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13.00 AID OR ASSIST FALSE OR FRAUDULENT DOCUMENT

13.01 STATUTORY LANGUAGE: 26 U.S.C. § 7206(2)

§7206. Fraud and false statements

Any person who -- . . .

(2) ***Aid or assistance.*** -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;

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

13.02 POLICY

Section 7206(2) may be used to prosecute a person who willfully prepares or in some way assists in preparing a materially false tax return or other document. The document need not be signed under penalties of perjury. The statute is also advantageous because there is no need for the prosecution to show a tax due and owing, as is necessary in § 7201 tax evasion prosecutions.

Section 7206(2) is particularly useful to prosecute tax return preparers. However, false claims charges under 18 U.S.C. § 287 may be preferable for tax returns claiming refunds when there is no question that the claim is fraudulent, particularly where the

¹ . Under 18 U.S.C. § 3571, the maximum fine for violations of 26 U.S.C. § 7206(2) is at least \$250,000 for individuals and \$500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

return is filed in the name of a fictitious or unknowing taxpayer, because the case will raise no tax issues and restitution is more readily available under Title 18. In addition, 18 U.S.C. § 1341 or 1343, may be preferable for large-scale fraudulent return schemes. Mail or wire fraud charges yield strategic benefits by allowing prosecutors to make the entire scheme an express element of each count, and they support restitution, money-laundering, and asset-forfeiture charges.

If a tax return preparer willfully created a fraudulent refund return for an undercover agent and actually filed the agent's tax return by mail or electronic filing, it may be strategically useful to charge the return preparer with a substantive offense for filing the agent's return, because the defendant will have no basis to attack the credibility of the undercover agent. The preparer may be prosecuted under 18 U.S.C. § 287 or 26 U.S.C. § 7206(2) for filing the false return.

If the taxpayer did not actually file the return, however, the prosecutor should be cautious about bringing a § 7206(2) charge. See *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983) (reversing conviction based on unfiled return); but see *United States v. Smith*, 424 F.3d 992, 1009 n.8 (9th Cir. 2005) (limiting *Dahlstrom*); *United States v. Feaster*, No. 87-1340, 1988 WL 33814, at *2 (6th Cir. Apr. 15, 1988) (unpublished) (rejecting *Dahlstrom*). As one court has aptly put it, “[t]here are few cases that discuss whether § 7206(2) contains a filing requirement” *United States v. Borden*, No. 6:05-cr-181-Orl-31DAB, 2007 WL 1128969, at *1 (M.D. Fla. April 12, 2007), *aff'd*, 269 Fed. Appx. 903 (11th Cir. 2008). The Eighth Circuit stated that “liability under section 7206(2) can attach even if a false return is never filed.” *United States v. McLain*, 646 F.3d 599, 604 (8th Cir. 2010). Two courts have held that an offense under § 7206(2) is complete when the document or information has been presented to the entity required by law to transmit the information to the IRS. *United States v. Cutler*, 948 F.2d 691, 695 (10th Cir. 1991); *United States v. Monteiro*, 871 F.2d 204, 210 (1st Cir. 1989); see also *Dahlstrom*, 713 F.2d at 1431 (Goodwin, J., dissenting) (“The statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented. . . . Presentation is a separate act from preparation”), as quoted in *United States v. Borden*, 2007 WL 1128969 at *2. To adopt a requirement that the filing of a return is an element of § 7206(2) “would mean that a conviction under § 7206(2) could never result from an undercover operation, because the tax forms in those cases would never be filed, nor would the ‘taxpayer’ ever intend to file them.” *United States v. Borden*, 2007 WL 1128969 at *2. Concluding that such a result would be contrary to

Congress's intent in drafting the statute, the district court in *Borden* declined to hold that the filing of the return in question was an element of § 7206(2). 2007 WL 1128969 at **2-3.

The Tax Division strongly encourages the use, wherever possible, of both civil injunctions and parallel criminal proceedings against fraudulent tax preparers. See Section 13.11, *infra*, for further discussion.

13.03 GENERALLY

Section 7206(2) has been described as the Internal Revenue Code's "aiding and abetting" provision. *United States v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981) (*citing United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976)), *abrogated on other grounds as noted in United States v. Brooks*, 174 F.3d 950, 956 (8th Cir. 1999). It is frequently used to prosecute individuals who advise or otherwise assist in the preparation or presentation of false documents, *e.g.*, fraudulent tax return preparers. However, this statute is not limited to preparers, but applies to anyone who causes a false return to be filed. While frequently the false document will be a tax return or information return, any document required or authorized to be filed with the IRS can give rise to the offense.

The constitutionality of Section 7206(2) has been upheld against challenges based on the First Amendment free speech clause and the Fifth Amendment due process clause. *United States v. Knapp*, 25 F.3d 451, 452, 457 (7th Cir. 1994) (rejecting First Amendment claim by defendant, "a self-proclaimed expert on preserving personal assets through creative estate planning" who claimed a "unique understanding of the United States Constitution, the Tax Code, [and] the . . . IRS"); *United States v. Rowlee*, 899 F.2d 1275, 1278-79 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment."); *United States v. Cochrane*, 985 F.2d 1027, 1031 (9th Cir. 1993) (finding statute not unconstitutionally vague); *United States v. Damon*, 676 F.2d 1060, 1062-63 (5th Cir. 1982) (same); *United States v. Buttorff*, 572 F.2d 619, 623-24 (8th Cir. 1978) (First Amendment); *but cf. United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing § 7206(2) conviction where advice provided on unsettled point of law).

Because similar concepts apply to both section 7206(2) and section 7206(1) violations, reference should be made to the discussion of section 7206(1) in [Section 12.00](#), *supra.*]

13.04 ELEMENTS OF SECTION 7206(2) OFFENSE

To establish a violation of Section 7206(2), the government must prove the following elements beyond a reasonable doubt:

1. Defendant aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws;
2. The document was false as to a material matter;
3. The act of the defendant was willful.

United States v. McLain, 646 F.3d 599, 604 (8th Cir. 2010); *United States v. Goosby*, 523 F.3d 632, 637 (6th Cir. 2008); *United States v. Smith*, 424 F.3d 992, 1009 (9th Cir. 2005); *United States v. Gambone*, 314 F.3d 163, 174 (3d Cir. 2003); *United States v. Searan*, 259 F.3d 434, 443 (6th Cir. 2001); *United States v. Aramony*, 88 F.3d 1369, 1382 (4th Cir. 1996); *United States v. Klausner*, 80 F.3d 55, 59 (2d Cir. 1996); *United States v. Salerno*, 902 F.2d 1429, 1431-32 (9th Cir. 1990); *United States v. Sassak*, 881 F.2d 276, 278 (6th Cir. 1989); *United States v. Coveney*, 995 F.2d 578, 588 (5th Cir. 1993); *United States v. Hooks*, 848 F.2d 785, 788-89 (7th Cir. 1988); *United States v. Crum*, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976). “[O]ne must engage in ‘some affirmative participation which at least encourages the perpetrator’ in order to be guilty of aiding in the preparation and presentation of false tax returns.” *Sassak*, 881 F.2d at 277 (*quoting United States v. Graham*, 758 F.2d 879, 885 (3d Cir. 1985)) .

“[T]he ‘willfully aiding, assisting, procuring, counseling, advising, or causing’ language of § 7206(2) effectively incorporates into this statute the theory behind accomplice liability.” *Searan*, 259 F.3d at 443. This “obviates the need for a grand jury to add 18 U.S.C. § 2 to an indictment.” *Searan*, 259 F.3d at 444.

13.05 AIDING AND ASSISTING

13.05[1] Persons Liable

The purpose of the statute “is to make it a crime for one to knowingly assist another in preparation and presentation of a false and fraudulent income tax return.” *United States v. Jackson*, 452 F.2d 144, 147 (7th Cir. 1971). Section 7206(2) and its predecessor statutes have been directed against fraudulent tax return preparers since as early as 1939. In *United States v. Kelley*, 105 F.2d 912 (2d Cir. 1939), Judge Learned Hand described the statutory predecessor of Section 7206(2):

The purpose was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.

Kelley, 105 F.2d at 917.

Liability under Section 7206(2) is not limited to return preparers. The argument that Section 7206(2) “is applicable only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns” was flatly rejected by the Third Circuit in *United States v. McCrane*, 527 F.2d 906, 913 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909, *reaff’d in relevant part on remand*, 547 F.2d 204 (3d Cir. 1976) (*per curiam*). The statute “has a broad sweep, making all forms of willful assistance in preparing a false return an offense.” *United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (citations omitted); *accord United States v. Coveney*, 995 F.2d 578, 588 (5th Cir. 1993).

The statute “reaches all knowing participants in the fraud.” *United States v. Clark*, 577 F.3d 273, 285 (5th Cir. 2009); *accord United States v. Fletcher*, 322 F.3d 508, 514 (8th Cir. 2003). Courts have held that anyone who causes a false return to be filed or furnishes information which leads to the filing of a false return can be guilty of violating Section 7206(2). *See, e.g., United States v. Clark*, 139 F.3d 485, 489-90 (5th Cir. 1998) (rejecting insufficiency claim by Pilot Connection members who counseled taxpayers to claim excess exemptions on Forms W-4). There need not be actual physical preparation of the return if the evidence demonstrates that the defendant provided aid, assistance, and advice in the preparation of the false tax return or took other actions that caused the taxpayer to file the false and fraudulent return. *United States v. Smith*, 424

F.3d 992, 1010-11 (9th Cir. 2005). The question is whether the defendant consciously did something that led to the filing of the false return.

The defendant in *United States v. Crum*, 529 F.2d 1380, 1381 (9th Cir. 1976), was involved in a scheme designed to furnish high income doctors with backdated beaver purchase contracts for use in obtaining fraudulent depreciation deductions. Crum, who bred and sold beavers, did not participate in the preparation of the returns, but he did attend two meetings with doctors where the scheme was discussed. He also signed two backdated beaver purchase contracts, one of which was signed to exhibit to an IRS agent. *Crum*, 529 F.2d at 1381-82. In affirming Crum's conviction under section 7206(2), the court described the following jury instruction as "a proper statement of the law":

In order to aid and abet another to commit a crime it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participates in it as he would in something he wishes to bring about; that is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed.

In making a determination as to whether the defendants aided or assisted in or procured or advised the preparation for filing of false income tax returns, the fact that the defendants did not sign the income tax returns in question is not material to your consideration.

Crum, 529 F.2d at 1382-83 n.4.

Accordingly, the court in *Crum* rejected the contention that Section 7206(2) applies only to preparers of tax returns. "The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of [a taxable business] interest" *Crum*, 529 F.2d at 1382 (quoting *United States v. Johnson*, 319 U.S. 503, 518 (1943)).

In *United States v. Maius*, 378 F.2d 716, 718 (6th Cir. 1967), the defendant was convicted even though he did not participate in the actual preparation of the false return, sign it, or file it. Maius managed a casino's bar and restaurant. As part of his duties, he prepared false daily sheets of the casino gambling loss collections. The figures were entered into the casino books and ultimately reflected on its income tax returns. *Id.* at 716-17. The defendant's knowledge that the records would be used in preparing the tax

returns, which he examined prior to their filing, was held sufficient to sustain his conviction. 378 F.2d at 718.

Similarly, in *United States v. Thomas*, No. 94-3249, 1994 WL 645725, at *6 (6th Cir. Nov. 15, 1994) (*per curiam*), the court upheld the conviction of a CPA who did not actually prepare the false returns and forms in question. In *Thomas*, the defendant CPA structured transactions to disguise personal expenses as deductible corporate expenditures, and controlled the account used in these transactions, which generated the records relied upon for the preparation of false corporate and personal tax returns. 1994 WL 645725, at **1-2. The defendant, who orchestrated the underlying scheme that resulted in the filing of false Forms W-2 and false corporate and personal income tax returns, was convicted of violating § 7206(2), even though he did not personally prepare the false forms in question, based on his role in creating the false information used to prepare and file those false forms. 1994 WL 645725, at **6-7.

In *United States v. Hooks*, 848 F.2d 785 (7th Cir. 1988), the defendant withheld \$375,000 worth of bearer bonds from the bank administering his deceased father-in-law's \$8 million estate. 848 F.2d at 787. He then cashed the bonds through a transaction structured to conceal his connection with the sale. *Id.* at 788. As a result, the value of the bonds was not included in the federal estate tax return prepared by the bank, and \$96,564.58 in estate tax was evaded. *Id.* The court found that the defendant's activities resulted in the filing of the false return: even though he did not actually prepare the returns and the preparer (the bank) did not know of the fraud, the defendant had violated Section 7206(2). *Hooks*, 848 F.2d at 791.

In *United States v. McCrane*, 527 F.2d 906 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909 (1976), *reaff'd in relevant part on remand*, 547 F.2d 204, 207 (3d Cir. 1976) (*per curiam*), the defendant solicited political contributions as finance chairman for a gubernatorial candidate. 527 F.2d at 908. The basic scheme was that the defendant advised donors to the political campaign that he would have false invoices for advertising services sent to them so they could deduct the disguised contributions as business expenses. *Id.* at 908-09. Even though the defendant did not assist in the preparation of the two false returns for which he was convicted, he "was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses." *Id.* at 913.

United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978), provides another example of what might be termed the underlying causation theory that can support a Section 7206(2) violation. Wolfson was charged with supplying inflated appraisals to persons who donated yachts to a university. 573 F.2d at 218. The taxpayers subsequently claimed charitable deductions on their returns based on the inflated appraisals. *Id.* Although Wolfson’s conviction was reversed on evidentiary grounds, the court rejected his contention that his actions were not within Section 7206(2). As the court explained:

Wolfson does not have to sign or prepare the return to be amenable to prosecution. If it is proved . . . that he knowingly gave a false appraisal with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime.

Wolfson, 573 F.2d at 225; accord *United States v. Gambone*, 314 F.3d 163,173-74 (3d Cir. 2003) (in a scheme to pay overtime wages from non-payroll accounts where no tax was withheld and false Forms W-2 were provided to employees, prosecution under § 7206(2) was appropriate); *United States v. MacKenzie*, 777 F.2d 811, 820 (2d Cir. 1985) (defendants’ conviction under § 7206(2) upheld where defendants issued false Forms W-2 to employees, knowing they would be used to file false returns, to conceal defendants’ own ongoing fraud). “[A]ffirmative participation need not rise to the level of actual counseling, . . . as long as it ‘at least encourages’ the preparation or presentation of a false return.” *Gambone*, 314 F.3d at 173-74; see also *United States v. Head*, 697 F.2d 1200, 1208 n.13 (4th Cir. 1982) (court of appeals noted that trial court’s dismissal of § 7206(2) charges because government had failed to prove defendant had actually prepared the returns at issue was “clearly contrary” to holdings of numerous circuits, which all held that actual preparation of the return was not required under § 7206(2)).

13.05[2] Signing of Document Not Required

Section 7206(2) prohibits aiding or assisting in, procuring, counseling, or advising the preparation or presentation of a false document. The fact that the defendant does not actually sign or file the document is not material. *United States v. Coveney*, 995 F.2d 578, 588 (5th Cir. 1993) (observing that “[a] person need not actually sign or prepare a tax return to aid in its preparation”); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991) (rejecting insufficiency claim based on the fact that defendant neither signed nor mailed returns); *United States v. Crum*, 529 F.2d 1380, 1382 n.4 (9th Cir.

1976) (approving instruction in case arising under § 7206(2) that “the fact that the defendants did not sign the income tax returns in question is not material”).

In this respect, a Section 7206(2) prosecution differs from a Section 7206(1) prosecution because one of the elements of a Section 7206(1) violation is subscribing (signing) any return, statement, or other document under penalties of perjury.

13.05[3] Knowledge of Taxpayer

It is no defense to a Section 7206(2) prosecution that the taxpayer who submitted the return was not charged, even when the taxpayer was aware of the falsity of the return, went along with the scheme, and could have been charged with a violation. Any criminal mental state (or lack thereof) on the part of the taxpayer is not relevant to the propriety of a defendant’s prosecution under Section 7206(2).

Rejecting a defense argument that taxpayer-witnesses commit perjury either when they sign the jurat indicating that they have examined their returns or when they testify under oath that they had not examined their returns before signing them, one court has held that “the innocence or guilty knowledge of a taxpayer is irrelevant” to a Section 7206 prosecution. *United States v. Jennings*, 51 Fed. Appx. 98, 99-100 (4th Cir. 2002) (*per curiam*) (citations omitted). Accordingly, both a defendant supplying false information to an entirely innocent taxpayer and a defendant supplying false information to a taxpayer who willingly accepts and uses the false information are guilty of violating Section 7206(2). This is clear from the language of Section 7206(2) which provides that it applies “whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document” See also *Baker v. United States*, 401 F.2d 958, 987-88 (D.C. Cir. 1968) (affirming convictions of defendants charged with conspiracy and violations of § 7206(2), where defendants agreed to report fees earned by one defendant on the other defendant’s tax return, which the second defendant filed, to conceal the first defendant’s receipt of additional taxable income).

After surveying other circuit precedent involving Section 7206(2) prosecutions of individuals who did not prepare the false returns, the Fourth Circuit stated that all that is required for a Section 7206(2) prosecution is that a defendant knowingly participate in providing information that results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements. *United States v. Nealy*, 729 F.2d 961, 963

(4th Cir. 1984); accord *United States v. Lefkowitz*, 125 F.3d 608, 618-19 (8th Cir. 1997) (affirming § 7206(2) conviction of corporation president who provided to accountant false information the president knew would result in filing of false return); *United States v. Marshall*, 92 F.3d 758, 760 (8th Cir. 1996) (noting that the taxpayers were unaware of inaccuracies while rejecting sufficiency challenge to § 7206(2) conviction); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991) (in rejecting claim that evidence on § 7206(2) counts was insufficient because defendant neither “signed any of the returns or . . . personally mailed any of the returns himself,” the court of appeals noted that § 7206(2) specifically permits conviction of a defendant “whether or not [the] falsity or fraud is with the knowledge or consent of the [innocent] person.”); *United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (observing that defendant willfully caused tax preparer to file a false estate tax return and therefore violated § 7206(2), regardless of whether the tax preparer knew of the falsity or fraud).

Occasionally, the primary witness against the person charged with aiding and assisting in the preparation or presentation of a false tax return may be the taxpayer, who may also be culpable. In order to enable the jury to weigh properly the credibility of such a witness, it may be necessary to ask the district court to instruct the jury on the requirements for accomplice testimony. *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963).

13.05[4] Filing of Documents

The Ninth Circuit in *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983), found that the filing of a return is an element of a Section 7206(2) violation. The dissent argued, however, that “[t]he statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented.” *Dahlstrom*, 713 F.2d at 1431 (Goodwin, J., dissenting).

The government has similarly argued that an offense under Section 7206(2) may be committed without the filing of a document. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. Therefore, the offense can be committed simply by counseling a taxpayer to file a false return: nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense defined by Section 7206(2) to be committed. In *United States v. Feaster*, No. 87-1340, 1988 WL 33814, at *2 (6th Cir.

April 15, 1988), the Sixth Circuit agreed with the government and held that “*Dahlstrom* is contrary to the plain language of 26 U.S.C. § 7206(2).” *Cf. United States v. Monteiro*, 871 F.2d 204, 209-10 (1st Cir. 1989) (court questioned, but did not decide, whether there is a filing requirement for a Section 7206(2) conviction).

Even if the crime may not be completed until a return is filed, it is not necessary that the defendant be the same individual who actually filed the false return, as long as the defendant’s willful conduct led to the filing of the false return. *United States v. Kellogg*, 955 F.2d 1244, 1248-49 (9th Cir. 1992). A plausible argument can be made 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); *accord Monteiro*, 871 F.2d at 210-11 (Section 7206(2) applies where defendant did not sign Forms W-2G but conspired with those who did; the offense is complete when the false information is given to the intermediary obligated by law to file it.). Similarly, in *United States v. Qaimari*, No. 3:05 CR 766, 2006 WL 1023684, at *1 (N.D. Ohio April 18, 2006), the defendant completed false Quick Claim forms to redeem lottery tickets, and was charged with violations of § 7206(2). These Quick Claim forms, which were not filed, became the basis for Forms W-2G, which the Ohio Lottery Commission subsequently filed via an IRS transmittal form, Form 4804. *Qaimari*, 2006 WL 1023684, at *3 n.2. The court held that the third party of legal consequence was the Lottery Commission, which paid out the winnings and was obligated to transmit information to the IRS via the Form W-2G. *Id.*

However, in sharp contrast to *Cutler*, *Monteiro* and *Qaimari*, is Seventh Circuit’s decision in *United States v. Palivos*, 486 F.3d 250, 259 (7th Cir. 2007). In *Palivos*, the court vacated a § 7206(2) conviction on the basis that a fraudulent tax return, which was patently false and was used to defraud a lender and the Small Business Administration, was never filed. 486 F.3d at 259. After commenting that “[t]here seems to be no dispute that to be a violation of [§ 7206(2)] the return must have been filed with the Internal Revenue Service,” the court noted that the fifth superseding indictment used the language “aided in the preparation *and* presentation to the IRS.” *Id.* (emphasis added). The court then noted that “the return for which there is some evidence of fraud is not the return which was filed with the IRS and cited in the indictment,” whereas there was insufficient evidence to establish that the Form 1040 and Schedule C ultimately filed with the IRS were false. Based on its findings, the court vacated the defendant’s conviction. It is not

clear from the court’s opinion whether the use of the conjunctive “and” in the indictment was the determinative factor in vacating the conviction, or whether the court reversed based on what it determined to be a variance. In any event, the court’s statement that there is “no dispute” that § 7206(2) includes a filing element may be non-binding dictum.

13.06 FALSE MATERIAL MATTER

13.06[1] Generally

A tax deficiency is not a prerequisite to a conviction under § 7206(2). See *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963) (rejecting the defense argument that there was insufficient evidence that the return was false as to a material matter because the indictment did not state the amount by which income had been underreported). A “wash” transaction, having no tax consequences, may be material if there is sufficient evidence of willfulness and intent to deceive. *Baker v. United States*, 401 F.2d 958, 987 (D.C. Cir. 1968) (citing *Sansone v. United States*, 380 U.S. 343, 353 (1965)). As noted in [Section 12.10](#), the law on materiality changed in the wake of *United States v. Gaudin*, 515 U.S. 506 (1995), and materiality is now held to be a jury question in Section 7206 prosecutions by the majority of circuits.

13.06[2] Examples: False “Material Matter”

The following are pre-*Gaudin* examples of matters found to be material by courts. Such law should still be consulted for issues such as sufficiency of the evidence.

In *United States v. Helmsley*, 941 F.2d 71, 75-76 (2d Cir. 1991), the defendant reported as ordinary business expenses certain payments that the government argued were actually nondeductible constructive dividends to the defendant and her husband. The testimony of the government’s expert witness on cross-examination, however, implied that the payments were a form of salary compensation to the Helmsleys, which were properly deductible as a business expense. *Id.* at 92. The trial court instructed the jury that it could convict whether the deductions were improper, as the government argued, or whether they were mischaracterized, as suggested by the government’s expert. *Id.* On appeal, the defendant challenged the conviction, claiming that mischaracterization of deductions was insufficient to support a Section 7206(2) conviction. The court, however, affirmed the conviction and held that whether the deductions were improperly taken or whether they were mischaracterized was inconsequential. In either case, the

court reasoned, the tax return entries were false, as proscribed by the statute. *Helmsley*, 941 F.2d at 92-93.

In *United States v. Damon*, 676 F.2d 1060, 1063-64 (5th Cir. 1982), the defendant tax return preparers argued on appeal that their convictions under Section 7206(2) were improper because the documents containing the false information, their clients' Schedules C, "were not specifically and explicitly required by statute or regulation." *Damon*, 676 F.2d at 1063. The Fifth Circuit affirmed the convictions on the grounds that the Schedules C prepared by defendants were "integral parts of such returns and were incorporated therein by reference." *Id.* at 1064.

In *United States v. Taylor*, 574 F.2d 232, 235 (5th Cir. 1978), the court held that, as a matter of law, the omission of a substantial amount of livestock receipts on tax return schedules constituted the omission of a material matter, because the schedules were integral parts of the tax return. At trial, Taylor was permitted to introduce evidence that he did not believe that the omission of livestock receipts was material because offsetting expenses rendered the omission without tax consequences. *Id.* at 234. The Fifth Circuit noted that the existence of offsetting expenses did not go to the materiality of the omitted receipts, "but to the lack of *mens rea* in their omission." *Taylor*, 574 F.2d at 237. Accordingly, the defendant's claimed belief of a lack of tax consequences may be admissible on the willfulness of the omission, even if not relevant to the materiality of the omission.²

The Sixth Circuit in *United States v. Theunick*, 651 F.3d 578, 586 (6th Cir. 2011), *petition for cert. filed* October 27, 2011, stated that Section 7206(2) prohibits causing a materially false statement to be made in a document required to be filed by the internal revenue laws. In the Theunick case, the defendants bought automatic weapons for personal use. The defendants purchased them using Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) forms for the tax-exempt transfer and registration of firearms. The seller, or transferors of the weapons were National firearms Act vendors. The ATF forms indicated that the firearms were "being transferred to . . . a government entity." The forms contained a box to check if the firearm was being acquired "for personal use," which was left unchecked. The forms also indicated that the weapons were tax-exempt by nature of their use by a government entity. The defendants were charged with

² Although *Taylor* was a Section 7206(1) case, the same principles apply to Section 7206(2) violations. See *Damon*, 676 F.2d at 1063-64.

violating Section 7206(2) by falsely claiming that the firearms transactions were tax-exempt. These tax-exempt forms were then forwarded to the Internal Revenue Service.

13.07 WILLFULNESS

Willfulness has the same meaning in Section 7206(2) cases as it has for other criminal tax violations: “the word ‘willfully’ in these statutes generally connotes a voluntary, intentional violation of a known legal duty.” *United States v. Bishop*, 412 U.S. 346, 360 (1973); *see also Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000). For additional discussions of willfulness, *see* Sections [8.08](#) and [12.11](#), *supra*.

In *Edwards v. United States*, 375 F.2d 862, 864-65 (9th Cir. 1967), the defendant tax attorney collected estimated tax payments from his clients, pocketed the money, and reported on the clients’ returns that the estimated tax payments had been made and were properly credited against the tax due. The defendant argued that he did not intend to evade tax but only wanted to gain a little time. *Id.* at 865. Rejecting the defendant’s claim that he did not act willfully, the court explained:

The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsification and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section.

Edwards, 375 F.2d at 865; *see also United States v. Greer*, 607 F.2d 1251, 1252 (9th Cir. 1979) (“section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return”).

It is not enough that the defendant’s purposeful conduct merely resulted in the filing of a false return; the false filing must also have been a deliberate objective of the defendant. *See United States v. Salerno*, 902 F.2d 1429, 1433 (9th Cir. 1990) (convictions reversed because government failed to show that casino employee knew or understood that his embezzlement scheme would affect preparation of the casino corporate returns); *United States v. Aracri*, 968 F.2d 1512, 1523 (2d Cir. 1992) (government presented sufficient evidence for jury to find that defendants intended that

fuel companies file false gasoline excise tax returns); *cf. United States v. Gurary*, 860 F.2d 521, 523-24 (2d Cir. 1988) (government presented sufficient evidence to show that defendants who sold fraudulent purchase invoices to corporations knew their scheme would result in corporations' using the fraudulent invoices in the preparation of the tax returns).

Section 7206(2) charges often arise in prosecutions of promoters of abusive tax shelters. In this context, a few cases have recognized uncertainty in the law as a defense to a finding of willfulness. *See, e.g., United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (court reversed Section 7206(2) convictions of defendants who had instructed investors on creating and carrying out a tax avoidance scheme, because the legality of the shelters was "completely unsettled"). However, the Ninth Circuit has narrowed the circumstances in which such a defense may be raised to situations in which the defendant has merely advocated tax strategies that were of debatable legality. *See United States v. Schulman*, 817 F.2d 1355, 1359 (9th Cir. 1987). Various courts have held that *Dahlstrom* does not provide a defense for defendants whose participation in an illegal scheme extended beyond advocacy and included actual assistance in effectuating the tax avoidance strategies. *See United States v. Tranakos*, 911 F.2d 1422, 1430-31 (10th Cir. 1990); *United States v. Kelley*, 864 F.2d 569, 577 (7th Cir. 1989); *United States v. Krall*, 835 F.2d 711, 713-14 (8th Cir. 1987); *United States v. Solomon*, 825 F.2d 1292, 1297-98 (9th Cir. 1987).

In instances in which the defendant's promotion of a tax avoidance scheme extended beyond mere advocacy, the government may show that irrespective of the defendant's claim that the law with respect to the scheme's legality is unclear, the defendant's conduct was clearly prohibited. *See Solomon*, 825 F.2d at 1297 (even assuming that the patent tax shelter itself was legal or of unsettled legality, defendants could not rely on an uncertainty of the law defense since their conduct in administration of the scheme was so clearly fraudulent); *see also Schulman*, 817 F.2d at 1359. In *United States v. Smith*, 424 F.3d 992 (9th Cir. 2005), the government told the jury during closing argument to assume that trusts known as Unincorporated Business Organizations, or "UBOs," which the defendants promoted and charged their clients to set up, were "legitimate," and the court found that there was "nothing 'inherently unlawful with an UBO.'" *Id.* at 1010. Even though the defendants did not actually prepare any of the returns in question, their convictions on the § 7206(2) charges were nonetheless upheld

based on ample evidence that the defendants “gave advice to *unlawfully* use UBOs to file false or fraudulent tax returns (or not to file at all).” *Id.* (emphasis in original).

While mere advocacy may not be sufficient for a finding of aiding in the filing of false documents, it is not necessary that the defendant have a definite relationship (*i.e.* business partners, etc.) with the filing party. *See Aracri*, 968 F.2d at 1524 (defendants’ aiding in the filing of false documents rendered them criminally liable regardless of relationship to filing organization).

13.08 CASE EXAMPLES

13.08[1] Return Preparers

In *United States v. Jackson*, 452 F.2d 144 (7th Cir. 1971) (*per curiam*), the Seventh Circuit affirmed the convictions of a return preparer. Twelve taxpayer witnesses testified that they paid the defendant to prepare their returns, which contained itemized deductions and exemptions in excess of any amount they could correctly claim. 452 F.2d at 146. The returns contained various false deductions that the taxpayers testified they had not told the defendant to claim on their behalf but that the defendant had independently claimed on their behalf. *Id.* The defendant argued that his conviction was unfair because the client-taxpayers had an incentive to lie. The court of appeals affirmed the defendant’s convictions, concluding that “the innocence or guilty knowledge of a taxpayer is irrelevant to . . . a prosecution [under 26 U.S.C. § 7206(2)].” *Id.* at 147; *see also United States v. Haynes*, 573 F.2d 236, 240-41 (5th Cir.1978).

13.08[2] Sham Circular Financing Transactions

In *United States v. Clardy*, 612 F.2d 1139, 1143-49 (9th Cir. 1980), the defendant employed check kiting and check swapping as a basis for deducting non-existent interest payments on his clients’ tax returns. As part of his scheme, the defendant arranged for the preparation of false documentation to support the claimed deductions. *Id.* at 1446-47. The jury was instructed on a good faith belief defense, but was also instructed: “If you find from the evidence that transactions do not exist except in form and are otherwise unreal or sham, you are to consider whether the defendant willfully engaged in such conduct for the purpose of procuring, counseling, advising, or preparing or presenting false federal income tax returns as charged in the indictment.” *Clardy*, 612 F.2d at 1152-53. The court of appeals affirmed the defendant’s convictions under § 7206(2), concluding that there

was ample evidence to support a finding that the defendant “engineered the three paper transactions for the sole purpose of taking interest tax deductions without any serious intention by anyone at any time, 1971 as well as later, of completing any of the transactions. *Id.* at 1153.

13.08[3] Inflated Values

In *United States v. Barshov*, 733 F.2d 842, 845 (11th Cir. 1984), the defendants, as general partners, had formed limited partnerships to purchase motion pictures for distribution and exhibition. The defendants inflated the purchase prices and the income generated by the films to maximize the depreciation costs and the investment credits, and they caused returns to be filed based on the inflated numbers. *Id.* at 845-46. The Eleventh Circuit affirmed the conviction for aiding and assisting in the preparation of false partnership returns and individual returns of the limited partners. *Id.* at 846.

13.08[4] Political Contributions Deducted as Business Expenses

In *United States v. McCrane*, 527 F.2d 906 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909, *reaff'd in relevant part*, 547 F.2d 204 (3d Cir. 1976), the defendant, who was the finance chairman for a gubernatorial candidate, solicited political contributions, but issued fictitious invoices through a public relations firm describing the money as payment for advertising services, in order to disguise the payments as business expenses for the contributors. The contributors then deducted the contributions as business expenses on their tax returns. 527 F.2d at 908-09. The defendant argued that Section 7206(2) applies only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns. *Id.* at 913. Affirming the defendant’s conviction, the Third Circuit noted that “[t]he defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses . . . [and] [h]e also advised and counseled the contributors to use these expenditures as tax deductions.” *McCrane*, 527 F.2d at 913.

13.08[5] Winning Racetrack Tickets -- Not Cashed by True Owner

Winners at the racetrack often pay other people to cash winning tickets so that the real winners’ names will not appear on the Forms 1099 that the racetrack files with the IRS.

In *United States v. Haimowitz*, 404 F.2d 38 (2d Cir. 1968) (*per curiam*), two people testified that they had cashed about \$100,000 worth of winning tickets for the defendants for a commission of 2½ % or 3%. A third witness testified that he had cashed \$200,000 worth of winning tickets. 404 F.2d at 39-40. The defendant apparently told two of the cashing parties that they would be given sufficient losing tickets to offset the winnings attributed to them. The Second Circuit upheld the conviction because the “scheme of causing the track to record another person as the winner was calculated to defeat the government in its tax collection.” *Haimowitz*, 404 F.2d at 40; *see also United States v. Monteiro*, 871 F.2d at 209-211 (defendant’s liability for aiding the preparation of fraudulent tax documents accrued at the point when those documents were submitted to an intermediary required by law to transmit the information in those documents to the IRS, with the intent that the racetrack would accept as true the information provided in those documents). Similarly, in *United States v. McGee*, 572 F.2d 1097, 1099 (5th Cir. 1978) (*per curiam*), the court affirmed the § 7206(2) conviction of a defendant who cashed winning racetrack tickets for others under his own name in return for a 10% commission. The court stated that “[t]he statute is written disjunctively and it is sufficient for the government to prove either that the information was supplied with the intent to deceive or that the information was false in the sense of being deceptive.” *McGee*, 572 F.2d at 1099 (citation omitted).

13.08[6] Payoffs to Union Officials Reflected as Commissions and Repairs

In *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), the defendants made payoffs to union officials, but falsely reflected the amounts in corporate records as payments for commissions, repairs, and other items. Pointing out that even if it were true that the defendants never examined the returns, which had been prepared by their accountant, the Eleventh Circuit held that “[s]ince the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms.” *Kopituk*, 690 F.2d at 1333 (citations omitted).

13.09 VENUE

Venue will lie where the acts of aiding, assisting, counseling or advising the preparation of a false return took place or where the return was filed. *United States v. Hirschfeld*, 964 F.2d 318, 321 (4th Cir. 1992); *but see United States v. Griffin*, 814 F.2d

806, 810 n.7 (1st Cir. 1987) (leaving open the question whether the district of filing provides a sufficient basis for venue in a Section 7206(2) prosecution where return was prepared in one district and filed in another).

For further information, *see* the discussion of venue in [Section 6.00](#), *supra*, and the discussion of venue in connection with section 7206(1) violations in [Section 12.13](#), *supra*.

13.10 STATUTE OF LIMITATIONS

The statute of limitations for Section 7206(2) 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(3); *United States v. Habig*, 390 U.S. 222, 223, 225-27 (1968). (For rules relating to employment taxes, see [Section 7.02\[5\]](#).)

Where the defendant's act of aiding a false filing precedes the filing of a return, the significant event is the filing of the false document, not the defendant's act that aided or caused the filing. Thus, although the defendant may have provided false information to the filer more than six years prior to the filing of the return, the filing of a subsequent return based on the false information renews the limitations period every time such a filing occurs. *See, e.g., United States v. Kelley*, 864 F.2d 569, 574-75 (7th Cir. 1989) (although defendant sold an abusive tax shelter more than six years before indictment, his clients' filing of returns that included illegal deductions arising from the shelter within the six years prior to his prosecution prevented the charges from being time-barred).

For further information, *see* the discussion of the statute of limitations in [Section 7.00](#), *supra*.

13.11 CIVIL INJUNCTIONS AGAINST FRAUDULENT RETURN PREPARERS

The Tax Division strongly encourages federal prosecutors to utilize, wherever possible, both civil injunctions and parallel criminal proceedings against fraudulent tax preparers. While care must be taken not to interfere with or jeopardize a criminal investigation, a civil injunction case should proceed first, to the extent that the civil injunction case is ready to proceed. Use of civil injunctions enables the Department of Justice to put fraudulent return preparers out of business as fast as we can develop the cases to do so. The Tax Division's policy on parallel proceedings, if consistently adhered

to, will result in most or all criminal cases' reaching the trial or guilty plea stage after the United States has already sued for (and in most instances obtained) an injunction.

In cases involving charges against fraudulent return preparers who are still preparing returns, the Tax Division strongly encourages attorneys to seek a preliminary injunction, under 26 U.S.C. §§ 7402 and 7407, upon the filing of the complaint or very soon thereafter in order to actually put these fraudulent return preparers out of business. Section 7402 provides:

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, . . . and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.²⁶ U.S.C. §7402(a); *United States v. Bell*, 414 F.3d 474, 476-77 n.2 (3d Cir. 2005). Section 7407 provides:

A civil action in the name of the United States to enjoin any person who is a tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as a tax return preparer may be commenced at the request of the Secretary. . . . The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against any such tax return preparer or any taxpayer.

26 U.S.C. §7407(a). Under Section 7407(b), if the district court finds

- (1) that a tax return preparer has --
 - (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by [Title 26 of the United States Code],
 - (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return preparer,
 - (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
 - (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

- (2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct. If the court finds that a tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as a tax return preparer.

26 U.S.C. §7407(b).

Injunctive relief may also be obtained under § 7408 against tax return preparers who promote unlawful tax shelters. Section 7408(b) provides:

[I]f the court finds --

- (1) that the person has engaged in any specified conduct, and

- (2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under [Title 26].

'Specified conduct' is defined in relevant part as

any action, or failure to take action, which is . . . subject to penalty under section 6700 [relating to penalty for promoting abusive tax shelters, etc.] [or] section 6701 [relating to penalties for aiding and abetting understatement of tax liability].

26 U.S.C. §7208(c); *United States v. Bell*, 414 F.3d at 476-77 n. 2.; *United States v. Gleason*, 432 F.3d 678, 682-84 (6th Cir. 2005).

Courts consider the following factors to determine whether a permanent injunction is needed: (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's own recognition or non-recognition of his or her own culpability; and (6) the likelihood that the defendant's occupation

would place him or her in a position where future violations could be anticipated. *United States v. Gleason*, 432 F.3d at 683 (citations omitted). Noting that promoters of tax fraud who provide detailed instructions and techniques to avoid paying taxes have been prosecuted for aiding and abetting the commission of tax fraud, the United States Court of Appeals for the Third Circuit has suggested that, where the facts of the case indicate that the defendant went beyond advocating and assisted the commission of tax violations, the injunction should include language to forbid aiding and abetting. *See United States v. Bell*, 414 F.3d at 483-84.

If a fraudulent tax return preparer is already out of business and the case is strictly a historical case, then the Tax Division's goals are to punish the return preparer, deter others, and ensure that the one-time return preparer does not reenter the field. In cases in which there is a substantial likelihood the return preparer will resume his or her return preparation business but there is no ongoing criminal investigation and there are reasons why a criminal investigation is not warranted, the Tax Division recommends filing a civil injunction complaint.

Federal prosecutors are also urged to use the media to deter the preparer's conduct and inform his or her customers of the indictment. This is critical in all cases in which an indictment is returned, especially where the circumstances of the case provided an insufficient basis to seek a preliminary injunction or where the return preparer is already out of business. Deterrence is key to our mission, and there is great potential for deterrence in publicizing our efforts to combat tax fraud, either through the public affairs offices of United States Attorneys' offices or the Office of Public Affairs at the Department of Justice. Toward that end, thought must be given in each case to how best to achieve deterrence, which necessarily includes a press release and efforts to obtain maximum media exposure in every case.

Where criminal tax charges against a fraudulent return preparer are resolved by guilty plea, the Tax Division encourages federal prosecutors to include a provision in the plea agreement by which the defendant agrees to be permanently enjoined from preparing or filing federal tax returns on behalf of third parties. As indicated by the sample language below, a Tax Division Civil Tax Section attorney will effectuate the agreement by filing a civil complaint:

Defendant agrees, as part of this plea agreement, to be permanently enjoined under IRC §§ 7402, 7407, and 7408, from preparing, assisting in,

directing or supervising the preparation or filing of federal tax returns, amended tax returns, or other related documents or forms for any person or entity for anyone other than (himself/herself) or other than for an entity for which they have a legal obligation to file a tax return. Defendant understands that the United States will file a civil complaint against (him / her) seeking this relief and related provisions, and defendant consents to the entry of a permanent injunction consistent with Fed. R. Civ. P. 65(d) in that separate civil action.

Prosecutors who include this or a similar provision in a plea agreement should notify the IRS Small Business, Self-Employed (“SBSE”) Group or the Tax Division Counsel for Civil/Criminal Coordination.

A plea agreement with a fraudulent return preparer may also include a stipulation that the defendant is liable for civil tax penalties. Prosecutors contemplating such an agreement should refer to Section 5.01[7], *supra*, which discusses the approval they may need to obtain under 26 U.S.C. § 6751(b)(1) before entering into such a plea agreement.

A criminal defendant can promise, as part of a plea agreement, to never prepare returns for third parties again, but that creates only a contract. Once the defendant’s period of incarceration, supervised release and/or probation have ended, the contract, if violated, is enforceable only by bringing a civil suit against the defendant. An injunction, on the other hand, is permanent, and if it is violated the government does not have to sue to enforce a contract. Rather, the government can go straight to civil contempt proceedings to force compliance with the injunction or to a criminal contempt prosecution to punish the violation.

The IRS and the Tax Division have worked together for many years to obtain similar injunctions against preparers who were pleading guilty to crimes. Language in a plea agreement indicating the defendant’s consent to the injunction facilitates the government’s ability to obtain a permanent injunction and, in most cases, requires minimal additional effort on behalf of the prosecutor. Such language should be included in every a plea agreement, unless there is a very compelling reason not to pursue this parallel civil relief.

Where fraudulent preparers do not plead guilty or otherwise agree and stipulate to such an injunction, the United States must file a civil injunction complaint (if one has not already been filed), to ensure that a permanent injunction goes into effect. A permanent

injunction will deter illegal conduct after the expiration of restrictions placed on the defendant during incarceration, supervised release, and/or probation, since such restrictions will be lifted once these periods have ended.