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IMPORTANCE OF TAX FRAUDS TODAY

The United States Supreme Court has said that fraud penalties "act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit."[1]

Fraud problems are ever increasing for a variety of reasons. Many cases arose and will continue to arise out of the sudden war profits and black market operations which existed during the war years. The high rates of income taxes during recent years, coupled with several years of excess profit taxes, increased the temptation to falsify returns. The staff of the Bureau of Internal Revenue was understaffed during the war; investigations which might have sifted out fraudulent returns at the time were temporarily passed by. The delay in investigation tended to give a false feeling of security to persons who, having filed false returns on an experimental basis, continued to do so relying on the misguided impression that their schemes were successful. In addition to creating new fortunes, the war produced many new taxpayers who were unfamiliar with the requirements of the Internal Revenue Code.

The successful prosecution of fraud claims constitutes a source of substantial funds to the government. In addition to the millions of dollars collected as evaded taxes, there are millions more collected as penalties and interest. The attitude of the Treasury Department as to the importance of fraud claims is indicated by the fact that recently the Treasury asked Congress for funds to permit the hiring of 16,200 new employees for purposes of enforcement. A Senate sub-committee was told that income tax evasions were estimated at a billion dollars a year. Previously, there had been testimony before a Congressional committee that fraud was suspected in 39,000 cases. The Penal Division of the Bureau of Internal Revenue, which handles matters in which criminal penalties are sought, had 554 cases pending at the close of its fiscal year ending June 30, 1944, 712 in 1945, and 845 in 1946.[2]

HOW FRAUD CASES ARISE

Often fraud cases are ferreted out as a result of the routine check of tax returns made by the various units of the Treasury Department. If the Internal Revenue Agent or the Deputy Collector, in checking a return, becomes suspicious of tax evasion, the taxpayer may become subject to a fraud investigation. The government receives a great many leads from such miscellaneous sources as personal letters from

[1] *Dorsheimer v. U.S.*, 74 U.S. (7 Wall.) 166, 173, 19 L.Ed. 187 (1868).
[2] Report of Commissioner of Internal Revenue, 1945, page 49; 1946, page 55.

dissatisfied employees, general newspaper reports and state court proceedings. Even though an anonymous letter written to the Revenue Department is apparently based on revenge and could be classified exclusively as a crank letter, the Treasury will make a thorough investigation. Many cases arose from the fact that the names of O.P.A. violators were reported to the Treasury.

Frequently information concerning a fraud is derived from informers. Section 3792 of the Internal Revenue Code provides the authority for payment of rewards to informers. The Commissioner may pay informers up to ten per cent of the net amounts collected, including tax, penalty, and interest.[3] However, such payments are not contractual, but depend on amounts which the Commissioner deems suitable and cannot exceed in the aggregate the sum appropriated by Congress for this purpose.[4]

What Is Fraud

An inquiry into the subject of what is fraud must necessarily be as broad as the wildest taxpayer's imagination. The schemes and devices which taxpayers may concoct run through various shadings, culminating in those which can be labeled fraudulent for the purpose of evading taxes.

One basic standard governs the determination of conduct which results in a finding of fraud: such conduct must be "willful." Section 145(a) (failure to file), Section 145(b) (attempt to evade taxes), and Section 145(c) (making of a false return) all provide that the conduct must be "willful."

The word "willful" has, quite understandably, evoked a tremendous quantum of discussion by the courts. No short, sweet, all-encompassing definition has been determined. The facts of each case must be scrutinized to see if willfulness exists. The Supreme Court has said, "The word often denotes any act which is intentional, or knowing, or voluntary, as distinguished from accidental, but when used in a criminal statute, it generally means an act done with a bad purpose [citations], without justifiable excuse [citations], stubbornly, obstinately, perversely [citations]. The word is also employed to characterize a thing done without ground for believing it lawful [citations], or conduct marked by careless disregard whether or not one has the right so to act."[5]

In *Spies v. United States*,[6] the Supreme Court said, "By way of illustration, and not by way of limitation, we would think affirmative

[3] T.D. 5379, 1944 C.B. 479.
[4] *Ibid;* also see *Gordon v. U.S.*, 36 F.Supp. 639 (Ct.Cls., 1941). The informer should file a formal claim on Treasury form No. 211.
[5] *U.S. v. Murdock*, 290 U.S. 389, 394, 78 L.Ed. 381, 54 S.Ct. 223 (1933).
[6] 317 U.S. 492, 499, 87 L.Ed. 418, 63 S.Ct. 364 (1943).

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 conceal."

In Mitchell v. Comm., [7] the court said, "Neglect, whether slight or great, is not equivalent to the fraud with intention to evade tax named in the statute. The fraud meant is actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing. Mere negligence does not establish either."

There is no clearer situation of willfully wrong conduct than that of maintaining two sets of books. In *Shinyu v. U.S.,*[8] the taxpayer kept one set of books in Japanese and a second set in English. The Japanese set showed about three times as much income as the English set. The court found that he fraudulently reported his taxes based on the English set.

Many cases of fraud are based on the fact that the taxpayer's bank deposits are vastly in excess of his reported income. In *Steinreich v. Comm.,*[9] the taxpayer made the claim that his bank entries constituted deposits from capital as opposed to income. Unfortunately for the taxpayer in that case, however, a recent divorce proceedings contained precise evidence of the taxpayer's assets. By referring to the predetermined list of assets, the Commissioner was able to establish that the bank deposits must have been derived from income.[10]

Even though the income of the taxpayer may be derived from illegal transactions, the presence of unexplained bank deposits may justify a fraud finding.[11] In *Chadick v. U.S.,*[12] the taxpayer was a County Commissioner who failed to report income because it was in connection with graft in road construction. The civil fraud charge was sustained. Such findings have also been sustained where there was a failure to report income from the sale of "protection" to bookmakers,[13] where the profits were derived from the policy or numbers game,[14] and where bribes were paid to a union's business agent.[15]

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[7] 118 F.(2d) 308, 310 (C.C.A. 5th, 1941).
[8] 148 F.(2d) 696 (C.C.A. 5th, 1945).
[9] 2 T.C.M. 1199 (Memo op., 1943).
[10] *Joseph Calafota v. Comm.,* 42 B.T.A. 881 (1940), aff'd. 124 F.(2d) 187 (C.C.A. 3d, 1941); *Hoefle v. Comm.,* 114 F.(2d) 713 (C.C.A. 6th, 1940).
[11] *Capone v. U.S.,* 51 F.(2d) 609 (C.C.A. 7th, 1931), cert. denied 284 U.S. 669, 76 L.Ed. 566, 52 S.Ct. 44 (1931).
[12] 77 F.(2d) 961 (C.C.A. 5th, 1935).
[13] *U.S. v. Skidmore,* 123 F.(2d) 604 (C.C.A. 7th, 1941).
[14] *U.S. v. Miro,* 60 F.(2d) 58 (C.C.A. 2d, 1932).
[15] *U.S. v. Commerford,* 64 F.(2d) 28 (C.C.A. 2d, 1933).

In *Robert Burd v. Comm.*,[16] the following four factors were set forth by the Board as governing its determination of fraud: (a) The taxpayer had a bank account in an assumed name. (b) He purchased $340,000.00 worth of property in his wife's name. (c) He transferred his business to his wife. (d) He refused to make a statement to the Revenue Agent. The decision contained this comment: "It is plain that his purpose was to conceal the source of his income and evade taxes. Such a state of fact rarely happens, it is designed."[17]

In an interesting case, a woman maintained accounts in several different banks. She argued without success that she was concealing the funds from her husband and not from the government.[18] Frequently the fraud arises from false entries in books, such as erroneous inventories.[19]

In *Allegheny Amusement Company v. Comm.*,[20] a corporation consisting of four stockholders owned a building which it leased to a third person. The corporation's sole function was to collect the rent and pay the building's expenses. It maintained no office; its treasurer did the necessary work from his home. The entire net income of the corporation was divided and passed on to the corporate stockholders as "compensation" to officers and, therefore, deducted from the corporate return. It was held that since there were no real services rendered by the officers, the deduction was fraudulent.

Coast Carton Co. v. Comm.,[21] involved much the same point. In the latter case, the corporation paid a salary to the son of the corporation's president, even after the son was dead.

In *Weinstein v. Comm.*,[22] the taxpayer did not contest the Commissioner's proof to the effect that by understating income and overstating deductions, his income was improperly reflected to the extent of $200,000.00 in one year. A finding of civil fraud was entered.

Back-dating a partnership agreement has been held to constitute fraud.[23] The person who witnessed the signatures to the partnership agreement testified as to the date it was actually signed. The accountant testified as to the date when he was first consulted concerning the organization of a partnership. This was long after the date appearing on the partnership instruments.

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[16] 19 B.T.A. 734 (1930).
[17] *Ibid*, p. 736.
[18] *Rusman v. Comm.*, 3 T.C.M. 922 (Memo op., 1944).
[19] *Maggio Bros. v. Comm.*, 6 T.C. 999 (1946); *Liberty Hoosier Mills v. Comm.*, 31 B.T.A. 64 (1934); *C. R. Rich v. Comm.*, 6 B.T.A. 822 (1927).
[20] 37 B.T.A. 12 (1938); also see *Holmes & James, Inc. v. Comm.*, 30 B.T.A. 74 (1934).
[21] 149 F.(2d) 739 (C.C.A. 9th, 1945).
[22] 33 B.T.A. 105 (1935).
[23] *Blumer v. Comm.*, 23 B.T.A. 1045 (1931).

Time after time the following quotation from *Gano v. Comm.* [24] has been quoted approvingly: "A failure to report for taxation income unquestionably received, such action being predicated on a patently lame and untenable excuse, would seem to permit of no difference of opinion. It evidences a fraudulent purpose."

It is to be noted that if the fraud penalties are assessed against the corporation, and if the entire corporate stock is sold, the corporation remains liable nevertheless. Even though there is a change of ownership and management, the tax liability is not relieved.[25]

A corporate officer who virtually owned the corporation through his stockholdings, converted corporate funds to his own use and failed to include the amount on either his own or the corporation's return. It was held to constitute a criminal attempt to evade taxes on the theory that the payment was a taxable dividend to the stockholder.[26]

If a joint return has been filed, either spouse may be responsible for the fraud penalties in spite of the fact that the fraud was committed entirely by one spouse.[27] The filing of a joint return without any objections by the wife, who does not file separately, will warrant a presumption that the joint return was filed with her tacit consent.[28]

What Is Not Fraud

The decided cases illustrate the hairline which distinguishes fraud from non-fraud. The sanctified guess of twelve jurors may make one man guilty of fraud, whereas another jury would reach a contrary result on the same facts. Where the issue is decided by the Tax Court rather than a jury, we find that the judges are ultimately seeking to determine what the taxpayer's intentions were; the facts and circumstances of each case may render all previous cases out of point.

We start with the premise that reductions of one's taxes by lawful means is not condemned.[29] The Supreme Court has said: "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."[30] However, as a practical matter, we know that

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[24] 19 B.T.A. 518, 533 (1930).
[25] *Erie Coca Cola Bottling Co. v. Comm.*, 1 B.T.A. 531 (1925).
[26] *Currier v. U.S.*, 70 F.Supp. 219 (D.C. Mass., 1947), aff'd 166 F.(2d) 346 (C.C.A. 1st, 1948). Embezzled funds do not constitute taxable income: *Comm. v. Wilcox*, 327 U.S. 404, 90 L.Ed. 752, 66 S.Ct. 546, 166 A.L.R. 884 (1946). In the *Currier* case the distinction was made that one cannot embezzle from himself. Also see *Petit v. Comm.*, 10 T.C. No. 161 (1948).
[27] *Myrna S. Howell v. Comm.*, 10 T.C. No. 115 (1948).
[28] *Carroro v. Comm.*, 29 B.T.A. 646, 650 (1933).
[29] *Comm. v. McWilliams*, 158 F.(2d) 637, 640 (C.C.A. 6th, 1946); *Comm. v. Tower*, 327 U.S. 280, 288, 90 L.Ed. 670, 66 S.Ct. 532, 164 A.L.R. 1135 (1946); *Gregory v. Helvering*, 293 U.S. 465, 469, 79 L.Ed. 596, 55 S.Ct. 266, 97 A.L.R. 1355 (1935).
[30] *Gregory v. Helvering*, 293 U.S. 465, 469, 79 L.Ed. 596, 55 S.Ct. 266, 97 A.L.R. 1355 (1935).

the dictum with reference to the difference between tax evasion and tax avoidance frequently boils down to nothing more than lip service; the government will vigorously seek to upset any transaction which has tax reduction as its patent purpose.

The requirement of willfulness is sufficient to excuse from fraud the man who can establish that his error was the result of negligence. A taxpayer omitted $42,500.00 income in his return; it was held that such conduct was not fraud but negligence.[31] The taxpayer's secretary made out his return and failed to include the taxable item; the taxpayer did not check his return. It is to be noted, however, that there was one favorable fact in that case: the omission was not discovered even after two government audits, until the taxpayer himself volunteered it at a hearing.

The defense of negligence often goes a long way in avoiding a finding of fraud. For example, in *Mitchell v. Comm.*,[32] no civil fraud was found even though the taxpayer was "grossly negligent" and his error was one which would have been discovered "by the exercise of a slight degree of care and diligence."

The ignorant man has a better chance of avoiding a fraud charge than the learned man.[33] If the deficiency is very small, a fraud claim may be defeated. Thus in *Klise v. Comm.*,[34] the taxpayer admitted deficiencies of $107.00 for one year and $18.73 for another year, but the court passed over the fraud charges as to these years with the observation that the deficiencies were slight. A taxpayer who has made errors against his interest along with those which reduced his tax is in a strong position to resist a charge of fraud.[35]

Another situation in which the taxpayer can prevail is where there are extraordinarily complicated facts which are hard to ascertain.[36] This is also true where the fraud relates to years long past. As the court said in *Delone v. Comm.*:[37] "Much would be excused to one called upon to answer an eleven year old charge of fraud which would not be allowed to one called upon to explain a recent transaction."

Reliance upon the advice of an attorney may or may not be a good defense. In *Griffiths v. Comm.*,[38] the taxpayer avoided the fraud because the error was based in part on the erroneous advice of an attorney. However, in *Ross v. Comm.*,[39] the fraud charge was sustained.

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[31] *Franklin v. Comm.*, 34 B.T.A. 927 (1936).
[32] 45 B.T.A. 822 (1941).
[33] *Lottie L. Clayton v. Comm.*, 7 T.C.M. 377 (Memo op., 1948); *Scheer v. Comm.*, 11 B.T.A. 836 (1928).
[34] 10 B.T.A. 1234 (1928).
[35] *Griffiths v. Comm.*, 50 F.(2d) 782 (C.C.A. 7th, 1931).
[36] *Arnold v. Comm.*, 14 B.T.A. 954 (1928).
[37] 100 F.(2d) 507 (C.C.A. 3d, 1938).
[38] 50 F.(2d) 782 (C.C.A. 7th, 1931).
[39] 13 B.T.A. 69 (1928).

In this case the attorney who had been a deputy collector for five years advised his client that the regulation did not correctly interpret the law. The fraud charge has also been sustained where the taxpayer did not establish for what purpose the attorney's advice was given.[40]

Where the error is the result of a misinterpretation of law on the part of the taxpayer, the willfulness necessary for fraud may be missing.[41] Misinterpretation of fact more readily supports a fraud charge than misinterpretation of law.

Some of the most interesting cases in the fraud field arise in connection with the problem of determining where bad judgment ends and fraud begins.[42]

In *Delone v. Comm.*,[43] the taxpayers omitted about $100,000.00 of income, and the court found that this was the result of a poor opinion. The court said: "No one can be found guilty of a fraudulent untruth by the mere expression of opinion."[44]

The Supreme Court has said in *Spies v. U.S.*:[45] "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care."

Civil and Criminal Aspects

A large number of sections of the Revenue Code are devoted to the declaration of penalties and punishments for fraud.[46] The most frequently cited section involving civil fraud is Section 293(b) which provides for a fifty per cent penalty for fraud intended to evade taxes. Section 145 is the most commonly encountered section relative to criminal penalties. The first subsection of Section 145 makes the willful failure to file a return a misdemeanor, and the punishment is imprisonment for not more than one year or a fine of not more than $10,000.00, or both. The second subsection of Section 145 makes the willful attempt to evade tax a felony, and the punishment is imprisonment for not more than five years or a fine of $10,000.00, or both.

Since failure to file is only a misdemeanor, it is apparent that such course is safer from the criminal standpoint than filing a false return. However, it may be more expensive financially. This is because the Commissioner, under Section 276(a) may assess a deficiency "at any

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[40] *Edmond B. Bronson v. Comm.*, 7 T.C.M. 415 (Memo op., 1948); *Plunkett & Co. v. Comm.*, 42 B.T.A. 464, 472 (1940).

[41] *Hirsch v. Comm.*, 42 B.T.A. 566 (1940).

[42] In *Landers Bros. Co. v. Comm.*, 17 B.T.A. 1078, 1081 (1929) it was said: "Even if the petitioner was mistaken as to the deductibility of its alleged loss, an error in judgment as to what does, and what does not, fall within the purview of the statute is not an indication of bad faith to be branded as fraud or penalized as such."

[43] *Supra* note 37.

[44] *Ibid*, p. 509.

[45] 317 U.S. 492, 496, 87 L.Ed. 418, 63 S.Ct. 364 (1943).

[46] For a useful chart of such penalties see: Gutkin, "Tax Law Violations," Sixth Annual Institute on Federal Taxation, p. 222.

time" where there has been a false return or a failure to file. At the time of this assessment, the government may assess a penalty of twenty-five per cent for the non-filing under Section 291(a) and fifty per cent for the fraud under Section 293(b). Thus, the total penalty may amount to seventy-five per cent.[47] The fifty per cent penalty applies to the entire deficiency even though only a part of it is due to fraud.[48]

Section 3748(a) of the Code fixes the period of limitations under Section 145(a) at three years and under 145(b) at six years. If the taxpayer is absent from the district where the offense is committed, the limitation period may be extended by the time of the absence.[49] Where there is a failure to file, the crime is committed when the return should have been filed. Under Section 145(b), the crime is committed when the overt act is done.

In 1942, Congress suspended the statute of limitations until three years after the termination of hostilities for acts involving the defrauding of the United States.[50]

Burden of Proof

The burden of proof varies depending on whether the fraud is to be the basis of criminal or civil penalties. For civil penalties, the proof must be clear and convincing.[51] Where criminal penalties are sought, the government's burden of proof is stronger: it must be beyond a reasonable doubt.[52]

The two types of penalties are sufficiently different to support the proposition that acquittal on a criminal charge is not jeopardy so as to bar an action for civil penalties, and, on the other hand, a denial of the government's demand for civil fraud penalties is not res adjudicata so as to bar criminal action. As the court said in *Spies v. U.S.*: "Invocation of one does not exclude resort to the other."[53]

The burden of proof may be met by circumstantial evidence. In *Frank Harris v. Comm.*,[54] the court accepted the government's evidence of the taxpayer's increase in net worth as shown by mortgage notes

[47] *Kessler v. Comm.*, 39 B.T.A. 646 (1939); *Epstein v. Comm.*, 34 B.T.A. 925 (1936); *Brecher v. Comm.*, 27 B.T.A. 1108 (1933); *McLaughlin v. Comm.*, 29 B.T.A. 247 (1933).

[48] *McKeen v. Comm.*, 39 B.T.A. 913 (1939).

[49] *U.S. v. Anthracite Brewing Co.*, 11 F.Supp. 1019 (D.C. Pa., 1935).

[50] Act of August 24, 1942, Pub.L. 706, 77th Cong., 2d Sess., 56 Stat. 747, 18 U.S.C.A. 590a.

[51] *Maddos v. Comm.*, 40 B.T.A. 572 (1939), aff'd 114 F.(2d) 548 (C.C.A. 3d, 1940); *Budd v. Comm.*, 43 F.(2d) 509 (C.C.A. 3d, 1930).

[52] *Gleckman v. U.S.*, 80 F.(2d) 394 (C.C.A. 8th, 1935), cert. denied 297 U.S. 709, 80 L.Ed. 996, 56 S.Ct. 501 (1936); *U.S. v. Murdock*, 290 U.S. 389, 78 L.Ed. 381, 54 S.Ct. 223 (1933).

[53] 317 U.S. 492, 495, 87 L.Ed. 418, 63 S.Ct. 364 (1943); *Helvering v. Mitchell*, 303 U.S. 391, 82 L.Ed. 917, 58 S.Ct. 630 (1938).

[54] 7 T.C.M. 195 (Memo op., 1948).

and bank deposits. The taxpayer's protestations that "he could not remember" did not absolve him from civil fraud.

CONDUCTING THE FRAUD CASE

The manner of handling the fraud case presents a vigorous challenge to the attorney. Particularly where criminal penalties are contemplated does the manner in which the case is conducted assume importance.[55] Shall the client cooperate with the Revenue Agent? Shall he make a full and voluntary disclosure? Shall he claim or waive his constitutional protections?

The principal question which the attorney is compelled to decide early in the case is whether the government's necessary proof can be obtained without the client's assistance. If the government determines that criminality is involved, the failure of the taxpayer to cooperate will seldom do more than delay the government's assembling of the facts needed for conviction. On the other hand, a cooperative attitude may influence the Internal Revenue Agent to recommend against prosecution. Even if prosecution is had, the jury hearing the case may form an unfavorable conclusion when testimony is produced on the defendant's uncooperativeness. In the event a finding of guilt is entered, the court may tend toward severity of sentence where the taxpayer was an obstructionist.

There is a point at which cooperation may end and self-conviction begins. For example, if the Revenue Agent were to request a balance sheet showing what assets the taxpayer had at the beginning of the period in question, the attorney must reflect carefully before supplying this data. It is a powerful tool in the hands of the Agent since any increment in assets during this period should be reflected in the income tax returns. If the Commissioner can pin the taxpayer down to a designated amount of wealth in the first year under investigation, he is a long way along the road to showing unreported gains. Of course, if this material can be procured elsewhere by the government, the taxpayer only hurts himself by withholding it.

The Fourth and Fifth Amendments to the Federal Constitution protect the taxpayer from unreasonable searches and seizures and from giving evidence against himself. Under these guarantees, the taxpayer may properly decline to answer the questions of the Internal Revenue Agents or to exhibit private papers and records in his possession. Corporations do not have this protection nor does the protection cover records in the possession of third parties. If an employee of the taxpayer is questioned, he too may claim these rights, but the Commis-

[55] The attorney himself may be subject to penalties for advising a tax fraud: I.R.C. Sec. 3793(b).

sioner may require his evidence in return for the granting of immunity. If the immunity is granted, the witness must testify. He may not, out of loyalty to his employer, choose to keep silent despite the granting of immunity.

The constitutional rights of the taxpayer may be waived by him and will be considered waived if he has permitted the Agent to make an examination of his books.[56]

It has been held that the Fifth Amendment does not give protection to the man who has failed to file a return.[57]

It is worth noting that admissions made to an accountant or records left in his custody are available to the government, whereas an attorney is shielded by reason of the privileged relationship of attorney and client.

Section 3631 limits the Commissioner to one examination of the taxpayer for each taxable year, unless the latter is given written notice of the necessity for an additional inspection. This is a possible aid to the taxpayer which appears to have been availed of only rarely.

A more substantial aid to the taxpayer is that afforded by the requirement that the government must assert a basis for fraud in order to examine records relating to years which would otherwise be barred by the statute of limitations. The taxpayer may gain information by requiring the government to show cause for asserting the claim of fraud.[58]

Should the taxpayer seek to avert the criminal fraud charge by a voluntary disclosure? And if so, how shall he make the disclosure? The Commissioner's rule is that if an investigation has not been started a disclosure by the taxpayer will eliminate the criminal aspects. An important question remains: when is an investigation initiated?

The leading case relative to disclosures is *United States v. Lustig*.[59] Lustig called upon the Collector almost thirty days after the Intelligence Unit had started to make inquiries. The claim of immunity was rejected.

The disclosure may be made by means of an amended return. This has the advantage of being simple and routine; however, it may form the basis for a new fraud charge unless scrupulously made.[60] A better

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[56] *Nicola v. U.S.*, 72 F.(2d) 780, 784 (C.C.A. 3d, 1934): "The constitutional guarantee is for the benefit of the witness and unless invoked is deemed to be waived."

[57] Reg. 111, Sec. 29.145-1; *U.S. v. Sullivan*, 274 U.S. 259, 263, 71 L.Ed. 1037, 47 S.Ct. 607, 51 A.L.R. 1020 (1927).

[58] *Martin v. Chandis Securities Co.*, 128 F.(2d) 731 (C.C.A. 9th, 1942); *Zimmerman v. Wilson*, 105 F.(2d) 583 (C.C.A. 3d, 1939).

[59] 163 F.(2d) 85 (C.C.A. 2d, 1947).

[60] *Levy v. U.S.*, 271 Fed. 942 (C.C.A. 3d, 1921).

method would seem to be a letter to the Collector setting forth the full story. An offer in compromise has the same type of drawback as an amended return: if it is false, it is a new crime under Section 3762 of the Code.

Section 3761(a) allows the Commissioner, with approval of the Secretary of the Treasury, the Under Secretary or the Assistant Secretary, to compromise both civil and criminal matters. It is interesting to note that in *Wight v. Rindskopf*,[61] the Wisconsin Supreme Court expressed the view that the settlement of a criminal charge was the equivalent of compounding a felony. It therefore denied legal fees for services rendered in connection with the compromise. Chief Justice Ryan said: "We could no more enforce contracts compounding or tending to compound crime coming from the federal jurisdiction, than contracts of polygamy from the jurisdiction of Utah or of Turkey."[62]

Even though the voluntary disclosure may succeed in removing the criminal charges, it will not wipe out the civil fraud penalty.[63]

Procedure in Criminal Prosecution

A brief note may be helpful as to the procedure followed in the processing of a criminal fraud case from investigation to trial. The case is forwarded by the Intelligence Unit, via the Special Agent in Charge, to the Regional Penal Division. After that, it is reviewed by the Penal Division of the Office of the Chief Counsel of the Bureau. Thereafter, it proceeds to the Commissioner's office wherefrom it is taken to an Assistant Attorney General in the Tax Division of the Department of Justice. The Assistant Attorney General relies solely on the report given him by the Commissioner. The case is not investigated independently by the FBI. The Intelligence Unit acts in the capacity of the FBI in federal tax matters. The file is studied by an attorney in the Criminal Section of the Tax Division and then is forwarded to the United States Attorney in the particular district where trial is to be had. It is the U.S. Attorney's job to seek to place the case on for trial. If the charge is a felony, the U.S. Attorney will present the case to the grand jury. If it is for an offense punishable by imprisonment for one year or less, an indictment is not needed; an information is sufficient.

Conclusion

We may expect fraud cases to become increasingly important. The manner of handling the fraud case constitutes a real challenge to the practitioner because no two cases are exactly alike.

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[61] 43 Wis. 344, 359 (1877).
[62] *Ibid*, p. 364.
[63] *Garden City Feeder Co. v. Comm.*, 27 B.T.A. 1132 (1933).

The Tax Court recently indicated the individuality of each case in *Lottie L. Clayton v. Comm.:* "Fraud is a subjective matter; and the question in cases involving fraud is whether the particular taxpayer, acting in the specific factual situation disclosed by the particular record, acted with fraudulent intent."[64]

The absence of a general rule for the handling of a fraud case necessitates great care and conscientious consideration by the taxpayer's counsel.

[64] 7 T.C.M. 377, 379 (Memo op., 1948).