

## INTERNAL REVENUE SERVICE

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MEMORANDUM FOR DISTRICT COUNSEL

FROM: Barry J. Finkelstein  
Assistant Chief Counsel (Criminal Tax)

SUBJECT: Resubmission of Search Warrant Request  
for the

This responds to your memorandum dated April 19, 2000 in which you resubmitted the search warrant request in the above referenced case. By memorandum dated \_\_\_\_\_, our office declined to authorize the referral of the search warrant to the Tax Division, Department of Justice, citing a lack of probable cause to believe the items sought to be seized were located on the premises to be searched or were likely to contain evidence of the crimes alleged to have been committed. Upon review of the most recent request together with the undercover transcripts, we are now of the opinion the case suffers from a lack of probable cause with respect to whether the target has committed a crime. Specifically, willfulness of the target is questionable given the exculpatory statements he made during conversations with the undercover agent and the lack of equal or greater inculpatory statements.

### DISCUSSION

By way of background, this case was presented to the Undercover Review Committee on \_\_\_\_\_, as case number \_\_\_\_\_. The issue of willfulness was raised during the undercover committee meeting. The minutes of the meeting clearly reflect Martin Klotz of the Criminal Tax Division pointed out the investigation needs to be careful of a Cheek<sup>1</sup> defense. Michael Harrison, Chief, Special Investigative Techniques, added "they need to get incriminating statements." We feel these concerns have not been adequately addressed in the investigation or the affidavit.

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<sup>1</sup> Cheek v. United States, 498 U.S.192 (1991).

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Our concern focuses on possible challenge to the warrant based on a viable Cheek defense. The Fourth Amendment protects an individual's reasonable expectation of privacy by requiring a finding of probable cause for the issuance of a valid search warrant. Probable cause has been defined as "facts and circumstances . . . such as to warrant a man of prudence and caution in believing that the offense has been {or is being} committed" and that seizable property can be found at the place or on the person to be searched. Brinegar v. United States, 338 U.S. 160, 175 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925). The issue in this case that arises is whether a crime has been committed. In order for there to be a crime under the criminal tax statutes, there must be a showing of willfulness. "Willfulness" is "a voluntary, intentional violation of a known legal duty." Cheek v. United States, 498 U.S. 192, 200 (1991). Accordingly, under Cheek, the government must be able to show that intentionally advised to violate the law.

This element is brought into question by many of the statements to the undercover agent. For instance, advises that the on the undercover agent's . [ ]. advises that

[ ]. insisted that when the undercover agent . [ ]. states the recent changes to the law " [ ]. advises the undercover agent he has

. According to , [ ]. Such statements raise a willfulness issue in this case on behalf of .

Another area of concern is the affidavit as currently drafted focuses exclusively on the inculpatory evidence presented in the case. While we do not dispute advises they always maintain control in the structures he puts together, we believe the affidavit should address the exculpatory statements made by to the undercover agents.<sup>2</sup> Such exculpatory statements set the stage for a Cheek defense. In order to overcome this possible defense, the affidavit must neutralize the exculpatory statements with evidence that clearly demonstrates willfulness. The scope of the warrant also needs to be limited. The affidavit currently identifies

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<sup>2</sup> In Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988), the Fifth Circuit held "[police] may not disregard facts tending to dissipate probable cause."

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whose reported income dropped substantially.<sup>3</sup> It must be demonstrated that these used the same scheme as the scheme explained and sold to the undercover agent. This scheme focused on

You must be able to show which of these utilized a similar scheme to reduce their .

Based on these concerns, we are returning the search warrant request to you without authorizing its referral to the Department of Justice. Should further assistance be required, please feel free to contact Martin Klotz or Martin Needle of the Criminal Tax Division on (202) 622-4470.

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<sup>3</sup> The affidavit indicates were identified through invoices turned over to the Revenue Agent by . Based on this list, the individual federal income tax returns were examined to determine if a pattern of evasion existed. Of this group, showed some pattern of reducing income from to (two could not be located on the IRS computer system) and the remaining continued to file consistent, high income returns. Accordingly, your permeated with fraud argument was withdrawn.