

[Criminal Tax Manual](#)

[prev](#) • [next](#)

TABLE OF CONTENTS

8.00 ATTEMPT TO EVADE OR DEFEAT TAX	1
8.01 STATUTORY LANGUAGE: 26 U.S.C. § 7201.....	1
8.03 GENERALLY.....	1
8.04 PLEADING TAX LOSS IN THE INDICTMENT.....	4
8.05 ELEMENTS OF EVASION.....	5
8.06 ATTEMPT TO EVADE OR DEFEAT	5
8.06[1] Attempt To Evade Assessment	6
8.06[2] Attempt To Evade Payment	9
8.06[3] Proof of an Intent to Evade Tax	11
8.07 ADDITIONAL TAX DUE AND OWING.....	12
8.07[1] Generally	12
8.07[2] Unit of Prosecution.....	14
8.07[3] Substantial Tax Deficiency	15
8.07[4] Method of Accounting	17
8.07[5] Loss Carryback – Not a Defense.....	18
8.07[6] Methods of Proof.....	18
8.07[7] Income Examples	20
8.07[8] Cases Involving Corporate Diversions.....	21
8.08 WILLFULNESS	23
8.08[1] Definition	23
8.08[2] Proof of Willfulness	25
8.08[3] Examples: Proof of Willfulness	29
8.08[4] Conscious Avoidance/Willful Blindness Instruction	33
8.09 VENUE.....	36
8.10 STATUTE OF LIMITATIONS.....	37
8.11 LESSER INCLUDED OFFENSES	39
8.11[1] Lesser Included Offense Instructions Generally	40
8.11[2] Section 7203 as a Lesser Included Offense of Section 7201	43
8.11[3] Section 7206(1) as a Lesser Included Offense of Section 7201.....	49

8.11[4] Section 7207 as a Lesser Included Offense of Section 7201 52
8.11[5] Dictum in Sansone and Schmuck..... 52
8.11[6] – Charging Tax Evasion and Putative Lesser Included Offenses 55
8.11[7] – Chart Summarizing Circuit Law and Recommendations..... 56

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8.00 ATTEMPT TO EVADE OR DEFEAT TAX

8.01 STATUTORY LANGUAGE: 26 U.S.C. § 7201

Section 7201. *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.¹

8.02 TAX DIVISION POLICY

“Tax evasion” is a shorthand phrase that many people use for all manner of tax fraud. But the charge of tax evasion, in violation of 26 U.S.C. § 7201, is not necessarily the best one to bring against individuals defrauding the IRS. Defendants frequently seek to exploit the fact that, in order to establish the crime of tax evasion, the government must prove the existence of a tax due and owing and willfulness. Prosecutors therefore should consider other charges, such as conspiring to defraud the United States, 18 U.S.C. § 371; filing false returns, 26 U.S.C. § 7206; or endeavoring to obstruct the IRS, 26 U.S.C. § 7212(a), as alternatives or supplements to the charge of tax evasion.

8.03 GENERALLY

Section 7201 proscribes a single crime – attempted evasion of tax – which can be committed in two distinct manners: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax. *See United States v. Mal*, 942 F.2d 682, 686-88 (9th Cir. 1991); *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir.1990); *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990); *see also United States v. Hunerlach*, 197 F.3d 1059, 1065 (11th Cir. 1999); *but see Sansone v. United States*, 380 U.S. 343, 354 (1965); *United States v. Hogan*, 861 F.2d 312, 315 (1st Cir.1988). A defendant attempting to evade assessment generally attempts to prevent the government from determining the true tax liability. *See United*

¹ For offenses under Section 7201, 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).

States v. Mal, 942 F.2d at 687. A defendant attempting to evade payment generally seeks to evade the payment of the true tax liability by hiding assets from the government. See *United States v. Hogan*, 861 F.2d at 315; *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984). Although *Sansone* has been cited for the proposition that evasion of payment and evasion of assessment constitute two distinct crimes, see, e.g., *Hogan*, 861 F.2d at 315, several circuits have rejected duplicity challenges to indictments by holding that Section 7201 proscribes only one crime, tax evasion, which can be committed either by attempting to evade assessment or by attempting to evade payment. See *United States v. Masat*, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991); *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990), *judgment vacated*, 498 U.S. 1043 (1991), *ruling on duplicity issue reinstated on remand*, 927 F.2d 955, 956 (7th Cir. 1991); *United States v. Mal*, 942 F.2d at 686. Furthermore, although the First Circuit initially expressed some skepticism concerning whether *Masat* and *Dunkel* were consistent with *Sansone*, see *United States v. Waldeck*, 909 F.2d 555, 557-58 (1st Cir. 1990), it subsequently relied on *Dunkel* in rejecting a defendant's duplicity claim, noting that "[n]o matter how one resolves the semantic question, . . . it is beyond reasonable dispute that the indictment charged [defendant] with a single, cognizable crime, and that the jury convicted him of the same crime. See *United States v. Dunkel*, 900 F.2d 105, 107 (7th Cir. 1990)." *United States v. Huguenin*, 950 F.2d 23, 26 (1st Cir. 1991).²

In order to establish the offense of tax evasion, whether of assessment or of payment, the government must prove, *inter alia*, that the defendant engaged in some affirmative conduct for the purpose of misleading the IRS or concealing tax liability or assets. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and Section 7201 expressly says "attempts in any manner" to evade or defeat any tax or the payment thereof. A common method used to attempt to

² The First Circuit also rejected the defendants' duplicity claims in both *Huguenin* and *Waldeck* on the grounds that the defendants in those cases were clearly apprised that the government was proceeding on an evasion of assessment theory. See *Huguenin*, 950 F.2d at 26; *Waldeck*, 909 F.2d at 558.

Although the court in *Waldeck* stated (909 F.2d at 558) that "the indictment could have been clearer by specifying that the crime charged was attempting to evade and defeat the assessment of taxes," the Tax Division believes that an indictment which tracks the first part of the statute and alleges an attempt to evade and defeat a tax clearly charges an attempt to evade tax by evasion of assessment. Similarly, an indictment that tracks the second part of the statute and alleges an attempt to evade payment of a tax clearly alleges an attempt to evade tax by evasion of payment. This analysis is consistent with the result in both *Huguenin* and *Waldeck*.

evade or defeat assessment of a tax is the filing of a false tax return that understates tax liability, either by omitting income, claiming deductions to which the taxpayer is not entitled, or both.

In evasion of payment cases, evading or defeating the correct assessment of the tax is not the issue. Evasion of payment usually occurs after the existence of a tax due and owing has been established, either by the taxpayer's reporting the amount of tax due and owing, by the Internal Revenue Service's examining the taxpayer and assessing the amount of tax deemed to be due and owing, or by operation of law on the date that the return is due, if the taxpayer fails to file a return and the government can prove that there was a tax deficiency on that date (*see United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992)).³ The taxpayer then seeks to evade the payment of the taxes due and owing.⁴ In order to establish the crime of attempted evasion of payment of tax, the government must establish that the taxpayer took some affirmative action to defeat the payment of the tax. "Merely failing to pay assessed taxes, without more, * * * does not constitute evasion of payment."⁵ *United States v. McGill*, 964 F.2d 222, 231 (3d Cir. 1992) (citing *Sansone*, 380 U.S. at 351); *United States v. Romano*, 938 F.2d 1569, 1573 (2d Cir. 1991) (evidence that defendant merely carried cash to Canada and failed to file return not sufficient to establish existence of affirmative act of evasion of payment); *see also United States v. Masat*, 896 F.2d 88, 97 (5th Cir. 1990) (citing *Spies v. United States*, 317 U.S. 492, 499 (1943)); *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir.1981). Generally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay taxes or the removal of assets from the reach of the IRS. *See United States v. McGill*, 964 F.2d at 231.

Historically, the crime of willfully attempting to evade and defeat the assessment of tax through evasion of assessment, as opposed to willfully attempting to evade the payment of a tax, has been the principal revenue offense. Although the basic elements of the crime are relatively simple, actually proving the necessary elements can be difficult.

³ Neither a formal assessment nor a demand for payment is required. *See United States v. Daniel*, 956 F.2d at 542.

⁴ This is not to imply that an affirmative act to evade payment of a tax can never occur prior to its assessment. *See United States v. McGill*, 964 F.2d 222, 231 (3d Cir. 1992).

⁵ Willfully failing to pay taxes is, however, a misdemeanor covered by 26 U.S.C. § 7203.

8.04 PLEADING TAX LOSS IN THE INDICTMENT

The government does not have to prove the exact amount of tax due and owing in a tax case, and it is common for the unreported income or the tax due and owing figures in the indictment to differ from those established by the evidence presented to the jury and included in the final criminal tax computations made by the government's summary witness. An important preliminary charging decision is whether or not to specify a tax loss in the indictment.

The primary benefit to including the specific tax loss amount in the indictment is that the tax loss figure becomes public information within the context of Federal Rule of Criminal Procedure 6(e) and 26 U.S.C. § 6103 when the indictment is returned or unsealed. Once public, the tax loss amount is available for use in a press release, or any other public forum.

The primary concern about including a specific tax loss amount in the indictment is the likelihood that the tax loss number will change during the course of trial. For example, the prosecutor may decide to limit the number of witnesses called in order to streamline a case, the testimony of a coconspirator may change on the witness stand, or the court may decide to exclude business records pertaining to one or more transactions. Furthermore, a discrepancy between the tax loss charged and proved may confuse or distract the jury and create an opportunity for a defense attorney to undermine the jury's confidence in the government's case.

Of course, if the prosecutor decides not to include the specific tax loss figure in the indictment, the defendant may seek a bill of particulars arguing that his or her ability to prepare for trial is impaired by the failure of the indictment to identify the tax loss at issue. *See* Fed. R. Crim. P. 7(f); *see also United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993); *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989); *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985) (bill of particulars only appropriate when the indictment is insufficient to permit the preparation of an adequate defense); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979).

When determining whether to include a specific tax loss amount in the indictment, the prosecutor must assess the facts and circumstances of the case, including the need for publicity and the likelihood of changes in the tax loss computations

8.05 ELEMENTS OF EVASION

To establish a violation of Section 7201, the following elements must be proved:

1. An affirmative act constituting an attempt to evade or defeat a tax or the payment thereof. *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 497-99 (1943).
2. An additional tax due and owing. *Boulware v. United States*, 552 U.S. 421, 424 (2008); *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Lawn v. United States*, 355 U.S. 339, 361 (1958).
3. Willfulness. *Cheek v. United States*, 498 U.S. 192, 193 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 358-59 (1973); *Sansone v. United States*, 380 U.S. 343, 351 (1965); *Holland v. United States*, 348 U.S. 121, 124, 139 (1954).

The government must prove each element beyond a reasonable doubt. *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990); *United States v. Williams*, 875 F.2d 846, 849 (11th Cir. 1989).

8.06 ATTEMPT TO EVADE OR DEFEAT

The means by which defendants can attempt to evade are virtually unlimited. As noted above, Section 7201 expressly prohibits attempts to evade tax “in any manner.” In order to violate Section 7201, the taxpayer generally must take some affirmative action with an intent to evade tax. The general rule is that omissions to act will not satisfy the affirmative act requirement. For example, a mere failure to file a return, standing alone, cannot constitute an attempt to evade taxes. See *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Hoskins*, 654 F.3d 1086, 1091 (10th Cir. 2011) (“To be liable under § 7201, a defendant must do more than passively fail to file a tax return”); *United States v. Nelson*, 791 F.2d 336, 338 (5th Cir. 1986).

Generally, for tax evasion purposes, “any conduct, the likely effect of which would be to mislead or to conceal” constitutes an affirmative attempt to evade tax. *Spies*, 317 U.S. at 499; *see, e.g., United States v. Bishop*, 264 F.3d 535, 545 (5th Cir. 2001). Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax. *See United States v. Voigt*, 89 F.3d 1050, 1090 (3d Cir. 1996); *United States v. Jungles*, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer’s entry into an “independent contractor agreement,” although a legal activity in and of itself, satisfied “affirmative act” element of Section 7201); *United States v. Conley*, 826 F.2d 551, 556-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).

Note that the government “need not prove each affirmative act alleged.” *United States v. Mackey*, 571 F.2d 376, 387 (7th Cir. 1978); *Conley*, 826 F.2d at 558-59; *cf. United States v. Miller*, 471 U.S. 130, 145 (1985) (government’s proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act); *Turner v. United States*, 396 U.S. 398, 420 (1970) (“[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged”); *Crain v. United States*, 162 U.S. 625, 634-36 (1896) (indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are proved).

8.06[1] Attempt To Evade Assessment

Although filing a false return is a common method of attempting to evade the assessment of a tax, the requirement of an affirmative attempt to evade can be met by proof of any affirmative act undertaken with a tax evasion motive. The Supreme Court “by way of illustration, and not by way of limitation,” set out examples of what can constitute an “affirmative willful attempt” to evade, in *Spies v. United States*, 317 U.S. 492, 499 (1943):

keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind, and

any conduct, the likely effect of which would be to mislead or to conceal.

Failing to file a return, coupled with an affirmative act of evasion and a tax due and owing, has come to be known as *Spies*-evasion, an example of which is found in *United States v. Goodyear*, 649 F.2d 226, 227-28 (4th Cir. 1981). The Goodyears failed to file a tax return for the year in question. Later, Mr. Goodyear falsely stated to Internal Revenue Service agents that the Goodyears had earned no income in that year, and the Goodyears both falsely told the agents that they had deposited all business receipts into corporate bank accounts. The false statements to the agents were the affirmative acts of evasion supporting the Goodyears' Section 7201 convictions. *Goodyear*, 649 F.2d at 227-28. Similarly, proof of a false statement, on an application for an extension of time to file a tax return, that no tax is owed for the year is sufficient to meet the affirmative act requirement. *United States v. Klausner*, 80 F.3d 55, 62 (2d Cir. 1996).

False statements to Internal Revenue Service agents are frequently alleged as affirmative acts of evasion. *See, e.g., United States v. Higgins*, 2 F.3d 1094, 1097 (10th Cir. 1993); *United States v. Frederickson*, 846 F.2d 517, 520-21 (8th Cir. 1988) (holding that repeated false statements to IRS agents and instructing employees not to talk to IRS agents were sufficient to support a jury finding of at least one affirmative act); *United States v. Ferris*, 807 F.2d 269, 270-71 (1st Cir. 1986); *United States v. Neel*, 547 F.2d 95, 96 (9th Cir. 1976); *United States v. Calles*, 482 F.2d 1155, 1160 (5th Cir. 1973). *But see United States v. Romano*, 938 F.2d 1569, 1572-73 (2d Cir. 1991) (holding that defendant who was stopped while trying to transport \$359,500 to Canada did not commit affirmative act of evasion despite initially claiming that he had only \$30,000 to \$35,000 in cash and only gradually acknowledging the full amount to U.S. customs officials; at the time of the conduct, the defendant had no obligation to disclose existence of the money to the IRS).

The false statements may be made before, simultaneously with, or after the taxpayer's failure to file a return. *See United States v. Copeland*, 786 F.2d 768, 769-70 (7th Cir. 1985); *Goodyear*, 649 F.2d at 227-28; *see also United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *United States v. Dandy*, 998 F.2d 1344, 1348 (6th Cir. 1993); *United States v. Becker*, 965 F.2d 383, 386 (7th Cir. 1992) (indictment does not fail for alleging that affirmative acts occurred on or about filing due date when they in fact occurred earlier); *United States v. Winfield*, 960 F.2d 970, 973 (11th Cir. 1992) (allegation that defendant made false statements six years after tax return was due

satisfies affirmative act element); *United States v. Mal*, 942 F.2d 682, 684 (9th Cir. 1991). The affirmative act must, however, have been committed with the intent to evade taxes owed for the year charged. See *United States v. Voigt*, 89 F.3d 1050, 1089-91 (3d Cir. 1996).

Courts have uniformly held that the filing of a false Form W-4 may constitute an affirmative act of evasion. See *United States v. DiPetto*, 936 F.2d 96, 97 (2d Cir. 1991) (filing and maintaining false Forms W-4 constituted affirmative acts of evasion); *United States v. Williams*, 928 F.2d 145, 148-49 (5th Cir. 1991) (maintenance of fraudulent Form W-4); *United States v. Waldeck*, 909 F.2d 555, 560 (1st Cir. 1990); *United States v. Connor*, 898 F.2d 942, 944-45 (3d Cir. 1990); *United States v. Copeland*, 786 F.2d 768, 770-71 (7th Cir. 1985); *United States v. King*, 126 F.3d 987, 990 (7th Cir. 1997). Moreover, a false W-4 filed prior to the prosecution years may constitute an affirmative act in each year that it is maintained, because the taxpayer is under a continuing obligation to correct intentional misrepresentations on the form. See *Williams*, 928 F.2d at 149 (defendant properly convicted of tax evasion for years 1983-85 where false Form W-4 claiming 50 exemptions was filed in 1983 and remained in effect through the prosecution years); *United States v. King*, 126 F.3d 987, 990-93 (7th Cir. 1997); *DiPetto*, 936 F.2d at 97.

The courts of appeals have recognized that various types of affirmative conduct can constitute affirmative attempts to evade tax. See, e.g., *United States v. Josephberg*, 562 F.3d 478 (2d Cir. 2009) (establishing stock accounts for his children into which [the defendant] had his investment banking income redirected). *United States v. Beall*, 970 F.2d 343, 346-47 (7th Cir. 1992) (using a warehouse bank and instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion);⁶ *United States v. Carlson*, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers and incorrect dates and places of birth could easily have misled or concealed information from the IRS); *United States v. Valenti*, 121 F.3d 327, 333 (7th Cir. 1997) (use of cash, not keeping business records, paying employees in cash and not reporting their wages to the IRS, advising employees they did not have to pay taxes); *United States v. Jungles*, 903 F.2d 468, 472-74 (7th Cir. 1990) (employee's use of "independent contractor" agreement to eliminate withholding and warehouse bank to evade income tax were affirmative acts).

⁶ The *Beall* court held also that the government need not prove the defendant personally received any of the money, so long as the defendant earned it. 970 F.2d at 345.

A false return does not need to be signed to be treated as an affirmative act of evasion, as long as it is identified as the defendant's return. See *United States v. Robinson*, 974 F.2d 575, 578 (5th Cir. 1992) (rejecting defendant's claim of variance between indictment's allegation that she filed a false return and evidence proving she filed an unsigned Form 1040, stating, "[t]he government did not have to prove that the false Form 1040 was a 'return' in order to show an affirmative act of evasion"); *United States v. Maius*, 378 F.2d 716, 718 (6th Cir. 1967); *Gariepy v. United States*, 220 F.2d 252, 259 (6th Cir. 1955); *Montgomery v. United States*, 203 F.2d 887, 889 (5th Cir. 1953). Nor does the fact that the return was signed by someone other than the defendant preclude a finding that the defendant knew of its falsity and had it filed in an attempt to evade. See *United States v. Fawaz*, 881 F.2d 259, 265 (6th Cir. 1989).

The fact that a return or other tax document is signed with the defendant's name is prima facie evidence that the defendant signed the document. 26 U.S.C. § 6064; *United States v. McKee*, 506 F.3d 225, 233 (3d Cir. 2007); *United States v. Kim*, 884 F.2d 189, 195 (5th Cir. 1989); *United States v. Brink*, 648 F.2d 1140, 1143 (8th Cir. 1981). Prosecutors need to carefully craft jury instructions reflecting the rule of section 6064. Note that "it is improper to charge a taxpayer with conclusive knowledge of the contents [of a return] on the basis of the signature alone. Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the tax return is prima facie evidence that the signor knows the contents thereof." *United States v. Bass*, 425 F.2d 161, 163 (7th Cir. 1970). Courts have ruled that if a jury finds beyond a reasonable doubt that the defendant signed the document, they may infer that the defendant knew of the document's contents. *Wainwright*, 413 F.2d at 801-02; *United States v. Rayborn*, 491 F.3d 513, 519 (6th Cir. 2007). Prosecutors must be aware, however, that 26 U.S.C. § 6064 does not create a rebuttable presumption that the defendant knew the contents of the document. *United States v. Trevino*, 419 F.3d 896, 902 (9th Cir. 2005); *Rayborn*, 491 F.3d at 519.

8.06[2] Attempt To Evade Payment

The affirmative acts of evasion associated with evasion of payment cases almost always involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. Obstinate refusal to pay taxes due and possession of the funds needed to pay the taxes, *without more*, does not establish the requisite affirmative act necessary for an attempted evasion of payment

charge. See *Spies*, 317 U.S. at 499. Accord *United States v. Hoskins*, 654 F.3d 1086, 1091 (11th Cir. 2011) (evasion of assessment case) (a defendant must do more than passively fail to file a tax return, the statute also “requires a positive act of commission designed to mislead or conceal”). Importantly, however, “[t]he government only need[s] to show one affirmative act of evasion for each count of tax evasion.” *Id.* (citation omitted); see also *United States v. Gross*, 626 F.3d 289, 293 (6th Cir. 2010) “[Section 7201] is distinct from the “willful failure to file” misdemeanor under § 7203, which requires the Government to prove only that the defendant willfully failed to pay income tax or perform one of the other requirements specified under that section.”).

Examples of affirmative acts of evasion of payment include placing assets in the names of others, dealing in currency, using nominees to conduct business, buy and sell assets, or conduct other financial transactions, or providing false information about assets or income to the IRS. See *Cohen v. United States*, 297 F.2d 760, 762, 770 (9th Cir. 1962); see also *United States v. Carlson*, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers, incorrect places of birth, and incorrect dates of birth could easily have misled or concealed information from the IRS); *United States v. Gonzalez*, 58 F.3d 506, 509 (10th Cir. 1995) (signing and submitting false financial statements to the IRS); *United States v. Pollen*, 978 F.2d 78, 88 (3d Cir. 1992); (defendant placed assets out of the reach of the United States Government by maintaining more than \$350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at bank, in a fictitious name); *United States v. Beall*, 970 F.2d 343, 345-47 (7th Cir. 1992) (defendant instructed employer to pay income to a tax protest organization); *United States v. McGill*, 964 F.2d 222, 227-29, 232-33 (3d Cir. 1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax); *United States v. Daniel*, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant used other persons’ credit cards, used cash extensively, placed assets in other persons’ names); *United States v. Conley*, 826 F.2d 551, 553 (7th Cir. 1987) (defendant concealed “nature, extent, and ownership of his assets by placing his assets, funds, and other property in the names of others and by transacting his personal business in cash to avoid creating a financial record”); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir. 1987) (defendant maintained a “cash lifestyle” in which he “conducted all of his professional and personal business in cash,” possessed no credit cards, never acquired attachable assets, and maintained “no bank accounts, office ledgers, or receipts or

disbursement journals”), *abrogated on other grounds by Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 597-98 (1993); *United States v. Hook*, 781 F.2d 1166, 1168-69 (6th Cir. 1986) (defendant did not file a false return or fail to file, but concealed assets); *United States v. Voorhies*, 658 F.2d 710, 712 (9th Cir. 1981) (defendant removed money from the United States and laundered it through Swiss banks); *but see McGill*, 964 F.2d at 233 (mere failure to report the opening of an account in one’s own name and in one’s own locale is not an affirmative act).

It is possible for a taxpayer to evade the payment of his or her taxes without making any misrepresentation. For example, a taxpayer who openly moves his assets beyond the reach of the IRS has committed an affirmative act of evasion. *See Kawashima v. Holder*, 132 S. Ct. 1166, 1175 (2012) ([I]t is still true that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit.”)

8.06[3] Proof of an Intent to Evade Tax

It is crucial that the affirmative act be committed with an intent to evade tax. The mere fact that there was a non-payment or understatement of taxes is insufficient; the government must prove that the defendant committed an affirmative act with the specific intent to evade tax. *See United States v. Slutsky*, 487 F.2d 832, 844 (2d Cir. 1973); *United States v. Coblenz*, 453 F.2d 503, 505 (2d Cir. 1972). That said, “[i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.” *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Voigt*, 89 F.3d 1050, 1090 (3d Cir. 1996); *United States v. Nolen*, 472 F.3d 362, 379 (5th Cir. 2006); *United States v. King*, 126 F.3d 987, 989-90 (7th Cir. 1997). Evidence proving that a defendant has engaged in “any conduct, the likely effect of which would be to mislead or to conceal,” including “keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind” (*Spies*, 317 U.S. at 499), can establish intent to evade assessment or payment of tax.

8.07 ADDITIONAL TAX DUE AND OWING

8.07[1] Generally

A tax deficiency is an essential element of a tax evasion case.⁷ “The Courts of Appeals have divided over whether the Government must prove the tax deficiency is ‘substantial.’” *Boulware v. United States*, 552 U.S. 421, 424 (2008) (citing *United States v. Daniels*, 387 F.3d 636, 640-41 & n.2 (7th Cir. 2004)) (collecting cases). A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. 26 U.S.C. § 6211; *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001). The inability to prove a tax deficiency means that there may be a false return case, or some other kind of case, but not a tax evasion case.

The tax deficiency need not be for taxes due and owing by the defendant; the deficiency may be for taxes due and owing by another taxpayer. One may attempt to evade the assessment or payment of taxes of another. See *United States v. Wilson*, 118 F.3d 228, 231, 236 (4th Cir. 1997) (attorney convicted of attempting to evade a client’s taxes); *United States v. Townsend*, 31 F.3d 262, 264, 266-67 (5th Cir. 1994) (motor fuels excise tax owed by someone other than defendant).

For purposes of trial preparation and the trial itself, tax computations prepared by the Internal Revenue Service are furnished to the prosecuting attorney. In addition, a revenue agent or special agent is assigned to the case to make any additional tax computations necessitated by changes during trial preparation and at the trial. In hard-fought cases, trial developments frequently will necessitate changes in the figures originally calculated by the Service and set forth in the indictment.

Although a tax deficiency must be established in all Section 7201 cases, the proof is often much simpler in an evasion of payment case. For example, if the taxpayer has filed a return and not paid the tax reported as due and owing, the reporting of the tax is a self-assessment of the tax due and owing. The existence of a tax due and owing is established by the introduction of the return. Similarly, if the Service has assessed the tax, then the element of a tax due and owing may be satisfied by introducing the Internal

⁷ When the tax at issue is the employees’ share of payroll taxes withheld by the employer, careful consideration should be given to charging the misconduct under 26 U.S.C. 7202 instead of under Section 7201. See [Section 9.03](#), *infra*.

Revenue Service's certificate of assessments and payments reflecting the assessment of the tax due and owing. A certificate of assessments and payments is prima facie evidence of the asserted tax deficiency, which, if unchallenged, may suffice to prove the tax due and owing. *United States v. Silkman*, 220 F.3d 935, 937 (8th Cir. 2000); *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981). However, it should be borne in mind that an assessment is not necessary to evasion of payment; a tax obligation arises by operation of law. *Voorhies*, 658 F.2d at 714-15.

The amount of tax deficiency in a particular case may include penalties and interest. 26 U.S.C. § 6671(a) (the phrase "'tax' imposed by this title" also refers to the penalties and liabilities imposed by this subchapter [Subtitle F, Chapter 68B]); 26 U.S.C. § 6665(a)(2) (the phrase "'tax' imposed by this title" also refers to the additions to the tax, additional amounts, and penalties provided by this chapter [Subtitle F, Chapter 68A]); 26 U.S.C. § 6601(e)(1) (the phrase "tax imposed by this title" also refers to interest imposed by that section on such tax); USSG §2T1.1, comment, (n.1) (tax loss includes interest and penalties in evasion of payment and willful failure to pay cases). *But see United States v. Wright*, 211 F.3d 233, 236 (5th Cir. 2000) (dictum) ("The IRC specifically excludes interest from being treated as tax for purposes of deficiency procedures. [Citing 26 U.S.C. § 6601.] The Sentencing Guidelines also exclude interest and penalties in assessing the penalty for tax evasion."). As a practical matter, the inclusion of penalties and interest as part of the tax deficiency will be relevant only in evasion of payment cases where it can be proved that the defendant was aware of the obligation for the additional amount of penalties and interest. The government may be able to show such knowledge by proving that, during the collection process, the IRS sent the defendant a notice and demand for payment setting forth the amount of tax, penalties, and interest for which the defendant was liable.

As noted, it is not essential that the Service has made an assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. And the government need not adjudicate a tax liability either civilly or administratively prior to bringing charges of evasion of payment of tax. *See United States v. Ellett*, 527 F.3d 38, 40 (2d Cir. 2008); *United States v. Daniel*, 956 F.2d 540, 542 (6th Cir. 1992); *United States v. Hogan*, 861 F.2d 312, 315-16 (1st Cir. 1988) (no need to make a formal assessment of tax liability when government finds tax due and owing); *United States v. Dack*, 747 F.2d 1172, 1174-75 (7th Cir. 1984) (per curiam); *Voorhies*, 658 F.2d at 714-15. In both *Ellett* and *Daniel*, the defendants argued that there was no tax deficiency

since no assessment or demand for payment had been made. The courts rejected this argument. *Ellett*, 527 F.3d at 38; *Daniel*, 956 F.2d at 542. In *Daniel*, the court held that a tax deficiency arises by operation of law on the date that the return is due if the taxpayer fails to file a tax return and the government can show a tax liability. *United States v. Voorhies*, 658 F.2d at 714-15.

8.07[2] Unit of Prosecution

As federal income taxes are paid on an annual basis, an alleged evasion of assessment must relate to a specific year and it must be shown that the defendant received, in the year alleged in the indictment, the income upon which the assessment of the tax was evaded. *United States v. Boulet*, 577 F.2d 1165, 1167-68 (5th Cir. 1978).⁸ Consequently, in most evasion of assessment cases, each tax year charged stands alone as a separate offense. Thus, if, for example, a defendant attempted to evade and defeat the assessment of tax for the years 2005, 2006, and 2007, there should be three separate counts in the indictment. *But cf. United States v. Root*, 585 F.3d 145 (3d Cir. 2009) (holding that a defendant could be charged in a single count with evading assessment for multiple tax years where an “analysis of the concerns traditionally associated with duplicitous charges” demonstrated that the defendant “was not prejudiced”).

Evasion of payment, on the other hand, often involves single or multiple acts that are intended to evade the payment of several years of tax due the government. Thus, in evasion of payment cases, it is often permissible to charge, in one count, that the defendant attempted to evade tax due and owing for multiple years. *See United States v. Shorter*, 809 F.2d 54, 56-57 (D.C. Cir. 1987), *abrogated on other grounds by Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597-98 (1993); *Root*, 585 F.3d at 152. In *Shorter*, the court approved the use of a single count to cover several years of attempted evasion of payment, when the offense was charged “as a course of conduct in circumstances such as those . . . where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes” for those years. *Shorter*, 809 F.2d at 56. During the twelve years covered by the single count in the indictment, the defendant in *Shorter* had conducted all of his personal and professional business in cash, refused to acquire attachable assets, and failed to record receipts and disbursements. These activities demonstrated a continuous course of

⁸ The government’s proof of additional tax in a given year cannot be based upon income that should have been reported in a different year. *See United States v. Wilkins*, 385 F.2d 465, 469-70 (4th Cir. 1967).

conduct, and “each affirmative act of tax evasion was intended to evade payment of all taxes owed” or that the defendant anticipated he might owe, at the time of his acts. *Id.* at 57. The court noted that the same evidence used to prove one multi-year count would be admissible to support the first of twelve single year counts. *Shorter*, 809 F.2d at 57. *See also United States v. Pollen*, 978 F.2d 78, 83-87 (3d Cir. 1992) (each of four counts covered the same seven years but indictment not multiplicitous when each count alleged a different affirmative act); *United States v. England*, 347 F.2d 425, 427 (7th Cir. 1965) (defendants charged with one count of evasion of payment of taxes owed from three consecutive years).

The determination of the unit of prosecution can have an impact on the validity of an indictment. In *United States v. Pollen*, 978 F.2d at 81-82 (3d Cir. 1992), the defendant made several international transfers of hundreds of thousands of dollars, in attempts to evade payment of seven years’ taxes. Some of these transfers were made in one year. The four counts of the indictment each charged attempted evasion of the taxes for all seven years, but each count alleged a distinct affirmative act. The defendant asserted that the indictment was impermissibly multiplicitous, subjecting him to multiple punishment for the same violations of section 7201, a result prohibited by the Double Jeopardy Clause of the Fifth Amendment, *see United States v. Stanfa*, 685 F.2d 85, 86-87 (3d Cir. 1982). *See also Jones v. Thomas*, 491 U.S. 376, 381 (1989) (interest protected by the Double Jeopardy Clause in the multiple punishment context is confined to "ensuring that the total punishment did not exceed that authorized by the legislature"). The court of appeals rejected this contention. Looking at the plain language of section 7201, the court found that it "proscribes 'attempts' to evade or defeat any tax and thus speaks in terms of the act of evasion, as well as the taxes evaded." *Pollen*, 978 F.2d at 86. The court then concluded that "Section 7201 permits a unit of prosecution based on separate significant acts of evasion." *Pollen*, 978 F.2d at 86. Therefore, separate counts of an indictment may relate to evasion of payment for the same years without raising a multiplicity problem, provided each count alleges a different affirmative act.

8.07[3] Substantial Tax Deficiency

Tax evasion prosecutions are not collection cases, and it is not necessary to charge or prove the exact amount of the tax that is due and owing. *United States v. Bishop*, 264 F.3d 535, 550-52 (5th Cir. 2001); *United States v. Thompson*, 806 F.2d 1332, 1335-36 (7th Cir. 1986); *United States v. Harrold*, 796 F.2d 1275, 1278 (10th Cir. 1986); *United*

States v. Citron, 783 F.2d 307, 314-15 (2d Cir. 1986); *United States v. Buckner*, 610 F.2d 570, 573-74 (9th Cir. 1979); *United States v. Marcus*, 401 F.2d 563, 565 (2d Cir. 1968).

It is enough to prove that a defendant attempted to evade a substantial income tax, even though the actual amount of tax that he or she owes may be greater than the amount charged in the criminal case. Indeed, the criminal tax figures will almost invariably be lower than the civil tax figures since, for example, items turning on reasonably debatable interpretations of the Tax Code that would increase the tax due and owing are not included in figures used in the criminal case. In other words, any doubts as to taxability are resolved in favor of the defendant in a criminal case even though they may ultimately be resolved against him or her civilly.

As noted, it is enough in a criminal case to prove that the defendant attempted to evade a substantial income tax. And as long as the amount proved as unreported is substantial, it makes no difference whether that amount is more or less than the amount charged in the indictment. See *United States v. Johnson*, 319 U.S. 503, 517-18 (1943); *United States v. Mounkes*, 204 F.3d 1024, 1028 (10th Cir. 2000); *United States v. Plitman*, 194 F.3d 59, 65-66 (2d Cir. 1999); *Marcus*, 401 F.2d at 565; *Swallow v. United States*, 307 F.2d 81, 83 (10th Cir. 1962). See, e.g., *United States v. Burdick*, 221 F.2d 932, 933-34 (3d Cir. 1955) (upholding a conviction where the indictment charged \$33,000 as unreported taxable income and the proof at trial established only \$14,500 as unreported). Similarly, in *United States v. Costello*, 221 F.2d 668, 675, 679 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the court upheld a conviction where the bill of particulars alleged \$244,000 gross income as unreported and about \$288,000 was proved at trial. In *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986), the court upheld an “open-ended” 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the defendant had attempted to evade “a large part” of the income tax due and that the tax due was “substantially in excess” of the amount he reported. *Citron*, 783 F.2d at 314-15.

Since the government only has to prove that a substantial tax was due and owing, any bill of particulars that is filed should note that proof of an exact amount is not required and that any figures furnished in a bill of particulars represent only an approximation. Whether a tax deficiency is substantial is a jury question, and the cases suggest that relatively small sums can be deemed substantial. See *United States v. Gross*,

286 F.2d 59, 60-61 (2d Cir. 1961) (unreported income in the amount of two \$2500 payments deemed “substantial”); *United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956) (“[A] few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution.”); *see also United States v. Davenport*, 824 F.2d 1511, 1516-17 (7th Cir. 1987) (\$3,358.68 in taxes evaded sufficient to support taxpayer’s conviction); *United States v. Cunningham*, 723 F.2d 217, 230-31 (2d Cir. 1983) (the evaded tax of \$2,617 as compared to the total tax due of \$33,539 held to be substantial), *implied overruling on other grounds recognized by United States v. Mandanici*, 205 F.3d 519, 526-27 (2d Cir. 2000).

The Seventh and Ninth Circuits have held that there is no substantiality requirement for a Section 7201 violation. *United States v. Daniels*, 387 F.3d 636, 639 (7th Cir. 2004); *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990). The Seventh Circuit stated, “We take this opportunity to clarify the law in this Circuit: the government need not charge a substantial tax deficiency to indict or convict under 26 U.S.C. § 7201. To hold otherwise would contradict the clear language of the statute and lead to an absurd result. Requiring the government to charge and prove that a defendant’s tax deficiency is substantial in order to prosecute her for tax evasion would prevent the prosecution and punishment of those who willfully cheat the government out of small or “insubstantial” amounts of money. A substantiality element would invite taxpayers to cheat on their taxes in small amounts without fear of prosecution. We cannot countenance such a result. Although evidence of a large or substantial tax deficiency may aid the government in proving willfulness, it is not itself an element of the offense.” *Daniels*, 387 F.3d at 641. In *Marashi*, the court held that both Section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade “any tax” and impose no minimum amount in their language. *Marashi*, 913 F.2d at 735. As a result, the court reasoned, the trier of fact needs to find only “some tax deficiency” to warrant a conviction. *Marashi*, 913 F.2d at 736.

8.07[4] Method of Accounting

The general rule is that when using the net worth method of proof to approximate income, the government must follow the same method of accounting used by the taxpayer. *Fowler v. United States*, 352 F.2d 100, 103 (8th Cir. 1965); *United States v. Vardine*, 305 F.2d 60, 64 (2d Cir. 1962). Conversely, if the defendant has used a particular method of reporting income, then the defendant is bound by that choice at trial.

See *United States v. Helmsley*, 941 F.2d 71, 85 (2d Cir. 1991) (defendant having used one depreciation method during the prosecution years could not recalculate her taxes under another depreciation method during trial). Thus, a defendant cannot report his income on the cash basis and then defend at trial by showing that on the accrual basis unreported income would be far less than the government proved using the cash basis. See *Clark v. United States*, 211 F.2d 100, 105 (8th Cir. 1954). In a similar vein, if the taxpayer has used a hybrid method of accounting, then the taxpayer “is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income.” *United States v. Lisowski*, 504 F.2d 1268, 1275 (7th Cir. 1974); *Morrison v. United States*, 270 F.2d 1, 4 (4th Cir. 1959).

8.07[5] Loss Carryback – Not a Defense

A defendant will sometimes argue that there is no tax deficiency and hence no evasion because a loss carryback from a subsequent year wipes out the tax deficiency in the prosecution year. For example, a defendant may admit not reporting certain income in 1989, but argue that he is not guilty of attempting to evade tax, because a 1990 loss carryback eliminates any tax deficiency for 1989. This defense is not valid; the “lucky loser argument” was expressly rejected in *Willingham v. United States*, 289 F.2d 283, 287-88 (5th Cir. 1961). See also *United States v. Keltner*, 675 F.2d 602, 604 (4th Cir. 1982). The “crime [was] complete when with willful intent, a false and fraudulent return [was] filed” – any adjustment from a loss in a subsequent year does not change in any way the fraud committed in the earlier year. *Willingham*, 289 F.2d at 288. Any evidence of a loss in a subsequent year is therefore irrelevant.

The same argument failed when the net operating loss in a subsequent year was for a Subchapter S corporation. *Keltner*, 675 F.2d at 604. The applicable principle is that each tax year is treated as a separate unit and all items of gross income and deductions must be reflected as they exist at the close of the tax year. See *United States v. Cruz*, 698 F.2d 1148, 1151-52 (11th Cir. 1983) (applying this principle to a situation involving a claimed foreign tax credit); cf. *United States v. Suskin*, 450 F.2d 596, 597-98 (2d Cir. 1971) (corporate carryforward loss not available to individual).

8.07[6] Methods of Proof

The general rule is that unreported income may be established by several methods of proof, and the government is free to use one or more legal methods available in

determining whether the taxpayer has correctly reported her or his income. *Holland v. United States*, 348 U.S. 121, 132 (1954); *United States v. Baum*, 435 F.2d 1197, 1201 (7th Cir. 1970); *United States v. Doyle*, 234 F.2d 788, 793 (7th Cir. 1956).

The various methods of proof used in tax cases to establish unreported income are discussed in detail in Chapters [30](#), [31](#), [32](#), and [33](#), *infra*. Briefly, the specific items method of proof consists of direct evidence of the items of income received by a taxpayer in a given year, *e.g.*, testimony by third parties as to monies paid to the taxpayer for goods or services. The net worth method of proof is an indirect method of proof that measures increases in the wealth of the taxpayer and compares the results with reported income. A variation of the net worth method is the expenditures method of proof, which reflects the expenditures made by a taxpayer. The expenditures method is particularly appropriate in the case of a taxpayer who does not purchase durable assets, such as stocks and real estate, but spends monies for consumable items, such as vacations, entertainment, food, drink, and the like. Another indirect method of proof is the bank deposits method, which is essentially a reconstruction of income by an analysis of bank deposits by a taxpayer who is in an income-producing business and makes regular and periodic deposits to bank accounts.

The Seventh Circuit and the District of Columbia Circuit have approved a variation of the expenditures method, which is called the cash method of proof. *United States v. Hogan*, 886 F.2d 1497, 1508-11 (7th Cir. 1989); *United States v. Khanu*, 662 F.3d 1226 (D.C. Cir. 2011). This method “focuses on the taxpayer’s sources and uses of income.” *Hogan* at 1509; *Khanu* at 1229. When using this method, the government is required to present evidence relating to the taxpayer’s cash expenditures. *Khanu* at 1229 *citing United States v. Touchin*, 899 F.2d 617, 619 (7th Cir. 1989). In this method of proof, the government compares the defendant’s cash expenditures with her or his known cash sources, including cash on hand, for each tax period. *Hogan* at 1509; *Khanu* at 1229. If such expenditures exceed sources, the excess is presumed to be unreported income. *Touchin* at 620; *Khanu* at 1229.

Except for the cash method, each of these methods of proof is discussed in detail in sections 30.00 through 33.00, and reference should be made to these sections for the applicable case law.

8.07[7] Income Examples

Examples of sources of income with respect to which defendants have attempted to evade taxes include the following:

1. Campaign contributions, when used for personal purposes. **United States v. Scott**, 660 F.2d 1145, 1151-52 (7th Cir. 1981).
2. Gambling proceeds. The taxpayer must report winnings and may deduct losses only to the extent of winnings. **Garner v. United States**, 501 F.2d 228, 233 (9th Cir. 1974) (en banc), *aff'd on other grounds*, 424 U.S. 648 (1976); **McClanahan v. United States**, 292 F.2d 630, 631-32 (5th Cir. 1961).
3. Embezzlement. Embezzled funds constitute taxable income to the recipient. **James v. United States**, 366 U.S. 213, 219-21 (1961); **United States v. Guidry**, 199 F.3d 1150, 1157-58 (10th Cir. 1999); **United States v. Harris**, 942 F.2d 1125, 1134 (7th Cir. 1991). The funds are considered to be income in the year of embezzlement. **James v. United States**, 366 U.S. 213, 219-21 (1961); **United States v. Lippincott**, 579 F.2d 551, 552 (10th Cir. 1978) (alleged loan from embezzled funds); **United States v. Milder**, 459 F.2d 801, 804 (8th Cir. 1972).
4. Extortion. “[M]oney obtained by extortion is income taxable to the extortioner.” **Rutkin v. United States**, 343 U.S. 130, 131 (1952); *see also* **United States v. Cody**, 722 F.2d 1052, 1061 (2d Cir. 1983) (defendant had duty to report income generated by extortion, kickbacks, and acceptance of valuable services).
5. Fraud. **Moore v. United States**, 412 F.2d 974, 978 (5th Cir. 1969); *see also* **United States v. Dixon**, 698 F.2d 445, 446 (11th Cir. 1983).
6. Alleged loans lacking intent to repay. **United States v. Swallow**, 511 F.2d 514, 519 (10th Cir. 1975); **United States v. Rosenthal**, 470 F.2d 837, 842 (2d Cir. 1972); **United States v. Rochelle**, 384 F.2d 748, 751 (5th Cir. 1967).
7. Kickbacks. **United States v. Sallee**, 984 F.2d 643, 647-48 (5th Cir. 1993); **United States v. Fogg**, 652 F.2d 551, 553-56

(5th Cir.1981); *United States v. Wyss*, 239 F.2d 658, 660 (7th Cir. 1957).

8. Bribery. *United States v. Anderson*, 809 F.2d 1281, 1288 (7th Cir. 1987); *United States v. Isaacs*, 493 F.2d 1124, 1144-46 (7th Cir. 1974).

9. Gratuities received by government employees. *United States v. St. Pierre*, 377 F. Supp. 1063, 1064 (S.D. Fla. 1974), *aff'd*, 510 F.2d 383 (5th Cir. 1975).

10. Narcotics sales. *United States v. Palmer*, 809 F.2d 1504, 1505 (11th Cir. 1987) (court implicitly included narcotics sales proceeds in income).

8.07[8] Cases Involving Corporate Diversions

One common fact pattern involves a shareholder in a closely held company who diverts corporate funds for personal use, either through the diversion of corporate gross receipts that are not reflected in the corporate books and records, or through the payment of personal expenses that are deducted as business expenses. In such circumstances, it is relatively straightforward to charge a false corporate return, in violation of 26 U.S.C. § 7206, as either the gross receipts line or the expense line of the corporate return is false. Charging a personal income tax offense against the shareholder, however – such as evasion (Section 7201) or filing a false return (Section 7206) – requires the government to prove that the diverted funds were taxable income, such as salary, a constructive dividend, or a capital gain. A defendant, on the other hand, may argue that the funds were not taxable because they represented a return of capital. *See* 26 U.S.C. § 301(c)(3)(A).

Whether diverted funds constitute a constructive dividend, a capital gain, or a return of capital requires a determination of the amount of the current or accumulated earnings and profits of the corporation, if any, and the shareholder's adjusted basis in his stock. Diverted funds may be a constructive dividend to the extent of the corporation's current earnings and profits in the first instance, and to the extent of the corporation's accumulated earnings and profits in the second. *See* 26 U.S.C. §361(a)(1) and (2). If the diverted funds exceed both current and accumulated earnings and profits, they will be treated as a nontaxable return of capital to the extent of the shareholder's adjusted basis in the stock. *See* 26 U.S.C. § 301(c)(2). If the diverted funds exceed not only any current or accumulated earnings and profits but also the shareholder's adjusted basis in the stock,

the excess will be treated as a capital gain to the shareholder. *See* 26 U.S.C. § 301(c)(3)(A).

In *Boulware v. United States*, 552 U.S. 421, 430(2008), the Supreme Court reaffirmed that “[e]conomic substance [is] the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books.” The Court held, however, that a shareholder may establish that a diversion was a return of capital, not a dividend, “without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital.” *Id.* at 424. In so ruling, the Court overruled *Miller v. United States*, 545 F.2d 1204 (9th Cir. 1976), wherein the Ninth Circuit held that a corporation's earnings and profits were not relevant unless the defendant could show that the parties intended the funds to be a return of capital at the time the funds were diverted.

Notably, upon remand from the Supreme Court, the Ninth Circuit affirmed Boulware’s convictions, finding that he had failed to proffer sufficient evidence of a return of capital claim to warrant a jury instruction on the issue. *United States v. Boulware*, 558 F.3d 971 (9th Cir. 2009). Citing *Boulware*, 552 U.S. at 436 and 437 n.12, the court of appeals noted that “the return of capital theory requires: (1) a corporate distribution with respect to a corporation’s stock, (2) the absence of corporate earnings or profits, and (3) the stockholder’s stock basis be in excess of the distribution.” 558 F.3d at 975. The court found that Boulware’s proffer was insufficient to satisfy the first and the third elements. As for the first, “[h]e failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. . . . [that is] without any offer to prove that the distribution was ‘with respect to stock,’ or that any nexus existed between the distribution and [his] stock ownership.” 558 F.3d at 977. And as for the third, there was “no formal evidence of Boulware’s stock basis in the record, nor did he make an offer of proof as to the amount.” 558 F.3d at 978. In light of *Boulware*, prosecutors should not assume that a given distribution was “with respect to stock,” but should consider the specific facts of the case to determine whether the distribution was made to a shareholder in his capacity as a shareholder; that is, because of his ownership of the stock. 552 U.S. at 437. Factors bearing on this determination include “the distribution of stock ownership [and] conditions of corporate employment (whether, for example, a shareholder’s efforts on behalf of a corporation amount to good reason to treat a payment of property as salary).” 552 U.S. at 437-38. Prosecutors should also be prepared to prove a corporation’s earnings and profits, and a shareholder’s stock basis, where appropriate.

8.08 WILLFULNESS

8.08[1] Definition

Willfulness has been defined by the courts as a “voluntary, intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192, 200-01 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). Therefore, in order to establish willfulness, the government must establish that the defendant was aware of his or her obligations under the tax laws. See *United States v. Bishop*, 264 F.3d 535, 546 (5th Cir. 2001); *United States v. Buford*, 889 F.2d 1406, 1409 (5th Cir. 1989); *United States v. Conforte*, 624 F.2d 869, 875 (9th Cir. 1980); *United States v. Peterson*, 338 F.2d 595, 598 (7th Cir. 1964). As the Seventh Circuit Court of Appeals has stated, there must be “proof that appellant knew he was violating a ‘known legal duty.’” *United States v. Fitzsimmons*, 712 F.2d 1196, 1198 (7th Cir. 1983).

When determining whether a defendant has acted willfully, the jury must apply a subjective standard; thus a defendant asserting a good faith defense is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. *Cheek v. United States*, 498 U.S. 192, 202-03 (1991); *United States v. Powell*, 955 F.2d 1206, 1211-12 (9th Cir. 1992); *United States v. Regan*, 937 F.2d 823, 826 (2d Cir. 1991), *amended by*, 946 F.2d 188 (2d Cir. 1992); *United States v. Whiteside*, 810 F.2d 1306, 1311 (5th Cir. 1987). The jury must therefore focus its inquiry on the knowledge of the defendant, not on the knowledge of a reasonable person. The jury may, however, “consider the reasonableness of the defendant’s asserted beliefs in determining whether the belief was honestly or genuinely held.” *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993); *United States v. Middleton*, 246 F.3d 825, 837 (6th Cir. 2001).

Although ignorance and misunderstanding of the law may be asserted in an attempt to negate willfulness, disagreement with the constitutional validity of the law may not. Once it has been established that the defendant was aware of a legal duty and intentionally violated that duty, it is no defense that the defendant believed that the law imposing the duty was unconstitutional. *Cheek*, 498 U.S. at 204-06. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. *Cheek*, 498 U.S. at 206; see also *United States v. Bonneau*, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge’s redaction of constitutionality arguments from defendant’s

exhibits did not unfairly prejudice the defense). *But see United States v. Gaumer*, 972 F.2d 723, 725 (6th Cir. 1992) (defendant should have been allowed to present excerpts of court opinions upon which he relied in determining whether he was required to file tax returns to the jury).

In some of its opinions prior to *United States v. Pomponio*, 429 U.S. 10 (1976), the Supreme Court spoke of willfulness in terms of “bad faith or evil intent” (*United States v. Murdock*, 290 U.S. 389, 398 (1933)), or “evil motive and want of justification in view of all the financial circumstances of the taxpayer” (*Spies v. United States*, 317 U.S. 492, 498 (1943)). This caused some confusion in the circuits, which was cleared up in *United States v. Pomponio*, 429 U.S. 10 (1976).

In *Pomponio*, the Court stated that its prior references to bad faith or evil intent did not modify the definition of willfulness as a “voluntary, intentional violation of a known legal duty.” *Id.* at 12. The clarification is important since it provides the answer to defense requests for an instruction that speaks in terms of a bad purpose or evil intent and which gives the defendant room to argue that he did not act willfully because he acted with a good purpose or motive. Such an instruction would impose an undue burden on the government and is not required. *Id.* The Supreme Court has made clear that “willfulness” connotes a “voluntary, intentional violation of a known legal duty,” and “[i]t does not require proof of any other motive.” *United States v. Jerde*, 841 F.2d 818, 821 (8th Cir. 1988) (citing *United States v. Pomponio*, 429 U.S. at 12); *accord, United States v. Sato*, 814 F.2d 449, 451 (7th Cir. 1987) (no need to prove “evil-meaning mind”); *United States v. Schafer*, 580 F.2d 774, 781 (5th Cir. 1978) (“Proof of evil motive or bad intent is not required”); *United States v. Patrick*, 542 F.2d 381, 388-89 (7th Cir. 1976) (“bad” before “purpose” may be omitted from willfulness instruction); *United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969) (“to require a bad purpose would be to confuse the concept of intent with that of motive”).

Note that the Ninth Circuit has said that a showing of “bad purpose or evil motive” can substitute for a showing of intentional violation of a known legal duty as a means of establishing willfulness. *Powell*, 955 F.2d at 1211. In *Powell*, the court stated that evidence of bad motive or evil purpose could be used by the government to establish that the defendants acted willfully but that such proof was not required. Rather, the government had the alternative of showing that the defendants had voluntarily and

intentionally violated a known legal duty, in which case, proof of evil motive or bad purpose would not be necessary. *Powell*, 955 F.2d at 1211.

Notwithstanding the alternative methods of proving willfulness set forth in *Powell*, the fact remains that the Supreme Court has definitively and unequivocally defined willfulness as the “voluntary, intentional violation of a known legal duty.” Thus, the government should never rely on any “alternative method” of proof that does not establish the defendant’s voluntary and intentional violation of a known legal duty. Similarly, juries should always be instructed that it is the government’s burden to prove that a defendant acted voluntarily and intentionally and violated a known legal duty.

Good motive alone is not a defense to a finding of willfulness, and the Supreme Court has upheld as proper a jury instruction that instructed the jury that “[g]ood motive alone is never a defense where the act done or omitted is a crime,” and that consequently motive was irrelevant except as it bore on intent.” *Pomponio*, 429 U.S. at 11; *accord*, *United States v. Dillon*, 566 F.2d 702, 704 (10th Cir. 1977).

Note that, while some tax crimes are felonies (*e.g.*, 26 U.S.C. § 7201, attempt to evade or defeat a tax), and others are misdemeanors (*e.g.*, 26 U.S.C. § 7203, failure to file an income tax return), the word “willfully” has the same meaning for both misdemeanors and felonies. *Pomponio*, 429 U.S. at 12. The Supreme Court, in *United States v. Bishop*, 412 U.S. 346 (1973), rejected its previous holdings that willfulness does not have the same meaning in felony and misdemeanor cases, holding that the willfulness requirement in either class of offense is the same – “a voluntary, intentional violation of a known legal duty.” *Bishop*, 412 U.S. at 356-61.

8.08[2] Proof of Willfulness

The element of willfulness is often the most difficult element to prove in an evasion case. Absent an admission or confession, which is seldom available, or accomplice testimony, willfulness is rarely subject to direct proof and must generally be inferred from the defendant’s acts or conduct. *See United States v. Bishop*, 264 F.3d 535, 545-46, 550-52 (5th Cir. 2001); *United States v. Guidry*, 199 F.3d 1150, 1156-1158 (10th Cir. 1999); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989); *United States v. Collorafi*, 876 F.2d 303, 305-06 (2d Cir. 1989); *United States v. Marchini*, 797 F.2d 759,

766 (9th Cir. 1986); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir. 1984); *United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984); *United States v. Ramsdell*, 450 F.2d 130, 133-34 (10th Cir. 1971); *Paschen v. United States*, 70 F.2d 491, 498-99 (7th Cir. 1934).

To prove willfulness, the third element, the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty. *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Miller*, 588 F.3d 897, 907 (5th Cir. 2009); *United States v. Beale*, 574 F.3d 512, 517-18 (8th Cir. 2009). Once the evidence establishes that a tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from that conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse, employer or creditors. See *Spies v. United States*, 317 U.S. 492, 499 (1943); *Guidry*, 199 F.3d at 1157; *United States v. DeTar*, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

The decision whether to infer willfulness from the evidence, however, must be left to the trier of fact. The government may not present expert witnesses to testify regarding whether the defendant acted willfully. See *United States v. Windfelder*, 790 F.2d 576, 580-81 (7th Cir. 1986). In *Windfelder*, an IRS agent opined that the defendant intentionally understated his income and that the defendant was well aware of what happened with certain assets. 790 F.2d at 582. The court of appeals held that, under Rule 704(b) of the Federal Rules of Evidence, the district court erred in admitting the agent's testimony because it impermissibly stated an opinion as to the defendant's willfulness. *Id.* In light of the overwhelming nature of the evidence as to the defendant's willfulness, however, the court of appeals found that the erroneous admission of the testimony was harmless. *Windfelder*, 790 F.2d at 580, 582-83.

When the underlying tax law at issue in a case is vague or highly debatable, it may be difficult, if not impossible, to prove that a defendant acted willfully. There may be situations, for example, when the law concerning whether a transaction has generated taxable income is not clear. While such cases are unusual, and normally readily distinguishable from most tax cases, an example of such a case is *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974). In *Critzer*, the defendant had earned income from businesses located on land in which she had possessory interest on a Cherokee Indian Reservation. The court found that there was a disputed question as to whether the

“income” the defendant earned from her businesses was subject to federal income taxes and that even different branches of the federal government had reached directly opposite conclusions on the question. In light of these findings, the court held that the convictions had to be reversed. “As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions.” *Id.* at 1162. The court also noted that “[i]t is settled that when the law is vague or highly debatable, a defendant – actually or imputedly – lacks the requisite intent to violate it.” *Critzer*, 498 F.2d at 1160-62. *See also United States v. Harris*, 942 F.2d 1125, 1127-28, 1131-35 & n.6 (7th Cir. 1991) (law on tax treatment of payments received by mistresses from wealthy widower provided no fair warning that failure to report such payments as income would be criminal activity, and case law favored proposition that payments should be treated as gifts; criminal prosecutions are no place for the government to try out pioneering interpretations of tax law); *United States v. Heller*, 830 F.2d 150, 151, 154-55 (11th Cir. 1987) (existence of a prior case in which Tax Court approved “case-closed method” of reporting advance payments of costs and fees received by an attorney meant that use of the method was not proscribed in reasonably certain terms, and prior case therefore was sufficient, as a matter of law, to make it inappropriate to impose criminal liability upon defendant-attorney for using the same method); *United States v. Garber*, 607 F.2d 92, 93-94, 97-100 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was “novel and unsettled” question).

Care should be taken to distinguish the average criminal tax case from a case such as *Garber*, which was based on “unique, indeed near bizarre, facts.” *United States v. Burton*, 737 F.2d 439, 444 (5th Cir. 1984); *see also United States v. Daly*, 756 F.2d 1076, 1083-84 (5th Cir. 1985). In *Burton*, the Fifth Circuit explained and limited its opinion in *Garber*. The court stated that “apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance,” explaining that “[e]vidence of legal uncertainty, except as it relates to defendant’s effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law.” *Burton*, 737 F.2d at 444. And, in *United States v. Curtis*, 782 F.2d 593, 598-600 (6th Cir. 1986), the Sixth Circuit rejected *Garber* on the following grounds: (1) *Garber* allows juries to find that uncertainty in the law negates

willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) it requires the jury to assume the judge's "responsibility to rule on questions of law."

In those few courts that have recognized uncertainty in the law as a potential defense, the court looks to see whether the law clearly prohibited the defendant's alleged conduct. See *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir. 1987) (explaining that application of decision in *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983), is limited to mere advocacy of tax shelter program). In *Dahlstrom*, the court reversed the convictions of the defendants, who had advocated the creation of tax shelters to investors, because the legality of the shelters was "completely unsettled." *Dahlstrom*, 713 F.2d at 1423, 1425, 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. See *United States v. Krall*, 835 F.2d 711, 714 (8th Cir. 1987). Compare *United States v. Mallas*, 762 F.2d 361, 361-365 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) with *Krall*, 835 F.2d at 711, 713, 714 ("[a]lthough precise 'foreign trust' arrangement used by Krall had not yet been declared illegal, there is no doubt the scheme violated well-established principles of tax law"; thus defendant could not claim that his conviction violated due process); *United States v. Tranakos*, 911 F.2d 1422, 1431 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled); *United States v. Schulman*, 817 F.2d 1355, 1359-60 (9th Cir. 1987) (tax shelters based on sham transactions clearly illegal); and *United States v. Crooks*, 804 F.2d 1441, 1449 (9th Cir. 1986) ("The doctrine of substance versus form is well ensconced in tax law.")

To minimize problems presented by trying to establish willfulness at trial, items turning on reasonably debatable interpretations of the Tax Code and questionable items of income should be eliminated from the case; and, whenever possible, complicated facts should be simplified. This is advantageous for purposes of presentation of the case to the jury: it strengthens the government's argument that there is no doubt that the defendant committed criminal acts to evade taxes, because the taxability and tax consequences were known to the taxpayer.

The Supreme Court has furnished excellent guidance on the type of evidence from which willfulness can be inferred. In the leading case of *Spies v. United States*, 317 U.S.

492, 499 (1943), the Supreme Court, “[b]y way of illustration, and not by way of limitation,” set forth the following as examples of conduct from which an “affirmative willful attempt” may be inferred:

keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Particularly noteworthy is the Court’s reference to “any conduct, the likely effect of which would be to mislead or to conceal.” It is apparent that the Court was intent on making it clear that there are no artificial limits on the type of conduct from which willfulness can be inferred and that evidence of any conduct at all is admissible, as long as the “likely effect” of the conduct would be to mislead or conceal.

8.08[3] Examples: Proof of Willfulness

1. Willfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Kim*, 884 F.2d 189, 192-93 (5th Cir. 1989) (evidence of willfulness was sufficient where taxpayer, *inter alia*, failed to report \$182,601 of income over three years); *United States v. Kryzske*, 836 F.2d 1013, 1019-20 (6th Cir. 1988) (willfulness found where taxpayer failed to file complete tax returns over a four-year period and underreported his income by \$940.50 for one of those years); *see also United States v. Guidry*, 199 F.3d 1150, 1157 (10th Cir. 1999) (willfulness cannot be inferred solely from the understatement of income); *United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996); *United States v. Skalicky*, 615 F.2d 1117, 1120 (5th Cir. 1980); *United States v. Larson*, 612 F.2d 1301, 1303, 1305 (8th Cir. 1980); *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980).

2. Providing accountant or return preparer with inaccurate and incomplete information. *United States v. Bishop*, 264 F.3d 535, 552 (5th Cir. 2001); *United States v. Samara*, 643 F.2d 701, 703 (10th Cir. 1981) (taxpayer kept receipt book for cash received but did not give the firm that prepared his returns any cash receipt books, thus concealing cash receipts); *see also United States v. Guidry*, 199 F.3d 1150, 1157 (10th Cir.1999); *United States v.*

Brimberry, 961 F.2d 1286, 1290 (7th Cir. 1992); *United States v. O’Keefe*, 825 F.2d 314, 318 (11th Cir. 1987); *United States v. Garavaglia*, 566 F.2d 1056, 1057-60 (6th Cir. 1977) (“taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape responsibility for the false tax returns which result”); *United States v. Chesson*, 933 F.2d 298, 305 (5th Cir. 1991); *United States v. Michaud*, 860 F.2d 495, 500 (1st Cir. 1988); *United States v. Ashfield*, 735 F.2d 101, 107 (3d Cir. 1984); *United States v. Conforte*, 624 F.2d 869, 876-77 (9th Cir. 1980); *United States v. Scher*, 476 F.2d 319, 323-24 (7th Cir. 1973).

3. False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Chesson*, 933 F.2d 298, 304 (5th Cir. 1991); *United States v. Frederickson*, 846 F.2d 517, 520-21 (8th Cir. 1988) (taxpayer falsely stated that she did not receive income from other employees who worked in her massage parlor and that she deposited most of her income into the bank); *United States v. Walsh*, 627 F.2d 88, 91-92 (7th Cir. 1980); *United States v. Thompson*, 518 F.3d 832, 852-53 (10th Cir. 2008) (presenting “false, backdated loan document to the IRS”); *United States v. Callanan*, 450 F.2d 145, 150 (4th Cir. 1971); *United States v. Jett*, 352 F.2d 179, 182 (6th Cir. 1965); *see also United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996); *United States v. Pistante*, 453 F.2d 412, 413 (9th Cir. 1971); *United States v. Adonis*, 221 F.2d 717, 719-20 (3d Cir. 1955).

4. Keeping a double set of books. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Daniels*, 617 F.2d 146, 148, 150 (5th Cir. 1980).

5. Hiding, destroying, throwing away, or “losing” books and records. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Chesson*, 933 F.2d 298, 304-05 (5th Cir. 1991) (taxpayers condoned the alteration and destruction of invoices after undergoing a civil audit for underreporting income); *United States v. Holovachka*, 314 F.2d 345, 357-58 (7th Cir. 1963); *Garipey v. United States*, 189 F.2d 459, 463 (6th Cir. 1951); *see also United States v. Walker*, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid assets “in an attempt to conceal them from the IRS”).

6. Making or using false documents, false entries in books and records, false invoices, and the like. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. Chesson*, 933 F.2d 298, 304 (5th Cir. 1991); *United States v. Walker*, 896 F.2d 295, 296, 298 (8th Cir. 1990) (defendants submitted false invoices to their family company “so that the company would treat their personal expenses as business expenses”).
7. Destruction of invoices to customers. *United States v. Garavaglia*, 566 F.2d 1056, 1059 (6th Cir. 1977).
8. Use of Nominees. Placing property or a business in the name of another. *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Daniel*, 956 F.2d 540, 542-43 (6th Cir. 1992); *United States v. Peterson*, 338 F.2d 595, 597 (7th Cir. 1964); *United States v. Woodner*, 317 F.2d 649, 650-51 (2d Cir. 1963).
9. Extensive use of currency or cashier’s checks. *United States v. Daniel*, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant “used cash extensively, even converting checks to cash immediately,” and paid employees and insurance policies in cash); *United States v. Holovachka*, 314 F.2d 345, 358 (7th Cir. 1963); *Schuermann v. United States*, 174 F.2d 397, 398 (8th Cir. 1949).
10. Spending large amounts of cash which could not be reconciled with the amount of income reported, *United States v. Bishop*, 264 F.3d 535, 550 (5th Cir. 2001); *United States v. Simonelli*, 237 F.3d 19, 30 (1st Cir. 2001); *United States v. Olbres*, 61 F.3d 967, 971 (1st Cir. 1995); *United States v. Kim*, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, *United States v. Skalicky*, 615 F.2d 1117, 1120 (5th Cir. 1980); *see also United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir. 1978); *United States v. Mortimer*, 343 F.2d 500, 503 (7th Cir. 1965) (purchasing money orders).
11. Use of bank accounts held under fictitious names. *United States v. Ratner*, 464 F.2d 101, 105 (9th Cir. 1972); *Elwert v. United States*, 231 F.2d 928, 935-36 (9th Cir. 1956); *cf. United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969) (separate personal bank account into which large amounts of cash from unidentified sources was deposited properly offered as evidence of willfulness).

12. Cashing checks and depositing currency in an out-of-town bank account. *United States v. White*, 417 F.2d 89, 92 (2d Cir. 1969).

13. Unorthodox accounting practices with deceptive results. *United States v. Slutsky*, 487 F.2d 832, 844 (2d Cir. 1973); *United States v. Waller*, 468 F.2d 327, 329 (5th Cir. 1972).

14. Repetitious omissions of items of income, e.g., income from various sources not reported. *United States v. Walker*, 896 F.2d 295, 299 (8th Cir. 1990) (over a two-year period taxpayer failed to report, *inter alia*, interest income totaling \$20,476); *United States v. Tager*, 479 F.2d 120, 122 (10th Cir. 1973); *Sherwin v. United States*, 320 F.2d 137, 140-41 (9th Cir. 1963).

15. Prior and subsequent similar acts reasonably close to the prosecution years. *United States v. Middleton*, 246 F.3d 825, 836-837 (6th Cir. 2001); *Matthews v. United States*, 407 F.2d 1371, 1381 (5th Cir. 1969); *United States v. Johnson*, 386 F.2d 630, 631 (3d Cir. 1967); *United States v. Magnus*, 365 F.2d 1007, 1009-10 (2d Cir. 1966); *United States v. Alker*, 260 F.2d 135, 139, 149 (3d Cir. 1958); *cf.* Fed. R. Evid. 404(b).

16. Alias used on gambling trip – relevant to an intent to evade taxes. *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir. 1974).

17. The defendant's attitude toward the reporting and payment of taxes generally. *United States v. Hogan*, 861 F.2d 312, 316 (1st Cir. 1988); *United States v. Stein*, 437 F.2d 775, 777, 780 (7th Cir. 1971); *United States v. O'Connor*, 433 F.2d 752, 754 (1st Cir. 1970); *United States v. Taylor*, 305 F.2d 183, 185-86 (4th Cir. 1962).

18. Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. *United States v. Guidry*, 199 F.3d 1150, 1157-58 (10th Cir.1999) (willfulness inferred from defendant's expertise in accounting via her business degree and her work experience as comptroller of a company); *United States v. Klausner*, 80 F.3d 55, 63 (2d Cir. 1996) (defendant's background as a CPA and extensive business experience including that as a professional tax preparer); *United States v. Smith*, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); *United States v. Segal*, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); *United States v.*

Rischar, 471 F.2d 105, 108 (8th Cir. 1973); *see also United States v. Diamond*, 788 F.2d 1025, 1026, 1230 (4th Cir. 1986); *United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business).

19. Offer to bribe government agent. *Barcott v. United States*, 169 F.2d 929, 931-32 (9th Cir. 1948) (attempt to bribe revenue agent).

20. Use of false names and surreptitious reliance on the use of cash. *United States v. Walsh*, 627 F.2d 88, 92 (7th Cir. 1980); *United States v. Holladay*, 566 F.2d 1018, 1020 (5th Cir. 1978).

21. Backdating documents to gain a tax advantage. *United States v. Drape*, 668 F.2d 22, 25-26 (1st Cir. 1982); *United States v. Crum*, 529 F.2d 1380, 1381-82 (9th Cir. 1976); *United States v. O'Keefe*, 825 F.2d 314, 318 (11th Cir. 1987).

22. Illegal sources of income. *United States v. Palmer*, 809 F.2d 1504, 1505-06 (11th Cir. 1987) (“From the illegal source of funds, a jury could reasonably infer an intent to conceal income”; sale of drugs).

8.08[4] Conscious Avoidance/Willful Blindness Instruction⁹

Most courts have ruled that if there is evidence that the defendant deliberately avoided acquiring knowledge of a fact or the law, the jury may infer that the defendant actually knew of the fact or the law and was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See, e.g., United States v. Poole*, 640 F.3d 114, 122 (4th Cir. 2011); *United States v. Williams*, 612 F.3d 500, 506-07 (6th Cir. 2010); *United States v. Heredia*, 483 F.3d 913, 922-23 (9th Cir. 2007); *United States v. Withers*, 100 F.3d 1142, 1145 (4th Cir. 1996); *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996); *United States v. Wisenbaker*, 14 F.3d 1022, 1027 (5th Cir. 1994); *United States v. Krown*, 809 F.2d 144, 148 (1st Cir. 1987); *United States v. Jewell*, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc); *see also United States v. Ramsey*, 785 F.2d 184, 189 (7th Cir. 1986) (mail and wire fraud); *but see United States v. Alston-Graves*, 435

⁹ Such instructions also have been referred to as deliberate ignorance, ostrich, or head-in-the-sand instructions. To minimize the potential for confusion with the meaning of “willfulness” as it relates to the defendant’s intent, the Tax Division recommends using the term “conscious avoidance” or “deliberate ignorance” and avoiding the phrase “willful blindness.”

F.3d 331, 338 (D.C. Cir. 2006) (no evidence of deliberate ignorance on the part of the defendant, but error in giving instruction harmless; collecting cases addressing willful blindness instructions).¹⁰ In such a case, the use of a conscious avoidance instruction may be appropriate.

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means. *United States v. Poole*, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." *Id.* Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge." *Id. citing United States v. Stadtmauer*, 620 F.3d 238, 245 (3d Cir. 2010) and *United States v. Bussy*, *supra*.

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir. 1991). *Accord United States v. Miller* 588 F.3d 897, 906 (5th Cir. 2009) ("The evidence demonstrates that [the defendant] was subjectively aware of a high probability of existence of illegal conduct.").

The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. *Stadtmauer*, 620 F.3d at 259. The rationale supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. *Poole*, 640 F.3d at 122; *Stadtmauer*, at 255; *Jewell*, 532 F.2d at 700.

In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under Section

¹⁰ Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir. 1991).

271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit¹¹ – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69. The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." *Id.* at 270-71.

Although *Global-Tech Appliances* has seemingly approved the use of the conscious avoidance instructions, it is important to note that circuit courts have approved their use only under proper circumstances. *See, e.g., United States v. Whiteford*, 676 F.3d 348, 357 (3d Cir. 2012) (A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of

¹¹ *See Alston-Graves, supra.*

deliberate ignorance), citing *United States v. Clay*, 618 F.3d 946, 953 (10th Cir. 2010); *United States v. Hogan*, 861 F.2d 312, 316 (1st Cir. 1988); *United States v. MacKenzie*, 777 F.2d 811, 818-19 (2d Cir. 1985); *United States v. Callahan*, 588 F.2d 1078, 1081-83 (5th Cir. 1979); *United States v. Dube*, 820 F.2d 886, 892 (7th Cir. 1987); *United States v. Willis*, 277 F.3d 1026, 1031-32 (8th Cir. 2002); *United States v. Dean*, 487 F.3d 840, 851 (11th Cir. 2007). Indeed, at least one court has said that the use of such an instruction is “rarely appropriate.” *United States v. deFrancisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). See also *United States v. Jinwright*, 2012 WL 2362632 (4th Cir. 2012) (requests for willful blindness instructions should be handled with caution).

Accordingly, prosecutors should take care to ensure that a conscious avoidance instruction is given only when the facts warrant its use and that the court complies with the relevant rules of the circuit when giving such an instruction. See, e.g., *United States v. Heredia*, 483 F.3d 913, 922-23 (9th Cir. 2007); *United States v. Withers*, 100 F.3d 1142, 1145 (4th Cir. 1996); *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996); *United States v. Wisenbaker*, 14 F.3d 1022, 1027 (5th Cir. 1994); *United States v. Krownen*, 809 F.2d 144, 148 (1st Cir. 1987); *United States v. Jewell*, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). A conscious avoidance instruction “is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because the courier knows full well that he is likely to find drugs there.” *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992).

Furthermore, in a tax case, the language of any conscious avoidance instruction must not conflict with the government’s obligation to prove the voluntary, intentional violation of a known legal duty. See Section 8.08. Care must be taken to ensure that the conscious avoidance instruction applies only to the element of “knowledge,” and does not extend to the government’s obligation to prove a “voluntary, intentional violation.” See *United States v. Stadtmauer*, 620 F.3d 238, 258-259 (3d Cir. 2010) (“The Court’s instructions made clear that willful blindness applied only to the element of knowledge”). When a deliberate ignorance or conscious avoidance instruction is given, the jury should also be given a separate Good Faith instruction, which expressly directs the jury not to convict for negligence or mistake.

8.09 VENUE

Tax evasion is a continuing offense under 18 U.S.C. § 3237(a). Venue is therefore proper in any district in which an affirmative act occurred.

As previously noted, one of the most common ways in which defendants attempt to evade tax involves the filing of a false return. In such a case, venue is proper in the district where a false return was filed. See *United States v. King*, 563 F.2d 559, 562 (2d Cir. 1977); *Holbrook v. United States*, 216 F.2d 238, 239 (5th Cir. 1954). Venue also lies in the district in which a false return is prepared or signed, even though the return is filed in a different district. *United States v. Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973); *King*, 563 F.2d at 562; *United States v. Hoover*, 233 F.2d 870, 872 (3d Cir. 1956); *Kowalsky v. United States*, 290 F.2d 161, 162-63 (5th Cir. 1961); *United States v. Marrinson*, 832 F.2d 1465, 1475 (7th Cir. 1987); *United States v. Humphreys*, 982 F.2d 254, 260 (8th Cir. 1992); *United States v. Marchant*, 774 F.2d 888, 891 (8th Cir. 1985). This is also true in cases in which the affirmative act of evasion is the filing of a false withholding Form W-4 rather than a false tax return: venue is proper where the false W-4 was prepared and signed or where it was received and filed. See *United States v. Felak*, 831 F.2d 794, 798-99 (8th Cir. 1987).

In tax evasion cases, venue is not limited to the district of signing, filing, or preparation of the false tax return. Venue is appropriate in any district where an attempt to evade took place. Thus, venue may be proper in the district in which a false statement is made to an I.R.S. agent, *United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981), where the making of false records or the concealment of assets took place, *Beaty v. United States*, 213 F.2d 712, 715-17 (4th Cir. 1954), *vacated and remanded for reconsideration on other grounds*, 348 U.S. 905, (1955), *reaff'd*, 220 F.2d 681 (4th Cir. 1955), or where there was a concealment of assets, *Reynolds v. United States*, 225 F.2d 123, 128 (5th Cir. 1955).

Reference should also be made to the discussion of venue in [Section 6.00](#), *supra*.

8.10 STATUTE OF LIMITATIONS

The statute of limitations is six years “for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof.” 26 U.S.C. § 6531(2). For a discussion concerning the measurement of the six-year period of limitations, see

[Section 7.00](#), *supra*. The most frequently litigated issue with respect to the statute is when the period of limitations commences.

The general rule is that the six-year period of limitations begins to run from the latter of the due date of the tax return or the last affirmative act constituting an attempt to evade. See *United States v. Wilson*, 118 F.3d 228, 236 (4th Cir. 1997); *United States v. DiPetto*, 936 F.2d 96, 98 (2d Cir. 1991); *United States v. Williams*, 928 F.2d 145, 149 (5th Cir. 1991); *United States v. Winfield*, 960 F.2d 970, 974 (11th Cir. 1992). (For rules relating to employment taxes, see [Section 7.02\[5\]](#).) Thus, if the delinquent filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. *United States v. Habig*, 390 U.S. 222, 225 (1968). However, where a false return is filed before the statutory due date, the statute of limitations does not start running until the statutory due date. *United States v. Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971); *United States v. Ayers*, 673 F.2d 728, 729-30 (4th Cir. 1982). When the affirmative act occurs before a tax deficiency is incurred, the statute of limitations generally begins to run at the time the tax deficiency arises. *United States v. Carlson*, 235 F.3d 466, 470 (9th Cir. 2000) (“the statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally, a tax deficiency”); *United States v. Payne*, 978 F.2d 1177, 1179 (10th Cir. 1992).

In tax evasion cases involving affirmative acts of evasion carried out after the statutory due date, the limitations period runs from the date of the last such act, thereby extending the period beyond six years from the time filing was required (or unpaid taxes were due). See, e.g., *United States v. Anderson*, 319 F.3d 1218, 1219 (10th Cir. 2003); *United States v. Ferris*, 807 F.2d 269, 271 (1st Cir. 1986) (false statements by defendant to revenue agents and prosecutor regarding income from prior year in question were affirmative acts which triggered the statute of limitations computation); *United States v. Dandy*, 998 F.2d 1344, 1355 (6th Cir. 1993) (“[T]o hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed”); *United States v. Townsell*, 367 F.2d 815, 816 (7th Cir. 1966) (the statute of limitations started running in 1961 when defendant transferred a sum of money to a Swiss bank, notwithstanding that the taxes were due between 1946 and 1953); *United States v. DeTar*, 832 F.2d 1110, 1113 (9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable more than six years before the indictment); *United States v.*

Hunerlach, 197 F.3d 1059, 1065 (11th Cir. 1999) (hiding rental income by purchasing property in nominee name within six years of indictment was timely affirmative act of evasion for limitations purposes).

In those situations in which the last affirmative act is the filing of a false return after the original due date of the return, but before the last day of the extended period resulting from the defendant's filing for an extension of the statutory due date, the limitations period should be considered to commence upon the defendant's filing of the false return. See *Habig*, 390 U.S. at 226 ("This provision [26 U.S.C. § 6513] does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and file the return before the last day of the extended period * * *").¹²

8.11 LESSER INCLUDED OFFENSES

Note: A chart in [Section 8.11\[7\]](#) summarizes the recommended position for each circuit.

A defendant tried for tax evasion may sometimes propose a lesser included offense instruction; that is, an instruction that the jury may find the defendant guilty of a less serious offense than tax evasion, such as filing a false return, in violation of § 7206, or misdemeanor failure to file or pay, in violation of § 7203. As explained below, the Supreme Court's adoption of the strict "elements" test in *Schmuck v. United States*, 489 U.S. 705, 709-10, 715-22 (1989), effectively narrowed what crimes can be considered lesser included offenses. See also *Carter v. United States*, 530 U.S. 255 (2000) (applying *Schmuck*). Under the strict elements test, tax evasion does not have any lesser included offenses. But in many circuits, there is pre-*Schmuck* law holding otherwise that has not been updated to reflect the holding of *Schmuck*, and some post-*Schmuck* decisions fail to properly apply the strict elements test. Prosecutors thus should research the controlling case law in their circuit and neither reflexively oppose nor acquiesce to defense requests. Prosecutors desiring to challenge circuit law as inconsistent with *Schmuck* and *Carter* should first consult with the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

Relatedly, although the government can also request a lesser included offense instruction, prosecutors should not request an instruction for tax evasion even in those

¹² Keep in mind that 26 U.S.C. § 6531 provides for a nine-month extension of the limitations period "[w]here a complaint is instituted before a commissioner of the United States."

circuits that would permit it. This abstention is consistent with the proper application of the elements test but also has other benefits. Prosecutors should, instead, consider charging the putative lesser count in addition to tax evasion if they want to rely upon that count as a potential basis for conviction. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[1] Lesser Included Offense Instructions Generally

8.11[1][a] Schmuck rejects the “inherent relationship” test in favor of the “statutory elements” test

Under the Federal Rules of Criminal Procedure, a defendant may be convicted of a lesser included offense, which is an offense that, while not charged in the indictment, is “necessarily included” in a charged count. Fed. R. Crim. P. 31(c)(1). In *Schmuck*, the Supreme Court resolved an inter-circuit conflict as to the test for determining whether one count is “necessarily” included in another under Rule 31. *Schmuck*, 489 U.S. at 710 & n.5; see also *United States v. Browner*, 937 F.2d 165, 167-68 (5th Cir. 1991) (discussing the use of the two tests at issue in *Schmuck* and noting that several states also used an intermediate approach that considered the indictment).

Schmuck considered two tests for whether a lesser offense is necessarily included — the inherent relationship test and the necessary elements test — and ultimately chose the latter. Under the rejected “inherent relationship” test, “one offense [was] included in another when the facts as alleged in the indictment and proved at trial support[ed] the inference that the defendant committed the less serious offense, and an ‘inherent relationship’ exist[ed] between the two offenses.” *Schmuck*, 489 U.S. at 708-09. This relationship was present when both offenses related “to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser offense.” *Id.* at 709. The Court rejected this approach and instead adopted the strict elements test, which requires a “textual comparison of the criminal statutes,” an approach, the Court explained, that lends itself to “certain and predicable” outcomes. *Id.* at 720. Under the strict elements test “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.*

In *Carter v. United States*, 530 U.S. 255 (2000), the Supreme Court applied *Schmuck*’s strict elements test in a bank robbery prosecution and held that 18 U.S.C. § 2113(b) was not a lesser included offense of 18 U.S.C. § 2113(a) because subsection (b) required an element (specifically, three elements) not required by subsection (a). In so holding, the majority in *Carter* rejected an argument that the “application of *Schmuck*’s elements test is too rigid.” *Id.* at 262. The Court applied the test strictly and rejected an argument that the additional elements in subsection (b) were implicitly in subsection (a). *See id.* at 267-270. The Court also rejected an argument that an element in subsection (b) but not in subsection (a) – a thing of “value exceeding \$1,000” – could be waived by a defendant seeking the lesser included offense instruction, noting that *Schmuck* explicitly rejected an approach that would permit a defendant to waive the right to notice in order to obtain a lesser included offense instruction in circumstances where a prosecutor would be barred from seeking the instruction due to the constitutional notice requirement. *Id.* at 274.

As discussed below, under a proper application of the elements test, tax evasion does not have any lesser included offenses. But some circuits have caselaw stating otherwise. How to approach the issue will vary by circuit and the circumstances of the case. Many circuits have not yet issued post-*Schmuck* decisions applying the strict elements test announced in *Schmuck* and applied in *Carter*. In these circuits, it remains open to argue, both in the district courts and to a circuit panel, that pre-*Schmuck* decisions have been overruled and no longer constitute binding circuit law. *See generally United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018) (listing law-of-the-circuit exceptions). But some circuits have issued post-*Schmuck* decisions that do not properly apply the strict elements test. In these circuits, the decisions are wrong, but correction requires action by the circuit court itself. Prosecutors thus should research the controlling case law in their circuit before deciding whether to oppose or acquiesce to a defendant’s request for a lesser included instruction.

8.11[1][b] Whether the Instruction Should Be Given

Even when an offense is a lesser included offense, a defendant is not automatically entitled to the instruction. In addition to the proposed lesser offense passing

the strict elements test, “the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater.” *Schmuck*, 489 U.S. at 716 n.8. In *Schmuck*, the Court emphasized that its decision “in no way alters th[at] independent requisite.” *Id.* *Carter* declined to address that separate requirement – which is a fact-based inquiry about whether the instruction is appropriate given the trial evidence in a particular case and not part of the strict elements test itself – because the strict elements test had not been satisfied. *Carter*, 530 U.S. at 261 n.3. *Cf. United States v. Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018) (declined to decide whether giving illegal gratuities is a lesser included offense of bribery because a jury could not rationally find the defendant guilty of the lesser offense yet acquit him of the greater, given his defense of being an extortion victim). As illustrated below, the circuit courts that fail to properly apply the *Schmuck* elements test also often find that this independent requirement is satisfied, so care must be taken in opposing a lesser offense instruction on this basis. If a prosecutor opposes an instruction on evidentiary grounds, the opposition should also raise the legal argument that tax evasion has no lesser included offense even in those circuits with contrary post-*Schmuck* law, although in those circuits prosecutors should note the district court is still bound by the erroneous circuit law.

In *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992), for example, the Fifth Circuit reversed the defendant’s tax evasion conviction because the district court did not give a requested lesser included offense instruction on failure to file. The defendant had not filed returns and had sent false Forms W-4 to his employer claiming to be exempt from taxes; the government had argued that willfulness, the contested element, was common to both offenses, but the Fifth Circuit held that the defendant might have been willful in failing to file tax returns yet not willful in submitting the Forms W-4. *See id.* at 75.

Defense requests should generally not be opposed on statute of limitations grounds. A defendant is entitled to a lesser included offense instruction even if the statute of limitations has run on the lesser offense because the defendant’s request waives a limitations argument. *See United States v. DeTar*, 832 F.2d 1110, 1115 (9th Cir. 1987) (following *United States v. Williams*, 684 F.2d 296, 299–300 (4th Cir. 1982)). While some older cases stated the defendant was not entitled to the instruction in these circumstances, they were often based on the view that the statute of limitations was jurisdictional and could not be waived. *See, e.g., Chaifetz v. United States*, 288 F.2d 133, 135 (D.C. Cir. 1960). This was a minority view among the circuits, and the Supreme

Court has since rejected it. *See Musacchio v. United States*, 577 U.S. 237, 247-48 (2016). The Supreme Court has also ruled, in a capital case, that a defendant is not entitled to the instruction when the defendant refuses to waive the statute of limitations. *Spaziano v. Florida*, 468 U.S. 447, 456 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016). Although a request for the instruction should be construed as a waiver, if there is a statute of limitations issue with a lesser offense, prosecutors should encourage the court to require an express waiver from the defendant.

If a court gives a lesser included offense instruction, the court must also decide whether to allow the jury to consider the lesser included offense only after acquitting on tax evasion or if the jury may consider it after making reasonable efforts to reach a unanimous verdict on evasion. Prosecutors should consider their circuit's pattern instruction on this, where available. In the Second and Ninth Circuits, at a minimum, the defendant is entitled to choose which version of the instruction should be given. *See United States v. Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978); *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984) (following *Tsanas*); *see also Catches v. United States*, 582 F.2d 453, 459 & n.14 (8th Cir. 1978) (noting, in a collateral-review case, general agreement with the "well-reasoned rule" in *Tsanas*).

If a court gives a lesser included offense instruction, it also may raise issues about the unit of prosecution. This is particularly true in an evasion of payment case, in which a single count of tax evasion may involve attempts to evade payment of multiple years of taxes due. *See* [Chapter 8.07\[2\]](#) (discussing unit of prosecution for tax evasion). In that situation, prosecutors should request that any lesser included offense instruction give the jury the option of convicting on an appropriate number of lesser counts (for example, if an evasion count covers five years of unpaid income taxes, then an instruction on failure to pay as a lesser included offense should allow the jury to convict on up to five counts of failure to pay in violation of Section 7203).

8.11[2] Section 7203 as a Lesser Included Offense of Section 7201

Section 7201 provides, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall ... be guilty of a felony" with a statutory maximum of five years. The elements of attempted tax evasion in violation of 26 U.S.C. § 7201 are: (1) the existence of a tax due and owing; (2) willfulness; and (3) an affirmative act constituting an attempted evasion of tax (or

attempted evasion of the payment of tax). *Boulware v. United States*, 553 U.S. 421, 424 n.2 (2008).

Section 7203 provides, “Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor” with a statutory maximum of one year. The elements of 26 U.S.C. § 7203 are (1) the defendant had a duty to file a return (or to pay a tax); (2) failed to timely file (or pay); and (3) the failure was willful. *United States v. Tucker*, 686 F.2d 230, 232 (5th Cir. 1982).

In order for Section 7203 to be a lesser included offense of a Section 7201 count under *Schmuck*’s elements test, the elements of Section 7203 would need to be a subset of the elements of Section 7201. As explained below, Section 7203 is not a lesser included offense of Section 7201 under *Schmuck*’s elements test because Section 7203 requires an element not required for Section 7201.

8.11[2][a] Failure to File as a Lesser Included Offense of Section 7201

An element of the offense of willful failure to file in violation of Section 7203 that is not present in Section 7201 is a failure to file. (Section 7203 also requires a personal duty, discussed below at [§ 8.11\[2\]\[b\]](#) in the context of failure to pay, which is not required by Section 7201.) Tax evasion can be, and frequently is, committed by filing a false return. Notwithstanding the clarity of this, the circuits have reached different conclusions about whether a § 7203 failure to file offense is a lesser included offense of tax evasion.

The Seventh and Ninth Circuits have published post-*Schmuck* opinions correctly holding that failure to file is not a lesser included offense of evasion. In the Seventh Circuit, this conclusion is “well settled.” *United States v. Becker*, 965 F.2d 383, 391 (7th Cir. 1992). “Section 7203 does not require ‘an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense.’” *Id.*

(quoting *United States v. Foster*, 789 F.2d 457, 460 (7th Cir. 1986)); see also *United States v. Hassebrock*, 663 F.3d 906, 917 (7th Cir. 2011).

The Ninth Circuit directly applied the *Schmuck* elements test in *United States v. Nichols*, 9 F.3d 1420, 1422 (9th Cir. 1993), to reach the same result. The court reasoned that “[b]ecause failure to file a return is an element of the offense of failure to file but is not an element of tax evasion, the offense of failure to file is not ‘necessarily included’ in the offense of tax evasion.” *Id.* Thus, “no instruction is given if the lesser offense requires an element not required for the greater offense, even if the prosecution proved that element of the lesser offense in support of its charge of the greater offense.” *Id.*

The Sixth Circuit reached a similar conclusion in an unpublished case when it applied the *Schmuck* elements test in *United States v. Harris*, 117 F.3d 1421 (6th Cir. 1997) (unpub.). That court found that “§ 7203 has one element not required under § 7201, the failure to file a return *by the due date*, and is not necessarily included in the § 7201 offense.” *Id.* at *9 (emphasis in original). Prosecutors should be aware that, despite *Harris*, the government conceded in another unpublished case that § 7203 might be a lesser included offense of § 7201. See *United States v. Christians*, 105 F. App’x 748, 752-53 (6th Cir. 2004). Sixth Circuit Local Rule 32.1, however, limits citation of unpublished decisions to those issued on or after January 1, 2007, and neither decision has binding effect in the circuit, so the issue remains open.

The Eighth Circuit held before *Schmuck* that the circuit “recognized there may be situations where, under the evidence and § 7203, a defendant is entitled to lesser offense instructions.” *Sansone v. United States*, 334 F.2d 287, 295 (8th Cir. 1964), *aff’d*, 380 U.S. 343 (1965). But the Eighth Circuit has never found a situation where the defendant was entitled to the instruction and, as of 2023, has not yet issued a post-*Schmuck* decision applying the strict elements test.

At least two circuits—the Second and Fourth—held, pre-*Schmuck*, that failure to file is a lesser included offense of § 7201 *Spies* evasion. See *Spies v. United States*, 317 U.S. 492, 499 (1943) (holding that a willful omission was insufficient for tax evasion; there must instead be an affirmative act of evasion). In *United States v. Rosenthal*, 454 F.2d 1252 (2d Cir. 1972), the Second Circuit addressed this issue where the defendant was convicted of both tax evasion and failure to file for the same year. *Rosenthal* vacated

the misdemeanor conviction stating that “the crime defined in § 7203 was a lesser included offense of that defined in § 7201.” 454 F.2d at 1255.

The Fourth Circuit also found failure to file to be a lesser included offense of tax evasion, at least when “one of the affirmative acts of evasion relied upon by the government in proving attempted tax evasion under Section 7201 is the failure to file an income tax return.” *United States v. Snyder*, 766 F.2d 167, 171 (4th Cir. 1985). The lesser included issue aside, the Fourth Circuit’s decision errs in describing a failure to file a tax return as an affirmative act. “*Spies* evasion” is often used as a shorthand for an evasion case where a defendant did not file a return. But the failure is not an element – some affirmative act is required. With respect to the lesser included offense holdings, the Second and Fourth circuits err because a “textual comparison of the criminal statutes” under the *Schmuck* strict elements test mandates the conclusion that failure to file is not necessarily a lesser included offense of tax evasion, even if on the particular facts a jury could convict on the misdemeanor and not the felony. See *Carter*, 530 U.S. at 261 n.3 (citing *Schmuck*, 489 U.S. at 716 n.8).

Only the Fifth Circuit has held in a post-*Schmuck* case that failure to file is a lesser included offense of tax evasion. See *United States v. Doyle*, 956 F.2d 73, 75 (5th Cir. 1992). *Doyle* did not cite *Schmuck*, let alone expressly apply its strict elements test. Instead, it relied on *United States v. DeTar*, 832 F.2d 1110 (9th Cir. 1987), which not only was a pre-*Schmuck* decision but a failure to pay case, not a failure to file case, as well as pre-*Schmuck* dicta in *Sansone v. United States*, 380 U.S. 1004 (1965). (*DeTar* is discussed below in the failure-to-pay section, [8.11\[2\]\[b\]](#) and the *Sansone* dicta in section [8.11\[5\]](#).) Notably, the Ninth Circuit held a year later in *United States v. Nichols*, 9 F.3d 1420, 1422 (9th Cir. 1993), that a failure to file offense is not a lesser included offense of tax evasion.

Although failing to cite *Schmuck* or expressly apply the strict elements test, the *Doyle* court did cite *United States v. Browner*, 937 F.2d 165 (5th Cir. 1991), a post-*Schmuck* decision which considered the government’s argument that although *Schmuck* rejected the inherent relationship test, the Supreme Court had left “open the possibility of resort to an indictment-based test under appropriate circumstances.” 937 F.2d at 169. In rejecting that argument, the *Browner* court noted that the Solicitor General had argued against adoption of an indictment-based theory and that “the Supreme Court’s opinion in *Schmuck* [had] adopted the strict statutory elements test that the government had

sought,” presenting “no reason to address the defendant’s alternative argument that under an indictment-based test he would have been entitled to the requested lesser included offense instruction.” 937 F.2d at 170. *Doyle*’s citation of *Browner* has resulted in at least one lower court within the circuit stating *Doyle* “applied the *Schmuck* ‘statutory elements’ test.” *United States v. Cryer*, 2007 WL 1805031 (W.D. La. 2007) (memorandum ruling of Magistrate Judge).

The Eleventh Circuit has not addressed the issue directly, but it has observed that “binding authority” from the pre-split Fifth Circuit “holds that a violation of § 7203 (misdemeanor failure to file a return) is a lesser included offense of § 7201 where the failure to file is the act that forms the basis of the tax evasion charge.” *United States v. Kaiser*, 893 F.2d 1300, 1306 (11th Cir. 1990) (citing pre-*Schmuck* cases *United States v. Newman*, 468 F.2d 791, 796 (5th Cir. 1972) and *United States v. Buckley*, 586 F.2d 498, 503–04 (5th Cir. 1978)).

In sum, a proper application of the *Schmuck* strict elements test results in the conclusion that a failure to file offense in violation of Section 7203 is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the misdemeanor and not the felony. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7203 failure to file counts. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[2][b] Failure to Pay as a Lesser Included Offense of Section 7201

An element of willful failure to file or pay, in violation of Section 7203, that is not present in Section 7201 is that the defendant must have an obligation to file the return or pay the tax at issue. Compare § 7203 (“Any person required under this title”) with § 7201 (“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof”). Thus, for example, while a defendant can be convicted under Section 7201 of evading the payment of tax not imposed on him by Title 26, *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994), a defendant generally cannot be convicted under Section 7203 for failing to pay tax unless the obligation to pay that tax is imposed on him by Title 26.. A defendant can only be convicted under Section

7203 for taxes owed and unpaid by another person by relying on 18 U.S.C. § 2 (a theory of liability implicitly present in all counts even if not expressly alleged. *See* CTM 21.04). But establishing liability under Section 2 for a failure to pay requires the involvement of another person – the individual who did have the duty to pay – which is not a requirement of Section 7201. *Cf. United States v. Rivera-Figueroa*, 149 F.3d 1, n.5 (1st Cir. 1998) (“The accessory-after-the-fact offense does have some elements in common with the principal crime insofar as it requires proof of the substantive offense by someone; and it is certainly a lesser offense carrying a lesser penalty. 18 U.S.C. § 3. But the accessory offense is not a lesser *included* offense because it requires proof that the principal offense does not, namely, that the defendant assisted after the principal crime was committed.”) Accordingly, a faithful application of the *Schmuck* strict elements test results in the conclusion that willful failure to pay in violation of Section 7203 is not a lesser included offense of Section 7201.

Two circuits have held otherwise. In a pre-*Schmuck* case, the Ninth Circuit, in *DeTar*, reversed a tax evasion conviction where the court declined to give an instruction on failure to pay. Although *DeTar* engaged in a cursory comparison of elements, it did not consider the requirement that the defendant have a personal duty to pay, instead stating that there were only two elements: willfulness and failure to pay the tax when due. *DeTar*, 832 F.2d at 1113. The lesser-included holding of *DeTar*, accordingly, does not survive *Schmuck* and *Carter*. However, in an unpublished post-*Schmuck* case, *United States v. Fisher*, 607 F. App’x 645 (9th Cir. 2015), the Ninth Circuit simply stated that “[i]t is undisputed that § 7203 is a lesser included offense of § 7201,” and reversed on the basis that, on the facts, the defendant could have been convicted on § 7203 and not § 7201.

In a post-*Schmuck* decision, the Third Circuit, in *United States v. McGill*, 964 F.2d 222, 239-40 (3d Cir. 1992), held that failure to pay is a lesser included offense of evasion of payment. In *McGill*, the defendant was charged with five counts of evasion of payment and the jury convicted on three counts. The jury acquitted on the other two evasion counts but convicted on failure to pay based on a lesser included instruction requested by the government. In affirming, the Third Circuit, like the Ninth Circuit in *DeTar*, described the elements of failure to pay in violation of Section 7203 as “1) the failure to pay a tax that is due, and 2) willfulness,” which elements, the court held, are within the elements of evasion of payment in violation of Section 7201. *McGill*, 964 F.2d at 229. In its 1992 decision, the Third Circuit did not cite, much less apply, the Supreme

Court's 1989 decision in *Schmuck*. Rather, the Third Circuit cited the Ninth Circuit's pre-*Schmuck* decision in *DeTar*. 964 F.2d at 239. Thus, like *DeTar*, *McGill* did not consider the requirement that § 7203 requires the defendant to have has a personal duty imposed by Title 26.

In sum, a proper application of the *Schmuck* strict elements test results in the conclusion that a failure to file offense in violation of Section 7203 is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the misdemeanor and not the felony. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7203 failure to pay counts. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[3] Section 7206(1) as a Lesser Included Offense of Section 7201

Section 7206(1) provides that whoever “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony” with a statutory maximum of three years. The elements of Section 7206(1) are (1) the defendant made and subscribed a return, statement, or other document which was false as to a material matter; (2) the return, statement, or other document contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law. *See* CTM 12.05.

An element of the offense of willfully filing of a false return or other document in violation of Section 7206(1) that is not present in Section 7201 is the requirement of filing a return or other document. Attempted tax evasion in violation of Section 7201 can be, and frequently is, committed by committing an act constituting attempted evasion without filing a tax return (or other document), a scenario often called “*Spies* evasion.” *See Spies v. United States*, 317 U.S. 492, 499 (1943). Thus, Section 7206(1) is not a lesser included offense of Section 7201. Notwithstanding the clarity of this, three circuits

have issued post-*Schmuck* decisions hold that filing a false return in violation of § 7206(1) can be a lesser included offense of tax evasion.

Prior to *Schmuck*, many circuits considered the question and held that filing a false tax return is a lesser included offense when the return is alleged as an act of evasion. See, e.g., *Gaunt v. United States*, 184 F.2d 284, 288, 290 (1st Cir. 1950); *United States v. Hooks*, 848 F.2d 785, 791 n.3 (7th Cir. 1988) (dicta); *United States v. Lodwick*, 410 F.2d 1202 1206 (8th Cir. 1969); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976). These circuits have not issued post-*Schmuck* decisions, however, so in these circuits it remains open to argue, both in the district courts and to a circuit panel, that these pre-*Schmuck* decisions have been overruled by *Schmuck*, and no longer constitute binding circuit law. The Fourth Circuit issued a similar decision shortly after *Schmuck* was decided, but that opinion was unpublished and relied solely on pre-*Schmuck* law. See *United States v. Payne*, 1989 WL 134637, *1 (4th Cir. 1989) (unpub.). Accordingly, in the Fourth Circuit the issue remains open. The Third and Sixth Circuits have not addressed this issue, either before or after *Schmuck*, so the issue remains open there as well.

In the “closely related” context of multiplicity, the Tenth Circuit drew upon the *Schmuck* elements test to find that filing a false return and tax evasion each contain an element that the other does not. *United States v. Greene*, 239 F. App’x 431, 437-38 (10th Cir. 2007). In particular, the court explained that the false return count “requires proof of knowingly signing a false statement under oath, which is not required to prove the evasion count.” *Id.* at 438. As the court emphasized, the *Schmuck* test is “‘certain and predictable’ because it ‘involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial.’” *Id.* at 437 (quoting *Schmuck*, 489 U.S. at 720).

The Second, Eleventh, and D.C. Circuits have issued post-*Schmuck* decisions holding that Section 7206(1) is a lesser included offense of Section 7201. The Eleventh Circuit, in *Kaiser*, did not cite *Schmuck*, much less apply its strict elements test. Instead, the Eleventh Circuit rested its lesser included holding on the *Blockburger* test applicable to Double Jeopardy analysis. Notably, the Eleventh Circuit acknowledged that “the offense of false filing has an element not required for tax evasion—i.e., the filing of a return.” *Kaiser*, 893 F.2d at 1305. Under *Schmuck*’s strict elements test, that would necessarily result in a conclusion that Section 7206(1) is not a lesser included offense of

Section 7201. But the Eleventh Circuit held that under *Blockburger*, the analysis was not limited to a comparison of the elements but also the specific facts, which in *Kaiser* included the fact that “tax evasion [was] charged solely by means of filing a false tax return.” 893 F.2d at 1306.

The Second Circuit, in *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), also failed to cite *Schmuck*, much less apply its strict elements test, when it held that a Section 7206 conviction merged into a Section 7201 conviction because it was a lesser included offense. In so holding, the Second Circuit cited pre-*Schmuck* circuit law, including *United States v. White*, 417 F.2d 89 (2d Cir. 1969), to hold “that where false returns “were ‘incidental step[s] in the consummation of the completed offense of attempted defeat or evasion of tax’ and as such ... constituted a ‘crime within [a] crime’ under the lesser included offense doctrine” then a conviction under Section 7206(1) for filing those false returns merges into a conviction under Section 7201 for the inclusive fraud of tax evasion.” But *Schmuck*’s rejection of the “inherent relationship” test in favor of the strict elements test also necessarily rejected the Second Circuit’s “incidental steps” case law.

The D.C. Circuit, in *United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993), similarly failed to even cite *Schmuck*, much less apply its strict elements test. Instead, the D.C. Circuit also relied on the Second Circuit’s pre-*Schmuck* decision in *White*, as well as other pre-*Schmuck* cases, to conclude “that, on the facts here presented, the section 7206 [convictions] merge, as lesser included offenses, into the ‘capstone’ section 7201 tax evasion convictions.”¹³

In sum, a proper application of the *Schmuck* strict elements test results in the conclusion that a Section 7206(1) offense is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the Section 7206(1) offense and not Section 7201. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7206(1) false return count. If a defendant is convicted on both

¹³ In *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 175 (5th Cir. 2008), the Fifth Circuit expressed agreement with *Dale* in an immigration case examining whether an immigration statute permitted removal based upon a Section 7206 conviction or only a Section 7201 conviction. But in subsequently answering this immigration question in the affirmative in *Kawashima v. Holder*, 565 U.S. 478 (2012), the Supreme Court “employ[ed] a categorical approach by looking to the statute defining the elements of the crime of conviction, rather than to the specific facts underlying the crime.” 565 U.S. at 483.

counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[4] Section 7207 as a Lesser Included Offense of Section 7201

Section 7207 provides, *inter alia*, “Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter,” shall be guilty of a misdemeanor, with a statutory maximum of one year. The elements of Section 7207 are: (1) the defendant submitted a return, statement, or other document to the Internal Revenue Service; (2) the return, statement, or other document was false or fraudulent as to a material matter; and (3) the defendant acted willfully. *Sansone v. United States*, 380 U.S. 343, 352 (1965).

In order for Section 7207 to be a lesser included offense of a Section 7201 count under *Schmuck*’s elements test, the elements of Section 7207 must be a subset of the elements of Section 7201. But Section 7207 is not a lesser included offense of Section 7201 under *Schmuck*’s elements test because Section 7207 requires an element not required for Section 7201. Similar to Section 7206, an element of Section 7207 that is not present in Section 7201 is the requirement of submitting a “list, return, account, statement, or other document.” But Section 7201 does not require anything to be delivered or disclosed to the IRS. As previously noted, attempted tax evasion in violation of Section 7201 can be, and frequently is, committed by committing an act constituting attempted evasion without delivering or disclosing anything to the IRS. See *Spies v. United States*, 317 U.S. 492, 499 (1943).

8.11[5] Dictum in Sansone and Schmuck

Prosecutors should be aware of dictum in the pre-*Schmuck* case of *Sansone v. United States*, 380 U.S. 343 (1965), stating that it is possible for Section 7203 failure to pay and Section 7207 offenses to be lesser included offenses of tax evasion. In *Sansone*, a defendant convicted of Section 7201 tax evasion had sought an instruction that Sections 7207 and 7203 were lesser included offenses, based on the argument that the jury “could acquit him of the charged offense of willfully attempting to evade or defeat tax ..., but still convict him of either of both of the asserted lesser-included offenses.” 380 U.S. at 345. After concluding that income tax returns were within the purview of Section 7207,

380 U.S. at 349, the Court considered the lesser included issue presented, beginning with a statement of the applicable two-prong standard. The *Sansone* Court stated the first prong of the test — which *Schmuck* later held is only satisfied if the strict-elements test is met — as providing that “[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it, [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.” *Id.* at 349 (citing *Berra v. United States*, 351 U.S. 131, 134 (1956)). *Sansone* then stated a second requirement, stating that “a lesser-offense charge is [nonetheless] not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses.” *Id.* at 349-50. As *Sansone* explained, this means that “[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense.” *Id.* at 350.

Sansone ultimately held that the second requirement for giving a lesser included offense instruction was not satisfied on the facts, reasoning that the jury could not rationally have found the defendant guilty of Section 7203 or 7207 but acquitted on Section 7201 because the only disputed element — willfulness — was common to all three offenses. 380 U.S. at 351-55. But before so holding, *Sansone* stated that Section 7203 failure-to-pay and 7207 violations based on the filing of false returns could support lesser included instructions on different sets of facts. Noting Section 7201’s status as “the capstone of a system of sanctions,” *Sansone* stated that Section 7201 “necessarily includes among its elements actions which, if isolated from the others, contains lesser offenses in this hierarchical system of sanctions.” 380 U.S. at 350-51. *Sansone* then applied this to Section 7203, stating that “[w]here there is, in a [Section] 7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the [Section] 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on [Section] 7203.” *Id.* at 351. *Sansone* similarly stated that, because “Section 7207 does not . . . require that the act be done as an attempt to evade or defeat taxes[,] [c]onduct could therefore violate [Section] 7207 without violating [Section] 7201 where the false statement, though material, does not constitute an attempt to evade or defeat taxation because it does not have the requisite effect of reducing the stated tax liability.” *Id.* at 352.

Prosecutors confronted with an argument that a Section 7203 failure-to-pay or Section 7207 lesser included instruction is, notwithstanding *Schmuck*, proper under

Sansone should advance three related arguments. First, prosecutors should argue that the statements in *Sansone* to the effect that such instructions could be proper under different facts are *dicta*; as noted above, *Sansone*'s holding was only that the separate "independent prerequisite" for entitlement to a lesser included offense instruction — "that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater," *Schmuck*, 489 U.S. at 716 n.8 — was not satisfied. This "independent prerequisite," as noted above at Chapter 8.11[1][b], is not technically part of the *Schmuck* elements test but a separate fact-based inquiry about whether the instruction is appropriate given the trial evidence. Second, prosecutors should argue that these *dicta* are no longer persuasive after *Schmuck*, under which, as explained above in Chapters 8.11[2] and [4], neither Section 7203 nor 7207 are lesser included offenses of tax evasion. And third, for similar reasons, prosecutors should argue that even if these statements in *Sansone* were not *dicta*, they were implicitly overruled by *Schmuck*'s express adoption of a strict elements test under which Sections 7203 and 7207 are not lesser included offenses of tax evasion.

Prosecutors should also be aware of dictum in *Schmuck* that cites *Sansone*, which dictum some post-*Schmuck* cases cite without actually applying the strict elements test. The *Schmuck* Court, in the part of its opinion observing that Rule 31(c) was intended to be a restatement of pre-existing law, stated that the strict elements test was the prevailing practice in the courts prior to the promulgation of Rule 31(c). 489 U.S. at 718-19. In a footnote, *Schmuck* stated that its "decisions after the adoption of Rule 31(c), while not formally adopting the elements approach, reflect adherence to it" as they "focused on the statutory elements of the individual offenses," citing *Keeble v. United States*, 412 U.S. 205 (1973). With a "See also" cite, *Schmuck* also cited *Sansone*, with a parenthetical stating, "analyzing the elements involved in 26 U.S.C. § 7207, and finding that they are a subset of the elements in 26 U.S.C. § 7201." See *Schmuck*, 489 U.S. at 720 n.11. Although it's true that *Sansone* held that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense," it's also true that *Sansone* did not apply *Schmuck*'s holding, 489 U.S. at 716, that no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." See *Carter v. United States*, 530 U.S. 255 (2000) (applying the *Schmuck* strict elements test to hold that no lesser included jury instruction was permitted because the lesser offense required an element not in the charged offense).

Because the offenses under Sections 7203, 7206, and 7207 each contain an element not required by Section 7201, none are lesser included offenses under the *Schmuck*'s elements test. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should preserve the argument that *Schmuck*'s citation of *Sansone* is dictum. In these circuits, prosecutors should also consider charging the lesser offense in the indictment, as discussed below.

8.11[6] – Charging Tax Evasion and Putative Lesser Included Offenses

While most requests are now made by defendants, “the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged.” *Keeble v. United States*, 412 U.S. 205, 208 (1973). Both the defendant and the government can thus request a lesser included offense instruction. *See, e.g., United States v. Smith*, 990 F.3d 607, 613 (8th Cir. 2021) (instruction “may be demanded by either the prosecution or the defense”); *United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013).

But to be consistent with a proper application of *Schmuck*, prosecutors should not request a lesser included offense instruction for a tax evasion charge even when circuit law would permit a lesser instruction; instead, the government should charge both offenses.¹⁴ *Cf. United States v. Jose*, 425 F.3d 1237, 1247 (9th Cir. 2005) (“Prosecutors should not be discouraged from charging defendants with greater and lesser included offenses in separate counts under the same indictment,” and such an approach “presents a ‘cleaner package’ to the jury.”).

This approach is not only consistent with the government’s position but also has the benefit of providing a potential low-risk way to challenge incorrect circuit law. In circuits where Section 7201 evasion has been found to have a lesser included offense, a defendant convicted on both counts can seek to have the lesser offense vacated, *see id.*, or merged into the evasion conviction, *see, e.g., Helmsley*, 941 F.2d at 99, but the government can then challenge the circuit’s lesser-included-offense law without risking an appellate reversal of an evasion conviction. Prosecutors desiring to do this should consult with the Tax Division’s Criminal Appeals & Tax Enforcement Policy Section.

¹⁴ To be consistent with the government’s position that Section 7201 has no lesser included offense under the *Schmuck* elements test, the government also should not seek an entry of judgment for a lesser included offense if a Section 7201 conviction is reversed on grounds not affecting the putatively lesser offense. *Cf. Rutledge v. United States*, 517 U.S. 292, 306 (1996).

By not requesting a lesser included offense instruction, and instead charging both offenses, the government also avoids potential Double Jeopardy issues. In *Green v. United States*, 355 U.S. 184, 190 (1957), the Supreme Court held that a jury’s conviction on the lesser included offense, while being silent on the greater offense, was an “implicit acquittal” that precluded retrial for the greater offense even after the lesser offense was overturned on appeal. *See also Price v. George*, 398 U.S. 323, 329 (1970). Some circuits, however, have held that *Green* and *Price* do not prohibit retrial for the greater offense if the jury was clearly deadlocked on that charge, rather than merely silent. *See United States v. Morgan*, 929 F.3d 411, 423 (7th Cir. 2019); *United States v. Williams*, 449 F.3d 635, 645-46 (5th Cir. 2006); *United States v. Bordeaux*, 121 F.3d 1187, 1193 (8th Cir. 1997).

8.11[7] – Chart Summarizing Circuit Law and Recommendations

The chart below summarizes where the circuits stand, as of 2023, on whether certain offenses are a lesser-included offense of tax evasion and provides recommended responses to defense requests for an instruction. The chart states “May oppose” in circumstances where there is contrary circuit law but a basis to conclude that the law is not binding (because the contrary law is before *Schmuck* was decided, is unpublished, or is dicta). In these circumstances, prosecutors may oppose a requested instruction but should first consult with the Tax Division’s Criminal Appeals & Tax Enforcement Policy Section.

As discussed in section [8.11\[6\]](#), the government should not request a lesser included offense instruction, even when the circuit’s law would allow it. In addition, prosecutors should consider whether the evidence at trial would preclude an instruction, as discussed in section [8.11\[1\]\[b\]](#), and if opposing an instruction on those grounds, should also object on legal grounds (while acknowledging where appropriate that circuit law is to the contrary).

Circuit	Failure to File (§ 7203)	Failure to Pay (§ 7203)	False Return (§ 7206)¹⁵
1st	Oppose (no circuit law)	Oppose (no circuit law)	May oppose (contrary circuit law is pre- <i>Schmuck</i>)

¹⁵ In all the circuits finding § 7206 to be a lesser-included offense of evasion, a false return was alleged as an affirmative act of evasion.

Circuit	Failure to File (§ 7203)	Failure to Pay (§ 7203)	False Return (§ 7206)¹⁵
2d	May oppose (contrary circuit law is pre- <i>Schmuck</i>)	Oppose (no circuit law)	Do not oppose (contrary post- <i>Schmuck</i> circuit law)
3d	Oppose (no circuit law)	Do not oppose (contrary post- <i>Schmuck</i> circuit law)	Oppose (no circuit law)
4th	May oppose (contrary circuit law is pre- <i>Schmuck</i>) ¹⁶	Oppose (no circuit law)	May oppose (contrary post- <i>Schmuck</i> circuit law is unpublished)
5th	Do not oppose (contrary post- <i>Schmuck</i> circuit law)	Oppose (no circuit law)	May oppose (contrary post- <i>Schmuck</i> circuit law is dicta)
6th	Oppose (unpublished post- <i>Schmuck</i> law supports opposing)	Oppose (no circuit law)	Oppose (no circuit law)
7th	Oppose (published post- <i>Schmuck</i> law supports opposing)	Oppose (no circuit law)	Oppose (contrary circuit law is pre- <i>Schmuck</i> and dicta)
8th	Oppose (circuit law is inconclusive)	Oppose (no circuit law)	May oppose (contrary circuit law is pre- <i>Schmuck</i>)
9th	Oppose (published post- <i>Schmuck</i> law supports opposing)	May oppose (contrary circuit law is pre- <i>Schmuck</i> or unpublished)	May oppose (contrary circuit law is pre- <i>Schmuck</i>)
10th	Oppose (no circuit law)	Oppose (no circuit law)	May oppose (multiplicity case permits opposing and contrary post- <i>Schmuck</i> circuit law is dicta)
11th	May oppose (post- <i>Schmuck</i> case referencing pre- <i>Schmuck</i> case in dicta)	Oppose (no circuit law)	Do not oppose (contrary post- <i>Schmuck</i> circuit law)
DC	Oppose (no circuit law)	Oppose (no circuit law)	Do not oppose (contrary post- <i>Schmuck</i> circuit law)

¹⁶ The Fourth Circuit's law also applies only when the failure to file is charged as an affirmative act, which should not be done in any event.