

[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 law on lesser included offenses is discussed in depth at [§ 8.11, *supra*.](#)

A lesser included offense is an offense that is not charged but that is “necessarily included” in a charged offense. Fed. R. Crim. P. 31(c)(1). In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court adopted a strict elements test for applying Rule 31, holding that “one offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense.” *Id.* at 716. Accordingly, no lesser included offense instruction should be given “[w]here the lesser offense requires an element not required for the greater offense.” *Id.*

The elements of § 7207 are not a subset of the elements of any other tax offense. But prosecutors should be aware of dicta in *Schmuck* and in *Sansone v. United States*, 380 U.S. 343, 352-53 (1965), that indicate § 7207 is a lesser included offense of tax evasion. Sections 8.11[4] and 8.11[5], *supra*, explain, however, why § 7207 is not a lesser included offense of evasion.

Section 7207 is not a lesser included offense of either § 7206(1) or § 7206(2) in the majority of circuits holding that filing is not an element of those offenses, because submitting the return or other document to the IRS is an element of § 7207. Despite the

statutory text not requiring the defendant's filing of a return as an element of § 7206(1), some circuits have held or stated otherwise, complicating the analysis in those circuits. *See supra* § 12.07[1] (discussing the law in these circuits). Courts in these circuits may, for this reason, conclude § 7207 is a lesser-included offense of § 7206(1). Nonetheless, a lesser-included offense instruction will rarely be appropriate. Even when the threshold legal test is met, "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *Schmuck*, 489 U.S. at 716 n.8. As a practical matter, that means the instruction would only be appropriate when there is a factual dispute about whether the return was signed under penalty of perjury, which will rarely be the case. *See Escobar*, 388 F.2d at 665 (holding that defendant was not entitled to instruction because it was undisputed that the returns at issue had perjury jurats); *United States v. Gaines*, 690 F.2d 849, 856 (11th Cir. 1982) (same, and noting *Escobar* binds the Eleventh Circuit); *United States v. Taylor*, 849 F.2d 1477, *4 (9th Cir. 1988) (table) (same).

Courts have also held that § 7207 is not a lesser included offense of § 7202. The elements of § 7202 are: 1) a duty to collect, account for, and pay over a tax; 2) the failure to collect, truthfully account for, or pay over the tax; and 3) willfulness. *See, e.g.*, *United States v. Thayer*, 201 F.3d 214, 219-21 (3d Cir. 1999). As the Eighth Circuit noted, other than willfulness, § 7202 and § 7207 are different statutes. *See United States v. Scharf*, 558 F.2d 498, 503 (8th Cir. 1977). More recently, the Sixth Circuit repeated this point, observing that the "only element those crimes share is willfulness." *United States v. Cheff*, 829 F.App'x 104, 108 (6th Cir. 2020). Put differently, every element of § 7207, except for willfulness, is an element that is not part of a § 7202 offense. Thus, § 7207 is not a lesser included offense of § 7202.

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.](#)