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6.0 *VENUE*

6.01 *GENERALLY*

6.01[1] *Constitutional and Statutory Provisions*

The Constitution and the federal laws of the United States grant defendants in criminal cases the right to be tried in the judicial district in which their offenses occurred. ***United States v. Maldonado-Rivera***, 922 F.2d 934, 968 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991); ***United States v. Griley***, 814 F.2d 967, 973 (4th Cir. 1987); ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990); ***United States v. Felak***, 831 F.2d 794, 798 (8th Cir. 1987).

Two provisions in the U.S. Constitution address this guarantee. Article III, section 2 of the U.S. Constitution states: "The trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. art. III, §2. The Sixth Amendment amplifies this guarantee and provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

U.S. Const. amend. VI.

Rule 18 of the Federal Rules of Criminal Procedure also provides for this guarantee:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.

Thus, the general rule is that a defendant in a criminal trial has the right to be tried in the district where the offense took place. An "exception" exists, however, for "continuing offenses" which are begun in one district and completed in another. ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). In these circumstances, the continuing offenses statute, 18 U.S.C. §3237(a), applies. This statute provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and

> completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which the offense was begun, continued, or completed.

18 U.S.C. § 3237(a) (1988). Thus, under this statute the government has the option of prosecuting an offense in any district in which criminal activity took place. ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

While defendants have the right to be tried in the district where the offense took place, they do not have a right to trial in a particular division within that district. ***In re Chesson***, 897 F.2d 156, 158 (5th Cir. 1990). Rather, the courts apply a balancing test which weighs the convenience of the defendant and witnesses with the prompt administration of justice. 897 F.2d at 159.

6.01[2] ***Policy Considerations***

Prosecutors should be aware that it is the policy of the Department of Justice to generally attempt to establish venue for a criminal tax prosecution in the judicial district of the taxpayer's residence or principal place of business because prosecution in that judicial district usually has the most significant deterrent effect.

6.02 ***PROOF OF VENUE***

6.02[1] ***Government's Burden***

The government has the burden of proving venue as to each count charged against the defendant. ***United States v. Maldonado-Rivera***, 922 F.2d 934, 968 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2811 (1991). Venue, however, is not an essential element of the government's case because failure to establish this element does not impact on the guilt or innocence of the defendant. ***United States v. Griley***, 814 F.2d 967, 973 (4th Cir. 1987); ***United States v. Netz***, 758 F.2d 1308, 1311 (7th Cir. 1987); ***United States v. Kaytso***, 868 F.2d 1020, 1021 (9th Cir. 1988).

As a result, unlike other elements of a crime which must be established beyond a reasonable doubt, venue need only be proved by a preponderance of the evidence. ***Maldonado-Rivera***, 922 F.2d at 968; ***Griley***, 814 F.2d at 973; ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987); ***United States v. Delgado***, 914 F.2d 1062,

1064 (8th Cir. 1990). Moreover, venue may be established either by direct or circumstantial evidence. ***Griley***, 814 F.2d at 973; ***Marrinson***, 832 F.2d at 1475; ***Netz***, 758 F.2d at 1311.

6.02[2] *Waiver of Improper Venue*

The issue of improper venue may be waived if not timely raised by the defense. ***United States v. Netz***, 758 F.2d 1308, 1311 (8th Cir. 1985). Generally, where venue is improper on the face of an indictment, venue objections are waived if not made prior to trial. ***United States v. Black Cloud***, 590 F.2d 270, 272 (8th Cir. 1979). However, where the indictment contains a proper allegation of venue so that a defendant has no notice of a defect until the government rests its case, an objection is timely if made at the close of evidence. *Id*.

6.03 *VENUE IN TAX PROSECUTIONS*

6.03[1] *26 U.S.C. § 7201: Tax Evasion*

The courts have recognized that the crime of willfully attempting to evade or defeat a tax liability is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); ***United States v. Felak***, 831 F.2d 794, 799 (8th Cir. 1987); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). As such, venue is proper in a section 7201 prosecution in any district where an act in furtherance of the crime was committed. This would include districts where the return was prepared, signed, mailed or filed. ***Slutsky***, 487 F.2d at 839; ***Felak***, 831 F.2d at 799; ***Marchant***, 774 F.2d at 891. In cases where a return was not filed, it would include districts where the affirmative acts of evasion took place. ***Slutsky***, 487 F.2d at 839; ***Felak***, 831 F.2d at 799; ***Marchant***, 774 F.2d at 891.

Notwithstanding the above rule, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7201 has the right to remove the case to the district where the defendant resided at the time the offense was committed if venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7201 cases, *see* Section 8.07, *infra*.

6.03[2] ***26 U.S.C. § 7203: Failure to File***

Failure to file a tax return is a crime of omission. The place of venue for crimes of omission is any district where the duty could have been performed. ***United States v. Clines***, 958 F.2d 578, 583 (4th Cir.), *cert. denied*, 112 S. Ct. 2994 (1992); ***United States v. Garman***, 748 F.2d 218, 219 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

Section 6091 of Title 26 sets forth the places for filing individual income tax returns. Generally, a return must be filed either: (1) "in the internal revenue district in which is located the legal residence . . . of the person making the return; or (2) "at a service center serving the internal revenue district referred to [above]." 26 U.S.C. § 6091(b)(1)(A) (1988). Thus, venue in a section 7203 prosecution is proper in either the district of residence or the district where the service center is located. ***Clines***, 958 F.2d at 583; ***Garman***, 748 F.2d at 219.

Notwithstanding the above rule, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7203 has the right to remove the case to the district where the defendant resided at the time the offense was committed. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7203 cases, *see* Section 10.04[7], *infra*.

6.03[3] ***26 U.S.C. § 7206(1): File False Tax Return***

The courts have recognized that the crime of willfully making or subscribing a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). As such, venue is proper in a section 7206(1) prosecution in any district where the false return was prepared and signed, even if filed and received elsewhere. ***United States v. Rooney***, 866 F.2d 28, 31 (2d Cir. 1989); ***Slutsky***, 487 F.2d at 839; ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987). Venue is also proper where the return was filed. ***Rooney***, 866 F.2d at 31; ***Slutsky***, 487 F.2d at 839.

Similarly, venue is proper in the district where the return preparer received information from the taxpayer, even though the taxpayer may have signed and filed the return in other districts. ***Rooney***, 866 F.2d at 31.

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7206(1) has the right to remove the case to the district where the defendant resided at the time the offense was committed where venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7206(1) cases, *see* Section 12.11, *infra*.

6.03[4] ***26 U.S.C. § 7206(2): Aid in Preparation of False Return***

The courts have recognized that the crime of willfully aiding and assisting in the preparation of a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990). As such, venue is proper in a section 7206(2) prosecution in any district where the false return was prepared and signed, even though filed in another district. ***Hirschfeld***, 964 F.2d at 321; ***Bryan***, 896 F.2d at 72. Similarly, venue is proper in the district where the false return was filed. In addition, venue is proper in any district where the acts of aiding and assisting took place. ***Hirschfeld***, 964 F.2d at 321; ***Bryan***, 896 at 72.

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under section 7206(2) has the right to remove the case to the district where the defendant resided at the time the offense was committed where venue is based solely on a mailing to the IRS. 18 U.S.C. § 3237(b) (1988). *See* Section 6.04[1], *infra*. For a more detailed discussion of venue in section 7206(2) cases, *see* Section 13.08, *infra*.

6.04 ***REMOVAL TO DISTRICT OF RESIDENCE***

6.04[1] ***Section 3237(b)***

Section 3237(a) of Title 18 is the federal "continuing offenses" statute and allows the government certain discretion in establishing venue. Under section 3237(b), however, certain income tax violations are not subject to this discretion. Rather, the defendant is given the option to transfer venue to the district where he or she resided at the time the offense was committed. Section 3237(b) provides:

> Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code, or where venue for prosecution of an offense described in . . . section 7201 or 7206(1), (2) or (5) . . . is based solely on the mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

18 U.S.C. § 3237(b) (1988). Thus, under section 3237(b), prosecutions under 26 U.S.C. §§ 7201, 7203, 7206(1), (2) or (5) may be subject to removal by the defendant, provided a motion is made within twenty days of arraignment.

Application of subsection (b) requires that the venue for offenses under Section 7201 or 7206(1), (2) or (5) be based solely on a mailing to the Internal Revenue Service. ***United States v. Melvan***, 676 F. Supp. 997, 1001-02 (C.D. Cal. 1987). This means the defendant has the right to transfer venue unless the government can establish contact within the designated district by means other than a mailing. ***United States v. Humphreys***, 982 F.2d 254, 260 (8th Cir. 1992), *cert. denied*, 114 S. Ct. 61 (1993).

Subsection (b)'s mailing requirement does not apply to failure to file prosecutions under section 7203. In these cases, the defendant has the absolute right to transfer venue if the designated district was not the defendant's place of residence at the time the crime was committed. ***United States v. U.S. District Court***, 693 F.2d 68, 70 (9th Cir. 1982).

6.04[2] ***Rule 21(b)***

Rule 21(b) of the Federal Rules of Criminal Procedure provides an alternate basis for transfer of venue by the defendant. ***United States v. Benjamin***, 623 F. Supp. 1204, 1211 (D.D.C. 1985). The rule provides:

> For the convenience of parties and witnesses, and in the interests of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district.

Fed. R. Crim. P. 21(b).

The Supreme Court in ***Platt v. Minnesota Mining & Mfg. Co.***, 376 U.S. 240 (1964), analyzed the factors relevant to a Rule 21(b) transfer decision. These factors included: (1) location of the defendants; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business; (6) expense to the parties; (7) location of counsel; (8) accessibility of the place of trial; (9) docket condition of each district; and (10) special considerations unique to the case. 376 U.S. at 243-44.

In exercising the discretion afforded the government to place venue in a particular district, prosecutors should be cognizant of the factors enumerated above and the possibility of transfer under Rule 21(b).