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16.01 *STATUTORY LANGUAGE: 26 U.S.C. § 7207*

Section 7207 of the Internal Revenue Code (Title 26) provides, in pertinent part:

§7207. ***Fraudulent returns, statements, or other documents***

> 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 fined* not more than $10,000 ($50,000 in the case of a corporation), or imprisoned not more than 1 year, or both. [1]
>
> * As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [1] which increased the maximum permissible fines for both felonies and misdemeanors. For the misdemeanor offenses set forth in section 7207, the maximum permissible fine for offenses committed after December 31, 1984, is increased to $100,000 in the case of individuals and $200,000 in the case of corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

16.02 *POLICY LIMITING THE USE OF SECTION 7207*

The Tax Division's policy regarding the use of section 7207 in criminal prosecutions has undergone dramatic changes. For a number of years, prosecutions were not authorized under this section. [2] On September 17, 1976, the Attorney General approved a Tax Division proposal to modify this policy. The modification in policy approved by the Attorney General allowed for the use of section 7207 in a limited number of criminal tax cases, commonly referred to as altered document cases. Such cases routinely involve the submission to the Internal Revenue Service of checks containing amounts which had been altered (usually, increased) after the checks had cleared the bank ("raised cancelled checks"), altered invoices, and similar altered documents as support for overstated deductions.

Section 7207 prosecutions, however, were not authorized where the altered document was a

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

federal tax return. Otherwise stated, prosecution under this section was limited to cases involving the falsification of documents other than federal tax returns.

Furthermore, the use of section 7207 was restricted to those cases where the Tax Division determined that the circumstances did not warrant a felony prosecution. Under this policy, the Tax Division would consider the following factors in determining whether prosecution under the misdemeanor section was justified: (1) the computed tax deficiencies were such as to be considered *de minimis* in relation to the circumstances of the particular case under consideration; and (2) the means and methods utilized in committing the offense were commensurate with charging a misdemeanor rather than a felony.

Recognizing that its policy created obstacles for the government in negotiating with lower-echelon individuals in a wider scheme who expressed a desire to cooperate in ongoing or future investigations in return for leniency, the Tax Division reconsidered its long-standing position that an income tax return could not form the basis of a section 7207 prosecution. On March 21, 1989, the Tax Division issued Directive No. 75 which modified its original position, permitting misdemeanor prosecution under section 7207 where the false document was a federal income tax return under *very limited* circumstances. The guidelines set forth the following provisions:

> The Department of Justice, Tax Division, agrees to consider approving plea agreements with charges brought under 26 U.S.C., Section 7207 for witnesses cooperating in Title 18 and Title 26 grand jury investigations and in no other circumstances under the following conditions:
>
> 1. Approval for Section 7207 charges will not be given in any case in which the Tax Division has previously authorized charges against the subject under Section 7206(1), Section 7201, or a tax (***Klein***) conspiracy.
>
> 2. The Tax Division must be provided with a prosecution statement or letter describing the outlines of the Title 26 and/or Title 18 investigation, the

involvement of the cooperating witness who will plead, and the anticipated cooperation that the witness is expected to provide in the investigation.

3. The subject must have agreed to be a cooperating witness in a Title 18 or Title 26 investigation to which the witness' proposed income tax violation related.

4. In addition to his cooperation in the ongoing criminal investigation and prosecution, the subject must agree to cooperate fully and truthfully with the Internal Revenue Service in any civil audit or adjustment of the tax liability arising out of the circumstances of the criminal case.

5. The subject must be informed that any plea agreement to tax misdemeanors under 26 U.S.C. § 7207 is subject to the approval of the Tax Division, Department of Justice. No such plea agreement is to be executed until authorized by the Tax Division or, if executed, unless it contains a provision that the plea agreement is subject to the approval of the Tax Division.

6. Approval for use of Section 7207 will not be given, hence should not be requested, if the underpayment of taxes resulting from the false statements in the return exceeds $2500 in any of the years. In such cases the plea must be to a tax felony.

7. The IRS must make a referral pursuant to 26 U.S.C. § 6103(h)(3)(A). The United States Attorney must have obtained tax disclosure confirming the filing of the return(s). The Tax Division should be provided with an abbreviated SAR, a computation of the taxes due, the tax return(s) involved, and a copy of the plea agreement or a statement of its terms. Section 7207 approval will not be given if the tax disclosure material suggests that a tax misdemeanor would be

an inappropriate disposition of the case.

8. The subject must sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved in all the years under investigation.

Tax Division Directive No. 75, dated March 21, 1989.

Willfully delivering to the Secretary any false or fraudulent list, return, account, statement, or other document can serve, with appropriate Tax Division approval, as the basis for other charges, including felony charges. For example, a false document can constitute an attempt to evade and defeat a tax in violation of section 7201 of the Code (Title 26). *See* Section 8.04, ***Attempt To Evade Or Defeat***, *supra*. A false document can also be the basis for a felony charge of violating 18 U.S.C. § 1001 even though the document could also be the basis for a section 7207 misdemeanor violation. ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977) (concurring opinion); ***United States v. Fern***, 696 F.2d 1269, 1274 (11th Cir. 1983). In ***Fern***, the defendant's argument that he should have been prosecuted under section 7207 instead of 18 U.S.C. § 1001 was rejected. This argument failed because of the long-established principle that where statutes overlap, the government can select the statute under which it wishes to prosecute. In ***United States v. Batchelder***, 442 U.S. 114, 123-24 (1979), the Court explained that:

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.

[Citations omitted].

16.03 *ELEMENTS*

To establish a violation of section 7207, the following elements must be proved beyond a reasonable doubt:

1. Submitting to the Internal Revenue Service a return, statement, or other document;
2. The return, statement, or other document is false or fraudulent as to a material matter; and,
3. Willfulness.

Sansone v. United States, 380 U.S. 343, 352 (1965).

16.04 *RETURN, STATEMENT, OR OTHER DOCUMENT*

By its express terms, section 7207 applies to "any list, return, account, statement, or other document." Aside from the policy considerations discussed above, there is no limit on the type of document that can be the subject of a violation. The usual situation will involve an Internal Revenue Service audit and the submission to the auditor of altered cancelled checks, altered invoices, or altered receipts and the like, as support for overstated deductions. Unlike a section 7206(1) violation, there is no requirement that the document be signed under penalties of perjury or even that the document be signed. *See* **United States v. Bishop**, 412 U.S. 346, 357 (1973). It is enough to show that the document was delivered or disclosed to the Internal Revenue Service. 26 U.S.C. § 7207; ***Bishop***, 412 U.S. at 358.

16.05 *FALSE OR FRAUDULENT MATERIAL MATTER*

The requirement of establishing that the document in issue is false or fraudulent as to a material matter is an element that is common to sections 7206(1), 7206(2), and 7207 violations -- "does not believe to be true and correct as to every material matter," 26 U.S.C. § 7206(1); "fraudulent or is false as to any material matter," 26 U.S.C. § 7206(2); "fraudulent or to be false as to any material matter," 26 U.S.C. § 7207. Reference should accordingly be made to the discussion of materiality in Sections 12.08 and 13.05, *supra*.

Materiality in a section 7207 case does not depend on whether the false statement has any bearing on the tax liability of the defendant. To the contrary, the Supreme Court has pointed out that conduct can violate section 7207 where the false material statement does not have the effect of reducing the defendant's tax liability. ***Sansone v. United States***, 380 U.S. 343, 352 (1965).

16.06 ***WILLFULNESS***

Section 7207 is a misdemeanor, but the word "willfully" has the same meaning in the "misdemeanor and felony sections of the Revenue Code." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); *see* ***United States v. Bishop***, 412 U.S. 346, 361 n.9 (1973). In both the misdemeanor and felony provisions of the Code, willfully "generally connotes a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192 (1991); ***United States v. Bishop***, 412 U.S. at 360.

For a discussion of willfulness, *see* Sections 8.06 and 12.09, *supra*.

16.07 ***LESSER-INCLUDED OFFENSE CONSIDERATIONS***

The Tax Division, on February 12, 1993, outlined its position with respect to lesser-included offenses in a memorandum to the United States Attorneys by then Acting Assistant Attorney General Bruton. With respect to a section 7201 charge, the Tax Division, relying upon the Court's holdings in ***Sansone v. United States***, 380 U.S. 343 (1965), and ***Schmuck v. United States***, 489 U.S. 705 (1989), stated that a lesser included offense instruction based on section 7207 could be appropriate. Yet, where the defendant has been charged with violating section 7206(1), the Tax Division has unequivocally stated that "*neither* party is entitled to an instruction that willfully delivering or disclosing a false return or other document to the Secretary of the Treasury (section 7207) is a lesser included offense of which the defendant may be convicted." Memorandum from Acting Assistant Attorney General Bruton, dated February 12, 1993, p.3. If the government fears that "there may be a failure of proof as to one of the elements unique to section 7206(1), the prosecutor may wish to consider including charges under both section 7206(1) and section 7207 in the same indictment, ..." Memorandum, at p.3. Therefore, the government should object to a request for a charge that section 7207 is a lesser-included offense of section 7206(1).

16.08 *VENUE*

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." *See* Fed. R. Crim. P. Rule 18.

If a statute does not indicate where Congress considers the place of committing a crime to be, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In section 7207 prosecutions, venue is proper in the judicial district in which the false document is delivered or disclosed to the Internal Revenue Service.

See also the discussion of venue in Section 6.00, *supra*.

16.09 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7207 offenses is six years from the time the false or fraudulent document is delivered or disclosed to the Internal Revenue Service. 26 U.S.C. § 6531(5).

See also the discussion of the statute of limitations in Section 7.00, *supra*.

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1. That portion of section 7207 dealing with information furnished to the Internal Revenue Service in connection with section 6047(b) of the Code (information relating to certain trusts and annuity plans), and section 6104(d) of the Code (public inspection of private foundations' annual reports) is not covered in this manual.

2. As a matter of history, section 7207's statutory predecessor was section 3616(a) of the Internal Revenue Code of 1939. The Supreme Court held, in ***Achilli v. United States***, 353 U.S. 373 (1957), that Congress did not intend section 3616(a) to apply to income tax returns. *See also* ***Berra v. United States***, 351 U.S. 131 (1956). With the adoption of the 1954 Internal Revenue Code, however, Congress placed section 7207 with the other sections of the Code, clearly making the section applicable to income tax violations. In addition, the language in section 3616(a) requiring an intent to evade or defeat a tax was eliminated, thus conforming the language of section 7207 to the language in other misdemeanor provisions. The result was that the Supreme Court reversed its prior holding and found that section 7207 "applies to income tax violations." ***Sansone v. United States***, 380 U.S. 343, 347-49 (1965).