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9.00 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX

9.01 STATUTORY LANGUAGE: 26 U.S.C. § 7202

§7202. ***Willful failure to collect or pay over tax***

Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined . . . or imprisoned not more than five years, or both, together with the costs of prosecution.[1]

9.02 TAX DIVISION POLICY

Section 7202 should be used to prosecute persons who fail to comply with their legal obligations to collect, account for, and pay over taxes. Prosecutors also should consider charges under 18 U.S.C. § 1341 (mail fraud) or § 1343 (wire fraud) if the defendant embezzled funds that were held in trust.

9.03 GENERALLY

This statute describes three ways it can be violated: (1) a willful failure to collect; (2) a willful failure to truthfully account for; and (3) a willful failure to pay over. It was designed primarily to assure compliance by third parties obligated to collect taxes or to deduct from wages paid to an employee the employee's share of Federal Insurance Contribution Act (FICA) taxes and the withholding tax on wages applicable to individual income taxes. The withheld sums are commonly referred to as "trust fund taxes." *See* ***Slodov v. United States***, 436 U.S. 238, 242-43 (1978); ***United States v. Evangelista***, 122 F.3d 112, 114 (2d Cir. 1997).[2] Although the question whether Section 7202 applies only to trust fund taxes or more broadly includes the employer's portion of FICA taxes has not been judicially determined, the Supreme Court's discussion of Section 6672, the civil

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[1] For offenses under Section 7202, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) &. (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in 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 . . . ." 18 U.S.C. § 3571(d).

[2] "Trust fund taxes," "collected taxes," and "third-party taxes," are used interchangeably to refer to these types of taxes. *See, e.g.,* ***Slodov***, 436 U.S. at 249; ***Davis v. United States***, 961 F.2d 867, 869 (9th Cir. 1992); ***In re Markos Gurnee P'ship***, 163 B.R. 124, 130 (Bankr. N.D. Ill. 1993).

counterpart to Section 7202, is illuminating. In ***Slodov***, the Court reviewed the legislative history of the statutory phrase "any person required to collect, truthfully account for, and pay over any tax imposed by this title," added in 1954 to the predecessor statutes to Sections 6672 and 7202, and concluded that Congress intended to limit the application of civil penalties under Section 6672 to violations of duty with respect to collected or withheld taxes -- like the employee's portion of employment tax -- and not direct taxes like the employer's portion of FICA or employer income taxes. *See* 436 U.S. at 249-50. That view is embodied in the Treasury Regulations promulgated under Section 6672. *See* Treas. Reg. § 301.6672-1 (stating in part that "[t]he penalty imposed by section 6672 applies only to the collection, accounting for, or payment over of taxes imposed on a person other than the person who is required to collect, account for, and pay over such taxes"). Additionally, that view is supported in the criminal context by the Department of Justice's position in ***United States v. Musacchia***, 955 F.2d 3, 4 (2d Cir. 1991), in which the Department took the extraordinary step of moving to vacate the defendant's conviction under Section 7202 on the ground that the motor fuel excise tax was a direct tax on that defendant and not a collected tax within the purview of Section 7202. As a result, the IRS and the Tax Division recommend that the prosecutor charge only that portion of employment tax that was withheld or collected from the employee.[3] The employer's portion of the employment taxes should be treated as relevant conduct, increasing the total tax loss to be considered by the sentencing court.

Alternatively, prosecutors may charge violations of duty with respect to both the employee and employer portions of employment tax as evasion of employment tax, in violation of 26 U.S.C. § 7201. *See generally* ***United States v. McKee***, 506 F.3d 225, 233-34 (3d Cir. 2006); ***United States v. Butler***, 297 F.3d 505, 509 (6th Cir. 2002).

9.04 ELEMENTS

To establish a violation of Section 7202, the prosecutor must prove the following elements beyond a reasonable doubt:

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[3] Because the civil penalties authorized by Section 6672 arise directly from a breach of duty with respect to collected or withheld payroll taxes, it is easy to confuse the two conceptually, and to treat them as interchangeable. They are not. Thus, it is vital to exercise care in selecting the proper theory of prosecution when making a charging decision, and to follow through on that theory at trial. The failure to recognize the distinction between collected taxes and Section 6672 penalties can have disastrous consequences. *See. e.g.,* ***United States v. Farr,*** 536 F.3d 1174 (10th Cir. 2008) (holding that government constructively amended indictment charging evasion of collected tax, where government proved only that defendant had evaded Section 6672 liability).

1. Duty to collect, and/or to truthfully account for, and/or pay over a tax;

2. Failure to collect, ***or*** truthfully account for, and/or pay over the tax; and

3. Willfulness.

United States v. Thayer, 201 F.3d 214, 219-21 (3d Cir. 1999); *see also* ***United States v. Simkanin***, 420 F.3d 397, 404-05 (5th Cir. 2005).

Cases prosecuted under this statute usually involve FICA (Social Security and Medicare taxes) and federal income tax withheld from wages. An employer's duty to collect, truthfully account for, and pay over trust fund taxes arises under Sections 3102(a) and 3402 of the Internal Revenue Code. *See generally* ***Davis v. United States***, 961 F.2d 867, 869 (9th Cir. 1992). Under Section 7202, it is the person or persons with the duty to collect, truthfully account for, and pay over who become culpable when there is a failure to perform this duty.[4] The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Section 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."[5]

A person is responsible for collecting, accounting for, and paying over trust fund taxes if he or she has "the authority required to exercise *significant* control over the [employer's] financial affairs, regardless of whether [the individual] exercised such control in fact." ***United States v. Jones***, 33 F.3d 1137, 1139 (9th Cir. 1994) (interpreting "person" under 26 U.S.C. § 6672; internal quotation omitted) (emphasis in original). Examples of the criteria used to determine the individual(s) with the duty to collect, truthfully account for, and pay over include the following:

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[4] Remember that 18 U.S.C. § 2(a) imposes criminal liability on aiders and abetters; and 18 U.S.C. § 2(b) imposes criminal liability on one who causes an intermediary to commit a criminal act, even if the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged. Thus, one who is not personally required to truthfully collect, account for, and pay over can still be charged with and convicted of a violation of Section 7202.

[5] An identical definition of "person" applies to 26 U.S.C. § 6672, the civil counterpart to Section 7202. *See* 26 U.S.C. § 6671(b).

(1) the duties of the officer as outlined by the corporate by-laws;

(2) the ability of the individual to sign checks of the corporation;

(3) the . . . signature on the employer's federal employment or other tax returns;

(4) the identity of the officers, directors and shareholders of the corporation;

(5) the identity of the individuals who hired and fired employees; and

(6) the identity of the individual(s) who were in charge of the financial affairs of the corporation.

United States v. Carrigan, 31 F.3d 130, 133 (3d Cir. 1994); *see also* ***United States v. McLain***, 646 F.3d 599, 603 (8th Cir. 2011) (employers, official or officers are responsible under section 7202), *cert. denied,* No 11-937 (Mar. 19, 2012). ***Purcell v. United States***, 1 F.3d 932, 936 (9th Cir. 1993) (responsible persons are "those who 'had the final word as to what bills should or should not be paid, and when'" (quoting ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958))); ***Davis v. United States***, 961 F.2d at 869, 873 (president and majority shareholder liable under § 6672 for paying other creditors rather than delinquent taxes); ***Hochstein v. United States***, 900 F.2d 543, 547 (2d Cir. 1990) (factors indicating responsible person status include duties outlined in corporate by-laws, ability to sign checks, status as officer or director, and ability to hire or fire employees); ***Gephart v. United States***, 818 F.2d 469, 473 (6th Cir. 1987) (describing five of the six criteria listed in ***Carrigan*** (all except signature on employer's tax returns)); ***Neckles v. United States***, 579 F.2d 938, 940 (5th Cir. 1978) (power and authority to pay creditors is sufficient, official position not required). More than one individual can be a responsible officer. ***Gephart***, 818 F.2d at 473.

The key to liability under Section 7202 is the person's authority with respect to corporate finances, not general management of the business. *See* ***Hochstein***, 900 F.2d at 547 (central question "is whether the individual has significant control over the enterprise's finances"); ***Jones***, 33 F.3d at 1140-41 (reversing finding of "responsible person" given absence of authority to pay taxes, even though influential in payment to creditor); ***Alsheskie v. United States***, 31 F.3d 837, 839-40 (9th Cir. 1994) (defendant not "responsible" when he submitted an affidavit indicating that the parent corporation "essentially precluded [him] from exercising the degree of autonomy, authority and control necessary to be able to pay the payroll tax liabilities . . . on a timely basis").

A responsible person who withholds taxes from his own wages, but fails to pay them over to the IRS, may not claim credit for the withheld taxes on his personal income tax returns. Such funds were never "actually withheld" because they never functionally left the control of the taxpayer. ***May v. Comm'r***, 137 T.C. 147, 152-154 (2011); ***United States v. Blanchard***, 618 F.3d 562, 576 (6th Cir. 2010).

The Tax Division's position historically has been that either (1) a willful failure to truthfully account for or (2) a willful failure to pay over constitutes a breach of the obligation to truthfully account for and pay over. Under this theory, a willful failure to pay over after the filing of a return making a truthful accounting leaves the duty as a whole unfulfilled and the responsible person subject to prosecution. This position is supported by ***Slodov***, wherein the Supreme Court stated that a person could be liable under Section 6672, the civil counterpart to Section 7202, if the person willfully failed to pay over the tax, even if he or she was not associated with the taxpayer-employer at the time the tax was collected or accounted for, assuming there were funds available to pay the trust fund taxes at the time the person became associated with the taxpayer-employer. 436 U.S. at 259-60. In ***United States v. Poll***, a pre-***Slodov*** case, the Ninth Circuit suggested a contrary reading of the statute, stating that "[w]e continue to regard the crime as requiring two failures to act, willful failure to truthfully account *and* willful failure to pay over." 521 F.2d 329, 334-35 n.3 (9th Cir. 1975), *overruled on other grounds*, ***United States v. Easterday,*** 564 F.3d 1004 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 490 (2009). However, the Second and Third Circuits rejected the ***Poll*** court's interpretation. *See* ***United States v. Evangelista,*** 122 F.3d 112, 121-22 (2d Cir. 1997); ***Thayer,*** 201 F.3d at 220-21 (adopting ***Evangelista***'s analysis and noting that to interpret the statute in the conjunctive would lead to the incongruous result of criminalizing a failure to collect a tax, while permitting the collecting of the tax, reporting it to the IRS, and spending it for one's "own selfish purposes") (internal quotation omitted). Ultimately, the Ninth Circuit itself agreed with ***Evangelista*** and held that the statement in ***Poll*** that Section 7202 required both a failure to truthfully account for and a failure to pay over was dictum. ***United States v. Gilbert***, 266 F.3d 1180, 1183 (9th Cir. 2001). ***Gilbert*** concluded that there is an obligation both to withhold and to pay over the tax, and that an individual who fails to perform one of these required duties is subject to conviction under Section 7202. ***Id***. at 1184. Consequently, the court held that the defendant who had collected and truthfully accounted for the withholding taxes was nevertheless properly convicted under Section 7202 for willfully failing to pay over the withheld taxes. ***Id***. at 1183-85. Thus, ***Gilbert*** confirms the Tax Division's position that a person violates Section 7202 if he or she willfully fails to collect the tax, willfully fails to truthfully account for the tax, **or** willfully fails to pay over the tax.

The element of willfulness under Section 7202 is the same as in other offenses under Title 26. *See* Section 8.08, *supra*. It must be shown that a defendant voluntarily and intentionally acted in violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 200 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Section 7202 enforces the requirement that employers and "responsible persons" withhold trust fund taxes from the gross wages of employees, truthfully account for those withheld taxes, and pay over those taxes to the United States Treasury. Under Section 6672, the civil counterpart to Section 7202, a voluntary, conscious, and intentional act of paying the claims of other creditors, including the wage claims of employees, instead of the trust fund taxes, constitutes a "willful" violation of the duty to pay over. *See* ***Sorenson v. United States***, 521 F.2d 325, 328 (9th Cir. 1975). Similarly, it is the Tax Division's position that a person willfully fails to pay over tax under Section 7202 when, instead of paying the employment taxes, he voluntarily and intentionally uses the money to pay the claims of other creditors, including wages to employees, with knowledge that the collected funds and the employer's portion are due to be paid over to the United States.

Evil motive or bad purpose is not necessary to establish willfulness under the criminal tax statutes. ***Pomponio***, 429 U.S. at 12. But, in ***United States v. Poll***, 521 F.2d 329 (9th Cir. 1975), *overruled*, ***United States v. Easterday***, 564 F.3d 1004 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 490 (2009), a pre-***Pomponio*** case, the Ninth Circuit held that if an employer-taxpayer lacked the resources to pay the tax at the time it was due, the prosecutor had the burden of proving "that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer." 521 F.2d at 333. Stating it was "guided by ***United States v. Andros***,"[6] which in turn was "rooted in ***Spies v. United***

[6] ***United States v. Andros*** held that "[t]o establish the offense of a willful failure to pay the taxes assessed [under 26 U.S.C. 7203], the Government was required to prove that the financial circumstances of the taxpayer were such that, on or about . . . [the date on which the taxpayer failed to pay the tax], the taxpayer possessed sufficient funds to be able to

States, 317 U.S. 492, 497-98 (1943)," the ***Poll*** court focused on the statement in ***Spies*** that "'*[w]e would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer*.'" 521 F.2d at 333 (emphasis in ***Poll***). The ***Poll*** court then opined that "the relevance of the taxpayer's financial circumstances is not . . . irrelevant to the proof of willfulness under 26 U.S.C. § 7202." Based on its belief that proof of willfulness required an "evil motive" or "want of justification," the Ninth Circuit then concluded that willfulness under Section 7202 required the prosecution to prove beyond a reasonable doubt that if the defendant was unable to pay the taxes when due, that inability was the result of an intentional act without justification. 521 F.2d at 333.

In ***United States v. Easterday***, 564 F.3d 1004, 1005 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 490 (2009), the Ninth Circuit held that in light of ***Pomponio***, ***Poll*** is no longer binding authority for the proposition that a defendant's ability to pay his tax liability is relevant to the determination of willfulness under 26 U.S.C. § 7202, because that requirement "was premised on a definition of willfulness that included some element of evil motive." The Tax Division agrees that ***Poll***'s requirement that the government must show a lack of justification for the expenditures that created or caused the lack of funds was abrogated by ***Pomponio***, which clarified the Supreme Court's jurisprudence on the meaning of "willfulness" in the context of the criminal tax statutes.[7] As ***Pomponio*** explained, "'the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty.'" 429 U.S. at 12 (quoting ***Bishop***, 412 U.S. at 360). The Court pointed out that this standard was not modified by "[o]ur references to other formulations of the standard" -- i.e., "bad faith or evil intent," "'*evil motive and want of justification in view of all the financial circumstances of the taxpayer*," and "knowledge that the taxpayer should have reported more income than he did." "On the contrary," the Court went on, "as the other Courts of Appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty." ***Pomponio,*** 429 U.S. at 12 (citations omitted and emphasis added); *see also* ***Cheek v. United States***, 498 U.S. 192, 201 ("Taken together, ***Bishop*** and ***Pomponio*** conclusively establish that the standard for the statutory

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meet his legal obligation to the Government and that he voluntarily and intentionally did not pay such taxes." 484 F.2d 531, 533-34 (9th Cir. 1973).

[7] Given the Division's position, prosecutors should avoid relying on ***Poll*** when seeking to offer evidence at trial of an employer or responsible person's ability to pay the payroll taxes.

willfulness requirement is the 'voluntary, intentional violation of a known legal duty'" (quoting ***Bishop***, 412 U.S. at 360)).

Hence, it is the Tax Division's position, as adopted by the Ninth Circuit in ***Easterday***, that to prove a willful failure to pay over, all the government need show is that payments were voluntarily and intentionally made to creditors other than the United States with knowledge that the withheld funds were due to the United States, and that there is no separate requirement that the government prove that the payments were without justification.

Willfulness can be proved by circumstantial evidence. *See* ***United States v. Radtke***, 415 F.3d 826 (8th Cir. 2005) (evidence of defendants' knowledge of cash payments to employees from which no tax was withheld sufficient to establish defendants' intent to defraud as to several fraud and tax offenses, including 26 U.S.C. § 7202 and 18 U.S.C. § 371 conspiracy to defraud the IRS and to commit violations of 26 U.S.C. §§ 7202 and 7206(1)); *see also* ***United States v. Scharf***, 558 F.2d 498, 501 (8th Cir. 1977) (evidence that the defendant had altered records was admissible for the purpose of showing "motive, intent, and willfulness."); ***United States v. Bailey***, 789 F. Supp. 788, 814 (N.D. Tex. 1992) (failure, for almost a decade, to pay over taxes withheld from employees' paychecks "compels a finding of willfulness").

9.04[1] Motor Fuel Excise Tax Prosecutions

Section 7202 is not applicable to those who have the duty to pay, as opposed to collect and pay over, the tax at issue. Section 7202 applies to a person who is not the taxpayer but is under a duty to collect the tax from the taxpayer and then truthfully account to the government for the collected tax and pay it over.

Often, the one obligated to pay a tax will pass it on to another, by, for example, including it as part of the price of goods. But the fact that the taxpayer "collects" the tax from another in this sense does not mean that he is responsible under the law for collecting the tax and thus potentially subject to prosecution under Section 7202. The practice of passing on the motor fuel excise tax imposed by 26 U.S.C. § 4081 as part of the purchase price is common in the motor fuel industry. *See generally* ***Janus Petroleum Co., Inc. v. United States***, 915 F. Supp. 556, 557 (E.D.N.Y. 1996); ***Cook Oil Co., Inc. v. United States***, 919 F. Supp. 1556, 1562 (M.D. Ala. 1996), *aff'd,* 108 F.3d 344 (11th Cir. 1997). There is no obligation, within the meaning of Section 7202, however, to collect and pay over these taxes. *See* ***United States v. Musacchia***, 955 F.2d 3, 4 (2d Cir. 1991) (vacating defendant's conviction under Section 7202 after being advised by Department of Justice that Section 7202 "does not apply to the gasoline taxes at issue here"). Consequently, prosecutors should take great care in excise tax cases to ensure that only those persons with a duty to collect the tax -- not those with the duty to pay the tax -- are charged with violations of Section 7202.

9.05 LESSER INCLUDED OFFENSE CONSIDERATIONS

The law on lesser included offenses is discussed in depth, *supra*, at § 8.11.

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

There are few cases discussing lesser included offense in the § 7202 context but courts have held that § 7207 is not a lesser included offense of § 7202. The elements of § 7207 are:1) the defendant submitted a return, statement, or other document to the IRS; 2) the return, statement, or other document was false or fraudulent as to a material matter; and 3) willfulness. *See* ***Sansone v. United States***, 380 U.S. 343, 352 (1965). As the Eighth Circuit noted, other than willfulness, Section 7202 and Section 7207 are different statutes. *See* ***United States v. Scharf***, 558. F.2d 498, 503 (8th Cir. 1977). More recently, the Sixth Circuit repeated this point, observing that the "only element those crimes share is willfulness." ***United States v. Cheff***, 829 F.App'x 104, 108 (6th Cir. 2020). Put differently, every element of § 7207, except for willfulness, is an element that is not part of a § 7202 offense. Thus, § 7207 is not a lesser included offense of § 7202.

9.06 VENUE

If a statute does not indicate where Congress considers the place of committing a crime to be, "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). Although the Tax Division has not located any case addressing the issue, venue in a Section 7202 prosecution would appear to be proper in the judicial district in which the defendant was required to collect, truthfully account for, or pay over the tax.

For a general discussion of venue, *see* Section 6.00, *supra*.

9.07 STATUTE OF LIMITATIONS

There is a six-year statute of limitations period for prosecutions under Section 7202. 26 U.S.C. § 6531(4); *see* ***United States v. Adam***, 296 F.3d 327, 331-32 (5th Cir. 2005*);* ***United States v. Gilbert***, 266 F.3d 1180, 1186 (9th Cir. 2001); ***United States v. Gollapudi,*** 130 F.3d 66, 70 (3d Cir. 1997); ***United States v. Evangelista,*** 122 F.3d 112, 119 (2d Cir. 1997) (reaffirming prior holding in ***United States v. Musacchia***, 900 F.2d 493, 499-500 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir. 1991), that six-year statute of limitations applied to charges brought under Section 7202); ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir. 1970); *see also* ***United States v. Creamer***, 370 F. Supp. 2d 715, 725 (N.D. Ill. 2005);[8] ***United States v. Anglin,*** 999 F. Supp. 1378, 1379-80 (D. Haw. 1998); ***United States v. Blanchard***, 618 F.3d 562, 568-69 (6th Cir. 2010).

Be aware, however, that two district courts that have considered the question have concluded that the statute of limitations for Section 7202 prosecutions is three years. ***United States v. Brennick,*** 908 F. Supp. 1004, 1019 (D. Mass. 1995); ***United States v. Block***, 497 F. Supp. 629, 630-32 (N.D. Ga. 1980), *aff'd on other grounds,* 660 F.2d 1086 (5th Cir. 1980).

In the ***Brennick/Block*** view, the omission of the language "collect, account for, and pay over" from the subsections of 26 U.S.C. § 6531 which establish the longer six-year period of limitations demonstrates that Congress did not intend to make the failure to "pay over" third party taxes subject to the six-year statute of limitations. ***Brennick***, 908 F. Supp. at 1019; ***Block***, 497 F. Supp. at 630-32. The ***Block*** court also noted that section

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[8] The district court incorrectly dismissed the Section 7202 counts in its 2005 opinion, notwithstanding the court's conclusion that the six-year statute of limitations applied. The court vacated the dismissal of those two counts in a later decision. *See* ***United States v. Creamer***, No. 04 CR 281-1, 2006 WL 2037326, at *1 (N.D. Ill. Apr. 4, 2006).

6531(4) was not directed at a class of offenses but rather to "the offense of willfully failing to pay any tax." 497 F. Supp. at 632; *see* 26 U.S.C. § 7203. The court reasoned that it was "quite clear" that failure to "pay over" third-party taxes was substantively different from a failure to "pay" taxes; thus, the exception contained in Section 6531(4) was found not to apply to the failure to pay over third-party taxes. 497 F. Supp. at 632; *but see* ***Wilson v. United States***, 250 F. 2d 312, 320 (9th Cir. 1958) (finding no distinction between the duty to pay ordinary taxes and the duty to pay over trust fund taxes). Likewise, the district court in ***Brennick*** concluded that Section 7202 does not describe a Section 6531(4) exception of failing to make any return. Rather, according to ***Brennick,*** Section 6531(4) "plainly refers only to a single offense . . . clearly described by the language of Section 7203." 908 F. Supp. at 1019.

The Second Circuit, in ***Musacchia***, reviewed the ***Block*** decision and concluded that the district "court's analysis is not convincing." ***Musacchia***, 900 F.2d at 500, *vacated in part on other grounds*, 955 F.2d at 4. The ***Musacchia*** court found that, although 26 U.S.C. § 6531(4) does not track the language of section 7202 exactly, the terms "pay" and "pay over" were used interchangeably by the Supreme Court in deciding ***Slodov***, 436 U.S. at 249, and thus the fact that Section 6531(4) uses the term "pay" rather than "pay over" is not dispositive. 900 F.2d at 500.

The ***Musacchia*** court found persuasive the government's argument that "it would be inconsistent for Congress to have prescribed a six-year limitations period for the misdemeanor offense defined in 26 U.S.C. § 7203 . . . while providing only a three-year limitation period for the felony offense defined in section 7202." 900 F.2d at 500. The court also noted that the language of section 6531(4) supports the conclusion that the six-year limitations period applies in a section 7202 prosecution. ***Musacchia***, 900 F.2d at 500.

To resolve any doubt that ***Musacchia*** is still good law after being vacated in part, the Second Circuit in ***Evangelista*** explicitly "reaffirm[ed] the holding of the original ***Musacchia*** opinion that 'a six year statute of limitations applies to the offense defined by 26 U.S.C. § 7202.'" 122 F.3d at 119 (citations omitted). In so doing, the Second Circuit also implicitly rejected ***Brennick,*** an opinion on which it relied for other propositions. ***Id***. The Third Circuit in ***Gollapudi*** explicitly rejected ***Brennick*** and ***Block***, relying instead on the reasoning in ***Musacchia.*** 130 F.3d at 70-71. To the ***Gollapudi*** court, it was clear that where Congress intended to limit the applicability of Section 6531 exceptions, it unambiguously did so by references to specific sections of the code. 130 F.3d at 70-71; *see* §§ 6531(5)-(8). Congress also chose to include exceptions to the three-year period under Section 6531 by general descriptions of proscribed conduct. *See* ***Gollapudi***, 130 F.3d at 70; §§ 6531(1)-(4). Consequently, "the language of section 6531(4) -- applying the six-year statute of limitations to the 'offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulation' -- suggests that it applied to any of such several sections of the code that define such an offense," and should not be limited, as ***Brennick*** and ***Block*** held, to Section 7203. ***Gollapudi***, 130 F.3d at 71 (citations omitted). The Ninth Circuit in ***Gilbert*** reached the same result, relying on the plain language of the statute and the holdings of the Second Circuit in ***Evangelista***, the Third Circuit in ***Gollapudi***, and the Tenth Circuit in ***Porth***, to conclude that the six-year statute of limitations under Section 6531(4) applies to Section 7202. ***Gilbert***, 266 F.3d at 1185-86. The Fifth Circuit in ***Adam***, 296 F.3d at 331-32, followed suit, relying on the plain language of Section 6531(4) and other circuit's rulings, rejecting the ***Block*** ruling, and holding that the six-year statute of limitations applies to Section 7202.

It is the view of the Tax Division that ***Adam***, ***Gilbert***, ***Gollapudi***, ***Evangelista***, ***Musacchia***, ***Porth***, ***Creamer***, and ***Anglin*** are correctly decided and that the six-year statute of limitations provided for in Section 6531(4) is applicable to prosecutions under Section 7202.

9.08 SENTENCING

9.09[1] USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202, which proscribes a willful failure to collect, account for, and pay over trust fund employment taxes, is USSG § 2T1.6. Section 2T1.6 directs that the base offense level for Section 7202 is determined by the Section 2T4.1 Tax Table; Section 2T1.6 does not contain any enhancements for specific offense characteristics. USSG § 2T1.6(b) does contain a cross reference indicating that the base offense level is to be determined by USSG § 2B1.1 (Theft, Property Destruction, and Fraud) "[w]here the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater. Section 3B1.2 of the Sentencing Guidelines, entitled "Abuse of Position of Trust of Use of Special Skill," provides, in pertinent part, that: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics."

In at least two cases, the Courts of Appeals have reversed the imposition of the Section 3B1.2 abuse-of-trust enhancement in a Section 7202 trust-fund case. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), the court held that the enhancement can be applied only where the defendant abused a position of trust vis-a-vis the victim, that the IRS is the victim of a Section 7202 offense, and that the defendant did not hold a position of trust vis-a-vis the IRS. In ***United States v. DeMuro***, Nos. 11-1887 & 11-1941, 2012 WL 1382985 (3d Cir. Apr. 23, 2012), the court similarly held that the defendants were not in positions of trust vis-a-vis the IRS where the defendants had been required by 26 U.S.C. § 7512 to establish a segregated bank account for withheld taxes.

There is an inter-circuit conflict as to whether a defendant must occupy a position of trust vis-a-vis the victim of the count of conviction, or whether the Section 3B1.2 enhancement may be applied where the abuse of trust occurred with respect to uncharged conduct that significantly facilitated the count of conviction. ***See United States v. Friedberg***, 558 F.3d 131, 133-35 (2d Cir. 2009) (identifying conflict). In those circuits limiting the enhancement to situations where the defendant held a position of trust vis-a-vis the victim, prosecutors should be cautious about asserting that the defendant held a position of trust vis-a-vis the IRS. In those circuits that allow uncharged conduct to be the basis for the Section 3B1.2 enhancement, the employees in a Section 7202 prosecution might be considered the "victims" of the defendant's embezzlement, as contemplated by USSG § 2T1.6(b), but the force of that position is somewhat undermined by the fact that employees automatically receive credit for taxes that are "actually withheld" even if the monies are not paid over to the government. Treasury Regulation (26 C.F.R.) § 1.31-1(a). And although the definition of a "responsible person" for Section 7202 purposes is broader than the position-of-trust definition used in Section 3B1.2 -- meaning that the enhancement can only apply to a subset of Section 7202 cases -- defendants are sure to argue that an abuse of trust is already included in the base offense level for a Section 7202 "trust fund" offense. See § 3B1.2 ("This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics.")

In sum, there is litigation risk in seeking the USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases. As the ***May*** and ***DeMuro*** cases illustrate, a sentence that is otherwise valid may be vacated on appeal due to the imposition of that enhancement. In a Section 7202 prosecution where a defendant's egregious abuse of a position of trust is clearly not adequately reflected in the offense level, prosecutors should consider seeking a variance under Section 3553(a) as opposed to the Section 3B1.2 enhancement.