CIVIL TAX FRAUD FOR FAILURE TO FILE A RETURN

Stephen E. Silver*

Because the federal government relies so heavily upon income tax revenues to finance its operations, it is important that taxpayers tender the correct payment of tax within the time prescribed by the *Internal Revenue Code of 1954* and the underlying regulations.[1] To insure compliance with the tax laws, Congress imposed various sanctions[2] ranging from a civil penalty of 5 percent of the deficiency[3] to a serious felony.[4]

Section 7203 makes it a misdemeanor for a taxpayer willfully to fail to file a tax return when required to do so by the Code or regulations.[5] Congress also has provided a civil penalty for a failure to file[6] a timely re-

---

* Associate, States, Meyer & Vucichevich, Phoenix, Arizona. B.S., 1964, Arizona State University; J.D., 1967, University of Arizona. Member, Arizona and Washington Bars. Mr. Silver was formerly Trial Attorney, Office of Regional Counsel, Western Region, Internal Revenue Service, Seattle, Washington.

1. The Code requires that each taxpayer with certain specified gross incomes file a return each year on the forms furnished by the district director. INT. REV. CODE OF 1954, § 6011(a) [hereinafter cited as I.R.C.]; Treas. Reg. § 1.6011-1 (1967).

2. In Helvering v. Mitchell, 303 U.S. 391, 401 (1938), the Supreme Court stated, "[The penalties] are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (footnote omitted).

3. I.R.C. § 6651(a).

4. *Id.* § 7201.

5. *Id.* § 7203:

> Any person required under this title to pay any estimated tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) . . . who willfully fails to pay such estimated tax or tax, make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution.

6. All that is required for proof of the offense is the willful failure to file. Spies v. United States, 317 U.S. 492, 497 (1943). The *Spies* Court considered the predecessor of § 7201, Int. Rev. Code of 1939 § 145(b), which is substantially the same as the present provision.

turn not justified by reasonable cause.[7] The civil penalty ranges from 5 to 25 percent of the deficiency, depending upon the number of months that the delinquency continues. If any amount of the deficiency is due to negligence or even to an "intentional disregard of rules and regulations, but without intent to defraud,"[8] the penalty will be added to the amount due, unless, of course, the taxpayer can show that the delay was due to a reasonable cause.

Congress has imposed additional sanctions where the failure to file was based on an intent to evade or avoid the tax rather than on negligence.[9] In cases of fraud, section 6653(b) imposes a penalty of 50 percent of the deficiency.[10] Section 7201 makes the willful evasion of tax a felony.[11] These sections are similar because they impose sanctions in addition to the misdemeanor[12] and penalty[13] provisions. The full extent of the parallel between these sections is uncertain, however.

In the *Internal Revenue Code of 1954*, Congress failed to delineate, with any degree of specificity, either a statutory definition of fraud or the intended interactions, if any, of sections 7201, 7203, 6651(a) and 6653(b). Although the Supreme Court has considered the interrelationship of sections 7201 and 7203,[14] it has not addressed itself to sections 6653(b) and 6651(a).[15]

---

7. I.R.C. § 6651(a):

> ADDITION TO THE TAX.—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof) . . . on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregation.

8. Spies v. United States, 317 U.S. 492, 497 (1943).

9. As the Supreme Court held in Helvering v. Mitchell, 303 U.S. 391, 397 (1938), "acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in nature, arising out of the same facts on which the criminal proceeding was based." Because of the Court's characterization of the civil action as "remedial," it would follow, a fortiori, that an earlier civil action would not bar criminal prosecution.

10. I.R.C. § 6653(b): "FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

11. I.R.C. § 7201:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

12. *See* note 5 and accompanying text *supra*.

13. *See* note 7 and accompanying text *supra*.

14. The crime of willful attempted evasion of taxes, as defined in § 7201 requires proof of three elements: (1) an additional tax due and owing, Lawn v. United States, 355 U.S. 339, 361 (1958); (2) willfulness, Spies v. United States, 317 U.S. 492 (1943); and (3) an attempt to evade or defeat payment of taxes legally due and owing. *Id.* A violation of § 7203 is a lesser-included offense of § 7201. Sansome v. United States, 380 U.S. 343 (1958).

15. The argument is frequently made by the taxpayer that where the govern-

Lacking Supreme Court clarification, lower courts have applied their own interpretations to the meaning and relation of 6653(b) and 6651(a). For purposes of determining civil fraud, these courts have exercised wide latitude in determining the sufficiency and weight to be accorded evidence which bears upon the intent of a taxpayer who does not file a tax return. Accordingly, there is no talismanic formula that can be applied uniformly to determine what actions or inactions constitute civil fraud where tax returns are not filed.

THE SPIES DOCTRINE

The Affirmative Action Requirement

In *Spies v. United States*,[16] the Supreme Court considered the relationship between the predecessors of sections 7201 and 7203. The taxpayer had been convicted of a felony for failure to file a return. He had, by his own admission, sufficient taxable income "to place him under a statutory duty to file a return and to pay a tax."[17] The Court unanimously held that the willful passive neglect of the statutory duties[18] was sufficient to constitute a violation of the misdemeanor section. The Court added, however, that where a taxpayer failed to file a return, the government would have to prove an affirmative act, the "likely effect of which would be to mislead or conceal,"[19] in order to support a felony conviction for tax evasion under the predecessor of section 7201.[20]

To reach this conclusion, the Court looked to the language of the felony provision which defines fraud as a willful attempt to evade any tax. It concluded that a willful commission would be necessary for a felony conviction while a willful omission would be sufficient for the misdemeanor. Some of the acts which the Court felt would evidence an affirmative commission were keeping two sets of books, making false entries, altering existing entries, destroying records, concealing sources of income, or the "handling of one's affairs to avoid making the records usual in transactions of the kind."[21]

---

ment chooses to prosecute for a willful failure to file a return under section 7203, the government is somehow equitably estopped from asserting the civil fraud penalty at a later time. See note 66 *infra*.

16. 317 U.S. 492 (1943).

17. *Id.* at 493.

18. Int. Rev. Code of 1939 § 145(a); ch. 1, 53 Stat. 62-63 (now INT. REV. CODE OF 1954 § 7203).

19. 317 U.S. at 499.

20. Int. Rev. Code of 1939 § 145(b), ch. 1, 53 Stat. 63. Note that in civil cases, the government is generally required to prove, by clear and convincing evidence, that the taxpayer intended to defraud the government, even where the taxpayer is suing for a refund after having paid the fraud penalty. *E.g.*, Jones v. Commissioner, 259 F.2d 300, 303 (5th Cir. 1958); Powell v. Granquist, 252 F.2d 56, 61 (9th Cir. 1958); Eagle v. Commissioner, 242 F.2d 635, 637 (5th Cir. 1957); Irolla v. United States, 390 F.2d 951, 953 (Ct. Cl. 1968). *See* I.R.C. § 7454(a) for the burden of proof in the Tax Court.

21. 317 U.S. at 499.

Although *Spies* was a criminal case, its impact has been felt in civil fraud cases involving the failure to file a return.

Affirmative Action in Civil Cases

The catalyst for the adoption of the *Spies* "affirmative action test" in civil fraud cases is found in the Eighth Circuit bellwether opinion of *First Trust & Savings Bank v. United States*,[22] involving a taxpayer named Kraftmeyer. Although the taxpayer had received taxable income for many years, he had never filed a return nor paid the tax due. Kraftmeyer knew little about the tax system and did not think that he was earning any income on which he should pay tax. He attributed his failure to file to this ignorance.

After being informed by an Internal Revenue agent of the severity of his noncompliance, however, Kraftmeyer "employed an attorney and cooperated with the revenue agents to produce a full showing of all his money transactions through the years in question."[23] The court relied heavily on the distinction set out in *Spies* and concluded that Kraftmeyer could not be liable for civil tax fraud without a showing of affirmative acts in addition to nonfiling:

> Congress makes the difference on the civil side as it does on the criminal side, between the taxpayers whose deficiencies of tax are due to (or caused by) his affirmative commission of fraud and the one whose deficiencies of tax are due to wilful [*sic*] omission to make return. That omission justifies the addition of the 5 percent up to 25 percent of the deficiencies found against the taxpayer but does not afford any basis for the addition of 50 percent of his deficiencies. Only the commission of acts of fraud with intent to evade tax to which 'the deficiencies are due' (or which bring about the deficiencies) affords a basis for the 50 percent addition to tax.[24]

In short, the Eighth Circuit found that Congress intended the civil penalty provisions, sections 6651(a) and 6653(b), to be an exact parallel to the criminal provisions, sections 7203 and 7201.[25] The relationship which the *Spies* Court found to exist between sections 7201 and 7203,[26] was held by the *First Trust* court to exist between sections 6653(b) and 6651(a).

First Trust was followed in spirit by two later Fifth Circuit cases, *Veino v. Fahs*[27] and *Jones v. Commissioner*.[28] In *Veino*, the Tax Court had

22. 206 F.2d 97 (8th Cir. 1953).
23. *Id.* at 98-99. For the significance of knowledge and cooperation upon fraudulent intent, see text accompanying notes 53-54 *infra* and notes 58-60 *infra*, respectively.
24. 206 F.2d at 100-01.
25. In dissent, Judge Thomas argued that the *Spies* test of affirmative action required to prove a § 7201 violation was not engrafted upon § 6653(b). 206 F.2d at 101-03.
26. See text accompanying notes 17-20 *supra*.
27. 257 F.2d 364 (5th Cir. 1958).
28. 259 F.2d 300 (5th Cir. 1958).

found that the taxpayer's income tax deficiency was due to his fraudulent failure to file a tax return. The Fifth Circuit, after citing *First Trust*, agreed that affirmative action was required for the 50 percent fraud penalty. The court noted, however, "there was much more present here than the mere failure to file tax returns"[29] since the taxpayer had failed to disclose $70,000 in a safety deposit box. The court held, therefore, that the "willful commissions averted to in the Spies case were present here."[30]

In *Jones*, on facts reflecting significant evasive intent on the part of the taxpayer, the court nonetheless held that the deficiency was not due to fraud. The taxpayer had employed an accounting firm to prepare returns which he never filed. During the course of a later investigation, however, the taxpayer gave the unfiled returns to the investigating agents and cooperated fully with them. This failure to file evidences more of an intent to defraud than can be attributed to a taxpayer, like Kraftmeyer in *First Trust*, whose failure was based on ignorance of the tax laws. Nevertheless, the Fifth Circuit held that Jones' conduct was not fraudulent because "[f]raud implies bad faith, intentional wrongdoing and sinister motive. It is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at most create only suspicion."[31] Concluding that there was no concealment, misrepresentation or subterfuge, the court held that specific fraudulent intent was missing.

Clearly then, in light of this definition of fraud, which is the generally accepted definition of the Tenth Circuit in *Davis v. Commissioner*,[32] the reasoning of the *Veino* and *First Trust* cases is more understandable.

Nevertheless, courts adopting the *Spies* reasoning have done so even though the "willful attempt" language of the criminal fraud provision is conspicuously absent from the civil fraud section. Rather, the latter section states that the 50 percent penalty is to be imposed only if any part of the deficiency was "due to fraud." Thus, although the reasoning of the Eighth and Fifth Circuits finds some support in the generally recognized definition of fraud, perhaps the reference to fraud in section 6653(b) indicates an intent by Congress to require something less for civil fraud than a "willful attempt" to evade tax.[33]

---

29. 257 F.2d at 368. *See* Charles F. Bennett, 30 T.C. 114 (1958).
30. 257 F.2d at 369.
31. 259 F.2d at 303, *quoting* Olinger v. Commissioner, 234 F.2d 823, 824 (5th Cir. 1956).
32. 184 F.2d 86, 87 (10th Cir. 1950). *Accord* Spies v. United States, 317 U.S. 492 (1943) ("evil motive and want of justification"); Armstrong v. United States, 327 F.2d 189, 196 (9th Cir. 1964) ("bad faith and evil motive"); Ballantyne v. United States, 293 F.2d 112, 116 (5th Cir. 1961), *cert. denied*, 369 U.S. 802 (1962) ("bad and evil purpose").
33. While there are some of the same elements in both a criminal and civil fraud case, the Service generally takes the position that the criminal elements required to prove a violation of section 7201, as such, are not specifically considered in proving civil fraud. See note 9 *supra*.

REJECTION OF THE AFFIRMATIVE ACTION TEST

The first significant break with the affirmative action test came in 1958 by the Ninth Circuit. In *Powell v. Granquist*,[34] the court assumed arguendo that *First Trust's* application of *Spies* to civil actions was correct, but went on to distinguish the facts before it from those in *First Trust*. In *Powell*, the taxpayer, who knew he had a duty to file a return, testified that he didn't file because he didn't "believe in the way the government was wasting money."[35] In addition, Powell did not cooperate with the investigating agents. Upon these facts, some of which were established by circumstantial evidence,[36] the 50 percent fraud penalty was upheld.

While the rejection of *Spies* was not explicit, it may be inferred from the fact that the *Powell* court acknowledged that the government could meet its burden of proof on the issue of fraud without the necessity of characterizing the taxpayer's actions or inactions with the "affirmative action" label. Thus, *Powell* was the precedent for a test based upon the "affirmative indication of fraud," which eventually was adopted by the Third Circuit and the Tax Court.

Affirmative Indication Test

The Third Circuit, in *Cirillo v. Commissioner*,[37] cited both *First Trust* and *Jones* but interpreted them in a way which had the effect of rejecting their conclusion that affirmative action was required to prove civil fraud. The *Cirillo* court viewed the issue as whether the circumstances attending the failure to file warranted an inference of an intent to evade paying taxes. Relying on *Powell*, the Third Circuit stated that for a fraud penalty to be justified the "circumstances surrounding the failure to file returns must strongly and unequivocally indicate an intention to avoid the payment of taxes."[38] This burden, the court concluded, could be satisfied if the "record . . . contain[ed] some convincing affirmative indication of the required specific intent."[39]

The Tax Court opinion in *Cirillo* clearly rejected the contention that the *Spies* interpretation of section 7201, a strictly construed criminal statute, applied in civil cases.[40] The court emphasized that the "terminology of attempt" in section 7201 was not employed by Congress as to civil fraud in section 6653(b). In addition, as the Tax Court pointed out, even

34. 252 F.2d 56 (9th Cir. 1958).
35. *Id.* at 60.
36. The Third Circuit in the later case of Stoltzfus v. United States, 398 F.2d 1002 (3d Cir. 1968), also stated that civil fraud could be proved by circumstantial evidence.
37. 314 F.2d 478, 482 (3d Cir. 1963).
38. *Id.*
39. *Id.*
40. Cirillo v. Commissioner, 20 CCH Tax Ct. Mem. 956 (1961). *Accord* Maggie Bailey, 29 CCH Tax Ct. Mem. 272 (1970) (there must be an "affirmative indication that . . . [the taxpayer] deliberately cheated the Government.").

in *Spies* the Supreme Court indicated that a willful failure to file could be considered with other acts in deciding whether there was a willful attempt to defeat and evade paying taxes. By citing its earlier opinion of *Charles F. Bennett*,[41] the Tax Court made it clear that it was rejecting the taxpayer's contention that the misdemeanor of willful failure to file so paralleled the delinquency penalty for failure to file a timely return under section 6651(a) as to preclude the assertion of the civil fraud penalty.[42]

Support for the *Cirillo* reasoning can impliedly be found in the Court of Claims' decision in *Irolla v. United States*.[43] Refusing "to take sides in . . . [the] supposed controversy,"[44] the court nevertheless indicated that it favored the affirmative indications test of the Third Circuit. In *Irolla*, the taxpayer had failed to file a return for nine years, although he had more than sufficient taxable income. The trial commissioner allowed into evidence a "memorandum of conference," which stated that when asked by investigating agents whether he owned any stocks or bonds, the taxpayer denied owning any although he did, in fact, own more than $435,000 worth of securities. Upon the taxpayer's exception to the inclusion of the "memorandum of conference" in evidence, the court answered, "[E]ven if [taxpayer's] counsel had knocked the 'conference memorandum' out of the case, he would not have been assured of success."[45]

The court thus indicated its support of the affirmative indication test. While the concealment by the taxpayer of stock and bond ownership would clearly constitute affirmative action, the court chose not to con-

41. 30 T.C. 114 (1958).

42. *Id.* at 123. The Tax Court has not specifically rejected the *Spies* test as applied to civil fraud but has on past occasions expressed approval of the approach followed in Powell v. Granquist, 252 F.2d 56 (9th Cir. 1958). *See, e.g.*, Anson Beaver, 55 T.C. 85 (1970). Quite to the dismay of the Service, however, the Tax Court in three recent Memorandum Opinions, Philip E. De Pumpo, 30 CCH Tax Ct. Mem. 491 (1971), James W. Morrell, 30 CCH Tax Ct. Mem. 393 (1971) and Renaud Ovellette, 30 CCH Tax Ct. Mem. 390 (1971) held on the facts presented that the government failed to carry the burden of proving that the nonfilers had the specific intent to fraudulently evade the payment of tax. The result in *Morrell* is most surprising in light of the record. The taxpayer was a practicing attorney who had been an Assistant United States Attorney at one time. He failed to file returns for the years 1961 through 1964, inclusive. In his capacity as an Assistant United States Attorney, Morrell had participated in the prosecution of several failure to file and attempted tax evasion cases. Morrell knew that he could have sought an extension of time to file his 1961 return or, in the alternative, file the return without paying the tax. Morrell alleged that he did not want to file without payment for fear that the Service would contact him within a short time seeking payment. Morrell admitted that he did not file returns for the subsequent years 1962, 1963 and 1964 because he was afraid his failure to file for 1961 would be more quickly discovered. Although the Tax Court acknowledged that this was a "close case" it found that the taxpayer's goal was not an attempt to escape paying the tax indefinitely but merely an attempt to "delay its payment." *See* note 57 and accompanying text, *infra*.

43. 390 F.2d 951 (Ct. Cl. 1968).

44. *Id.* at 956.

45. *Id.*

sider it. Instead, it relied upon other factors,[46] none of which demonstrated affirmative action by the taxpayer that would mislead or conceal.[47]

Application of the New Test

The rationale of the Third Circuit in *Cirillo* has gained acceptance from several courts outside the Fifth and Eighth Circuits.[48] The affirmative indication of fraud is a question of fact requiring a case-by-case determination. The more significant indicators which have either singularly or cumulatively been found to support the imposition of the fraud penalty can be divided into four classifications. The courts, however, have not been content to rely solely upon one of them. Generally, two or more are present in a case where the fraud penalty is asserted in the statutory notice of deficiency by the government.

The first indicator is the degree of cooperation which a taxpayer gives after he is informed that he is under investigation. Lack of cooperation, such as withholding pertinent information from agents,[49] is relevant in determining if the taxpayer had the requisite fraudulent intent.[50] Secondly, the fact that the failure to file may have been motivated by extrinsic factors, such as a reluctance to reduce his standard of living, has been held to be a strong indication of the intent to defraud.[51] A failure

46. The court cited five factors, excluding the taxpayer's concealment of his ownership of stocks and bonds, which they felt pertinent to establishing an intent to defraud by the taxpayer: (1) the taxpayer was a man of extensive business and financial experience; (2) the taxpayer was familiar with the income tax system; (3) the taxpayer knew that he had taxable income for each of the nine years; (4) the taxpayer failed to file returns over a long period of time (nine years); and (5) the taxpayer's explanation of why he did not file (he said he kept thinking he would do it "next year" but next year never came) was completely unsatisfactory. *Id.* at 954-55.

47. In a lengthy dissent, Judge Skelton found that the actions of the taxpayer in failing to file the required returns were not affirmative acts. In his view, the opinion of the majority was patently contrary to *First Trust.*

48. Stoltzfus v. United States, 264 F. Supp. 824 (E.D. Pa. 1967), *aff'd,* 398 F.2d 1002 (3d Cir. 1968); Albert Gemma, 46 T.C. 821 (1966); Arold H. Ripperger, 20 CCH Tax Ct. Mem. 307 (1961).

49. Charles F. Bennett, 39 T.C. 114, 122 (1958).

50. Powell v. Granquist, 252 F.2d 56, 59 (9th Cir. 1958); Alphonsus C. Fox, 27 CCH Tax Ct. Mem. 125, 127 (1968); Charles F. Bennett, 30 T.C. 114, 122 (1958); Domenic DeFranco, 9 CCH Tax Ct. Mem. 1158 (1950). *See also* Stoltzfus v. United States, 264 F. Supp. 824, 827 (E.D. Pa. 1967), *aff'd* 398 F.2d 1002 (3d Cir. 1968). *Cf.* Melinder v. United States, 281 F. Supp. 451 (W.D. Okla. 1968).

If the taxpayer should take the fifth amendment when requested to furnish information, problems arise as to whether evidence of his refusal would be admissible to show a lack of cooperation. If the material requested is within those required to be kept under section 6001, it might come within the "required records doctrine" of Shapiro v. United States, 335 U.S. 1 (1948), and the fifth amendment will be inapplicable. Smith v. United States, 236 F.2d 260 (8th Cir.), *cert. denied,* 352 U.S. 909 (1956); Beard v. United States, 222 F.2d 84 (4th Cir.), *cert. denied,* 350 U.S. 846 (1955). *See generally* Andrews, *The Right to Counsel In Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074, 1114 n.235 (1968); Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid,* 76 YALE L.J. 1, 40 n.180 (1966).

51. Albert Gemma, 46 T.C. 821 (1966). *Accord,* Alphonsus C. Fox, 27 CCH Tax Ct. Mem. 125 (1968).

to file returns for an extensive period of time is another affirmative indication of fraud.[52] As the Third Circuit has noted, failure to file returns over a lengthy period, while not conclusive, "is persuasive evidence of an intent to defraud the government."[53]

Finally, the most significant indication appears to be failure to file by a taxpayer who has a working knowledge of the federal tax system.[54] In *Otis Blackwell*,[55] for example, the taxpayer had hired an accountant to prepare returns in previous years. For the year in question, however, the taxpayer chose not to have the accountant prepare a return. In assessing the 50 percent fraud penalty, the Tax Court stated that the taxpayer "knew that he had to pay tax on . . . [the] income since he had filed returns for previous years. His failure to file returns can only be interpreted as an attempt to conceal . . . [his] income from the taxing authorities."[56]

In addition, a frequently used defense has been held to be an affirmative indication of fraud. Nonfilers often assert that their failure to file was due to fear of possible criminal prosecution for neglecting to file the return or returns for the preceeding year or years and not to avoid the payment of taxes.[57] In *Fred N. Acker*,[58] the Tax Court held that such an explanation was, "in itself, an admission that one of the reasons for his continued failure to file returns was to conceal his prior years' defalcations."[59]

---

52. Stoltzfus v. United States, 398 F.2d 1002, 1005 (3d Cir. 1968); Powell v. Granquist, 252 F.2d 56 (9th Cir. 1958); Irolla v. United States, 390 F.2d 951 (Ct. Cl. 1968); Albert Gemma, 46 T.C. 821, 834-35 (1966); Arold H. Ripperger, 20 CCH Tax Ct. Mem. 307, 309-10 (1961). *See also*, Schwarzkopf v. Commissioner, 246 F.2d 731, 734 (3d Cir. 1957); Kurnick v. Commissioner, 232 F.2d 678, 681 (6th Cir. 1956).

53. Stoltzfus v. United States, 398 F.2d 1002, 1005 (3d Cir. 1968).

54. *E.g.*, Cirillo v. Commissioner, 314 F.2d 478 (3d Cir. 1963); Powell v. Granquist, 252 F.2d 56 (9th Cir. 1958); Alphonsus C. Fox, 27 CCH Tax Ct. Mem. 125 (1968); Albert Gemma, 46 T.C. 821 (1966); Arold A. Ripperger, 20 CCH Tax Ct. Mem. 307 (1961); Fred Acker, 26 T.C. 107 (1956).

55. 24 CCH Tax Ct. Mem. 1367 (1965).

56. *Id.* at 1368.

57. A nonfiler, when confronted with the decision of whether to file a return where the return for the preceding year was not filed, must decide how to answer the following request for information that appears on the Form 1040: "Enter below name and address used on your return for [the prior year] (if same as above write 'Same'). If none filed, give reason." If the taxpayer writes "Same," this act would constitute an affirmative concealment. By leaving the space blank, the omission, if intentional, would be misleading. See Caplin, I.R.S. News Release, IR No. 432 (Dec. 13, 1961), in 1962 CCH FED. TAX RPTR. ¶ 6212.

The then Commissioner Mortimer M. Caplin reaffirmed existing policy that even a true voluntary disclosure of the nonfiling of a tax return would not in itself afford immunity from criminal prosecution. At the same time, however, Commissioner Caplin stressed that the Service would carefully consider and weigh the voluntary disclosure along with the facts and circumstances in deciding whether or not to recommend prosecution. As a practical matter, a timely, good faith voluntary disclosure ordinarily will be dispositive of a prosecution recommendation for it may have an adverse impact on the reasonable probability of securing a conviction. *See generally* Lipton, *Prosecution for Tax Evasion—New Policies and Procedure*, 30 TAXES 351 (1952).

58. 26 T.C. 107 (1956).

59. *Id.* at 113. *But see* B. Frank Wells, 17 CCH Tax Ct. Mem. 798 (1958).

The same reasoning was recently applied in *Stoltzfus v. United States*,[60] where Judge Lord stated that such an explanation "must be rejected as a matter of law for it is not even colorably valid."[61] On appeal to the Third Circuit, the same argument was summarily rejected:

> By not filing a return in each year subsequent to 1943 . . . [the nonfiler] attempted to conceal his failure to file for the prior years. We fail to see how such conduct indicates an innocent state of mind. Quite to the contrary, we find such conduct is some evidence of an intent to fraudulently avoid paying taxes knowingly due.[62]

CONCLUSION

It goes almost without saying that the government has a much better chance of proving fraud if the taxpayer has filed a return which is later discovered to be false and misleading than if the taxpayer has completely failed to file. As the Third Circuit said in *United States v. Croessant*,[63] there is an easy distinction between filing a false return and not filing at all as far as criminal fraud is concerned.[64] "[T]he man who files a wilfully false return has endeavored to mislead his government. He creates the appearance of having complied with the law, whereas his neighbor who has filed no return does no such thing."[65] The courts have recognized, however, that attempted tax evasion can exist when a taxpayer intentionally fails to file a return. The reasoning is obvious. The taxpayer who does not file does not pay any tax to his government, and thus stands the chance of escaping payment altogether. The government prosecutes few, if any, criminal cases involving attempted tax evasion which do not meet the *Spies* affirmative action test, however.[66] This apparent reluctance of the government has effectively allowed the knowledgeable taxpayer to side-

60. 264 F. Supp. 824 (E.D. Pa. 1967), *aff'd*, 398 F.2d 1002 (3d Cir. 1968).
61. 264 F. Supp. at 828.
62. Stoltzfus v. United States, 398 F.2d 1005 (3d Cir. 1968).
63. 178 F.2d 96 (3d Cir. 1949).
64. *See* section 7207 which provides, in part:

> Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

A violation of section 7207, in certain circumstances, may be a lesser-included offense of section 7201. Sansone v. United States, 380 U.S. 343, 351 (1964). Accordingly, a defendant may be entitled to a section 7207 "lesser-included offense" jury instruction where the charged offense under section 7201 requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.
65. 178 F.2d at 97.
66. The criteria which determine whether criminal prosecution for attempted tax evasion will be sought are based upon two fairly obvious administrative decisions: (1) Is the evidence sufficient to indicate guilt beyond a reasonable doubt? (2) Does there appear to be a reasonable probability of conviction? The criteria used in determining which cases warrant criminal prosecution for attempted tax evasion, however, do not apply in a civil case. Consequently, the assertion of the civil fraud penalty may nevertheless be warranted in a case where the government sought only criminal prosecution under section 7203. Accordingly, the argument

step the felony sanction for attempted tax evasion even though he intended to evade payment of his taxes by not filing a return. In most instances, this nonfiler will be criminally confronted only with the misdemeanor provision for failure to file.[67]

At this stage of judicial development, and absent Supreme Court clarification, the inconsistent classification by the courts of the actions or inactions of taxpayers in determining whether civil fraud exists has not provided a test than can be applied on a uniform basis. This confused classification has witnessed judicial adoption of moderately conflicting theories which result in invalid conclusions. Instead of classifications determining the result, the result has determined the classification. The answer appears to lie in the definition of terms.

Since the terminology of "willful attempt" in section 7201 does not appear in section 6653(b), the affirmative indication of fraud test rather than the affirmative action test should be applied. While the distinction between the two appears at first to be merely one of semantics, the cases show a real difference. A mere failure to file, without any action, cannot be civil tax fraud under the affirmative action test. Under the affirmative indication test, however, failure to file may be in and of itself persuasive evidence of fraud.[68]

In addition, it is submitted that the *First Trust* requirement that civil fraud be shown to exist by an "attempt" is neither realistic nor necessary. It would be more reasonable to broaden the definition of attempt to encompass omissions which would be judged in light of the surrounding circumstances, as well as commissions.

Nevertheless, absent Supreme Court clarification, labels may serve as a convenient point of reference if they are sufficiently broad so as to allow trial courts the necessary latitude in reaching a reasoned conclusion.[69]

---

that some form of equitable estoppel applies overlooks this administrative screening process. *See generally* Duke, *Prosecution for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 72 (1966).

67. It has generally been standard practice for the special agent who recommends criminal prosecution under section 7203 for willful failure to file to also recommend the assertion of the civil fraud penalty under section 6653(b). In these cases, more often than not, the special agent has not given proper consideration in his report, beyond a one sentence conclusion, to whether the civil fraud penalty can be sustained in the event of litigation. In order to remove the fraud penalty from a proposed notice of deficiency, the District Director is required to obtain the approval of Regional Counsel.

68. *E.g.*, Stoltzfus v. United States, 398 F.2d 1002, 1005 (3d Cir. 1968); Cirillo v. Commissioner, 314 F.2d 478 (3d Cir. 1963); Albert Gemma, 46 T.C. 821 (1966).

69. In the meantime, it will be interesting to watch the results in the United States Tax Court in view of its abandonment of the "national law view" in favor of following the law of the several circuits. Jack E. Golsen, 54 T.C. 742 (1970); Lloyd G. Jones, 54 T.C. 734 (1970). See note 42 *supra*.