes:**
- State and Local Taxes
- Foreign Taxes
- Tax Loss from Other Periods
- Tax Loss of Related Taxpayers
- Preparer Cases
- Acquitted Conduct
**Restitution - Statutory Authority**

18 U.S.C. 3556 – Order of Restitution - (a) The court, in imposing a sentence on a defendant who has been found guilty of an offense shall order restitution in accordance with section 3663A, and may order restitution in accordance with section 3663. The procedures under section 3664 shall apply to all orders of restitution under this section.

18 U.S.C. 3663 – Order of Restitution (Victim Witness Protection Act of 1982) - (a)(1)(B)(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(a)(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

18 U.S.C. 3664(e) - Any dispute as to the amount or type of restitution shall be resolved by the court by the preponderance of the evidence.

18 U.S.C. 3563 – Conditions of Probation - (b) Discretionary conditions. -- The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in 3553(a)(2), that the defendant -- (2) make restitution to a victim of the offense under 3556 (but not subject to the limitation of 3663(a) or 3663A(c)(1)(A);

18 U.S.C. 3583 – Inclusion of a term of supervised release after imprisonment – (d) Conditions of supervised release. -- The court may order, as a further condition of supervised release, any condition set forth as a discretionary condition of probation in 3563(b)
Principles of Calculating Restitution

• Restitution must be based on actual loss caused by defendant. *U.S. v. Hirmer*, 767 F.Supp.2d 1305 (N.D. Fl. 2011); *U.S. v. Serawop*, 505 F.3d 1112, 1124 (10th Cir. 2007) (district court that orders restitution in an amount greater than the total loss caused by the offense exceeds its statutory jurisdiction and imposes illegal sentence)

• To estimate loss, there must be a reasonable basis to approximate loss, and impossible to determine actual loss. *U.S. v. Futrell*, 209 F.3d 1286, 1291-92 (11th Cir. 2000)

• Restitution is limited to losses caused by specific conduct underlying the offense of conviction, and does not include relevant conduct. *See Hughey v. U.S.*, 495 U.S. 411, 420 (1990); *US v. Batson*, 608 F.3d 630, 637 (9th Cir. 2010); *see also U.S. v. Jinwright*, 683 F.3d 471 (4th Cir. 2012) (court is entitled to look at all acts comprising a scheme, conspiracy or pattern of criminal conduct as an element of the offense, such as a conspiracy to defraud)
Principles of Calculating Restitution

• Restitution can be imposed against defendant for another person’s tax liabilities where defendant is convicted of aiding and abetting the evasion of payment. *U.S. v. Bontrager, Docket No. 2:12-CR-00052 (W.D.WA) (Mar. 11, 2014)*

• Restitution can be imposed jointly and severally, but government must monitor collections to avoid double recovery. *U.S. v. Hagerman, 2011 WL 6096505, at *17 (N.D.N.Y.) (Nov. 30, 2011)*

• Restitution can include pre- and post-judgment interest to compensate for time-value of loss. *U.S. v. Perry, 714 F.3d 570, 577 (8th Cir. 2013)*

• Restitution generally does not include penalties. *U.S. v. Chalupnik, 514 F.3d 748, 754 (8th Cir. 2008).* However, penalties are included in restitution for evasion of payment under IRC 7201 or willful failure to pay under IRC 7203. *Crim Tax Manual 44.03[4]*

• Government must establish amount of restitution by a preponderance of the evidence. *U.S. v. Vaknin, 112 F.3d 579, 587 (1st Cir. 1997)* (a restitution award “cannot be woven solely from the gossamer strands of speculation and surmise“)
Challenges to Restitution Order

- Under 18 U.S.C. 3664(o)(1), a sentence that imposes an order of restitution is a final judgment, but can be altered under limited circumstances. See U.S. v. Puentes, 803 F.3d 597, 605-06 (11th Cir. 2015):
  
  (A) corrected under Fed. R. Crim. P. 35 and 18 U.S.C. 3742;
  - Within 14 days of sentencing, “the court may correct a sentence that resulted from arithmetical, technical, or other clear error” pursuant to Fed. R. Crim. P. 35(a).
  - Government can move to reduce at any time based on substantial assistance
  (B) appealed and modified under 18 U.S.C. 3742;
  - 18 U.S.C. 3742 – grounds for appeal
  - Fed. R. App. P. 4(b) – appeal due within 14 days of entry of final judgment
  (C) amended under 18 U.S.C. 3664(d)(5)
  - If a victim discovers additional losses after sentencing and petitions the district court, the court may amend the restitution order to include the additional losses “upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.”
  (D) adjusted under 18 U.S.C. 3664(k), 3572 or 3613A.
**Statutory Authority to Assess Restitution as a Tax**

**IRC 6201(a)(4) Certain orders of criminal restitution.**

(A) **In general.** The Secretary shall assess and collect the amount of restitution under an order pursuant to [18 U.S.C. 3556], for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

(B) **Time of assessment.** An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

(C) **Restriction on challenge of assessment.** The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit or proceeding in court permitted under section 7422).

**IRC 6213(b)(5)** - restitution-based assessment is not subject to deficiency procedures.

**IRC 6501(c)(11)** - “[i]n the case of any amount described in section 6201(a)(4), such amount may be assessed, or a proceeding in court for the collection of such amount may be begun without assessment, at any time.”
Court Decisions Involving Tax Restitution

- **Rozin v. Commissioner**, T.C. Memo. 2017-52 - taxpayer's payment of restitution ordered in tax fraud prosecution (prior to August 2010) did not reduce taxpayer's income-tax deficiency and fraud penalty, but would be applied once deficiency and penalty was assessed.

- **Muncy v. Commissioner**, T.C. Memo. 2017-83 - taxpayer's criminal plea agreement and judgment ordering restitution did not discharge, and did not reduce, his income-tax deficiencies.

- **U.S. v. Rubenstein**, 228 F.Supp.3d 223 (E.D.N.Y. 2017) - IRS authorized to assess interest on restitution ordered and collect; no violation of ex post facto or double jeopardy clause, or plea agreement.

- **U.S. v. Westbrooks**, 858 F.3d 317 (5th Cir. 2017) - order for payment of restitution prior to supervised release constitutes component of sentence, not condition of supervised release; court resolved error by modifying judgment to postpone payments; restitution can include reduction in tax of third parties.

- **Klein v. Commissioner**, 149 T.C. No. 15 (October 3, 2017) - CDP proceedings - IRS not authorized to add underpayment interest or failure-to-pay penalties to restitution, or to assess or collect underpayment interest or additions to tax without first determining taxpayers’ civil tax liabilities.

- **Choi v. U.S.**, 2018 WL 620454 (D.MD) (January 30, 2018) - restitution order can not be challenged in motion for ineffective assistance of counsel or vacated based on settlement with IRS appeals.

- **Bontrager v. Commissioner**, 151 No. 12 (December 12, 2018) - restitution can be assessed against person convicted of evasion of payment of third party’s tax; RBA not subject to discharge in bankruptcy.

- **Carpenter v. Commissioner**, 152 No. 12 (April 18, 2019) - court-ordered restitution payment schedule does not preclude IRS from collecting balance due administratively.
THANK YOU!!