Tax Offenses *(26 U.S.C. §§ 7201, 7203, 7206(1))*

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6.26.7201 Tax Evasion - Elements of the Offense (26 U.S.C. § 7201)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with income tax evasion, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **had a substantial income tax deficiency;**

Second: That *(name)* **made an affirmative attempt to evade or defeat the**

(assessment) (payment) **of the income tax; and**

Third: That *(name)* **acted willfully.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 59-2 (Matthew Bender 2003) [hereinafter, Sand et al., supra]; Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 67.03 [hereinafter O'Malley et al., supra].

26 U.S.C. § 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, in addition to other penalties provided by law, be guilty of a felony . . . .

The term "person" includes an individual or natural person as well as other entities. *See* 26 U.S.C.A. § 7343 (defining "person"); *United States v. Lynch*, 735 F.App'x. 780 (3d Cir. 2018) (non-precedential) (rejecting argument that term "person" does not include an individual). If the charge involves a tax other than the income tax, the instructions should be modified.

In *Sansone v. United States*, 380 U.S. 343 (1965), the Court stated:

> [T]he elements of § 7201 are willfulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax.

380 U.S. at 351 (citations omitted); *see also Boulware v. United States*, 128 S. Ct. 1168, 1173

n.2 (2008) (stating elements); *United States v. Voigt*, 89 F.3d 1050, 1089 (3d Cir. 1996) (stating elements); *United States v. Farnsworth*, 302 F. App'x. 110, 2008 WL 5174899 (3d Cir. 2008) (stating elements). The deficiency must be substantial. *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007). In addition to this instruction, the court should also give Instructions 6.26.7201-1 (Tax Evasion - Tax Deficiency Defined), 6.26.7201-2 (Tax Evasion - Computation of Tax Deficiency), 6.26.7201-3 (Tax Evasion - Affirmative Attempt to Evade or Defeat Defined), and 6.26.7201-4 (Tax Evasion - Willfully Defined).

There are two types of tax evasion: evasion of assessment and evasion of payment. This distinction may require further explanation to the jury in some cases. The Third Circuit has explained:

> Section 7201 encompasses two kinds of affirmative behavior: the evasion of assessment and the evasion of payment. Evasion of assessment cases are far more common. The affirmative act requirement in such a case is satisfied, inter alia, with the filing of a false return. *See, e.g., Sansone*, 380 U.S. at 351-52, 85 S. Ct. at 1010-11. If the false filing is shown to be willful, the offense is complete with the filing. *See id.* Evasion of payment cases are rare, and the required affirmative act generally occurs after the filing, if there is a filing at all. *United States v. Mal*, 942 F.2d 682, 687 (9th Cir. 1991) (evasion of payment "involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed") (emphasis added). . . .
>
> Affirmative acts of evasion of payment include: placing assets in the name of others; dealing in currency; causing receipts to be paid through and in the name of others; and causing debts to be paid through and in the name of others. For example, in *Spies*, the petitioner "insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records." The Supreme Court found this evidence sufficient to sustain a finding of attempted evasion. *Spies*, 317 U.S. at 499, 63 S. Ct. at 368 (emphasis added). In *Conley*, the Court of Appeals for the Seventh Circuit affirmed a § 7201 conviction where the defendant placed assets in his sons' names, deposited his assets with others, dealt in currency, and paid creditors but not the government.

United States v. McGill, 964 F.2d 222, 230 (3d Cir. 1992) (emphasis omitted) (citing *United States v. Conley*, 826 F.2d 551, 557 (7th Cir. 1987)). *See also United States v. Root*, 585 F.3d 145, 151-54 (3d Cir. 2009) (discussing distinction).

If a defendant is charged with tax evasion of either type and failed to file a tax return, the court may need to instruct the jury that the government must prove a tax assessment beyond a reasonable doubt. When a defendant files a tax return, the return represents a self-assessment, so the issue does not arise.

According to Sand, the Third Circuit is alone in suggesting that evasion of payment and

evasion of assessment are two separate offenses, a suggestion found only in dictum. *See* Sand et al., supra, 59-3 (Comment). In *United States v. Farnsworth*, 456 F.3d 394 (3d Cir. 2006), the Third Circuit raised a question concerning the elements of evasion of payment. Denying the government's petition for mandamus, the court held that the trial court "did not commit a clear error of law when it ruled that it would instruct the jury that the existence of an assessment is a prerequisite to a conviction for attempted evasion of payment under 26 U.S.C. § 7201." 456 F.3d at 401. The court noted that "[t]he only two Third Circuit opinions to discuss whether attempted evasion of payment requires an assessment have commented in dicta that it does." 456 F.3d at 401.

In *Farnsworth*, the court discussed its dicta in *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992), and *United States v. McLaughlin*, 126 F.3d 130 (3d Cir. 1997). In *McGill*, the court stated that "[e]vasion of payment cases are rare, and the required affirmative act generally occurs after the filing, if there is a filing at all" and cited a Seventh Circuit case as standing for the proposition that "evasion of payment 'involves conduct designed to place assets beyond the government's reach after a tax liability has been assessed.'" 964 F.2d at 230. In *McLaughlin*, the court stated that, "[h]ad the government charged the [defendants] with evasion of payment, it would have had to prove a valid assessment from which the [defendants] hid assets." 126 F.3d at 136 (citations omitted).

In *Farnsworth*, the court acknowledged that several other Courts of Appeals have determined that proof of an assessment is not necessary. 456 F.3d at 402. The court then concluded:

> Given this relevant precedent, we agree with the Government that the weight of authority favors its view that an assessment is not required to prove attempted evasion of payment under § 7201. In the end, however, in light of our own dicta in *McGill* and *McLaughlin*, and the general lack of clarity in this area of law, we cannot conclude that the District Court's proposed jury instruction was clearly erroneous.

456 F.3d at 403.

Ultimately, the district court did not instruct on assessment in Farnsworth's trial. Farnsworth then unsuccessfully challenged the resulting conviction. In *United States v. Farnsworth*, 302 F. App'x. 110, 2008 WL 5174899 (3d Cir. 2008), a non-precedential opinion, the Third Circuit explained that its earlier decision in *Farnsworth* addressed only the question of whether the proposed assessment instruction "constituted 'a clear error of law.'" Stressing the reservations the court had expressed in the first *Farnsworth* decision, the Third Circuit concluded that the trial court did not commit error by declining to instruct that an assessment is a necessary element of attempted evasion of payment.

Section 7203 is a lesser included offense under 26 U.S.C. § 7201. *McGill*, 964 F.2d at 231.

(Revised 2018)

6.26.7201-1 Tax Evasion - Tax Deficiency Defined

The first element that the government must prove beyond a reasonable doubt is that (*name*) **had a substantial tax deficiency due and owing, that is that** *(name)* **owed** *(a substantial federal income tax) (substantially more federal income tax than (he)(she) reported on (his)(her) tax return) (substantially more federal income tax than (he)(she) paid)* **for calendar year***(s) (specify year(s))***.**

The government does not have to prove the exact amount that *(name)* **owed or that** *(name)* **evaded all of the taxes charged in the indictment. The government is required to establish only that** *(name)* **owed a substantial amount of income tax during the year***(s)* **in question, regardless whether it is more or less than the amount set forth in the indictment.**

Comment

Sand et al., supra, 59-4.

In *United States v. Burdick*, 221 F.2d 932, 934 (3d Cir. 1955), the Third Circuit explained "it is not necessary to prove evasion of the entire amount alleged in the indictment. It is sufficient to prove that a substantial amount of tax liability has been willfully evaded." *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007). In *United States v. Wilson*, 601 F.2d 95, 99 (3d Cir. 1979), the Third Circuit stated that, where the government relies on proof that the defendant did not report income, the government does not have to prove the exact amount of the unreported income, but only that the defendant failed to report a substantial amount of income.

The court may want to consider providing the jury guidance in determining whether the amount of tax evaded was "substantial." The Third Circuit has not defined the term in this context, nor have most of the other circuits. *But see United States v. Nunan*, 236 F.2d 576, 585 (2d Cir. 1956). In light of the limited case law on the meaning of "substantial" in this context, the court may instruct the jury to rely on the common meaning for the word "substantial."

Alternatively, the court may instruct the jury:

Whether the amount is “substantial” turns on whether under the surrounding circumstances the amount of the deficiency would be significant to an ordinary person.

6.26.7201-2 Tax Evasion - Computation of Tax Deficiency

In order to prove a tax deficiency in this case, the government has introduced evidence that *(name)* **received income that was omitted from** *(his)(her)* **tax return, that is,** *(describe the specific item of income or other evidence which is the basis for the allegation of evasion)***.**

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that *(name)* **received income** *(in addition to what (he)(she) reported on (his)(her) income tax return for the year in question)***, then you must decide whether there was a substantial tax due** *(in addition to what was shown to be due on the return)(in addition to what (name) paid)***, as a result of** *(name)***'s** *(additional,)* **unreported income. In reaching your decision on this issue, you should consider, along with all the other evidence, the testimony introduced during the trial concerning the computation of** *(name)***'s tax liability, when the alleged** *(additional)* **income was taken into account.**

If you find, based on all the evidence, that the government has established beyond a reasonable doubt that *(name)* **received** *(additional)* **income, and that there was a substantial tax due** *(in addition to what was shown to be due on (his)(her) income tax return) (in addition to what (name) paid)***, as a result of this** *(additional)* **income, then this first element has been satisfied.**

Comment

Sand et al., supra, 59-5.

This instruction addresses tax evasion based on unreported income. If the government relies on the proof that the defendant overstated deductions, the court should modify the instruction accordingly.

In *United States v. Smith*, 206 F.2d 905, 910 (3d Cir. 1953), the Third Circuit addressed the way in which the government established the defendant's tax deficiency. First, the court addressed the government's approach to establishing income:

> [T[he Government did not rely upon bald cash items and let it go at that. Whether the item was cash or a check, it was traced to its source and shown to be income within the legal sense of that term.

Second, the court addressed and rejected the defendant's argument that he was entitled to additional deductions and exemptions.

> Defendant filed no returns and refused to make his records available to the investigating revenue agents. Having reconstructed defendant's income from what material it could unearth, the Government showed substantial net income. Defendant complains, however, that he was not allowed exemptions for his wife and his two children, that he had certain bad debts, charitable contributions, and expenses which are deductible. The trouble is that there is no proof as to these matters or, where there are intimations in the record, the jury did not draw the inference which defendant seeks. The Government made out a case for the jury by showing substantial net income. Of course, defendant could controvert this evidence by testimony that he was entitled, under the law, to certain deductions which the Government did not allow him. The only testimony he introduced on this point was in attempting to establish certain business expenses. No one would doubt that the jury was not bound to believe the underlying facts upon which he says those deductions are based.

Smith, 206 F.2d at 910 (citations omitted). *See also United States v. Marabelles*, 724 F.2d 1374, 1383 (9th Cir. 1984) (noting defendant's burden to establish deductions).

In *Boulware v. United States*, 128 S. Ct. 1168 (2008), the Supreme Court rejected the argument that the defendant was required to present evidence of intent to treat a corporate distribution as a return of capital rather than income. The Court stated:

> Sections §§ 301 and 316(a) [of Title 26] govern the tax consequences of constructive distributions made by a corporation to a shareholder with respect to its stock. A defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed.

128 S. Ct. at 1182.

In certain cases, it may be appropriate to instruct that in determining the issue of the taxable income of the defendant, no distinction is made between income derived from lawful or unlawful sources. *See* 2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* § 56.21 (4th ed. 1990).

(Revised 12/2009)

6.26.7201-3 Tax Evasion - Affirmative Attempt to Evade or Defeat Defined

The second element that the government must prove beyond a reasonable doubt is that *(name)* **made an affirmative attempt to evade or defeat a tax. The phrase "attempt to evade or defeat any tax" involves two things: first, the formation of an intent to evade or defeat a tax; and, second, willfully performing some act to accomplish the intent to evade or defeat that tax.**

The government must first prove beyond a reasonable doubt that *(name)* **knew and understood that during the calendar year***(s) (specify year(s))***,** *(he)(she)* **had a tax deficiency. The government then must prove beyond a reasonable doubt that** *(name)* **intended to evade or defeat the tax due and that** *(name)* **also willfully did some affirmative act to try to accomplish this intent to evade or defeat that tax.**

An affirmative act is an act done to mislead the government with respect to the amount of taxes due and owing for the year*(s)* **in question or to conceal income to avoid the assessment or payment of a tax. In this case, the government alleges in the indictment that** *(name) (describe specific affirmative act(s) alleged in the indictment)***. Even otherwise lawful or innocent conduct may constitute an affirmative act if you find that** *(name)* **acted with intent to conceal income or mislead the government. An act likely to mislead the government or conceal funds satisfies this element**. *[However, failing to file a federal tax return, standing alone, is not an affirmative attempt to evade or defeat a tax.]*

[The government needs only to prove one act to satisfy this element of the offense, but you must unanimously agree on which (act was) (or acts were) committed.]

Comment

O'Malley et al., supra, § 67.04, Sand et al., supra, 59-7.

The court should instruct on the unanimity requirement if the government alleges more than one affirmative act. If the proof establishes that the defendant failed to file a tax return as required, the court should instruct that failure to file alone is not sufficient to establish an affirmative act.

This offense requires proof of an affirmative act to mislead or conceal. A mere omission is not sufficient. *See United States v. McKee*, 506 F.3d. 225, 235-36 (3d Cir. 2007); *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992). In *McGill*, the Third Circuit stated:

> [T]he failure of the taxpayer to report the opening of an account in his or her own name in his or her own locale cannot amount to an affirmative act of evasion. Omissions, including failures to report, do not satisfy the requirements of § 7201; the Government must prove a specific act to mislead or conceal. McGill testified that he opened the account on the advice of counsel in response to IRS criticism for banking under the names of others. There is no evidence that McGill concealed this new account from the IRS apart from the fact that he did not inform the IRS of its existence.

McGill, 964 F.2d at 233-234 (internal citation omitted). Thus, failure to file a return does not violate the statute in the absence of proof of affirmative conduct to mislead or conceal. *See United States v. Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981).

In *Spies v. United States*, 317 U.S. 492, 499 (1943), the Court discussed the affirmative act requirement:

> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as 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. If 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.

The government does not need to introduce direct evidence of intent to evade payment of taxes in order to prove the affirmative act required by the statute. Instead, intent can be inferred from the defendant's conduct, even from acts that are entirely consistent with innocent behavior. *See United States v. Voigt*, 89 F.3d 1050, 1090 (3d Cir. 1996). The affirmative act may be otherwise lawful or innocent conduct. *See Voigt*, 89 F.3d at 1089 (concluding that acts such as defendant's "refusal to pay for a piece of jewelry in cash; his use of bizarre confidentiality agreements; and his maintenance of overseas bank accounts taken together, provided the jury with sufficient evidence from which it could infer that they were 'designed' to evade the payment of admitted tax deficiencies, even if such actions otherwise might constitute wholly innocent conduct . . . ."). Some courts have held that filing a false document with the IRS constituted an affirmative act under the statute. *See, e.g.*, *United States v. King*, 126 F.3d 987, 990 (7th Cir. 1997) (holding conviction could rest on false W-4); *United States v. Robinson*, 974 F.2d 575 (5th Cir. 1992) (holding conviction could rest on false 1040 form even if it did not qualify as a "return").

An affirmative act may apply to the evasion of tax owed for more than one tax year. Moreover, an indictment may also charge in one count a continuing series of affirmative acts designed to evade the payment of tax during multiple years. Thus, in *United States v. Pollen*, 978 F.2d 78 (3d Cir. 1992), the Court upheld convictions on three 7201 counts which each charged a particular act of evasion, such as a transfer of funds, taken with the intent to evade the payment of tax for the same seven tax years. In addition, the Court affirmed a conviction for an additional count which charged that, during a three-year period, the defendant engaged "in a continuous scheme and course of conduct to conceal assets from the IRS." *Id.* at 82. The scheme included the use of currency, money orders, and cashier's checks to buy assets and pay expenditures, and the use of nominees to conceal expenditures. *Id.* Thus, the appropriate unit of prosecution may be either a single affirmative act, or a course of conduct. *Id.* at 84-85.

6.26.7201-4 Tax Evasion - Willfully Defined

The third element the government must prove beyond a reasonable doubt is that *(name)* **acted willfully. "Willfully" means a voluntary and intentional violation of a known legal duty.** *(Name)***'s conduct was not willful if** *(he)(she)* **acted through negligence, mistake, accident, or due to a good faith misunderstanding of the requirements of the law. A good faith belief is one that is honestly and genuinely held.**

[This definition of "willfulness" applies to all of the tax offenses charged in this case.]

[However, mere disagreement with the law or belief that the tax laws are unconstitutional or otherwise invalid does not constitute a good faith misunderstanding of the requirements of the law; all persons have a duty to obey the law whether or not they agree with it.]

Comment

See Cheek v. United States, 498 U.S. 192 (1991). For model instructions on willfully and the good faith defense generally, *see* Instructions 5.05 (Willfully) and 5.07 (Good Faith Defense). Those instructions may be used, when appropriate under the circumstances of the case, to supplement this instruction. However, caution should be exercised in giving Instruction 5.07 (Good Faith Defense) in tax cases. *See United States v. Basile*, 2014 WL 2937030 (3d Cir. 2014) (non-precedential), and discussion below.

In *Cheek*, the Court reaffirmed that "willfully" in federal tax statutes means "voluntary, intentional violation of a known legal duty" and therefore requires proof that the defendant had actual knowledge that the law imposed a legal duty and voluntarily and intentionally violated that duty. 498 U.S. at 201-02. However, it is not necessary to define "willful" in terms of "evil motive" or "bad purpose." *United States v. Pomponio*, 429 U.S. 10, 11-12 (1976). The definition of "willfully" in tax cases mandates the conclusion that a defendant cannot be found

guilty if the jury concludes that the defendant honestly believed the tax laws did not make his or her conduct criminal, even if that belief was unreasonable. *Cheek*, 498 U.S. at 201-02. In *Cheek*, the Court reasoned that, because of the complexity of federal tax laws, citizens may honestly not realize their conduct is criminal and thus may innocently believe they are not violating the law. If the jury finds that the defendant made a mistake about or was ignorant whether his or her conduct violated the law, then the jury must find that the government failed to meet its burden of proving willfulness beyond a reasonable doubt. The mistake or ignorance need not be reasonable, as long as it is honest or genuine. Of course, the jury can disbelieve the defendant's claim of mistake, find that it was not honestly or genuinely held, and therefore find that the defendant did act willfully. *Cheek*, 498 U.S. at 201-02. *See also United States v. Evans*, 356 F. App'x. 580 (3d Cir. 2009) (non-precedential).

The Third Circuit case law tracks that of the Supreme Court. *See also United States v. Stadtmauer*, 629 F.3d 238 (3d Cir. 2010) (noting requirement that government prove the defendant voluntarily and intentionally violated a known legal duty and holding that willful blindness instruction should not be given on question of willful violation of legal duty); *United States v. Evans*, 356 F. App'x. 580 (3d Cir. 2009) (non-precedential) (holding that willfulness instruction adequately covered good faith and allowed defendant to argue his theory of the case); *United States v. DePaoli*, 41 F. App'x. 543 (3d Cir. 2002) (holding that instructions in tax evasion case properly conveyed good faith defense and did not lead jury to apply requirement that good faith belief be objectively reasonable); *see also United States v. Moses*, 148 F.3d 277, 283 (3d Cir. 1998) (discussing "willfully" requirement in failure to file case); *United States v. Greenlee*, 517 F.2d 899 (3d Cir. 1975) (same). The definition of "willfully" is the same for all tax offenses. *Pomponio*, 429 U.S. at 12. In *United States v. Basile*, 2014 WL 2937030 (3d Cir. 2014) (non-precedential), the Third Circuit rejected the defendants' argument that the following instruction permitted the jury to reject their claim of good faith if the jury found it to be unreasonable:

> *A belief need not be objectively reasonable to be held in good faith*; nevertheless, you may consider whether the Defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether the belief was honestly or genuinely held.

The Third Circuit held that this instruction accurately stated the law. Language from Instruction 5.07 (Good Faith Defense) may not be appropriate in tax cases. *United States v. Basile*, 2014 WL 2937030 (3d Cir. 2014) (non-precedential). In *Basile*, the court emphasized that, in tax cases, a good faith defense can rest on ignorance of or a mistake concerning the law. *Basile*, 2014 WL 2937030 (citing *Cheek*).

Disagreement with the law does not amount to good faith. *Cheek*, 498 U.S. at 206; *United States v. Simkanin*, 420 F.3d 397, 404-12 (5th Cir. 2005). An instruction to this effect should be given in appropriate cases.

In some cases, the judge may choose to instruct the jury specifically that the defendant's

claim that the tax laws are invalid, unconstitutional, or inapplicable is incorrect as a matter of law.

(Revised 2014)

6.26.7203 Failure to File a Tax Return - Elements of the Offense (26 U.S.C. § 7203)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with willfully failing to file tax returns in the years** *(year number)* **through** *(year number)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **was required to file an income tax return;**

Second: That *(name)* **did not file a tax return at or before the time required by law or regulation;**

Third: That *(name)***'s failure to file was willful.**

Comment

26 U.S.C. § 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 . . . . In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

The court should also give Instructions 6.26.7203-1 (Failure to File a Tax Return - Requirement That a Return Be Filed), 6.26.7203-2 (Failure to File a Tax Return - Failure To File), and 6.26.7201-4 (Tax Evasion - Willfully Defined). If the defendant is charged with failing to pay tax or estimated tax, keep records, or supply information, the instruction should be modified.

§ 6050I (a) provides:

Cash receipts of more than $10,000.--Any person--

> (1) who is engaged in a trade or business, and
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

If the government alleges a violation of § 6050I, the court should modify the instruction to clarify that the first element requires proof of receipt in trade or business of more than $10,000 in a single transaction or related transactions.

In *United States v. McGill*, 964 F.2d 222 (3d Cir. 1992), the Third Circuit distinguished between tax evasion in violation of § 7201 and willful failure to file under § 7203:

> Merely failing to pay assessed taxes, without more, however, does not constitute evasion of payment, though it may satisfy the requirements for the willful failure to pay taxes under § 7203. Only affirmatively evasive acts - acts intending to conceal - are punishable under § 7201.

McGill, 964 F.2d at 231 (citation omitted). A defendant need not take affirmative action to be convicted under § 7203. Section 7203 is a lesser included offense under 26 U.S.C. § 7201. *McGill*, 964 F.2d at 231.

In *United States v. Street*, 370 F. App'x. 343 (3d Cir. 2010) (non-precedential), the Third Circuit rejected the argument that the defendant had not violated the statute because his accountant had "made" the returns, although the defendant had not then filed them. The court quoted the Seventh Circuit's explanation that "[m]aking a tax return is a term of art for the combination of completing and filing; any accountant or lawyer would have told [the defendant] so, had he asked." *United States v. Dunkel*, 900 F.2d 105, 108 (7th Cir.1990), vacated on other grounds, 498 U.S. 1043, 111 S.Ct. 747, 112 L.Ed.2d 768 (1991).

In *United States v. Siceloff*, 451 Fed. App'x. 183 (3d Cir. 2011) (non-precedential), the Third Circuit held that the prosecution need not prove that the IRS had assessed the tax owed by the defendant in order to prove a violation of this statute.

(Revised 10/2012)

6.26.7203-1 Failure to File a Tax Return - Requirement That a Return Be Filed

The first element that the government must establish beyond a reasonable doubt is that *(name)* **was required to file an income tax return for the tax year***(s)* **in question.**

During the relevant tax year, *(specify year)***, the law of the United States required that anyone having a gross income of** *(specify amount)* **or more during a tax year was required to file an income tax return, regardless of whether a tax was due for that year. Therefore, the government must establish, beyond a reasonable doubt, that** *(name)***'s gross income for the calendar year ending December 31,** *(specify year)***, was more than** *(specify amount)***.**

Comment

Sand et al., supra, 59-15.

If an issue arises concerning whether certain amounts should be included in gross income, the court should instruct on that question. O'Malley includes the following language:

> A person is required to file a federal income tax return for any calendar year in which [he] [she] has gross income in excess of $ ____ . Gross income means the total of all income received before making any deductions allowed by law. Gross income includes the following: (1) Compensation for services, including fees, commissions and similar items; (2) Gross income derived from business; (3) Gains derived from dealings in property; (4) Interest; (5) Rents; (6) Royalties; (7) Dividends; (8) Alimony and separate maintenance payments; (9) Annuities; (10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

O'Malley § 67.12. The Eleventh Circuit includes the following language in its instruction on tax evasion:

> Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.
>
> On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

See Eleventh Circuit § 93.1.

6.26.7203-2 Failure to File a Tax Return - Failure To File

The second element that the government must establish beyond a reasonable doubt is that *(name)* **failed to file an income tax return for the tax year***(s)* **in question at or before the time required.**

An individual taxpayer who must file an income tax return is required to file *(his)(her)* **return on or before April 15 of the year following the taxable year in question. Therefore, in order to satisfy this second element, the government must prove beyond a reasonable doubt that** *(name)* **failed to file** *(his)(her)* **income tax return***(s)* **on or before April 15,** *(specify year(s))***.**

Comment

Sand et al., supra, 59-16.

If the date for filing taxes was extended later than April 15 in one of the tax years involved, the instruction should be modified accordingly.

6.26.7206 False Income Tax Return - Elements of the Offense (26 U.S.C. § 7206(1))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with filing a false tax return** *(statement) (document)***, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That *(name)* **made and subscribed and filed an income tax return** *(statement) (document)***;**

Second: That the tax return *(statement) (document) [(contained) (is verified by)]* **a written declaration that it was made under the penalties of perjury;**

Third: That the return was false regarding a material matter;

Fourth: That *(name)* **did not believe the return** *(statement) (document)* **was true and correct as to that material matter; and**

Fifth: That *(name)* **acted willfully.**

Comment

26 U.S.C. § 7206(1) provides that any person who

> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter

shall be guilty of a felony.

The court should also give Instructions 6.26.7206-1 (False Income Tax Return - Making or Subscribing a Return Defined), 6.26.7206-2 (False Income Tax Return - Return Made Under Penalties of Perjury), 6.26.7206-3 (False Income Tax Return - Return Was Materially False),

6.26.7206-4 (False Income Tax Return - Defendant's Knowledge of Falsity), and, if appropriate, 6.26.7206-5 (False Income Tax Return - Unanimity as to Falsity).

In *United States v. Gollapudi*, 130 F.3d 66, 71-72 (3d Cir. 1997), the Third Circuit stated that in order to convict the defendant under this section:

> [T]he government had to prove that (1) defendant made and subscribed a return which was false as to a material matter; (2) the return contained a written declaration that it was made under the penalties of perjury; (3) defendant did not believe the return was true and correct as to every material matter; and (4) defendant falsely subscribed to the return willfully, with the specific intent to violate the law.

As indicated, the offense requires specific intent. As a result, the court must also instruct on willfully. *See* 6.26.7201-4 (Tax Evasion - Willfully Defined). The court may give a willful blindness instruction addressing the defendant's knowledge of the falsity of the information. See 6.26.7206-4 (False Income Tax Return - Defendant's Knowledge of Falsity). However, the court should not give an instruction that suggests that willful blindness will satisfy the requirement that the defendant had specific intent to violate the law. *See United States v. Stadtmauer,* 629 F.3d 238 (3d Cir. 2010).

The existence of a tax deficiency or loss to the government is not an element of the offense. *United States v. Olgin*, 745 F.2d 263, 272 (3d Cir. 1984).

In *Gollapudi*, the defendant argued unsuccessfully that "the literal truth of the information on a tax return is a complete defense, even if the response on the return was highly misleading." 130 F.3d at 72. The Third Circuit concluded nevertheless that

> there was ample evidence for the District Court to find that Gollapudi filed a false statement. First, an IRS agent testified that Gollapudi admitted that he prepared and signed the W-2 forms and that they were false. Additionally, although Gollapudi presented evidence that the withholding amounts were true based on his "gross up" method, the District Court found this theory to be without merit based on the testimony of another IRS agent who demonstrated that no withholding was actually made. Moreover, it was established that the alleged withholding was never submitted to the IRS, but rather, was maintained in Gollapudi's corporate checking account. . . . [H]e misstated the amount of his withholdings. Despite the fact that he understood his obligations, he submitted a form which he did not believe was true and accurate as to every material matter.

130 F.3d at 72 (citation omitted).

(Revised 11/2010)

6.26.7206-1 False Income Tax Return - Making or Subscribing a Return Defined

The first element that the government must prove beyond a reasonable doubt is that *(name)* **made and subscribed and filed a tax return** *(statement) (document)***.**

A tax return is made and subscribed to at the time it is signed. A tax return is filed at the time it is delivered to the Internal Revenue Service.

Comment

Sand et al., supra, 59-21.

6.26.7206-2 False Income Tax Return - Return Made Under Penalties of Perjury

The second element that the government must prove beyond a reasonable doubt is that the return *(statement) (document) [(contained) (was verified by)]* **a written declaration that it was made under penalty of perjury.**

To satisfy this element, the government must prove that on its face the return *(statement) (document)* **contained a statement indicating that the return was made under penalty of perjury.**

Comment

Sand et al., supra, 59-22.

6.26.7206-3 False Income Tax Return - Return Was Materially False

The third element that the government must prove beyond a reasonable doubt is that the return was false regarding a material matter.

An income tax return may be false not only by reason of understatement of income, but also because of an overstatement of lawful deductions or because deductible expenses are mischaracterized on the return.

The false statement in the return must be material. This means that it must be essential to an accurate determination of *(name)***'s tax liability. However, the government does not need to prove the existence of a tax deficiency or loss to the government.**

Comment

Sand et al., supra, 59-23.

The question of materiality is for the jury. *See Neder v. United States*, 527 U.S. 1, 119 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995). The Eighth Circuit has held that for prosecutions under 26 U.S.C. § 7206(2), the government must establish that the return contained untrue information and that the defendant knew that the information was false. *See United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984).

6.26.7206-4 False Income Tax Return - Defendant's Knowledge of Falsity

The fourth element that the government must prove beyond a reasonable doubt is that *(name)* **did not believe the return** *(statement) (document)* **was true and correct as to that material matter.**

Whether *(name)* **did not believe the return to be true and correct as to that material matter may be proven by** *(name)***'s conduct and by all of the facts and circumstances surrounding the case.**

Comment

Sand et al., supra, 59-23.

The government must establish not only that the return contained untrue information but also that the defendant knew that the information was false. *See United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984).

In *United States v. Stadtmauer*, 629 F.3d 238 (3d Cir. 2010), the Third Circuit approved the following willful blindness instruction addressed to the knowledge requirement:

> The element of knowledge on the part of the defendant may be satisfied by inferences drawn from proof that the defendant closed his eyes to what would otherwise have been obvious to the defendant. A finding beyond a reasonable doubt of a conscious purpose by the defendant to avoid knowledge that the tax returns at issue were false or fraudulent as to a material matter would permit an inference that he had such knowledge.
>
> Stated another way, the defendant's knowledge of a fact or circumstance may be inferred from his willful blindness to the existence of that fact and circumstance.
>
> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that the defendant knew that the tax returns at issue were false or fraudulent as to a material fact based on evidence that you find exists that proves beyond a reasonable doubt that the defendant was aware of a high probability that the tax returns at issue were false or fraudulent as to a material matter; and two, that defendant consciously and deliberately tried to avoid learning about this fact or circumstance.

Reviewing the instruction, the Third Circuit concluded that the jury would understand it as applying both to the defendant's knowledge of the facts and to his knowledge of the law but not to the issue of specific intent and that it was therefore a correct statement of the law.

(Revised 11/2010)

6.26.7206-5 False Income Tax Return - Unanimity as to Falsity

The indictment charges that *(name)***'s income tax returns were materially false in at least one of several respects, that is** *(specify alleged falsities)***.**

The government is not required to prove that all of the items alleged are materially false: proof that a single item is materially false is sufficient. However, each of you must agree with each of the other jurors that the same item is materially false. Unless you unanimously agree that the government has proved the same item was materially false beyond a reasonable doubt, you must find the defendant not guilty.

Comment

This instruction should be given if the government alleges more than one theory of falsity. In such a case, proof of any one material falsity will support conviction. *See United States v. Broscoe*, 65 F.3d 576, 588 (7th Cir. 1995); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). But the jury must unanimously agree as to at least one material falsity in order to convict. *See United States v. Ryan*, 828 F.2d 1019, 1020 (3d Cir. 1987) (discussing unanimity requirement in conviction for making false statement to federally insured bank under 18 U.S.C. § 1014).