TABLE OF CONTENTS

13.00 *AID OR ASSIST FALSE OR FRAUDULENT DOCUMENT*

13.00 *AID OR ASSIST FALSE OR FRAUDULENT DOCUMENT*

13.01 *STATUTORY LANGUAGE: 26 U.S.C. § 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 $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

* For offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984, 18 U.S.C. § 3612, [1] increased the maximum permissible fines for both misdemeanors and felonies. For the felony offenses set forth in section 7206, the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

13.02 *GENERALLY*

Section 7206(2) has been described as the Internal Revenue Code's "aiding and abetting" provision. ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir.), *cert. denied*, 454 U.S. 841 (1981). It is frequently used to prosecute individuals who advise or otherwise assist in the preparation or presentation of false documents, *e.g.*, fraudulent tax return preparers. However, this statute is not limited to preparers, but applies to anyone who causes a false return to be filed. While frequently the false document will be a tax return or information return, any document required or authorized to be filed with the Internal Revenue Service can give rise to the offense.

The constitutionality of section 7206(2) has been upheld against challenges based on the First Amendment free speech clause and the Fifth Amendment due process clause. ***United States v.***

Damon, 676 F.2d 1060 (5th Cir. 1982) (statute not unconstitutionally vague); ***United States v. Buttorff***, 572 F.2d 619, 624 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978) (First Amendment); ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (statute not unconstitutionally vague); ***United States v. Moss***, 559 F. Supp. 37 (D.Or. 1983) (First Amendment). *But see* ***United States v. Dahlstrom***, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984).

Because similar concepts apply to both section 7206(2) and section 7206(1) violations, reference should be made to the discussion of section 7206(1) in Section 12.00, *supra*.

13.03 *ELEMENTS OF SECTION 7206(2) OFFENSE*

To establish a section 7206(2) offense, the government must prove the following elements beyond a reasonable doubt:

1. Defendant aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws;
2. The document was false as to a material matter;
3. The act of the defendant was willful.

United States v. Perez, 565 F.2d 1227, 1233-34 (2d Cir. 1977); ***United States v. Sassak***, 881 F.2d 276, 278 (6th Cir. 1989); ***United States v. Hooks***, 848 F.2d 785, 788-89 (7th Cir. 1988); ***United States v. Salerno***, 902 F.2d 1429, 1432 (9th Cir. 1990); ***United States v. Crum***, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976).

13.04 *AIDING AND ASSISTING*

13.04[1] *Persons Liable*

The purpose of the statute is to make it a crime for one to knowingly assist another in preparation and presentation of a false and fraudulent income tax return. ***United States v. Jackson***, 452 F.2d 144, 147 (7th Cir. 1971). Section 7206(2) and its predecessor statutes have been directed against fraudulent tax return preparers since as early as 1939. In ***United States v. Kelley*** 105 F.2d 912 (2d Cir. 1939), Justice Learned Hand described the statutory predecessor of section 7206(2):

> The purpose was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.

Kelley, 105 F.2d at 917.

Although directed against return preparers, section 7206(2) is not limited to return preparers. The argument that section 7206(2) "is applicable only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns" was flatly rejected by the Third Circuit in ***United States v. McCrane***, 527 F.2d 906, 913 (3d Cir. 1975), *vacated and remanded on another issue*, 427 U.S. 909, *reaff'd on section 7206(2) counts, vacated and remanded on other counts*, 547 F.2d 204 (3d Cir. 1976). The statute "has a broad sweep, and makes all forms of willful assistance in preparing a false return an offense." ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988); *see also* ***United States v. Coveney***, 995 F.2d 578, 588 (5th Cir. 1993). Courts have held that anyone who causes a false return to be filed or furnishes information which leads to the filing of a false return can be guilty of violating section 7206(2). The question is whether the defendant consciously did something that led to the filing of a false return.

The defendant in ***United States v. Crum,*** 529 F.2d 1380, 1382 (9th Cir. 1976), was involved in a scheme designed to furnish high income doctors with backdated beaver purchase contracts for use in obtaining a fraudulent depreciation deduction. Crum, who bred and sold beavers, did not participate in the preparation of the returns, but he did attend two meetings with doctors where the scheme was discussed. He also signed two backdated beaver purchase contracts, one of which was signed to exhibit to an IRS agent. ***Crum***, 529 F.2d at 1381-82. In affirming Crum's conviction under section 7206(2), the court described the following jury instruction as "a proper statement of the law":

> In order to aid and abet another to commit a crime it is necessary that the accused wilfully associate [sic] himself in some way with the criminal venture, and wilfully participates in it as he would in something he wishes to bring about; that is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed.
>
> In making a determination as to whether the defendants aided or assisted in or procured or advised the preparation for filing of false income tax returns, the fact that the defendants did not sign the income tax returns in question is not material to your consideration.

Crum, 529 F.2d at 1382-83 n.4.

Accordingly, the court in ***Crum*** rejected the contention that section 7206(2) applies only to preparers of tax returns. "The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of [a taxable business] interest . . . ." ***Crum***, 529 F.2d at 1382 (citing ***United States v. Johnson***, 319 U.S. 503, 518 (1943)).

In ***United States v. Maius***, 378 F.2d 716 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967), the defendant was convicted, even though he did not participate in the actual preparation of the false return. Maius managed a casino's bar and restaurant. As part of his duties, he prepared false daily sheets of the casino gambling loss collections. The figures were entered into the casino books and ultimately reflected on its income tax returns. The defendant's knowledge that the records would be

used in preparing the tax returns was held sufficient to sustain his conviction. ***Maius***, 378 F.2d at 718.

In ***United States v. Hooks***, 848 F.2d 785 (7th Cir. 1988), the defendant withheld $375,000 worth of bearer bonds from the bank administering his deceased father-in-law's $8 million estate. ***Hooks***, 848 F.2d at 787. He then cashed the bonds through a transaction structured to conceal his connection with the sale. As a result, the value of the bonds was not included in the federal estate tax return prepared by the bank, and $96,564.58 in estate tax was evaded. The court found that the defendant's activities resulted in the filing of the false return. Even though he did not actually prepare the returns and regardless of whether the preparer (the bank) knew of the fraud, the defendant had violated section 7206(2). ***Hooks***, 848 F.2d at 791.

In ***United States v. McCrane*** 527 F.2d at 913, the defendant solicited political contributions as finance chairman for a gubernatorial candidate. The basic scheme was that the defendant would advise donors to the political campaign that he would have false invoices for advertising services sent to them so they could deduct the disguised contributions as business expenses. Even though the defendant did not prepare or assist in the preparation of the two false returns for which he was convicted, he "was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses." ***McCrane***, 527 F.2d at 913.

United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978), provides another example of what might be termed the underlying causation theory that can support a section 7206(2) violation. Wolfson was charged with supplying inflated appraisals to persons who donated their yachts to a university. The taxpayers subsequently claimed a charitable deduction on their returns based on the inflated appraisals. Although Wolfson's conviction was reversed on evidentiary grounds, the court rejected his contention that his actions were not within section 7206(2) because he did not actually prepare a return (the defendant had provided an appraisal which the taxpayer or his accountant had used to prepare a return). ***Wolfson***, 573 F.2d at 225. Rejecting this argument, the court concluded:

> Wolfson does not have to sign or prepare the return to be amenable to prosecution. If it is proved on remand that he knowingly gave a false appraisal with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime.

Wolfson, 573 F.2d at 225.

13.04[2] ***Signing of Document Not Required***

Section 7206(2) prohibits the aiding or assisting in, procuring, counseling, or advising the preparation or presentation of a false document. The fact that the defendant does not actually sign or file the document itself "is not material." ***United States v. Coveney***, 995 F.2d 578 (5th Cir. 1993); ***United States v. Bryan***, 896 F.2d 68, 74 (5th Cir.), *cert. denied*, 498 U.S. 847 (1990); ***United States v. Maius***, 378 F.2d, 716, 718 (6th Cir.), *cert. denied*, 389 U.S. 905 (1967); ***United States v. Crum***, 529 F.2d 1380, 1382 n.4. (9th Cir. 1976). *See also* ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991).

In this respect, a section 7206(2) prosecution differs from a section 7206(1) prosecution because one of the elements of a 7206(1) violation is subscribing (signing) any return, statement, or other document under penalties of perjury.

13.04[3] ***Knowledge of Taxpayer***

It is no defense to a 7206(2) prosecution that the taxpayer who submitted the return was not charged, even when the taxpayer was aware of the falsity of the return, went along with the scheme, and could have been charged with a violation. Any criminal mental state (or lack thereof) on the part of the taxpayer is not relevant to the legality of a defendant's prosecution pursuant to section 7206(2). Accordingly, both a defendant supplying false information to an entirely innocent taxpayer and a defendant supplying false information to a taxpayer who willingly accepts and uses the false information are guilty of violating section 7206(2). This is clear from the language of

section 7206(2) which provides that it applies "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 . . . ."

The Fourth Circuit, after surveying other circuit precedent involving section 7206(2) prosecutions of individuals who did not prepare the false returns, stated that all that is required for a section 7206(2) prosecution is that a defendant knowingly participate in providing information which results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements. ***United States v. Nealy***, 729 F.2d 961, 963 (4th Cir. 1984). *Accord* ***United States v. Wolfson***, 573 F.2d 216, 225 (5th Cir. 1978); *See also* ***United States v. Dunn***, 961 F.2d 648, 651 (7th Cir. 1992); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991); ***United States v. Zimmerman***, 832 F.2d 454, 457 (8th Cir. 1987); ***United States v. Greger***, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); ***United States v. Crum***, 529 F.2d 1380, 1382 (9th Cir. 1976); ***United States v. Kopituk***, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983); *cf.* ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and, therefore, violated section 7206(2), regardless of whether the tax preparer knew of the falsity or fraud).

Occasionally, the primary witness against the person charged with aiding and assisting in the preparation or presentation of a false tax return may be the taxpayer, who may also be culpable. In order to enable the jury to weigh properly the credibility of the witness, it may be necessary in such a case to instruct the jury on the requirements for accomplice testimony. ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963).

13.04[4] ***Filing of Documents***

The Ninth Circuit in ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984), found that the filing of a return is an element of a section 7206(2)

violation. The dissent argued, however, that "the statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented." ***Dahlstrom***, 713 F.2d at 1431.

The government has similarly argued that an offense under section 7206(2) may be committed without the filing of a document. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. Therefore, the offense can be committed simply by counseling a taxpayer to file a false return: nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense to be committed. In ***United States v. Feaster***, No. 87-1340 (6th Cir. April 15, 1988) (unpublished opinion), *cert. denied*, 488 U.S. 898 (1988), the Sixth Circuit agreed with the government and held that "***Dahlstrom*** is contrary to the plain language of 26 U.S.C. § 7206(2)." *Cf.* ***United States v. Monteiro***, 871 F.2d 204, 209-10 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989) (court questioned, but did not decide, whether there is a filing requirement for a section 7206(2) conviction).

Even though the crime may not be completed until a return is filed, it is not necessary that the defendant be the same individual who actually filed the false return, as long as the defendant's willful conduct led to the false filing. ***United States v. Kellogg***, 955 F.2d 1244 (9th Cir. 1992).

Moreover, the filing requirement is not applicable in situations where the taxpayer is required to provide information to an intermediary who, in turn, is required to file a form with the Internal Revenue Service. In such circumstances, the offense is complete when the taxpayer has presented the false document or information to the entity required by law to transmit it to the Internal Revenue Service. ***United States v. Monteiro***, 871 F.2d 204, 210-11 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989) (defendant's tax avoidance scheme caused race track to report wrong persons as winners on the track's Forms 1099); ***United States v. Cutler***, 948 F.2d 691, 694 (10th Cir. 1991) (defendant provided false information to stock brokerage firm which caused the firm to file Forms

1099-B containing false statements).

13.05 *FALSE MATERIAL MATTER*

13.05[1] *Generally*

Both sections 7206(1) and 7206(2) require that the falsity be material. Accordingly, reference should be made to the discussion of materiality in Section 12.08, *supra*.

In prosecutions under section 7206(1), courts have held that materiality is a question of law for the court and not a question of fact for the jury, although the jury must still decide whether the document was willfully falsified. *See* Section 12.08, *supra*. A number of courts interpreting section 7206(2) have reached this same conclusion. ***United States v. Rogers***, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); ***United States v. Haynes***, 573 F.2d 236, 240 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978); ***United States v. Cutler***, 948 F.2d 691, 697 (10th Cir. 1991). *See also* ***United States v. Hutchison***, 1993 WL 137780, (9th Cir. January 13, 1993) (court specifically found, in a section 7206(2) case, that false taxpayer identification constituted a material matter).

As noted in the discussion of a false material matter in Section 12.08, *supra*, the courts apply two tests in determining materiality. One standard is that any item on a tax return that is necessary for a correct computation of the tax involved is a material item. The other is the so-called ***DiVarco*** test -- whether the false item has a tendency to influence or impede the Internal Revenue Service in checking on the accuracy of the return regardless of the tax consequences of the falsehood. ***United States v. DiVarco***, 343 F. Supp. 101 (N.D. Ill. 1972), *aff'd*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974). *See* cases cited in Section 12.08[3], *supra*.

13.05[2] ***Tax Deficiency Not Necessary***

It is not necessary in section 7206(2) cases to prove a tax deficiency, an intent to evade, or any pecuniary loss to the government. The falsity of the material matter is the crime, regardless of the tax consequences of the falsehood. Accordingly, in ***Baker v. United States*** , 401 F.2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970), the defendant argued that the indictment did not charge a section 7206(2) offense because the count complained of "alleged a 'wash' transaction having no tax consequences." The court rejected this argument, holding that "a false statement may be 'material' notwithstanding the lack of tax consequences." ***Baker***, 401 F.2d at 987 (footnote omitted). Similarly, in ***United States v. Hull***, 324 F.2d 817, 823 (5th Cir. 1963), the Fifth Circuit held that an indictment under section 7206(2) was sufficient even though it failed to state the amount of unreported income. "We further conclude that there is no merit in Hull's contention that the trial court erred in failing to charge the jury that a showing of a tax deficiency is a prerequisite to conviction." ***Hull***, 324 F.2d at 823. *See also* ***United States v. Abbas***, 504 F.2d 123, 126 (9th Cir. 1974), *cert. denied*, 421 U.S. 988 (1975) (rejecting defendant's argument that the items alleged to be false must be material to the computation of the correct tax liability to support a conviction of 26 U.S.C. § 7206(2)) (citing ***Edwards v. United States***, 375 F.2d 862, 865 (9th Cir. 1967)).

In ***United States v. Helmsley***, 941 F.2d 71, 92-93 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992), the defendant reported certain payments as ordinary business expenses which the government argued were actually nondeductible constructive dividends to defendant and her husband. The testimony of the government's expert witness on cross-examination, however, implied that the payments were a form of salary compensation to the Helmsleys which were properly deductible as a business expense. The trial court instructed the jury that it could convict whether the deductions were improper, as the government argued, or whether they were mischaracterized, as suggested by the government's expert. On appeal, the defendant challenged the conviction, claiming that mischaracterization of deductions was insufficient to support a section

7206(2) conviction. The court, however, affirmed the conviction and held that whether the deductions were improperly taken or whether they were mischaracterized was inconsequential. In either case, the court reasoned, the tax return entries were false, as proscribed by the statute. ***Helmsley***, 941 F.2d at 93.

13.05[3] ***Examples: "Material Matter"***

In ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982), the defendant tax return preparers argued on appeal that their conviction under section 7206(2) was improper because the documents containing the false information, defendants' Schedules C, "were not specifically and explicitly required by statute or regulation . . . ." ***Damon***, 676 F.2d at 1063. The Fifth Circuit affirmed the conviction on the grounds that the schedules prepared by defendants were "integral parts of such returns and were incorporated therein by reference." ***Damon***, 676 F.2d at 1064.

In ***United States v. Taylor***, 574 F.2d 232 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978), the court held that the omission of a substantial amount of livestock receipts on tax return schedules constituted the omission of a material matter as a matter of law because the schedules were integral parts of the tax return. At trial, Taylor was permitted to introduce evidence that he did not believe that the omission of livestock receipts was material because offsetting expenses rendered the omission without tax consequences. The Fifth Circuit noted that the existence of offsetting expenses did not go to the materiality of the omitted receipts, "but to the lack of *mens rea* in their omission." ***Taylor***, 574 F.2d at 237. Accordingly, the defendant's belief of a lack of tax consequences may be admissible on the willfulness of the omission, even if not relevant to the materiality of the omission.

Although ***Taylor*** was a section 7206(1) case, the same principles apply to section 7206(2) violations. *See* ***Damon***, 676 F.2d at 1063-64.

13.06 ***WILLFULNESS***

Willfulness has the same meaning in section 7206(2) cases as it does in other criminal tax violations. "The Court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." ***United States v. Bishop***, 412 U.S. 346, 360; (1973); *See also* ***Cheek v. United States***, 498 U.S. 192, 196 (1991). For additional discussions of willfulness, *see* Sections 8.06 and 12.09, *supra*.

In ***Edwards v. United States***, 375 F.2d 862 (9th Cir. 1967), the defendant tax attorney collected estimated tax payments from his clients, pocketed the money, and reported on the clients' returns that the estimated tax payments had been made and were properly credited against the tax due. The defendant argued that he did not intend to evade tax but only wanted to gain a little time. The court summarized the applicable law:

> The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsification and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section.

Edwards, 375 F.2d at 865; *see also* ***United States v. Greer***, 607 F.2d 1251, 1252 (9th Cir.), *cert. denied*, 444 U.S. 993 (1979) ("section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return").

It is not enough that the defendant's purposeful conduct merely resulted in the filing of a false return; the false filing must also have been a deliberate objective of the defendant. *See* ***United States v. Salerno***, 902 F.2d 1429, 1438 (9th Cir. 1990) (convictions reversed because government failed to show that casino employee knew or understood that his embezzlement scheme would affect preparation of the casino corporate returns); *cf.* ***United States v. Gurary***, 860 F.2d 521 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (government presented sufficient evidence to show that defendants, who sold fraudulent purchase invoices to corporations, knew their scheme

would result in corporations using the fraudulent invoices in the preparation of the tax returns). *See also* ***United States v. Aracri***, 968 F.2d 1512, 1523 (2d Cir. 1992) (government presented sufficient evidence for jury to find that defendants intended that fuel companies file false gasoline excise tax returns).

Section 7206(2) charges often arise in prosecutions of promoters of abusive tax shelters. In this context, a few cases have recognized uncertainty in the law as a defense to a finding of willfulness. *See* ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984) (court reversed the section 7206(2) convictions of the defendants, who had instructed investors on creating and carrying out a tax avoidance scheme, because the legality of the shelters was "completely unsettled"). The Ninth Circuit, however, has narrowed the circumstances in which such a defense may be raised to situations in which the defendant has merely advocated tax strategies that were of debatable legality. *See* ***United States v. Schulman***, 817 F.2d 1355, 1359 (9th Cir.), *cert. dismissed*, 483 U.S. 1042 (1987). Accordingly, ***Dahlstrom*** has been held not to provide a defense for defendants whose participation in an illegal scheme extended beyond advocacy and included actual assistance in effectuating the tax avoidance strategies. ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir.), *cert. denied*, 493 U.S. 811 (1989); ***United States v. Krall***, 835 F.2d 711, 713-14 (8th Cir. 1987); ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir.), *cert. denied*, 484 U.S. 1046 (1987); ***United States v. Tranakos***, 911 F.2d 1422, 1430-31 (10th Cir. 1990).

In instances where the defendant's promotion of the tax avoidance scheme extended beyond mere advocacy, the government may show that, although the law was asserted (by the defendant) to be unclear as to the scheme's legality, the defendant's conduct was clearly prohibited. *See* ***Solomon***, 825 F.2d at 1297 (even assuming that the patent tax shelter itself was legal or of unsettled legality, defendants could not rely on an uncertainty of the law defense since their conduct in administration of the scheme was so clearly fraudulent); *see also* ***Schulman***, 817 F.2d at 1359.

While mere advocacy may not be sufficient for a finding of aiding in the filing of false documents, it is not necessary that the defendant have a definite relationship (*i.e.* business partners, etc.) with the filing party. *See* ***Aracri***, 968 F.2d at 1524 (defendants' aiding in the filing of false documents rendered them criminally liable regardless of relationship to filing organization).

13.07 *CASE EXAMPLES*

13.07[1] *Return Preparers*

In ***United States v. Jackson***, 452 F.2d 144, 147 (7th Cir. 1971), the Seventh Circuit affirmed the conviction of a return preparer. Twelve taxpayer witnesses testified that they paid the defendant to prepare their returns, which contained itemized deductions and exemptions in excess of any amount they could correctly claim. The returns contained false deductions, such as medical deductions, charitable deductions, special work clothes, interest expense, and the like. All of the deductions were fictitious and supplied by the defendant, who told the taxpayers they would receive a refund. The defendant argued that his conviction was unfair because the client-taxpayers had an incentive to lie. The court concluded that "the innocence or guilty knowledge of a taxpayer is irrelevant to such a prosecution." ***Jackson***, 452 F.2d at 147; *see also* ***United States v. Haynes***, 573 F.2d 236 (5th Cir.), *cert. denied*, 439 U.S. 850 (1978).

13.07[2] *Sham Circular Financing Transactions*

In ***United States v. Clardy***, 612 F.2d 1139 (9th Cir. 1980), check kiting and check swapping were used by defendants as a basis for deducting non-existent interest payments. The jury was instructed on a good faith belief defense, but was also instructed: "If you find from the evidence that transactions do not exist except in form and are otherwise unreal or sham, you are to consider whether the defendant willfully engaged in such conduct for the purpose of procuring, counseling, advising, or preparing or presenting false federal income tax returns as charged in the indictment."

Clardy, 612 F.2d at 1152.

13.07[3] ***Inflated Values***

In ***United States v. Barshov***, 733 F.2d 842 (11th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), the defendants' general partners had formed limited partnerships to purchase motion pictures for distribution and exhibition. The defendants inflated the purchase price and the income generated by the films to maximize the depreciation costs and the investment credit, and caused returns to be filed based on the inflated numbers. The Eleventh Circuit affirmed the conviction for aiding and assisting in the preparation of false partnership returns and individual returns.

13.07[4] ***Political Contributions Deducted as Business Expenses***

In ***United States v. McCrane***, 527 F.2d 906 (3d Cir. 1975), *vacated and remanded on another issue*, 427 U.S. 909, *reaff'd on section 7206(2) counts, vacated and remanded on other counts*, 547 F.2d 204 (3d Cir. 1976), the defendant, who was the finance chairman for a gubernatorial candidate, solicited political contributions, but issued fictitious invoices through a public relations firm describing the money as payment for advertising services in order to disguise the payments as business expenses for the contributors. The contributors then deducted the contributions as business expenses on their returns. One corporation deducted a $2,000 contribution as a business expense on the basis of the fictitious advertising bills. Another corporation deducted a $15,000 political contribution as a business expense on the basis of the fictitious invoices. A witness testified that the defendant said he would furnish fictitious bills to facilitate the deduction of the political contribution as a business expense. The defendant argued that section 7206(2) applies only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns. Defendant's conviction was affirmed. The Court noted that "[t]he defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses . . . [and] [h]e also advised and counseled the contributors to

use these expenditures as tax deductions." ***McCrane***, 527 F.2d at 913.

13.07[5] ***Winning Racetrack Tickets -- Not Cashed by True Owner***

Winners at the racetrack often pay another person to cash winning tickets so that the real winner's name will not appear on the Form 1099, which the racetrack files with the Internal Revenue Service.

In ***United States v. Haimowitz***, 404 F.2d 38 (2d Cir. 1968), two people testified that they had cashed about $100,000 worth of winning tickets for the defendants for a commission of 2 1/2% or 3%. A third witness testified that he had cashed $200,000 worth of winning tickets. The defendant apparently told two of the cashing parties that they would be given sufficient losing tickets to offset the winnings attributed to them. The Second Circuit upheld the conviction because the "scheme of causing the track to record another person as the winner was calculated to defeat the government in its tax collection." ***Haimowitz***, 404 F.2d at 40. *See also* ***United States v. Monteiro***, 871 F.2d 204 (1st Cir.), *cert. denied*, 493 U.S. 833 (1989). Similarly, in ***United States v. McGee***, 572 F. 2d 1097, 1099 (5th Cir. 1978), the Fifth Circuit affirmed the conviction, under section 7206(2), of a defendant who cashed winning racetrack tickets for others under his own name in return for a 10% commission. The court stated that "[t]he statute is written disjunctively and it is sufficient for the government to prove either that the information was supplied with the intent to deceive or that the information was false in the sense of being deceptive." ***McGee***, 572 F. 2d at 1099 (citing ***United States v. Snider***, 502 F.2d 645 (4th Cir. 1974)).

13.07[6] ***Payoffs to Union Officials Designated as Commissions and Repairs***

In ***United States v. Kopituk***, 690 F.2d, 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983), the defendants made payoffs to union officials, but falsely reflected the payments in corporate records as being for commissions, repairs, and other items. Pointing out that even if it were true that the defendants never examined the returns, which had been prepared by their

accountant, the Eleventh Circuit held that "[s]ince the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms." ***Kopituk***, 690 F.2d at 1333 (citations omitted).

13.08 *VENUE*

Venue will lie where the acts of aiding and assisting took place or where the return was filed. ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993). *But see* ***United States v. Griffin***, 814 F.2d 806, 810 n.7 (1st Cir. 1987) (court chose to leave open the question of whether the district of filing provides a sufficient basis for venue in a section 7206(2) prosecution).

For further information, *see* the discussion of venue in Section 6.00, *supra*, and the discussion of venue in connection with section 7206(1) violations in Section 12.11, *supra*.

13.09 *STATUTE OF LIMITATIONS*

The statute of limitations for section 7206(2) offenses is six years from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(3) (1986); ***United States v. Habig***, 390 U.S. 222, 223 (1968).

Where the defendant's act of aiding a false filing precedes the filing of a return, the significant event is the filing of the false document, not the defendant's act that aided or caused the filing. Thus, although the defendant may have provided false information to the filer more than six years prior to the filing of the return, the filing of a subsequent return based on the false information renews the limitations period every time such filing occurs. *See, e.g.*, ***United States v. Kelley***, 864 F.2d 569, 574-75, (7th Cir.), *cert. denied*, 493 U.S. 811 (1989) (although defendant sold an abusive tax shelter more than six years ago, his clients' annual claims for illegal deductions arising from the shelter within the six years prior to his prosecution made the charges timely).

For further information, *see* the discussion of the statute of limitations in Section 7.00, *supra*.

---

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