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12.00 FRAUD AND FALSE STATEMENT

12.01 STATUTORY LANGUAGE: 26 U.S.C. § 7206(1)

§7206. ***Fraud and false statements***

Any person who --

(1) ***Declaration under penalties of perjury***. --

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

12.02 TAX DIVISION POLICY

The Tax Division prefers for tax cases to be brought under Title 26, and § 7206(1) is often a viable charge for defendants who commit tax fraud and file tax returns in their own names. Prosecutors should consider bringing charges under other statutes, such as 26 U.S.C. § 7201 (tax evasion), 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1001 (false statements), and 26 U.S.C. § 7212(a) (obstruction of IRS), however, if technical defenses are likely to be raised to § 7206(1).

12.03 GENERALLY

Section 7206(1) makes it a felony to willfully make and subscribe a false document, if the document was signed under penalties of perjury. "[T]he primary purpose of section 7206(1) 'is to impose the penalties of perjury upon those who willfully falsify their returns regardless of the tax consequences of the falsehood.'" ***United States v.***

[1] Under 18 U.S.C. § 3571, the maximum fine under Section 7206(1) is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

Romanow, 509 F.2d 26, 28 (1st Cir. 1975) (quoting ***Gaunt v. United States***, 184 F.2d 284, 288 (1st Cir. 1950)). Section 7206(1) is referred to as the "tax perjury statute," because it makes the falsehood itself a crime. Historically, because Section 7206(1) does not require proof of a tax deficiency, it permits prosecution in cases in which there is no tax deficiency, a minimal tax deficiency, or a tax deficiency that would be difficult to prove. However, the government's burden of proving materiality to the jury may now make it more difficult to obtain convictions in cases with no demonstrable tax loss. *See* § 12.10[5], *infra*.

12.04 PLEADING CONSIDERATIONS

An important preliminary charging decision is whether or not to specify the amount of the unreported income or false items in the indictment.[2] The considerations are the same as those set forth in Section 8.07 of this Manual.

12.05 ELEMENTS

The elements of a Section 7206(1) offense are as follows:

> 1.The defendant made and subscribed a return, statement, or other document which was false as to a material matter;
>
> 2.The return, statement, or other document contained a written declaration that it was made under the penalties of perjury;
>
> 3.The defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and
>
> 4.The defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Bishop, 412 U.S. 346, 350 (1973); ***United States v. Hills,*** 618 F.3d 619, 634 (7th Cir. 2010); ***United States v. Griffin***, 524 F.3d 71, 75-76 (1st Cir. 2008); ***United States v. Marston***, 517 F.3d 996, 999 n.3 (8th Cir. 2008); ***United States v. Clayton***, 506 F.3d 405, 410, 413 (5th Cir. 2007) (*per curiam*); ***United States v. Pirro***, 212 F.3d 86, 89 (2d Cir. 2000); ***United States v. Scholl***, 166 F.3d 964, 979-80 (9th Cir. 1999); ***United States v. Peters***, 153 F.3d 445, 461 (7th Cir. 1998); ***United States v. Gollapudi***, 130 F.3d

[2] *See infra*, for sample indictment forms charging Section 7206(1) violations, including a sample "open ended" indictment.

66, 71-72 (3d Cir. 1997); ***United States v. Monus***, 128 F.3d 376, 386-87 (6th Cir. 1997); ***United States v. Aramony***, 88 F.3d 1369, 1382 (4th Cir. 1996); ***United States v. Owen,*** 15 F.3d 1528, 1532 (10th Cir. 1994); ***United States v. Kaiser***, 893 F.2d 1300, 1305 (11th Cir. 1990).

12.06 RETURN, STATEMENT, OR DOCUMENT

Section 7206(1) expressly applies to "any return, statement, or other document" signed under penalties of perjury. It is not limited to tax returns. ***United States v. Marston***, 517 F.3d 996, 1002 (8th Cir. 2008).

In some cases, a defendant files what is referred to as a "zero" or "0" return, in which zeros are inserted on all the lines, or files blank Forms 1040 with no information from which a tax can be computed. In criminal cases involving such returns, there is precedent that Forms 1040 that report zeros and/or constitutional objections and returns with lines through all the boxes are not valid returns. *See* ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984) (*per curiam*); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980) (*per curiam*); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979) (*per curiam*); ***United States v. Brown***, 600 F.2d 248, 251 (10th Cir. 1979); ***United States v. Grabinski***, 558 F. Supp. 1324, 1329-31 (D. Minn. 1983) (collecting cases), *aff'd* 727 F.2d 681 (8th Cir. 1984). Similarly, a blank return with no information from which a tax can be computed has been held not to constitute a valid return. ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir. 1980) (*citing* ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970)).

This has also been true in the civil tax realm. In ***Beard v. Comm'r***, the Tax Court held that for a document to be considered a return, the document must

(1) purport to be a return;

(2) be executed under penalties of perjury;

(3) contain sufficient data to allow calculation of tax; and

(4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

82 T.C. 766, 777-79 (T.C. 1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986); *accord* ***Turner v. Comm'r***, TC Memo. 2004-251 (T.C. 2004) (the taxpayer's return "contained zero entries for every line regarding his 1999 income" and "attached to his Form 1040 documents containing tax-protester rhetoric"). In circuits in which the document filed by a taxpayer does not constitute a return, care should be taken to charge the false filing as a "document" rather than a "return."

The United States Court of Appeals for the Ninth Circuit held in ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980) (*per curiam*), that unlike blanks, zeros on tax returns constitute information as to income from which a tax loss could be computed just as if the return had contained other numbers. In ***Long***, the Ninth Circuit held that "[n]othing can be calculated from a blank, but a zero, like other figures, has significance. A return containing false or misleading figures is still a return." ***Id***. at 76. Similarly, where a defendant filed a blank Form 1040 containing only his signature but attached his Forms W-2, the Ninth Circuit affirmed his conviction for violating § 7206(1). ***United States v. Crowhurst***, 629 F.2d at 1300. The court held that the test for determining whether a filing constitutes a return is "whether or not sufficient information is supplied from which a tax may be computed," and the fact that the defendant "did not himself enter numerals on the appropriate lines of the 1040 form should not prevent his conviction for making a false return." ***Id***.; *see also* ***United States v. Grabinski***, 558 F. Supp. at 1330 n. 11 ("A taxpayer could attach a copy of anything he wished to his 1040 form and it would be a return if he provided all of the information called for on that form.").

While most Section 7206(1) prosecutions involve income tax returns, there are some reported cases involving false documents other than tax returns. *See, e.g.*, ***United States v. Pansier***, 576 F.3d 726, 736 (7th Cir. 2009) (false Forms 8300 filed against IRS agents); ***United States v. Droms***, 566 F.2d 361, 362-63 (2d Cir. 1977) (*per curiam*) (financial information statement submitted to the IRS for settlement purposes); ***United States v. Cohen***, 544 F.2d 781, 782-83 (5th Cir. 1977) (false statement made in an offer in compromise, Form 656); ***Jaben v. United States***, 349 F.2d 913, 915-16 (8th Cir. 1965) (application for extension of time for filing). Note that these three cases are merely examples of the use of the statute: in none of them was the application of Section 7206(1) to the particular type of false document actually challenged by the defense. In ***United States v. Carrabbia***, 381 F.2d 133, 134-35 (6th Cir. 1967), however, the defendant specifically argued that his conviction on a charge under § 7206(1) was invalid because

the statute did not apply to a Form 11-C, a renewal application to allow him to continue in the business of accepting wagers for the ensuing governmental fiscal year, that was alleged to be false. The court of appeals rejected the defendant's argument, concluding that the defendant's conduct fell within the ambit of § 7206(1). 381 F.2d at 136.

The Fifth Circuit limited the application of § 7206(1) to documents required either by the Internal Revenue Code or applicable regulations thereunder, in ***United States v. Levy***, 533 F.2d 969, 975 (5th Cir. 1976). But subsequent decisions of the Fifth Circuit have limited ***Levy's*** interpretation of Section 7206(1). *See* ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982) (permitting § 7206(2) prosecution for filing false Schedules C); ***United States v. Taylor***, 574 F.2d 232, 237 (5th Cir. 1978) ("While there is no explicit requirement in the regulations for the completion and filing of Schedules E and F, it is implicit in required Form 1040 that such schedules, when appropriate, become integral parts of such form and are incorporated therein by reference. . . . Therefore, we conclude that section 7206(1) requires the same duty of honest reporting on schedules as it requires for entries on the Form proper."); *see also* ***United States v. Edwards***, 777 F.2d 644, 652 (11th Cir. 1985) (permitting § 7206(1) prosecution for false Schedule C, following ***Taylor*** and distinguishing ***Levy***); *cf.* ***United States v. Hunerlach***, 197 F.3d 1059, 1068-69 (5th Cir. 1999) (affirming conviction based on defendant's submission of a false Form 433A in the fulfillment of his obligations under a plea agreement, where argument that a Section 7206(1) conviction cannot rest on Form 433A was not made below).

Other circuits flatly reject ***Levy***. In ***United States v. Holroyd***, 732 F.2d 1122 (2d Cir. 1984), the Second Circuit held that a statement made on an IRS form, the use of which is not expressly authorized by statute or regulation, may provide the basis for a Section 7206(1) prosecution. In connection with an ongoing assessment of his ability to pay a tax liability, the defendant had signed under penalties of perjury and filed with the IRS two false IRS collection information statements -- Form 433-AB and Form 433-A. ***Id***. at 1124. The trial court dismissed the indictment on the authority of ***Levy*** because Form 433-AB was not a required form. ***Id***. at 1123. The Second Circuit, however, rejected the ***Levy*** court's restrictive interpretation of Section 7206(1), concluding:

> 26 U.S.C. Section 7206(1) means what it says on its face. It applies to any verified return, statement or other document submitted to the IRS. The indictment against [the defendant], in our view, did state a crime cognizable under that section.

Holroyd, 732 F.2d at 1128.

Similarly, the defendants in ***United States v. Franks***, 723 F.2d 1482, 1485 (10th Cir. 1983), argued that because the question concerning the existence of foreign bank accounts on their 1974 income tax returns, as well as the Forms 4683 attached to their amended 1974 and 1975 returns, were not authorized by the Internal Revenue Code or by any regulation, the responses to those questions could not support a Section 7206(1) prosecution. The Tenth Circuit refused to apply the ***Levy*** rationale and rejected this argument:

> Like the Fifth Circuit, in cases decided subsequent to ***United States v. Levy***, we do not believe the rationale of ***Levy*** should be extended, and, in our view, such does not apply to the schedules here appended to a Form 1040, or to an answer made in response to a question contained in the Form 1040. In the instant case, it is clearly established that the defendants in their 1974 tax return gave a false answer to a direct question concerning their interest in foreign bank accounts, and that they attached to their amended tax return for 1974 and their tax return for 1975 a completed Form 4683 which did not identify *all* of the foreign bank accounts over which they had signatory authority. Such, in our view, comes within the purview of 26 U.S.C. Section 7206(1).

Franks, 723 F.2d at 1486 (citations omitted); *see also* ***United States v. Harvey***, 869 F.2d 1439, 1441 & n.3 (11th Cir. 1989) (failing to report interest income from Cayman Islands accounts on Schedule B and falsely answering "no" on Schedule B, Part III (Foreign Accounts and Foreign Trusts), Form 1040, supported a charge defendant violated § 7206(1)).

12.07 "MAKES" ANY RETURN, STATEMENT, OR DOCUMENT

12.07[1] Requirement of Filing

The plain language of the statute does not require that the return, statement or other document be filed. Nevertheless, some courts have held that although "make and subscribe," as used in Section 7206(1), are words that connote "preparing and signing," a completed Form 1040 does not become a 'return,' and a taxpayer does not 'make a return,' until the form is filed with the Internal Revenue Service. ***United States v. Harvey***, 869 F.2d 1439, 1448 (11th Cir. 1989) (*en banc*) ("the crime of willfully filing a false tax return for income earned in 1980 . . . could not have occurred until April of 1981 when

[the defendant] filed the allegedly fraudulent return"); ***United States v. Gilkey***, 362 F. Supp. 1069, 1071 (E.D. Pa. 1973); ***United States v. Horwitz***, 247 F. Supp. 412, 413-14 (N.D. Ill. 1965); *see also* ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983) (reversing § 7206(2) conviction because return not filed). According to ***Gilkey***, 362 F. Supp. at 1071, the rationale for this holding is that taxpayers ought to have the "right of self-correction."

12.07[2] Persons and Entities Liable

Under traditional perjury law, corporations cannot commit perjury because a corporation cannot take an oath to tell the truth. A corporation, however, can be prosecuted for a Section 7206(1) violation because Section 7206(1) expressly refers to "any person," and 26 U.S.C. §7701(a)(1) specifically defines "person" to include a corporation. *See* ***United States v. Ingredient Technology Corp.***, 698 F.2d 88, 99-100 (2d Cir. 1983); *accord* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir. 1986) ("A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false tax return."). "While a corporation has no independent state of mind, the acts of individuals on its behalf may be properly chargeable to it." ***United States v. Ingredient Technology Corp.***, 698 F.2d at 99 (citations omitted).

Further, the maker of the return does not have to physically complete or prepare the return. In ***United States v. Badwan***, 624 F.2d 1228, 1232 (4th Cir. 1980), the defendants argued that they did not "make" the return, as required by section 7206(1), since their returns were prepared by an accountant. The Fourth Circuit rejected the argument that the defendant had to actually prepare the return:

> The evidence did clearly show, however, that the accountant who prepared the returns did so solely on the basis of information provided to him by the Badwans, and that the Badwans then signed and filed the returns. This satisfies the statute.

Badwan, 624 F.2d at 1232.

Reliance on a qualified tax return preparer has been referred to as an affirmative defense to a charge under § 7206(1). ***United States v. Loe***, 248 F.3d 449, 469 n.91 (5th Cir. 2001) (*citing* ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989)); ***United States v. Duncan***, 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled on other grounds by*

Schad v. Arizona, 501 U.S. 624 (1991). In order to avail himself or herself of this defense, however, a defendant must demonstrate that he or she provided full information to the preparer and then filed the return without having reason to believe it was incorrect. ***United States v. Wilson***, 887 F.2d at 73 (citations omitted). For other cases discussing a good faith reliance defense, see ***United States v. Lindo***, 18 F.3d 353, 356 (6th Cir. 1994); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990).

Additionally, a return preparer can be charged under Section 7206(1) for willfully making and subscribing a false tax return for a taxpayer. *See* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir. 1986). In ***Shortt Accountancy***, one of the defendant accounting firm's accountants had prepared and signed a client's Form 1040, which contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. 785 F.2d at 1450-51. On appeal, the defendant firm argued that a tax preparer cannot "make" a return within the meaning of Section 7206(1) since it is the taxpayer, not the preparer, who has the statutory duty to file the return. ***Id***. at 1451. The court rejected this argument, holding that the prohibitions of Section 7206(1) are not based on the taxpayer's duty to file, but instead, Section 7206(1) simply prohibits perjury in connection with the preparation of a federal tax return. ***Id***. at 1454. According to the court, "sections 7206(1) and 7206(2) are 'closely related companion provisions' that differ in emphasis more than in substance," and "[p]erjury in connection with the preparation of a federal tax return is chargeable under either section." ***Shortt Accountancy***, 785 F. 2d at 1454 (*quoting* ***United States v. Haynes***, 573 F.2d 236, 240 (5th Cir. 1978)). Generally, however, it is the better practice to charge a violation of Section 7206(2) against a person who prepares a false return for an individual required to file.

12.08 "SUBSCRIBES" ANY RETURN, STATEMENT, OR DOCUMENT

12.08[1] Generally

The submission of a false unsigned return cannot, without more, serve as the basis for a 7206(1) prosecution because the act of subscribing (signing) a return, statement, or other document, is an element of the offense. An unsigned return, however, may provide the basis for a tax evasion charge under 26 U.S.C. § 7201 if the evidence shows that the unsigned return was filed by the defendant as his return and was intended to be such. *See* ***United States v. Robinson***, 974 F.2d 575, 577-78 (5th Cir. 1992) (noting that submission

of unsigned documents purporting to be returns can constitute affirmative acts of evasion).

Section 7206(1) does not require that the defendant personally sign the return, so long as he authorized the filing of the return with his name subscribed . ***United States v. Ponder***, 444 F.2d 816, 822 (5th Cir. 1971). Similarly, a return signed by only one spouse nevertheless qualifies as a joint return where there is evidence that the parties intended to file their return jointly. ***United States v. Robinson***, 974 F.2d at 579 n.5 (citations omitted). *See also* ***United States v. McKee***, 506 F.3d 225, 233 (3d Cir. 2007) ("'The law does not require the defendant's own signature to sustain a conviction under §7201: it merely requires sufficient circumstances . . . from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it.'") (*quoting* ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989)).

12.08[2] Proof of Signature

Assuming that the document is signed, the government must still authenticate the signature -- establish that the signature is what the government alleges it to be, *i.e.*, that the named person actually signed the document. The signature can be authenticated by the use of any one of three methods provided by the Federal Rules of Evidence:

1. ***Lay testimony on handwriting*** -- any witness who is familiar with the defendant's handwriting may testify that the questioned signature is that of the defendant. The limitation on this approach is that the familiarity of the witness with the handwriting of the defendant must not have been acquired for purposes of the litigation. Fed. R. Evid. 901(b)(2).

2. ***Expert testimony*** -- a qualified expert may compare the questioned signature with authenticated specimens of the defendant. Fed. R. Evid. 901(b)(3).

3. ***Jury comparison*** -- the finder of fact may compare authenticated specimens with the questioned signature without expert help. Fed. R. Evid. 901(b)(3).

For purposes of comparison, 28 U.S.C. § 1731, provides:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

Furthermore, the authentication of a signature is aided by a statutory presumption provided by the Internal Revenue Code, 26 U.S.C. § 6064 (1986):

> The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

For similar presumptions with respect to corporate and partnership returns, see 26 U.S.C. §§ 6062-6063.

Accordingly, if an individual's name is signed to a return, statement, or other document, there is a rebuttable presumption by virtue of § 6064 that the document was actually signed by that individual. *See* ***United States v. Kim***, 884 F.2d 189, 195 (5th Cir. 1989) (noting presumption and rejecting constitutional challenge to § 6064). This presumption applies to both civil and criminal cases. ***United States v. Cashio***, 420 F.2d 1132, 1135 (5th Cir. 1969).

The statutory presumption has practical consequences at trial, because it is not necessary to present direct evidence showing that the defendant actually signed the returns; it is sufficient that the defendant's name is on the returns and the returns are true and correct copies of returns on file with the Internal Revenue Service. ***United States v. Wilson***, 887 F.2d 69, 72 (5th Cir. 1989); ***United States v. Carrodeguas***, 747 F.2d 1390, 1396 (11th Cir. 1984).

Even when a defendant's signature is never authenticated the jury may correctly conclude that the defendant knew that the return was false when it was filed. In ***United States v. McKee***, 506 F.3d 225, 228, 233 (3d Cir. 2007), the defendants were charged with employment tax evasion, in violation of § 7201, and one of the affirmative acts of evasion charged was the filing of false employment tax returns, Forms 941. The defendants challenged the sufficiency of the evidence of affirmative acts of evasion on the grounds that their signatures on the Forms 941 were never authenticated at trial. ***Id***. at 233. The defendants argued that the jury could not rely on 26 U.S.C. § 6064, which, as noted above, provides that the fact of a signature on a tax return is *prima facie* evidence

that the return was signed by the named individual. 506 F.3d at 233. The Third Circuit held that the fact that a return may have been signed by someone other than the defendants does not necessarily undermine the jury's conclusion that the defendants knew the returns were false and approved the filings to evade the applicable employment taxes. ***Id.*** "'The law does not require the defendant's own signature to sustain a conviction under §7201: it merely requires sufficient circumstances . . . from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it.'" ***Id***. (quoting ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989)). Although ***McKee*** involved evasion charges under § 7201, the court's holding regarding the filing of false income tax returns may be helpful in cases under § 7206(1) where the defendant challenges the authenticity of his or her signature and the applicability of § 6064.

Increasingly, taxpayers are filing tax returns electronically. Any electronically filed tax return must contain the perjury jurat. The Internal Revenue Service has developed methods by which tax returns may be electronically filed. These include the use of PINs and the IRS Form 8879, IRS e-file Signature Authorization. "[A]ny return, declaration, statement, or other document filed and verified, signed, or subscribed under any method adopted under [26 U.S.C. § 6061(b)(1)(B)] shall be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though signed or subscribed." 26 U.S.C. § 6061(b)(2). It is important to ensure that there is admissible evidence that the taxpayer was responsible for the electronic filing of the tax return.

12.09 MADE UNDER PENALTIES OF PERJURY

12.09[1] Requirement Of A Jurat

Section 7206(1) requires that the return, statement, or other document be made "under the penalties of perjury." This element should be self-evident as the document either does or does not contain a declaration that it is signed under the penalties of perjury. A signature plus the declaration is sufficient; the document need not be witnessed or notarized. As required by 26 U.S.C. § 6065, all income tax returns contain such a declaration. Note that at least one court has determined that when a taxpayer adds the phrase "without prejudice" near the taxpayer's signature on the jurat, it does not affect the jurat. ***United States v. Davis***, 603 F.3d 303, 307 (5th Cir. 2010) ([W]here there is

some ambiguity as to language's effect on the jurat . . .the IRS should be entitled to construe alterations of the jurat against the taxpayer, at least when there is any doubt.")

If a taxpayer presents a return or other document in which the jurat is stricken, then prosecution should not be brought under Section 7206(1), as the document is not signed under the penalties of perjury. However, 26 U.S.C. § 7201 (tax evasion) or 18 U.S.C. § 1001 (false statement) charges may be considered in such an instance.

12.09[2] Law Of Perjury Does Not Apply To Section 7206(1) Prosecutions

Although referred to as the "tax perjury statute," Section 7206(1) prosecutions are not perjury prosecutions. "The language 'made under the penalties of perjury' is of purely historical significance." ***Escobar v. United States***, 388 F.2d 661, 664 (5th Cir. 1967) (citations omitted). Accordingly, the heightened requirement of proof traditionally applicable in perjury prosecutions does not apply to Section 7206(1) prosecutions. ***Id***. at 665; *see also* ***United States v. Carabbia***, 381 F.2d 133, 137 (6th Cir. 1967) (holding that the two-witness rule applicable to perjury prosecutions does not apply).

12.10 FALSE MATERIAL MATTER

12.10[1] Generally

Section 7206(1) requires that a return, statement, or other document must be "true and correct as to every material matter." Accordingly, the government must prove that the matter charged as false is material.

"[A] 'material' matter is one that affects or influences the IRS in carrying out the functions committed to it by law *or* 'one that is likely to affect the calculation of tax due and payable.'" ***United States v. Griffin***, 524 F.3d 71, 76 (1st Cir. 2008) (citations omitted). "A false statement may be material even if it was only *likely to influence the calculation* of tax due and payable." ***Id***. at 76-77 (emphasis in original).

In 1994, the Supreme Court held in ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1994), that materiality is a question for the jury, and not the court, in prosecutions under 18 U.S.C. § 1001. In ***Neder v. United States***, 527 U.S. 1, 8 (1999), the "Government d[id] not dispute that the District Court erred under ***Gaudin*** in deciding the materiality element of a § 7206(1) offense itself, rather than submitting the issue to the

jury." The ***Neder*** Court opined that ***Gaudin*** mandates that questions of materiality in Title 26 cases be submitted to the jury. 527 U.S. at 19-20. *Accord* ***Washington v. Recuenco***, 548 U.S. 212, 219-20 (2006) (*reaffirming* ***Neder***); *see also* ***United States v. Jackson***, 196 F.3d 383, 384-85 (2d Cir. 1999).

In view of ***Neder*** and ***Gaudin***, the "better practice" in Section 7206 cases is to submit all questions of materiality to the jury. *See* 2B Kevin F. O'Malley, William C. Lee & Jay E. Grenig, Federal Jury Practice and Instructions, § 67.15 (5th ed. 2000) (collecting, by circuit, instructions in which the jury is asked to decide materiality in § 7206(1) cases).

12.10[2] Reynolds "literal truth" Defense

Prosecutors, particularly in the Seventh Circuit, need to be aware of the potential of the Reynolds "literal truth" defense despite the fact that it has no continuing validity following the change in the language of the jurat on tax returns. In ***United States v. Reynolds***, 919 F.2d 435, 436-37 (7th Cir. 1990), the defendant filed a Form 1040EZ reporting all the categories of income requested on the form, but omitting a category of income not reportable on that form. Although the defendant's responses on the form were literally true, the prosecution characterized these responses as misleading because the defendant had a category of income (the unreported income) which disqualified him from use of that form. ***Id***. at 437. The Seventh Circuit held that, although the form was misleading, the literal truth of the statements on the form precluded a Section 7206(1) conviction. The court stated, however, that Reynolds could be tried for violations of Section 7201 or Section 7203. ***Id***. The Seventh Circuit adopted a similar position with respect to Form 1040A, which, like Form 1040EZ is a simplified tax form, in ***United States v. Borman***, 992 F.2d 124, 126 (7th Cir. 1993).

The Third Circuit addressed and distinguished the "***Reynolds*** defense" in ***United States v. Gollapudi***, 130 F.3d 66 (3d Cir. 1997). There, the taxpayer was charged with a violation of section 7206(1) for listing a false amount of withholding on a Form 1040. 130 F.3d at 68. The taxpayer argued that he had in fact withheld taxes, but had simply not paid over the withheld funds to the IRS, and that his returns thus were "literally true" under ***Reynolds***. ***Id***. at 72. The Third Circuit rejected the taxpayer's claims as a factual matter, crediting the testimony of an IRS agent that no taxes had ever been withheld. ***Id.*** But the court of appeals went on to note that ***Reynolds*** and ***Borman*** offer a defense to

Section 7206 only when there is no specific line item which can be proven false. ***Gollapudi***, 130 F.3d at 72. According to the Third Circuit, ***Reynolds*** stands for the simple proposition that using the wrong tax form -- one that does not contain an identifiable line item that can be charged as false -- cannot constitute a violation of Section 7206(1). ***Id***.

In 1993, in response to the ***Reynolds*** and ***Borman*** cases, the IRS changed the jurat on the Form 1040EZ to read:

> I have read this return. Under penalties of perjury, I declare that to the best of my knowledge and belief, the return is true, correct, and accurately lists all amounts and sources of income I received during the tax year. (Emphasis added.)

In that same year, the IRS also changed the jurat on the Form 1040A to read:

> Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statement, and to the best of my knowledge and belief, they are true, correct, and accurately list all amounts and sources of income I received during the tax year. Declaration of preparer (other than the taxpayer) is based on all information of which the preparer has any knowledge. (Emphasis added.)

The additional language was incorporated to forestall any potential Reynolds literal truth defense, however, some defendants in tax cases still attempt to raise it as a defense to their crimes. *See, e.g.,* ***United States v. Ladum***, 141 F.3d 1328, 1335-36 (9th Cir. 1998).

12.10[3] Proof of One Material Item Enough

A Section 7206(1) indictment may charge in a single count that several items in one document are false. If one count in an indictment charges three items on a single return as false (*e.g.*, dividends, interest, and capital gains), then it is sufficient if only one of those items is proven to be false. The government does not have to prove that every item charged is false. The same is true of a charge that the defendant omitted several items from his or her return. *See* ***Griffin v. United States***, 502 U.S. 46, 49 (1991) (when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient as to any one of the acts charged); ***United States v. Duncan***, 850 F.2d 1104, 1108-13 (6th Cir. 1988) (noting that this principle

applies only insofar as the acts on which unanimity is required fall into "distinct conceptual groupings."), *criticized by* ***Schad v. Arizona***, 501 U.S. 624, 635 (1991) (plurality opinion) ("the notion of 'distinct conceptual groupings' is simply too conclusory to serve as a real test"). It is also permissible to present to a jury alternative theories of falsity. *See* ***United States v. Foley***, 73 F.3d 484, 493 (2d Cir. 1996) (noting that "properly instructed jury" could convict under § 7206(2) for deduction of bribe that was either illegal under federal law, illegal under state law, or legal but not an ordinary business expense, but reversing conviction where one of the alternate bases was invalid as a matter of law), *overruled in part on other grounds by* ***Salinas v. United States***, 522 U.S. 52 (1997).

While a jury must reach a unanimous verdict as to the factual basis for a conviction, a general instruction on unanimity is sufficient to insure that such a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of confusion. ***United States v. Schiff***, 801 F.2d 108, 114-15 (2d Cir. 1986). At least one court, however, has held that when a single false return count contains two or more factually distinct false statements, the jury must reach unanimity on the willful falsity of at least one statement. ***United States v. Duncan***, 850 F.2d at 1113. In ***Duncan***, one count in the indictment against two defendants alleged two false statements, one involving an interest deduction and one involving an income characterization. 850 F.2d at 1106. The court of appeals vacated the Section 7206(1) convictions of the defendants because the trial judge failed to instruct the jury, after a specific request by the jury during its deliberations, that conviction required unanimity on at least one of the alleged willful false statements. ***Id***. at 1110. The Sixth Circuit concluded that in the context of the case and given the juror's request for clarification, there was a "tangible risk of jury confusion and of nonunanimity on a necessary element of the offense charged." ***Duncan***, 850 F.2d at 1113-14. *But cf.* ***Schad v. Arizona***, 501 U.S. at 630-32 (plurality opinion) (finding that jury was not required in first-degree murder prosecution to agree on one of alternative theories of premeditated or felony-murder); ***United States v. Moore,*** 129 F.3d 873, 877 (6th Cir. 1997) (explaining ***Duncan*** and distinguishing its holding in bank fraud case); ***United States v. Sanderson***, 966 F.2d 184, 187-89 (6th Cir. 1992) (holding that trial court's failure to give specific unanimity instruction was not plain error in prosecution charging in a single count theft of government property and theft of employee time).

12.10[4] Proving Materiality after Neder and Gaudin

Prior to ***Gaudin***, some commentators noted conflicting authority as to what constituted proof of materiality in Section 7206 prosecutions. *See Twelfth Survey on White Collar Crime*, 34 AM. CRIM. L. REV. 1035, 1065 (1997) (noting conflict within § 7206(2) case law).[3] Courts defined a material item either as

1) one required on an income tax return that is necessary for a correct computation of the tax (the ***"Warden*** test"); *see* ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir. 1980); ***United States v. Taylor***, 574 F.2d 232, 235 & n.6 (5th Cir.1978) (recognizing and describing both tests); ***United States v. Warden***, 545 F.2d 32, 37 (7th Cir. 1976); ***United States v. Null***, 415 F.2d 1178, 1181 (4th Cir. 1969); ***Siravo v. United States***, 377 F.2d 469, 472 (1st Cir. 1967); or

2) one having a natural tendency to influence or impede the Internal Revenue Service in ascertaining the correctness of the tax declared or in verifying or auditing the returns of the taxpayer (the "***DiVarco*** test"). *See* ***United States v. Greenberg***, 735 F.2d 29, 31 (2d Cir. 1984) (holding that Section 7206(1) is intended to prevent misstatements that could hinder the IRS in verifying the accuracy of a return; accordingly, such false statements are material); ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973); *see also* ***United States v. Fawaz***, 881 F.2d 259, 264 (6th Cir. 1989); ***United States v. Taylor***, 574 F.2d 232, 235 & n.6 (5th Cir. 1978) (recognizing both ***Warden*** and ***DiVarco***).

Early indications are that the conflict of authority regarding the test of materiality survived the issuance of ***Gaudin***. Some courts favor the ***Warden*** test, *see*, *e.g.*, ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999) (not reporting money received from academic grade-selling scheme "obviously material to the IRS's ability correctly to calculate [defendant's] tax liabilities), *aff'd*, 231 F.3d 663, 667 n.1 (9th Cir. 2000) (*en banc*); ***United States v. Scholl***, 166 F.3d 964, 979 (9th Cir.1999) ("'information is material if it is necessary to a determination of whether income tax is owed'") (*quoting*

[3] Perhaps it is more accurate to say that what occurred was not a conflict, in the sense of a circuit split, but rather the unresolved emergence of two complimentary but separate tests for materiality, with one test embracing the other. *See* ***United States v. Taylor***, 574 F.2d 232, 235 n.6 (5th Cir. 1978) ("Application of ***DiVarco*** to this case renders consideration of the ***Warden*** test unnecessary."). No circuit has explicitly rejected either the ***Warden*** or ***DiVarco*** formulation. Further, both tests have been utilized within the same circuits, without comment. Indeed, both ***Warden*** and ***DiVarco*** were decided in the Seventh Circuit.

United States v. Uchimura, 125 F.3d 1282, 1285 (9th Cir. 1997)); ***United States v. Clifton***, 127 F.3d 969, 970 (10th Cir. 1997) (material statement is one that is "necessary 'in order that the taxpayer . . . compute his taxes correctly'") (*quoting* ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir. 1980)); ***United States v. Aramony***, 88 F.3d 1369, 1384 (4th Cir. 1996) (material item is one which "must be reported 'in order that the taxpayer estimate and compute his tax correctly.'") (*quoting* ***United States v. Null***, 415 F.2d 1178, 1181 (4th Cir.1969) (internal quotation omitted)); ***United States v. Klausner***, 80 F.3d 55, 60 & n.4 (2d Cir. 1996) (material matters are those "essential to the accurate computation of . . . taxes."), while the First Circuit seems to favor ***DiVarco***. *See* ***United States v. DiRico***, 78 F.3d 732, 736 n.1 (1st Cir. 1994) (quoting from ***Greenberg***, 735 F.2d at 31-32 and citing ***DiVarco***, 484 F.2d at 673); *see also* ***United States v. Gaudin***, 515 U.S. at 509 (noting that material statement for § 1001 purposes is one having a natural tendency to influence, or capable of influencing, the decision of the decision making body to which it was addressed.) (quotation omitted).

Given that the forum for litigating materiality has shifted from the bench to the jury under ***Neder*** and ***Gaudin***, how materiality is defined in jury instructions is a key issue.

Pattern Jury instructions defining materiality in Section 7206 cases exist in most circuits. The Seventh Circuit tracks the language of ***Gaudin*** and follows alternative tests:

> A line on a tax return is a material matter if the information required to be reported on that line is capable of influencing the correct computation of the amount of tax liability of the individual . . . or the verification of the accuracy of the return. . . .
>
> OR
>
> A false matter is material if the matter was capable of influencing the Internal Revenue Service.

FED. CRIM. JURY INSTR. OF THE SEVENTH CIRCUIT, 26 U.S.C. § 7206 (Materiality) (1999). The First Circuit's model instruction is similar. *See* Pattern Criminal Jury Instructions for the District Courts of the First Circuit, False Statements on Income Tax Return, 4.26.7206 (2008 rev. ed.) ("A 'material' matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it by law, such as monitoring and verifying tax liability.").

The Fifth and Ninth Circuit pattern instructions track the language of the ***DiVarco*** test. *See* Fifth Circuit Pattern Jury Instructions - Criminal, False Statements on Tax Return, 2.97 (2001) ("A statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer."); Ninth Circuit Manual of Model Jury Instructions - Criminal, Filing False Tax Return, 9.39 (2010) (noting in comment that material item is one which "had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return.").

The Third Circuit follows ***Warden***. *See* Third Circuit Model Criminal Jury Instructions, False Income Tax Return - Return Was Materially False, 6.26.7206-3 (2010) ("The false statement in the return must be material. This means that it must be essential to an accurate determination of (name)'s tax liability.") The Tenth Circuit employs a hybrid instruction that incorporates both ***Warden*** and ***DiVarco***. *See* Criminal Pattern Jury Instructions, False Statements on Income Tax Return, 2.93 (10th Cir. 2011) ("A statement is material . . . if it concerned a matter necessary to the correct computation of taxes owed and was capable of influencing the decision of the Internal Revenue Service.").

The Eleventh Circuit, by comparison, has set out into uncharted territory. *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Aiding and Abetting Filing False Return, No. 95 (2010) (noting, in instruction for § 7206(2), that "[a] declaration is 'material' if it relates to a matter of significance or importance as distinguished from a minor or insignificant or trivial detail. The Government does not have to prove that it was deprived of any tax because of the filing of the false return, or that additional tax is due . . . .").

12.10[5] Tax Deficiency Not Required, But Possibly No Longer "Irrelevant"

On occasion, defendants in false return cases argue that the lack of a tax deficiency renders the alleged false item immaterial. For instance, in cases involving unreported income, a taxpayer might argue that she had expenses which exceeded her true gross income, thus rendering his failure to report income immaterial, because it had no bottom-line tax effect. Prior to ***Gaudin***, such arguments fell on deaf ears. Courts held not only that proof of a tax deficiency was not required in a false return case, but also that

evidence of the lack of a tax deficiency was irrelevant. ***See United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990) (rejecting as "irrelevant" sufficiency of evidence challenge based on asserted lack of tax deficiency in § 7206(1) case); ***United States v. Olgin***, 745 F.2d 263, 272 (3d Cir. 1984) (affirming trial court's exclusion of evidence of tax effect of unreported expenses and noting that "evidence of tax liability is generally inadmissible in prosecutions under I.R.C. 7206") (citations omitted); ***United States v. Garcia***, 553 F.2d 432, 432 (5th Cir. 1977) (*per curiam*) (upholding trial court's refusal to allow defense evidence of tax liability or lack thereof in § 7206(1) case); ***Schepps v. United States***, 395 F.2d 749, 749 (5th Cir. 1968) (*per curiam*) (same); *see also* ***United States v. Citron***, 783 F.2d 307, 313 (2d Cir. 1986) (rejecting argument that material falsity is one which results in substantial tax due); ***United States v. Fritz***, 481 F.2d 644, 645 (9th Cir. 1973) (*per curiam*) (evidence of potential adjustments to tax liability not relevant to willfulness since no evidence presented that defendant considered making the proposed adjustments); *cf*. ***United States v. Johnson***, 558 F.2d 744, 745-47 (5th Cir. 1977) (where defendant claims a good-faith-reliance defense, evidence of lack of tax deficiency might be relevant to willfulness, subject to Rule 403, but disallowing introduction based on facts of case).

While courts still maintain that proof of a tax deficiency is not *required* in a section 7206(1) prosecution, *see* ***United States v. Scholl***, 166 F.3d 964, 979 (9th Cir.1999); ***United States v. Peters***, 153 F.3d 445, 461 (7th Cir. 1998); ***United States v. Minneman***, 143 F.3d 274, 279 (7th Cir. 1998), some post-***Gaudin*** opinions indicate that the presence or *lack* of a tax deficiency may be relevant to a jury's determination of materiality.

In ***United States v. Uchimura***, 125 F.3d 1282 (9th Cir. 1997), the Ninth Circuit held that in a Section 7206(1) case, "information is material if it is necessary to a determination of whether income tax is owed." 125 F.3d at 1285. In deciding whether the question of materiality should be submitted to the jury as a matter of course in false return cases, the court addressed whether the false item at issue-- unreported income--was inherently material. ***Id***. at 1284-85 The court considered a hypothetical situation in which a taxpayer's legitimate deductions exceed his gross income and the taxpayer thus has no taxable income. In such a circumstance, "unreported income . . . may not be necessary to a determination of whether income tax is owed." *Id*. at 1285. While the court insisted that "[w]e do not mean by this example that to satisfy the materiality element of § 7206 the government must show that additional tax is owed," it also left no doubt that

the lack of a tax deficiency is relevant to a jury's determination of materiality and ought to be admitted: "That no additional tax is owed of course has a bearing on materiality, but the question is ultimately one for the jury to decide." 125 F.3d at 1285, n.5

The Tenth Circuit followed suit in ***United States v. Clifton***, 127 F.3d 969 (10th Cir. 1997). ***Clifton*** addressed the same hypothetical as ***Uchimura***, in which the taxpayer fails to report income, but has no tax due because her deductions exceed taxable income for the year. In this situation, the "taxpayer's failure to report all taxable income will not affect the computation of tax, which in turn might very well affect the jury's deliberations on the element of materiality." 127 F.3d at 971. It is hard to read this language as anything other than a mandate that evidence supporting the lack of tax deficiency must be submitted to the jury. *See also* ***United States v. Aramony***, 88 F.3d 1369, 1384-85 (4th Cir. 1996).

Prosecutors should consider arguing that if the language in ***Uchimara*** and ***Clifton*** has the effect of requiring proof of tax loss, it would no longer be true that the falsehood itself defines the crime of filing a false return. *See* ***Gaunt v. United States***, 184 F.2d 284, 288 (1st Cir. 1950) (observing that the purpose of the false returns statute is "to impose the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood.").[4] Otherwise, proof of false returns would constitute proof of evasion.

Clearly, this was not Congress's intent in drafting § 7206(1), which "charges an offense separate and distinct in itself[.]" ***United States v. White***, 417 F.2d 89, 93 (2d Cir. 1969). As the Second Circuit explained in ***White***,

> Section 7206(1) . . . is only one part in a comprehensive statutory scheme to prohibit and punish fraud occurring in the assessment and collection of taxes by the government. Section 7201 is the inclusive section, prohibiting all attempts to evade or defeat any tax in any manner, and such an attempt is punishable as a felony. There follows a series of sections prohibiting specific methods of fraud in the collection and payment of taxes, all of which are separately punishable standing alone. Among these are 7203, 7206 and 7207, all directed against the taxpayer. Other sections are directed at persons involved in the process of tax collection. . . . Section 7206(1) provides penalties for signing, under oath, false returns or statements made in the process of tax collection. The offense charged is perjury, the operative element

[4] *Gaunt* referred to 26 U.S.C. § 7206's statutory predecessor, 26 U.S.C. § 145(c) (1939).

> is the signature under oath, and the felony penalties reflect the seriousness of this method of committing fraud. Thus the perjury offenses charged under 7206 may separately form the basis for an indictment[.]

United States v. White, 417 F.2d at 93-94 (citations omitted). Nevertheless, in light of the recent appellate decisions, it would be prudent for the prosecutor to consider the tax loss -- or lack thereof -- as part of the overall assessment of the government's ability to prevail in a Section 7206(1) case.

Another doctrine that may come into question, or at least be subject to reassessment, is that of the irrelevance of the "substantiality of the understatements." Pre-***Gaudin***, some defendants appealed their false returns convictions on the basis that the material falsehoods on their returns were insubstantial. Courts rejected these arguments, holding that the issue was whether the misstatements were material, not whether they were substantial. *See* ***United States v. Helmsley***, 941 F.2d 71, 92 (2d Cir. 1991); ***United States v. Citron***, 783 F.2d 307, 313 (2d Cir. 1986); ***United States v. Gaines,*** 690 F.2d 849, 858 (11th Cir. 1982)**.** The validity of these holdings is called into question by ***Uchimura*** and ***Clifton***. If it is now relevant whether a tax deficiency exists in a Section 7206(1) prosecution, it would seem that the amount of any tax deficiency, and thus the degree of any misstatement, would be relevant to a jury's determination of materiality by the rationale of these two holdings.

12.10[6] Reliance by Government on False Statements Not Required

Section 7206(1) does not require a showing that the government relied on the false statements. "[I]t is sufficient that they were made with the intention of inducing such reliance." ***Genstil v. United States***, 326 F.2d 243, 245 (1st Cir. 1964); *accord* ***United States v. Romanow***, 509 F.2d 26, 28 (1st Cir. 1975) ("[m]ateriality . . . is to be measured objectively by a statement's potential rather than by its actual impact."). The government is not required to prove that the defendant intended to induce the government to rely on his or her false statement or that the government was actually deceived. "[T]he intent to induce government reliance on a false statement or to deceive the government is *not* an element of 26 U.S.C. § 7206(1)." ***United States v. Griffin***, 524 F.3d 71, 81 (1st Cir. 2008) (emphasis original) (*citing* ***United States v. Boulerice***, 325 F.3d 75, 79-80 (1st Cir. 2003)).

Neither is it a defense that the false statements were so outrageous and flagrant that they should not be taken seriously. *See* ***United States v. Winchell***, 129 F.3d 1093, 1098 (10th Cir. 1997) (rejecting claim of tax defier who declared $7.5 billion in income and sought nearly $5.5 billion refund that statements in Section 7206(1) case were not material because they were preposterous). ***Winchell*** is a particularly favorable case for the government. There, the defendant challenged his conviction explicitly on the basis of materiality, arguing that his alleged false statements were so facially ridiculous that they would not have been acted upon by the government. 129 F.3d at 1098. ***Winchell*** thus reaffirms the proposition that it is the potential and not actual impact of the alleged false statement that the jury must weigh in determining materiality.

12.10[7] Pre-Gaudin Examples Of Material Matters

The following are examples of false items found to be material by courts, pre-***Gaudin***. They should continue to remain valid law for issues such as sufficiency of the evidence on appeal.

1. Amounts listed on returns as receipts from a business, improperly claimed deductions, and the like, have a direct bearing on a tax computation and are material. ***United States v. Morse***, 491 F.2d 149, 157 (1st Cir. 1974); ***United States v. Engle***, 458 F.2d 1017, 1019-20 (8th Cir. 1972).

2. Gross income falsely reported is clearly material. "This Court has . . . held that false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1)." ***United States v. Hedman***, 630 F.2d 1184, 1196 (7th Cir. 1980).

3. Omitted gross receipts on Schedule F, farm income, are material. ***United States v. Taylor***, 574 F.2d 232, 235-36 (5th Cir. 1978).

4. False schedule designed to induce allowance of unwarranted depreciation is material. The Ninth Circuit could "scarcely imagine anything more material." ***United States v.***

Crum, 529 F.2d 1380, 1383 (9th Cir. 1976) (Section 7206(2) violation, but principle applies to Section 7206(1)).

5. Schedule C claiming business loss deductions to which the taxpayers were not entitled rendered the returns false as to a material matter. ***United States v. Damon***, 676 F.2d 1060, 1064 (5th Cir. 1982).

6. Omission of a material fact makes a statement false, just as if the statement included a materially false fact. *See* ***United States v. Cohen***, 544 F.2d 781, 783 (5th Cir. 1977) (defendant had $30,000 in checks which he did not include on an Offer in Compromise, Form 656).

7. Understatement of gas purchases by gas station operator was material because it restricted ability of the Internal Revenue Service to verify his income tax returns and his diesel fuel excise tax returns. If purchases are unreported, a number of related items, such as inventory, income, or other costs, could also be incorrect. "'[A]uditability of this entire calculation [may be] made more difficult by the misstatements." ***United States v. Fawaz***, 881 F.2d 259, 263-64 (6th Cir. 1989).

8. The source of income is a "material matter" and the willful and knowing misstatement of the source of income is prohibited by § 7206(1). ***United States v. Vario***, 484 F.2d 1052, 1056 (2d Cir. 1973); ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973); ***United States v. Sun Myung Moon***, 532 F. Supp. 1360, 1367 (S.D.N.Y. 1982).

12.10[8] Pre-Gaudin Examples: No Tax Deficiency

12.10[8][a] Failure to Report a Business

In ***Siravo v. United States***, 377 F.2d 469, 471 (1st Cir. 1967), the defendant reported wages he had earned but did not report either his jewelry business or substantial gross receipts he received in connection therewith. The defendant argued that his omissions did not constitute false statements. ***Id***. at 472. The First Circuit affirmed his conviction, holding that for a statement to be "true and correct," it must be both accurate and complete. ***Id****.; see also* ***United States v. Taylor***, 574 F.2d 232, 234-36 (5th Cir. 1978) (failure to report substantial amounts of gross livestock receipts on Schedule F renders a return materially false).

12.10[8][b] Failure to Report Gross Receipts

In ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978) (*per curiam*), the defendant did not report gross receipts from a gambling and bootlegging operation conducted at his service station. Although the government did not prove that the defendant received any profits or income from the illicit business, the failure to report substantial gross receipts was sufficient to support a conviction. ***Id***.

In ***United States v. Vario***, 484 F.2d 1052, 1053-54 (2d Cir. 1973), the defendant failed to report gross income from a gambling or "policy" operation or that he was engaged in such an operation. The government did not use the net worth, specific items, bank deposits, or expenditures method to prove the defendant's receipt of additional unreported income; instead, through federal agents and "policy" members, the government established that the defendant was active in the organization and that it produced gross income he failed to report. 484 F.2d at 1054. The court of appeals found that evidence that the defendant paid for police protection was admissible to prove that the defendant had sufficient income from the operation to pay for the protection, that he had a source of income he was concealing, and that there was a relationship between the defendant and his coconspirator. 484 F.2d at 1056 (citations omitted).

12.10[8][c] Reporting Net Business Income, But Not Gross Income

In ***United States v. Young***, 804 F.2d 116, 117 (8th Cir. 1986), the court rejected the defendant's claim that because the income from his bail bonding business was

included on the corporate return as net income, the failure to include it as gross income on the return did not make the return untruthful, but only incomplete. Omissions from a tax return of material items which are necessary for a computation of income means the return is not true and correct within the meaning of section 7206(1). 804 F.2d at 119.

12.10[8][d] Reporting A False Source But Correct Figures

In ***United States v. DiVarco***, 484 F.2d 670, 672-73 (7th Cir. 1973), the government proved that income reported by the defendant as commissions from a mortgage and investment business did not come from that business. The fact that the source stated on the return was false was sufficient to support a Section 7206(1) conviction because "a misstatement as to the source of income is a material matter." ***Id***. at 673.

12.10[8][e] Gambling Losses Deducted as Business Expenses

In ***United States v. Rayor***, 204 F. Supp. 486, 488 (S.D. Cal. 1962), the defendant claimed deductions for personal gambling losses on the corporate tax return of his construction business. A subsequent audit revealed that there would have been an overpayment of corporate taxes even if the gambling losses had not been falsely deducted. ***Id***. at 489. The defendant claimed in a motion to dismiss that there was no offense charged as there was no deficiency for the year in question. ***Id***.

The district court denied the motion to dismiss, concluding that "what is claimed as deductible from gross income must be stated truthfully and is of utmost materiality." ***Rayor***, 204 F. Supp. at 491. Moreover, the court continued:

> The Government was entitled, as of March 7, 1956, to a statement which stated the gross income truthfully and correctly and which *did not* claim as legitimate business expenses personal gambling losses. The auditing of the return, in the light of the returns for the other years, which later developed that the omission of these falsely claimed deductions would have made *no* difference in the defendant's tax liability for the year 1955, cannot be retrojected to the date of the false statement, so as to confer verity on it.

Rayor, 204 F. Supp. at 492 (emphasis added).

12.10[8][f] Failure to Report Income from Illegal Business

In ***United States v. Garcilaso de la Vega***, 489 F.2d 761, 762 (2d Cir. 1974), the defendant was charged with failing to report income he earned from selling narcotics. The government's case was premised on the defendant's failure to report the additional income, not his failure to report that narcotics sales were the source of this additional income. ***Id***. at 765. The charge to the jury made it clear that it was the failure to report income, not the failure to report the illegal source of the income, that constituted the violation of section 7206(1). ***Id***.; *see* ***Garner v. United States***, 424 U.S. 648, 659-61 (1976) (finding that defendant, who reported his occupation as "professional gambler" on his tax return instead of claiming Fifth Amendment privilege against self-incrimination, could not later rely on privilege to preclude use of return against him in a criminal prosecution).

In some cases involving illegal source income, an indirect method of proof is needed to demonstrate the material falsity of the return. In ***United States v. Marrinson***, 832 F.2d 1465 (7th Cir. 1987), the government used the cash expenditures method of proof to establish that the defendant had omitted substantial additional income in each of the years charged, and offered evidence that the likely source of the unreported taxable income was marijuana sales. 832 F.2d at 1469, 1471. The Seventh Circuit held that "[d]irect proof of a defendant's likely source of income is not required . . . . The jury needed only enough circumstantial evidence from which they reasonably could have found the marijuana business to have been the source of the increase in the defendant's wealth." 832 F.2d at 1472.

In a case involving a fraudulent pyramid investment, or "Ponzi" scheme, the government proved the defendants had additional unreported income in each of the years in question, using the expenditures method of proof. ***United States v. Weiner***, 755 F. Supp. 748, 754-55 (E.D. Mich. 1991). The court also found that the government had successfully proven that the defendant had constructively, though not actually, received income in the form of profits from the scheme that he did not report, but should have reported, on his Forms 1040. ***Id***. at 755 (citations omitted).

12.10[8][g] Foreign Bank Account Questions on Tax Forms

In ***United States v. Franks***, 723 F.2d 1482, 1485 (10th Cir. 1983), the defendants falsely answered "No" to questions on income tax returns asking if they had any interest

in or signature authority over bank accounts in a foreign country. They also attached a form to their amended return which did not list "*all* of their foreign accounts over which they had control." (Emphasis in original). The court affirmed the false return convictions, holding that the false responses to these questions "comes within the purview of 26 U.S.C. § 7206(1)." ***Franks***, 723 F.2d at 1486; *accord* ***United States v. Harvey***, 869 F.2d 1439, 1441 & n.2 (11th Cir. 1989) (failing to report interest income from Cayman Islands accounts on Schedule B and falsely answering "no" on Schedule B, Part III (Foreign Accounts and Foreign Trusts), Form 1040, supported a charge defendant violated § 7206(1)).

12.11 WILLFULNESS -- DOES NOT BELIEVE TO BE TRUE AND CORRECT

12.11[1] Generally

Section 7206(1) is a specific intent crime requiring a showing of willfulness. Proof of this element is essential, and "neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice." ***United States v. Claiborne***, 765 F.2d 784, 797 (9th Cir. 1985), *abrogation on other grounds recognized by* ***United States v. Alexander***, 48 F.3d 1477, 1484 (9th Cir. 1995); *accord* ***United States v. Rozin***, 664 F.3d 1052 1058 (6th Cir. 2012); ***United States v. Kokenis***, 664 F.3d 919, 929 (7th Cir. 2011); ***United States v. Winchell***, 129 F.3d 1093, 1096 (10th Cir. 1997) (listing § 7206 as one example of a "specific intent" crime); ***United States v. Erickson***, 676 F.2d 408, 410 n.4 (10th Cir. 1982) (same).

The Supreme Court has defined "willfulness" as "'a voluntary, intentional violation of a known legal duty.'" ***Cheek v. United States***, 498 U.S. 192, 200 (1991) (quoting ***United States v. Bishop***, 412 U.S. 346, 360 (1973)); *accord*, ***United States v. Griffin***, 524 F.3d 71, 78 (1st Cir. 2008); ***United States v. Winchell***, 129 F.3d 1093, 1096-97 (10th Cir. 1997) (noting in § 7206(1) case that ***Cheek's*** definition of willfulness is the "conclusively established standard," and affirming trial court's refusal of an additional specific intent instruction); *see* also, ***United States v. Guidry,*** 199 F.3d 1150, 1156 (10th Cir. 1999) (same). In ***Guidry***, the Tenth Circuit explained that the same principles that govern proving willfulness in an evasion case apply to proving willfulness in the context of § 7206(1):

> While it is well established willfulness cannot be inferred solely from an understatement of income, willfulness can be inferred from

> making false entries of alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.
>
> . . . This conduct can be used to prove willfulness "even though the conduct may also serve other purposes such as concealment of other crime."

199 F.3d at 1157 (*quoting* ***Spies v. United States***, 317 U.S. 492, 499 (1943); *citing* ***United States v. Samara***, 643 F.2d 701, 704 (10th Cir. 1981)). Willfulness can also be proven by evidence that the defendant had been repeatedly advised by IRS agents that he could not deduct personal, non-business expenditures on his tax returns. *See* ***United States v. Garcia***, 762 F.2d 1222, 1225 (5th Cir. 1985). Similarly, where the IRS repeatedly disallows the defendant's deductions for personal expenses in prior years, resulting in assessments of additional taxes and civil judgments to collect those assessments, such evidence can be used to establish that the defendant willfully falsified his tax return. ***Id***. at 1225-26.

When charged with violations of § 7206(1), defendants frequently request a separate instruction on good faith. The Fourth Circuit has held that where the district court gives adequate instructions on specific intent, declining to give a separate instruction on good faith is not error. *See* ***United States v. Fowler***, 932 F.2d 306, 317 (4th Cir. 1991) (citing ***United States v. Pomponio***, 429 U.S. 10, 13 (1976), and ***Cheek v. United States***, 498 U.S. 192, 201 (1991), and collecting cases). This is the majority position among the circuits. ***United States v. Leahy***, 445 F.3d 634, 652 n.14 (3d Cir. 2006) (*citing* ***United States v. Gross***, 961 F.2d 1097, 1102-03 (3d Cir. 1992)). *See also*, ***United States v. Kokenis***, 662 F.3d 919, 929-30 (7th Cir. 2011) (a defendant is not entitled to a specific instruction if a jury was adequately instructed on his theory of defense) (citation and punctuation omitted).[5]

[5] The ***Kokenis*** court, in finding that the defendant was not entitled to a good faith defense instruction, observed that "A defendant is entitled to an instruction on his theory of defense only if (1) the instruction provides a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of defense is not part of the government's charge; and (4) the failure to include the instruction would deprive the defendant of a fair trial." ***Kokenis*** at 929 (citations omitted).

One court, however, held pre-***Cheek***, that a general instruction on willfulness is not sufficient when the evidence supports the giving of a good faith instruction. ***United States v. Harting***, 879 F.2d 765, 769 (10th Cir. 1989) (*citing* ***Pomponio); United States v. Hopkins***, 744 F.2d 716, 718 (10th Cir. 1984) (*en banc*). In ***Pomponio***, a prosecution under Section 7206(1), the Supreme Court approved the following jury instruction on willfulness:

> In explaining intent, the trial judge said that "[t]o establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law." The jury was told to "bear in mind the sole charge that you have here, and that is the violation of 7206, the willful making of the false return, and subscribing to it under perjury, knowing it not to be true and [sic] to all material respects, and that and that alone."

429 U.S. at 11 n.2.

The Eighth Circuit initially took the same position as the Tenth Circuit. *See* ***United States v. Leahy***, 445 F.3d at 652 n.14 (*citing* ***United States v. Casperson***, 773 F.2d 216, 223-24 (8th Cir. 1985)). Subsequently, the Eighth Circuit appeared to move more toward the majority of circuits in finding that a good faith instruction is not required, despite a defense request, where the jury instructions adequately convey the specific intent requirement. *See* ***United States v. Leahy***, 445 F.3d at 652 n.14 (*citing* ***Willis v. United States***, 87 F.3d 1004, 1008 (8th Cir. 1996 (discussing issue in context of denial of a motion under 28 U.S.C. § 2255))). For a further discussion of willfulness and the legal ramifications of the ***Cheek*** case, *see* Section 8.08, *supra*, and Section 40.04, *infra*.

In some circumstances, the defendant may try to negate the element of willfulness by claiming that he lacked willfulness because he reasonably relied on the advice of others. *See* ***Rozin***, 664 F.3d at 1060. "The elements of a reliance defense include: (1) full disclosure of all pertinent facts and (2) good faith reliance on the accountant's advice." ***Id.***

In a Section 7206(1) prosecution, the government is not required to show an intent on the defendant's part to evade income taxes. ***United States v. Taylor***, 574 F.2d 232, 234

(5th Cir. 1978); ***United States v. Engle***, 458 F.2d 1017, 1019 (8th Cir. 1972).[6] Also, there is "no requirement that showing the specific intent for a § 7206(1) violation requires proof of an affirmative act of concealment; it is enough that the government show the defendant was aware that he was causing his taxable income to be underreported." ***United States v. Barrilleaux***, 746 F.2d 254, 256 (5th Cir. 1984) (*per curiam*). Moreover, the government may rely solely on circumstantial evidence to prove willfulness. *See*, *e.g.*, ***United States v. Tucker,*** 133 F.3d 1208, 1218-19 (9th Cir. 1998) (false returns); ***United States v. Klausner***, 80 F.3d 55, 63 (2d. Cir. 1996) (evasion); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984) (violation of § 7203).

12.11[2] Signature on Return as Evidence of Knowledge of Return Contents

The defendant's signature on a document can help establish willfulness. *See* ***United States v. Tucker***, 133 F.3d 1208, 1218 n.11 (9th Cir. 1998) (noting that signature is sufficient to establish knowledge of contents of return). "A taxpayer's signature on a return does not in itself prove his knowledge of the contents, but knowledge may be inferred from the signature along with the surrounding facts and circumstances, and the signature is *prima facie* evidence that the signer knows the contents of the return." ***United States v. Mohney***, 949 F.2d 1397, 1407 (6th Cir. 1991) (*citing* ***United States v. Harper***, 458 F.2d 891, 894 (7th Cir. 1971)); ***United States v. Davis***, 603 F.3d 303, 306 (5th Cir. 2010) ("A taxpayer's signature on a return with a jurat indicates that the taxpayer attests to the accuracy of the reported data."); ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982) (finding that defendant's signature is sufficient to establish knowledge once it has been shown that the return was false); ***United States v. Romanow***, 505 F.2d 813, 814-15 (1st Cir. 1974) (noting that the jury could conclude from nothing more than the presence of his uncontested signature that he had in fact read the Form 941); ***United States v. Bettenhausen***, 499 F.2d 1223, 1234 (10th Cir. 1974) ("From proof of one's signing a return it may be believed that he knew its contents . . . .").

Prosecutors should, however, be aware of the Ninth Circuit's decision in ***United States v. Trevino***, 419 F.3d 896, 902 (9th Cir. 2005). In ***Trevino***, the court held that it was error to instruct the jury that "[a] return or other tax document signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it

[6] Of course, to the extent that the government can show that the defendant was motivated by a desire to evade taxes, the case is more attractive to a jury. Consequently, this is one of the factors considered by the Tax Division in deciding whether to authorize prosecution.

and had knowledge of its contents." The court noted that while 26 U.S.C. § 6064 provides that an individual's signature on the return is prima facie evidence that the return was actually signed by that individual, it does not create any other presumption. ***Id***.; *see also* ***United States v. Rayborn***, 491 F.3d 513, 519 (6th Cir. 2007) (discussing ***Trevino*** and holding that any error was harmless where trial court instructed: "If you find beyond a reasonable doubt that the defendant signed the tax return, that is evidence from which you may but are not required to find or infer that the defendant had knowledge of the contents of the return.").

12.11[3] Collective Intent of Corporations

A showing of "collective intent" on the part of a corporate defendant can satisfy the willfulness requirement in a Section 7206(1) prosecution of a corporate defendant. *See* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir. 1986). In ***Shortt Accountancy***, an accountant employed by the defendant accounting firm prepared and signed for a client a tax return that contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. 785 F.2d at 1450-51. The accountant, acting on information provided to him by the chief operating officer, was unaware of the fraudulent nature of the deductions. ***Id***. at 1451. The Ninth Circuit held that the accountant's lack of intent to make and subscribe a false return did not prevent the conviction of the defendant corporation under Section 7206(1), because the defendant's chief operating officer acted willfully. ***Id***. at 1454. The officer's willfulness and the accountant's act of making and subscribing the false return were sufficient to constitute an intentional violation of Section 7206(1) on the part of the defendant corporation. ***Id***. The court reasoned that precluding a finding of willfulness in this situation would allow a tax return preparer to "escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return." ***Id***. Thus, a corporation is liable under section 7206(1) when its agent intentionally causes it to violate the statute. ***Shortt Accountancy,*** 785 F. 2d at 1454; *cf*. ***United States v. Bank of New England, N.A.***, 821 F.2d 844, 855-56 (1st Cir.1987) (collective knowledge in prosecution of bank for currency transaction reporting violations); ***United States v. Gold***, 743 F.2d 800, 822-23 (11th Cir. 1984) (Medicare fraud prosecution of medical corporation); ***United States v. Phillip Morris USA, Inc.***, 449 F. Supp. 2d 1, 893-894 (D.D.C. 2006) ("Corporations are liable for the collective knowledge of all employees and agents within (and acting on behalf of) the corporation.") (citation omitted).

12.11[4] Amended Returns

Although willfulness may be inferred from circumstantial evidence, the Second Circuit has held that the filing of an amended return after the filing of a false return cannot provide the sole basis for an inference of willfulness. ***United States v. Dyer***, 922 F.2d 105, 108 (2d Cir. 1990). In ***Dyer***, the court reversed a Section 7206(1) conviction because the trial judge's instructions allowed the jury to conclude that the defendant's amended return, by itself, could support a finding that he had known his original return to be false when he filed it. 922 F.2d at 107-108. The filing of an amended return may indicate that a taxpayer now believes the original return was inaccurate, but it does not prove he had such knowledge at the time of the false filing. ***Id***. at 108. Thus, without more, an amended return provides only an inference of mistake, rather than of fraud. ***Id***.; *cf.* ***Santopietro v. United States***, 948 F. Supp. 145, 154 (D. Conn. 1996) (explaining ***Dyer*** and allowing introduction of amended return coupled with other evidence), *aff'd in part, vacated in part on other grounds*, 166 F.3d 88 (2d Cir. 1999), *abrogated sub nom.* ***Sabri v. United States***, 541 U.S. 600 (2004).

In ***United States v. Tishberg***, 854 F.2d 1070, 1073 (7th Cir. 1988), the court decided that amended returns filed between an audit and indictment may demonstrate a defendant's good faith effort to correct his past mistakes. As the trier of fact, the jury is free to consider this evidence, but the filing of amended returns does not negate the import of the defendant's previous actions. ***Id***. at 1073-74. A defendant's act of filing amended returns after he becomes aware that he is under criminal investigation for tax evasion may be considered by the jury to evaluate the defendant's true intent during the earlier period. ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990). Where the facts and circumstances establish that the defendant was aware of his receipt of additional taxable income and failed to report it, a reasonable jury can conclude that the defendant's omission of income from his original returns was intentional, as opposed to an act of negligence or mistake. ***United States v. Tishberg***, 854 F.2d at 1073.

Similarly, if a defendant underreported income on a false return, the inclusion of the income on a subsequent return does not establish a lack of willfulness at the time the original return was filed. The Seventh Circuit has held that a subsequent return is not probative of the defendant's state of mind at the time he filed the false return. ***United States v. McClain***, 934 F.2d 822, 834-35 (7th Cir. 1991) (affirming trial court's exclusion of amended return offered by *defendant*).

The district court may be within its discretion to grant a motion *in limine* to exclude the defendant's amended return filed post-indictment, where the return is offered for the purpose of showing that the defendant made a good faith mistake in omitting income from his original return. ***United States v. Radtke***, 415 F.3d 826, 840 (8th Cir. 2005). "Whether an amended tax return filed post-indictment technically might be 'relevant' to the taxpayer's intent at the time he filed the original return, there is no doubt that self-serving exculpatory acts performed substantially after a defendant's wrongdoing is discovered are of minimal probative value as to his state of mind at the time of the alleged crime." ***Id***. at 840-41.

12.11[5] Reliance On Professional Advice

Reliance by the defendant on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return, if the defendant can show that he or she provided the preparer with complete information and then filed the return without any reason to believe it was false. *See* ***United States v. Tandon,*** 111 F.3d 482, 490 (6th Cir. 1997) (noting that jury instruction for professional reliance defense not warranted where there was no evidence that full disclosure was made or that advice was given); ***United States v. Brimberry***, 961 F.2d 1286, 1290-91 (7th Cir. 1992) (denying good faith reliance defense in absence of full disclosure of all material facts); ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989) (finding that professional reliance defense was not available where defendant presented no evidence concerning either element).

12.11[6] Willful Blindness Instruction

It is a defense to a finding of willfulness that the defendant was ignorant of the law or of facts which made the conduct illegal, since willfulness requires a voluntary and intentional violation of a known legal duty. However, if the defendant deliberately avoided acquiring knowledge of a fact or the law, then the jury may infer that he actually knew it and that he was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See* ***United States v. Dykstra***, 991 F.2d 450, 452 (8th Cir. 1993); ***United States v. Ramsey***, 785 F.2d 184, 189-91 (7th Cir. 1986) (mail and wire fraud charges).[7] In such a case, the use of an "ostrich instruction" -- also known as a

[7] Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991); *cf*. ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1986) ("The element of knowledge may be

deliberate ignorance, conscious avoidance, willful blindness, or ***Jewell*** instruction, may be appropriate. *See* ***United States v. Bussey***, 942 F.2d 1241, 1245-48 (8th Cir. 1991); ***United States v. Defazio***, 899 F.2d 626, 635-36 (7th Cir. 1990); ***United States v. Jewell***, 532 F.2d 697, 699-704 (9th Cir.1976); *see generally* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351 (1992).

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means. ***United States v. Poole***, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." Id. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge." ***Id.*** *citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***, *supra.*

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Pool***e, 640 F.3d at 122; ***Stadtmauer***, at 255; Jewell, 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

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satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him."

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69.

The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71. *Accord* ***Poole***, 640 F.3d at 122 (This circuit approves willful blindness instructions when the jury is not permitted to infer guilty knowledge from a mere showing of careless disregard or mistake."). *See also* ***United States v. Wert-Ruiz***, 228 F.3d 250, 255 (3d Cir. 2000); ***Wisenbaker***, 14 F.3d at 1027.

A number of courts have approved the use of such instructions under proper circumstances. *See, e.g.*, ***United States v. Griffin***, 524 F.3d 71, 79 (1st Cir. 2008) (government did not forfeit its right to request a willful blindness instruction where the evidence supported such an instruction, simply because it contended at trial that defendant had actual knowledge); ***United States v. Alston-Graves***, 435 F.3d 331, 338 n.2 (D.C. Cir. 2006) (collecting cases reflecting that all circuits have approved willful blindness instructions for specific intent criminal offenses when evidence supports instruction); ***United States v. Marston***, 517 F.3d 996, 1003-04 (8th Cir. 2008) (district court did not err in giving willful blindness/deliberate ignorance instruction in prosecution for filing false tax documents); ***United States v. Bornfield,*** 145 F.3d 1123, 1128-30 (10th Cir. 1998) (finding no plain error in trial court's use of deliberate ignorance instruction in money laundering case)*;* ***United States v. Neville,*** 82 F.3d 750, 759-60 (7th Cir. 1996) (drug conspiracy); ***United States v. Hauert***, 40 F.3d 197, 203 (7th Cir. 1994) (finding, in false returns and evasion case, no error in court's instruction that "[n]o person can intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious"); ***United States v. Bussey***, 942 F.2d 1241, 1246-51 (8th Cir. 1991) (false returns, failure to file, and false statement under 18 U.S.C. §1001); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir. 1991) (failure to file); ***United States v. Picciandra***, 788 F.2d 39, 46-47 (1st Cir. 1986) (evasion); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985) (conspiracy and false returns); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979) (evasion).

In a criminal tax prosecution, when the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability, the trier of fact may find that the defendant exhibited "willful blindness" satisfying the scienter requirement of knowledge. ***Poole,*** 640 F.3d at 122; ***United States v. Anthony***, 545 F.3d 60, 64 (1st Cir. 2008). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. de Francisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (*per curiam*) (reversing drug possession conviction where deliberate ignorance instruction given); ***United States v. Heredia***, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (collecting cases); *cf.* ***United States v. Rodriguez***, 983 F.2d 455, 457-58 (2d Cir. 1993) (noting that in the Second Circuit, unlike the Ninth, a "conscious avoidance" charge is "commonly used.").

Thus, it is advisable not to request such an instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case. Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d at 818 n.2. Further, to avoid potential confusion as to the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance." Any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

12.12 LESSER INCLUDED OFFENSE CONSIDERATIONS

The Tax Division's policy concerning lesser-included offenses is stated at Section 8.11, *supra*.

12.13 VENUE

"[T]he place of signing a tax return does not control the determination of venue[]" for a charge under Section 7206(1). ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987). Venue in a Section 7206(1) prosecution lies in any district where the false return was made, subscribed, or filed. ***Id***.; ***United States v. Shyres***, 898 F.2d 647, 657-58 (8th Cir. 1990). Venue also lies in the district where the false return was prepared and signed. ***United States v. Rooney***, 866 F.2d 28, 31 (2d Cir. 1989); ***Marrinson***, 832 F.2d at 1475; ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977). Venue may also lie "where the preparer received information from the defendant even though the defendant signed and filed the returns elsewhere." ***United States v. Marrinson***, 832 F.2d at 1475 (collecting cases).

Reference should be made to the discussion of venue in Section 6.00, *supra*.

12.14 STATUTE OF LIMITATIONS

The statute of limitations for Section 7206(1) offenses is six years. In the case of a return, the limitations period runs from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(5); ***United States v. Habig***, 390 U.S. 222, 225 (1968); ***United States v. Marrinson***, 832 F.2d 1465, 1475-76; ***United States v. Samara***, 643 F.2d 701, 704 (10th Cir. 1981). (For rules relating to employment taxes, see Section 7.02[5].)

For a further discussion of the statute of limitations, *see* Section 7.00, *supra*.