

FTC ¶ V-3115



Fed. Tax Coordinator ¶ V-3115 (2d.)

**Federal Tax Coordinator, Second Edition**

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**Chapter - V Interest on Taxes, Penalties****V-3100 Felony False Documents Penalties.****¶ V-3115 IMPOSING ON PERSONS WHO AREN'T THE TAXPAYER OR  
PREPARER THE PENALTY FOR ADVISING OR ASSISTING IN THE  
PREPARATION OF FALSE OR FRAUDULENT RETURNS OR DOCUMENTS.**

The Seventh Circuit said [IRC s 7206\(2\) \(V-3113\)](#) makes all forms of willful assistance in preparing a false return an offense and includes all participants in a scheme which results in the filing of a false return, whether or not they actually prepare it. Thus, it upheld a conviction for aiding in the preparation of a materially false federal estate tax return, where the defendant (D) concealed and later cashed bearer bonds that should have been included in a decedent's estate. D received the bonds from his mother-in-law, who was one of the executors of the estate. When the other executor (a bank) asked her about the bonds, which it knew had been part of decedent's portfolio, she said that they could not be found. On that assurance, the bank prepared the federal estate tax return without including the bonds in the estate. The court rejected D's argument that one who is not the taxpayer, tax preparer, or supplier of information for the return can't be charged with aiding a false estate tax filing.<sup>46</sup>

A return preparer (a CPA) could be convicted of aiding and abetting the filing of false tax returns with respect to returns prepared by his firm, even though there was no evidence that the preparer participated directly in the preparation of the returns. The preparer was aware that his firm was preparing returns for clients in which the clients were charging personal expenses to their corporation. The jury could infer that the preparer consciously avoided learning that the returns were false.<sup>47</sup>

Taxpayers have been convicted under [IRC s 7602\(2\)](#) for preparing false corporate financial statements that served as the basis for preparing the corporation's tax return,<sup>48</sup> and for creating fictitious invoices and shell companies that were used to prepare false excise tax returns.<sup>49</sup>

A taxpayer who laundered his illegal income by exchanging his cash (\$20,000) for business checks (\$18,000) drawn by another person who intended to record the check as payment for business expenses was guilty of causing a false return to be filed.<sup>50</sup>

The Sixth Circuit held that an employer could not violate [IRC s 7206\(2\) \(V-3113\)](#) merely by providing an employee with a false Form W-2. Code [Sec. 7204](#) is the exclusive sanction for an employer who files a false Form W-2 ([V-3013](#)). The employer could not properly be convicted for counseling an employee to understate income on her tax return because the employee testified that the employer gave her no advice regarding her tax return.<sup>1</sup>

The Third Circuit held that evidence of affirmative participation that includes, but is not limited to, furnishing false W-2s is sufficient to sustain a conviction. Such affirmative participation need not rise to the level of actual counseling as long as it at least encourages the preparation or presentation of a false return. Thus, convictions in a false W-2 case were upheld where there was no direct evidence that defendants explicitly counseled employees to underreport their income, but there was ample circumstantial evidence to allow the jury to conclude that they aided and assisted them in doing so by encouraging exactly that behavior. The defendants not only furnished false W-2s to scores of employees, but also created false employee time cards, engaged in intricate and deceptive bookkeeping intended to mask underreported income, and issued checks to employees from nonpayroll accounts for unreported overtime wages. A parade of employees testifying that they understood these actions as a sign that they should not report their overtime wages was evidence in itself that the defendants took affirmative steps to encourage the employees to file false returns. Further, some witnesses testified that agents of the defendants told them more specifically that their straighttime policy meant that they should not worry about reporting overtime income.<sup>2</sup>

#### Footnotes

- 46 [Hooks, William v. U.S.](#), (1988, CA7) 62 AFTR 2d 88-5949, 848 F2d 785, 88-1 USTC ¶13771.
- 47 [Cohen, Stephen v. U.S.](#), (1990, DC PA) 1990 WL 237239.
- 48 [Hastings, Michael D. v. U.S.](#), (1991, CA9) 949 F2d 399, reported in full (1991, CA9) 1991 US App LEXIS 33067, cert den (1992, S Ct) 503 US 975, 118 L Ed 2d 312.
- 49 [Aracri, Joseph v. U.S.](#), (1992, CA2) 70 AFTR 2d 92-6305, 968 F2d 1512.
- 50 [U.S. v. Williams, Drake](#), (1987, CA5) 809 F2d 1072.
- 1 [Hughes, Martin J. v. U.S.](#), (1990, CA6) 66 AFTR 2d 90-5716, 899 F2d 1495, 91-1 USTC ¶50022, affg in part & revg in part(1987, DC OH) 61 AFTR 2d 88-623, 88-1 USTC ¶9277.
- 2 [U.S. v. Gambone, John A. Sr.](#), (2003, CA3) 91 AFTR 2d 2003-330, 314 F3d 163, 2003-1 USTC ¶50162, affg(2001, DC PA) 88 AFTR 2d 2001-6091, 2001-2 USTC ¶50652, 167 F Supp 2d 803, cert den(2003, S Ct) 540 US 815, 157 L Ed 2d 31.

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