Criminal Tax Manual
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12.00 FRAUD AND FALSE STATEMENT

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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* not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [FN1] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

12.02 **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. Section 7206(1) is one of the more flexible prosecutorial weapons in the government's arsenal against criminal tax offenses. 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 which would be difficult to prove. However, changes in the law regarding materiality may now make it more difficult to obtain convictions in cases with no demonstrable tax deficiency. *See* § 12.08[3].

12.03 **ELEMENTS**

The elements of a section 7206(1) prosecution 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. Pirro*, 212 F.3d 86, 89 (2d Cir. 2000); *United States v. Hayes*, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1388 (2001); *United States v. Scholl*, 166 F.3d 964, 979 (9th Cir.), *cert. denied*, 528 U.S. 873 (1999); *United States v. Peters*, 153 F.3d 445, 461 (7th Cir. 1998)); *United States v. Tucker*, 133 F.3d 1208, 1218 (9th Cir. 1998); *United States v. Gollapudi*, 130 F.3d 66, 71-72 (3d 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. Borman*, 992 F.2d 124, 126 (7th Cir. 1993); *United States v. Robinson*, 974 F.2d 575, 579 (5th Cir. 1992); *United States v. Kaiser*, 893 F.2d 1300, 1305 (11th Cir. 1990); *United States v. Drape*, 668 F.2d 22, 25 (1st Cir. 1982).

12.04 **RETURN, STATEMENT, OR DOCUMENT**

Section 7206(1) expressly applies to "any return, statement, or other document" signed under penalties of perjury. 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. Droms*, 566 F.2d 361 (2d Cir. 1977) (per curiam) (financial information statement submitted to the IRS for settlement purposes); *United States v. Cohen*, 544 F.2d 781 (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 above-cited 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.

The Fifth Circuit limited the application of 7206(1) to documents required by statutes or regulations in *United States v. Levy*, 533 F.2d 969 (5th Cir. 1976). There, the court of appeals held that section 7206(1) was restricted to statements or documents required either by the Internal Revenue Code or applicable regulations to be filed or submitted. *Levy* involved the submission of a Form 433AB. *Levy's* interpretation of section 7206(1), however, has been limited by the Fifth Circuit itself. *See United States v. Damon*, 676 F.2d 1060, 1063-64 (5th Cir. 1982) (allowing § 7206(1) prosecution for false Schedule C); *United States v. Taylor*, 574 F.2d 232, 237 (5th Cir. 1978) (upholding § 7206(1) prosecution for false Schedules E and F); *cf. 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*). *See also United States v. Hunerlach*, 197 F.3d 1059, 1068 (5th Cir. 1999) (affirming conviction based on Form 433A where argument that a section 7206(1) conviction cannot rest on Form 433A 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. The trial court dismissed the indictment on the authority of *Levy* because Form 433-AB was not a required form. 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 Holroyd . . . 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 (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*, *supra*, 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).

12.05 **"MAKES" ANY RETURN, STATEMENT, OR DOCUMENT**

12.05[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. Gilkey*, 362 F. Supp. 1069, 1071 (E.D. Pa. 1973); *accord 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." However, there is no requirement that the defendant file the return, if it was in fact filed and the defendant "made or subscribed" the return. *United States v. Kellogg*, 955 F.2d 1244, 1248-49 (9th Cir. 1992).

There appears to be room for the argument, however, that an unfiled return may form the basis of a section 7206(1) or (2) prosecution, if the return was transmitted to a third person obligated to file it. *See United States v. Cutler*, 948 F.2d 691, 694-95 (10th Cir. 1991) (upholding § 7206(2) conviction for false and unfiled 1099B given to intermediary required to file); *United States v. Monteiro*, 871 F.2d 204, 210-11 (1st Cir. 1989) (same).

12.05[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. *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (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) where its agent deliberately causes it to make and subscribe to a false tax return.").

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 (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; *cf. United States v. Wilson*, 887 F.2d 69, 73 (5th Cir. 1989) (discussing reliance on preparer as defense to willfulness); *United States v. Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (same).

Additionally, a return preparer can be charged under section 7206(1) for willfully making and subscribing a false tax return for a taxpayer. *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. On appeal from the conviction under section 7206(1), the defendant firm argued that a tax preparer cannot "make" a return within the meaning of the statute since it is the taxpayer, not the preparer, who has the statutory duty to file the return. The court rejected this argument, however, holding that the prohibitions of section 7206(1) are not based on the taxpayer's duty to file; rather, section 7206(1) simply prohibits perjury in connection with the preparation of a federal tax return. *Shortt Accountancy*, 785 F.2d at 1454. In the court's opinion, "sections 7206(1) and 7206(2) are `closely related companion provisions' that differ in emphasis more than in substance," and perjury in connection with the preparation of a 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 the person who prepares a false return for the individual required to file.

12.06 **"SUBSCRIBES" ANY RETURN, STATEMENT, OR DOCUMENT**

12.06[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 (but not a section 7206(1) violation) 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).

12.06[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 the 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 the 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 concerning corporate and/or 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).

12.07 **MADE UNDER PENALTIES OF PERJURY**

12.07[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 (1986), all income tax returns contain such a declaration.

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 penalty of perjury. However, 26 U.S.C. § 7201 (tax evasion) or 18 U.S.C. § 1001 (false statement) charges may be considered in this instance.

12.07[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. Accordingly, the heightened requirement of proof traditionally applicable in perjury prosecutions does not apply to section 7206(1) prosecutions. *Escobar v. United States*, 388 F.2d 661, 665 (5th Cir. 1967); *United States v. Carabbia*, 381 F.2d 133, 137 (6th Cir. 1967) (holding that the two-witness rule applicable to perjury prosecutions was not required in § 7206(1) prosecutions, even though it would have been met in the instant case). Similarly, when the "exculpatory no" doctrine was still good law, the Fifth Circuit suggested, in dicta, that it was inapplicable to section 7206(1) prosecutions. *See United States v. Hajecate*, 683 F.2d 894, 901 (5th Cir. 1982) (dicta) (holding "exculpatory no" doctrine applied to "no" answer on tax return charged as § 1001, but opining that conduct could still be prosecuted under § 7206(1)).

12.08 **FALSE MATERIAL MATTER**

12.08[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.

Historically, the "prevailing rule" was that materiality was an issue to be decided by the court in 7206 prosecutions. *United States v. Fawaz*, 881 F.2d 259, 261 (6th Cir. 1989). However, in 1994, in an "unexpected" ruling, [FN2] the Supreme Court in *United States v. Gaudin*, 515 U.S. 506 (1994), held 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, 7, 9, 17 (1999), the Supreme Court resolved a circuit split regarding whether *Gaudin* mandates that questions of materiality in Title 26 cases be submitted to the jury. *See also United States v. Jackson*, 196 F.3d 383, 384 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 993 (2000). In *Neder*, the Court held erroneous the trial court's refusal to submit the issue of materiality in a section 7206(1) fraud case to the jury, but found the error harmless.

The Court's decision accords with prior decisions of a clear majority of the circuits, which treated materiality as a jury question in section 7206(1) and (2) prosecutions. *See United States v. Clifton*, 127 F.3d 969, 970 (10th Cir. 1997) (holding that materiality in § 7206(1) prosecution must be submitted to the jury); *United States v. Uchimura*, 125 F.3d 1282, 1284-85 (9th Cir. 1997) (concluding that § 7206(1) materiality is a mixed question of law for the jury); *United States v. Knapp,* 120 F.3d 928, 932 (9th Cir. 1997) (noting that question of materiality in § 7206(1) and (2) prosecution should have been submitted to jury); *United States v. McGuire*, 99 F.3d 671, 671 (5th Cir. 1996) (per curiam) (holding that § 7206(1) count on which defendant was acquitted "incorrectly removed the issue of materiality from the jury."); *United States v. Randazzo*, 80 F.3d 623, 631 (1st Cir. 1996) (finding error, in case involving false statement and § 7206(1), in trial court decision not to submit issue of materiality to the jury); *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir. 1996) (holding in § 7206(1) case that materiality, "being an element of the offense and a mixed question of law and fact, is a matter for the jury to decide."); *United States v. DiDomenico*, 78 F.3d 294, 302-03 (7th Cir. 1996) (noting that defendants convicted of § 7206(1) and (2) would have been entitled to a new trial had they objected to failure of court to submit materiality issue to the jury); *cf. Knapp v. United States*, 516 U.S. 1024 (1995) (vacating and remanding § 7206(1) and (2) case for reconsideration in light of *Gaudin*); *United States v. Tandon,* 111 F.3d 482, 488-89 & n.5 (6th Cir. 1997)

(noting, pointedly, that law pre-*Gaudin* was that materiality was a question of law, but arguably not resolving issue); *United States v. Aramony*, 88 F.3d 1369, 1383 (4th Cir. 1996) (explicitly reserving issue of whether materiality is a jury question in a § 7206(1) prosecution); Pattern Jury Instructions-- Criminal Cases Instruction 83 (11th Cir. 1997) (noting in comment to instruction for § 7206(2) prosecution that "[t]he issue of 'materiality' is for the jury, not the Court," citing *Gaudin*). *But see United States v. Zvi*, 168 F.3d 49, 59-60 (2d Cir. 1999) (stating that the better practice in false tax return cases is for the district court to make a determination of materiality, and then inform the jury that the alleged misrepresentation, if found, is material, under the statute, as a matter of law), *cert. denied,* 528 U.S. 872 (1999); *United States v. Klausner*, 80 F.3d 55, 58-61 (2d Cir. 1996) (finding in § 7206(2) case that materiality is question of law for the court, where false deductions necessarily created inaccurate tax computation).

See generally, Elizabeth Grace Livingston, Comment, *Judicial Treatment of the Element of Materiality in Federal Criminal False Statement Statutes*, 72 Tul. L. Rev. 1343 (1998).

For a defense-oriented view of the reach of *Gaudin* into criminal tax cases, see Kathryn Keneally, *A New Look at Criminal Tax Enforcement*, Champion, Nov. 1996, at 31, 32.

In view of *Neder* and *Gaudin*, the "better practice" in section 7206 cases is to submit "*all* questions of materiality to the jury." *S ee* 2 Edward J. Devitt et al, Federal Jury Practice And Instructions --Civil and Criminal, § 56.15 (4th ed. Supp. 1999).

12.08[2] **Reynolds "literal truth" Defense**

In *United States v. Reynolds*, 919 F.2d 435 (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. The Seventh Circuit held that, although the form was misleading, the literal truth of the statements on the form precluded a 7206(1) conviction. The court explicitly stated, however, that Reynolds could be tried for violations of section 7201 (evasion) or section 7203 (failure to supply information). *Reynolds*, 919 F.2d at 437. *United States v. Borman*, 992 F.2d 124 (7th Cir. 1993), echoes the views of the *Reynolds* court with respect to Form 1040A (both Form 1040A and Form 1040EZ are simplified tax forms).

The *Reynolds* defense was recently addressed, and distinguished, by the Third Circuit 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. The taxpayer argued that he had in fact withheld taxes, but had simply not paid over the withheld funds to the IRS, and thus that his returns were "literally true" under *Reynolds*. 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. But the court of appeals went on to note that *Reynolds* and *Borman* offer a defense to section 7206 only where there is no specific line item which can be proven false. *Gollapudi*, 130 F.3d at 72. For the Third Circuit, *Reynolds* stands for the simple proposition that using the wrong tax form--that does not contain an identifiable line item that can be charged as false--does not violate section 7206(1). *Id.*

12.08[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 return. *See Griffin v. United States*, 502 U.S. 46 (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. Helmsley*, 941 F.2d 71, 91 (2d Cir. 1991) (finding that where deductions taken by taxpayer were either overstated or mischaracterized, in either case entry was "false and fraudulent"); *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."). 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).

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. *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. The court 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. The court found 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. 624 (1991) (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).

12.08[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).[FN3] 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 both *Warden* and *DiVarco*); *United States v. Warden*, 545 F.2d 32 (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 United States v. Hayes*, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000) (not reporting money received from academic grade selling scheme "obviously material to the IRS's ability correctly to calculate Hayes's tax liabilities), *cert. denied*, 121 S.Ct. 1388 (2001); *United States v. Scholl*, 166 F.3d 964, 979 (9th Cir.), *cert. denied*, 528 U.S. 873 (1999) ("[I]nformation is material if it is necessary to a determination of whether income tax is owed.") (citing *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."); *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.") (internal citations 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."). Others favor *DiVarco*. *See United States v. DiRico*, 78 F.3d 732, 736 n.1 (1st Cir. 1994) (noting that proof of *DiVarco* test satisfies materiality element); *cf*. *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.").

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. *See Neder v. United States*, 527 U.S. 1, 7, 9, 17 (1999) (finding erroneous jury instructions omitting materiality as element of offense in section 7206(1) prosecution, but holding error harmless).

Pattern Jury instructions defining materiality in section 7206 cases exist in only a few 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 the 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, Ch. 10, § 7206 (Materiality) (1999).

The Fifth and Ninth Circuit instructions track the language of the *DiVarco* test. *See* Pattern Jury Instructions-- Criminal Cases Instruction 2.97 (5th Cir. 1997) ("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."); Pattern Jury Instructions-- Criminal Cases Instruction 9.6.5 (9th Cir. 1997) (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 Eleventh Circuit, by comparison, has set out into uncharted territory. *See* Pattern Jury Instructions -- Criminal Cases Instruction 83 (11th Cir. 1997) (noting, in instruction to § 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. It is not necessary, however, that the Government be deprived of any tax by reason of the filing of the false return, or that it be shown that additional tax is due . . . .").

12.08[5] **Tax Deficiency Not Required, But No Longer "Irrelevant"**

On occasion, defendants in false returns 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 he had expenses which exceeded his true gross income, thus rendering his failure to report income immaterial, since 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 . . . ."); *United States v. Garcia*, 553 F.2d 432, 432 (5th Cir. 1977) (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) (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. Johnson*, 558 F.2d 744, 745-47 (5th Cir. 1977) (noting that such evidence might be relevant to willfulness, subject to Rule 403, but disallowing introduction based on facts of case); *United States v. Fritz*, 481 F.2d 644, 645 (9th Cir. 1973) (evidence of potential adjustments to tax liability not relevant to willfulness since no evidence presented that defendant considered making the proposed adjustments).

While courts still maintain that proof of tax deficiency is not *required* in a section 7206(1) prosecution (*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* circuit opinions indicate that the presence or *lack* of a tax deficiency may be relevant to a jury's determination of materiality. *See United States v. Scholl*, 166 F.3d 964, 979 (9th Cir.), *cert. denied*, 528 U.S. 873 (1999).

For example, the Ninth Circuit in *United States v. Uchimura*, 125 F.3d. 1282, 1285 (9th Cir. 1997), 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 returns cases, the court addressed whether the false item at issue-- unreported income-- was inherently material. The court considered a hypothetical situation where 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 was owed." *Id.* While the court insisted that "we do not mean by this example that to satisfy the materiality requirement of § 7206(1) 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: "[t]hat no additional tax is owed of course has a bearing on materiality, but the question is ultimately one for the jury to decide." *Id.*, 125 F.3d at 1285, n. 5

The Tenth Circuit followed suit in *United States v. Clifton*, 127 F.3d 969, 970 (10th Cir. 1997). *Clifton* addressed the same hypothetical case as did *Uchimura*, in which the taxpayer fails to report income, but has no tax due because his deductions exceed taxable income for the year. In this situation, the "taxpayer's failure to report all taxable income might very well affect the jury's deliberations on the element of materiality." 127 F.3d at 970. 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 (4th Cir. 1996).

If trial courts follow these holdings, a tax deficiency or the lack thereof may be an issue in every section 7206(1) case. Prosecutors will be placed in the unenviable position of having to argue to the jury that the false statements at issue are material, even though there was no bottom line tax harm. Such an argument promises to have little jury appeal, regardless of whether the jury is instructed pursuant to *DiVarco* or *Warden*. For this reason, one prosecutors has flatly concluded that "[t]he practical consequence of treating materiality as a question of fact is that it is incumbent on the Government to prove a tax loss." Barger, *Trial of a Tax Fraud Case, a Prosecutor's Perspective*, (ABA Center for Continuing Legal Education) (1997), *available in* WESTLAW, TP-ALL database, Document No. N97WCCB ABA-LGLED G-1. This is not to say that *Uchimara* and *Clifton* were correctly decided, or that the trend noted will be the one accepted by most courts. Clearly, this is a question that will be the subject of future litigation, and prosecutors should be aware of the above authority.

In such litigation, prosecutors should consider arguing that if the holdings in *Uchimara* and *Clifton* have the "practical effect" noted above, then it would appear that the crime of false returns has been written off the books. If proof of tax loss is now required, 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."). [FN4] Proof of false returns would constitute proof of evasion.

Another doctrine that is likely to 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 rational of these two holdings.

12.08[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, 28-29 (1st Cir. 1975) ("[m]ateriality . . . is to be measured objectively by a statement's potential rather than by its actual impact."). 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 protester 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. *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.

12.08[7] **Pre-Gaudin Examples Of Material Matters**

The following are examples of false items found to be material by courts, pre-*Gaudin*. They ought still to be 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 (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. "Adaptability" of the entire calculation may be more difficult because of the misstatements. *United States v. Fawaz*, 881 F.2d 259, 263-64 (6th Cir. 1989).

8. Failure to report source of income. *United States v. DiVarco*, 484 F.2d 670, 673 (7th Cir. 1973).

12.08[8] **Pre-Gaudin Examples: No Tax Deficiency**

12.08[8][a] **Failure to Report a Business**

In *Siravo v. United States*, 377 F.2d 469 (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. The First Circuit affirmed his conviction, holding that for a statement to be "true and correct," it must be both accurate and complete.

12.08[8][b] **Failure to Report Gross Receipts**

In *United States v. Holladay*, 566 F.2d 1018 (5th Cir.1978), 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.

12.08[8][c] **Reporting Net Business Income, But Not Gross Income**

In *United States v. Young*, 804 F.2d 116 (8th Cir. 1986), the court rejected 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).

12.08[8][d] **Reporting A False Source But Correct Figures**

In *United States v. DiVarco*, 484 F.2d 670 (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." *DiVarco*, 484 F.2d at 673.

12.08[8][e] **Gambling Losses Deducted as Business Expenses**

In *United States v. Rayor*, 204 F. Supp. 486, (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. The defendant claimed in a motion to dismiss that there was no offense charged as there was no deficiency for the year in question.

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.

12.08[8][f] **Failure to Report Income from Illegal Business**

In *United States v. Garcilaso de la Vega*, 489 F.2d 761(2d Cir. 1974), the defendant was charged with failing to report income which 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. 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). *Garcilaso de la Vega*, 489 F.2d at 765. *See Garner v. United States*, 424 U.S. 648 (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).

12.08[8][g] *Foreign Bank Account Questions on Tax Forms*

In *United States v. Franks*, 723 F.2d 1482 (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." 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.

12.09 **WILLFULNESS -- DOES NOT BELIEVE TO BE TRUE AND CORRECT**

12.09[1] **Generally**

Section 7206(1) is a specific intent crime requiring a showing of willfulness. Proof of this element is essential, and "neither a showing of careless disregard nor gross negligence in signing a tax return will suffice." *United States v. Claiborne*, 765 F.2d 784, 797 (9th Cir. 1985); *accord*, *United States v. Erickson*, 676 F.2d 408, 410 n. 4 (10th Cir. 1982)(listing § 7206 as one example of a "specific intent" crime).

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); *accord, United States v. Winchell*, 129 F.3d 1093, 1097 (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). For a more complete discussion of willfulness and the legal ramifications of the *Cheek* case, *see* Section 8.06, *supra*, and Section 40.11, *infra*.

In *United States v. Pomponio*, 429 U.S. 10 (1976), a

section 7206(1) prosecution, 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."

Pomponio, 429 U.S. at 11 n.2.

In a section 7206(1) prosecution, the government is not required to show an intent to evade income taxes by the defendant. *United States v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978); *United States v. Engle*, 458 F.2d 1017, 1019 (8th Cir. 1972). [FN5] There is also "no requirement that showing the specific intent for a section 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). Moreover, the government may rely solely on circumstantial evidence to prove willfulness. *See United States v. Tucker,* 133 F.3d 1208, 1218 (9th Cir. 1998) (false returns); *United States v. Klausner*, 80 F.3d 55, 63 (2d. Cir. 1996) (evasion).

12.09[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 proved knowledge of contents of return); *United States v. Mohney*, 949 F.2d 1397, 1407 (6th Cir. 1991) (holding that signature is *prima facie* evidence that the signer knows the contents of the return)*; 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. . . .").

12.09[2] **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. *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 a tax return for a client which contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. The accountant, acting on information provided to him by the chief operating officer, was unaware of the fraudulent nature of the deductions. The Ninth Circuit found 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. 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. 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." 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) (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).

12.09[3] **Amended Returns**

Although willfulness may be inferred from circumstantial evidence, the Second Circuit has held that the filing of an amended return after filing 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. 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. Thus, without more, an amended return provides only an inference of mistake, rather than of fraud. *Dyer*, 922 F.2d at 108; *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).

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).

12.09[4] **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 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).

12.09[5] **Ostrich 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 (7th Cir. 1986). [FN6] In such a case, the use of an "ostrich instruction" -- also known as a deliberate ignorance, conscious avoidance, willful blindness, or a *Jewell* instruction may be appropriate. *See United States v. Bussey*, 942 F.2d 1241, 1246 (8th Cir. 1991); *United States v. DeFazio*, 899 F.2d 626, 635 (7th Cir. 1990); *United States v. Jewell*, 532 F.2d 697

(9th Cir.1976). *See generally*, Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351 (1992).

A number of courts have approved the use of such instructions under proper circumstances. *See*, *e.g.*, *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, 760 (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 "no 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 (8th Cir. 1991) (evasion); *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 (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 (5th Cir. 1979) (evasion). However, it has also been said that the use of such instructions is "rarely appropriate." *United States v. deFrancisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (reversing drug possession conviction where deliberate ignorance instruction given). *But see United States v. Rodriguez*, 983 F.2d 455, 457 (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 with 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.

12.10 **LESSER INCLUDED OFFENSE CONSIDERATIONS**

Tax Division Memorandum, dated February 12, 1993, regarding Lesser Included Offenses in Tax Cases (hereinafter "Memorandum") explains the Tax Division's policy. A copy of this memorandum is included in Section 3.00, *supra*. The Memorandum states the government's adoption of the strict "elements" test of *Schmuck v. United States*, 489 U.S. 705, 709-10 (1989). This test provides that one offense is necessarily included in another only when the statutory elements of the lesser offense are a subset of the elements of the greater offense. The sections of the above-noted Tax Division Memorandum relevant to false returns are as follows:

(Section 7206 and 7201) (*Memorandum* at 2-3)

2. [I]n evasion cases where the filing of a false return (Section 7206) is charged as one of the affirmative acts of evasion (or the only affirmative act), it is now the Tax Division's policy that a lesser included offense instruction is not permissible, since evasion may be established without proof of the filing of a false return. *See Schmuck v. United States*, 489 U.S. 705 (1989) (one offense is necessarily included in another only where the statutory elements of the lesser offense are a subset of the elements of the charged greater offense). Therefore, as with *Spies*-evasion cases, prosecutors

should consider charging both offenses if there is any chance that the tax deficiency element may not be proved but it still would be possible for the jury to find that the defendant had violated Section 7206(1). But where a failure of proof on the tax deficiency element would also constitute a failure of proof on the false return charge, nothing generally would be gained by charging violations of both Sections 7201 and 7206.

Where the imposition of cumulative sentences is possible, the prosecutor has the discretion to seek cumulative punishments. But where the facts supporting the statutory violations are duplicative (*e.g.*, where the only affirmative act of evasion is the filing of the false return), separate punishments for both offenses should not be requested.

(Section 7206 and 7207) (*Memorandum* at 3)

4. Adhering to a strict "elements" test, the elements of Section 7207 are not a subset of the elements of Section 7206(1). Consequently, it is now the government's position that in a case in which the defendant is charged with violating Section 7206(1) by making and subscribing a false tax return or other document, *neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (Section 7207) is a lesser included offense of which the defendant may be convicted. Here, again, if there is a fear that there may be a failure of proof as to one of the elements unique to Section 7206(1), the prosecutor may wish to consider including charges under both Section 7206(1) and Section 7207 in the same indictment, where such charges are consistent with Department of Justice policy regarding the charging of violations of 26 U.S.C. 7207. Where this is done and the jury convicts on both charges, however, cumulative punishments should not be sought. In all other situations, the decision to seek cumulative punishments is committed to the sound discretion of the prosecutor.

(Other Offenses) (*Memorandum* at 4)

6. In tax cases, questions concerning whether one offense is a lesser included offense of another may not be limited to Title 26 violations, but may also include violations under Title 18 (*i.e.*, assertions that a Title 26 charge is a lesser included violation of a Title 18 charge or vice-versa). The policy set out in this memorandum will also govern any such situations -- that is, the strict elements test of *Schmuck v. United States*, 489 U.S. 705, should be applied.

(General Warning) (*Memorandum* at 3)

5. Prosecutors should be aware that the law in their circuit may be inconsistent with the policy stated in this memorandum. *See e.g.*, *United States v. Doyle*, 956 F.2d 73, 74-75 (5th Cir. 1992); *United States v. Boone*, 951 F.2d 1526, 1541 (9th Cir. 1991); *United States v. Kaiser*, 893 F.2d 1300, 1306 (11th Cir. 1990); *United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir. 1969). Nevertheless, since the government has now embraced the strict "elements" test and taken a position on this issue in the Supreme Court, it is imperative that the policy set in this memorandum be followed.

With the advent of the Sentencing Guidelines, the issue of cumulative punishments generally will arise only in pre-guidelines cases. *Memorandum* at 2. Under the Sentencing Guidelines, related tax counts are grouped, and the sentence is based on the total tax loss, not on the number of statutory violations. In the extraordinary case in which cumulative punishments are possible, the Memorandum provides discretion to the prosecutor

to seek cumulative punishment.

Prosecutors dealing with issues of lesser included offenses, cumulative punishment, and related issues in tax cases are encouraged to contact the Tax Division's Criminal Appeals and Tax Enforcement Policy Section at (202) 514-3011.

See also the discussions of lesser-included offenses in Sections 8.00 and 10.00, *supra*, and 16.00, *infra*.

12.11 **VENUE**

Venue in a section 7206(1) prosecution lies in any district where the false return was made, subscribed, or filed. *United States v. Shyres*, 898 F.2d 647, 657 (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); *United States v. Marrinson*, 832 F.2d 1465, 1475 (7th Cir. 1987); *United States v. King*, 563 F.2d 559, 562 (2d Cir. 1977).

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

12.12 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7206(1) offenses is six years 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. Mittelstaedt*, 31 F.3d 1208, 1220 (2d Cir. 1994); *United States v. Samara*, 643 F.2d 701, 704 (10th Cir. 1981); *see also United States v. Marrinson*, 832 F.2d 1465, 1475-1476 (7th Cir. 1987).

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

FN 1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

FN 2. *United States v. Randazzo*, 80 F.3d 623, 624 (1st Cir. 1996).

FN 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 Taylor*, 574 F.2d at 235 n.6 ("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. For example, both *Warden* and *DiVarco* were decided in the Seventh Circuit.

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

FN 5. Of course, to the extent that the government can show 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.

FN 6. 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). *But see United States v. MacKenzie*, 777 F.2d 811, 818 n.2 (2d Cir. 1986).