



1990

**Federal Income Taxation—Willfulness Need Be Only Subjectively Reasonable—Does the Government Now Face an Impossible Burden of Proof? *Cheek v. United States*, 111 S. Ct. 604 (1991).**

Janet Hanna

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the **Tax Law Commons**

---

**Recommended Citation**

Janet Hanna, *Federal Income Taxation—Willfulness Need Be Only Subjectively Reasonable—Does the Government Now Face an Impossible Burden of Proof? *Cheek v. United States*, 111 S. Ct. 604 (1991).*, 13 U. ARK. LITTLE ROCK L. REV. 707 (1991).

Available at: <https://lawrepository.ualr.edu/lawreview/vol13/iss4/7>

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

FEDERAL INCOME TAXATION—WILLFULNESS NEED BE ONLY SUBJECTIVELY REASONABLE—DOES THE GOVERNMENT NOW FACE AN IMPOSSIBLE BURDEN OF PROOF? *Cheek v. United States*, 111 S. Ct. 604 (1991).

In 1987<sup>1</sup> John L. Cheek was indicted on three counts of attempted tax evasion<sup>2</sup> and six counts of willful failure to file a federal income tax return.<sup>3</sup> Cheek failed to file federal income tax returns after 1979,<sup>4</sup> and by mid-1980 he claimed as many as sixty withholding allowances.<sup>5</sup> Between 1981 and 1984, Cheek also claimed exemption from federal income tax on his W-4 forms.<sup>6</sup>

---

1. *United States v. Cheek*, 882 F.2d 1263, 1265 (7th Cir. 1989).

2. 26 U.S.C. § 7201 (1989) provides:

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 \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

3. 26 U.S.C. § 7203 (Supp. 1991) provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, 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 \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 60501, the first sentence of this section shall be applied by substituting "5 years" for "1 year."

4. *United States v. Cheek*, 111 S. Ct. 604, 606 (1991).

5. *Id.*

6. *Id.* Cheek's activities went further. In 1983 he unsuccessfully attempted to obtain a refund for the taxes withheld by his employer during 1982. *Id.* While unsuccessful in obtaining a refund, Cheek was charged with knowingly presenting a false and fraudulent claim to the United States in violation of 18 U.S.C. § 287. *Id.* at 607 n.2. In addition, Cheek challenged various income tax provisions in civil courts and appeared at two trials of criminal tax offenders between 1982 and 1986. *Id.* at 607. In the four civil cases, the courts informed Cheek that his arguments were frivolous and historically rejected by the courts. *Id.* Cheek argued that he was not a taxpayer within the meaning of the tax laws, that wages are not income, that income taxes are not authorized by the sixteenth amendment, and that the sixteenth amendment cannot be enforced. *Id.* A court of appeals labelled as frivolous Cheek's 1985 lawsuit in which he sought a refund for taxes withheld by his employer in 1983 and 1984. *Id.* at 607 n.3. The court reduced the district court's

Cheek made two arguments at trial, claiming first a sincere belief that enforcement of the tax laws is unconstitutional and second, that his actions between 1980 and 1986 were legal.<sup>7</sup> Specifically, in his second argument, Cheek claimed that he did not act with the statutory willfulness required by tax law.<sup>8</sup> After a lengthy deliberation, the jury convicted Cheek on all counts.<sup>9</sup> On appeal, Cheek argued that the dis-

---

Rule 11 sanction against Cheek's attorney from \$10,000 to \$5,000 but imposed an extra \$1,500 for bringing a frivolous appeal. *Id.*

Evidence was presented at Cheek's trial that in 1980 or 1981 Cheek received word from an attorney that courts consistently labelled as frivolous any claim that wages are not income. *Id.* at 607. The attorney also made clear to Cheek that the fifth amendment right against self incrimination does not protect a taxpayer against failing to file a tax return. *Id.* at 607 n.4. Cheek's attorney informed him that to successfully challenge the tax system, he should sue for a refund after a withholding is made or risk criminal prosecution. *Id.* See *Briggs v. United States*, 214 F.2d 699 (4th Cir.), cert. denied, 348 U.S. 864 (1954) (defendant's contention that his income was not taxable held insufficient to support a defense for failing to report it); *United States v. Mundt*, 666 F.2d 1029 (6th Cir. 1981) (court found defendant willfully failed to file by submitting protest returns with no information but with notations and attachments claiming defendant's constitutional rights would be violated if he were forced to disclose the requested information).

7. *Cheek*, 111 S. Ct. at 607. Cheek's belief in the unconstitutionality of the tax laws ultimately failed. *Id.* at 613. However, Cheek's argument that he sincerely believed in the legality of his actions between 1980 and 1986 prevailed with the Court. *Id.* at 611. In support of both contentions, Cheek explained that his beliefs regarding the constitutionality of the tax laws arose from indoctrination he obtained from attending antitax seminars since 1978, as well as from his own studied conclusions. *Id.* at 607. The district court described Cheek's beliefs to the jury. Included in this description were Cheek's interpretations of the Constitution, court opinions, and the common law. *Id.* at 608 n.5. The court informed the jury that Cheek testified that based on these beliefs he concluded he was not required to file income tax returns or pay taxes. *Id.* Moreover, he believed he properly claimed exempt status on his W-4 forms and that he could validly claim refunds for all withholdings of his income. *Id.* See D. MCGOWAN, D. O'DAY & K. NORTH, CIVIL AND CRIMINAL TAX FRAUD § 16.32 at 521-22 (1986) (hereinafter MCGOWAN) (noting that even if a defendant is shown to have been aware of his legal duties in years past, intervening circumstances between those years and the year of the alleged crime may tend to show the defendant did not have knowledge of the legal duties which he is charged with knowingly violating).

8. *Cheek*, 111 S. Ct. at 607.

9. *Id.* at 608. The jury received instructions that to "prove 'willfulness' the Government must prove the voluntary and intentional violation of a known legal duty." *Id.* at 607. The trial court instructed that such a burden cannot be proved by showing mistake, ignorance, or negligence. *Id.* at 607-08. Further instructions stated that willfulness is negated by an objectively reasonable good faith misunderstanding of the law but not by mere disagreement with the law. *Id.* at 608. Additionally, the jury was instructed that the defendant was to be found not guilty if the jury believed Cheek honestly and reasonably thought that he did not have to pay income taxes or file tax returns. *Id.*

After hours of deliberation, the jury requested further clarification and the judge provided the following supplemental instruction: "[A] person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's collection system and disagreement with the government's tax collection policies does not constitute a good faith misunderstanding of the law." *Id.* Still unable to reach a verdict, the jury received a final instruction that read: "[A]n honest but unreasonable belief is not a defense and

strict court misapplied the law when it instructed the jury that only an objectively reasonable misunderstanding of the law can negate the tax statute's willfulness requirement.<sup>10</sup> The United States Court of Appeals for the Seventh Circuit affirmed the district court.<sup>11</sup>

The United States Supreme Court granted certiorari<sup>12</sup> because the objectively reasonable standard for the negation of statutory willfulness applied by the Seventh Circuit<sup>13</sup> conflicted with the subjective standard applied by several other circuits.<sup>14</sup> The Court vacated the judgment of the Seventh Circuit and remanded the case for further proceedings.<sup>15</sup> The Court held that in order to negate statutory willfulness a good faith misunderstanding of the tax laws or a good faith belief that one is acting lawfully does not have to be objectively reasonable.<sup>16</sup> *Cheek v. United States*, 111 S. Ct. 604 (1991).

The old maxim that ignorance or mistake of the law is not a defense to criminal prosecution terrorizes citizens into informing themselves of the law.<sup>17</sup> Common-law commentators presumed everyone

---

does not negate willfulness [and] advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." *Id.*

10. *Id.* at 608.

11. *Id.*

12. *Cheek v. United States*, 110 S. Ct. 1108 (1990).

13. *See United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987) (requiring that actual ignorance of the laws be objectively reasonable); *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (requiring that a good faith misunderstanding of the tax laws be objectively reasonable).

14. *Cheek*, 111 S. Ct. at 609. *See United States v. Whiteside*, 810 F.2d 1306 (5th Cir. 1987); *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985); *United States v. Phillips*, 775 F.2d 262 (10th Cir. 1985).

15. *Cheek*, 111 S. Ct. at 613. The Court stated that Cheek's views regarding the constitutionality of the tax statutes are "irrelevant to the issue of willfulness [and should] not be heard by the jury. . . ." *Id.* However, evidence of Cheek's misunderstanding of the tax laws should be presented to the jury. *Id.* at 611.

16. *Id.* at 611.

17. *See Yochum, Ignorance of the Law Is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221 (1989). This maxim has long been a part of the American legal system. *See, e.g., Liparota v. United States*, 471 U.S. 419, 441 (1985) (White, J., dissenting); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910); *Reynolds v. United States*, 98 U.S. 145, 167 (1878); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting); O. HOLMES, *THE COMMON LAW* 47-48 (1881). *Compare Yochum, supra*, at 226 (suggests that ignorance or mistake should no longer be valid defenses for tax crimes since "even aliens must know April 15 is our day of reckoning").

knew the law since supposedly it is "definite and knowable."<sup>18</sup> This presumption was applied repeatedly in interpreting criminal statutes because the object of criminal laws is to force citizens to conform their conduct to uniform standards.<sup>19</sup>

Despite the traditional application of the ignorance-of-the-law-is-no-excuse maxim, Congress lessened the maxim's force in regard to federal income tax crimes.<sup>20</sup> Congress did so by including specific intent to violate the law as an element of many federal tax crimes.<sup>21</sup> Accordingly, ignorance of the law became a defense, and not merely an affirmative defense, to criminal tax prosecutions.<sup>22</sup> Currently, "willfulness"<sup>23</sup> is a necessary element of each federal criminal tax offense,<sup>24</sup> and for nearly sixty years courts have struggled to properly define the term as used in the tax statutes.<sup>25</sup>

In 1933 the Supreme Court in *United States v. Murdock*<sup>26</sup> held that willfulness, as used in the federal income tax statutes, requires proof of an intentional, knowing, or voluntary act as well as proof of an

---

18. *Cheek*, 111 S. Ct. at 609.

19. See, e.g., *Hamling v. United States*, 418 U.S. 87, 119-24 (1974); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); *Yochum*, *supra* note 17, at 221.

20. *Yochum*, *supra* note 17, at 223. See *United States v. Murdock*, 290 U.S. 389 (1933) (the maxim was weakened under the federal income tax laws due to the complexity of the area).

21. *Cheek*, 111 S. Ct. at 609. Willfulness is included as an element of every criminal tax offense. E.g., 26 U.S.C. §§ 7201-07 (1989 & Supp. 1991). In 1919 Congress first included willfulness in the tax statutes. Note, *Criminal Liability for Willful Evasion of an Uncertain Tax*, 81 COLUM. L. REV. 1348, 1355 n.47 (1981). Congress included the specific intent element, commonly referred to as willfulness, to avoid criminally punishing a person who in good faith misunderstands the extent of his tax liability, his duty to file a return, or his duty to keep adequate records. *United States v. Murdock*, 290 U.S. 389, 396 (1933). In *Spies v. United States*, 317 U.S. 492 (1943), the Court noted that by including willfulness as an element, Congress meant to separate the intentional tax violators from those who mean well but become confused. *Id.* at 496.

22. *D. McGOWAN*, *supra* note 7, at 502. Specific intent crimes, such as those involving willfulness, allow ignorance of the law as a defense to prosecution despite the old maxim that ignorance of the law is no excuse. *Id.* See *infra* notes 79-81 and accompanying text.

23. Judge Learned Hand said of the word "willful" that "[i]t's a very dreadful word. . . . It's an awful word. It's one of the most troublesome words in a statute that I know. If I were to have the index purged, 'willful' would lead all the rest in spite of its being at the end of the alphabet." MODEL PENAL CODE § 2.02(10) comment n.47 (1985).

24. 26 U.S.C. §§ 7201-07 (1989 & Supp. 1991).

25. *Cheek*, 111 S. Ct. at 609. Since 1933 the Supreme Court and lower federal courts have struggled to conclusively define willfulness in the context of federal income tax statutes. See, e.g., *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346 (1973); *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Murdock*, 290 U.S. 389 (1933).

26. 290 U.S. 389 (1933).

evil motive, evil intent, or bad faith.<sup>27</sup> The Court based this requirement on the notion that "willfully" is used in criminal statutes to denote an act committed "with a bad purpose . . . , without justifiable excuse . . . , stubbornly, obstinately, perversely . . . , without ground for believing it is lawful . . . , or by careless disregard whether or not one has the right so to act. . . ."<sup>28</sup>

The Court in *Murdock* found that the trial court erred in refusing to instruct the jury: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful."<sup>29</sup> By denying the defendant the requested instruction, the trial court effectively destroyed the defendant's right to submit to the jury his absence of evil motive.<sup>30</sup> The Court, therefore, affirmed its earlier reversal of the defendant's conviction for willfully failing to supply information on his tax return.<sup>31</sup>

Ten years later in *Spies v. United States*,<sup>32</sup> the Court reaffirmed *Murdock* and held that willfulness requires a showing of an evil motive.<sup>33</sup> The Court adhered to the evil motive requirement because American courts traditionally have not favored imprisonment for non-payment of debt.<sup>34</sup> Also, the Court concluded that the felony sections of the tax code required a higher showing of willfulness than did the misdemeanor sections, particularly since the felony sections were created by Congress to enforce the tax system.<sup>35</sup>

---

27. *Id.*

28. *Id.* at 394-95 (citations omitted). This string of definitions has become known as the "Murdock List" and, according to one commentator, is the basis for two divergent lines of authority defining willfulness. Orlando, "Willfully" Under Section 7203 of The Internal Revenue Code of 1954, 74 DICK. L. REV. 563, 576 (1969). See also *infra* notes 37 and 38.

29. *Murdock*, 290 U.S. at 393.

30. *Id.* at 396. The Court noted that the defendant's refusal to answer the questions on his tax return might have been intentional and lacking in legal justification. *Id.* at 397. However, the Court added that a jury might still find that the defendant was not acting in bad faith or with evil intent. *Id.* at 398.

31. *Id.* at 398. The defendant contended that he feared prosecution under state law if he revealed certain information on his tax return. *Id.* at 393.

32. 317 U.S. 492 (1943).

33. *Id.* at 498.

34. *Id.*

35. *Id.* at 497. The Court based this distinction on the grounds that the felony sections required a showing of affirmative action whereas the misdemeanor sections required only a showing of an omission. *Id.* at 499. See also Orlando, *supra* note 28, at 571. Congress must have meant that felonies require a willful "commission in addition to the willful omissions" that consti-

After *Murdock* and *Spies*, interpreting the exact meaning of statutory willfulness presented problems.<sup>36</sup> Courts faced defendants eager to suggest that only a finding of "bad purpose" could bring their actions to the requisite level of willfulness required under the criminal tax statutes.<sup>37</sup> The government argued that a showing of one alternative definition of willfulness contained in the *Murdock* List, such as careless disregard, would suffice to support a showing of statutory willfulness.<sup>38</sup>

Confusion and a split of authority resulted over the interpretation of *Spies*.<sup>39</sup> Courts did not uniformly apply the misdemeanor-felony distinction created by that decision.<sup>40</sup> The standard adopted by each court greatly influenced the defendant's likelihood of conviction or acquittal.<sup>41</sup> The *Spies* and *Murdock* decisions were open to interpretation and courts could arrive at any equitable decision they sought to reach.<sup>42</sup>

---

tute misdemeanors. Orlando, *supra* note 28, at 571. This distinction was later abandoned. *United States v. Bishop*, 412 U.S. 346 (1973).

36. Orlando, *supra* note 28, at 576.

37. Orlando, *supra* note 28, at 576. This was the strictest interpretation of *Murdock* and greatly benefited the defendant since a jury instruction describing willfulness as anything other than an act done with bad purpose was enough to constitute reversible error. For example, if the court defined willfulness as an act done "without ground for believing it is lawful," the defendant was entitled to a reversal of his conviction. This strict line of authority restrained the courts from using any definition in the *Murdock* List other than the one describing willfulness as an act done with a bad purpose. The premise of this construction was that any other charges to a jury "dilute[d] the stringent standards for bad purpose and evil motive" which the Supreme Court emphasized as necessary to show willfulness in *Murdock*. Orlando, *supra* note 28, at 576. *See United States v. Vitiello*, 363 F.2d 240 (3d Cir. 1966).

38. Orlando, *supra* note 28, at 577. This was the weaker approach to the *Murdock* List which supported dilution of the requisite showing of evil intent or bad purpose. Orlando, *supra* note 28, at 577. *See also Lumetta v. United States*, 362 F.2d 644 (8th Cir. 1966); *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963); *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958), 278 F.2d 234 (9th Cir. 1958), *cert. denied*, 364 U.S. 832 (1960).

39. Orlando, *supra* note 28, at 577. *See, e.g., Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958) (lesser meaning for willfulness is required under the misdemeanor section than under the felony section); *United States v. Vitiello*, 363 F.2d 240 (3d Cir. 1966) (same evil motive is required for both the felony and misdemeanor sections).

40. Orlando, *supra* note 28, at 577. If the lesser showing of willfulness standard was applied, defendants charged with misdemeanors were more likely to be convicted since the government did not carry the burden of proving bad purpose or evil motive. Orlando, *supra* note 28, at 577. *See, e.g., Abdul v. United States*, 254 F.2d 292, 294 (9th Cir. 1958). If the stronger showing of willfulness was required, it became more difficult for a defendant to be convicted of a tax misdemeanor because the government would have to prove bad purpose or evil motive. Orlando, *supra* note 28, at 577. *See Vitiello*, 363 F.2d 240 (3d Cir. 1966); *Haner v. United States*, 315 F.2d 792 (5th Cir. 1963).

41. *See supra* note 40 and accompanying text.

42. Orlando, *supra* note 28, at 589 n.122.

In *United States v. Bishop*<sup>43</sup> the Court finally stated that the same willfulness standard must be applied to both misdemeanor and felony tax crimes.<sup>44</sup> Willfulness at this point, connoted a voluntary, intentional violation of a known legal duty and involved a bad purpose or evil motive.<sup>45</sup> *Bishop* rendered useless the alternative meanings of willfulness outlined in *Murdock*.<sup>46</sup> After *Bishop* all that remained of the *Murdock* List was the requirement of "bad purpose or evil motive" for willfulness.<sup>47</sup>

Unfortunately, much confusion resulted from the Court's statement in *Bishop* that it would continue to use this definition with specific reference to the *Murdock* standard of "bad purpose or evil motive"<sup>48</sup> until Congress provided otherwise.<sup>49</sup> Although *Bishop* clearly defined willfulness for misdemeanors and felonies, it failed to state whether proof of motive was necessary to establish willfulness.<sup>50</sup>

In *Bishop* and *Murdock* the Court failed to indicate whether evil motive or bad purpose connotes an immediate intent or an ultimate goal.<sup>51</sup> This distinction is relevant where a taxpayer does not pay taxes based on a disagreement with the way in which the government spends tax revenue.<sup>52</sup> Such action is clearly a flagrant attempt to withhold

---

43. 412 U.S. 346 (1973).

44. *Id.* at 361.

45. *Id.* at 360.

46. See 15 J. MERTENS, LAW OF FEDERAL INCOME TAX § 55A.19, at 76-77 (Dec. 1990) [hereinafter MERTENS]. Prior to *Bishop*, the *Murdock* List was still useful to distinguish the standard of willfulness in felony and misdemeanor cases. *Id.* For example, willfully under a misdemeanor statute meant to act with a bad purpose, without basis for believing one's action is lawful, without reasonable cause, with caprice, or with careless disregard. *Id.* at 76 (citing *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958)). Compare *supra* note 28 and accompanying text. However, in a felony statute willful meant to act with intent, knowledge, and purpose as it now means in all tax crimes. MERTENS, *supra*, at 76.

47. *Bishop*, 412 U.S. at 361.

48. *Id.* *Murdock* rejected the contention that willfulness could be established by an intentional violation of a tax misdemeanor statute without a showing of evil motive. Note, *Meaning of Willfulness for Tax Felonies and Misdemeanors*, 35 OHIO ST. L.J. 229, 233 (1974).

49. *Bishop*, 412 U.S. at 361.

50. MCGOWAN, *supra* note 7, § 16.04 at 496. Although it appeared the Court had conclusively defined statutory willfulness, the use of ambiguous formulations, such as evil intent and evil motive, made the definition less concise. MCGOWAN, *supra* note 7, at 495-96. The confusion over bad purpose, evil motive, and evil intent is due mainly to the fact that in *Bishop* the Court followed the *Murdock* definition of these terms without recognizing that *Murdock* itself created the ambiguous interpretation of willfulness. Note, *supra* note 48, at 238.

51. Note, *supra* note 48, at 234. Interestingly, in *Bishop* the Court defined bad purpose or evil motive only in reference to *Murdock*. Note, *supra* note 48, at 233.

52. Note, *supra* note 48, at 234.



from the government money which the taxpayer knows he owes.<sup>53</sup> Thus, the taxpayer intends to violate a legal duty although his ultimate goal or motive is not evil.<sup>54</sup> By defining willfulness as a "voluntary, intentional violation of a known legal duty" coupled with a showing of "bad purpose or evil motive," the Court in *Bishop* made the standard virtually impossible to prove.<sup>55</sup>

Despite all the confusion over the *Bishop* formulation of willfulness, it was clear that a minimum level of scienter equivalent to knowledge was required to establish willfulness.<sup>56</sup> Carelessness and gross negligence no longer sufficed to support a finding of willfulness.<sup>57</sup> The *Bishop* requirement of bad purpose or evil motive presented another problem.<sup>58</sup> It became necessary for courts to develop standards to separate good purposes from evil motives.<sup>59</sup>

In 1976 the Court in *United States v. Pomponio*<sup>60</sup> settled much of the confusion created by *Bishop*. The Court held that proof of motive<sup>61</sup> is not required to prove willfulness.<sup>62</sup> The Court concluded that willfulness "simply means a voluntary, intentional violation of a known legal duty."<sup>63</sup> The Court stated that *Bishop* did not hold that willfulness re-

---

53. Note, *supra* note 48, at 234.

54. Note, *supra* note 48, at 234.

55. *Bishop*, 412 U.S. at 360-61. See Note, *supra* note 48, at 234 (A taxpayer failing to pay taxes based on an objection to the government's use of the money would not be convicted because the government would be unable to establish the evil motive required in conjunction with the intent to violate a known legal duty).

It has been argued that the evil motive requirement applied to the tax statutes was only surplusage. Note, *supra* note 48, at 234. The evil motive requirement provided no additional protection to good faith taxpayers, yet it "hamstrung" the government by forcing it to establish the defendant's motives as an element of the tax crime. Note, *supra* note 48, at 234. Thus, the Court's desire to protect from conviction honest taxpayers who are easily confused was not furthered by this requirement of bad faith or evil motive. Note, *supra* note 48, at 234. After *Spies*, the definition of willfulness did nothing but "encourage ignorance and charlatry." Yochum, *supra* note 17, at 227.

56. Note, *supra* note 48, at 235.

57. Note, *supra* note 48, at 235.

58. Note, *supra* note 48, at 235.

59. Note, *supra* note 48, at 235. Courts had to decide whether failing to pay taxes in order to buy medicine for a sick child was a good purpose and whether failing to pay taxes due to a bad season at the horse races was a bad purpose. Note, *supra* note 48, at 235.

60. 429 U.S. 10 (1976).

61. Motive in this context means establishing the taxpayer's bad faith, evil intent, evil motive or lack of justification for his actions. McGOWAN, *supra* note 7, § 16.04 at 495.

62. *Pomponio*, 429 U.S. at 11-12.

63. *Id.* at 12. See *United States v. Pohlman*, 522 F.2d 974 (8th Cir. 1975) (en banc), cert. denied, 423 U.S. 1049 (1976); *United States v. Greenlee*, 517 F.2d 899 (3d Cir.), cert. denied, 423 U.S. 985 (1975); *United States v. McCorkle*, 511 F.2d 482 (7th Cir.) (en banc), cert. denied,

quires proof of bad purpose or evil motive in addition to a violation of a known legal duty.<sup>64</sup> Thus, in *Pomponio* the Court put to rest the defense's argument that proof of knowledge plus some other evil motive was required to prove willfulness.<sup>65</sup> The Court affirmed the holding in *Bishop* that willfully means the same thing in both the felony and misdemeanor tax statutes.<sup>66</sup>

Despite the clear definition of statutory willfulness set forth in *Pomponio*, courts occasionally deviated from this formulation.<sup>67</sup> For example, in *United States v. Loney*<sup>68</sup> the Ninth Circuit Court of Appeals improperly characterized willfulness as acting with the specific intent to do something forbidden by the law.<sup>69</sup> Such imprecise statements blurred the clear definition of willfulness set forth in *Pomponio*.<sup>70</sup> The "[i]ntent to do 'something wrong'" is not equivalent to the Court's construction of willfulness as a voluntary, intentional violation of a known legal duty.<sup>71</sup> By requiring proof that the defendant did something illegal, such instructions fail to take notice of the situation where a defendant intentionally commits an illegal act without knowing the act is illegal.<sup>72</sup>

There are two defenses to statutory willfulness. First, a defendant can plead ignorance of the tax laws.<sup>73</sup> The ignorance defense arose, at

---

423 U.S. 826 (1975); *United States v. Hawk*, 497 F.2d 365 (9th Cir.), *cert. denied*, 419 U.S. 838 (1974).

64. 429 U.S. at 12. The Court pointed to the following language from *Bishop* to support its contention that it never required a showing of bad faith or evil motive to establish willfulness:

The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as 'bad faith or evil intent,' . . . or 'evil motive and want of justification in view of all the financial circumstances of the taxpayer,' . . . or knowledge that the taxpayer 'should have reported more income than he did. . . .'

412 U.S. at 360 (citations omitted). In hindsight, the Court concluded that its references in the above language to other formulations of willfulness did not modify the original formulation of a "voluntary, intentional violation of a known legal duty." *Pomponio*, 429 U.S. at 12.

65. Yochum, *supra* note 17, at 225 n.19. The Court's "sheepish" opinion finally laid this controversy to rest.

66. *Pomponio*, 429 U.S. at 12.

67. MCGOWAN, *supra* note 7, § 16.06 at 497.

68. 719 F.2d 1435 (9th Cir. 1983).

69. *Id.* at 1436.

70. MCGOWAN, *supra* note 7, § 16.06 at 499.

71. MCGOWAN, *supra* note 7, § 16.06 at 499.

72. MCGOWAN, *supra* note 7, § 16.06 at 499. The best way to avoid jury confusion as to the meaning of willfulness is to follow the Supreme Court's language precisely and instruct the jury that willfulness requires that the defendant knew of his legal duty and that he intentionally violated that known legal duty. MCGOWAN, *supra* note 7, § 16.06 at 500.

73. *United States v. Murdock*, 290 U.S. 389, 396 (1933); Note, *supra* note 21, at 1356. It

least in part, from the inclusion of the word "willfully" in the criminal tax statutes.<sup>74</sup> This defense seldom saves the defendant from conviction because juries rarely believe it.<sup>75</sup> Presently, one cannot act willfully to violate a tax statute if one is ignorant of his duty to follow the statute.<sup>76</sup> Secondly, a defendant can raise as a defense a misunderstanding<sup>77</sup> of the tax law or good faith belief that he violated no provision of the tax law.<sup>78</sup>

In criminal tax cases, defenses of ignorance or misunderstanding of a legal duty are distinguished from defenses that admit violation of a statute.<sup>79</sup> For example, a taxpayer might admit the elements of an offense but gain an acquittal because of excuse or justification.<sup>80</sup> On the other hand, the ignorance or misunderstanding defense negates the willfulness element of the government's case.<sup>81</sup>

The Seventh Circuit confused the misunderstanding defense by labelling a sincere misunderstanding of a legal duty the "good faith defense."<sup>82</sup> By designating the defense as such, the Seventh Circuit

---

has been argued that ignorance should not be allowed as a defense since most people are aware of the old maxim that ignorance of the law is no excuse and still believe it to be true. Thus, only the deceitful and tricky will utilize the ignorance defense. Yochum, *supra* note 17, at 227.

74. Yochum, *supra* note 17, at 233.

75. Note, *supra* note 21, at 1357 n.60. Moreover, if the circumstances of a case reveal that the defendant's ignorance was due to purposely avoiding learning of a legal duty, the claim of ignorance will usually fail. Note, *supra* note 21, at 1357 (citing *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979)).

76. *Infra* notes 114-16 and accompanying text. *But cf.* Yochum, *supra* note 17, at 233 (A taxpayer who mistakenly concludes an item is a gift, and therefore is nontaxable, should not be prosecuted; but a taxpayer who ignorantly concludes the item is not taxable should be subject to criminal prosecution. In the first situation the taxpayer considered the law but rejected it, and in the second, the law was ignored.).

77. *Murdock*, 290 U.S. at 396. It is important to note that a good faith misunderstanding of the tax law, which is a valid defense to prosecution based on lack of statutory willfulness, is not equivalent to a good faith disagreement with the tax law. For example, if a tax protester knows that for thirty years courts have held that wages are taxable income, then the tax protester cannot argue that he did not act willfully in refusing to pay taxes on this income. *McGowan*, *supra* note 7, § 16.06 at 498. This follows from the Supreme Court's definition of willfulness as a "voluntary, intentional violation of a known legal duty." *Pomponio*, 429 U.S. at 12. Also, a defendant cannot raise as a valid defense the fact that he objects to the way in which income tax revenue is spent by the federal government. *Mertens*, *supra* note 46, § 55.A19 at 77.

78. See *supra* notes 73-77 and accompanying text. Related to the misunderstanding and good faith defenses, a court will not convict a taxpayer for violating a provision of the tax code that was novel, vague, or unsettled at the time of the taxpayer's alleged violation. *E.g.*, *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979).

79. *McGowan*, *supra* note 7, § 16.11 at 505.

80. *McGowan*, *supra* note 7, § 16.11 at 505. An example of this is the insanity defense.

81. *McGowan*, *supra* note 7, § 16.11 at 505.

82. See *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

phrased the issue as pertaining to good faith rather than to willfulness.<sup>83</sup> By shifting focus from the element of willfulness to the good faith defense, the Seventh Circuit created a line of cases holding that a good faith misunderstanding of the law must be objectively reasonable in order to negate willfulness.<sup>84</sup>

Two standards emerged for determining whether a defendant's defense to a criminal tax prosecution negates statutory willfulness.<sup>85</sup> One standard maintains that a good faith misunderstanding or ignorance of the tax laws must be *objectively* reasonable to negate willfulness.<sup>86</sup> The other standard maintains that a misunderstanding or ignorance of the tax laws must be only *subjectively* reasonable to negate statutory willfulness.<sup>87</sup>

Several circuits followed the subjective standard for negating willfulness.<sup>88</sup> In fact, the courts applying this standard were in accord with the "overwhelming weight of authority."<sup>89</sup> According to this line of reasoning, a defendant's belief regarding the legality of his actions is irrelevant to the issue of willfulness.<sup>90</sup> This view recognized that the

---

83. MCGOWAN, *supra* note 7, § 16.11 at 505.

84. *See infra* note 86.

85. *See* MCGOWAN, *supra* note 7, § 16.11 at 505-06. *See also* United States v. Moore, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (good faith misunderstanding of the tax laws must be objectively reasonable to negate willfulness); United States v. Whiteside, 810 F.2d 1306 (5th Cir. 1987) (good faith misunderstanding or ignorance of the tax laws need not be objectively reasonable to negate willfulness).

86. *See, e.g.*, United States v. Moore, 627 F.2d 830 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981); United States v. Bressler, 772 F.2d 287 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); United States v. Witvoet, 767 F.2d 338 (7th Cir. 1985); United States v. Buckner, 830 F.2d 102 (7th Cir. 1987). *But see* United States v. Dack, 747 F.2d 1172 (7th Cir. 1984) (defendant could be acquitted if he could show a bona fide belief, even if it was objectively unreasonable).

87. *See, e.g.*, United States v. Whiteside, 810 F.2d 1306 (5th Cir. 1987); United States v. Phillips, 775 F.2d 262 (10th Cir. 1985); United States v. Aitken, 755 F.2d 188 (1st Cir. 1985); Battjes v. United States, 172 F.2d 1 (6th Cir. 1949). The term "subjectively reasonable" in this context means that the taxpayer acted in good faith or with the actual belief that his actions were correct.

88. *See supra* note 87.

89. MCGOWAN, *supra* note 7, § 16.11 at 505. The better view was that a genuine, subjective misunderstanding of the law negated willfulness regardless of the reasonableness of the misunderstanding. MCGOWAN, *supra* note 7, § 16.11 at 506. This idea was based on the notion that a jury will disregard a frivolous argument. *See* Yochum, *supra* 17, at 229.

90. Note, *supra* note 21, at 1356; MCGOWAN, *supra* note 7, § 16.11 at 506. At most, the objective reasonableness of a defendant's beliefs might be probative, but not dispositive. For example, if a low-tax-bracket taxpayer who owes no tax does not file a return because he sincerely believes he is not required to do so, then he has not acted willfully. MCGOWAN, *supra* note 7, § 16.11 at 506.

focus in criminal tax prosecutions should be on whether the taxpayer's belief was actual and not whether the belief was reasonable.<sup>91</sup> In areas outside taxation, courts have tended to recognize the need to protect a person who has a sincere but unreasonable belief from conviction or liability.<sup>92</sup>

The Seventh Circuit appears to be the only circuit that required a criminal prosecution defense to be objectively reasonable under the tax statutes.<sup>93</sup> The circuit's requirement of an objectively reasonable misunderstanding or ignorance of the law was inconsistent with the bulk of authority that interpreted willfulness according to the subjective standard.<sup>94</sup>

Willfulness, along with the other elements<sup>95</sup> of the criminal tax

---

91. See Yochum, *supra* note 17, at 230. In *United States v. Harrold*, 796 F.2d 1275 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987), a tax protester decided, based on his own research, that wages were not income. The court held that the tax protester could not enter his research into evidence since all that was relevant to the case was whether he held the belief and not whether his belief was reasonable. *Id.* at 1285.

Similarly, in *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), a taxpayer filed no return and filed false W-4's on the basis that he owed no taxes. The taxpayer did not believe an exchange of his time for money created income. The First Circuit vacated his conviction, holding that while the outrageousness of a belief might certainly influence a jury's decision as to whether the defendant actually held the belief, the taxpayer is innocent if the jury believes his alleged belief. *Id.* at 191-92. See Yochum, *supra* note 17, at 228.

92. See, e.g., *Commonwealth v. Carter*, 502 Pa. 433, 442, 466 A.2d 1328, 1332 (1983) (murder is reduced to manslaughter when the defendant raises the defense that her "belief, sincere though unreasonable, negates malice"); *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990) (no willful discrimination where a belief is incorrect and even unreasonable if it is sincere); see also Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1140 (1990) (suggesting an alteration in the self-defense doctrine for battered wives who shoot their husbands thinking sincerely, but unreasonably, that such an action is all they can do to protect themselves); Note, *The Sham Exception to the Noerr-Pennington Doctrine: A Commercial Speech Interpretation*, 49 BROOKLYN L. REV. 573, 574 (1983) (a lobbyist should be able to freely lobby without antitrust problems lurking in his mind so long as the lobbyist's belief that he will achieve the hoped-for legislation is sincere even if unreasonable); PROSSER & KEETON, PROSSER AND KEETON ON TORTS § 107 at 742 (5th ed. 1984) (action for deceit cannot be sustained when a speaker had an "honest belief, however unreasonable" that what he said was true and he had information to justify the representation).

93. See *supra* note 86 and accompanying text.

94. MCGOWAN, *supra* note 7, § 16.11 at 505, § 16.04 at 496.

95. For example, to prove that a taxpayer attempted to defeat or evade a tax under the felony provision of the Internal Revenue Code the government must prove the following: (1) an additional tax due and owing; (2) willfulness; and (3) an attempt to evade or defeat a tax. MCGOWAN, *supra* note 7, § 16.43 at 531. "Attempt" has been defined as the commission of some act, as distinguished from the omission of some act. *Spies v. United States*, 317 U.S. 492, 499 (1943); Northern, *Protecting the Client in Criminal Tax Investigations*, 11 WASHBURN L.J. 10, 12 (1972).

To prove violation of the misdemeanor provision for the willful failure to file a timely return,

statutes, must be proved beyond a reasonable doubt.<sup>96</sup> Usually, willfulness is the most difficult element for the government to prove in criminal tax prosecutions.<sup>97</sup> To prove willfulness, the government does not have to present direct proof of willful intent.<sup>98</sup> Rather, the government can imply willful intent from the defendant's acts.<sup>99</sup> Consequently, the government seldom prosecutes a taxpayer unless the taxpayer has a pattern of behavior from which a jury might infer willfulness.<sup>100</sup>

The government cannot successfully carry its burden of proof by the taxpayer's failure to produce evidence which contradicts the government's allegations.<sup>101</sup> A defendant is better off if he attempts to show that the government has not or cannot sustain its burden of proof.<sup>102</sup> This entails raising the defenses of ignorance or misunderstanding of the pertinent tax law.<sup>103</sup>

In *Cheek v. United States*<sup>104</sup> the Court noted that Cheek could be convicted for evasion<sup>105</sup> and failure to file<sup>106</sup> only if the government proved Cheek acted willfully.<sup>107</sup> The case focused on the appropriate interpretation of willfully as used in the statutes.<sup>108</sup> The Court concluded, based on the reasoning in *Bishop* and *Pomponio*, that the government must establish that the law imposed a duty on the defendant, that the defendant knew this duty existed, and that he voluntarily and intentionally violated that duty.<sup>109</sup>

---

the government must prove the following: (1) the defendant was a person required by law to file a return; (2) that no return was filed; and (3) that the failure to file was willful. MCGOWAN, *supra* note 7, § 7203.

96. Comment, *Administration of Criminal Tax Justice: Reading the Process*, 32 LOY. L. REV. 921, 925 (1987).

97. Northern, *supra* note 95, at 13.

98. MERTENS, *supra* note 46, § 55A.19 at 79-80 n.3.

99. MERTENS, *supra* note 46, § 55A.19 at 79-80 n.3.

100. Comment, *supra* note 96, at 926. The government follows this method most often when it must rely on circumstantial or indirect evidence to establish its burden of proof. Comment, *supra* note 96, at 926.

101. Comment, *supra* note 96, at 923.

102. Balter, *Fraud and Negligence*, 32 J. TAX'N 46, 49 (1970).

103. See *supra* notes 73-77 and accompanying text. Other methods useful for defeating the government's assertion of willfulness include developing exculpatory evidence tending to show either reliance on professional counsel or confusion due to an unsettled, or perhaps novel tax law. Comment, *supra* note 96, at 925.

104. 111 S. Ct. 604 (1991) (Justice White wrote the opinion for the majority).

105. 26 U.S.C. § 7201 (1989). See *supra* note 2.

106. 26 U.S.C. § 7203 (1991). See *supra* note 3.

107. 111 S. Ct. at 607.

108. *Id.* See *supra* notes 2 and 3.

109. 111 S. Ct. at 610.

At issue in *Cheek* was whether Cheek's belief that he was not violating a legal duty had to be objectively reasonable to prevent conviction.<sup>110</sup> Cheek claimed that he did not know his legal duties because he misunderstood the law.<sup>111</sup> Accordingly, he believed in good faith that he was not violating any law.<sup>112</sup> Thus, the Court required the government to negate Cheek's claim of misunderstanding in order to satisfy the knowledge element required for statutory willfulness.<sup>113</sup>

Ultimately, the government must prove that the defendant knew his legal duty.<sup>114</sup> The Court reasoned that a person cannot *know* a legal duty if that person is ignorant of it, misunderstands it, or believes it does not exist.<sup>115</sup> The jury, therefore, must decide whether the defendant in good faith misunderstood that legal duty.<sup>116</sup> The Court stated that the reasonableness of the misunderstanding is irrelevant.<sup>117</sup> The Court said that if Cheek truly believed that wages were not income, then no matter how unreasonable a court finds the belief, the government would fail in carrying its burden of proving willfulness.<sup>118</sup> In determining whether or not to believe Cheek's claim of good faith belief or misunderstanding, the jury may consider any source of admissible evidence tending to show Cheek's awareness of his duty to file a return treating wages as income.<sup>119</sup>

Cheek conceded that a defendant who knew the law, but disagreed with it, cannot claim misunderstanding as a defense.<sup>120</sup> He argued, however, that a defendant who sincerely misunderstood the law could not have known his legal duty and thus could not have acted willfully.<sup>121</sup> The Supreme Court agreed and reversed the Seventh Circuit Court of Appeals.<sup>122</sup> The Supreme Court held that a defendant's good

---

110. *Id.*

111. *Id.* at 611 n.8.

112. *Id.*

113. *Id.* at 610.

114. *Id.*

115. *Id.* at 611.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* Such evidence includes the defendant's awareness of the following: (1) relevant provisions of the Code or regulations; (2) court decisions rejecting his interpretation of the tax law; (3) authoritative rulings of the Internal Revenue Service; and (4) any contents of the personal income tax return forms and accompanying instructions that make it plain that wages should be designated as income. *Id.*

120. *Id.* at 611 n.8.

121. *Id.*

122. *Id.* at 611.

faith belief defense need not be objectively reasonable.<sup>123</sup>

The defendant's knowledge and beliefs are traditionally considerations for the jury.<sup>124</sup> Requiring an objectively reasonable misunderstanding involved a legal inquiry which the jury is not allowed to consider.<sup>125</sup> People commonly have irrational beliefs.<sup>126</sup> Constitutional questions under the sixth amendment's jury trial provisions arise if a jury is not allowed to hear all relevant evidence regarding the defendant's knowledge and beliefs of his statutory duties.<sup>127</sup> Where possible, the Supreme Court interprets Congressional legislation in a way that avoids constitutional questions.<sup>128</sup> The Court followed the foregoing tradition in order to avoid the constitutional issues.<sup>129</sup>

The Court found the district court erred in instructing the jury to disregard evidence of Cheek's belief that the Internal Revenue Code does not tax wages or require a taxpayer such as Cheek to file a tax return.<sup>130</sup> The admissibility of Cheek's beliefs is not dependent on their reasonableness.<sup>131</sup> However, the more unreasonable his beliefs, the less likely it is that the jury will believe that he held them.<sup>132</sup>

The Court rejected Cheek's argument that his beliefs<sup>133</sup> concerning the constitutional validity of the tax laws should have been heard by the jury.<sup>134</sup> This decision was based on the *Murdock-Pomponio* line of cases construing statutory willfulness as requiring proof of knowledge of the tax law.<sup>135</sup> Claims that certain tax code provisions are unconstitutional reveal full knowledge of these provisions and a studied

---

123. *Id.*

124. *Id.*

125. *Id.* The Court's reasoning seems flawed here since in tort cases juries routinely decide whether someone acted reasonably by using an objective standard.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 611-12.

130. *Id.* at 611.

131. *Id.* at 611-12.

132. *Id.* The Court noted, however, that the more unlikely Cheek's beliefs or misunderstandings, the more likely the jury will not believe them and will determine the beliefs instead to be mere disagreement with the law. *Id.* If this occurs, the Government will have carried its burden of proving knowledge. *Id.* at 612.

133. Cheek claimed that he sincerely believed that the income tax laws are unconstitutional in their application to him, and thus, he could not lawfully be required to be aware of any legal duty to pay taxes. *Id.* at 612.

134. *Id.*

135. *Id.*



conclusion that they are unenforceable and invalid.<sup>136</sup> Thus, claims based on the unconstitutionality of a tax provision are dissimilar to those based on a misunderstanding or good faith belief.<sup>137</sup> Since constitutional claims about a tax law reveal knowledge of the law, such beliefs are not relevant to the issue of willfulness.<sup>138</sup>

Justice Scalia concurred in the judgment.<sup>139</sup> Scalia agreed that precedent established that a good faith belief that one does not owe a tax negates willfulness.<sup>140</sup> However, he disagreed with the test set forth by the majority of the Court.<sup>141</sup> The majority's test for willfulness excludes evidence of a defendant's good faith but erroneous belief in the validity of a tax law, since such a belief necessarily entails full knowledge of the legal duty at issue.<sup>142</sup> Scalia argued that if one believes a statute unconstitutional, then obedience to the statute cannot be a known legal duty.<sup>143</sup> Thus, evidence relating to such beliefs is relevant to the issue of willfulness.<sup>144</sup>

Scalia was concerned that the Court's crucial test<sup>145</sup> was overinclusive and would result in the imposition of what he termed a "startling innovation"<sup>146</sup> of criminally punishing a taxpayer for misinterpreting a complex area of the law.<sup>147</sup> Under the majority's formulation a taxpayer can be guilty of violating a known legal duty if he believes a regulation interpreting a tax statute is incorrect and relies instead on the statute itself.<sup>148</sup> Scalia argued that willfulness cannot possibly refer to a situation where one knows that a legal text exists but in good faith

---

136. *Id.*

137. *Id.*

138. *Id.* at 613. It is important that the Court is interpreting a statute, and in its interpretation concludes that Congress did not intend to exonerate those who understood its enactments but regarded them as unconstitutional.

139. *Cheek*, 111 S. Ct. at 613 (Scalia, J., concurring).

140. *Id.*

141. *Id.* The majority's "crucial test," which prevents a defendant from raising as a defense to willfulness his belief that the tax laws are unconstitutional, is as follows: "Constitutional claims disclose complete knowledge of a tax provision and a thoughtful conclusion, no matter how wrong, that the provision is neither valid or enforceable." *Id.* at 612-13.

142. *Id.* See *supra* note 141 and accompanying text.

143. 111 S. Ct. at 614.

144. *Id.*

145. Comment, *supra* note 141 and accompanying text.

146. 111 S. Ct. at 614.

147. *Id.*

148. *Id.* Scalia noted that there could be no rational basis for restricting the majority's formulation so that it only allows for a finding of willfulness when one has the full knowledge of a statute's mandates, but disallows a finding of willfulness when one violates a duty imposed by a regulation of which one has full knowledge. *Id.*

does not think it binding.<sup>149</sup>

Justice Blackmun, joined by Justice Marshall, dissented.<sup>150</sup> Blackmun stated the issue as one of elementary income tax law.<sup>151</sup> Blackmun noted that after seventy years of the federal income tax system, it is "incomprehensible" that a man of "competent mentality" can assert with any success the defense that he believed his wages from labor are not income.<sup>152</sup> The dissent was concerned that the Court's holding overstepped the bounds of common sense because it will encourage taxpayers to retain frivolous ideas of the law in hopes of convincing a jury that these ideas are sincere.<sup>153</sup>

The Court's rejection of the Seventh Circuit's objectively reasonable standard for proving willfulness places a heavy burden on the government in criminal tax offense cases. Particularly troubling is the language that a jury is "free to consider any admissible evidence from any source" tending to show that a defendant was aware of his legal duty.<sup>154</sup> This language supports the notion that the government is obligated to present direct or circumstantial evidence of the defendant's subjective state of mind. Assuming this to be a correct interpretation of *Cheek*, the United States government will face an almost impossible task in obtaining convictions for tax crimes.

The burden of proof in criminal cases is on the government to prove each element of the alleged offense beyond a reasonable doubt.<sup>155</sup> In order to prove a defendant's intentional violation of a known legal duty, the government now faces the nearly impossible burden of showing, by presentation of affirmative and admissible evidence, the defendant's subjective state of mind, which of course is peculiarly within the knowledge of the defendant.

Since it appears from *Cheek* that the government must bring forth affirmative evidence that the accused taxpayer subjectively knew his legal duty,<sup>156</sup> the consequence of *Cheek* is that the government will seldom survive a directed verdict in favor of the defendant taxpayer. In the past in the Seventh Circuit, the government could present evidence based on a reasonable taxpayer's knowledge from which the jury could

---

149. *Id.*

150. *Id.* (Blackmun, J., dissenting).

151. *Id.*

152. *Id.* at 615.

153. *Id.*

154. *Id.* at 611.

155. See Comment, *supra* note 96.

156. *Cheek*, 111 S. Ct. at 611.

infer that the accused taxpayer knew of a particular duty. This decision, however, markedly increases the government's burden since the Court held that the government cannot rely on whether an objectively reasonable person would have been aware of the legal duty at issue.<sup>157</sup> Therefore, it appears that the government will not be able to suggest simply that a defendant knew his wages were income because all objectively reasonable people know this. Instead, the government must now establish that a particular defendant knew of the legal duty which he is charged with violating.

Perhaps the Court acted rashly by dismissing the objectively reasonable standard for proving willfulness. While ridding the accused taxpayer of the burden of living up to an objectively reasonable taxpayer standard, the Court stripped the United States Tax Commissioner of his leverage in criminal tax prosecutions by casting upon him an insurmountable burden of proof. In fairness and as a trade-off for the benefits this decision bestows on the accused taxpayer, the Commissioner should be allowed to shift the burden of proving no knowledge of the legal duty at issue to the taxpayer. Without this burden of proof trade-off, the Commissioner may just as well not prosecute taxpayers for willful violation of an Internal Revenue Code provision.

To correct the problems undoubtedly created in future cases, the Supreme Court may back off from the implications of its decision in *Cheek*. Alternatively, the United States government may seek relief from Congress by requesting modification of the willfulness requirement in the statutes governing tax crimes.

*Janet Hanna*

---

157. *Id.*