Research Memorandum

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To: Scott A. Srebnick, Esquire

Re: *United States v. Castroneves*

What constitutes an “affirmative act of evasion” within the meaning of 26 U.S.C. § 7201?

The instant research memorandum collects judicial discussions on the broad array of conduct that constitutes an "affirmative act of evasion" within the meaning of 26 USC § 7201. The research culled through all of the cases found under the pertinent annotations to the federal statutory section and the results of a supplemental Westlaw query.

Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax… or the payment thereof" shall be guilty of the felony offense of tax evasion. *See* 26 U.S.C. § 7201. In order to prove tax evasion under this section, the government must demonstrate the existence of a tax deficiency, that the accused acted willfully, and that the accused took an affirmative act to evade or defeat the obligatory payment of tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965).

In its landmark decision in *Spies v. United States*, 317 U.S. 492, 499 (1943), the Supreme Court discussed the requirement that an affirmative action showing intent to defeat or evade a tax obligation be proved and remarked that conviction under this section demands proof of some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but combining it with a willful and affirmative attempt to evade tax in any manner or to defeat it by any means elevates the offense to the degree of felony.

The often quoted *Spies* opinion further noted "[b]y way of illustration, *and not by way of limitation*, [that an] affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Id*. at 499 (emphasis added).

The synopses of published case discussions that follow are grouped under the issuing federal courts in order to facilitate review.

Second Circuit

In *United States v. Klausner*, 80 F.3d 55 (2d Cir. 1996), the panel found that defendant committed affirmative acts constituting attempted income tax evasion based on evidence that defendant lied on his request for extension to file his tax return by stating that he did not owe any tax for that year when he owed $16,022, that he told an IRS special agent that he did not expect to pay additional taxes when he actually owed $190,000 in taxes, and that he and his wife had combined income of approximately $100,000 when their combined income was significantly higher, despite defendant's eventual cooperation with government by filing his delinquent tax returns. *Id*. at 62 ("An affirmative act includes 'any conduct, the likely effect of which would be to mislead or to conceal.' *Spies v. United States*, 317 U.S. 492, 499 (1943). Such conduct includes 'false statements made to Treasury representatives for the purpose of concealing unreported income.' *United States v. Beacon Brass Co*., 344 U.S. 43, 45-46 (1952); *see also United States v. Winfield*, 960 F.2d 970, 973 (11th Cir.1992) ("[A]n affirmative act constituting an evasion or attempted evasion of the tax occurs when false statements are made to the IRS after the tax was due...."); *United States v. Copeland*, 786 F.2d 768, 770 (7th Cir.1985) ("Where a taxpayer has willfully failed to file a tax return in violation of § 7203, a prior, concomitant or subsequent false statement may elevate the § 7203 misdemeanor to the level of a § 7201 felony."); *United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir.1981) (same).") (citations omitted).

In *United States v. Romano*, 938 F.2d 1569 (2d Cir. 1991), the panel held that an attempt to transport $359,500 in cash from the United States to Canada, in a car trunk, did not constitute the affirmative act necessary to sustain a tax evasion conviction. Defendant was not required to disclose that he possessed cash in that amount until the due date of the next tax return in the following calendar year. A defendant must commit affirmative acts willfully to be convicted of tax evasion, and evidence of affirmative acts may be used to show willfulness in tax evasion case.

In *United States v. DiPetto*, 936 F.2d 96, 97 (2d Cir. 1991), the panel found that "the evidence substantiated the jury's necessary conclusion that the DiPettos filed false forms W-4 in an attempt to mislead the government or conceal from the government the correct amount of their taxable income. Furthermore, by maintaining rather than correcting the false W-4s the DiPettos perpetuated their attempted deception. The filing and maintaining

of the false forms W-4 satisfied the affirmative act requirement set forth in *Spies v. United States*, 317 U.S. 492, 499 (1943)." (citations omitted).

In *United States v. Mollet*, 290 F.2d 273 (2d Cir. 1961), the panel found that the defendant who had stated to a revenue officer that he had no money to pay taxes due, who had omitted from a list of his assets certain brokerage accounts, and who had transferred one such account to a Canadian broker in his daughter's name when collection officers discovered it, was guilty of "affirmative action" sufficient to sustain a conviction for felony of willfully attempting to evade payment of taxes.

In *United States v. Schenck*, 126 F.2d 702 (2d Cir. 1942), the panel held that the crime of willfully attempting to evade income taxes may be committed by taking fraudulent deductions from gross income reported as well as by fraudulently failing to report income received.

Third Circuit

In *United States v. McKee*, 506 F.3d 225 (3d Cir. 2007), the panel found that the evidence was sufficient to sustain a conviction of defendants on charges of payroll tax evasion, where false partnership employment tax returns for quarters ending in March 1998 through January 2001 constituted affirmative acts of evasion, and jury could reasonably have concluded that one of two defendants signed 941 Forms and that each defendant authorized fraudulent filings.

In *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), the panel found that the "affirmative act" element of the tax evasion statute was satisfied by evidence that defendant decided not to purchase a piece of jewelry with cash when informed that a currency transaction report (CTR) would have to be filed with Internal Revenue Service (IRS), that defendant required potential victims of fraud scheme to fill out "confidentiality agreements" that forbade them from disclosing transactional details, and that a defendant maintained overseas bank accounts and directed a codefendant to wire funds into those accounts. Those acts, taken together, provided the jury panel with sufficient evidence from which they could infer that the acts were designed to evade payment of admitted tax liabilities, even if such actions might otherwise constitute wholly innocent conduct. *Voigt* was an evasion of payment case.

As the Third Circuit explained, the Supreme Court has held as to the "affirmative act" element that "[i]f the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Id.* at 1090 (*quoting Spies v. United States*, 317 U.S. 492, 499 (1943)). Elaborating on the "affirmative act" of evasion requirement, the *Voigt* panel reaffirmed that an "affirmative act is anything done to mislead the government or conceal funds to avoid payment of an admitted and accurate deficiency." *Id.* (citation omitted). The holding also notes that "[o]ne act will suffice." *Id.* "Whereas simple nonpayment of taxes owed cannot sustain a conviction under the statute, acts intended to conceal or mislead are sufficient." *Id.*

The Supreme Court in *Spies* broadly held that "any conduct, the likely effect of which would be to mislead or conceal," is sufficient to satisfy the "affirmative act" element. *Spies*, 317 U.S. at 499. The *Voigt* panel opinion collected several cases that simply require that there be some evidence from which a jury could infer an intent to mislead or conceal beyond mere failure to pay assessed taxes; as it is for the jury to determine, as a matter of fact, whether the affirmative act was undertaken, in part, to conceal funds from or mislead the government. *See United States v. Mal*, 942 F.2d 682, 687 (9th Cir.1991) (evasion of payment "involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed"); *United States v. Jungles*, 903 F.2d 468, 473-74 (7th Cir.1990) (activity that is lawful itself can constitute affirmative act to evade); *United States v. Conley*, 826 F.2d 551, 556 (7th Cir.1987) (rational jury can infer intent to evade upon learning of manner in which defendant conducted his financial affairs); *United States v. Shorter*, 809 F.2d 54, 57-58 (D.C.Cir. 1987) (jury could infer intent to evade where defendant carried on "cash lifestyle"); *United States v. Voorhies*, 658 F.2d 710, 714-15 (9th Cir.1981) ("Voorhies' conduct in 1974 [of liquidating assets and transporting proceeds to Switzerland] had the 'likely effect' of misleading or concealing."); *see also United States v. Pollen*, 978 F.2d 78, 86 (3d Cir.1992) (transporting funds to foreign countries, thereby making it more difficult to trace, provides inference of intent to evade).

In *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992), the defendant was charged with the evasion of payment. The Third Circuit explained that "[g]enerally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay his or her taxes or the removal of assets from the reach of the Internal Revenue Service. …

Section 7201 encompasses two kinds of affirmative behavior: the evasion of assessment and the evasion of payment. Evasion of assessment cases are far more common. The affirmative act requirement in such a case is satisfied, *inter alia*, with the filing of a false return. …If the false filing is shown to be willful, the offense is complete with the filing. Evasion of payment cases are rare, and the required affirmative act generally occurs after the filing, if there is a filing at all. *United States v. Mal*, 942 F.2d 682, 687 (9th Cir.1991) (evasion of payment "involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed")." *Id*. at 230 (citations omitted). *McGill* also explained that "[a]ffirmative acts of evasion of payment include: placing assets in the name of others; dealing in currency; causing receipts to be paid through and in the name of others; and causing debts to be paid through and in the name of others. For example, in *Spies* [*v. United States*, 317 U.S. 492 (1943)], the petitioner 'insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records.' The Supreme Court found this evidence sufficient to sustain a finding of attempted evasion. *Spies*, 317 U.S. at 499." *Id*. at 230 (brackets added; citations omitted).

The Third Circuit cited cases from other circuits in order to illustrate the conduct that constitutes an affirmative act in evasion of payment cases. *Id*. at 230 (*citing United States v. Mal*, 942 F.2d 682, 688 (9th Cir.1991) ("if a defendant transfers assets to prevent the IRS from determining his true tax liability, he has attempted to evade assessment; if he does so after a tax liability has become due and owing, he has attempted to evade payment."); *United States v. Conley*, 826 F.2d 551, 557 (7th Cir.1987) (affirming § 7201 conviction where the defendant placed assets in his sons' names, deposited his assets with others, dealt in currency, and paid creditors but not the government); *United States v. Hook*, 781 F.2d 1166 (6th Cir. 1986) (affirming § 7201 conviction where the defendant did most of his business in cash, used credit cards belonging to others, and bought a house in his girlfriend's name); *United States v. Voorhies*, 658 F.2d 710, 714 (9th Cir.1981) (affirming § 7201 conviction where the defendant traveled out of country on three occasions in one year, carrying over $80,000 in negotiable assets, did not declare these amounts to customs, and was later unable to account for use of large amount of cash and gold coins)).

The *McGill* discussion further explained that the Supreme Court in *Spies* specifically included deposits into an account registered to a family

member as an affirmative act of evasion. *Spies*, 317 U.S. at 499. The *Conley* panel found similar conduct to constitute an affirmative act. *Conley*, 826 F.2d at 557 (defendant used his son's name on a bank account that he opened for personal use). "Banking under the name of one's spouse satisfies the affirmative act requirement under § 7201. By analogy, banking through a business account containing the names of others also suffices as an affirmative act." *McGill*, 964 F.2d at 233. The panel found that defendant depositing money in his spouse's account and in his office expense account with other lawyers were "affirmative acts" of tax evasion taken after the IRS had issued levies on the defendant's personal bank accounts.

However, the *McGill* panel also found that "unless a taxpayer is in the situation of giving voluntary admissions during an investigation or a forced response to a *subpoena*, the failure of the taxpayer to report the opening of an account in his or her own name in his or her own locale cannot amount to an affirmative act of evasion. Omissions, including failures to report, do not satisfy the requirements of § 7201; the Government must prove a specific act to mislead or conceal." *Id*. at 233 (*citing Spies*, 317 U.S. at 499).

In *United States v. Connor*, 898 F.2d 942 (3d Cir. 1990), the panel held that a defendant's affirmative act of filing a fraudulent W-4 employee withholding certificate, on which he falsely claimed to be exempt from federal income taxes, could properly form the basis of a conviction for tax evasion. *Id*. at 945 ("purposeful failure to file an accurate W-4 form could be viewed by the jury as an affirmative willful act to support the violation of 26 U.S.C. § 7201 comparable to the affirmative acts of evasion outlined in *Spies v. United States*, 317 U.S. at 499.").

In *United States v. Hoover*, 233 F.2d 870 (3d Cir. 1956), the panel held that as long as there exists affirmative and positive conduct coupled with a tax evasion motive, a violation of the predecessor statute making it a felony to willfully attempt to evade or defeat taxation exists. *Id*. at 872 ("We think that the present indictment contains charges of affirmative actions, which are sufficient to constitute a violation of Section 145(b). It states that the defendant signed his name to an income tax return with knowledge that the return did not correctly state his income, and tendered the return to an Internal Revenue Service official at Altoona. That the indictment does not explicitly state whether or not the tender was accepted is immaterial. The tender was a positive, affirmative attempt to evade taxes.").

In *United States v. Kafes*, 214 F.2d 887, 890 (3d Cir. 1954), the panel held that "a showing of a failure to file plus other affirmative acts is sufficient to sustain a conviction under section 145(b), but that a willful failure to file alone is not sufficient. In the present case, the trial court correctly charged that there was evidence of acts of commission which could supply the needed quantum: for example, defendant's avoidance of making proper books of account and records; his failure to enter some items in the duplicate receipt books that he did finally begin to keep; and the cashing of checks without clearance through his bank account."

Fifth Circuit

In *United States v. Herrera*, 2009 WL 323184 (5th Cir. 2009), the government alleged that defendant attempted to conceal funds by shifting them from his bank accounts. From 1999 through 2000, most of defendant's money was deposited into seven accounts registered in his name or the name of a company he owned. After a warning in 2000 that the IRS was going to begin collection efforts, including levying on bank accounts, most of Herrera's money was deposited into accounts in his wife's name. The government argued that a reasonable juror could infer that Herrera willfully shifted funds to evade the levies.

The trial court found that the government's evidence was insufficient in three respects. First, the government did not adequately demonstrate that Herrera exercised any control over where the deposits were made and so could not have acted willfully. Second, there was not enough evidence that he had contact with the bank accounts attributed to him. Finally, there was no evidence that even if he made the transfers, he did so with the specific intent to evade taxes. Herrera relied on others to manage his financial affairs and was not responsible for the pattern of deposits. The Fifth Circuit agreed with the district court. *Id*. at *2 ("Although the government presented enough evidence for a jury to conclude that Herrera had contact with the accounts … the government did not demonstrate that he exercised any control over his finances. On cross-examination, the government witness admitted that none of the deposit checks was signed by Herrera. Further, his wife testified that when she needed money, she would call Herrera's financial advisor, who was co-named on all of the accounts, not Herrera. Without evidence that Herrera orchestrated the transfers, a reasonable juror could not find beyond a reasonable doubt that he willfully shifted funds to avoid paying taxes."). The proof was sufficient as to other affirmative acts.

While the defendant did not receive formal notice of lien until after a quitclaim transferring a house to his wife was prepared, he had been warned six months earlier that such a lien could be instituted. The Fifth Circuit found that "the explanations for the quitclaim do not line up with the circumstances surrounding its execution. …The jury reasonably could have disbelieved the wife's testimony and concluded, based on the timing and circumstances surrounding the quitclaim, that Herrera transferred the house to avoid the IRS's collection efforts." *Id*. at *3.

The panel also concluded that the evidence was sufficient to support finding that defendant lied to IRS agents about his past income to deter them from pursuing any further collection efforts, so as to support defendant's conviction for tax evasion. There were discrepancies between defendant's self-reported income and deposit records. The meeting with the IRS agents was not a casual one, given that the IRS emphasized in advance that defendant was about to be charged with a criminal offense, that he should have a lawyer present, and that any statements he made would be used against him at trial. *Id*. at *3 - *4. The trial evidence was sufficient to convict on two out of the three affirmative acts alleged by the government. "The district court therefore erred in ordering acquittal, because the jury reasonably could have concluded that Herrera transferred his house to avoid an IRS lien and/or lied to IRS agents about past income to deter them from pursuing further collection efforts." *Id*. at *4.

In *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001), the panel found that the accused attorney committed the affirmative act of evasion required to sustain conviction for attempted evasion. Bishop was charged with knowingly and willfully attempting to evade and defeat a substantial income tax due and owing by him by failing to timely file an income tax return on or about October 15, 1992, causing false and misleading books and records to be created, providing incomplete or misleading information to his tax preparer, concealing information likely to alert IRS agents to unreported income, and other affirmative acts of evasion.

The Fifth Circuit panel found the indictment to be legally sufficient and also concluded that the conviction was supported by sufficient evidence, including evidence that the defendant requested that a $400,000 check be deposited into his personal account, knowing that such transaction would prevent the fee from being recorded in his firm's books.

In *United States v. Williams*, 928 F.2d 145 (5th Cir. 1991), the panel held that the defendant's submission of a false and fraudulent Form W-4 to his employer and the act of keeping it on file during subsequent tax years constituted an affirmative act for each subsequent tax year for purposes of the statute because defendant was under a continuing obligation to correct intentional misrepresentations on the form. *Id*. at 148-149 ("By maintaining the false form on file, Williams continued to perpetrate his initially intended misrepresentations which were vitally relevant to the tax issue. There is no doubt that Williams knew the form contained false relevant data and that he intended such precisely to prevent the appropriate withholding of his taxes by his employer. Williams was under a continuing obligation to correct his intentional misrepresentations. He failed to do so. Maintaining on file the March 17, 1983 W-4 thus constituted an act the likely effect of which was to mislead or conceal.") (citations and internal quotations omitted).

In *United States v. Masat*, 896 F.2d 88 (5th Cir. 1990), the indictment charged defendant with the evasion of substantial tax due and owing, and alleged various acts committed toward that end, including failure to file tax returns, transferring assets to nominees, and filing false W-4 forms.

The Fifth Circuit panel explained there are three elements to the crime of tax evasion: the existence of a substantial tax deficiency, willfulness, and an affirmative act made with the intent to evade taxes. A defendant may not be convicted of tax evasion on the basis of willful omissions alone; the defendant must have undertaken an affirmative act of evasion. In its charge, the trial court instructed that there were only two elements of tax evasion: a tax deficiency and a willful attempt to evade. The court did not explain that an affirmative act must be a commission, rather than an omission. The court mentioned failure to file as one aspect of the willful attempt requirement. Clarifying its instructions, the court listed five acts, which are evidence of attempt to evade, one of which was failure to file, an omission. The willful failure to file is merely a misdemeanor, and in the absence of any other affirmative act it is insufficient evidence for conviction of attempted tax evasion. This error in the jury instructions resulted in reversal and remand for a new trial. *Id*. at 97-98.

Seventh Circuit

In *United States v. King*, 126 F.3d 987 (7th Cir. 1997), the panel held that a false Form W-4 withholding allowance certificate filed by defendant that technically expired before tax years at issue did not preclude relying on such certificate, which employer had on file and continued to reference, as affirmative act supporting convictions for attempting to evade or defeat tax. *Id*. at 989-90 ("Filing a false Form W-4 satisfies the affirmative act requirement. …If the false filing is shown to be willful, the offense is complete with the filing. …If a defendant files a Form W-4 in which he falsely claims to be exempt from withholding, and he keeps the fraudulent form on file indefinitely, all the while believing that his employer will honor it until he files a new one, it is only logical that the fraudulent W-4 may supply the affirmative act for § 7201 charges in later years, regardless of the fact that it technically expired pursuant to Treasury regulations. … [T]he submission of a false Form W-4 constitutes an affirmative act of tax evasion for later years where the taxpayer intended to escape withholding for those years.") (citations omitted).

In *United States v. Eaken*, 17 F.3d 203 (7th Cir. 1994), the panel held that conviction of income tax evasion was supported by sufficient evidence demonstrating that defendant took affirmative steps to conceal his receipt of embezzled funds from estate account for which he was administrator, and by those actions defendant intended to conceal his receipt of embezzled funds as income from IRS. *Id*. at 205-207 ("[I]t is undisputed that Eaken took additional affirmative steps to conceal his own receipt of the embezzled funds from the estate account. First, Eaken made 34 individual withdrawals from the estate account; to make these withdrawals, he used withdrawal forms rather than checks. Second, the majority of the withdrawn funds was deposited into three separate accounts, two of which were not in Eaken's name. … Despite the fact that Eaken's name was among the names on the signature card for each account, the parceling of the embezzled funds among three different accounts at the same bank constitutes an affirmative act which may reasonably be interpreted as an attempt to conceal Eaken's receipt of the embezzled funds as his income. In fact, such manipulation of funds is common among tax evasion and money laundering schemes. Eaken insists that his actions evidence only an intent to conceal his crime of embezzlement, and that they do not rise to the level of willful affirmative action .... Again, we disagree. These actions can clearly constitute willful affirmative acts under *Spies*; that Court stated, "[i]f the tax-evasion motive

plays any part in such conduct the offense [under § 7201] may be made out even though the conduct may also serve other purposes such as the concealment of other crime." 317 U.S. at 499…. No doubt these actions assisted Eaken's execution of the embezzlement scheme. However, a rational trier of fact could also find that by these actions he intended to conceal his receipt of the embezzled funds as income from the IRS. Whether the affirmative positive acts of depositing the embezzled funds into multiple bank accounts evidence an attempt to evade tax obligations obviously depends upon Eaken's intent with regard to these acts. For example, by these acts Eaken could have intended merely to conceal the money from the estate beneficiaries. Similarly, by these acts Eaken could have intended to conceal the embezzlement from the probate court. Indeed, Eaken insisted at trial that this was his only intent with regard to his actions. … However, it is also reasonable to conclude from the evidence presented at trial that by these acts Eaken intended to conceal from the IRS his receipt of the embezzled funds as income during the year 1985.") (citations omitted).

In *United States v. Stein*, 437 F.2d 775, 780 (7th Cir. 1971), where gist of offense charged in indictment was evasion of tax assessment rather than evasion of tax payment, the panel held that the amount actually paid was irrelevant, and the government was required to show only that defendant attempted to evade the assessment by fraudulently understating his taxable income on his tax return.

In *United States v. Mesheski*, 286 F.2d 345 (7th Cir. 1961), the panel held that a conviction for willfully attempting to evade payment of income taxes must be based upon some affirmative positive act to attempt to defeat or evade, and a mere failure to file a return and pay the tax is insufficient. The government argued that defendant took additional affirmative actions. Defendant prepared tax returns for clients and received payment from the taxpayers in cash or in checks payable to his order. He then prepared his own checks payable to the IRS and envelopes addressed to the agency, which he showed to his clients, who were also given receipts and assured that their tax obligations to the IRS were discharged. Defendant forestalled investigation by the taxpayers who would not thereafter be expecting to receive either cancelled checks or receipts from the IRS. Although defendant had committed affirmative acts with regard to his clients, the panel found that the evidence regarding his own tax obligations disclosed nothing other than mere passive failure to pay income tax on funds embezzled from other taxpayers. Id. at 346-47.

The Seventh Circuit concluded that the defendant's "reprehensible actions, designed to hinder detection of the strictly local crime of embezzlement, [did] not constitute such affirmative conduct as clearly and reasonably infers a motive to evade or defeat tax." *Id*. at 347.

Eighth Circuit

In *United States v. Schoppert*, 362 F.3d 451, 460 (8th Cir. 2004), the panel held that defendant's conviction for income tax evasion was supported by evidence that defendant made extensive use of cash, that defendant used another individual's credit card to make purchases, that defendant gave false information to the IRS, and that all of these affirmative acts were committed to evade the payment of taxes.

In *United States v. Felak*, 831 F.2d 794 (8th Cir. 1987), the panel held that trial evidence supported finding affirmative acts constituting evasion or attempted evasion. From 1947 through 1975, during which time defendant regularly paid income taxes, he never claimed more than three exemptions. In 1976, defendant claimed 16 exemptions, thereafter filed a form claiming 47 exemptions, and then a form on which he claimed to be totally exempt. After IRS notified the taxpayer's employer that the claim of total exemption could not be honored, defendant claimed the largest number of exemptions that his employer's computer could process and never sought to justify the number of exemptions claimed.

Ninth Circuit

In *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004), the panel found the evidence sufficient to support convictions for filing false income tax returns and tax evasion, in connection with defendant's alleged diversion of funds from closely-held corporation, and defendant's failure to report those diverted funds on his personal tax returns. Although the defendant contended that the money in his accounts consisted of loans from the corporation, government witness who performed analysis of bank deposits testified that he had eliminated any loans that defendant could have received from the corporation, that he credited defendant with deductions for money in bank accounts used to make purchases on behalf of the corporation, and that an analysis was done as to what credit defendant was given on his loan account at the corporation to reduce his loan for purchases that he made for corporation.

In *United States v. Carlson*, 235 F.3d 466 (9th Cir. 2000), defendant Carlson was convicted of three counts of evasion of assessment of taxes and two counts of evasion of payment. The panel found that evidence showing defendant opened two bank accounts using false social security numbers, and initiated practice of transferring funds into those accounts after learning that the IRS was attempting to levy on his account at another bank, was sufficient to establish "affirmative act" element of felony tax evasion charge. Carlson's conduct could have misled IRS and thwarted its collection efforts. *Id*. at 468-469 ("A review of evidence presented at trial discloses that Carlson clearly engaged in affirmative acts of evasion. Both documentary evidence and the testimony of Carlson's former attorney established that Carlson opened two accounts at Central Pacific Bank using false social security numbers after learning that the IRS was attempting to levy on his bank account at First Hawaiian. In addition, documentary evidence and Agent Backers's testimony showed that Carlson deposited his gross receipts into the First Hawaiian account, withdrew large amounts of cash from it, and deposited most of that cash into the secret Central Pacific accounts.").

In *United States v. Huebner*, 48 F.3d 376 (9th Cir. 1994), the panel held that the defendants' conviction for conspiracy to aid and abet taxpayers in attempted evasion of payment of their income taxes for various years was supported by evidence that defendants made bankruptcy filings for taxpayers with accompanying falsifications for the purpose of permanently depriving IRS of money which it would have collected if it had not been forced to release its levy. The affirmative attempt consisted of the same single filing by taxpayer of a false and fraudulent voluntary petition for bankruptcy.

In *United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991), the panel found that the evidence showing that defendants commingled investor funds with personal funds and then used commingled assets to pay for personal obligations supported inference that defendants intended to evade payment of income taxes, regardless of whether income tax returns for years in which diversions occurred had been filed. *Id*. at 1541 ("The use of family trusts and cash transactions in a business is sufficient to establish an affirmative act of evasion. *United States v. DeTar*, 832 F.2d 1110, 1114 (9th Cir.1987). The evidence of income diversion is admissible to establish income tax evasion, regardless of whether or not the Boones filed a return.").

In *United States v. Marabelles*, 724 F.2d 1374 (9th Cir. 1984), the panel held that defendant's filing of false tax returns supplied the requisite affirmative act to sustain the conviction for attempted income tax evasion. *Id*. at 1379-80 ("The Government argues that Marabelles' willfulness can be inferred from: (1) his failure to keep records; (2) the large amount of his unreported income (51% omitted gross receipts in 1977 and 62% in 1978); (3) his consistent pattern of not reporting all gross receipts; (4) his submitting insufficient information regarding his income to the tax return preparers; (5) his practice of dealing in cash; and (6) his admittedly false statements to IRS agents that he had reported all of his income and that he made out a billing receipt for every painting job he did. … The Government argues, and Marabelles does not dispute, that the requisite affirmative acts are established by the filing of the false tax returns.") (citations omitted).

In *United States v. Miller*, 545 F.2d 1204, 1215, n.13 (9th Cir. 1976), the panel noted that government establishes a *prima facie* case of tax evasion by demonstrating that the taxpayer has unexplained funds which could be considered as income and which taxpayer has failed to report in his return.

In *Edwards v. United States*, 375 F.2d 862 (9th Cir.1967), defendant prepared tax returns for many clients. His practice was to secure a check from the clients payable to him covering the amount of tax due, plus his fee. He deposited this amount in a special "trust account" and from this account he would draw checks payable to the IRS, which he would then send to the IRS together with his clients' tax returns. However, defendant did not make all of the payments for his clients that he was obligated to make. On those occasions involved in the charges, defendant prepared the statements of estimated tax due and collected from his clients the amounts payable with such statements, representing to them that the statements would be filed and the payments would be duly made. The defendant then failed to file or pay. When he prepared the final returns, he falsely showed the estimated tax payments as having been made and as being proper credits against the total taxes due. The tax returns prepared were signed by his clients on his representation that the statements were true, and the returns were then filed. *Id*. at 865-66. The panel emphasized that a broad range of acts may satisfy affirmative act element and held that, while the affirmative act must generally "serve[ ] the purpose of evasion," Congress did not intend to "establish a hierarchy of attempts or evasions and limit § 7201 to those of a more deceitful or troublesome character." *Id*. at 866.

As the Ninth Circuit explained, "[a]n affirmative willful act which in any manner serves the purpose of evasion is all that is required. In this case the failure to file or pay was implemented by affirmative conduct designed to assure its continuation and preclude its discovery. Appellant falsely represented to certain clients that their returns had been filed and their taxes paid, and this was accompanied by a diversion of the funds entrusted for the purpose of payment. These acts in our judgment were sufficient to constitute attempts to evade or defeat the tax imposed and payment thereof, if done with the requisite state of mind. …The trouble in this case is in its lack of proof of willfulness in the sense of a specific intent to evade or defeat the tax or its payment. Evasion and defeat, as we understand their use in this section, contemplate an escape from tax and not merely a postponement of disclosure or payment. …Nothing in the record would suggest that he ever intended the permanent evasion of any of his clients' taxes." *Id*. at 866-67.

In *Forman v. United States*, 261 F.2d 181 (9th Cir. 1958), the panel held that tax evasion may include attempts not only to block prosecution of taxpayers but to block collection of tax. An attempt to evade or defeat tax may be made by false statements to Treasury representatives. *Id*. at 183.

In *Kobey v. United States*, 208 F.2d 583 (9th Cir. 1953), the panel held that, in the prosecution of bookmakers for conspiracy to defraud the government and to violate the income and excise tax laws, trial evidence was sufficient to warrant jury inference that defendant's intent in counseling their employees to destroy certain records of their activities was for the purpose of deceiving the federal government and evading taxes due.

Tenth Circuit

In *United States v. Thompson*, 518 F.3d 832 (10th Cir. 2008), the panel found that evidence was sufficient to show that foreign commission checks were personal income to taxpayers, rather than income or loans to one of their corporations, as required to show tax evasion. Checks were addressed to the attention of taxpayer, corporate accounting department was unaware of checks, operating officer of sister foreign corporation personally converted some checks to cash and handed receipts over to taxpayer, and all of the funds were disposed of at taxpayer's direction. *Id*. at 852-853 ("The government only needed to show one affirmative act of evasion for each count of tax evasion…. For instance, the creation and presentation of a false, back-dated loan document certainly qualifies as an affirmative act of

evasion. Later, and long after the IRS began investigating, the [defendants had their U.S. corporation] file several sets of amended corporate returns, in which they attempted to claim that the commissions were actually corporate income, rather than personal income. A reasonable jury could have found beyond a reasonable doubt that these were affirmative acts of evasion as to the foreign commission checks issued in 1992, 1993, and 1997.") (brackets added; citations omitted).

In *United States v. Mounkes*, 204 F.3d 1024, 1030 (10th Cir. 2000), the panel held that both the diversion of corporate funds to personal use and the structuring of payments to avoid IRS reporting requirements constitute affirmative acts of evasion or attempted evasion of income taxes.

Eleventh Circuit

In *United States v. Hunerlach*, 197 F.3d 1059 (11th Cir. 1999), the panel noted the commission of several affirmative acts of evasion within the six years immediately preceding the indictment, one of which was to hide rental income from the government by purchasing a rental property in the name of another person. The Eleventh Circuit held that false statements to an IRS agent regarding assets can constitute the affirmative act of evasion required to sustain a conviction for willfully evading payment of tax.

In *United States v. Winfield*, 960 F.2d 970 (11th Cir. 1992), the panel held that information which alleged that defendant knowingly failed to pay income tax for 1978 and concealed his income by making false statements to the IRS in June and August of 1984 asserted affirmative acts and alleged the felony of income tax evasion rather than merely the misdemeanor of failure to file a tax return. *Id*. at 973 ("Since the instant indictment does set forth affirmative acts of evasion after 1978, it is critical to determine whether the crime of willful tax evasion includes acts of evasion occurring after the tax return in question was due. We find that the question is answered by the rule announced in *United States v. Beacon Brass Co*., 344 U.S. 43 (1952). There, the Supreme Court, in construing the predecessor to 26 U.S.C. § 7201, held that false statements made to the IRS after the date the return was due were included as part of the crime. Id. at 45-46, 73 S.Ct. at 79. Nothing warrants a departure from *Beacon Brass* with respect to the version of Section 7201 under which Winfield was convicted. Indeed, the language of the statute violated by Winfield is identical to the Internal Revenue Code provision construed in *Beacon Brass*. *See* 26 U.S.C. § 7201; *Beacon Brass*,

344 U.S. at 44. Hence, an affirmative act constituting an evasion or attempted evasion of the tax occurs when false statements are made to the IRS after the tax was due, and an allegation to that effect satisfies the affirmative act element of the crime.") (citations omitted).

In *United States v. Edwards*, 777 F.2d 644, 650 (11th Cir. 1985), the panel found that concealing income can constitute the willful commission of an act supporting a conviction for willfully attempting to evade or defeat a tax under Section 7201.

In *United States v. Stone*, 702 F.2d 1333 (11th Cir. 1983), the defendants on trial conceded that they understated their farm income, but they attributed their omission to inadvertence. Their defense centered on the element of willfulness. The panel explained that the affirmative act and willfulness elements of the offense of federal income tax evasion are related and evidence that goes to prove willfulness may also go to the question of an affirmative act. The Eleventh Circuit held that the required affirmative act need be nothing more than the filing of a false and fraudulent tax return. *Id*. at 1338-39.

In *United States v. Schafer*, 580 F.2d 774 (5th Cir. 1978), the former Fifth Circuit noted that willfulness may be shown by affirmative acts of evasion such as concealment of financial transactions and the providing of false or incomplete information in an attempt to hamper a tax investigation. A defendant's consistent pattern of understatement has been held to present a jury question as to willfulness, as has the failure to report a substantial amount of income. Making false statements to Treasury agents has been held to constitute the type of affirmative act of evasion necessary to permit a § 7201 conviction. "Generally, therefore, proof of repetitious conduct is admissible for the limited purpose of showing the intent of the [defendant], where, otherwise it might be claimed that the acts in the tax years were either inadvertent or innocent." *Id*. at 781, n.8.

The panel found evidence of a consistent pattern of under-reporting large amounts of income. In the three prosecution years, Schafer reported a total taxable income of only $25,584.26, while the government demonstrated that he should have reported at least $203,399.81. "The discrepancy was not due to a single, isolated transaction, but rather to a consistent pattern spread over three years. In addition, Schafer certainly handled his affairs in such a manner as to avoid the usual making of records. … His records of his

investments in, and loans to, his other corporations were equally abysmal. The IRS agents were required to construct the financial statements of many of those entities from the ground up, since there were few tax returns filed and grossly inadequate records kept. When the IRS agents attempted to gain access to [ ] records for the purpose of investigating the 'lead' furnished by the taxpayer, they were met with obstinate refusals. At least 16 summonses were issued, but the responses were inadequate and the records piecemeal. In fact, one of Schafer's agents told the IRS agents they would not produce the records 'because this was what they were going to base their defense on'. The jury certainly could have found that such conduct was designed to conceal or mislead. *Id*. at 782-83.

The evidence also showed that Schafer made at least one false statement to an IRS agent concerning proceeds from a family inheritance. "With willfulness thus established, defendant's filing of false and fraudulent income tax returns constituted an affirmative act of evasion. *Sansone v. United States*, 380 U.S. 343, 352 (1965). The jury could also have found the requisite affirmative act from any one of a number of other incidents in the record, some of which are detailed above." *Id*. at 782-83.

In *United States v. Burrell*, 505 F.2d 904 (5th Cir. 1974), a panel of the former Fifth Circuit held that the prosecution must show that the defendant not only understated his income but also that the defendant committed some overt act or acts as part of the attempt to evade or defeat taxation. *Id*. at 911 ("[A]ffirmative acts of evasion such as concealment of financial transactions and the providing of false or incomplete information in an attempt to hamper the investigation have been held to constitute sufficient evidence to permit the trier of fact to infer the specific intent to evade taxes. … Finally, making false statements to Treasury agents has been held to constitute the type of affirmative act of evasion necessary to permit a § 7201 conviction…. in *Spies* [*v. United States*, 317 U.S. 492 (1943)], the Supreme Court carefully noted its examples were intended to illustrate the type of conduct required, but not limit the list of overt acts to those described.") (brackets added).

In *United States v. Newman*, 468 F.2d 791 (5th Cir. 1972), a panel of the former Fifth Circuit held that false statements made by defendant to Treasury agents denying any income during the years in question constituted a sufficient affirmative act to satisfy requirement that there be proof of affirmative conduct by the defendant. *Id*. at 794 ("It is clear that making false statements to Treasury agents for the purpose of concealing income

constitutes a sufficient affirmative act to satisfy § 7201. *See United States v. Beacon Brass Co*., 1952, 344 U.S. 43, 45-46. …Clandestinity in affirmation to the government constitutes the necessary affirmative acts to come within the felonious scope of the statute.").

In *Willingham v. United States*, 289 F.2d 283 (5th Cir. 1961), a panel of the former Fifth Circuit held that a taxpayer may not, with impunity, willfully make false deductions in an attempt to evade income taxes and thereby actually reduce the tax imposed for a certain year, merely because thereafter a loss occurs which for tax purposes can be carried back to wipe out any tax liability for the prior year. *Id*. at 288 ("We think the crime is complete when with willful intent, a false and fraudulent return is filed for a year as to which, with all benefits arising out of events up to that time taken in his favor, there would still be a tax due by him but for the fraud. Such tax is, in our opinion, the tax imposed by this chapter. Any adjustment that may be permissible resulting from subsequent losses does not prevent the fraud committed in 1953 from being an attempt to evade or defeat any tax imposed by this chapter.") (citations and internal quotations omitted).

District of Columbia Circuit

In *United States v. Shorter*, 809 F.2d 54 (D.C.Cir. 1987), the panel held that, notwithstanding that defendant's statements to IRS agents denying that he had any bank accounts were true, statements could be relied upon by jury as affirmative acts of tax evasion where defendant had established and maintained cash method of operation in order to preclude the IRS from collecting on civil tax judgments against defendant.

District Court Opinions

In *United States v. Root*, 560 F.Supp.2d 402 (E.D.Pa.2008), the district court explained that "Section 7201 proscribes the offense of tax evasion, which can be committed either by evading the assessment or evading the payment of taxes. …A defendant evades the assessment of taxes by impeding the IRS from assessing a tax on his or her income, for example, by filing a false tax returns and creating false documents. …Evasion of payment, on the other hand, generally involves concealment of the taxpayer's ability to pay his or her taxes by hiding assets from the IRS after tax returns have been filed. Affirmative acts of evasion of payment include: placing assets in the name of others; dealing in currency; causing receipts to

be paid through and in the name of others; and causing debts to be paid through and in the name of others." *Id*. at 415 (citations and internal quotations omitted).

In *United States v. Stierhoff*, 500 F.Supp.2d 55 (D.R.I. 2007), the district court found that the evidence of elaborate steps defendant took to conceal his true identity and income, coupled with defendant's admission that he did not file federal tax returns, was sufficient to sustain tax evasion conviction of self-employed seller of electronic equipment whose business generated $2.4 million in gross receipts and whose bank accounts increased by over $1 million during four-year period when no returns were filed.

In *United States v. Ringwalt*, 213 F.Supp.2d 499 (E.D.Pa.2002), the district court found that the evidence was sufficient to prove that defendant knew at the time his business tax returns were filed that they were false and that he willfully filed a false income tax return or willfully evaded taxes due. In addition to the evidence showing that over $1 million of defendant's personal expenses and cash advances were recorded in the books as "business expenses," the evidence showed that the defendant was directly involved in the scheme to report personal expenses as business expenses, and that defendant's conduct was not the result of any mistake.

In *United States v. Rhodes*, 921 F.Supp. 261, 264 (M.D.Pa.1996), the indictment sufficiently alleged that defendant committed various affirmative acts, including: failing to make an income tax return, failing to pay the taxes, concealing his correct income by such means as extensive use of cash, handling business affairs in such a way as to avoid making records, maintaining duplicate invoices, purchasing interests in the Turks and Caicos Islands to divert and conceal income, causing title in a personal residence to be transferred to offshore trusts, and causing false returns to be filed.

In *United States v. Crocker*, 753 F.Supp. 1209, 1212 (D.Del.1991), the district court held that "[t]he affirmative act element of tax evasion may be met by evidence of the affirmative act of filing a fraudulent W-4 in which an employee falsely claims to be exempt from withholding." (internal quotations omitted).

In *United States v. Feldman*, 731 F.Supp. 1189 (S.D.N.Y.1990), the district court found that an allegation that defendant made false statements in 1985 to an outside accountant could amount to an affirmative act of evasion

as to taxes due and owing in the 1981 tax year. *Id*. at 1193 ("any conduct, the likely effect of which would be to mislead or conceal" constitutes an affirmative act of evasion) (*citing Spies*, 317 U.S. at 499).

In *United States v. Hart*, 673 F.Supp. 932 (N.D.Ind.1987), the district court found that a taxpayer's false claims of exemption on W-4 forms, his failure to file 1040 returns, and his repeated affirmations to the IRS that he was tax-exempt were "affirmative acts" constituting evasion or attempted evasion of tax for purposes of prosecution for willful attempt to evade taxes.

In *United States v. House*, 617 F.Supp. 240 (W.D.Mich.1985), the district court held that "[t]he filing of false and fraudulent Forms W-4 is sufficient to satisfy the element of an affirmative act of evasion. The statute makes it a crime to willfully attempt, in any manner, to evade or defeat any income tax imposed by law. 26 U.S.C. § 7201. The filing of a false W-4 claiming exempt status has the effect of substantially reducing or eliminating, without legal justification, the amount of tax withheld from wages. In combination with defendants' failure to file income tax returns and pay the tax due, the act of filing false Forms W-4 is an affirmative act of evasion." *Id*. at 243.

In *United States v. Whiteside*, 404 F.Supp. 261, 265 (D.C.Del.1975), the district court found that evidence showing that defendant prepared his clients' tax returns, accepted payment of their taxes, and deposited the funds into his own personal account satisfied requirements of an affirmative act as element of willfully attempting to defeat a tax (*criticizing United States v. Mesheski*, 286 F.2d 345 (7th Cir.1961)).

In *United States v. Jannuzzio*, 184 F.Supp. 460 (D.C.Del.1960), the district court found that diversion of corporate funds was not an act capable of evading or defeating taxes under Federal Insurance Contribution Act. *Id*. at 463 ("The cumulative acts of the willful failure to file a tax return required by law and the willful failure to pay the tax due are incapable without more to substantiate a willful attempt to evade or defeat the tax. Such action, absent affirmative conduct intentionally designed to evade or defeat the tax or the payment thereof establishes only lesser violations of the revenue laws.").