

[Criminal Tax Manual](#)

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16.00 FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS

16.01 STATUTORY LANGUAGE: 26 U.S.C. § 7207

Section 7207 of the Internal Revenue Code provides, in pertinent part:

Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined¹ . . . or imprisoned not more than 1 year, or both.²

16.02 ELEMENTS

To establish a violation of Section 7207, the following elements must be proved beyond a reasonable doubt:

1. the defendant submitted a return, statement, or other document to the Internal Revenue Service;
2. the return, statement, or other document was false or fraudulent as to a material matter; and
3. the defendant acted willfully.

Sansone v. United States, 380 U.S. 343, 352 (1965).

16.03 RETURN, STATEMENT, OR OTHER DOCUMENT

By its express terms, Section 7207 applies to “any list, return, account, statement, or other document.” Moreover, “a document prepared by another could give rise to liability on the part of the taxpayer if he delivered or disclosed it to the Service.” *United States v. Bishop*, 412 U.S. 346, 358 (1973). Aside from the policy considerations discussed below and except as noted in [§ 16.03\[1\]](#) *infra*, there is no limit on the type of

¹ The maximum permissible fine for a violation of 26 U.S.C. § 7207 is \$100,000 for an individual and \$200,000 for a corporation. 18 U.S.C. §§ 3571(b)(5) & (c)(5). Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d).

² The portion of Section 7207 dealing with information furnished to the Internal Revenue Service in connection with 26 U.S.C. § 6047(b) (information relating to certain trusts and annuity plans), 26 U.S.C. § 6104(d) (public inspection of exempt organizations’ annual reports), and 26 U.S.C. 527 (political organizations) is not covered in this Manual.

document that can be the subject of a violation of 26 U.S.C. § 7207. *See United States v. Holroyd*, 732 F.2d 1122, 1126 (2d Cir. 1984). The usual situation will involve an IRS audit and the submission to the auditor of altered canceled checks, altered invoices, or altered receipts to support overstated deductions. Unlike Section 7206(1), Section 7207 does not require that the alleged false document be signed under penalties of perjury, or even signed at all. *United States v. Bishop*, 412 U.S. at 357-58. It is enough to show that the defendant delivered or disclosed the document to the Internal Revenue Service, knowing it was materially false. *Id.* at 358.

16.03[1] Tax Return as False Document

The Tax Division generally will not authorize a prosecution or plea agreement under Section 7207 where the allegedly false document forming the basis for a charge under Section 7207 is a tax return.

16.04 FALSE OR FRAUDULENT MATERIAL MATTER

The requirement to establish that the document in issue is false or fraudulent as to a material matter is an element that is common to violations of Sections 7206(1), 7206(2), and 7207. *See* 26 U.S.C. 7206(1) (“does not believe to be true and correct as to every material matter,”); 26 U.S.C. § 7206(2) & 2707 (“fraudulent or . . . false as to any material matter”). Accordingly, reference should be made to the discussion of materiality in §§ [12.10](#) and [13.06](#), *supra*.

Although no court has addressed the issue, materiality appears to be a question for the jury in Section 7207 cases. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (holding that materiality under 18 U.S.C. 1001 is a jury question); *Neder v. United States*, 527 U.S. 1, 8 (1999) (noting that government did not dispute that the district court had erred under *Gaudin* in deciding materiality element of a § 7206(1) offense itself, rather than submitting the issue to the jury). The question of materiality therefore should be submitted to the jury in Section 7207 cases, to avoid any issue on appeal. *See* 2B KEVIN F. O’MALLEY, ET AL, FEDERAL JURY PRACTICE AND INSTRUCTIONS--CRIMINAL § 67.18, note (5th ed. 2000) (stating that, after *Gaudin*, “a better practice might be to submit *all* questions of materiality to the jury” (citing *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir. 1996)); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Instruction 96, Annotations (2003 Revision) (“The issue of ‘materiality’ [under 26 U.S.C. § 7207] is for the jury, not the Court” (citing *Gaudin*)).

Materiality in a Section 7207 case does not depend on whether the false statement has any bearing on the tax liability of the defendant. To the contrary, conduct can violate Section 7207 even when the false material statement does not have the effect of reducing the defendant's tax liability. *Sansone v. United States*, 380 U.S. 343, 352-53 (1965).

16.05 WILLFULNESS

The word “willfully” has the same meaning in the “misdemeanor and felony sections of the Revenue Code.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976); accord *United States v. Bishop*, 412 U.S. 346, 361 n.9 (1973). It “generally connotes a voluntary, intentional violation of a known legal duty.” *United States v. Bishop*, 412 U.S. at 360; *United States v. Drape*, 668 F.2d 22, 26 (1st Cir. 1982).

For an in-depth discussion of willfulness, see §§ [8.08](#) and [12.11](#), *supra*.

16.06 TAX DIVISION POLICY

The Tax Division generally disapproves the use of Section 7207 in any case in which a defendant used a false document as part of a scheme to deceive the IRS. In such a case, felony prosecution under 26 U.S.C. § 7212(a) or 18 U.S.C. § 1001 should be considered.³ A misdemeanor prosecution under Section 7207 may be appropriate, however, for a defendant who cooperates fully, if the case involves an isolated false document and there are mitigating circumstances, such as evidence that the defendant immediately confessed when questioned about the document. This exception particularly applies to a lower-echelon participant in a wider scheme who agrees to cooperate fully and provide substantial assistance in the investigation and prosecution of another individual. In such cases,

1. any plea agreement to a misdemeanor charge is subject to the approval of the Tax Division, which will evaluate whether the conduct at issue merits treatment as a misdemeanor;

³ A false document can be the basis for a felony charge of violating 18 U.S.C. § 1001 even if the document could also support a Section 7207 misdemeanor violation. See *United States v. Tomeny*, 144 F.3d 749, 752-53 (11th Cir. 1998); *United States v. Parsons*, 967 F.2d 452, 456 (10th Cir. 1992); *United States v. Fern*, 696 F.2d 1269, 1273-74 (11th Cir. 1983); *United States v. Schmoker*, 564 F.2d 289, 291-92 (9th Cir. 1977) (concurring opinion); see also *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) (noting that selection of charges is within the government’s discretion). A false document often can establish an attempt to evade and defeat a tax in violation of Section 7201. See [§ 8.06](#), *Attempt To Evade Or Defeat*, *supra*.

2. the prosecutor recommending the misdemeanor plea should provide a written statement confirming that the prosecutor anticipates further criminal prosecutions and believes that the defendant will provide substantial assistance;
3. the IRS should express its view and refer the case pursuant to 26 U.S.C. § 6103(h)(3)(A);
4. the plea agreement should be conditioned on the defendant's full and truthful cooperation with the IRS in any civil audit or adjustment of the tax liability arising out of the circumstances of the criminal case;
5. the tax loss should not exceed \$20,000 for any year; and
6. the defendant should sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved for all of the years under investigation.

16.07 LESSER-INCLUDED OFFENSE CONSIDERATIONS

The elements of Section 7207 do not readily appear to be a subset of the elements of Section 7201, but the Supreme Court stated in *Sansone v. United States*, 380 U.S. 343, 352-53 (1965), that an offense under Section 7207 may be a lesser-included offense of Section 7201.⁴ See also *Schmuck v. United States*, 489 U.S. 705, 716 & 720 n.11 (1989); *United States v. Humphreys*, 982 F.2d 254, 262 (8th Cir. 1992). Accordingly, it is the Tax Division's policy that, in an appropriate case, either party may request the giving of a lesser included offense instruction based on Section 7207 where the defendant has been charged with attempted income tax evasion by the filing of a false tax return or other document. See [§ 3.00](#), *supra*, Memorandum from James A. Bruton, Acting Assistant Attorney General, Tax Division, to All United States Attorneys, *Re: Lesser Included Offenses in Tax Cases*.

In addition, it has been held that a conspiracy to violate Section 7207 may be a lesser-included offense of a conspiracy to defraud the United States for the purpose of impeding and impairing the functions of the IRS. See *United States v. Southland Corp.*, 760 F.2d 1366, 1381-82 (2d Cir. 1985). In *Southland*, a pre-*Schmuck* decision, the court

⁴ This statement does not appear to be true to the elements test adopted by the Court in *Schmuck*, given that the filing of a false return is not required for a violation of Section 7201, see *Spies v. United States*, 317 U.S. 492, (1943) (attempt to evade tax may consist of failure to file coupled with some affirmative act).

noted that there was no dispute that "the elements of a conspiracy to file a return known to the maker to be fraudulent or false as to any material matter (§ 7207) would also constitute elements of a conspiracy to defraud the United States by impeding the functioning of the IRS." 760 F.2d at 1382. But the court of appeals determined that the district court had not erred in refusing to instruct on Section 7207, reasoning that "[o]nce the jury decided that Southland had filed a return taking a deduction for legal expenses which it knew had not been incurred, as the jury would have had to do in order to find a violation of 26 U.S.C. § 7207, it would have decided every element necessary to convict Southland of defrauding the United States under 18 U.S.C. § 371."

It has been the Tax Division's position that the elements of Section 7207 are not a subset of the elements of Section 7206(1)." In *United States v. Bishop*, 412 U.S. 346, 361 n.9 (1973), the government argued that Section 7207 is not an included offense in Section 7206(1) because Section 7207 requires that the actor have knowledge of falsity, while Section 7206(1) requires only that the defendant did not believe the statement he made to be true. The government pointed out that knowledge of actual falsity is different from the lack of a subjective belief of truthfulness. See *United States v. Bishop*, Brief for the United States, 1972 WL 136473, at *10-*11, *20-*23.

The Court found it unnecessary to reach this contention, and the Tax Division is not aware of any decision that has decided the issue. Thus, it is the Tax Division's position that a prosecutor should oppose and not seek a lesser-included offense instruction on Section 7207 when a defendant has been charged with violating Section 7206(1) by making and subscribing a false tax return or other document. If the prosecutor is concerned about a potential for failure of proof as to one of the elements unique to Section 7206(1), then he or she should consider charging both Section 7206(1) and Section 7207 in the same indictment. See [§ 3.00](#), *supra*, *Memorandum from James A. Bruton, Acting Assistant Attorney General, Tax Division, to All United States Attorneys, Re: Lesser Included Offenses in Tax Cases*.

16.08 VENUE

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." U.S. Const. amend VI; *see also* Fed. R. Crim. P. 18 (trial proper "in a district where the offense was committed"). If a statute does not indicate what Congress considers to be the place

“wherein the crime shall have been committed,” U.S. Const. amend VI, “the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *United States v. Anderson*, 328 U.S. 699, 703 (1946). In a Section 7207 prosecution, venue is proper in the judicial district in which the defendant delivered or disclosed a false document to the IRS. *See also* the discussion of venue in [Section 6.00](#), *supra*.

16.09 STATUTE OF LIMITATIONS

The statute of limitations for Section 7207 offenses is six years from the date the defendant delivered or disclosed the false or fraudulent document to the IRS. *See* 26 U.S.C. § 6531(5). *See also* the discussion of the statute of limitations in [§ 7.00](#), *supra*.