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Tax preparer's willful assistance in preparation of false or fraudulent tax returns under § 7206(2) of Internal Revenue Code of 1954 (26 U.S.C.A. § 7206(2))

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I. Prefatory matters

§ 1[a] Introduction—Scope

This annotation collects and analyzes the federal cases in which a tax preparer has been charged with willfully assisting in the preparation of false or fraudulent tax returns under § 7206(2) of the Internal Revenue Code of 1954 (26 U.S.C.A. § 7206(2)), or its predecessors (§ 3793(b)(1) of the Internal Revenue Code of 1939, and § 1693(b)(1) of the Revenue Act of 1926).

The term "tax preparer," as used in this annotation, means any person who, for compensation, prepares tax returns for any and all persons desiring to avail themselves of such services. Thus, persons who prepare tax returns in connection with some other responsibility—for example, corporation counsel, executors, trustees, and the like—are not considered "preparers" for the purposes of this annotation.

§ 1[b] Introduction—Related matters

Related Annotations are located under the Research References heading of this Annotation.

§ 1[c] Introduction—Text of 26 U.S.C.A. § 7206(2)

Following is the text of 26 U.S.C.A. § 7206(2):

§ 7206. Fraud and False Statements.

> Any person who—
>
> (2) Aid or assistance.— Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5, 000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Preceding § 7206(2) of the Internal Revenue Code of 1954 was § 3793(b) (1) of the Internal Revenue Code of 1939. This section, in turn, was preceded by § 1693(b)(1) of the Revenue Act of 1926. Both of these predecessor statutes had wording substantially similar to that of the present statute.

§ 2[a] Summary and comment—Generally

[Cumulative Supplement]

The revenue laws of the United States have long contained a section making it unlawful to willfully assist in the preparation of false or fraudulent tax returns. The present section (§ 7206(2)) was preceded by § 3793(b)(1) of the Internal Revenue Code

of 1939. This section, in turn, was preceded by § 1693(b)(1) of the Revenue Act of 1926 (for the texts of these sections, see § 1[c], supra).

Although it may seem that tax preparers (see § 1[a], supra, for a definition of preparer as used in this annotation) would have little incentive to assist in the preparation of false or fraudulent returns, it is not at all rare for preparers to violate § 7206(2). It seems obvious that § 7206(2), and its predecessors, were aimed primarily at those who assist taxpayers in understating their tax. However, it is not necessary that the preparer understate the tax due in order to be subject to punishment under this section. It has been held that any misstatement, in the tax return, of a material fact is sufficient to constitute a violation of the section, whether or not such misstatement results in loss to the government (§ 3, infra). The misstatement may even result in the payment to the government of more money than that to which the government is entitled, and may still result in conviction under the statute (§ 3, infra).

To be guilty of violating § 7206(2), the preparer must "willfully" assist in the preparation of a false or fraudulent return. It has been held that any deliberate falsification with full understanding of its materiality, and with the intent that it should be accepted as true, satisfies the section's requirement of willfulness (§ 4, infra).

The fact that § 7206(2) makes it a felony for one to willfully "aid or assist" in the preparation of a false or fraudulent tax return may be confusing. The courts have held that in order for a preparer to be convicted under this section, it is not necessary that the taxpayer be a party to the wrongdoing (§ 5, infra). According to these decisions, a preparer may be guilty of willfully aiding and assisting in the preparation of a false or fraudulent return in violation of § 7206(2), even though he acts alone in preparing the false or fraudulent return, and even though the taxpayer is innocent of any wrongdoing (§ 5, infra). Then too, even though the false information in a return, which forms the basis for a prosecution under § 7206(2), is entirely supplied by the taxpayer, the preparer is guilty of aiding and assisting in the preparation of a false return if he knew that the information was false when he included it in the return (§ 5, infra).

Under § 7206(2), a mere false statement in a return is not sufficient; it must be false as to a "material" matter. There is some disagreement among the federal circuits as to the meaning of "material" as used in § 7206(2) (§ 6, infra). On the one hand, it has been held that in order to be "material" the particular item which has allegedly been falsified must be an item which must be reported in order that the taxpayer can estimate and compute his tax correctly—in short, it must directly influence the tax liability. On the other hand, it has been held that it is not necessary for the allegedly false items in the returns to be material to the computation of the correct tax liability. It has also been held that the fact that the falsity in a tax return does not result in an understatement of the taxes due does not mean that the falsity is not material as required by § 7206(2) (§ 6, infra).

It has been argued that § 7206(2), having been construed as not requiring complicity on the part of the taxpayer (§ 5, infra), enables the taxpayer to escape prosecution for evading income taxes simply by falsely accusing the preparer of making the particular false or fraudulent entries, and this consequently denies the preparer due process of law. This argument has been rejected, however (§ 7, infra). The fact that § 7206(2) provides an incentive for the taxpayer to accuse the preparer of instigating the violations of that section has also been considered (§ 7, infra).

The decisions seem to indicate that insofar as prosecutions of preparers under § 7206(2) are concerned, no defense is available to the preparer simply because irregularities exist in the signatures on the returns. It has been held that the prosecution of a preparer under § 7206(2), on the basis of the taxpayer's testimony, is not affected by the fact that the taxpayer, in signing the return, had certified that the return was true and correct (§ 8, infra). And it has also been held that the fact that the signature on the return is false does not render the return invalid so as to prevent prosecution of the preparer under § 7206(2) (§ 8, infra).

Although there has been some confusion in the past, it is now settled that the 6–year statute of limitations applies to prosecutions under § 7206(2) (§ 9[a], infra), and that the statute begins to run on the original due date on all returns that are regularly filed on or before the statutory deadline, but that for those returns that are filed after the original due date pursuant to a valid extension of the filing date, the period begins to run on the date that the return is actually filed (§ 9[b], infra).

An examination of the cases in which preparers have been prosecuted under § 7206(2) or its predecessors (§§ 10- 13, infra) discloses that the most common offense is that of claiming deductions to which the taxpayer is not entitled, or claiming greater deductions than that to which the taxpayer is entitled (§ 10, infra), although the preparers involved also frequently claimed exemptions to which the taxpayer was not entitled (§ 11, infra).

CUMULATIVE SUPPLEMENT

Cases:

To the extent one comments generally on the tax laws without aiding, assisting, procuring, counseling or advising the preparation or presentation of the alleged false or fraudulent tax documents, he does not violate the Internal Revenue Code. U.S. v. Schulz, 529 F. Supp. 2d 341, 2007-2 U.S. Tax Cas. (CCH) P 50619, 100 A.F.T.R.2d 2007-5538 (N.D. N.Y. 2007), judgment aff'd, 517 F.3d 606, 101 A.F.T.R.2d 2008-937 (2d Cir. 2008).

Section 7602(2), Internal Revenue Code of 1954, 26 U.S.C.A. § 7602(2), makes unlawful all forms of willful assistance in preparing false tax return, and perjury in connection with preparation of federal tax return is chargeable under § 7602(2). United States v Shortt Accountancy Corp. (1986, CA9 Cal) 785 F2d 1448, 86-1 USTC ¶ 9317, 57 AFTR 2d 86-1120, cert den (US) 92 L Ed 2d 715, 106 S Ct 3301.

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[END OF SUPPLEMENT]

§ 2[b] Summary and comment—Practice pointers

Generally speaking, an indictment for willfully aiding in the preparation of a false or fraudulent return or claim has been held sufficient if it pleads the offense substantially in the language of § 7206(2) (Am. Jur. 2d, Federal Tax Enforcement § 131). Nevertheless, counsel for a preparer who has been charged in such terms would be well advised to request a bill of particulars (Rule 7(f), Federal Rules of Criminal Procedure). It has been said that in such cases a bill of particulars is especially desirable in the interest of justice to enable the accused to prepare his defense and to avoid surprise at the trial, and that bills of particulars have been quite freely granted in cases of this nature (Am. Jur. 2d, Federal Tax Enforcement § 132).

However, in a prosecution for willfully aiding in and advising the preparation and presentation of a false or fraudulent income tax return for each of several named persons, it has been held that the defendant, on his motion for a bill of particulars, was not entitled to have the government state whether any of the alleged acts were personally done by the defendant and whether in writing or otherwise, since this amounted to asking for a disclosure of evidence, but that he was entitled to be apprised as to whether the government intended to rely on his personal acts, or that of someone in his employ, as to each taxpayer, since this might be necessary to enable him to defend himself at the trial (United States v Banks (1957, DC NY) 20 FRD 159). It has also been held that if the government is not going to claim fraudulent deductions in an income tax evasion case, it can be required to state so in a bill of particulars (United States v Brown (1959, DC NY) 179 F Supp 893), and there seems to be no reason why the same should not be true of a case involving § 7206(2).

The cases included in this annotation reveal that it is not uncommon for preparers, before retaining counsel, to turn over their records or make damaging admissions to investigating agents of the Internal Revenue Service (IRS), thereby supplying the government with all of the evidence that it needs to secure a conviction. For a discussion of some possible measures for redeeming the situation after the client has voluntarily provided the government with the evidence that it needs to secure a conviction, see Defending Federal Tax Evasion Cases, 13 Am. Jur. Trials 1 §§ 32 et seq.

II. General considerations

§ 3. Pecuniary loss to government as net essential to violation of statute

[Cumulative Supplement]

It has been held that any misstatement of a material fact is sufficient to constitute a violation of 26 U.S.C.A. § 7206(2), whether or not such misstatement results in loss to the government.

And in Edwards v United States (1967, CA9 Or) 375 F2d 862 (disapproved on other grounds United States v Bishop 412 US 346, 36 L Ed 941, 93 S Ct 2008, on remand (CA9 Cal) 485 F2d 248, cert den 417 US 931, 41 L Ed 234, 94 S Ct 2642), it was said that the offense to which § 7206(2) is directed is not evasion or defeat of tax, but rather the falsification and the counseling and procuring of such deception as to any material matter.

Thus, in United States v Potstada (1962, DC Cal) 206 F Supp 792, it was said that the cases dealing with § 7206(2) and its predecessor 26 U.S.C.A. § 3793(b)(1) seem to hold that it is not necessary to allege any pecuniary loss to the United States as the result of the false statement, and that it is sufficient to allege and prove obstruction, delay, or impairment of government functions. The court also indicated its agreement with the statement that the conduct that Congress intended to prevent was the willful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible, and that the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.

CUMULATIVE SUPPLEMENT

Cases:

Scope of statute proscribing knowingly aiding and assisting preparation of false tax returns encompasses individuals who help to promote tax avoidance scheme. 26 U.S.C.A. § 7206(2). U.S. v. Vallone, 698 F.3d 416, 2012-2 U.S. Tax Cas. (CCH) P 50593, 110 A.F.T.R.2d 2012-6110 (7th Cir. 2012).

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[END OF SUPPLEMENT]

§ 4. Meaning of specific terms—"willfully"

[Cumulative Supplement]

It has been held that "willfully," as used in § 7206(2), includes any deliberate falsification with full understanding of its materiality and with intent that it be accepted as true.

In affirming the conviction of an accountant under § 7602(2) for claiming false deductions and padding legitimate deductions in his clients' tax returns, the court in United States v Conlin (1977, CA2 NY) 551 F2d 534, cert den 434 US 831, 54 L Ed 2d 91, 98 S Ct 114, held that the trial court had "adequately informed the jury of the quality of evidence needed to convict" when it instructed the jury that the accountant could not be convicted unless he acted with criminal or evil intent, and that his conduct was not willful if he acted with negligence or carelessness, or mistake, or innocently, or even with gross negligence or gross carelessness. That the accountant was more than simply careless was indicated by both the frequency and the similarity of his mistakes, the court said.

A preparer who "willfully" aids in the preparation of a false or fraudulent claim in a tax return does so with knowledge that the claim is false or fraudulent, according to the court in Newton v United States (1947, CA4 Va) 162 F2d 795, cert den 333 US 848, 92 L Ed 1130, 68 S Ct 650, wherein it was held that an indictment for violating 26 U.S.C.A. § 3793(b)(1), now 26 U.S.C.A. § 7206(2), that charged that the defendant "unlawfully and feloniously did willfully aid in.… the preparation.… of a false and fraudulent claim," was utterly inconsistent with a lack of guilty knowledge on the defendant's part.

Where the evidence showed that an accountant who prepared tax returns for clients had expensed items that should have been capitalized and depreciated, and for this the accountant was charged with aiding and abetting taxpayers in filing false or fraudulent returns in violation of § 7206(2), it was held in Hull v United States (1966, CA5 Tex) 356 F2d 919 (disapproved on other grounds United States v Habig 390 US 222, 19 L Ed 1055, 88 S Ct 926). that the evidence was insufficient to prove a willful violation, that at best the evidence showed merely an error in judgment, and that therefore the government failed in its burden of proof in sustaining a verdict of guilty on those particular charges. The opinion contained no further discussion on this point.

In United States v Cliff (1959, DC Fla) 60-1 USTC ¶ 9180, affd (CA5 Fla) 271 F2d 126, cert den 361 US 963, 4 L Ed 2d 544, 80 S Ct 591, in which a preparer was convicted of violating § 3793(b)(1) of the 1939 Internal Revenue Code (now § 7206(2)), the court, in instructing the jury, said that "willfully," as used in the section, meant intentional, knowing, or voluntary, as distinguished from an accidental act or an act occasioned by neglect or carelessness, and that it generally meant an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely.

According to the court in Edwards v United States (1967, CA9 Or) 375 F2d 862 (disapproved on other grounds United States v Bishop 412 US 346, 36 L Ed 941, 93 S Ct 2008, on remand (CA9 Cal) 485 F2d 248, cert den 417 US 931, 41 L Ed 234, 94 S Ct 2642), the willfulness required under § 7206(2) does not necessarily include an evil intent. However, in dealing with a related problem, the United States Supreme Court in United States v Bishop (1973) 412 US 346, 36 L Ed 2d 941, 93 S Ct 2008, on remand (CA9 Cal) 485 F2d 248, cert den 417 US 931, 41 L Ed 2d 234, 94 S Ct 2642, made it clear that "willfully" as used in § 7206, requires a "bad purpose" or "evil motive."

Similarly, the Court of Appeals for the Ninth Circuit, in United States v Abbas (1974, CA9 Cal) 504 F2d 123, cert den 421 US 988, 44 L Ed 2d 477, 95 S Ct 1990, held that the trial judge was not required to include the term "bad purpose" or "evil motive" when instructing on "willfulness. " Rejecting the defendant's contention that the trial court had improperly instructed the jury in defining "willfully," the court said that while the use of such terms is often helpful, all that is required are instructions which communicate the proper notion of specific intent in understandable terms. Thus, the court affirmed the conviction, under § 7206(2), of a tax preparer for willfully assisting in the preparation of false federal income tax returns for three different clients.

"Willfulness," as used in 26 U.S.C.A. § 7206(2) involves more than a mere overstatement of claimed deductions in the preparation of an income tax return, but it may be established by proof of facts and circumstances from which an inference can be reasonably drawn that the act was willful and intentional, according to the court in United States v Villa (1974, CA10 Colo) 75-2 USTC ¶ 9523, in which the court sustained the conviction of a tax preparer under this section, where the evidence showed only that the taxpayer had given the preparer certain stated figures for particular deductions, and the preparer had increased these amounts on the return, taking considerably larger deductions than the taxpayer had given him. The court rejected the defendant's contention that the record was wholly lacking in evidence indicating that he intended to prepare a fraudulent return, or in proof that in preparing the return he acted with willful intent. Noting that the word "willfulness" often denoted an act which was intentional, or knowing, or voluntary, as distinguished from accidental, the court pointed out that the amounts inserted in the tax return did not result from adjustments of the books, but apparently were determined by the preparer without any basis.

CUMULATIVE SUPPLEMENT

Cases:

See, United States v Sternstein (CA2 NY) 596 F2d 528, § 7.

Statute prohibiting willfully aiding and assisting in the preparation of false tax returns imputes criminal liability to a tax preparer who prepares a false return, regardless of whether the taxpayer knows of or consents to the falsity. 26 U.S.C.A. § 7206(2). U.S. v. Huff, 389 Fed. Appx. 299, 2010-2 U.S. Tax Cas. (CCH) P 50531, 106 A.F.T.R.2d 2010-5461 (4th Cir. 2010).

In finding defendant guilty of aiding and assisting in preparation of false tax returns, jury was required to find that defendant had acted willfully. 26 U.S.C.A. § 7206(2). U.S. v. Cockett, 330 F.3d 706, 91 A.F.T.R.2d 2003-2439, 2003 FED App. 0166P (6th Cir. 2003).

In prosecution under § 7206(2) of Internal Revenue Code of 1954, 26 U.S.C.A. § 7206(2), for willfully aiding and abetting in preparation of false income tax returns, trial court properly instructed jury that evidence regarding defendant's mental state could be considered only for limited purpose of determining whether defendant had requisite specific intent, since defendant had not asserted insanity as complete defense, but had simply attempted to show inability to form specific intent, essential ingredient of crimes charged. United States v Erickson (1982, CA10 Okla) 676 F2d 408, 82-1 USTC ¶ 9175, cert den 459 US 853, 74 L Ed 2d 103, 103 S Ct 118.

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[END OF SUPPLEMENT]

§ 5. "Aids or assists"

[Cumulative Supplement]

It has been held in the following cases that the term "aids and assists" as used in § 7206(2) does not require that the taxpayer be a party to the wrongdoing, and that a tax preparer may be guilty of aiding and assisting in the preparation of a false or fraudulent tax return in violation of § 7206(2) even though he acts alone in preparing the false or fraudulent return.

Second Circuit
United States v Kelley (1939, CA2 NY) 105 F2d 912
Fifth Circuit
United States v Cliff (1959, DC Fla) 60-1 USTC ¶ 9180, affd (CA5 Fla) 271 F2d 126, cert den 361 US 963, 4 L Ed 2d 544, 80 S Ct 591
Eighth Circuit
United States v Warner (1970, CA8 Mo) 428 F2d 730, cert den 400 US 930, 27 L Ed 2d 191, 91 S Ct 194
Ninth Circuit
Cosgrove v United States (1954, CA9 Cal) 224 F2d 146
Thus, the crime of assisting in the preparation of a fraudulent tax return as proscribed by the predecessor of 26 U.S.C.A. § 7206(2) was held in United States v Kelley (1939, CA2 NY) 105 F2d 912, not to presuppose that the taxpayer himself was a party to the fraud. It was further held that a preparer could be convicted of assisting in the preparation and presentation of fraudulent income taxes in violation of the section even though the taxpayer was not guilty of any fraud. In preparing the tax returns for a client, and for the estate of another client, three attorneys took false deductions for depreciation of equipment, falsely wrote off a particular claim as a bad debt, in addition to other acts of fraud in connection with the returns for the years 1929 to 1932 inclusive. Affirming the attorneys' convictions, the court said that the clients' guilt was quite immaterial in the prosecution at hand, because the statute expressly provided that the assistance should be a crime "whether or not such falsity or fraud is with the knowledge or consent of the person authorized.… to present such return." The court explained that the purpose was very plainly to reach the advisors of taxpayers who prepared the returns, and who might wish to keep down the taxes because of the credit that they would get with their principals, who might be altogether innocent.

And where a tax preparer was convicted of violating § 3793(b)(1) of the 1939 Internal Revenue Code (now § 7206(2)), in United States v Cliff (1959, DC Fla) 60-1 USTC ¶ 9180, affd (CA5 Fla) 271 F2d 126, cert den 361 US 963, 4 L Ed 2d 544, 80 S Ct 591, the court instructed the jury that it was immaterial to the guilt or innocence of the defendant whether he acted with the connivance, the consent, or the knowledge, even, of the particular taxpayers for whom he prepared the false and fraudulent returns.

♦

It has been held that even though the false information is supplied by the taxpayer, a tax preparer is guilty of aiding and assisting in the preparation of a false or fraudulent tax return in violation of § 7206(2) if the preparer knew that the information was false when he included it in the return.

Such was the holding in Driscoll v United States (1967, CA1 Mass) 376 F2d 254, where on appeal from a conviction for violations of § 7206(2), the tax preparer complained, of the court's refusal to instruct that a preparer was not responsible for the truth and accuracy of the information furnished by the taxpayer. Rejecting this contention and affirming the defendant's conviction, the court said that if the proposed instruction meant that a tax preparer could allow submission of statements known to him to be false if they were supplied by the taxpayer, the proposed instruction was wholly incorrect, and that if it merely meant that the burden was upon the government to prove that the preparer knew that the returns were false, the court fully gave such an instruction.

CUMULATIVE SUPPLEMENT

Cases:

Tax Code provision setting forth misdemeanor offense for willful furnishing of a false W–2 to an employee did not preclude conviction under separate provision setting forth felony offense for aiding and assisting others in preparation of false individual income tax returns based on conduct that included the provision of false W–2 forms, nor did it preclude introduction of evidence as to furnishing of false W–2 forms in prosecution for that felony offense; relevant inquiry under felony statute is whether the defendant engages in some affirmative participation which at least encourages the employee to prepare or present a false return. 26 U.S.C.A. §§ 7204, 7206. U.S. v. Gambone, 314 F.3d 163, 91 A.F.T.R.2d 2003-330 (3d Cir. 2003).

Reach of 26 U.S.C.A. § 7206(2), making it unlawful for tax preparer to willfully assist in preparation of false or fraudulent tax return, is not limited to actual preparers of allegedly false and fraudulent return. United States v Hurwitz (1983, SD W Va) 573 F Supp 547.

Conviction for 17 counts of aiding or assisting in filing of fraudulent federal tax returns was supported by testimony by employees of Internal Revenue Service (IRS) and taxpayers for whom defendant prepared fraudulent returns. 26 U.S.C.A. § 7206(2). U.S. v. Pruitt, 119 Fed. Appx. 629 (5th Cir. 2004), petition for cert. filed (U.S. Jan. 25, 2005).

See United States v Bryan (1990, CA5 Tex) 896 F2d 68, 90-1 USTC ¶ 50158, § 13[a].

Liability for knowingly aiding and assisting the preparation of false tax returns extends to all participants in a scheme which results in the filing of a false return, whether or not those parties actually prepare return. 26 U.S.C.A. § 7206(2). U.S. v. Vallone, 698 F.3d 416, 2012-2 U.S. Tax Cas. (CCH) P 50593, 110 A.F.T.R.2d 2012-6110 (7th Cir. 2012).

26 U.S.C.A. § 7206 is designed to reach all those who knowingly participate in providing information that results in materially fraudulent tax return, whether or not taxpayer is aware of false statements; scope extends to all parties of scheme which results in

filing of false return whether or not those parties actually prepare it; indictment charging defendants with supplying documents which they knew to contain materially false matters and which they knew would be used in preparation of income tax return, contains all essential elements to charge offense of aiding or assisting preparation of false return. United States v Siegel (ND Ill) 472 F Supp 440, 79-2 USTC ¶ 9698, 44 AFTR 2d 79-5955.

Statute barring a person from counseling either the preparation or the presentation of a false return cannot be violated if a false return is never prepared. 26 U.S.C.A. § 7206(2). U.S. v. McLain, 646 F.3d 599, 2011-2 U.S. Tax Cas. (CCH) P 50518, 108 A.F.T.R.2d 2011-5393 (8th Cir. 2011).

Scope of the federal statutory provision criminalizing the aiding or assisting of a false tax return under internal revenue laws extends to all participants of a scheme that results in the filing of a false return, whether or not those parties actually prepare it. 26 U.S.C.A. § 7206(2). Brailey v. Com., 55 Va. App. 435, 686 S.E.2d 546 (2009).

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[END OF SUPPLEMENT]

§ 6. "Material"

[Cumulative Supplement]

There is some disagreement among the Federal Circuits as to the meaning of "material" as used in § 7206(2). The court in the following case held that in order to be "material" the particular item which has allegedly been falsified must be an item which must be reported in order that the taxpayer can estimate and compute his tax correctly.

Whether or not a particular falsified matter in an income tax return is "material" as required by § 7206(2) depends upon whether the particular item is an item which must be reported in order that the taxpayer can estimate and compute his tax correctly, according to the court in United States v Warden (1976, CA7 Ill) 545 F2d 32, 43 ALR Fed 119, wherein it was held that since deductions invariably affect the taxpayer's liability, they are material as the term is used in § 7206(2). The defendant, a certified public accountant who prepared tax returns for clients, and who was convicted under § 7206(2) for inflating or totally fabricating the figures for various expenses used for deductions in the returns of his clients, contended on appeal that his Sixth Amendment right to trial by jury was violated when the trial judge informed the jury that the deductions in question were material matters as that term was used in the indictment. The defendant argued that this took the entire issue of materiality, which the trial judge described as an essential element of the offense, away from the jury. Rejecting this contention and affirming the judgment, the court said that since deductions are subtracted from gross income or adjusted gross income to reduce the ultimate tax liability, they are material to the contents of the return, and that when the trial judge instructed the jury that the deductions were material matters as that term was used in the indictment, he did no more than state the obvious facts that deductions affect the computation of tax liability. The jury was required to find that the deductions, which invariably affect the ultimate determination of tax liability, were substantially overstated, the court added.

However, in United States v Abbas (1974, CA9 Cal) 504 F2d 123, cert den 421 US 988, 44 L Ed 2d 477, 95 S Ct 1990, where a tax preparer had been convicted of willfully assisting in the preparation of false federal income tax returns for three different clients in violation of 26 U.S.C.A. § 7206(2), it was held that it was not necessary for the items in the returns which were alleged to be false, to be material to the computation of the correct tax liability, to support a conviction under § 7206(2). In rejecting the defendant's argument that in order to support a conviction it was necessary for those items to be material to the computation of the correct tax liability, the court merely said that Edwards v United States (1967, CA9 Or) 375 F2d 862 (disapproved on other grounds United States v Bishop 412 US 346, 36 L Ed 941, 93 S Ct 2008, on remand (CA9 Cal) 485 F2d 248, cert den 417 US 931, 41 L Ed 234, 94 S Ct 2642), supra § 4, "belied" that contention.

♦

In the following case it was held that the fact that the falsity in a tax return does not result in an understatement of taxes due does not mean that the falsity is not material as required by § 7206(2).

The material element of falsity or fraud in a tax return under § 7206(2) is not an understatement of the tax due, according to the court in United States v Potstada (1962, DC Cal) 206 F Supp 792, in which it was held that pecuniary loss as the result of a false statement is not necessary under § 7206(2) and that it is sufficient if the false statement results in obstruction, delay, or impairment of governmental functions. The defendant, a preparer, was charged, inter alia, with willfully and knowingly aiding and procuring the preparation and presentation of a gift tax return for a certain named taxpayer which represented that the taxpayer made certain cash gifts to the preparer and four members of his family, when in fact the preparer knew that such gifts were not made. The defendant moved to dismiss the count, contending that the government was in no way the victim of any fraud, and that despite the fact that there was allegedly a false statement of a material fact, there was actually no materiality in the alleged falsity, since there was no understatement of the tax due. Rejecting this contention and denying the motion, the court said that in any event materiality is essentially a question of fact, and that whether the false gift return was for the purpose of frustrating or obstructing the processes of government as it related to internal revenue functions was to be determined from the evidence, and not on a pretrial motion to dismiss, if the indictment sufficiently alleged facts from which frustration or obstruction could be inferred.

CUMULATIVE SUPPLEMENT

Cases:

The elements of a violation of statute prohibiting aiding and assisting in the preparation of a false tax return include that the document in question was false as to a material matter and that the defendant acted willfully. 26 U.S.C.A. § 7206(2). Kawashima v. Holder, 132 S. Ct. 1166 (2012).

Trial court's error in refusing to submit materiality issue to jury regarding tax fraud offenses was harmless, where no jury could reasonably have found that defendant's failure to report substantial amounts of income on his tax returns was not a material matter. 18 U.S.C.A. § 7206(1); Fed. Rules Cr. Proc. Rule 52(a), 18 U.S.C.A. Neder v. U.S., 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35, 99-1 U.S. Tax Cas. (CCH) ¶ 50586, 83 A.F.T.R.2d 99-2668 (1999).

There was sufficient evidence that defendant made materially false statements on individual income tax returns he prepared to support his conviction for 26 counts of willfully assisting in preparation of false tax returns; Schedule Cs on defendant's clients tax returns were necessary for Internal Revenue Service (IRS) to verify their income, and, thus, inaccurate information on those Schedule Cs was material. 26 U.S.C.A. § 7206(2). United States v. Ramseur, 793 Fed. Appx. 245, 124 A.F.T.R.2d 2019-6560 (5th Cir. 2019).

Conviction for aiding in preparation of false tax returns in violation of 26 U.S.C.A. § 7206(2) would be affirmed, despite defendant's contention, among others, that his willful acts were not in connection with material matters, since false tax returns had potential to obstruct or inhibit functions that Internal Revenue Service is required by law to perform. United States v Holecek (1984, CA8 Neb) 739 F2d 331, 84-2 USTC ¶ 9638, cert den Holecek v United States (1985, US) 84 L Ed 2d 343, 105 S Ct 1200.

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[END OF SUPPLEMENT]

§ 7. Due process of law

[Cumulative Supplement]

It has been argued that § 7206(2), having been construed as not requiring complicity on the part of the taxpayer (§ 5, supra), enables the taxpayer to escape prosecution for evading income taxes simply by falsely accusing the tax preparer of making the particular false or fraudulent entries, and that this consequently deprives the preparer of due process of law. The court in the following case has rejected this argument.

The fact that a taxpayer may escape prosecution for evading income taxes by falsely accusing the preparer of making the particular fraudulent entries on the return was held in United States v Jackson (1971, CA7 Ill) 452 F2d 144, not to constitute a denial of due process to a tax preparer convicted, on the testimony of the taxpayer, of violating 26 U.S.C.A. § 7206(2). The taxpayers had testified that certain false deductions and exemptions in excess of the taxpayers' proper entitlements were entered on the returns by the defendant preparer without the knowledge or approval of the taxpayers. The defendant preparer argued that he was denied due process because his prosecution under § 7206(2) depended upon the testimony of a taxpayer who could escape criminal liability by maintaining lack of knowledge of the false claims in the tax returns. Rejecting this argument, the court said that the obvious purpose of the statute was to make it a crime for one to knowingly assist another in the preparation and presentation of a false and fraudulent income tax return, and that the innocent or guilty knowledge of the taxpayer was irrelevant to a prosecution under the statute.

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The fact that § 7206(2) provides an incentive for the taxpayer to accuse the preparer of instigating the violations of that section has also been considered in the courts. The following case examines this issue, concluding that such treatment of the taxpayer does not affect the validity of the tax preparer's conviction.

In Strangway v United States (1963, CA9 Cal) 312 F2d 283, cert den 373 US 903, 10 L Ed 2d 199, 83 S Ct 1291, it was held that the fact that a taxpayer who caused an incorrect return to be filed in co–operation with another could escape the penalty under § 7206(2) by revealing the fraud was, at the most, a policy question which, however resolved, could not affect the validity of the tax preparer's conviction under that section. On the testimony of the taxpayer, the defendant had been convicted of preparing a false and fraudulent return in violation of § 7206(2). On appeal he contended that to uphold his conviction on the testimony of the taxpayer would make it possible for any taxpayer in such a situation to escape the penalty by revealing the fraud. Rejecting this contention and affirming the defendant's conviction, the court said that whether, as a result of the present prosecution, the taxpayer who had testified against the preparer, or any other taxpayer, would escape prosecution was not revealed by the record, and that the statute under which the preparer was prosecuted made it explicit that what would otherwise be a violation thereof was not affected by the fact that the taxpayer may have known and consented to the falsity or fraud which was effectuated.

CUMULATIVE SUPPLEMENT

Cases:

In appeal of conviction for assisting in preparation of false or fraudulent income tax return in which tax preparer argued that he had been deprived of due process of law by trial court's refusal to admit into evidence IRS Special Agent's report which contained information that many returns prepared by defendant on flat, rather than contingent, fee were not fraudulent, case would be remanded for trial trial judge to determine whether report reveals that substantial number of returns show no error, and if so to make finding to that effect and order new trial in which report will be admissible. United States v Sternstein (CA2 NY) 596 F2d 528.

[Top of Section]

[END OF SUPPLEMENT]

§ 8. Signature on return

[Cumulative Supplement]

The fact that the taxpayer, in signing the return, has certified that the return is true and correct, does not affect prosecution of the preparer under § 7206(2), on the basis of the taxpayer's testimony, according to the court in the following case.

Where a tax preparer was convicted under § 7206(2) on the testimony of the taxpayer, who had signed the return declaring that the return was true and correct, it was held in Strangway v United States (1963, CA9 Cal) 312 F2d 283, cert den 373 US 903, 10 L Ed 2d 199, 83 S Ct 1291, that it was immaterial to the preparer's conviction that the taxpayer's signature on the return constituted a declaration under penalty of perjury, and that the taxpayer's later testimony might have laid a foundation for a perjury prosecution against her based on the untruthful return. Affirming the preparer's conviction, the court said that the jury knew that the taxpayer's testimony concerning her allowable income tax deductions differed from the facts concerning such deductions as set out in her prior return, that it was for the jury to determine whether she told the truth in her return or at the trial, and that the jury accepted her trial testimony as the truth and this finding was binding upon the court.

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And under the ruling in the following case, the fact that the signature on the return is false does not render the return invalid so as to prevent prosecution of the preparer under § 7206(2).

The fact that an income tax return prepared by a preparer was signed by the preparer for the client without the client's express authority, or the fact that a client signed the spouse's name to a return which the preparer had prepared, was held in United States v Wolf (1952, DC Pa) 102 F Supp 824, not to render the return invalid so as to prevent prosecution of the preparer for violating § 26 U.S.C.A. § 3793(b)(1)(now § 7206(2)). The preparer had been convicted on 32 counts charging him with violating the section in preparing returns for clients. On a motion for a new trial he contended that he should have been granted a judgment of acquittal on counts where it appeared from the evidence that the taxpayer, personally, had not signed the return, but that someone else had signed it on his behalf. Rejecting this contention and denying the motion, the court said that the returns were in the custody of the Collector of Internal Revenue and were treated by the government and the taxpayers as the returns of the taxpayers involved, that furthermore there was evidence, as to most of the returns, that oral authority to sign was given, and that in any event, whether prior specific authority was shown was unimportant in view of the fact that there was evidence that the taxpayers treated the returns as their returns, and there was no evidence that they ever intended otherwise. Certainly, there was sufficient evidence of ratification of authority to sign if not sufficient evidence of prior authority to do so, the court added.

CUMULATIVE SUPPLEMENT

Cases:

Tax returns on which taxpayer added phrase "without prejudice" near his signature on the jurats were valid tax returns, as required in defendant tax preparer's prosecution for aiding and assisting in the preparation of false tax returns, where the Internal Revenue Service (IRS) did not reject the returns based on the additional language; IRS was entitled to construe ambiguous alterations of the jurat against the taxpayer. 18 U.S.C.A. § 2; 26 U.S.C.A. § 7206(2). U.S. v. Davis, 603 F.3d 303, 23 A.D. Cas. (BNA) 24, 2010-1 U.S. Tax Cas. (CCH) P 50345, 105 A.F.T.R.2d 2010-1854 (5th Cir. 2010).

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[END OF SUPPLEMENT]

§ 9[a] Statute of limitations—Which statute governs

[Cumulative Supplement]

According to the courts in the following cases, prosecution under § 7206(2) is governed by a 6–year statute of limitations.

Sup Ct
United States v Habig (1968) 390 US 222, 19 L Ed 2d 1055, 88 S Ct 926
Second Circuit
United States v Jurzykowski (1957, DC NY) 159 F Supp 7
Third Circuit
United States v Zavin (1961, DC NJ) 190 F Supp 393
Fifth Circuit
United States v Cliff (1959, DC Fla) 60-1 USTC ¶ 9180, affd (CA5 Fla) 271 F2d 126, cert den 361 US 963, 4 L Ed 2d 544, 80 S Ct 591
Thus, a preparer's motion to dismiss his indictment for assisting in the preparation of false returns for clients in violation of 26 U.S.C.A. § 3793(b)(1)(now § 7206(2)) was granted in United States v Jurzykowski (1957, DC NY) 159 F Supp 7, on the ground that the 6–year statute of limitations had run. The defendant had prepared the returns in the federal judicial district of his residence, and had filed the returns in a second federal judicial district of that same state where he was indicted for the alleged violations. In granting the dismissal the court said that in order for the statute of limitations on the violations in question to be tolled, it would have been necessary for the preparer to commit some affirmative act, and that since he never resided in the federal judicial district in which he was indicted, and was never absent from his place of abode during the 6 1/2 years that elapsed from the time the returns in question were filed and the time he was indicted, the 6–year statute of limitations had run.

In United States v Zavin (1961, DC NJ) 190 F Supp 393, it was held that under 26 U.S.C.A. § 6531(3), the 6–year limitation applies to the prosecution of a tax preparer under 26 U.S.C.A. § 7206(2). The defendant had been indicted for 30 violations of § 7206(2), for claiming depreciation deductions to which the taxpayers were not entitled. He moved to dismiss the indictment on the ground that the prosecution was barred by a 3–year statute of limitations. He contended that the charges against him did not fall within § 6531(3), because subsection (3) did not contain the phrase "as to any material matter," relating to false or fraudulent returns, that was contained in § 7206(2). Denying the motion, the court said that § 6531(3) prescribed a 6–year limitation for the prosecution of the offense of assisting in the preparation of a false return, that a return which is false as to any material matter is a false return, and that therefore the 6–year limitation applies to the offense of assisting in the preparation of a return which is false as to any material matter.

CUMULATIVE SUPPLEMENT

Cases:

Six-year statute of limitations applied to charge of aiding and assisting in filing false tax returns. 26 U.S.C.A. § 7206(2). U.S. v. Christensen, 344 F. Supp. 2d 1294 (D. Utah 2004).

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[END OF SUPPLEMENT]

§ 9[b] Statute of limitations—When does limitation period begin

According to the United States Supreme Court in the following case, the 6–year limitations period on prosecutions under § 7206(2) begins to run for those who timely file their returns, on the original due date for filing returns, but for those taxpayers who receive an extension for filing returns beyond this due date, it begins to run on the date that the return is actually filed.

Where a District Court dismissed the count of an indictment charging the defendant with aiding in the preparation and presentation of a false return in violation of 26 U.S.C.A. § 7206(2), on the ground that the 6–year statute of limitations, 26 U.S.C.A. § 6531, barred prosecution under those counts because the limitations period began to run on the original due date of the return, and not on the date the return was actually filed (which was a later date, the taxpayer having received an extension of time for filing), the United States Supreme Court in United States v Habig (1968) 390 US 222, 19 L Ed 2d 1055, 88 S Ct 926, reversed and remanded the cause, holding that where a tax return is filed after the prescribed filing date pursuant to a properly granted extension of time, the 6–year statute of limitations begins to run on the date the return is actually filed. On appeal from the dismissal, the government argued that the requirement that the limitations period begin on the original due date of the return was necessarily based upon the "surprising assertion" that Congress intended the limitations period to begin to run before the defendant committed the acts upon which the crime was based. The Supreme Court agreed, explaining that only if the return is filed before the due date does the 6–year limitations period begin to run on the due date. This was done to give the government the administrative assistance, for purposes of its criminal tax investigations, of a uniform expiration date for most taxpayers, despite variations in the dates of actual filing, the court said.

III. Application to particular false or fraudulent returns

§ 10. Claiming false or excessive deductions

[Cumulative Supplement]

In the following cases where tax preparers were charged with claiming false or excessive deductions in their clients' tax returns, the courts upheld the convictions or indictments of the preparers for willfully assisting in the preparation of false or fraudulent tax returns in violation of § 7206(2) or its predecessor statutes.

Second Circuit
United States v Kelley (1939, CA2 NY) 105 F2d 912
United States v Herskovitz (1954, CA2 NY) 209 F2d 881
United States v Egenberg (1971, CA2 NY) 441 F2d 441, cert den 404 US 994, 30 L Ed 2d 546, 92 S Ct 530
United States v Conlin (1977, CA2 NY) 77-1 USTC ¶ 9291 551 F2d 534, cert den 434 US 831, 54 L Ed 91, 98 S Ct 114
United States v Banks (1957, DC NY) 20 FRD 159
Third Circuit
United States v Zavin (1961, DC NJ) 190 F Supp 393
Fourth Circuit
Newton v United States (1947, CA4 Va) 162 F2d 795, cert den 333 US 848, 92 L Ed 1130, 68 S Ct 650
Fifth Circuit
Hull v United States (1966, CA5 Tex) 356 F2d 919 (disapproved on other grounds United States v Habig 390 US 222, 19 L Ed 1055, 88 S Ct 926)
United States v Dobbs (1975, CA5 Ga) 506 F2d 445
United States v Cliff (1959, DC Fla) 60-1 USTC ¶ 9180, affd (CA5 Fla) 271 F2d 126, cert den 361 US 963, 4 L Ed 2d 544, 80 S Ct 591
Sixth Circuit

United States v McKee (1972, CA6 Mich) 456 F2d 1049, cert den 407 US 910, 32 L Ed 2d 684, 92 S Ct 2436, reh den 409 US 899, 34 L Ed 2d 158, 93 S Ct 102 and reh den 409 US 1019, 34 L Ed 2d 311, 93 S Ct 429 and reh den 412 US 914, 36 L Ed 2d 978, 93 S Ct 2286 and reh den 414 US 989, 38 L Ed 2d 229, 94 S Ct 261

Seventh Circuit

United States v Blount (1964, CA7 Ill) 339 F2d 331

United States v Jackson (1971, CA7 Ill) 452 F2d 144

United States v Warden (1976, CA7 Ill) 545 F2d 32, 43 ALR Fed 119

Eighth Circuit

Amos v United States (1974, CA8 Mo) 496 F2d 1269, cert den 419 US 896, 42 L Ed 2d 140, 95 S Ct 174

Ninth Circuit

Strangway v United States (1963, CA9 Cal) 312 F2d 283, cert den 373 US 903, 10 L Ed 2d 199, 83 S Ct 1291

United States v Miller (1976, CA9 Cal) 529 F2d 1125, cert den 426 US 924, 49 L Ed 2d 379, 96 S Ct 2634

Tenth Circuit

United States v Villa (1974, CA10 Colo) 75-2 USTC ¶ 9523

Where three attorneys who prepared tax returns for the Ringling Brothers–Barnum and Bailey Combined Shows, and for the estate of Charles Ringling, another client, were convicted under the predecessor to 26 U.S.C.A. § 7206(2), for taking false deductions for depreciation of equipment, falsely writing off a particular claim as a bad debt, and for other acts of fraud in connection with the returns for the years 1929 to 1932 inclusive, the Court of Appeals affirmed the convictions in United States v Kelley (1939, CA2 NY) 105 F2d 912, holding that there was sufficient evidence to support the verdict. In rejecting the defendants' contention that the crime of assisting in the preparation of a fraudulent tax return presupposed that the taxpayer himself was a party to the fraud, the court said that the clients' guilt was quite immaterial in the prosecution at hand, because the statute expressly provided that the assistance should be a crime "whether or not such falsity or fraud is with the knowledge or consent of the person authorized.… to present such return." The purpose was very plainly to reach the advisers of taxpayers who prepared the returns, and who might wish to keep down the taxes because of the credit that they would get with their principals, who might be altogether innocent, the court explained.

The convictions of two tax preparers under a predecessor to § 7206(2) for willfully aiding, assisting in, and counseling the preparation of false and fraudulent income tax returns were affirmed in United States v Herskovitz (1954, CA2 NY) 209 F2d 881, where the tax preparers, accountants who operated what the court called a "refund factory," had padded deductions on the returns, so that every return, when filed, requested a refund from the government. The court said that the fraud practiced by the defendant tax preparers was established beyond cavil.

The conviction under 26 U.S.C.A. § 7206(2) of a certified public accountant who prepared tax returns for a number of European musicians and singers was upheld in United States v Egenberg (1971, CA2 NY) 441 F2d 441, cert den 404 US 994, 30 L Ed 2d 546, 92 S Ct 530, where the accountant "grossly inflated" his clients' deductions, and falsely stated on the returns of some clients that the client did not intend to return to the United States before the end of that year, thereby securing an immediate refund of excess taxes withheld.

Where a tax preparer had been indicted on 21 counts for violating § 3793(b)(1) (now § 7206(2)), and the preparer moved for a bill of particulars, it was held in United States v Banks (1957, DC NY) 20 FRD 159, that the defendant was entitled to be apprised (1) as to whether it was his personal act as to each taxpayer, or one of his employees (and if so whom) that the government expected to rely upon; and (2) as to whether the defendant was being charged with claiming deductions that were wholly fictitious, or with deductions that were demonstrable but not properly deductible, including a computation of what the government conceded to have been a proper amount of deductions. Each count of the indictment was worded substantially the same as the statute, the name of each taxpayer whose return was involved being included, and including the statement that the return claimed a deduction of a specified amount while the defendant knew that the total deductions to which the taxpayer was entitled was a different specified amount, the second amount being less than the first in each count.

Where a preparer, under indictment for 30 violations of § 7206(2), for claiming depreciation deductions to which the taxpayers were not entitled, moved to dismiss the indictment on the ground that the prosecution was barred by a 3–year statute of limitations, it was held in United States v Zavin (1961, DC NJ) 190 F Supp 393, that under 26 U.S.C.A. § 6531(3), the 6–year limitation applies to the prosecution of a tax preparer under 26 U.S.C.A. § 7206(2). The preparer contended that the charges against him did not fall within § 6531(3), because subsection (3) did not contain the phrase "as to any material matter" relating to false or fraudulent returns that was contained in § 7206(2). In denying the motion, the court said that § 6531(3) prescribed a 6–year limitation for the prosecution of the offense of assisting in the preparation of a false return, that a return which is false as to any material matter is a false return, and that therefore the 6–year limitation applies to the offense of assisting in the preparation of a return which is false as to any material matter.

Where defendants, father and son, who were engaged in preparing income tax returns for others, were convicted of willfully and knowingly aiding and assisting in the fraudulent preparation of tax returns by overstating deductions, it was held in United States v Dobbs (1975, CA5 Ga) 506 F2d 445, that the trial court did not err in excluding the result of a survey covertly conducted by a secretary to defendants' counsel, consisting of questions propounded to three Internal Revenue Service (IRS) employees who assisted the public in preparing tax returns, the inquiry concerning deductions similar to some of those upon which the convictions of the defendants were based, and allegedly establishing that the IRS personnel gave the same advice as the defendants regarding tax return preparation. In affirming the judgment, the court said that the circumstances of the survey did not coincide with the underlying basis of the conduct charged to the defendants, and that the hypothetical questions posed, as well as the answers thereto, were attenuated at best. The gist of the charges against the defendants was adding to the deductions submitted to them by taxpayers, and not in types of deductions or the formulae therefor, the court added.

Where a tax preparer was charged in a 28–count indictment with fraudulently preparing income tax returns in violation of 26 U.S.C.A. § 7206(2), was found guilty on at least 15 of these counts, but was sentenced to 3 years on the first count only, and where the preparer, on appeal, contended that there was no affirmative proof that she had prepared the income tax return in question, it was held in United States v McKee (1972, CA6 Mich) 456 F2d 1049, cert den 407 US 910, 32 L Ed 2d 684, 92 S Ct 2436, reh den 409 US 899, 34 L Ed 2d 158, 93 S Ct 102 and reh den 409 US 1019, 34 L Ed 2d 311, 93 S Ct 429 and reh den 412 US 914, 36 L Ed 2d 978, 93 S Ct 2286 and reh den 414 US 989, 38 L Ed 2d 229, 94 S Ct 261, that the jury had a right to consider the pattern of similar conduct on the part of the preparer in relation to the other 27 counts of the indictment as to which the jury brought in 14 additional verdicts of guilty. In regard to the first count, there was evidence that the return involved had been signed with the name and address of the defendant preparer, that the taxpayer had gone to the preparer to have his return prepared, and that a false deduction was taken on the return which the taxpayer had not authorized the defendant preparer to take. In affirming the judgment, the court said that there was ample evidence from which the jury could have found the preparer guilty on count one of the indictment on which she was sentenced.

It was held that the evidence supported the verdicts which found a defendant guilty of violating 26 U.S.C.A. § 7206(2), in United States v Blount (1964, CA7 Ill) 339 F2d 331, where taxpayers, whose returns the defendant had prepared, testified that the defendant claimed deductions to which the taxpayers were not entitled. The defendant was convicted on 14 counts of violating § 7206(2), and appealed the ensuing judgment. In affirming the judgment, the court said that the evidence was sufficient to clearly indicate that the defendant had relied upon the illiteracy of Negro taxpayer witnesses and their pride of race in perpetrating a scheme to defraud any such person who went to him confidently expecting honest treatment, that he took advantage of them for his own personal gain, that what he called the Wonder Movement (which he claimed was designed to combat the white man) was actually an opiate which might deaden whatever suspicions any of these victims might have entertained in regard to the propriety of what the defendant was doing, and that through the means which he employed he was able to secure a victim's signature on a form which enabled him to secure refund checks from the government arising out of the fraudulent preparation and filing of the respective tax returns. In nearly every instance, each taxpayer paid the defendant for preparing his tax return, and in no instance did any of the government's witnesses (taxpayers whose returns the defendant had prepared) receive a refund check from the defendant as the defendant had promised, the court said.

In prosecuting a certified public accountant for filing false tax returns for clients in violation of § 7206(2), in that he inflated or totally fabricated figures for various expenses used for deductions, it was held in United States v Warden (1976, CA7 Ill) 545 F2d 32, 43 ALR Fed 119, that the government was not obliged to prove the exact amount alleged in the indictment. On appeal from a conviction, the defendant contended, inter alia, that since the amounts of deductions set forth in the indictment were different than the amounts proved, there existed a fatal variance between the indictment and the proof. This contention was rejected and the judgment was affirmed, the court explaining that in order for a variance between an indictment and proof to be fatal, the evidence offered must prove facts materially different from those alleged in the indictment.

The conviction of a tax preparer for willfully aiding and assisting in the preparation of false and fraudulent income tax returns of various taxpayers in violation of 26 U.S.C.A. § 7206(2) was affirmed in Amos v United States (1974, CA8 Mo) 496 F2d 1269, cert den 419 US 896, 42 L Ed 2d 140, 95 S Ct 174, where the preparer made false claims for deductions from the taxpayers' income, the false deductions ranging from $500 to $2,700. The defendant was a retired railroad postal service worker who was engaged in the practice of assisting taxpayers in the preparation of their federal income tax returns.

The evidence was held sufficient to convict a tax preparer on nine counts of preparing false income tax returns for his clients and of aiding in the presentation of false documents to the Internal Revenue Service, in violation of 26 U.S.C.A. § 7206(2), in United States v Miller (1976, CA9 Cal) 529 F2d 1125, cert den 426 US 924, 49 L Ed 2d 379, 96 S Ct 2634, where there was evidence that the defendant, an accountant in the business of preparing income tax returns, included in the returns of some clients, deductions that were false and that were not provided by the client, and that he also prepared false documents to support those false deductions when the Internal Revenue Service audited the clients' returns. The judgment was affirmed without further discussion on this point.

CUMULATIVE SUPPLEMENT

Cases:

The evidence was sufficient to support conviction for conspiracy to defraud the government and aiding and abetting the filing of fraudulent income tax returns; five clients testified that defendant personally prepared their tax returns, the evidence demonstrated that defendant instructed and supervised preparation of fraudulent tax returns by his employees, two of the client-witnesses testified that they did not provide defendant with information about their expenses, and four testified that after discussing their expenses with him, defendant estimated the amounts and then increased the amounts he put into the forms. 18 U.S.C.A. § 286; 26 U.S.C.A. § 7206(2). U.S. v. Contreras, 247 Fed. Appx. 293, 2007-2 U.S. Tax Cas. (CCH) P 50712, 100 A.F.T.R.2d 2007-5961 (2d Cir. 2007).

For purposes of conviction of tax preparer for violation of § 7206(2), itemized deductions constitute material matters if they are essential to accurate computation of clients' taxes. United States v Klausner (1996, CA2 NY) 80 F3d 55, 96-1 USTC ¶ 50173, 77 AFTR 2d 96-1540.

Evidence was sufficient to sustain defendant's conviction for aiding and assisting in the preparation of false federal tax returns; five of defendant's clients testified that their charitable-contribution and employment-expense deductions were inflated unilaterally by defendant, who confessed to inflating them to secure larger refunds for his clients. 26 U.S.C.A. § 7206(2). U.S. v. Campbell, 142 F. Supp. 3d 298, 2015-2 U.S. Tax Cas. (CCH) P 50550, 116 A.F.T.R.2d 2015-6702 (E.D. N.Y. 2015).

Evidence that defendant provided one client with copy of tax return and then submitted falsified return to Internal Revenue Service (IRS), that defendant, in response to an audit, submitted false documentation to IRS claiming a client made charitable donations, and that after IRS investigation led to suspension of his firm's electronic filing identification number, defendant reached an agreement with another tax preparer to use her number, and used it to file two more returns containing false information, was sufficient to show that defendant acted willfully when he submitted false information in his clients' tax returns,

as required for defendant's conviction for aiding and assisting in preparation of false income tax returns. 26 U.S.C.A. § 7206(2). United States v. Johnson, 682 Fed. Appx. 118, 2017-1 U.S. Tax Cas. (CCH) P 50,179, 119 A.F.T.R.2d 2017-1140 (3d Cir. 2017).

Evidence was sufficient to support conviction for aiding in preparation of false tax returns; seven taxpayers for whom defendant prepared returns testified defendant used incorrect filing status or overstated deductions for them, resulting in increased tax refunds, and that they had not provided defendant with information to support deduction amounts, there was evidence that defendant was only person in his office who entered deduction information and signed tax returns as preparer, and IRS special agent testified she posed as client and asked defendant to prepare her return, and that defendant created deductions for mileage, gifts to charity, dry cleaning, and professional dues and supplies for which agent was not authorized, resulting in refund of $1500 more than she was allowed. 26 U.S.C.A. § 7206(2). U.S. v. Fokkoun-Ngassa, 253 Fed. Appx. 269, 2007-2 U.S. Tax Cas. (CCH) P 50794, 100 A.F.T.R.2d 2007-6523 (4th Cir. 2007).

Evidence was sufficient to prove that taxpayers' returns included false statements which were fabricated by defendant, as required to support defendant's conviction for procuring the presentation of tax returns containing false statements; taxpayers testified that the deductions for medical expenses and charitable contributions set forth on returns were wrong, and taxpayers testified that they let defendant compute the deductions without assisting defendant. 26 U.S.C.A. § 7206(2). U.S. v. Hayes, 322 F.3d 792, 91 A.F.T.R.2d 2003-1324 (4th Cir. 2003).

Evidence established defendant's knowledge of falsity of corporation's and trustor's tax returns, with respect to deductions for legal expenses, in prosecution for aiding and assisting in filing a false tax return; defendant, a certified public accountant (CPA), instructed another partner at his accounting firm to categorize the payments from trustor's corporation to family trusts as legal fees, but in an audio recording defendant stated that the trustor wrote that off as legal fees and took a deduction knowing that it wasn't legal fees, and payments were deposited to defendant's personal bank account. 26 U.S.C.A. § 7206(2). United States v. Nicholson, 961 F.3d 328, 125 A.F.T.R.2d 2020-2254 (5th Cir. 2020).

Finding that defendant, the co-owner and Chief Operating Officer (COO) of tax preparation company that he and his wife had founded, knowingly aided, assisted, counseled or advised in preparation and filing of fraudulent income tax returns on behalf of company's clients was sufficiently supported by evidence, though defendant was not personally involved in preparation of all but two of the returns underlying criminal charges, where these two returns suffered from same problems as other returns that company had prepared, by grossly overstating or creating from whole cloth the business losses claimed, and where defendant also created false tax returns for himself and his wife which grossly underreported their taxable income. 18 U.S.C.A. § 2; 26 U.S.C.A. § 7206(2). United States v. Morrison, 833 F.3d 491, 2016-2 U.S. Tax Cas. (CCH) P 50384, 118 A.F.T.R.2d 2016-5480 (5th Cir. 2016).

Evidence was sufficient to show that tax returns prepared by defendant contained information that was false as to any material matter, as required to support conviction for willfully aiding and assisting preparation and presentation of false tax returns; eight taxpayers testified that each return prepared by defendant for them contained expense that taxpayer did not incur and that no such expense was ever communicated to defendant. 26 U.S.C.A. § 7206(2). U.S. v. Baker, 522 Fed. Appx. 244, 111 A.F.T.R.2d 2013-1694 (5th Cir. 2013).

Conviction for aiding and assisting in preparation of false and fraudulent tax forms was supported by evidence that defendant, while working for service, presented himself as tax-return preparer, discussed tax returns and refunds with his clients, received tax-preparation information from them and claimed business losses, credits, and deductions on their returns that were neither substantiated nor requested. 18 U.S.C.A. § 371; 26 U.S.C.A. § 7206(2). U.S. v. Mudekunye, 646 F.3d 281, 2011-2 U.S. Tax Cas. (CCH) P 50504, 108 A.F.T.R.2d 2011-5208 (5th Cir. 2011).

Convictions for willfully aiding and assisting the preparation of false tax returns and presenting false claims for tax refunds were supported by evidence that defendant presented himself to taxpayers as a tax return preparer or tax consultant, that taxpayers discussed their returns or refunds with defendant, that defendant gave taxpayers specific tax advice, that taxpayers

paid defendant, that taxpayers gave defendant information from which he could prepare returns, and that taxpayers did not provide defendant with any information or documentation that could have supported the business losses and deductions claimed on their returns. 18 U.S.C.A. § 287; 26 U.S.C.A. § 7206(2). U.S. v. Clark, 577 F.3d 273, 2009-2 U.S. Tax Cas. (CCH) P 50539, 104 A.F.T.R.2d 2009-5539 (5th Cir. 2009).

Convictions for knowingly and willfully assisting in preparation of false or fraudulent income tax returns in violation of 26 U.S.C.A. § 7206(2) would be affirmed, despite defendants' contention that statute was unconstitutionally vague on its face, since indictment charged and evidence established that defendants had willfully and systematically prepared false or fraudulent tax returns claiming deductions to which they knew taxpayers were not entitled, and such conduct fell squarely within precise language of statue's proscriptions. United States v Damon (1982, CA5 Tex) 676 F2d 1060, 82-1 USTC ¶ 9397.

Evidence that, as electronic tax return originator, defendant presented false tax returns to the Internal Revenue Service (IRS), that clients met with defendant to discuss preparation of their tax returns, they relied on defendant when they brought documents to his office and signed engagement letters, that returns prepared for defendant's clients showed pattern of false income and expense items done with result of maximizing earned income tax credit (EITC) refunds, and that defendant prepared initial year returns for most of his clients and often also their subsequent returns, was sufficient to support defendant's convictions for assisting in preparation of false tax returns. 26 U.S.C.A. § 7206(2). United States v. Hairston, 825 Fed. Appx. 327, 126 A.F.T.R.2d 2020-5936 (6th Cir. 2020).

Sufficient evidence supported conviction for aiding and assisting in the preparation and presentation of false and fraudulent tax returns, even though defendant's employees' testified for the government pursuant to a plea agreement and defendant's clients might not have known that the information defendant put on their returns was false; defendant's former clients testified that defendant prepared their tax returns using false information for such things as medical expenses, unreimbursed employee expenses, and education expenses, and defendant's employees' testified that defendant taught them how to prepare false tax returns for their clients. 26 U.S.C.A. § 7206(2). United States v. Jeffries, 820 Fed. Appx. 346, 126 A.F.T.R.2d 2020-5254 (6th Cir. 2020).

There was sufficient evidence that defendant willfully prepared false tax returns to support convictions for aiding and abetting preparation of false tax returns; although defendant, who prepared tax returns for clients, argued that clients gave him written verification that information in their tax returns was true and correct, and that he relied on those verifications, seven former clients testified that defendant listed non-existent businesses on their tax returns, and denied telling defendant that they owned businesses, or directing defendant to include business profits, losses, or expenses on their tax returns, and one client testified that she was not given a copy of her tax return before it was filed. 26 U.S.C.A. § 7206(2). United States v. Williams, 683 Fed. Appx. 376, 2017-1 U.S. Tax Cas. (CCH) P 50,182, 119 A.F.T.R.2d 2017-1200 (6th Cir. 2017).

Evidence was sufficient to establish that defendant was responsible for submitting tax returns with numerous false deductions and that his actions were willful, as elements of offense of willfully aiding or assisting in the preparation and presentation of false or fraudulent income tax returns; taxpayers testified that they came to defendant or to his business to have their taxes prepared, they were assisted by either defendant or one of his employees, taxpayers relied on defendant to determine what deductions were legal and proper, some of defendant's employees explicitly testified that they also relied on defendant to determine the propriety of deductions and to review the returns before they were submitted, all of the defendant's employees testified that they were data entry personnel and did not have the knowledge or training to determine whether deductions were proper, and false deductions claimed on most of the tax returns were similar in type. 26 U.S.C.A. § 7206(2). U.S. v. Goosby, 523 F.3d 632, 101 A.F.T.R.2d 2008-1872 (6th Cir. 2008).

Sufficient evidence supported finding that defendant, who operated tax preparation business, knew that dependents were fraudulently claimed on tax returns for three of his clients, as element of assisting in preparation of false individual income tax returns; all three clients testified that defendant proposed addition of dependents on his or her return. 26 U.S.C.A. § 7206(2). U.S. v. Ali, 616 F.3d 745 (8th Cir. 2010).

Admission of evidence of civil tax penalties imposed for overstating deductions on over 60 taxpayers' returns was not reversible error, in trial for aiding and assisting with preparation of false tax returns, even though penalties were imposed between 11 and 13 years go, where prior conduct was identical to much of conduct at issue in charged offenses, evidence was relevant to show that defendant was on notice that overstating deductions violated tax law, and trial court instructed jury that it could not consider prior conduct to proved charged offenses. U.S. v. Reiss, 230 Fed. Appx. 629, 2007-2 U.S. Tax Cas. (CCH) P 50532, 99 A.F.T.R.2d 2007-2797 (8th Cir. 2007).

The government presented sufficient evidence to support conviction for aiding and assisting in the preparation or presentation of false income tax returns, where it was as a result of attending defendant's seminar that taxpayers retained defendant's company to implement defendant's tax strategy of converting ordinary personal expenses into business expenditures, and client addressed her questions and concerns not only to the individuals who assisted her, but also to defendant on one occasion. 26 U.S.C.A. § 7206(2). U.S. v. Fletcher, 322 F.3d 508, 91 A.F.T.R.2d 2003-1148 (8th Cir. 2003).

Sufficient evidence supported defendant's convictions of one count of conspiring to defraud the United States and eight counts of aiding and assisting in the preparation of false tax returns; testimony from IRS agents, clients, and software suppliers proved defendant profited from participating in a scheme to deny the government tax revenues and that he assisted his coconspirators in obtaining false tax refunds for thousands of clients, defendant shared electronic filing identification number for office of his tax preparation company with coconspirators who used the number to file false tax returns, defendant paid some coconspirators from his bank account, and tax returns prepared by conspirators intentionally claimed false deductions and credits. 18 U.S.C.A. § 371; 26 U.S.C.A. § 7206(2). United States v. Maurival, 848 Fed. Appx. 397, 127 A.F.T.R.2d 2021-1293 (11th Cir. 2021).

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[END OF SUPPLEMENT]

§ 11. Claiming unauthorized exemptions

[Cumulative Supplement]

In the following cases where the preparers of tax returns were charged with claiming, in their clients' returns, exemptions to which the clients were not entitled, the courts upheld the preparers' convictions of willfully assisting in the preparation of false or fraudulent tax returns in violation of § 7206(2), or one of its predecessor statutes.

In United States v Barnes (1963, CA6 Tenn) 313 F2d 325, an attorney, who prepared from 1,500 to 2,000 tax returns for others during the year in question was convicted of violating § 7206(2), and appealed on the ground that there was insufficient proof to connect him with the preparation of the false returns in question. The evidence showed that the attorney, assisted by "several" employees, either (1) loaned money to persons apparently entitled to income tax refunds, securing these loans by transfer to him of the taxpayers' interests in the refund claims, or (2) had purchased outright the taxpayers' interests in such funds, had prepared the returns on the "short form" Form 1040–A, which the taxpayer had signed in blank, and without the taxpayers' knowledge, had claimed one more exemption than the number to which the taxpayer was actually entitled, cashing the refund check when it was received and keeping the funds. Affirming the attorney's conviction, the court said that the interview of the taxpayers by the attorney, the recording of the relevant tax information by him, the placing by the attorney of the price–tag on the right to receive the tax refund, the denial of the taxpayers that false exemption information was given to the attorney by them, the gain which the attorney stood to realize from inflating the refund claims, the uniform inflation of the claims by one exemption to the extent of fabricating names on returns, and the appearance of the attorney's name as attorney–in–fact in the endorsements of the refund checks, formed a substantial basis in evidence to connect the attorney with the preparation of the returns and upon which a conviction under the statute could be predicated.

Evidence that a taxpayer, in preparing income tax returns for clients, improperly increased the number of exemptions reported to him by the clients, by naming as dependents of the clients certain relatives, or others, who were not in fact dependents, was held in United States v Borgis (1950, CA7 Ill) 182 F2d 274, to be amply sufficient to establish that the defendant willfully and knowingly prepared and filed false and fraudulent income tax returns for others in violation of a predecessor to 26 U.S.C.A. § 7206(2).

See also United States v Jackson (1971, CA7 Ill) 452 F2d 144, supra § 10, upholding the conviction of a preparer who, without the knowledge or approval of the taxpayers, had taken certain false deductions and exemptions in excess of that to which the taxpayers were entitled.

Where a tax preparer had been convicted of violating § 7206(2) for making false and fraudulent claims of exemptions on her clients' returns, in Howard v United States (1967, CA9 Cal) 372 F2d 294, cert den 388 US 915, 18 L Ed 2d 1356, 87 S Ct 2129, the conviction was affirmed over the defendant's contention that she had been placed in double jeopardy (a previous trial had resulted in a hung jury), and that the government's filing of a second indictment which included some of the charges included in the first indictment, as well as others, violated the due process clause.

CUMULATIVE SUPPLEMENT

Cases:

Evidence was sufficient to support conviction for aiding and assisting in the preparation of fraudulent tax returns; government established that defendant had personally prepared at least 26 tax returns, each containing materially false information, and that defendant had personally interviewed his clients and therefore knew, or should have known, that the individuals he listed as foster children on their returns did not qualify as such for purposes of the earned income credit. 26 U.S.C.A. § 7206(2). U.S. v. Gena, 258 Fed. Appx. 592, 2008-1 U.S. Tax Cas. (CCH) P 50120, 100 A.F.T.R.2d 2007-7052 (4th Cir. 2007).

First Amendment did not protect defendant's speeches challenging constitutionality of federal income tax laws which motivated employees to file false W–4 forms; defendant did not establish selective prosecution since he publicly and with attendant publicity encouraged violation of law. United States v Moss (CA8 Neb) 604 F2d 569, cert den (US) 62 L. Ed. 2d 752, 100 S Ct 1014.

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[END OF SUPPLEMENT]

§ 12[a] Inducing government agents to falsify reports—Conviction upheld

In the following case where a preparer of tax returns had induced a government agent to falsify reports relating to a tax return of the preparer's client, the preparer's conviction of willfully assisting in the preparation of false or fraudulent tax returns in violation of § 7206(2) was upheld.

Where an attorney who was primarily engaged in the preparation of federal income tax returns for clients was convicted of violating § 7206(2) for procuring a revenue agent's report which fraudulently and falsely stated that some of a taxpayer's (client of the defendant attorney) income had been omitted from the taxpayer's returns for 3 consecutive years because of litigation involving the contract jobs from which the income had been received, it was held in United States v Baum (1970, CA7 Ill) 435 F2d 1197, cert den 402 US 907, 28 L Ed 2d 647, 91 S Ct 1373, that the evidence amply supported the conviction. The defendant contended that since the taxpayer was dead, the government could not prove that the revenue agent's report was false.

The court rejected this contention and affirmed the judgment, pointing out that the testimony of an associate of the defendant's was sufficient in itself to show that the statement was false, and that this evidence was corroborated by another's testimony.

§ 12[b] Inducing government agents to falsify reports—Conviction reversed

In the following case where a preparer of tax returns had induced a government agent to falsify reports relating to tax returns of the preparer's clients, the conviction of the preparer of willfully assisting in the preparation of false or fraudulent tax returns in violation of 26 U.S.C.A. § 3793(b)(1), now § 7206(2), was reversed.

Where an attorney who prepared estate tax returns for three clients, filed each of the returns late, and the local Internal Revenue Service official stamped each return as having been received on time, and where the attorney and the official were tried and acquitted of conspiring to defraud the government of the penalties for a late filing, and of jointly covering up the late filing by predating the returns, it was held in Cosgrove v United States (1954, CA9 Cal) 224 F2d 146, that these acquittals prevented the government from later trying the attorney for violating § 3793(b)(1) (now § 7206(2)), because the prior acquittal on the conspiracy charge operated as res judicata in respect to the later charge of violating § 3793(b)(1). The court decided that the charges in the first trial (of which the attorney was acquitted) contained every element charged against him in the second trial for violating § 3793(b) (1), that the basic facts of the two trials were identical, and that the prior verdict of acquittal was res judicata as to the second trial. The judgment against the preparer on these charges was accordingly reversed.

§ 13[a] Other—Conviction or indictment upheld

[Cumulative Supplement]

In the following cases where the preparers of tax returns were charged with committing acts which were not revealed in the opinion, or acts other than those discussed in §§ 10- 12, supra, indictments or convictions of the preparers for willfully assisting in the preparation of false or fraudulent tax returns in violation of § 7206(2), or one of its predecessor statutes, were upheld.

Sup Ct
United States v Habig (1968) 390 US 222, 19 L Ed 2d 1055, 88 S Ct 926
First Circuit
Driscoll v United States (1967, CA1 Mass) 376 F2d 254
Second Circuit
United States v Brilliant (1960, CA2 NY) 274 F2d 618, cert den 363 US 806, 4 L Ed 2d 1149, 80 S Ct 1242
United States v Egenberg (1971, CA2 NY) 441 F2d 441, cert den 404 US 994, 30 L Ed 2d 546, 92 S Ct 530
Re Russo (1956, DC NY) 19 FRD 278, affd (CA2 NY) 241 F2d 285, cert den 355 US 816, 2 L Ed 2d 33, 78 S Ct 18
Third Circuit
United States v Le Fevre (1973, CA3 Del) 483 F2d 477
United States v Wolf (1952, DC Pa) 102 F Supp 824
Fourth Circuit
United States v Wheeler (1973, CA4) 73-1 USTC ¶ 9328, cert den 412 US 921, 37 L Ed 2d 148, 93 S Ct 2742, reh den 412 US 963, 37 L Ed 2d 1012, 93 S Ct 3018
Fifth Circuit
Hull v United States (1966, CA5 Tex) 356 F2d 919 (disapproved on other grounds United States v Habig 390 US 222, 19 L Ed 1055, 88 S Ct 926)
United States v Washburn (1973, CA5 Fla) 488 F2d 139
United States v Miller (1974, CA5 Fla) 491 F2d 638, reh den (CA5 Fla) 493 F2d 664 and cert den 419 US 970, 42 L Ed 2d 186, 95 S Ct 236; United States v Johnson (1974, CA5 Tex), 495 F2d 1097
United States v Burks (1975, CA5 Miss) 508 F2d 672, cert den 421 US 1012, 44 L Ed 2d 681, 95 S Ct 2418
Eighth Circuit

United States v Warner (1970, CA8 Mo) 428 F2d 730, cert den 400 US 930, 27 L Ed 2d 191, 91 S Ct 194
United States v Jackson (1973, CA8 Mo) 477 F2d 879

Ninth Circuit

Edwards v United States (1967, CA9 Or) 375 F2d 862 (disapproved on other grounds United States v Bishop 412 US 346, 36 L Ed 941, 93 S Ct 2008, on remand (CA9 Cal) 485 F2d 248, cert den 417 US 931, 41 L Ed 234, 94 S Ct 2642)
Gilbert v United States (1968, CA9 Cal) 401 F2d 507
United States v Abbas (1974, CA9 Cal) 504 F2d 123, cert den 421 US 988, 44 L Ed 2d 477, 95 S Ct 1990
United States v Potstada (1962, DC Cal) 206 F Supp 792

Dist Col Circuit

United States v De Marco (1975, DC Dist Col) 394 F Supp 611

Evidence to convict a tax consultant for violating § 7206(2) was held sufficient in United States v Washburn (1973, CA5 Fla) 488 F2d 139, where the evidence showed that the defendant tax consultant had prepared a joint return for a client whose estranged wife had rejected the idea of filing jointly and had filed a separate return of her own, and where the evidence also showed that the consultant had signed the wife's name to the return without her permission and had claimed certain of the wife's losses against the husband–client's income. In affirming the judgment, the court said that viewed in the light most favorable to the government, there was abundant evidence to support the verdict.

Where a tax preparer, along with the taxpayer for whom he prepared the tax, had been charged with, among other things, making, under penalty of perjury, income tax returns which he did not believe to be true and correct as to every material matter, in violation of 26 U.S.C.A. § 7206(1), it was held in United States v Miller (1974, CA5 Fla) 491 F2d 638, reh den (CA5 Fla) 493 F2d 664 and cert den 419 US 970, 42 L Ed 2d 186, 95 S Ct 236, that even though only the taxpayer could be prosecuted under § 7206(1), and even though the tax preparer must be prosecuted under § 7206(2), the citation in the indictment of § 7206(1) as opposed to that of § 7206(2) would not "inexoribly be fatal," and that since the indictment clearly placed the preparer on notice of the unlawful conduct attributed to him, the indictment was not deficient. The lower court's order dismissing these particular counts in the indictment was reversed and the cause was remanded.

Where a tax preparer was being prosecuted for violating § 7206(2), it was held sufficient in United States v Warner (1970, CA8 Mo) 428 F2d 730, cert den 400 US 930, 27 L Ed 2d 191, 91 S Ct 194, to prove that the figures on the returns which the defendant had prepared did not coincide with the figures on memoranda prepared by the taxpayers and given to the defendant, that such alterations were not authorized by the taxpayers, and that it was not necessary to prove which version was correct. On appeal from a guilty verdict, the defendant argued that the proof was insufficient to support the verdict because in all but one instance the taxpayers had not been queried as to which figure was correct but were asked only which figure they had authorized. Conceding that it was possible that the defendant found errors which necessitated revising each taxpayer's figures, the court said that nevertheless no changes had been brought to the taxpayers' attention at the time, that no corrections had been authorized, and that the defendant never suggested such a theory when he presented his case. In affirming the judgment, the court explained that in the absence of any other explanation, the memoranda prepared by the taxpayers raised an inference of correctness, the information summarized therein being matters within their own personal knowledge, that the nature of the changes was suspect and negatived inadvertence, and that since the court was required to view the evidence in a light most favorable to the prevailing party, and to sustain the verdict if there was substantial evidence to support it, the evidence was unquestionably sufficient to support the verdict.

CUMULATIVE SUPPLEMENT

Cases:

Evidence was overwhelming, in prosecution of tax return preparer for aiding and abetting the filing of false tax returns, and therefore any errors in admission of prior bad acts evidence and a witness's improperly stated legal conclusions were harmless; evidence included testimony of six of defendant's clients, defendant's statements to government agents, and the high tax refund

rate that defendant achieved for his clients. 26 U.S.C.A. § 7206(2). U.S. v. Jackson, 65 Fed. Appx. 754, 2003-1 U.S. Tax Cas. (CCH) ¶ 50478, 91 A.F.T.R.2d 2003-2277 (2d Cir. 2003).

There was sufficient evidence that defendant was knowing and willful participant in filing of corporation's false tax return, as required to support conviction for aiding and abetting in filing of false tax return; evidence indicated that customers made out checks to corporation and that defendant endorsed checks, deposited them in his account, transferred funds from his account to corporation, and told preparer of corporate tax returns that funds which he transferred to corporation were loans rather than income. 26 U.S.C.A. § 7206(2). U.S. v. Meneilly, 78 F. Supp. 2d 95 (E.D.N.Y. 1999).

There was sufficient evidence to support defendant's conviction for aiding in preparation of false tax returns, even though defendant did not prepare any tax returns, in light of evidence that defendant knew that information he provided to his accomplice for preparation of K-1 forms was false, that he knew that information on K-1 forms would be used to prepare tax returns, and that he acted willfully. 26 U.S.C.A. § 7206(2). United States v. Delavan, 826 Fed. Appx. 259, 126 A.F.T.R.2d 2020-6009 (4th Cir. 2020).

Evidence that defendant and codefendant had agreement to complete tax returns with false information in order to ensure that clients received higher tax refunds was sufficient to support convictions for conspiracy to defraud United States and aiding and assisting in preparation of false and fraudulent tax returns. 18 U.S.C.A. § 371; 26 U.S.C.A. § 7206(2). U.S. v. Allen, 623 Fed. Appx. 599, 2015-2 U.S. Tax Cas. (CCH) P 50484, 116 A.F.T.R.2d 2015-6144 (4th Cir. 2015).

Evidence of willfulness was sufficient to support defendant's conviction on eight counts of aiding or assisting preparation of a materially false tax return, where defendant hired employees who did not have social security numbers and failed to report such employees on his quarterly tax return or provide his accountant with necessary documentation with respect to such employees. 26 U.S.C.A. § 7206(2). U.S. v. Abuhawwas, 215 Fed. Appx. 311, 2007-1 U.S. Tax Cas. (CCH) P 50337, 99 A.F.T.R.2d 2007-798 (4th Cir. 2007).

Defendant was properly convicted of aiding and abetting preparation of false W–4 forms where defendant told members of tax association how to prepare forms with intention that his advice be accepted, members paid him for advice, promised assistance warranted inference of expectation that advice would be followed, and where defendant actually supplied forms and materials to be filed with W–4 forms. Further, forms actually filed were potentially deceptive since case involved number of taxpayers whose collective action was calculated to cause substantial disruption in process of collection of income taxes, and false W–4 forms filed at defendant's behest were designed to deceive employers charged with duty of withholding. United States v Kelley (1985, CA4 NC) 769 F2d 215, 85-2 USTC ¶ 9592, 56 AFTR 2d 85-5634.

There was sufficient evidence that defendant made materially false statements on individual income tax returns he prepared to support his conviction for 26 counts of willfully assisting in preparation of false tax returns; Schedule Cs on defendant's clients tax returns were necessary for Internal Revenue Service (IRS) to verify their income, and, thus, inaccurate information on those Schedule Cs was material. 26 U.S.C.A. § 7206(2). United States v. Ramseur, 793 Fed. Appx. 245, 124 A.F.T.R.2d 2019-6560 (5th Cir. 2019).

Conviction for aiding and assisting in the preparation of a false tax return was supported by sufficient evidence of defendant's participation in the preparation of fraudulent returns, even if witnesses did not see defendant inputting every detail. 26 U.S.C.A. § 7206(2). U.S. v. Womack, 481 Fed. Appx. 925, 110 A.F.T.R.2d 2012-5290 (5th Cir. 2012), petition for cert. filed (U.S. Oct. 26, 2012) and petition for cert. filed (U.S. Nov. 29, 2012).

In prosecution under § 7602(2), it is not necessary that defendant sign or actually prepare tax return in order to be guilty of willfully aiding and assisting in preparation of tax returns. Thus, court would affirm conviction under § 7602(2) for willfully aiding and assisting in preparation or presentation of false tax returns since defendant's participation in scheme went beyond mere rendering of tax advice, he spoke at seminars to generate clients for corporation in which he was involved and attended

licensee seminars at which tax schemes were discussed, at one seminar in Cayman Islands attended by defendant it was disclosed that commodities transactions would involve assignment of losses to taxpayer and gains to foreign company so as to generate taxable loss on paper, and since he participated in decision to create offshore corporation for clients and discussed how to avoid discovery or tracing through postal cancellation markings. United States v Bryan (1990, CA5 Tex) 896 F2d 68, 90-1 USTC ¶ 50158.

Evidence was sufficient to support convictions for assisting in the preparation of fraudulent income-tax returns; defendant, the owner of an accounting-services firm, prepared tax returns for clients, the returns stated that clients had $8,000 and $5,000, respectively, in net income from a maintenance business, and client testified that she and her husband were not operating any business at the time and that she never told defendant that they were. 26 U.S.C.A. § 7206(2). U.S. v. Sperl, 458 Fed. Appx. 535, 109 A.F.T.R.2d 2012-794 (6th Cir. 2012).

Sufficient evidence was presented at trial to prove that tax returns contained materially false statements, as element of offense of willfully aiding or assisting in the preparation and presentation of false or fraudulent income tax returns; evidence at trial established that most of the taxpayers who used defendant to prepare their returns had been audited or filed amended returns, and they paid or owed additional money to the Internal Revenue Service (IRS) as a result of the false statements, and some of the false deductions were so large or inflated, such as the approximately $162,000 of gambling losses on one taxpayer's return, that they were obviously material. 26 U.S.C.A. § 7206(2). U.S. v. Goosby, 523 F.3d 632, 101 A.F.T.R.2d 2008-1872 (6th Cir. 2008).

Fact that defendant did not prepare returns for others did not preclude his conviction for knowingly aiding and assisting the preparation of false tax returns, where defendant understood that clients that bought trust system for income tax minimization marketed and sold by defendant and codefendants would be filing tax returns based on their use of trusts, and also understood, given his knowledge that trusts were not lawful means of tax avoidance, that those returns would be fraudulently understating clients' income. 26 U.S.C.A. § 7206(2). U.S. v. Vallone, 698 F.3d 416, 2012-2 U.S. Tax Cas. (CCH) P 50593, 110 A.F.T.R.2d 2012-6110 (7th Cir. 2012).

Indictment charging defendant with criminal tax violations, alleging defendant was culpable in the preparation of corporation's false tax returns was factually sufficient to support charge of aiding or assisting in the preparation of fraudulent tax returns, notwithstanding defendant's claim that the fraudulent tax return was not actually filed. 26 U.S.C.A. § 7206(2). U.S. v. Black, 469 F. Supp. 2d 513 (N.D. Ill. 2006).

Evidence of litigation brought by government against a separate entity whose trusts defendant modeled his own trusts after was inadmissible as irrelevant in prosecution for aiding and assisting in the preparation of fraudulent income tax returns, where evidence had no bearing on defendant's misrepresentations, including backdated documents, phantom deductions, and misstated assets. 26 U.S.C.A. § 7206(2); Fed.Rules Evid.Rule 401, 28 U.S.C.A. U.S. v. Whistler, 139 Fed. Appx. 1 (9th Cir. 2005).

Defendant's and co-defendant's testimony, as to their good faith belief that they were pursuing the proper procedure to attempt to change federal income tax laws by instructing taxpayers that anyone could claim to be a "nonresident alien" to escape income tax liability, was not relevant to the issue of defendant's wilfulness, in prosecution for conspiracy to defraud the United States by assisting in the preparation of false tax returns, and aiding and assisting in the preparation of false federal tax returns, where defendant admitted that he knew that his view of the tax laws had been repeatedly rejected. 18 U.S.C.A. § 371; 26 U.S.C.A. § 7206(2). U.S. v. Ambort, 405 F.3d 1109 (10th Cir. 2005).

Evidence was sufficient to sustain conviction for aiding or assisting in preparation of materially false tax returns, where defendant, who operated a tax preparation business, taught his employee how to reuse fraudulent information from previous returns, report false income and expenses, create fictitious employee W-2s, and claim deductions for false dependents. 26 U.S.C.A. § 7206(2). U.S. v. Barber, 591 Fed. Appx. 809, 2014-2 U.S. Tax Cas. (CCH) P 50523, 114 A.F.T.R.2d 2014-6790 (11th Cir. 2014).

Evidence was sufficient to support defendants' convictions for aiding and assisting in the preparation and presentation of false tax returns; defendant prepared fraudulent returns for at least seven customers of tax business who testified at trial, and other defendant likewise prepared fraudulent returns for at least six customers. 26 U.S.C.A. § 7206(2). U.S. v. Moss, 543 Fed. Appx. 959, 2013-2 U.S. Tax Cas. (CCH) P 50579, 112 A.F.T.R.2d 2013-6719 (11th Cir. 2013).

Under the *Pinkerton* doctrine, defendant was liable for aiding and abetting another in the preparation of false tax returns for any of his co-conspirators' actions in filing false tax returns for customers of defendant's tax preparation business without defendant's direct involvement, where government produced substantial evidence showing that defendant trained his co-conspirators to file false returns and that the co-conspirators did just that. 26 U.S.C.A. § 7206(2). U.S. v. Moss, 2011 WL 6182401 (M.D. Ala. 2011).

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[END OF SUPPLEMENT]

§ 13[b] Other—Indictment dismissed

[Cumulative Supplement]

In the following cases where the preparers of tax returns were charged with committing acts which were not revealed in the opinion, or acts other than those discussed in §§ 10- 12, supra, indictments of the preparers for willfully assisting in the preparation of false or fraudulent tax returns in violation of § 7206(2), or one of its predecessor statutes, were dismissed.

Where a defendant was being prosecuted for willfully assisting in the preparation of fraudulent income tax returns in violation of 26 U.S.C.A. § 7206(2), and when the first taxpayer whose return had been allegedly falsified by the defendant appeared to testify against the defendant, the trial judge summarily discharged the jury, because he didn't believe the prosecuting attorney's and witness' assurances that the witnesses had been advised of their rights, the United States Supreme Court held in United States v Jorn (1971) 400 US 470, 27 L Ed 2d 543, 91 S Ct 547, that the defendant tax preparer had been placed in jeopardy and his reprosecution would violate the double jeopardy provision of the Fifth Amendment. At the time he discharged the jury, the judge ordered the case to be calendared again and declared that he would personally talk to the witnesses. Later, on the defendant's motion, the judge dismissed the case on the ground of former jeopardy, and the government appealed directly to the United States Supreme Court. The Supreme Court reluctantly affirmed the dismissal.

Where an attorney consummated a sale of stock on Friday, December 30, 1949 (the last banking day of the year), the buyer giving the attorney a certified check in payment for the stock, and the attorney deposited the check in his trustee account after business hours on the same day, then drew checks on the trustee account, depositing the proper amounts in the clients' accounts on January 3, 1950, it was held in United States v Unger (1958, DC NJ) 159 F Supp 850, that the failure of the attorney to report on the client's income tax return for the year of 1949, the proceeds of the sale of stock, did not constitute a violation of 26 U.S.C.A. § 3793(b)(1) (now 26 U.S.C.A. § 7206(2)), because the proceeds of the sale could not be considered as income to the client until 1950. The attorney had agreed to pay the proceeds of the sale to two different persons, one of whom was the taxpayer for whom he prepared the return in question. The government contended that the transaction simply amounted to the receipt of the certified check by an agent, and that under the law of agency, receipt of a certified check by an agent was receipt by the principal. The court disagreed and granted the attorney's motion to dismiss the indictment, explaining that the attorney operating as agent for two independent principals acted in accordance with the recognized rules governing fiduciaries and members of his profession in depositing the check in his trustee account and drawing checks on this account to those entitled to the proceeds, including the client taxpayer, that no device was used to delay receipt of this income by the taxpayer, and that the terms under which the attorney–agent received the proceeds allocable to his two principals, requiring him to pay certain expenses and divide the proceeds, were similar to the terms governing escrow agents whose receipts constituting capital gains for such principals have not been held taxable to such principals until distributed.

Where a certified public accountant who prepared tax returns for clients, had among other things, expensed items of manufacturing expense that should have been capitalized and depreciated on a client's return, and where the preparer had been convicted for this and other acts of aiding and abetting several different taxpayers in the filing of false and fraudulent tax returns in violation of § 7206(2), the judgment as to these charges was reversed in Hull v United States (1966, CA5 Tex) 356 F2d 919 (disapproved on other grounds United States v Habig 390 US 222, 19 L Ed 1055, 88 S Ct 926), and the prosecution was ordered dismissed. The court said that the evidence was insufficient to prove a willful violation, that at best the evidence showed merely an error in judgment, and that therefore the government failed in its burden of proof in sustaining a verdict of guilty on those particular counts.

CUMULATIVE SUPPLEMENT

Cases:

Where prior proceeding on taxpayers' petitions for redetermination of deficiency concluded with decision in favor of taxpayers, it was collateral estoppel in subsequent criminal proceeding under 26 U.S.C.A. §§ 7201 and 7206 where only fair construction of Tax Court's decision was that taxpayers did not have income in excess of what they reported and finding was conclusive as to taxpayers, government, and accountant accused of aiding in preparation of false return despite fact that accountant was not party to prior Tax Court proceedings. United States v Abatti (SD Cal) 463 F Supp 596.

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[END OF SUPPLEMENT]

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