TABLE OF CONTENTS

11.00 *FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION*

11.00 *FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION*

11.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7205(a)*

§7205. ***Fraudulent withholding exemption certificate or failure to supply information***

(a) ***Withholding on wages***. -- Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined* not more than $1,000, or imprisoned not more than 1 year, or both. **1**

*As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 **2** which increased the maximum permissible fines for both misdemeanors and felonies. For the misdemeanor offenses set forth in section 7205, the maximum permissible fine for offenses committed after December 31, 1984, is at least $100,000 for individuals. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

11.02 *GENERALLY*

Section 7205(a) is directed at employees who attempt to thwart the income tax wage withholding system by submitting false Forms W-4 or W-4E (hereinafter referred to as Forms W-4) to their employers. **3** Until the above-noted (n.1, *supra*) statutory amendment in 1984, section 7205

---

1 A change was made in the language of section 7205 by the Deficit Reduction Act of 1984 (Pub. L. No. 98-369, 98 Stat. 494), effective date July 18, 1984. Section 7205 previously provided that a violation would be subject to the punishment provided for in section 7205, "in lieu of any other penalty provided by law...." This language was amended by the Senate to read, "in addition to any other penalty provided by law."

2 Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

3 For the criminal offense applicable to persons required to furnish a withholding statement (*e.g.*, an employer required to withhold taxes on wages) who willfully furnish a false or fraudulent statement, or who willfully fail to furnish a statement, *see* 26 U.S.C. § 7204 which is not separately treated in this manual.

had been one of the government's only prosecutorial weapons in combatting employees' attempts to pay no taxes and to remove themselves from the federal income tax system. In the first instance, the employee, often a tax protestor, submits a false employee withholding certificate (Form W-4) to an employer, claiming either an excessive number of withholding allowances or, more typically, an exemption from withholding, based on a claim of having incurred no tax liability in the previous year and anticipating no tax liability in the present year. The result is the prevention of periodic tax withholding on wages throughout the year. Subsequently, when an income tax return is due, the employee fails to file a return.

Prior to the 1984 statutory change, the government's prosecutive approaches to the furnishing of false Forms W-4 included: (1) charging the supplying to an employer of a false or fraudulent Form W-4 as a violation of 26 U.S.C. § 7205; (2) charging in one count the supplying of a false Form W-4, in violation of 26 U.S.C. § 7205, and, in a second count, charging a failure to file an income tax return, in violation of 26 U.S.C. § 7203; or (3) charging only the section 7203 offense, where no income tax return was filed, and using the filing of the false Form(s) W-4 as evidence of willfulness.

Since the 1984 statutory change, the government now typically charges the filing of a false Form W-4 as an affirmative act in a ***Spies***-evasion felony prosecution rather than bringing the misdemeanor 7205 charge. *See* ***United States v. Connor***, 898 F.2d 942 (3rd Cir.), *cert. denied*, 110 S. Ct. 3284 (1990); ***United States v. Foster***, 789 F.2d 457, 460-61 n.4 (7th Cir.), *cert. denied*, 479 U.S. 883 (1986) (explaining why, following statutory changes, the government was no longer limited to charging the filing of a false Form W-4 as a violation of section 7205, as some courts had suggested). *See* Section 8.04[01], *supra*, dealing, among other things, with ***Spies***-evasion and false Forms W-4, and Section 40.04[01], *infra*, ***Tax Protestors***. However, in appropriate cases, section 7205 charges are still available. *See* ***Foster***, 789 F.2d at 460-61 (charging section 7201 and 7205 violations); ***United States v. Copeland***, 786 F.2d 768, 770-71 (7th Cir. 1986) (same).

11.03 *ELEMENTS OF SECTION 7205(a)*

To establish a violation of section 7205(a), the following elements must be proved beyond a reasonable doubt:

> 1. The defendant was required to furnish an employer with a signed withholding exemption certificate (Form W-4) relating to the number of withholding exemptions claimed;
>
> 2. The defendant supplied his or her employer with a signed withholding statement [or failed to supply the employer with a signed withholding exemption certificate]; **4**
>
> 3. The information supplied to the employer was false or fraudulent;
>
> 4. The defendant acted willfully.

United States v. Herzog, 632 F.2d 469, 471-72 (5th Cir. 1980); ***United States v. Olson***, 576 F.2d 1267, 1271 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978).

11.04 *DUTY TO COMPLETE AND FILE FORM W-4*

The employee's duty to supply an employer with information relating to the number of withholding exemptions claimed is contained in 26 U.S.C. § 3402(f)(2)(A), as follows:

> On or before the date of commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled.

The defendant's status as an employee is an essential element of the offense which the government must establish beyond a reasonable doubt. ***United States v. Bass***, 784 F.2d 1282, 1284 (5th Cir. 1986); ***United States v. Herzog***, 632 F.2d 469, 472 (5th Cir. 1980); ***United States v. Johnson***, 576 F.2d 1331, 1332 (8th Cir. 1978); *see* ***United States v. Pryor***, 574 F.2d 440, 442 (8th Cir. 1978).

---

4 The discussion in this section is limited to the supplying of false or fraudulent information, but section 7205(a) also makes criminal the failure to supply an employer with a signed withholding exemption certificate as required by 26 U.S.C. § 3402(f)(2)(A).

In most instances, proof of this element should not present any difficulty, because the actual filing of a Form W-4 or multiple Forms W-4 are a defendant's admission(s) of his employee status. *See* Fed. R. Evid. Rule 801(2); 26 U.S.C. § 6064. Moreover, the records and testimony of the employer, including the Form(s) W-2 and payroll records, will provide the necessary proof of employee status.

On the other hand, the precise time or date of filing a false form W-4 is not an essential element of section 7205. ***Johnson***, 576 F.2d at 1332. *See also* ***United States v. Pryor***, 574 F.2d 440, 442 (8th Cir. 1978).

11.05 *FALSE OR FRAUDULENT INFORMATION*

Section 7205(a) proscribes providing false ***or*** fraudulent information on a Form W-4. The government must thus establish that the withholding form that was filed was false or fraudulent. *See* ***United States v. Malinowski***, 472 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973); ***United States v. Buttorff***, 572 F.2d 619, 625 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978); ***United States v. Peterson***, 548 F.2d 279, 280 (9th Cir. 1977); ***United States v. Hinderman***, 625 F.2d 994, 995 (l0th Cir. 1980); ***United States v. Smith***, 484 F.2d 8, 10 (l0th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

The Eighth Circuit, in ***Hinderman***, 528 F.2d at 102, held that section 7205 does not require that a statement be "false in the sense of deceptive." *See also* ***United States v. Lawson***, 670 F.2d 923, 928 (l0th Cir. 1982); ***United States v. Hudler***, 605 F.2d 488, 490 (l0th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) ("The criterion is not whether the employer and the government were, or could have been, deceived. The crime is the willful furnishing of false or fraudulent information.").

The Form W-4 filed by a defendant typically is asserted to be false or fraudulent insofar as it claims either an excessive number of withholding allowances or exemption from withholding. In ***United States v. McDonough***, 603 F.2d 19 (7th Cir. 1979), the defendant argued for a reversal on the grounds that the government failed to prove beyond a reasonable doubt the number of exemptions to which the defendant actually was entitled. The Seventh Circuit acknowledged that the government must establish that the information supplied was false or fraudulent, but stated that:

> [p]roof of falsehood does not, however, require a showing of what is true. The evidence in this case contains many reasonable inferences that the information given by the defendant was untrue. The testimony of the IRS agent, together with the other evidence, was sufficient for the jury reasonably to conclude beyond a reasonable doubt that the information was false. That the agent's testimony did not establish beyond a reasonable doubt that the defendant was entitled to a certain number of exemptions is immaterial.

McDonough, 603 F.2d at 24; *cf*. ***United States v. Peister***, 631 F.2d 658, 664-65 (l0th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) (government does not have to establish that taxpayer was not exempt where false information supplied).

As noted, one device used to violate section 7205 is to falsely claim an exemption from withholding. Instructions on Forms W-4 require the employee to read the certificate to determine whether the employee can claim exempt status. The 1993 Form W-4, at line 7, requires the employee to certify the following before claiming exempt status:

> I claim exemption from withholding for 1993 and I certify that I meet **ALL** of the following conditions for exemption:
>
> * Last year I had a right to a refund of **ALL** Federal income tax withheld because I had **NO** tax liability; **AND**
>
> * This year I expect a refund of **ALL** Federal income tax withheld because I expect to have **NO** tax liability; **AND**
>
> * This year if my income exceeds $600 and includes nonwage income, another person cannot claim me as a dependent.

(Emphasis in original.) *See also* 26 U.S.C. § 3402(n) (employer not required to deduct and withhold any tax upon wages if a Form W-4 certifies that the employee: (1) incurred no tax for the prior year; and (2) anticipates no tax liability for the current year).

In cases where the defendant has claimed exempt status, the government often can introduce a tax return for the prior year which reflects a tax liability. The prior year tax return serves as an admission that the defendant knew he owed federal income tax "last year" and thereby knowingly filed a false Form W-4 in the prosecution year. Alternatively, computations of the defendant's taxable income and income tax liability for each of the years in question may be introduced to demonstrate

the false or fraudulent nature of the exempt Form(s) W-4 filed. The fact that aggregate withholding in a particular year exceeds an individual's income tax liability for such year *does not* alter the fact that a tax liability for such year exists. ***United States v. Echols***, 677 F.2d 498, 499 (5th Cir. 1982). *See* ***United States v. Hinderman***, 528 F.2d 100, 101 (8th Cir. 1976). The foregoing is illustrated by an example in the regulations. Thus, Treas. Reg. § 31.3402(n)-l (1993), provides as follows:

> Example (2). Assume the facts are the same as in example (1) except that for 1970 A has taxable income of $8,000, income tax liability of $1,630, and income tax withheld of $1,700. Although A received a refund of $70 due to income tax withholding of $1,700, he may not state on his exemption certificate that he incurred no liability for income tax imposed by subtitle A for 1970.

An administrative assessment under 26 U.S.C. § 6201 is not required before an individual can have a tax liability. ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985).

Furthermore, the government need not prove an employer relied on the forms submitted. ***United States v. Thomas***, 788 F.2d 1250, 1254 (7th Cir.), *cert. denied*, 479 U.S. 853 (1986).

11.06 ***WILLFULNESS***

11.06[1] ***Generally***

Willfulness in a section 7205 prosecution is the same as it is in all specific intent criminal tax offenses -- "a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 194 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Flitcraft***, 803 F.2d 184, 186-87 (5th Cir. 1986); ***United States v. Grumka***, 728 F.2d 794, 796 (6th Cir. 1984); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1987); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985); ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978); ***United States v. Olson***, 576 F.2d 1267, 1272 (8th Cir.), *cert. denied*, 439 U.S. 896 (1978); ***United States v. Hinderman***, 625 F.2d 994, 996 (l0th Cir. 1980).

Whether the defendant "subjectively" had a good faith misunderstanding of the law, as opposed to a disagreement with the law, is a jury question. *See* ***United States v. Schiff***, 801 F.2d 108, 112 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); ***United States v. Turner***, 799 F.2d 627, 629 (10th Cir. 1986). Failure to instruct a jury on this defense is reversible error. ***Cheek***, 498 U.S. at 194; ***United States v. Aitken***, 755 F.2d 188 (lst Cir. 1985); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***Flitcraft***, 803 F.2d at 187. *See* also the discussion of willfulness in Sections 8.06, *supra* and 40.09, *infra*.

11.06[2] ***Examples: Proof of Willfulness***

1. Evidence that the defendant had a tax liability in a prior year and then filed a Form W-4 in which 99 exemptions were claimed and a document that falsely declared he had no tax liability in the prior year and anticipated none in the year in issue. ***United States v. Arlt***, 567 F.2d 1295, 1298 (5th Cir.), *cert. denied*, 436 U.S. 911 (1978); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

2. The filing of protest returns and notice by the IRS that the protest returns were invalid. ***Grumka***, 728 F.2d at 797.

3. Both the failure to file a return and the failure to pay taxes show a general motive to avoid taxes, which makes it more likely that the defendant willfully filed fraudulent withholding exemption claims. ***United States v. McDonough***, 603 F.2d 19, 23 (7th Cir. 1979).

4. The large number of exemptions claimed. ***McDonough***, 603 F.2d at 24.

5. Evidence of prior tax paying history and of attempts by the defendant's employer and the Internal Revenue Service to explain legal requirements to the defendant is sufficient to sustain the jury's finding that the defendant was aware of his legal obligations and intentionally chose not to comply. ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986); ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978).

6. Defendants, husband and wife, filed Forms W-4 for prior years claiming five withholding allowances; the husband attended a tax protest seminar and three days later both husband and wife changed their withholding certificates to claim a total of 28 withholding allowances, gave "vague answers" to their employers when questioned about the

"sudden increase," and made no claim at trial that they expected to have 28 allowances. ***United States v. Anderson***, 577 F.2d 258, 260, 262 (5th Cir. 1978).

7. No error to admit in evidence a copy of a civil suit filed against the IRS challenging the constitutionality of the income tax laws. "Evidence of a person's philosophy, motivation, and activities as a tax protester is relevant and material to the issue of intent." ***United States v. Reed***, 670 F.2d 622, 623 (5th Cir.), *cert. denied*, 457 U.S. 1125 (1982).

8. Defendant's filing of "Affidavits of Revocation" stating that she was not required to file returns or pay taxes, and letters to IRS stating that wages are not income are evidence of willfulness. ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1987).

11.07 *VENUE*

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed . . . ." *See* Fed. R. Crim. P. R. 18. *See* the discussion of venue in Section 6.00, *supra*.

If a statute does not indicate where Congress considers the place of committing a crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7205 prosecutions, venue is proper in the judicial district in which the false Form W-4 is submitted to the employer. Note that where a defendant is charged with evasion under section 7201 and the filing of a false or fraudulent Form W-4 is an affirmative act of evasion, venue is proper where a false withholding statement is prepared and signed, where it is received and filed, or where an attempt to evade otherwise occurred. *See* ***United States v. Felak***, 831 F.2d 794, 799 (8th Cir. 1987).

11.08 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7205 offenses is three years from the time the false or fraudulent Form W-4 is filed. 26 U.S.C. § 6531. The three-year limitations period can pose difficulties in combining a section 7205 charge with other tax charges which have a six-year statute of limitations (*e.g.*, 26 U.S.C. §§ 7201, 7203). If charges are brought only under these other sections,

because the statute of limitations has expired on charging a false Form W-4, the false form can be introduced to show the defendant's willfulness in the section 7203 or 7201 prosecution. *See* ***United States v. McDonough***, 603 F.2d 19, 23 (7th Cir. 1979) (admissibility of evidence of a general motive to avoid taxes).