

July 1994

SPECIFIC ITEMS METHOD

GOVERNMENT PROPOSED JURY INST. NO. ____

Specific Items Method of Proof
(Unreported Income)

To establish the first element of the offense charged, namely, the receipt by the defendant of unreported income upon which a substantial amount of tax was due and owing, the government has presented evidence under the "specific item" method of proof. The "specific item" method simply consists of offering evidence of particular or specific amounts of taxable income received by the defendant during a particular tax period, with evidence that the defendant did not include such amounts in his [her] tax return for such period, together with evidence concerning the defendant's knowledge of the omission and his [her] intent and willfulness in attempting to evade payment of tax by the omission.

United States v. Beck, 59-2 U.S.T.C., para. 9486, p. 73,115 (W.D. Wash. Feb. 19, 1959), *aff'd in part and rev'd in part on other grounds*, 298 F.2d 622 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962)

GOVERNMENT PROPOSED JURY INST. NO. ____

Specific Items Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he reported on his income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income omitted from his tax return, the government in this case has introduced evidence of [*describe the specific items of income or other evidence which is the basis for the allegation of evasion*].

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial income in addition to what he reported on his income tax return for the year in question, then you must decide whether there was tax due in addition to what was shown to be due on the return, as a result of the defendant's additional, unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional tax liability, when the alleged additional income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial additional income, and that there was tax due in addition to what was shown to be due on his income tax return, as a result of this additional income, then this first element has been satisfied.

2 L. Sand, *et al.*, *Modern Federal Jury Instructions*, (1993 Ed.), Instruction 59-5

July 1994

NET WORTH METHOD

GOVERNMENT PROPOSED JURY INST. NO. ____

Net Worth Method of Proof

Theory

To establish the understatement of tax for the evasion counts for the years ____, ____, and ____, the government relies upon proof by the so-called net worth method. I should explain that a person's "net worth" is the difference between his assets and his liabilities at any given date. It is the difference between what he [she] owns and what he [she] owes at that time. If a person has more assets at the end of the year than at the beginning of the year and if that person's liabilities remain the same, or decrease, then his [her] net worth has obviously increased. However, only the cost price of the assets is to be considered. Mere increases in market value, which have not been realized, must not be taken into account.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint net worth and expenditures.] 1

The theory of the net worth method of proof is that if the government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it, has increased during the taxable year, then it may be inferred that the defendant had receipts of either money or property during the year; and if the government satisfies you beyond a reasonable doubt that the defendant had a source of taxable income and that the receipts did not come from nontaxable sources, then you may find that the receipts constituted taxable income to the defendant.

If you also find that the government proved that the defendant spent money on items which did not add to the defendant's net worth at the end of the year (items such as living expenses and taxes), then it may be inferred that those expenditures also came from funds received during the year. Consequently, such expenditures also may be taken into account in determining the amount of the defendant's taxable income for the year, provided they were not deductible expenditures which the defendant was entitled to claim as deductions in computing taxable income on his [her] return.

In this case the government has undertaken to prove what the defendant was worth at the

beginning of each year involved and what he [she] was worth at the end of that year, so as to show that his [her] net worth increased during the year. The government also has introduced other evidence, which, if you believe it, would tend to establish money paid out by the defendant for such non-deductible items as federal income taxes, living expenses, and other personal expenditures.

The government claims that the sum of the defendant's net worth increases and non-deductible expenditures for each year, less adjustments, as shown by the government's evidence, represents the defendant's correct taxable income for that year. The resulting figures are alleged by the government to be a reasonable approximation of what the defendant should have reported on his [her] income tax return.

As I have already told you, an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. So you must consider the evidence as to each year separately in arriving at your verdict.

Opening Net Worth

Now, I want to point out to you that, because the net worth method of proving unreported income involves a comparison of the beginning and ending net worth of the defendant in each prosecution year, the result cannot be correct unless the beginning point, or the opening net worth, is reasonably accurate. You will readily appreciate that if the defendant actually owned substantial assets at the beginning point, which the government has failed to include in its computations, apparent increases in net worth during the indictment years may be no more than the disclosure of money previously saved, or the result of a change in the form of other assets, which the defendant owned at the beginning of the year, and which the government did not take into account. For example, a taxpayer might have had a substantial amount of cash on hand (not in a bank) which he [she] had saved up in prior years and which he [she] used to acquire assets or make purchases or other expenditures during a prosecution year. In that case an apparent increase in the defendant's net worth might be only the result of a conversion of prior accumulated cash into tangible property. Similarly, cash on hand accumulated from prior years may have been used to make non-deductible expenditures. You must, therefore, in order to convict, be satisfied that the government's evidence establishes an opening net worth with reasonable certainty as of the beginning of the year.

July 1994

NET WORTH METHOD

On the other hand, the government is not required to refute all possible speculation that the defendant might have had assets at the beginning of the year, which the investigation failed to disclose; nor is it necessary for the government to prove the exact cost of the assets owned by the defendant at the starting point, or the precise amount of his [her] undeposited cash on hand. It is enough if the government, although unable to determine the exact cost of the assets owned by the defendant at the beginning of the year, can show beyond a reasonable doubt that such assets were insufficient to account for the subsequent increases in the defendant's net worth.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case the government has endeavored to prove that the defendant (and his [her] spouse) **1** did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by [*e.g., tracing the financial and income tax return filing history of the defendant (and his spouse) and by introducing in evidence the defendant's own statements.*] The evidence introduced by the government of the defendant's [*income tax returns and*] financial history in years prior to those named in the indictment may be considered by you only for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider whether the government has tracked down all "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his [her] representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth included all of the defendant's assets. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, then such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will return a verdict of not guilty as to any such count of the indictment.

If you find as to any year that the funds reflected in increased net worth and expenditures are not substantially in excess of the income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of the reported income, then you will return a verdict of not guilty as to any such count of the indictment.

If you find, on the other hand, that the government has established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you also are convinced beyond a reasonable doubt that the funds reflected in increased net worth and expenditures during such year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented taxable income on which the defendant willfully attempted to evade or defeat the tax.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's increased net worth and non-deductible expenditures arose from taxable, rather than nontaxable sources.

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business,

July 1994

NET WORTH METHOD

legal or illegal, carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources or that the funds did not come from nontaxable sources. In other words, the government must establish either a likely source of income from which you believe the net worth increases and expenditures sprang, or that nontaxable sources of income have been negated as a source of the net worth increases and expenditures.

If you find that the defendant offered timely explanations of the source of his funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations to prove the source of his net worth, for, as I have said, the burden is on the government to prove that the increases arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

NET WORTH METHOD

July 1994

United States v. Koskerides, 877 F.2d 1129, 1137 (2d Cir. 1989)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 Where the defendant was married and filed joint returns and the net worth computation reflects a joint net worth, then appropriate language should be used in the instruction. This would also apply where both a husband and wife are charged.

July 1994

NET WORTH METHOD

GOVERNMENT PROPOSED JURY INST. NO. ____

The "Net Worth Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of the defendant _____ for the year[s] ____, the government has relied upon proof by the so-called "net worth method" of determining income for that particular period. This "net worth method," if used correctly, is an indirect or circumstantial way to reliably determine income.

A person's "net worth" is the difference between that person's total assets and total liabilities on any given day. Said another way, a person's net worth is the difference between what a person owns and what that person owes at any particular time. If a person had more assets at the end of the year than at the beginning of that year, and if that person's liabilities remained the same during that same year, then that person's net worth has increased.

In determining net worth, however, only the cost price of the defendant's assets is to be considered. Mere increases in market value, which have not been actually realized through sale or conversion into cash, must not be taken into account in computing net worth in a case such as this.

If the evidence in the case shows beyond a reasonable doubt that the defendant's net worth, computed in this manner, has increased during the year[s] in question, then the jury may find that the defendant _____ had receipts of either money or property during that year. If the evidence in the case also establishes beyond a reasonable doubt that the defendant had one or more sources of taxable income, and that the receipts just referred to did not come from taxable income, then the jury may find that such receipts constituted taxable income to the defendant during that period.

To show that the defendant's net worth increased in this case, the government has undertaken to prove the defendant's net worth at the beginning of the year 19__, and also attempted to prove the defendant's net worth at the end of that same year. The government also has introduced evidence in an effort to prove that the defendant paid out various amounts of money during the taxable year for such non-deductible items as personal and living expenses.

Because the "net worth method" of determining income involves a comparison of the net worth of the defendant at the beginning and again at the end of the year in question, the result cannot

NET WORTH METHOD

July 1994

be accepted as correct unless this starting net worth figure, the beginning point, is reasonably accurate. Although the government is not required to prove the exact value of each and every asset owned by the defendant at the starting point, the evidence must establish beyond a reasonable doubt that all assets owned by the defendant at the starting point were not sufficient to account for any subsequent increase in the defendant's net worth. Said another way, the evidence in the case must establish beyond a reasonable doubt that the defendant's assets at the beginning of the year, plus the defendant's reported income for that same taxable year, do not add up to an amount sufficient to account for the increases in net worth, plus non-deductible expenditures during that same year.

The government contends that any increases in the net worth of the defendant _____ during the taxable year 19__, plus any non-deductible expenditures by the defendant for that year as shown by the evidence in the case, represent the defendant's true and correct net income for that year. These resulting figures are alleged by the government to be a reasonable approximation of what the defendant _____ should have reported on his [her] income tax return for the calendar year 19__.

The burden is always upon the government to establish beyond a reasonable doubt that any amounts reflected in defendant's increased net worth, plus non-deductible expenditures, were from taxable, rather than non-taxable sources. In this regard, you are instructed that federal income tax is levied on income derived from compensation for personal services of every kind, and in whatever form paid, as well as on income from interest, dividends, gains, profits, and certain other items not pertinent to this case.

The law provides, however, that funds or property received from certain sources do not constitute taxable income. Since no federal income is levied on such funds or property, such funds or property do not need to be reported as income. Non-taxable funds or non-taxable property include such items as gifts, inheritances, the proceeds of life insurance policies, and certain other items not pertinent to this case.

If it appears from the evidence in the case that during the course of the investigation of his [her] income tax return and before the trial of this case, the defendant _____ offered to Treasury agents certain explanations of the sources of certain funds or property and these sources of funds or property were reasonably capable of being checked and verified by Treasury agents, the government

July 1994

NET WORTH METHOD

may not unreasonably disregard such explanations. In evaluating the evidence in this case you may take into consideration any failure of the government to reasonably investigate the truth of any such explanations as well as the trustworthiness of the explanations provided.

On the other hand, the government is not required, without suggestion or explanation from the defendant _____, to investigate every conceivable source of non-taxable funds. If it appears from the evidence in the case that the defendant did not provide an explanation as to the source or sources of any increase in his [her] net worth, then the jury may consider such failure as one of the circumstances in evidence in the case, bearing in mind always that the law never imposes upon a defendant in a criminal case the burden or duty to offer or produce any evidence. The burden is always upon the government to establish beyond a reasonable doubt from the evidence in the case every essential element of the crime charged, including the claim that any increase in the defendant's net worth was from taxable sources.

If the jury should find that the evidence in the case does not establish the net worth of the defendant to a reasonable degree of certainty at the beginning of the year 19__, then the jury should find the defendant _____ not guilty. If the jury should find that any increase in net worth is not substantially in excess of the income reported by the defendant _____ on his [her] return for 19__, then the jury should find the defendant not guilty.

On the other hand, if the evidence in the case establishes beyond a reasonable doubt the amount of the net worth of the defendant _____ as of the beginning of the calendar year 19__, and further establishes beyond a reasonable doubt that funds reflected in any increased net worth, plus the defendant's expenditures, during the same year substantially exceed the income reported on the defendant's tax return, the jury should then proceed to determine whether the evidence in the case also establishes beyond a reasonable doubt that such additional funds represented taxable income, and then proceed to determine whether the government has proven that the defendant acted willfully in attempting to evade or defeat the additional tax, as charged in Count __ of the indictment.

Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions - Criminal* (4th Ed. 1990), § 56.05, pp. 987-990.

GOVERNMENT PROPOSED JURY INST. NO. ____

Income Tax Evasion - Net Worth Method
(26 U.S.C. § 7201)

To prove that additional tax was due, the government must prove beyond a reasonable doubt that:

- (a) defendant received income in addition to what was reported, and
- (b) that tax was due in addition to what was shown to be due on the income tax return.

In this case, the government has used the so-called net worth method of proof. By using this method the government attempts to prove that the amount the defendant was worth increased during the year by more than the income shown on the defendant's tax return and by the defendant's other nontaxable receipts. I will now explain this to you in more detail.

Net worth is the value of everything the defendant owns -- the defendant's assets -- less the amounts the defendant owes -- the defendant's liabilities. **1** To determine whether the government has proved by the net worth method that the defendant had additional unreported income, you must answer the following five questions:

1. Determine the defendant's net worth on January 1, 19_, that is, when the tax year began, and on December 31, 19_ , when the year ended. How much did the defendant's net worth increase during that year?
2. How much did the defendant spend during that year for personal use and for other things that could not be deducted from defendant's income for tax purposes?
3. Next add the increase in the defendant's net worth and the amount the defendant spent on himself [herself] and for nondeductible purposes. Was the total of these amounts greater than the amount of income reported on the defendant's tax return?

4. Did the defendant have any nontaxable income during the year that would explain the difference, that is, income which the defendant did not have to report on his [her] return, such as gifts or inheritance?

[5. Did the defendant have business losses or expenses or bad debts that the defendant could have deducted from the defendant's income to reduce the defendant's tax but did not deduct?] 2

[The government has the burden of proving beyond a reasonable doubt that the defendant's net worth increased during the tax year by more than is explained by the defendant's reported income less the defendant's personal, nondeductible spending plus the defendant's other nontaxable sources of income.] 3 The government does not have to prove exact amounts; it need only prove the amounts with reasonable accuracy. The government also has an obligation to have its revenue agents follow up reasonable leads during their investigation that might explain an apparent increase in net worth, such as sources of other nontaxable income. *[The government must give the defendant credit for amounts that the law entitled the defendant to deduct from the defendant's income to reduce the defendant's tax, but that the defendant failed to deduct.] 4*

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), § 9.06B

NOTES

1 This sentence should be modified to reflect that the assets are valued *at cost* and that mere unrealized increases in market value are not taken into consideration.

2 This paragraph is not correct, at least in the context in which it appears above. Business losses or expenses or bad debts are all accounted for, and the defendant would be given full credit in a proper net worth computation for all deductions and expenses, whether claimed or not on the defendant's return. In point of fact, if a defendant failed to claim all of his [her] expenses and deductions, then this would result in the reporting of a higher taxable income than would otherwise be reported. Thus, under these circumstances, computed unreported income would be less when reported income is compared with corrected taxable income as computed by the net worth method. It may be that No. 5 in the instruction is meant to explain

"below the line" reductions in the total of the net worth increase and non-deductible expenditures but the paragraph is still incorrect -- the reductions, as noted above, do not pertain to reported items. Moreover, business expenses are not a "below the line" adjustment but are automatically accounted for in computing the net worth increase.

3 The first sentence of this paragraph is confusing. It does not conform to the mechanics of a net worth computation which seeks to establish unreported income by demonstrating that the defendant's net worth increase, plus nondeductible expenditures, less reductions (such as nontaxable sources of income) and other adjustments, exceeds reported income.

4 This statement is not correct in the context of a net worth case which automatically accounts for all of the deductible expenses paid for by the defendant. Whether the defendant has or has not claimed all available deductions on his [her] return may have a bearing on willfulness but does not affect the computation of correct taxable income. Note that the defendant's failure to claim all available deductions of this nature results in a smaller understatement, *i.e.*, his [her] reported income is higher than it would otherwise be.

July 1994

NET WORTH METHOD

GOVERNMENT PROPOSED JURY INST. NO. ____

Net Worth Method

In this case the government relies upon the so-called "net worth method" of proving unreported income.

A person's "net worth" at any given date is the difference between his total assets and his total liabilities on that date. It is the difference between what he owns and what he owes (measuring the value of what he owns by its cost rather than unrealized increases in market value).

If the evidence establishes beyond a reasonable doubt that the Defendant's net worth increased during a taxable year, then you may infer that the Defendant had receipts of money or property during that year; and if the evidence also establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those receipts were taxable income to the Defendant.

In addition to the matter of the Defendant's net worth, if the evidence establishes beyond a reasonable doubt that the Defendant spent money during the year on living expenses, taxes and other expenditures, which did not add to his net worth at the end of the year, then you may infer that those expenditures also came from funds received during the year; and, again, if the evidence establishes that those receipts cannot be accounted for by non-taxable sources, then you may further infer that those funds were also taxable income to the Defendant (provided, of course, the expenditures were not for items which would be deductible on the Defendant's tax return).

Because the "net worth method" of proving unreported income involves a comparison of the Defendant's net worth at the beginning of the year and his net worth at the end of the year, the result cannot be accepted as correct unless the starting net worth is reasonably accurate. In that regard the proof need not show the exact value of all the assets owned by the Defendant at the starting point so long as it is established that the assets owned by the defendant at that time were insufficient by themselves to account for the subsequent increases in his net worth. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's net worth was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed net worth of the defendant at the starting point (or

the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation, concerning the existence and value of other assets. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations advanced by the defendant or which otherwise arose during the investigation concerning other assets the defendant had at the beginning of the year (or other nontaxable sources of income he had during the year), then you should find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable asset or source of non-taxable funds.

If you decide the evidence in the case establishes beyond a reasonable doubt the maximum possible amount of the defendant's net worth at the beginning of the tax year, and further establishes that any increase in his net worth at the end of that year, together with this [*sic, his*] nondeductible expenditures made during the year, did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional funds represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.2, pp. 231-233.

GOVERNMENT PROPOSED JURY INST. NO. ____

Net Worth Method

To prove that substantial additional tax was due, the government must prove beyond a reasonable doubt that (a) the defendant received substantial income in addition to what he reported on his income tax return, and (b) there was tax due in addition to what was shown to be due on the return.

In order to prove that the defendant received substantial additional income omitted from his tax return, the government in this case has used the so-called net worth method of proof. By using this method the government attempts to prove that the amount the defendant was worth increased during the year by more than the income shown on the his tax return and by his other nontaxable receipts. Let me explain this in more detail.

Net worth is the value of everything the defendant owns -- his assets -- less the amounts he owes -- his liabilities. **1** To determine whether the government has proved by the net worth method that the defendant had additional unreported income, you must answer the following five questions:

1. Determine the defendant's net worth on January 1, 19__, that is, when the tax year you are considering began, and on December 31, 19__, when the year ended. How much did the defendant's net worth increase during that year?

2. How much did the defendant spend during that year for personal use and for other things that could not be deducted from his income for tax purposes?

3. Next add the increase in his net worth and the amount the he spent on himself and for nondeductible purposes. Was the total of these amounts greater than the amount of income reported on his tax return? If the answer to this question is "yes," you must then consider the following questions.

4. Did the defendant have any nontaxable income during the year that would explain the difference, that is, income which he did not have to report on his return, such as gifts or inheritances?

[5. Did the defendant have business losses or expenses or bad debts that he could have deducted from his income to reduce his tax but did not deduct?] 2

[The government has the burden of proving beyond a reasonable doubt that the defendant's net worth increased during the tax year by more than is explained by his reported income less his personal, nondeductible spending plus his other nontaxable sources of income.]

3 The government does not have to prove exact amounts; it need only prove the amounts with reasonable accuracy. The government also has an obligation to have its revenue agents follow up reasonable leads during their investigation that might explain an apparent increase in net worth, such as sources of other nontaxable income. *[And the government must give the defendant credit for amounts that the law entitled the defendant to deduct from his income to reduce his tax, but that he failed to deduct.]* 4

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial income in addition to what he reported on his income tax return for the year in question, you must decide whether there was tax due in addition to what was shown to be due on the return, as a result of defendant's additional, unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the expert testimony introduced during the trial concerning the computation of the defendant's additional tax liability, when the alleged additional income was taken into account.

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that the defendant received substantial additional income, and that there was tax due in addition to what was shown to be due on his income tax return, as a result of this additional income, then this first element has been satisfied.

2 L. Sand, *et al.*, *Modern Federal Jury Instructions*, (1993 Ed.), Instruction 59-6

July 1994

NET WORTH METHOD

1 This sentence should be modified to reflect that the assets are valued *at cost* and that mere unrealized increases in market value are not taken into consideration.

2 This paragraph is not correct, at least in the context in which it appears above. Business losses or expenses or bad debts are all accounted for, and the defendant would be given full credit in a proper net worth computation for all deductions and expenses, whether claimed or not on the defendant's return. In point of fact, if a defendant failed to claim all of his [her] expenses and deductions, then this would result in the reporting of a higher taxable income than would otherwise be reported. Thus, under these circumstances, computed unreported income would be less when reported income is compared with corrected taxable income as computed by the net worth method. It may be that No. 5 in the instruction is meant to explain "below the line" reductions in the total of the net worth increase and non-deductible expenditures but the paragraph is still incorrect -- the reductions, as noted above, do not pertain to reported items. Moreover, business expenses are not a "below the line" adjustment but are automatically accounted for in computing the net worth increase.

3 The first sentence of this paragraph is confusing. It does not conform to the mechanics of a net worth computation which seeks to establish unreported income by demonstrating that the defendant's net worth increase, plus nondeductible expenditures, less reductions (such as nontaxable sources of income) and other adjustments, exceeds reported income.

4 This statement is not correct in the context of a net worth case which automatically accounts for all of the deductible expenses paid for by the defendant. Whether the defendant has or has not claimed all available deductions on his [her] return may have a bearing on willfulness but does not affect the computation of correct taxable income. Note that the defendant's failure to claim all available deductions of this nature results in a smaller understatement, *i.e.*, his [her] reported income is higher than it would otherwise be.

GOVERNMENT PROPOSED JURY INST. NO. ____

Expenditures Method of Proof

Theory

The government has introduced evidence of the expenditures method of proof to establish that the taxable income reported by the defendant on his [her] income tax returns is not true and correct. By this method, the government seeks to establish that the defendant **1** spent an amount greater than the amount reported on his [her] income tax returns as being available for spending. In other words, the government claims that the defendant could not have spent the amount that he [she] did in a given year unless he [she] had more income than the defendant reported on his [her] return for that year.

[In this case, the defendant is married, and is charged with filing false joint income tax returns for the defendant and his [her] spouse. The government accordingly has introduced evidence purporting to reflect their joint expenditures.] 1

Under this method, the first step is to add up and total the amounts that the defendant spent during a given year. The next step is to subtract from the total amount spent: (1) any funds that the defendant had on hand at the beginning of the year which were spent during the year; (2) any monies received by a conversion into cash of assets that were on hand at the beginning of the year; and (3) any nontaxable funds received during the year.

The government claims that a reasonable approximation of the taxable income the defendant should have reported is the amount remaining after personal deductions, exemptions, and adjustments are subtracted from the defendant's income computed on the basis I have just explained to you.

Opening Net Worth

Now, I want to go over some of the points I have just mentioned. As I previously said, under the expenditures method you subtract from the total amount spent any funds the defendant had on hand at the beginning of the year and any monies received by converting into cash assets that were on hand at the beginning of the year. Another way of saying this is that a starting point or opening net worth must be established so that the defendant is not improperly charged with spending which

July 1994

EXPENDITURES METHOD

only reflects what he [she] earned or had from prior years.

You will readily appreciate that if the defendant actually owned substantial assets at the beginning point which the government has failed to consider in its computations, apparent spending of income during the indictment years may be no more than the disclosure of money previously saved, or the result of a conversion into cash of assets which the defendant owned at the beginning of the year.

For example, a taxpayer might have had a substantial amount of cash on hand which he [she] had saved up in prior years and used to make purchases or other expenditures during a prosecution year. In that case an apparent spending out of income during the year might be only the result of spending money earned in a prior year. You must, therefore, be satisfied that the government's evidence establishes that the defendant has been given credit for any cash on hand that he [she] had as well as for any cash realized from the conversion into cash of assets that he [she] had on hand.

On the other hand, the government is not required to refute all possible speculation that the defendant might have converted into cash assets that he [she] had at the beginning of the year which the investigation failed to disclose; nor is it necessary for the government to prove the precise amount of cash on hand that the defendant had at the beginning of the year. It is enough if the government can show beyond a reasonable doubt that cash on hand and the conversion of assets into cash do not account for the expenditures of the defendant during the taxable year.

The burden rests originally upon the government, and the burden remains upon the government, to establish an opening net worth with reasonable certainty.

In this case, the government has endeavored to prove that the defendant did not have any cash on hand or assets at the beginning of the year which he [she] later converted into cash, other than those disclosed as a result of its investigation by, among other things, tracing the financial history of the defendant. The evidence introduced by the government of the defendant's [*income tax return(s) and*] financial history in years prior to those named in the indictment may be considered by you for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment.

In determining whether or not the opening net worth is reasonably accurate, you may consider

whether the government has tracked down "reasonable leads" or explanations, if any, suggested to the government by the defendant (or his representative) during the investigation which tend to establish the defendant's innocence.

If you are satisfied that any such reasonable leads and explanations have been exhausted or refuted, then this would be evidence which you could consider in determining whether the opening net worth relied on by the government is reasonably accurate. Obviously, improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the government's investigation has failed to refute what seem to you to be plausible explanations, such failure may be considered by you in determining the validity of the opening net worth.

If you find that the government has not established the opening net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, then you will find that the defendant is not guilty for any such year of reporting a taxable income that is not true and correct.

If you find as to any year that the funds spent by the defendant are not substantially in excess of the taxable income reported by the defendant on his [her] return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of reported taxable income, then you will find that the defendant is not guilty for any such year of reporting a taxable income that is not true and correct.

If you find, on the other hand, that the government has established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you are also convinced beyond a reasonable doubt that the expenditures established by the government during such year are substantially in excess of the income reported on the defendant's tax return, then you will proceed to inquire whether the government has established that those funds represented income.

Current Taxable Income

The burden is on the government to establish beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from taxable, rather than nontaxable sources.

July 1994

EXPENDITURES METHOD

In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business, [*legal or illegal*], carried on for gain or profit, or gains or profits and income derived from any source whatever.

The law states, however, that certain kinds of funds do not constitute income. Since no income tax is levied on such funds they need not and should not be reported as income. These funds include gifts, inheritances, proceeds of loans, and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon the government to prove beyond a reasonable doubt that the funds reflected in the defendant's expenditures arose from a taxable source or sources, or that the funds did not come from nontaxable sources. In other words, expenditures alone do not establish the receipt of taxable income unless the evidence shows either: (1) a likely source of income from which you believe they sprang; or (2) that the government has established that the defendant did not have a nontaxable source of income which accounts for the expenditures.

If you find that the defendant offered timely explanations of the source of his [her] funds, which were reasonably susceptible of being checked, the government may not disregard them; and you may take into consideration any failure by the government to run down such explanations, if any were made, or the results of any investigation made by the government into the truth of the explanations. On the other hand, where relevant leads are not forthcoming, the government is not required to negate every conceivable source of nontaxable funds, and if the defendant failed to supply information in that regard, you may take such failure into account. The defendant is not required, however, to provide any explanations or to prove the source of his [her] funds, for, as I have said, the burden is on the government to prove that the funds used for expenditures arose from taxable sources.

This instruction is based on the rationale of the courts in the following decisions:

Taglianetti v. United States, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd.*, 394 U.S. 315 (1969)

United States v. Citron, 783 F.2d 307, 315 (2d Cir. 1986)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Marshall, 557 F.2d 527, 529 (5th Cir. 1977)

United States v. Newman, 468 F.2d 791, 793 (5th Cir. 1972), *cert. denied*, 411 U.S. 905 (1973)

United States v. Penosi, 452 F.2d 217, 219 (5th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972)

United States v. Caswell, 825 F.2d 1228, 1231-32 (8th Cir. 1987)

United States v. Pinto, 838 F.2d 426, 431-32 (10th Cir. 1988)

The instruction is also based on the rationale of the following decisions involving the net worth method which is essentially the same as the expenditures method, *Taglianetti v. United States*, 398 F.2d at 562:

Holland v. United States, 348 U.S. 121 (1954)

Friedberg v. United States, 348 U.S. 142 (1954)

United States v. Calderon, 348 U.S. 160 (1954)

United States v. Massei, 355 U.S. 595 (1957)

United States v. Johnson, 319 U.S. 503 (1942)

United States v. Sorrentino, 726 F.2d 876, 879, 880 (1st Cir. 1984)

United States v. Breger, 616 F.2d 634, 635 (2d Cir.), *cert. denied*, 446 U.S. 919 (1980)

United States v. Terrell, 754 F.2d 1139, 1144 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

United States v. Schafer, 580 F.2d 774, 775 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978)

United States v. Anderson, 642 F.2d 281, 285 (9th Cir. 1981)

NOTE

1 The instruction should be modified in those instances where a joint return is involved and also where the net worth computation reflects the joint net worth of a husband and wife, or, in rare instances, the joint net worth of a defendant and a third party.

GOVERNMENT PROPOSED JURY INST. NO. ____

Cash Expenditures Method

In this case the government relies upon the so-called "cash expenditures method" of proving unreported income. The theory of this method of proof is that if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth exceed the total of his reported income together with nontaxable receipts and available cash at the beginning of the year, then the taxpayer has understated his income.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year, but also an examination of his "net worth" at the beginning and at the end of that year.

[The remainder of this instruction should consist of the text of Offense Instruction No. 69.2, the "Net Worth Method," from the second paragraph to the end of that instruction.] **1**

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.4, p. 236

NOTE

1 Instruction No. 69.2 referred to above in the bracketed material is reproduced, *supra*, in the jury instructions on the net worth method.

GOVERNMENT PROPOSED JURY INST. NO. ____

Cash Expenditures Method

To establish a substantial understatement of the tax on the income tax return of defendant _____ for the year[s] _____, the government has relied upon proof by the so-called "cash expenditures method" of determining income for that particular period. This "cash expenditures method", if done correctly, is an indirect or circumstantial way to reliably determine income.

In this method of proof, if a taxpayer's expenditures and disbursements for a particular taxable year, together with any increase in net worth, exceed the total of reported income together with non-taxable receipts for that same year and available cash at the beginning of the year, then the taxpayer has unreported income.

A person's net worth is the difference between a person's total assets and that person's total liabilities on any given date. Said another way, net worth is the difference between what a person owns and what that person owes at any particular time.

The "cash expenditures method" necessarily involves not only the examination of the defendant's expenditures and disbursements during the taxable year in question, but also an examination of the defendant's net worth at the beginning and again at the end of that year. **1**

Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions*, (4th Ed. 1990), § 56.06, pp. 999-1000.

NOTE

1 Notes following this jury instruction in Devitt, Blackmar, & O'Malley state that "The pertinent portions of the instruction on the "Net Worth Method", Section 56.05, should be given to the jury in conjunction with this instruction." Thus, the prosecutor should consult with the above net worth instructions, *supra*, for appropriate language to include. While the expenditures method is a "variant of the net worth method," there are certain different elements involved in their presentation, including the showing of net worth required. Under the expenditures method, "net worth need not be established by a formal net worth statement. Rather, accurate inclusion of diminution of resources

July 1994

EXPENDITURES METHOD

serves the function of enabling the jurors to determine if expenditures were financed by liquidation of assets, depletion of a cash hoard, or unreported income." *United States v. Citron*, 783 F.2d 307, 315 (2d Cir. 1986); *See Taglianetti v. United States*, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); *United States v. Caswell*, 825 F.2d 1228, 1232 (8th Cir. 1987); *United States v. Pinto*, 838 F.2d 426, 432 (10th Cir. 1988).

GOVERNMENT PROPOSED JURY INST. NO. ____

Bank Deposits (Plus Cash Expenditures) Method 1

To prove the alleged understatements of taxable income, the government relies upon the bank deposits [*plus cash expenditures*] method of proof. **2**

To use this method of proof, the government must establish that the defendant was engaged in an income-producing activity during the tax years in issue and that, during the course of such activity, regular and periodic deposits having the inherent appearance of current income were made into bank accounts in the defendant's name or under his [her] dominion and control.

Deposits into such accounts are totalled. Non-income transactions, such as transfers between bank accounts, redeposits, and deposits of nontaxable amounts, such as loans, gifts, inheritances, or prior accumulations, are subtracted from the total deposits. [*To this total is added any additional undeposited income that the defendant received during the tax year in issue, and any cash or currency expenditures made with undeposited funds not derived from a nontaxable source.*] **3**

The appropriate deductions, exclusions, exemptions, and credits to which the defendant is entitled then are subtracted, leaving an amount the government contends to be the corrected taxable income for the tax year in issue. This amount is then used to compute the corrected tax due and owing for the year, which is then compared with the actual tax paid in order to establish the alleged understatement of taxes.

If you find that such bank deposits [*plus undeposited income and cash expenditures*] **3** establishes a taxable income figure for each tax return in issue, which exceeds the taxable income reported on the tax returns for the years involved, you will proceed to inquire whether the government has established that those excess deposits [*and other funds received or spent but not deposited*] **3** represent additional taxable income on which the defendant willfully attempted to evade or defeat the tax. In this connection, if the government has established that the defendant was engaged in an income-producing business or activity, that he [she] was making regular and periodic deposits of money to bank accounts in his [her] name or under his control, that the deposits and other

July 1994

BANK DEPOSITS METHOD

funds received and available for deposit have the appearance of income, then you may, but are not required to, draw the inference that these deposits [*and other funds available for deposit*] represented income during the year in question.

Explanations or "leads" may be offered to the government by or on behalf of the defendant as to the source of the funds used or available for deposits during the prosecution years, such as cash-on-hand, **1** gifts, loans, or inheritances. If such leads are relevant, reasonably plausible, and are reasonably susceptible of being checked, then the government must investigate into the truth of the explanations. Additionally, leads must be furnished well in advance of trial for the government to be obligated to investigate them or to include them in the government's computations. However, if no such leads are provided, the government is not required to negate every conceivable source of nontaxable funds.

The government claims that it has correctly taken into account all of the factors which I have mentioned and that the bank deposits plus undeposited income and cash expenditures results in a figure which fairly approximates the defendant's true individual taxable income for the calendar years 19_ and 19_.

This instruction is based on the rationale, and not the actual language, of the opinions below:

United States v. Morse, 491 F.2d 149, 151 (1st Cir. 1974)

United States v. Slutsky, 487 F.2d 832, 840 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974)

United States v. Nunan, 236 F.2d 576, 587 (2d Cir. 1956), *cert. denied*, 353 U.S. 912 (1957)

United States v. Venuto, 182 F.2d 519, 521 (3d Cir. 1950)

Morrison v. United States, 270 F.2d 1, 2 (4th Cir.), *cert. denied*, 361 U.S. 894 (1959)

Skinnett v. United States, 173 F.2d 129 (4th Cir. 1949)

United States v. Conaway, 11 F.3d 40, 43-44 (5th Cir. 1993)

United States v. Tafoya, 757 F.2d 1522, 1528 (5th Cir. 1985)

United States v. Normile, 587 F.2d 784, 785 (5th Cir. 1979)

United States v. Boulet, 577 F.2d 1165, 1167 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114

(1979)

United States v. Horton, 526 F.2d 884, 887 (5th Cir.), *cert. denied*, 429 U.S. 820 (1976)

United States v. Parks, 489 F.2d 89, 90 (5th Cir. 1974)

United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964), *cert. denied*, 386 U.S. 1003 (1967)

United States v. Ludwig, 897 F.2d 875, 878-882 (7th Cir. 1990)

United States v. Esser, 520 F.2d 213, 216 (7th Cir. 1975), *cert. denied*, 426 U.S. 947 (1976)

United States v. Stein, 437 F.2d 775, 779 (7th Cir.), *cert. denied*, 403 U.S. 905 (1971)

United States v. Lacob, 416 F.2d 756, 759 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Mansfield, 381 F.2d 961, 965 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967)

United States v. Abodeely, 801 F.2d 1020, 1024-1025 (8th Cir. 1986)

United States v. Vannelli, 595 F.2d 402, 404 (8th Cir. 1979)

United States v. Stone, 770 F.2d 842, 844 (9th Cir. 1985)

United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)

United States v. Hall, 650 F.2d 994, 999 (9th Cir. 1981)

United States v. Helina, 549 F.2d 713, 720 (9th Cir. 1977)

Percifield v. United States, 241 F.2d 225, 229 & n.7 (9th Cir. 1957)

United States v. Bray, 546 F.2d 851, 853 (10th Cir. 1976).

NOTES

1 CAUTION: The above instruction does not include an instruction on cash on hand. In those instances where the bank deposits computation includes cash expenditures or currency deposits the cases indicate that the government must establish a beginning cash on hand figure. *See* Section 33.08, *supra*, CASH ON HAND. In such a case, the above instruction should be supplemented with a cash on hand instruction. For an example of a cash on hand instruction, *see Pattern Jury Instructions, Criminal Cases*, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, para. 3, p. 234, reproduced *infra*.

2 The material in brackets applies to cases which include cash or currency expenditures.

3 The material in brackets applies to cases which include both cash or currency expenditures and undeposited income. Where either, but not both, are included in a case, the bracketed language

July 1994

BANK DEPOSITS METHOD

should be modified accordingly.

GOVERNMENT PROPOSED JURY INST. NO. ____

Bank Deposits Method

In this case the government relies upon the so-called "bank deposits method" of proving unreported income.

This method of proof proceeds on the theory that if a taxpayer is engaged in an income producing business or occupation and periodically deposits money in bank accounts in his name or under his control, an inference arises that such bank deposits represent taxable income unless it appears that the deposits represented redeposits or transfers of funds between accounts, or that the deposits came from nontaxable sources such as gifts, inheritances or loans. This theory also contemplates that any expenditures by the defendant of cash or currency from funds not deposited in any bank and not derived from a nontaxable source, similarly raises an inference that such cash or currency represents taxable income.

Because the "bank deposits method" of proving unreported income involves a review of the defendant's deposits and cash expenditures which came from taxable sources, the government must establish an accurate cash-on-hand figure for the beginning of the tax year. The proof need not show the exact amount of the cash-on-hand so long as it is established that the government's claimed cash-on-hand figure is reasonably accurate. So, if you should decide that the evidence does not establish with reasonable certainty what the defendant's cash-on-hand was at the beginning of the year, you should find the defendant not guilty.

In determining whether or not the claimed cash-on-hand of the defendant at the starting point (or the beginning of the year) is reasonably accurate, you may consider whether government agents sufficiently investigated all reasonable "leads" suggested to them by the defendant, or which otherwise surfaced during the investigation concerning the existence of other funds at that time. If you should find that the government's investigation has either failed to reasonably pursue, or to refute, plausible explanations which were advanced by the defendant, or which otherwise arose during the investigation, concerning the defendant's cash-on-hand at the beginning of the year, then you should

July 1994

BANK DEPOSITS METHOD

find the defendant not guilty. Notice, however, that this duty to reasonably investigate applies only to suggestions or explanations made by the defendant, or to reasonable leads which otherwise turn up; the government is not required to investigate every conceivable source of nontaxable funds.

If you decide that the evidence in the case establishes beyond a reasonable doubt that the defendant's bank deposits together with his non-deductible cash expenditures during the year did substantially exceed the amount of income reported on the defendant's tax return for that year, you should then proceed to decide whether the evidence also establishes beyond a reasonable doubt that such additional deposits and expenditures represented taxable income (that is, income from taxable sources) on which the defendant willfully attempted to evade and defeat the tax as charged in the indictment.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.3, p. 234

GOVERNMENT PROPOSED JURY INST. NO. ____

The "Bank Deposits Method" of Determining Income - Explained

To establish a substantial understatement of the tax on the income tax return of defendant _____ for the year[s] ____, the government has relied upon proof by the so-called "bank deposits method" of determining income during a particular period. This "bank deposits method", if done correctly, is an indirect or circumstantial way to reliably determine income.

The theory of this method of proof is that if a taxpayer is engaged in an activity that produces income and if that taxpayer periodically deposits money in bank accounts under the taxpayer's name, or under the taxpayer's control, it may be inferred, unless otherwise explained, that these bank deposits represent taxable income. If there are expenditures of cash by the taxpayer from funds not deposited in any bank and not from any non-taxable source, such as by gift or from inheritance, it may be inferred, unless otherwise explained, that this cash represents unreported income.

In this method of proof, a taxpayer's bank deposits for the tax year are totaled, with adjustments made for funds in transit at the beginning and again at the end of that year. Any "non-income" deposits are excluded from this total and income which has not been deposited is included in the total. This procedure produces a gross income figure.

Income tax is then calculated in the usual way with legitimate credits and legitimate deductions taken into account. If the resulting figure is greater than that which the taxpayer reported on his [her] tax return for that year, then that taxpayer has unreported income in that amount.

Because the "bank deposits method" of determining income involves a review of bank deposits and cash expenditures during a taxable year, the government must establish with a

July 1994

BANK DEPOSITS METHOD

reasonable degree of certainty an accurate "cash on hand" figure for the beginning of the tax year in question. The government is not required to prove an exact "cash on hand" figure, but must prove a figure that is reasonably accurate.

If, therefore, you do not find that the government has established to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, then you should find the defendant not guilty.

If on the other hand, you find that the government has proven to a reasonable degree of certainty what the defendant's "cash on hand" was at the beginning of the year 19__, you must then proceed to decide whether the evidence in the case establishes beyond a reasonable doubt that the bank deposits and non-deductible cash expenditures of the defendant _____substantially exceeded the amount reported on his [her] tax return for that year. If so, you should then proceed to decide whether or not the government has proven, beyond a reasonable doubt, that the defendant willfully attempted to evade or defeat the additional tax as charged in Count __ of the indictment.

Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions - Criminal* (4th Ed. 1990), § 56.07, pp. 1002-1004.

Consider Each Count Separately

A separate crime is charged in each count of the indictment. Each charge, and the evidence pertaining to it, should be considered separately by the jury. The fact that you may find [*the*] accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Devitt, Blackmar, Wolff, and O'Malley, *Federal Jury Practice and Instructions, Civil and Criminal* (4th Ed. 1992), Section 12.12

July 1994

MULTIPLE COUNTS

GOVERNMENT PROPOSED JURY INST. NO. ____

Separate Consideration Of Multiple Counts

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.09

GOVERNMENT PROPOSED JURY INST. NO. ____

Consider Each Count And Each Defendant Separately

A separate crime is alleged against [*each*][*one or more*] of the defendants in each count of the indictment. Each alleged offense, and any evidence pertaining to it, should be considered separately by the jury. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that defendant or any other defendant.

You must give separate and individual consideration to each charge against each defendant.

Devitt, Blackmar, Wolff, and O'Malley, *Federal Jury Practice and Instructions, Civil and Criminal* (4th Ed. 1992), Section 12.13

July 1994

MULTIPLE COUNTS & DEFS.

GOVERNMENT PROPOSED JURY INST. NO. ____

Separate Consideration Of
Each Count And Each Defendant

A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant.

All of the instructions apply to each defendant and to each count (unless a specific instruction states that it applies only to [*a specific defendant*][*or*][*a specific count*]).

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO. ____

Give Each Defendant Separate Consideration

It is your duty to give separate and personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual defendant leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants.

Each defendant is entitled to have his [her] case determined from evidence as to his [her] own acts, statements, and conduct and any other evidence in the case which may be applicable to him [her].

The fact that you return a verdict of guilty or not guilty to one defendant should not, in any way, affect your verdict regarding any other defendant.

Devitt, Blackmar, Wolff, and O'Malley, *Federal Jury Practice and Instructions, Civil and Criminal* (4th Ed. 1992), Section 12.14.

July 1994

MULTIPLE DEFS.

GOVERNMENT PROPOSED JURY INST. NO. ____

Separate Consideration For Each Defendant

Although the defendants are being tried jointly, you must give separate consideration to each defendant. In doing so you must analyze what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his case decided on the evidence and the law applicable to him.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.11

GOVERNMENT PROPOSED JURY INST. NO. ____

Separate Consideration For Each Defendant

Although the defendants are being tried together, you must give separate consideration to each defendant. In doing so you must determine what the evidence in the case shows with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant[s]. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant[s].

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Section 2.14

July 1994

SINGLE COUNT - SINGLE DEF.

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Single Defendant -- Single Count)

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.20, p. 31

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Single Defendant -- Single Count)

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not be a part of your consideration or discussions.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.21, p. 32

July 1994

SINGLE DEF. - SINGLE COUNT

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Single Defendant -- Single Count)

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.1, p. 25

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.22, p. 33

July 1994

SINGLE DEF. - MULTIPLE COUNTS

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Single Defendant -- Multiple Counts)

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.2, p. 26

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.23, p. 34

July 1994

MULTIPLE DEFS. - SINGLE COUNT

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Multiple Defendants -- Single Count)

The case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find any one of the defendants guilty or not guilty should not affect your verdict as to any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.3, p. 27

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant. You must give separate consideration as to each defendant.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General and Preliminary Instructions, Instruction No. 1.24, p. 35

July 1994

MULTIPLE COUNTS & DEFS.

GOVERNMENT PROPOSED JURY INST. NO. ____

Caution -- Punishment
(Multiple Defendants -- Multiple Counts)

A separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant should be considered separately and individually. The fact that you may find one or more of the defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or any other defendant.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the defendant is guilty or not guilty. The defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the defendant is convicted the matter of punishment is for the judge to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 10.4, p. 28

"On Or About" -- Explained

The indictment charges that the offense alleged [*in Count* _____] was committed "on or about" a certain date.

Although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in [*Count* ____ *of*] the indictment, it is not necessary for the government to prove that the offense was committed precisely on the date charged.

Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 13.05

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Basic Instructions, Instruction No. 119, p. 30.

July 1994

ON OR ABOUT

GOVERNMENT PROPOSED JURY INST. NO. ____

Date Of Crime Charged

The indictment charges that the offense was committed "on or about" _____. Although the evidence need not establish with certainty the exact date of the alleged offense, it must establish that the offense was committed on a date reasonably near the date charged.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 3.01

Devitt, Blackmar, Wolff and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 13.05, Notes, p. 394.

GOVERNMENT PROPOSED JURY INST. NO. ____

Each Tax Year is Separate

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

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

July 1994

TAX DEFICIENCY

GOVERNMENT PROPOSED JURY INST. NO. ____

Proof of Precise Amount of Tax Owed Not Necessary

The government must prove beyond a reasonable doubt that the defendant _____ willfully attempted to evade or defeat a substantial portion of the tax owed.

Although the government must prove a willful attempt to evade a substantial portion of tax, the government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of [*additional*] tax owed.

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

NO LOSS TO GOVT.

July 1994

GOVERNMENT PROPOSED JURY INST. NO. ____

Not Necessary to Show Any Additional Tax Due

Although the government is required to prove beyond a reasonable doubt that the defendant willfully filed a false document as charged in Count ____ of the indictment [*information*], the government is not required to prove that any additional tax was due to the government or that the government was deprived of any tax revenues by reason of any filing of any false return.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.19

GOVERNMENT PROPOSED JURY INST. NO. ____

Funds or Property From Unlawful Sources

There has been evidence in this case that the defendant received funds or property from unlawful sources.

In determining the issue of the taxable income of the defendant no distinction is made between income derived from lawful or unlawful sources. Funds or property received from unlawful or illegal sources, therefore, are treated in the same manner as funds or property from lawful or legal sources.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.21

26 U.S.C. § 61

James v. United States, 366 U.S. 213 (1961)

Rutkin v. United States, 343 U.S. 130 (1952)

GOVERNMENT PROPOSED JURY INST. NO. ____

Computation of Tax Deficiency

The first step in arriving at an individual's taxable income is to determine the gross income of that individual. Gross income generally means all income from whatever source derived. Gross income includes, but is not limited to, compensation for services, such as wages, salaries, fees, or commissions, income derived from a trade or business, gains from dealings in property, interest, royalties, and dividends. Gross income includes both lawful and unlawful earnings.

After having determined an individual's gross income, the next step in arriving at the income upon which the tax is imposed is to subtract from the gross income such deductions and losses as the law provides. In this connection, an individual is permitted to deduct from gross income all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business or other profit-seeking endeavors, to the extent those expenses are not reimbursed by the business.

The amount remaining after subtracting the allowable deductions and losses from gross income is termed "adjusted gross income." In arriving at income upon which the tax is imposed, the individual is permitted to deduct from adjusted gross income either the zero bracket amount allowed by law, or, in the alternative, amounts paid during the year for itemized deductions, which are limited by law, such as, medical expenses, state income and property taxes, interest, charitable contributions, and other miscellaneous items. An individual is then allowed a deduction for each qualified exemption. The resulting figure is termed "taxable income", that is to say, the sum on which the income tax is normally imposed.

26 U.S.C. §§ 61 through 223 (Corporations, 26 U.S.C. §§ 61 through 281)

GOVERNMENT PROPOSED JURY INST. NO. ____

Accrual Method of Accounting

Taxable income is computed by using the same method of accounting that the taxpayer used to compute his [her] income, as long as such accounting method clearly reflects income. In this case, the defendant reported taxable income and deductible expenses on the accrual method of accounting.

Under the accrual method of accounting, income is to be included in the taxable year when all events have occurred which fix the right to receive such income and the amount of the income can be determined with reasonable accuracy. Similarly, deductions are allowable for the taxable year in which all the events have occurred which establish the fact of liability giving rise to such deduction and the amount of the deduction can be determined with reasonable accuracy. When income is actually received or an expense is actually paid is irrelevant in the accrual method of accounting.

26 U.S.C. §§ 446, 461(a)

Treasury Regulations on Income Tax (1986 Code), Sec. 1.461-1(a)(2) (26 C.F.R.)