Fictitiously Overstating Taxable Income

By Stanley Veliotis*

Introduction

TAX FRAUD IS A FREQUENT TOPIC of law review articles.[1] Scholarly business and economic journals also frequently publish articles addressing tax fraud.[2] The topic has also been of intense interest in the business press[3] and even television programming.[4] As noted in a tax fraud literature review, "[Q]uestions about tax fraud have been around as long as taxes themselves and will remain an area of discovery as long as taxes exist."[5]

An obvious case of tax fraud—and the easiest for laypersons to appreciate—is that of understating one's taxable income.[6] Tax laws

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1. A database search of law review articles with "tax fraud" in the title, HeinOnline, https://heinonline.org [https://perma.cc/P3A5-7SCC] (composing an advanced search for "tax fraud" in the title and refining search by section type: article). A July 31, 2020 search of the HeinOnline law library database for "tax fraud" in an article's title revealed 205 articles. *Id.*

2. A database search of scholarly articles with "tax fraud," "tax," or "fraud" in the title, ProQuest: ABI/INFORM Collection, https://www.proquest.com/abicomplete/fromDatabasesLayer/advanced [https://perma.cc/5GRG-C33Z] (composing an advanced search for "tax fraud," "tax," or "fraud" in the document title and sorting by source type: scholarly articles). A July 31, 2020 search of the ABI/INFORM database for "tax fraud" in an article's title revealed forty-one scholarly articles. *Id.* There were twenty-nine additional scholarly articles that have the word "tax" and "fraud" in the title but not the exact phrase "tax fraud." *Id.*

3. ABI/INFORM, *supra* note 2. A July 31,2020 database search for "tax" and "fraud" in the title revealed 422 trade journal articles, fifty-two magazine articles, and 1140 newspaper articles. *Id.*

4. *See, e.g.*, *Tax Me if You Can*, PBS Frontline (Feb. 19, 2004), https://www.pbs.org/wgbh/pages/frontline/shows/tax/ [https://perma.cc/CZ4F-VJ2T].

5. Benno Torgler, *What Do We Know About Tax Fraud? An Overview of Recent Developments*, 75 Soc. Rsch. 1239, 1239 (2008).

6. With rare exception, academic and practitioner articles on tax evasion address the more typical case of income understatement. *See, e.g.*, Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. Pub. Econ. 323, 324 (1972) (stating taxpayers have "two main strategies:" declare actual income or declare less than their actual income).

and their related administrative procedures are "generally designed to ferret out income understatement cases"[7] (where taxpayers underreport gross income, overstate deductions, or overstate creditable expenditures).[8] These monitors and processes are not designed for "the reverse situation of possible overstatements" of taxable income.[9] This Article details and contrasts several settings in which a taxpayer fictitiously *overstates* taxable income, through behavior the tax law would consider a "sham-in-fact."[10] Understanding these different settings helps answer critical questions related to the overstating, such as: which taxpayer is doing the overstating, why are they doing it, when (i.e., which reporting years) are they doing it, and how is it being accomplished? By understanding these nuances, the government and intermediaries—including tax advisors and defense counsel—may develop optimal countermeasures and the government may better tailor investigations and prosecutions.

Part I describes the case of a taxpayer fictitiously reporting income when such income *does not and never will* actually exist for any taxpayer. To obtain tax benefits, a taxpayer might do this to take advantage of negative marginal tax rates ("MTRs")[11] or to become eligible for a particular tax standing that does not apply at a lower income level.[12] Alternatively, a taxpayer may overstate income on a tax return as a conforming side effect of securing non-tax related benefits, such as receiving a loan by overstating income on the application. In the latter scenario, the taxpayer's conduct is not done to save taxes; indeed, it may even raise tax costs.[13]

Parts II and III describe cases of taxpayers reporting income when such income *does actually exist* in order to obtain tax benefits. Conversely, these sections contemplate a taxpayer fictitiously overstating income for the purpose of taking advantage of the relatively lower

7. George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225, 260 (1994); *see also* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 586 (1995) ("[E]xisting compliance mechanisms generally attempt to detect or prevent the *understatement* of earnings, which is the normal compliance problem faced by the IRS.").

8. Overstating credits is not a direct case of overstating income, although in some cases—*see infra* Part I.A—overstating income can lead to overstated credits.

9. Yin et al., *supra* note 7, at 260; *see also* Alstott, *supra* note 7, at 586.

10. Kirchman v. Comm'r, 862 F.2d 1486, 1492 (11th Cir. 1989) (defining shams-in-fact as "transactions that never occur . . . [i.e.] transactions that have been created on paper but which never took place").

11. *See infra* Part I.A.1.

12. *See infra* Part I.A.2.

13. *See infra* Part I.B.

MTRs of the year in which,[14] or taxpayer for which[15] the overstating is occurring.[16]

There are various examples of ways in which taxpayers obtain nontax benefits in Parts II and/or III. A publicly traded firm might take steps to avoid detection when they have fictitiously moved income from a future year's financial statement to an earlier year or an individual might take advantage of subsidies not available in another year,[17] or to another taxpayer, or to mask the true income earner.[18]

This Article ends with Part IV detailing considerations in applying the Internal Revenue Code's ("Code") tax crime provisions to the various types of fictitious overstatement settings. The wrongdoers' goals and methods of overstating can be subtly different and are relevant to which Code crime provision(s) apply and the government's ability to prove the requisite state of mind in tax prosecutions (and even in non-tax prosecutions where tax filings are relevant).

The purpose of this Article is not merely to catalog interesting cases of when the complicated tax law leads to perverse results that overstating taxable income can actually reduce taxes or to shine a light on scams in non-tax settings that use fictitious tax returns as a tool. The examples are also offered as a roadmap to the government and others tasked with analyzing such settings.

I. Overstating Taxable Income That Never Existed

A. How a Taxpayer May Obtain Permanent Tax Benefits

Part I.A.1 describes how taxable income overstatement benefits a taxpayer facing a negative marginal tax rate ("MTR"). Part I.A.2 describes how overstatement benefits a taxpayer seeking to reach a certain threshold for eligibility for a particular beneficial tax status.

1. Negative Marginal Tax Rates

The clearest case of a taxpayer permanently benefiting from deliberately overstating income that will never exist is when she faces a negative MTR. While several tax provisions can lead to negative MTRs,

14. *See infra* Part II.A.
15. *See infra* Part III.A.
16. In a symmetrical manner, the amount of income overstated in one year (or for one taxpayer) is generally reflected as an understatement of income of the same amount in the other year (or for the other taxpayer).
17. *See infra* Part II.B.
18. *See infra* Part III.B.

a frequently identified example is the earned income tax credit ("EITC"). However, let's first address negative MTRs.

The United States charges federal income tax with a tax rate(s) applied to a tax base of taxable income.[19] The tax rate is nominally applied based on a progressively increasing rate schedule (i.e., MTRs progressively increase). This is a result of nominal MTRs increasing in a step-function manner. For example, for 2019 a single individual is nominally subjected to a tax rate of 10% on the first $9,700 of taxable income, 12% on the next $29,775, and so forth.[20] In other words, as one has additional taxable income, the tax due on such marginal income is calculated at the same or higher MTR than the MTR that applied to the immediately prior dollar of income.[21]

On the other hand, when an MTR is—in effect—negative, we have a tax regime (as opposed to merely a MTR) that is regressive.[22] Economists often refer to a tax as regressive if the average tax rate (not MTR) decreases as income increases.[23] While some argue how progressive a tax regime should be,[24] most agree that at the low end of the earning range, the tax law should encourage further labor.[25] Several commentators have identified a common example presenting a

19. I.R.C. § 1 (2020).

20. I.R.C. § 1(c) (2020); INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, FORM 1040-ES, at 7, https://www.irs.gov/pub/irs-prior/f1040es—2019.pdf [https://perma.cc/R9W4-HEHC].

21. However, the tax law's many complicating formulae sometimes lead to pockets of marginal income taxed at a decreasing MTR. These occur when the tax law phases out certain tax benefits until the benefit is fully phased out. In the phase out range, marginal income is taxed at a higher ("stealth" or "implicit") MTR than the nominal MTR, but after the phaseout range ends, the taxpayer reverts (i.e., regresses) to the lower nominal MTR. *See, e.g.*, Stephen J. Entin, *Mommy, What's a Stealth Tax?*, WALL ST. J., Mar. 11, 2003, at A14; Jan L. Williams et al., *How Deductions, Credits, and Other Benefits Impact the Actual Marginal Rate*, 79 CPA J. (2009).

22. There is a case of MTR regressing to zero for trivial marginal amounts, thus leading to average tax rates falling. Individuals with below $100,000 of taxable income must use tables of fixed amounts of tax on taxable income based on $25 or $50 increments. For example, a single taxpayer with $99,950 of taxable income in 2019 has a tax of $18,169. The next $49 of marginal income incurs zero tax per the tables, thus revealing an actual MTR of zero, even though the nominal MTR is 24%. *See* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, TAX YEAR 2019 1040 AND 1040-SR INSTRUCTIONS, at 73 (2020), https://www.irs.gov/pub/irs-pdf/i1040gi.pdf [https://perma.cc/8548-3XQN]. For a study suggesting taxpayers strategically report just enough charitable deductions to arrive at the highest end of a $50 bracket, *see* Joel Slemrod, *An Empirical Test for Tax Evasion*, 67(2) REV. ECON. & STAT. 232 (1985).

23. *See, e.g.*, JAMES MIRRLEES ET AL., TAX BY DESIGN: THE MIRRLEES REVIEW 24 (2011).

24. *See, e.g.*, BARRY J. HERSHEY, THE AMERICAN TAX SYSTEM: A CALL FOR REFORM 18 (1984) ("The system should be moderately progressive.").

25. *See, e.g.*, Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 105 (2018) ("[The] primary goal is to encourage

negative MTR (and thus regressivity): the EITC.[26] The EITC is a refundable credit[27] that was partially introduced in 1975 to help address the regressivity in the social security tax's Old-Age, Survivors, and Disability Insurance ("OASDI") component, which is charged as 6.2% of the first block of wages and self-employment income and then is zero afterwards.[28]

Besides EITC, taxpayers with children may benefit from the refundable additional child tax credit ("ACTC"), which also results in negative MTRs.[29] Let's look at an EITC and ACTC example for a married couple with three dependents and one spouse having wages of $13,000 for 2019. Because of the standard deduction of $24,400,[30] taxable income is negative and thus tax is zero. However, they will receive a refund of $7,436 ($5,861 EITC plus $1,575 ACTC). Now assume this taxpayer decides to artificially inflate EITC and ACTC by overstating earned income with a fictitious Schedule C with $1,000 of self-employment income.[31] This will increase EITC by $405 and ACTC by $139. When factoring in the self-employment tax of $141 (14.13%),[32] the

employment. By raising the return to employment for low-income workers, the [EITC] credit provides an incentive to enter the labor force and to stay in it.").

26. *See, e.g.*, *id.* at 64 ("[EITC] induces negative [MTRs], with tax liability declining with each additional dollar earned . . . . amplify[ing] taxpayers' economic incentives to seek and maintain employment."); Edgar K. Browning, *Effects of the Earned Income Tax Credit on Income and Welfare*, 48 NAT'L TAX J. 23, 24 (1995) (explaining the EITC "operates like an earnings subsidy with a negative" 40% MTR).

27. In other words, a taxpayer may receive a refund from the government which exceeds the tax withholding she paid in.

28. *See, e.g.*, Joseph A. Pechman, Federal Tax Policy 221 (5th ed. 1987); HERSHEY, *supra* note 24, at 64. For 2020, the wage cap, at which the 6.2% charge ends, is $137,700. Topic No. 751 Social Security and Medicare Withholding Rates, INTERNAL REVENUE SERV. (Oct. 22, 2020), https://www.irs.gov/taxtopics/tc751 [https://perma.cc/2YTP-R3YG].

29. Gizem Kosar & Robert A. Moffitt, *Trends in Cumulative Marginal Tax Rates Facing Low-Income Families, 1997-2007*, 31 TAX POL. & ECON. 43, 48 (2017). ACTC applies if the taxpayer has over $2,500 of wages and self-employment income and is usually limited to 15% of such income above $2,500. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBLICATION 972: CHILD TAX CREDIT AND CREDIT FOR OTHER DEPENDENTS 8 (2020), https://www.irs.gov/pub/irs-pdf/p972.pdf [https://perma.cc/2AZX-FZ8W].

30. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBLICATION 501: DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION 24 (2020), https://www.irs.gov/pub/irs-pdf/p501.pdf [https://perma.cc/Z3TS-Z3UG].

31. Schedule C is the form taxpayers file with the IRS to report their revenue and related expenses of their sole proprietorships. *See e.g.*, I.R.S. Form 1040: Schedule C (2020), https://www.irs.gov/pub/irs-pdf/f1040sc.pdf [https://perma.cc/96RE-ATBM].

32. The SE tax rate is 15.3% (2.9% after the cap noted, *supra* note 28) but it is due on only 92.35% of SE income (14.13% = 15.3% * 92.35%). I.R.S. Form 1040: Schedule SE (2020), https://www.irs.gov/pub/irs-pdf/f1040sse.pdf [https://perma.cc/Q4FP-VVD6]. Because half of SE tax is deductible, in effect the net overall tax rate is even lower for taxpayers with positive taxable income. I.R.C. § 164(f) (2020).

refund has increased by $403 to $7,839. This reveals a true net negative MTR of 40.3%. (Instead of Schedule C, a less sophisticated taxpayer might overstate income with fictitious wages, which is easily detected by the IRS.)[33]

Academics are concerned that EITC provides an incentive for overreporting earned income up until the maximum EITC is obtained.[34] A renowned economist provides an IRS anecdote: "[T]axpayers are beginning to walk in the doors of the IRS, file returns, and claim credit for work that cannot be verified. IRS suspicions are aroused by a variety of factors. The credit recipient often seems to know how much income to declare to receive the maximum EITC."[35] In a congressional hearing, Congressman Linder shared with IRS Chief of Criminal Investigation Division, Ms. Nancy Jardini, an anecdote that the only "taxpayers who overstate their income are people seeking EITC refunds."[36] Tax preparers told him that taxpayers present a legitimate form W-2 for $12,000 and "say, 'I want to be honest with you; I made another $12,000 last year and I just want to make sure it is reported.' They get . . . the highest EITC return."[37] Ms. Jardini conceded "there is opportunity there for both dishonest people who want to claim income they don't have as well as unscrupulous preparers to take advantage of that, and we do see fraud in that pro-

33. A fake Schedule C is more practical because fictitious wages lead to detection as the IRS would not find a corresponding W-2 wage statement filed with the employer's annual W-3 filing. *See* I.R.S. Form W-3 (2020), https://www.irs.gov/pub/irs-pdf/fw3.pdf [https://perma.cc/FT35-FN2G]. A motivated scammer might actually file a fictitious conforming form W-3, thereby delaying IRS detection. The IRS has recently partially addressed this concern by delaying annual EITC/ACTC refunds to after February 15 of each filing season. *PATH Act Tax Related Provisions*, INTERNAL REVENUE SERV. (Apr. 3, 2020), https://www.irs.gov/newsroom/path-act-tax-related-provisions [https://perma.cc/887B-DBKE] ("[A]dditional time helps the IRS stop . . . fraudulent claims with fabricated wages.").

34. *See, e.g.*, Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 370 (2002) ("[S]avvy taxpayers . . . may have the counter-intuitive incentive to overstate income or not claim deductions associated with a . . . business."); Leslie Book, *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 KAN. L. REV. 1145, 1173 n.95 (2003) ("[A] taxpayer may have the perverse incentive of creating income or omitting deductions."); Alstott, *supra* note 7 ("[T]he unusual problem of incentives . . . tends to encourage *overstatement* of earnings . . . in the subsidy range.").

35. Gene Steuerle, *The IRS Cannot Control the New Superterranean Economy*, TAX HIST. (June 28, 1993), http://www.taxhistory.org/www/econpers.nsf/Web/CC1E032B28C86981852566DB0063DAA6 [https://perma.cc/A3HV-RERL].

36. *Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 109th Cong. 32 (2005) (statement of John Linder, Chairman, Subcomm. on Oversight). This Article offers many more settings in which taxpayers benefit from overstating income, although EITC is clearly a popular setting.

37. *Id.*

gram."[38] In 2017, over 27 million tax returns were filed with over $66 billion of EITC, of which nearly 19 million returns (with over $49 billion of EITC) had AGI under $25,000.[39]

While EITC and ACTC are clear examples of negative MTR settings, two more examples come to mind. The first example involves the dependent care credit. Assume a taxpayer with an MTR sufficiently low enough has dependent-care expenses but she does not have earned income allowing her to use the credit for such expenses.[40] By fictitiously creating Schedule C income of up to $3,000 per child (which is the cap per child), the taxpayer could create $1,050 of credit per child.[41]

The second example is rarely encountered but it still fits the bill. Consider an itemizing (i.e., Schedule A) taxpayer whose charitable contributions are capped at 60% of adjusted gross income and she also has investment interest expense deduction limited because of limited investment income.[42] To avoid her ability to carryover unused charitable and investment expenses to future years, let's assume she is concerned these two carryforwards will go unused (e.g., this will be her last year itemizing). Notice how a fictitious inclusion of investment income reduces taxable income by 160% of the fictitious income by releasing an equal amount of investment interest expense and 60% of the income to release that much charitable donation.[43] A similar result occurs if we replace investment interest expense with

38. *Id.*

39. *All Returns: Tax Liability, Tax Credits, and Tax Payments*, INTERNAL REVENUE SERV. (Nov. 3, 2020), https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income#_grp3 [https://perma.cc/J6X4-3W5K] (select "2017 XLS" under "Individual Complete Report (Publication 1304), Table 3.3" and see columns 36 & 37; rows 10, 11, 12, 13, 14, 15 & 16). There were over 18 million tax returns filed with ACTC totaling over $24 billion. *Id.* at cols. 38, 39; row 10.

40. *See* I.R.C. § 21 (2020); INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, INSTRUCTIONS FOR FORM 2441, at 4 (2019), https://www.irs.gov/pub/irs-pdf/i2441.pdf [https://perma.cc/PKX8-QUPQ] (explaining when the credits apply to cover dependent care expenses).

41. *See id.* (instructing how to calculate the expenses for each child). In determining overall MTR, the taxpayer should not neglect SE tax. *See* I.R.S. Form 1040: Schedule SE, *supra* note 32.

42. I.R.C. §§ 163(d), 170(b)(1)(G) (2020).

43. For example, assume a taxpayer with $100,000 of wages, $66,000 of charitable donations and $10,000 of investment interest expense. Her taxable income is $40,000 because the charity is limited to $60,000 and the interest expense is limited to zero because there is no investment income. Notice how fictitiously adding $10,000 of investment income leads to taxable income going even lower, down to $34,000. This is because the new $110,000 gross income is reduced by the full $66,000 of charity and the full interest expense of $10,000.

non-professional gambling expenses, which are limited to her gambling winnings.[44] The taxpayer could fictitiously increase the amount of gambling winnings, which will be fully offset by gambling losses,[45] yet likewise frees up more charitable deductions.

2. Tax Eligibility and Character Tax Benefits

Besides benefiting from negative MTRs, two other settings provide tax savings by overstating income. These arise when a taxpayer must surpass a certain threshold of income to be eligible for a particular beneficial tax status. The first setting is the hobby activity. The second is qualifying for retirement plan tax benefits by surpassing certain earned income thresholds.

A taxpayer is not permitted to take a deduction for expenses related to an activity not engaged in for a profit.[46] In other words, taxpayers cannot deduct expenses of a hobby but can if the activity amounts to a business. Under section 183(d), a taxpayer enjoys a presumption of business status—as opposed to a hobby—if she has a profit in three or more of five consecutive years.[47] For most horse-related activities, the requirement is that a profit is instead two or more of seven consecutive years.[48]

A 1980 business magazine article recommended that "[i]f you manage to make a profit in any two [this is prior law; the amount is now three] years in a five-year period, then the [IRS] will *assume automatically* that your hobby is a business."[49] While some authors refer to section 183(d) as a "safe harbor,"[50] it is actually a rebuttable presumption.[51] In a civil dispute with the IRS, failure to qualify for the presumption results in the taxpayer bearing the normal burden of proof

44. I.R.C. § 165(d) (2020). To be even more extreme, imagine she has excesses in both investment interest and gambling losses.

45. *Id.*

46. I.R.C. § 183(a) (2020). Before 2018, these hobby expenses were deductible on Schedule A up to hobby revenue (assuming taxpayer's hobby expenses and other miscellaneous expenses subject to a 2% of AGI floor were high enough). I.R.C. § 67(a) (2020). After 2017, the miscellaneous 2% category was eliminated until 2026. I.R.C. § 67(g) (2020).

47. I.R.C. § 183(d) (2020).

48. *Id.*

49. Allan J. Samansky, *Hobby Loss or Deductible Loss: An Intractable Problem*, 34 Univ. Fla. L. Rev. 50, n.18 (1981). In 1980, it was based on two out of five years. *See* id. at 46, n.5.

50. *See, e.g.*, George A. Dasaro, *Profit Motive Needed to Deduct Sideline Business Losses*, 71 Prac. Tax Strategies 344, 345 (2003).

51. Joseph H. Marxer, *Section 183 of the Internal Revenue Code: The Need for Statutory Reform*, 62 Ind. L.J., 425, 429 (1987).

by the preponderance of the evidence.[52] In other words, if there is no presumption, "then the matter proceeds under the normal rule that the [IRS assessment] is presumptively correct and the taxpayer carries the burden of proving the assessment incorrect."[53] Shifting this burden to the IRS can "provide a substantial benefit to the taxpayer"[54] and "probably gives the qualifying taxpayer a psychological advantage[:]" the government "would first have to present evidence that the activity was not engaged in for profit[; if] the government could not produce credible evidence, the taxpayer would win the case without presenting evidence . . . ."[55]

Let's look at an example of a couple facing a positive nominal MTR. The non-working spouse enjoys a horse-related activity that generates revenue that over the course of a lifetime will never exceed expenses. In a span of seven consecutive years, the activity has a cumulative net loss of $50,000 (total revenue of $20,000 less total expenses of $70,000). Assume a profit in only one year ($10,000) because a horse finally won a race purse ($20,000), which was more than that year's expenses ($10,000). Because he has not had a profit in two years, the activity is presumed to be a hobby and thus—unless he can show sufficient evidence of profit motive—none of the $50,000 overall losses will ever be deductible. However, if there is instead a profit in one of the six loss years, the activity is presumed to be a business, and thus—unless the IRS can show sufficient evidence—the overall losses are allowed on an annual basis. To create this presumption, assume he reports fictitious revenue of $10,001 in one of the loss years, thereby creating a profit of $1[56] ($10,001 fictitious revenue minus ac-

52. Paul R. McDaniel et al., Federal Income Taxation: Cases and Materials 597 (5th ed. 2004).

53. J. Martin Burke & Michael K. Friel, Taxation of Individual Income 484 (10th ed. 2012). *See also* Joseph M. Dodge et al., Federal Income Tax: Doctrine, Structure, and Policy 238 (4th ed. 2012) ("Failure to satisfy [183(d)] presumption does not mean that that taxpayer is presumed not to have a profit motive; the taxpayer simply is back to having to make . . . her case using the factors in Reg. 1.183-2(b).").

54. Nicole E. Ballard, Cherie J. O'Neil & Donald P. Samelson, *Avoiding Taxes by Avoiding Deductions*, 82 Taxes 45, 47 (2004).

55. Samansky, *supra* note 49, at 49–50.

56. There is no requirement that the profit in any year be material in terms of size or proportion. The Fourth Circuit disagreed with the IRS position that taxpayer's profit was "insignificant," stating that "the amounts of any net profits are irrelevant to a determination of whether the presumption has been met and [its] effect . . . ." Faulconer v. Comm'r, 748 F.2d 890, 895 (4th Cir. 1984). *See* Treas. Reg. § 1.183-2(b) (listing nine independent factors, including "the amount of occasional profits, if any, which are earned"). Daniel Q. Posin, Jr. & Donald B. Tobin, Principles of Federal Income Taxation of Individuals 410–11 (7th ed. 2005).

tual $10,000 expenses) in that year and thus meeting the two-of-seven requirement. This would allow the taxpayer to stand a far better chance of deducting $39,999 against the couple's combined taxable income over the seven years.[57]

Another example of benefiting from fictitious overstated income is the case of earned income rendering taxpayers eligible for certain retirement plan benefits. Contributions to a traditional or Roth IRA cannot exceed a taxpayer's earned income.[58] Let's assume a person with no earned income but negative taxable income wishes to contribute to a traditional IRA (to defer tax on investment yield)[59] or Roth IRA (to permanently exempt investment yield from tax).[60] She could fictitiously create a Schedule C profit up to her contribution but no more than the general cap allows (i.e., $6,000 for 2020).[61] If the taxpayer was not happy about paying self-employment tax, she could limit her Schedule C income to $400, the threshold for becoming subject to self-employment tax.[62] Similar manipulations might occur with simplified employee pension plans, for which contributions are limited to 25% of earned income.[63]

B. How a Taxpayer Obtains Non-Tax Benefits

We now turn to circumstances where a taxpayer fictitiously overstates taxable income that never existed, but that action is a con-

57. If concerned that the trivial $1 profit might attract IRS attention or help defeat him on audit or litigation, he could report a larger gain, which is still a rational decision if the tax paid on the gain in that year would be greater than the tax saved in the other years by deducting the losses.

58. I.R.C. §§ 219(b)(1)(B), (f)(1) (2020); I.R.C. § 408A(c)(2)(A)(2020), cross referencing I.R.C. §§ 219(b)(1)(B), (f)(1) (2020) and I.R.C. § 401(c)(2) (2020) (to allow self-employment income to count as earned income). IRA contributions are generally allowed to be made until April 15 after the reference year. *See, e.g.*, *Tax Time Guide: Contribute to an IRA by April 15 to Claim It on 2018 Tax Returns*, INTERNAL REVENUE SERV. (Sept. 19, 2020), https://www.irs.gov/newsroom/tax-time-guide-contribute-to-an-ira-by-april-15-to-claim-it-on-2018-tax-returns [https://perma.cc/X2H5-WYX9].

59. Under a traditional IRA, a taxpayer benefits from deducting contributions into the IRA and then is taxed on those contributions and any investment yield on those contributions later upon distribution. I.R.C. §§ 219(a), 408(d)(1) (2020).

60. Unlike a traditional IRA, a taxpayer does not deduct contributions into a Roth IRA but the benefit is that those contributions and any investment yield on those contributions are not taxed upon distribution. I.R.C. §§ 408A(c)(1), (d)(1) (2020).

61. *Traditional and Roth IRAs*, INTERNAL REVENUE SERV. (Jan. 28, 2020), https://www.irs.gov/retirement-plans/traditional-and-roth-iras [https://perma.cc/8KAJ-4GJ9].

62. I.R.C. § 6017 (2020).

63. *SEP Plan FAQs – Contributions*, INTERNAL REVENUE SERV. (Dec. 11, 2019), https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-seps-contributions [https://perma.cc/98FF-CZU5].

forming side effect of fraudulent activity not related to income tax. Publicly traded firms might seek to overstate income on their financial statements in this way; however, we will address these cases in Part II.B because such firms are more likely to overstate income in a way that involves fictitious timing of income inclusion, not fictitious income that never exists.[64]

Some individuals and businesses conform their tax returns to the overstated income they disclose in requests for bank loans, disaster relief, insurance settlements, or selling a business.[65] For example, academic literature has documented extensive overstatements of income on mortgage applications.[66] We might, however, expect fewer instances of conforming overstatement on the tax return as the applicant would likely incur tax costs (assuming a positive MTR).[67] This is unlike the case of publicly traded firms, where the tax is being paid by the firm, while the executives obtain benefits from the firm's stock price being increased by overstated profits.[68] Of course, some applicants supply a version of a tax return with overstated income to a lender, whereas the return filed with the IRS does not contain such overstated income.[69] This setting is outside the scope of this Article, as the wrongdoer has not actually filed any form with the IRS for which the taxpayer could be accused of a tax crime. Someone bent on fraudulently overstating income on an application would be smart to conform their tax returns if the lender requests IRS disclosure of tax information.[70] Furthermore, sophisticated taxpayers would likely be

64. *See infra* Part II.B.

65. Joseph D. Beams & W. Eugene Seago, *Why Some Taxpayers Benefit from Not Claiming Deductions*, 84 Taxes 39 (2006). *See also* Ray A. Knight & Lee G. Knight, *Criminal Tax Fraud: An Analytical Review*, 57 Mo. L. Rev. 175, 176 (1992) ("[V]iolation of criminal tax statutes has long been a natural and frequently inevitable handmaiden of the commission of many nontax crimes.").

66. *See, e.g.*, Atif Mian & Amir Sufi, *Fraudulent Income Overstatement on Mortgage Applications During the Credit Expansion of 2002 to 2005*, 30 Rev. Fin Stud. 1832 (2017).

67. James Edward Maule, *No Thanks, Uncle Sam, You Can Keep Your Tax Break*, 31 Seton Hall Legis. J. 81, 115 (2006).

68. *See infra* note 98 and accompanying text.

69. *See, e.g.*, Vernon Martin, *Preventing Fraud and Deception*, 77 Appraisal J. 136, 141 (2009) ("[M]any [lenders] have been burnt by counterfeit tax returns."); United States v. Haque, 315 F. App'x 510 (6th Cir. 2009) (CPAs made large profits preparing fake tax documents for loan applicants but forms never filed with IRS). In some cases, the lender does not ask for tax returns, which "open[s] the door for abuse when borrowers or their mortgage brokers or loan officers overstate income or assets in order to qualify the borrower for a larger mortgage." Dale Arthur Oesterle, *The Collapse of Fannie Mae and Freddie Mac: Victims or Villains?*, 5 Entrepreneurial Bus. L.J. 733, 751, n.127 (2010).

70. Section 6103 contemplates taxpayers signing IRS Form 4506-T to release their tax return transcript, I.R.S. Form 4506-T (2019), https://www.irs.gov/pub/irs-pdf/f4506t.pdf

hesitant to fraudulently overstate income on an application without conforming the tax returns because the IRS may compare the two.[71]

The premium tax credit ("PTC") presents another possible setting in which the taxpayer fictitiously overstates taxable income that never existed to obtain a non-tax benefit. The PTC is one of a few government programs which increase benefits if income is increased. PTC is for taxpayers whose income is generally between 100% and 400% of the poverty line.[72] In non-Medicaid expansion states, those "earning below the poverty line have a big incentive to overstate income[, which] raises issues of income verification [and] enforcement of perjury rules . . . ."[73] This example is another case of how many government programs lead to distortions of the true marginal cost of labor for low wage earners. A recent study found that as income thresholds are surpassed, many low wage earners lose more and more government benefits, creating high marginal "tax" rates (where their term "tax" includes lost benefits, such as subsidized housing and Medicaid).[74] The study also found some workers face negative marginal "tax" rates,[75] confirming there are even more cases than those described in this Article as candidates for fictitiously overstating income.

[https://perma.cc/Q5Z4-MTHL] and/or IRS Form 4506 to release their tax return, I.R.S. Form 4506 (2020), https://www.irs.gov/pub/irs-pdf/f4506.pdf [https://perma.cc/M3WL-BZJS]. I.R.C. § 6103 (2020). In a case brought by plaintiffs claiming they were wrongly denied an adoption, the court noted that by refusing to submit Form 4506, plaintiffs prevented defendant adoption agency from discovering returns produced in discovery differed from the returns plaintiffs filed with the IRS. Derzack v. County of Allegheny, 173 F.R.D. 400 (W.D. Pa. 1996).

71. *See, e.g.*, Gaines v. Comm'r, T.C. Summary Opinion 2003-127 (2003) (auditor detected taxpayer's applications to open investment account and credit card listed far more income than on returns); United States v. Lin, 326 F.R.D. 214, 217 (N.D. Cal. 2018) (IRS brought tax fraud cases against taxpayers who declared far less income on their tax return than they did in mortgage applications).

72. I.R.C. §§ 36B(a), (c)(1) (2020). For details, *see* Francine J. Lipman & James E. Williamson, *Reconciling the Premium Tax Credit: Painful Complications for Lower and Middle-Income Taxpayers*, 69 SMU L. Rev. 351 (2016). Arguably, PTC could be listed in Part I.A.1's negative MTR settings because section 36B is a Code provision. *See supra* Part I.A.1.

73. J. Angelo DeSantis, *The Thin Red Federal Poverty Line: How Rejecting the Medicaid Expansion Affects Those with Exchange Coverage*, 47 J. Marshall L. Rev. 923, 939 (2014) (contrasting two states in which Medicaid is expanded, where those below the poverty line enroll in Medicaid, unlike non-expansion states, "where switching to Medicaid is not an option for most individuals . . .").

74. David Altig et al., *Marginal Net Taxation of Americans' Labor Supply* (Nat'l Bureau of Econ. Rsch., Working Paper No. w27164, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603794 [https://perma.cc/S66R-VTKT] (the United States' plethora of tax and benefit programs have their own work incentives and disincentives).

75. In the extreme, a person receives a $40,600 increase in net tax and government benefits from earning another $1,000. *Id.* at 12, 16 fig.8.

Another setting involving overstating taxable income for a non-tax benefit is when one taxpayer overstates to mask the true nature of behavior by *another* person. A recent example is the televised disclosure by President Trump's attorney that the President arranged for payments to his former attorney, Michael Cohen.[76] Several months later, Cohen plead guilty to campaign law violations.[77] In January 2017, Cohen sought reimbursement from executives of the President's firm for the $130,000 he paid to keep a woman silent in advance of the election, as well as a payment of $50,000 for separate work Cohen performed, for a total of $180,000.[78] The President's firm "grossed up" for tax purposes the $180,000 to $360,000,[79] and then added a bonus of $60,000 so that Cohen would be paid $420,000 in total.[80] Cohen sent monthly invoices for $35,000, each of which stated it was pursuant to a "retainer agreement" and was "payment for services rendered" for the relevant month.[81] The firm's executive forwarded the first invoice to an employee at the firm, stating: "Post to legal expenses. Put 'retainer for the months of January and February of 2017' in the description," and thus the paying organization presumably accounted for these payments as legal expenses.[82] The U.S. Attor-

76. Alice Woodhouse, *Giuliani Says Trump Repaid Cohen for Payment to Porn Star*, FIN. TIMES (May 2, 2018), https://www.ft.com/content/3b2d2a88-4e7a-11e8-a7a9-37318e776bab.

77. *See Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations*, DEP'T OF JUST. (Aug. 21, 2018), https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax [https://perma.cc/R54T-58TU].

78. *Id.* While President Trump is not named in the plea, he is "Individual 1." *See Michael Cohen's Prepared Statement to the House Committee on Oversight and Reform*, WASH. POST (Feb. 27, 2019, 4:44 AM), https://www.washingtonpost.com/michael-cohen-s-prepared-statement-to-the-house-committee-on-oversight-and-reform/d2cdc193-2f0c-44bb-b2f8-e7dadddf545e_note.html [https://perma.cc/7KXP-QLUA] (see the document "Testimony of Michael D. Cohen Committee on Oversight and Reform U.S. House of Representatives" at 7).

79. This represents a 50% gross up, which appears reasonable if federal MTR is approximately 40% (including Affordable Care Act surcharges), along with uncapped portion of self-employment tax (2.9%), 6.85% New York State income tax, and 3.876% New York City income tax. For New York rates, see NEW YORK DEP'T OF TAX'N & FIN., INSTRUCTIONS FOR FORM IT-201, at 55, 69 (2017), https://www.tax.ny.gov/pdf/2017/inc/it201i_2017.pdf [https://perma.cc/H6BX-WK9F]. As these add up to slightly over 50%, the parties likely assumed Cohen would deduct New York tax on Schedule A. *See* I.R.C. § 164(a)(3) (2020).

80. *Michael Cohen Pleads Guilty*, *supra* note 77.

81. *Id.*

82. *Id.*; *see also* Stanley Veliotis, *Did Trump Write Off His Hush-money Payments? Another Reason We Need to See His Tax Returns*, N.Y. DAILY NEWS (May 9, 2018), https://www.nydailynews.com/opinion/trump-write-hush-money-payments-article-1.3980656 [https://perma.cc/KVG5-FVVB]; Catherine Rampell, *No Collusion? We'll See. But What*

ney in fact discovered that "there was no such retainer agreement, and the monthly invoices COHEN submitted were not in connection with any legal services he had provided in 2017."[83] This situation is an example of overstated taxable income to the extent of the $130,000 payment to hide the behavior of another person.[84]

II. Overstating Taxable Income in the Taxpayer's Wrong Year

Unlike Part I, where the reported income *never actually existed*, Part II addresses the case of a taxpayer fictitiously overstating taxable income that is actually experienced *at some point* in the taxpayer's life but reported in the wrong year. Thus, it is merely a matter of timing as to when the income is reported. Part II.A describes how a taxpayer may obtain tax benefits by engaging in this behavior, while Part II.B describes how a taxpayer may obtain non-tax benefits by doing this.

A. To Obtain Overall Tax Benefits

Here, the tax evasive behavior at issue is the taxpayer falsely reporting the year of income. This abuse can be accomplished by falsifying the year of revenue or an asset's gain sale (e.g., taxpayer was actually paid in 2020 but reported as if received in 2019). The latter can include stepping up the basis of an asset by falsely claiming it was sold at a gain in 2019 and then falsely claiming to have bought it back at the new stepped up value.[85]

About Tax Fraud?, WASH. POST (Aug. 23, 2018), https://www.washingtonpost.com/opinions/tax-crimes-brought-down-al-capone-what-about-trump/2018/08/23/996cea04-a710-11e8-8fac-12e98c13528d_story.html [https://perma.cc/4MZB-Q3NU].

83. *Michael Cohen Pleads Guilty*, *supra* note 77.

84. An open question is whether Cohen could have deducted the $130,000 payment to the silenced woman as a business expense. The answer may be "no" due to the illegality of the payment. *See* I.R.C. § 162(c)(2) (2020).

85. Assume taxpayer actually sold an asset for $10,000 in 2020 at a gain of $8,000 because the basis at purchase in 2016 was $2,000. Taxpayer fictitiously reports the sale in 2019 at $9,000, for a gain of $7,000 (i.e., overstatement of taxable income in 2019), and then fictitiously acts as if he bought it back at $9,000, thus creating a gain of only $1,000 in 2020. One might wonder why he feels the need to falsely step up the basis and report two sales in two years (2019 and 2020): Why not just report the entire gain solely in year 2019? This might be done if there is information reporting that alerts the IRS to the actual sale proceeds (e.g., Form 1099-S Proceeds from Real Estate Transactions for a sale that occurred in 2020). Again, this Article is addressing shams-in-fact, not actual sale-and-buybacks, although there can be a question whether an immediate sale and buyback has economic substance. *See* Stanley Veliotis, *Do Tax-Motivated Wash Gain Sales Pass Economic Substance Muster?*, 71 TAX LAW. 391 (2018).

Tax settings described in Part I.A are also subject to abuse here. For example, if a taxpayer is subject to negative MTR in year one but not year two, she might fictitiously move an item of income from year two to year one. If a horse enthusiast has profit in only one of seven years and wants the section 183(d) business presumption, a taxpayer may manipulate the timing of the profit and deductions from the activity to satisfy the tests.[86] However, there are more cases than those in Part I.A in which a taxpayer benefits by shifting the reporting of the actually experienced item of income to another year. These opportunities are created by the use of MTR shopping[87] and time value of money ("TVM").

A taxpayer shops for the ideal MTR by accelerating or deferring the reporting of taxable income to a year with a lower (or zero) MTR.[88] This includes shifting to a period before an MTR increase, so that the overall lifetime tax liabilities are minimized.[89] The act of MTR shopping, however, should consider TVM related to paying the related tax: If MTRs are always the same or decreasing in the future, the taxpayer should defer as long as possible—so as to benefit from TVM on delayed tax payment—and if MTRs are higher in the future, deferral makes sense if TVM is high enough.[90] In other words, the TVM cost of prepaying tax in an earlier year (due to overstating income in such earlier year) should be weighed against the savings from avoiding the higher future tax rate.[91]

For example, assume a taxpayer wants to know whether 2019 or 2020 is the better year to report taxable income. If his MTRs are static,

86. *See* POSIN & TOBIN, *supra* note 56 ("[M]ay be able to do a little planning by way of bunching up income in order to turn a perhaps small profit in several years . . . ."); Samansky, *supra* note 49 (under a prior version of presumption, taxpayer needed to avoid losses in five consecutive years and "taxpayers could usually rearrange income and deductions to break the five-year string").

87. The phrase "tax rate shopping" is seen in literature addressing a taxpayer's search among jurisdictions for a lower MTR. *See, e.g.*, Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. L. 45, 70 (2002). The phrase can also apply in *one* jurisdiction for a taxpayer's search for a *year* with a lower MTR. Veliotis, *supra* note 85, at n.1.

88. *See, e.g.*, MYRON SCHOLES ET AL., TAXES AND BUSINESS STRATEGY: A PLANNING APPROACH 23 (4th ed. 2009).

89. *Id.*; Raymond M. K. Wong, Agnes W. Y. Lo & Michael Firth, *Managing Discretionary Accruals and Book-Tax Differences in Anticipation of Tax Rate Increases: Evidence from China*, 26(2) J. INT'L FIN. MGMT & ACCT. 188, 189 (2015).

90. *See, e.g.*, Wong, Lo & Firth, *supra* note 89 (the goal is to minimize net present value of tax payments); Veliotis, *supra* note 85, at n.36–38 and accompanying text; SCHOLES ET AL., *supra* note 88.

91. *See, e.g.*, Wong, Lo & Firth, *supra* note 89; Veliotis, *supra* note 85, at n.36–38 and accompanying text; SCHOLES ET AL., *supra* note 88.

he would prefer to report the income in 2020 to push off the associated tax payment by a year. If his MTR is increasing in 2020 by *any* amount, reporting the income in 2019 is always ideal if TVM is zero. However, if TVM is positive (e.g., 10% annual interest rate, for ease of calculation), notice how an increase of MTR from 20% in year 2019 to 22% in year 2020 does not provide a benefit (or detriment) to pulling the income into 2019. In other words, while the taxpayer would save 2% tax by reporting it a year earlier, he would lose an equal amount of TVM because he is paying 20% tax a year earlier than otherwise. Thus, the 2% tax rate savings (22% MTR of 2020 minus 20% MTR of 2019) would be exactly offset by the TVM cost of 2% (early payment of 20% tax times 10% TVM). Therefore, if TVM is under 10% per year, the acceleration to 2019 is optimal in this example. In other words, if TVM is under 10% per year, he might seek to fictitiously pull income from 2020 (i.e., year of understatement) into 2019 (i.e., year of overstatement). In such a case, he might seek to fictitiously pull income from 2020 (i.e., year of understatement) into 2019 (i.e., year of overstatement).

A taxpayer might also seek to fictitiously overstate income in the case of expiring carryovers. For example, corporations have five years to use a capital loss carryforward.[92] A taxpayer may wish to move an actual or potential capital gain of a future year (i.e., year of understatement) to the year of capital loss carryforward expiration (i.e., year of overstatement) by fictitiously reporting that it sold an asset at a gain in the year of expiration.[93] Similarly, if a corporation does not have sufficient income to soak up an expiring charitable contribution carryforward, which also expires in the fifth year,[94] it may seek to fictitiously pull income from a future year into the year of charitable carryforward expiration (e.g., falsely claim the profit on an actual sale to a customer in year six was a profit in year five).

Another tax-law provision provides an opportunity to artificially create large pockets of income subject to zero MTR. Assume a single taxpayer buys a home for $500,000 and lives in it for two years while the property appreciates to $750,000. She will continue living in the home, which may continue appreciating. Notice how a fictitiously re-

92. I.R.C. § 1212(a)(1)(B) (2020). This assumes the corporation is not subject to a Subchapter S election. *See* I.R.C. § 1361 et seq (2020).

93. As in the example *supra* note 85, taxpayer may also wish to act as if it bought the asset back so that it would have an explanation of why it still owns the asset despite having claimed to have sold it. It would have a stepped-up basis, thus removing from future tax the gain overstated in the year of the fictitiously reported initial sale. *See supra* note 85.

94. I.R.C. §§ 170(b)(2)(A), (d)(2) (2020).

ported sale in year three for $750,000 leads her to have a $250,000 gain, which is excludable under section 121.[95] She then acts as if she bought it back, so she has a new basis of $750,000 and can restart the clock on another two year holding period for eligibility for future section 121 exclusion(s) for any further appreciation for the *same* home.

While this Article is not detailing procedural elements of tax crime cases, such as how the government detects fraud, it is worth noting the relevance to Part II of the government investigators' "net worth method." This method is the "best known of the circumstantial methods of proof of evasion" and "is regularly applied to routine cases of tax evasion."[96] This audit method exposes taxpayers who have net worth (i.e., excess of assets over liabilities) that is unexplained (e.g., taxpayer reports less income than would otherwise explain such a high net worth). The IRS threat of the net worth method could explain why a sophisticated taxpayer does not merely understate (i.e., ignore) income in the actual year the income was earned (i.e., do not bother also overstating a gain in an earlier year). For example, assume a taxpayer earns taxable income of $100,000 in year two but later learns for tax purposes it would have been better to show up as income in year one (e.g., zero MTR in year one). By including the $100,000 in year one taxable income, the taxpayer reduces the risk of the government detecting as of the end of year two an unexplained net worth increase of $100,000 had he completely ignored the income over both years. Again, as in many of the examples in Part II.A, ideally a taxpayer would avoid tax evasive behavior by entering into actual transactions before year end; however, the fictitious behavior this Article is seeking to shine a light on is done "after the fact."

B. To Obtain Non-Tax Benefits

The motivations in many of the settings in Part I.B also apply in this section. The major difference is that the income will *at some point* exist in the settings in part, whereas in Part I.B the income never actually existed and will never actually exist. Thus, in Part II.B, it is merely a matter of timing when the income is reported on the tax return.

95. I.R.C. §§ 121(a), (b)(1) (2020).

96. Knight & Knight, *supra* note 65, at 182; *See also* Karen Iafe et al., *Tax Evasion*, 31 Am. Crim. L. Rev. 875, 878 (1994) (most common method); C. Michael Chitwood, Paul J. Haase & Kerry Halpern, *Tax Violations*, 38 Am. Crim. L. Rev. 1345, 1356 (2001) (same); I.R.S. Criminal Investigation, IRM 9.5.9.5, 9.5.9.5.1 (Sept. 9, 2020), https://www.irs.gov/irm/part9/irm_09-005-009 [https://perma.cc/4FK4-4E8J] (noting all Circuits approve).

The first setting involves conforming a publicly traded firm's tax returns to an overstated profit reported in publicly released financial statements, such as to increase their stock prices. If a firm is deceiving shareholders or securities regulators about its earnings, it "generally must deceive the tax collector . . . ."[97] In post-Enron scandal hearings, Senator Grassley stated that "con men pay a little tax to help hide their fraud, bump up the stock price and cash in their stock options . . . . They basically have made the IRS an unwitting accomplice to their fraud."[98] WorldCom reported fraudulent financial statement income (created by capitalizing costs that should have been expensed currently, not in the future) on its federal income tax returns and paid the resulting income tax.[99] WorldCom needed to do so because a firm "that inflates earnings must either falsify its federal income tax return and pay tax on phantom income or face a significant risk that its earnings fraud will be detected."[100] For firms "that inflate book income, tax fraud becomes a necessary component of the accounting fraud."[101]

A study conducted shortly after the Enron and WorldCom scandals found that publicly traded firms paid an additional eight cents tax for each dollar of inflated pre-tax earnings, or a total of $320 million on inflated earnings of over $3 billion.[102] A subsequent study examined a sample of firms that restated their financial statement earnings downward due to accounting irregularities and thus could be

97. Craig M. Boise, *Playing with "Monopoly Money": Phony Profits, Fraud Penalties and Equity*, 90 MINN. L. REV. 144, 147 (2005) ("[Inflating firms] often pay tax on the fictitious income they create because doing so helps to hide the accounting fraud from investors, analysts and the SEC.").

98. *Grassley Wins Senate Approval of Corporate Crackdown Measure*, U.S. SENATE COMM. ON FIN. (May 15, 2003), https://www.finance.senate.gov/chairmans-news/grassley-wins-senate-approval-of-corporate-crackdown-measure [https://perma.cc/2BJW-53NH] (adding "payment of taxes was just part of the bag of tricks to fool shareholders").

99. Boise, *supra* note 97, at 158.

100. *Id.*

101. *Id.*; *see also* Rebecca Blumenstein et al., *After Inflating Their Income, Companies Want IRS Refunds*, WALL ST. J., May 2, 2003, at A2. ("[Firms] usually continue paying the proper amount of taxes on their improper numbers so as not to be found out; [this] is a perverse set of circumstances. You are basically making gifts to the government in order to make yourself not look bad.").

102. Merle Erickson, Michelle Hanlon & Edward L. Maydew, *How Much Will Firms Pay for Earnings that Do Not Exist? Evidence of Taxes Paid on Allegedly Fraudulent Earnings*, 79 ACCT. REV. 387, 396 (2004) (indicating "how far managers of firms are willing to go when allegedly inflating earnings"). Of the sixty-five observed cases of overstating net income, twenty-two were from overstating revenue and seventeen were from understating costs. *Id.*

presumed to have managed financial statement earnings upward.[103] The study found that firms trade off the net present value of tax benefits against the net expected detection costs associated with nonconforming earnings management.[104]

An individual or private business might also falsely overstate income in the wrong year and thus can provide another setting under this section too. For example, assume a borrower seeking to qualify for a loan to buy a home in year one reports receiving a large fee from a client that he will not actually receive until year two. Alternatively, assume an individual will retire in year two and starts drawing social security payments but does not want those payments reduced due to excess earned income in year two.[105] This individual might likewise fictitiously report this income as year one income (i.e., year of overstatement) when it really belongs in year two (i.e., year of understatement).

While not as relevant to this Article's focus on tax crime aspects of overstatement, one can appreciate that lying to a mortgage lender or stock market investor about the timing of income is not as nefarious as lying about income that never exists, as in Part I.B. This is because the person in Part II.B is not overstating *lifetime* income. Nonetheless, this timing shift may cause harm to the misled person. For example, if a publicly traded firm fictitiously shifts profit from the first quarter of year two to the fourth quarter of year one (say, to beat analysts' forecasts for the firm's quarterly profit), there may be dramatic stock price reactions.[106]

III. Overstating Taxable Income for the Wrong Taxpayer

Part III addresses the case of a taxpayer deliberately overstating taxable income when that income actually belongs to another taxpayer. Unlike Part I, where the reported income *never actually existed* for anyone, here it exists for someone. For example, income actually belongs to A (i.e., A has understated A's income) but she arranges for B to report the income (i.e., B has overstated B's income). This can happen when A wrongly shifts assets and their related income to "fam-

103. Brad A. Badertscher et al., *Earnings Management Strategies and the Trade-Off Between Tax Benefits and Detection Risk: To Conform or Not to Conform?*, 84 ACCT. REV. 63 (2009).

104. *Id.*

105. *See* William Reichenstein & William Meyer, *Social Security's Earnings Tests: A Primer for Financial Planners*, 28 J. FIN. PLAN. 53 (2015).

106. *See* Eli Bartov, Dan Givoly & Carla Hayn, *The Rewards to Meeting or Beating Earnings Expectations*, 33 J. ACCT. & ECON. 173 (2002); Boise, *supra* note 97, at 155.

ily members," whether they be human family members or corporate affiliates in the case of a common-owned group of firms. Alternatively, A shifts income to B, but B is not related or affiliated to A; instead, B is fictitiously acting as the income earner (or owner of an income producing asset), perhaps for a fee. In both related and unrelated party settings, the other party is reporting the income whereas someone else is the actual owner of the income.

Part III.A describes how taxpayers might obtain tax benefits by engaging in this behavior, while Part III.B describes how taxpayers might seek non-tax benefits by doing this.

A. To Obtain Overall Tax Benefits

How does taxpayer A derive tax benefits from arranging for overstated taxable income in taxpayer B's name? Taxpayers might engage in this behavior for the same tax purposes described in Parts I.A and II.A, such as to qualify A or B for favorable tax attributes or to subject the shifted income to a lower combined MTR (i.e., the combined marginal tax paid by A and B divided by the amount of shifted marginal income).

In substantive tax analysis, income shifting is handled under the assignment of income doctrine, for which the Supreme Court's decision in *Lucas v. Earl* is the seminal case.[107] In this case in which fraud was not relevant, the Court ruled that income must be taxed fully to the husband even though he and his wife entered into an agreement to evenly split the husband's salary.[108] In an example of shifting income amounting to civil tax fraud, a Seventh Circuit decision involved a tax attorney who assigned income to entities he owned and failed to report the income on his own individual tax returns.[109] These cases focus on the understatement by the true owner and do not explicitly address the income overstatement on the other taxpayer's return.

First to be addressed is income shifting between related parties, such as corporate taxpayers with overseas affiliates[110] that shift to their

107. Lucas v. Earl, 281 U.S. 111 (1930).

108. *Id.* at 114–16. "[N]o distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Id.* at 115. The "fruit and tree" metaphor applies beyond labor income. *See, e.g.*, Helvering v. Horst, 311 U.S. 112, 122 (1940) (bond owner is taxed on interest even if interest paid to another party).

109. Cole v. Comm'r, 637 F.3d 767 (7th Cir. 2011). *See infra* notes 133–35 and accompanying text for distinction between civil and criminal tax evasion.

110. In the case of U.S. corporate parents, a typical example would be controlled foreign corporations. *See* I.R.C. § 957 (2020).

entities.[111] The World Bank discusses the global risk that occurs when entities set a transfer price between them that is above or below the market price for a product and shift profits to an affiliate taxed at a lower rate, such that a multinational firm can reduce its overall tax payments.[112] Transfer pricing is an issue throughout the world, with tax evasion being effected through techniques such as accounting fraud—which is often difficult to identify—because it can create the impression of the existence of fair accounting records by using fake documents to understate profit in one country and overstate profit in a lower tax country.[113] In the United States, the IRS uses section 482 to help ensure firms are not overstating income of affiliated entities in other countries—especially those with lower MTRs—by intercompany pricing that overstates profit in such countries.[114] It is important to note that normally the transfer pricing overstatement of income does not happen on the tax return of a U.S. subsidiary of a foreign parent; instead it normally happens in a country with MTRs lower than the United States.[115] One of the largest U.S. transfer pricing settlements involved Glaxo Smith Kline's payment of $3.4 billion to the IRS for understating U.S. tax by shifting profits to overseas entities.[116]

Another example of "transfer pricing" relates to interfamily transfers. For example, shifting taxable income into the hands of lower MTR family members, such as children. A recent example is the alle-

111. For U.S. corporate parents, this is especially desirable after 2017, when earnings of overseas subsidiaries generally are no longer taxable, even when repatriated to a U.S. corporate parent. *See, e.g.*, Dhammika Dharmapala, *The Consequences of the Tax Cut and Jobs Act's International Provisions: Lessons from Existing Research*, 71 NAT'L TAX J. 707, 711 (2018).

112. Lorraine Eden, *Transfer Price Manipulation*, *in* DRAINING DEVELOPMENT?: CONTROLLING FLOWS OF ILLICIT FUNDS FROM DEVELOPING COUNTRIES 205, 207 (Peter Reuter ed., 2012), http://documents1.worldbank.org/curated/ru/305601468178737192/pdf/668150PUB0EPI0067848B09780821388693.pdf#page=223 [https://perma.cc/WPE7-GCPW].

113. Andreea - Lavinia Cazacu (Neamtu), *Transfer Pricing and the Manifestations of Tax Evasion*, 5 J. INT'L BUS. & ECON. 114, 115 (2017) (using terminology employed outside the U.S. of "fiscal fraud" and distinguishing licit tax evasion (called "tax avoidance" in the U.S.) from illicit tax evasion). Ideally, an external audit firm would detect fraudulent intercompany pricing arrangements when auditing for compliance with *ASC 280 Segment Reporting*, ACCT. STANDARDS CODIFICATION, https://asc.fasb.org/ [https://perma.cc/WQA5-MVL5]. *See, e.g.*, Christine A. Botosan, Adrienna Huffman & Mary Harris Stanford, The State of Segment Reporting by US Public Entities: 1976 - 2017 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3363738 [https://perma.cc/PVK3-B94Q].

114. I.R.C. § 482 (2020).

115. The maximum income tax rate for U.S. corporations for many decades was 35% until 2018, when reduced to 21% and is now more competitive with rates in other developed countries. I.R.C. § 11(b) (2020). *See also* Dharmapala, *supra* note 111, at n.3.

116. I.R.S. News Release IR-2006-142 (Sept. 11, 2006).

gation at the heart of a Pulitzer Prize winning[117] investigation of the finances of President Trump's father, Fred Trump, a real estate operator, and the income shifting to his children.[118] This investigation describes Fred Trump setting up separate entities owned by his children when they were in lower MTR brackets than he was.[119] He would direct vendors to sell products and services to these entities, which would then mark up the costs when reselling them to Fred Trump.[120] In this way, overall family MTR savings occurred (along with larger estate and gift tax savings because the funds were removed from Fred Trump's estate).[121]

The second setting involves arrangements similar to the arrangements described above but between *unrelated* parties. Cross-border transfer pricing arrangements can similarly occur between unrelated parties, in which case the parties typically share the tax savings.[122] As to domestic settings, there are cases in which taxpayer A seeks to fictitiously assign income to taxpayer B, who is not related to A. The recurring example of fictitious assignment with individuals involves the so-called "Ten Percenters" at U.S. gambling establishments.[123] Because

117. *David Barstow, Susanne Craig and Russ Buettner of The New York Times*, PULITZER PRIZE, https://www.pulitzer.org/winners/david-barstow-susanne-craig-and-russ-buettner-new-york-times [https://perma.cc/T8R9-97HL].

118. David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html [https://perma.cc/EL34-HFPQ].

119. *Id.*

120. *Id.*

121. *Id.* In 1986, Congress enacted the "kiddie tax" to curtail MTR shopping benefits of shifting certain investment income to young children, even when the parents actually transfer the underlying asset. *See, e.g.*, Samuel D. Brunson, *Grown-Up Income Shifting: Yesterday's Kiddie Tax Is Not Enough*, 59 UNIV. KAN. L. REV. 457, 458 (2011).

122. Items are often "exported at knockdown prices . . . to depress profits artificially and dodge tax." The buyer "then sells them on at their true market value and splits the difference between the artificial and the true price with the original seller." CHRISTIAN AID, FALSE PROFITS: ROBBING THE POOR TO KEEP THE RICH TAX-FREE 4 (2009), https://www.christianaid.ie/sites/default/files/2017-08/false-profits-robbing-the-poor-to-keep-rich-tax-free-march-2009.pdf [https://perma.cc/Y7KB-68NX].

123. Ronald H. Jensen, *Reflections on* United States v. Leona Helmsley*: Should 'Impossibility' Be a Defense to Attempted Income Tax Evasion?*, 12 VA. TAX REV. 335, 342 (1993). When a gambling win is large enough, the establishment must issue a Form W-2G to the winner. *See* INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORMS W-2G AND 5754 (2019), https://www.irs.gov/pub/irs-prior/iw2g—2020.pdf [https://perma.cc/E95F-FH8T]. Some of these cases involve completing the required forms at the race track under an assumed name using false identification. *See e.g.*, United States v. Lincoln, 472 F.2d 1183 (5th Cir. 1973).

> A custom has developed at the [race] tracks where certain persons called 'ten percenters' cash the winning tickets for the true winners and fill out the form

many actual winners do not want to be taxed on their winning, the actual winner (A) often gives the winning ticket to B to claim the winnings and report the winnings as part of B's taxable income.[124] B then gives all the winnings (net of any flat level of withholding) to A, after normally charging normally a 10% fee.[125] A recent guilty plea and several court cases provide examples of Ten Percenter cases in which the government pursued tax crime charges.[126]

B. Non-Tax Benefits

Many of the incentives behind the settings in Part I.B and Part II.B also apply in Part III.B., although sometimes the overstatement is a side effect of the main goal of understating *another* person's income. For example, if taxpayer A wants his elderly mother B to have income low enough to be eligible for government benefits, A might overstate his ownership of assets (and thus any income on such assets) by fictitiously claiming to own what B actually owns.[127] Another example involves the Ten Percenters described above. In one case, the Ten Percenters were not just employed to help save tax for the actual winners; they were also used to hide the fact that the winners were jockeys who had conspired to fix the race's order of finish and thus guarantee winning tickets.[128] One can also imagine a winning gambler not wanting a spouse finding out that they were at the ponies when they should have been mowing the lawn.

Scams involving money laundering often involve shifting income among various entities. A frequent method to launder money has long been the use of shell companies or front companies, where shells do not have an actual business operation and front companies operate an

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> setting forth their names and social security numbers rather than those of the true winners in exchange for 10 percent of the winnings. The ten percenter does this to shield the true winner from income tax liability on his winnings.

Id.

124. Jensen, *supra* note 123.

125. *Id.*

126. *"Ten-Percenter" Sentenced to One Year and One Day in Federal Prison on Tax and Tax Fraud Convictions Involving Winnings at Lone Star Park Horse-Racing Track*, U.S. DEP'T OF JUST. (June 22, 2015), https://www.justice.gov/usao-ndtx/pr/ten-percenter-sentenced-one-year-and-one-day-federal-prison-tax-and-tax-fraud [https://perma.cc/UF48-A7LU]. For court cases, *see infra* Part IV.E. The press release is silent as to whether the Ten Percenter sought to avoid tax on the overstated income by deducting gambling losses. *See "Ten-Percenter" Sentenced to One Year and One Day, supra.* A non-professional gambler may deduct these on Schedule A as a miscellaneous expense up to the amount of the gambling winnings. I.R.C. § 165(d) (2020).

127. *See* Henry J. Reske, *A Wider Medicaid Fraud Net*, 1 A.B.A. J. 26 (1997).

128. United States v. Walsh, 544 F.2d 156 (4th Cir. 1976).

actual legitimate business that includes receipts from the illicit source.[129] Many think of the use of these entities as a way to help a criminal avoid the fate of notorious gangster Al Capone, who was convicted solely for not reporting his taxable income. By money laundering through shell or front companies, a criminal pays tax on the illicit gains and thus avoids a tax evasion charge.[130] However, the nuanced issue in this Article is the fact that such a shell or front company, or other accommodating party, is overreporting *its* own income as a side effect of the true earner underreporting his income.[131]

IV. Tax Crimes Related to Overstating Taxable Income

Part IV does not seek to be an exhaustive look at tax crime jurisprudence and academic commentary, including procedural elements (e.g., sentencing guidelines, due process) related to convicting a party that fictitiously overstates income. Part IV assumes the requisite conscious state of mind (e.g., filing a fictitious Schedule C when no business actually exists) as opposed to negligently overstating income (e.g., innocently misadding a column of numbers when calculating the year's revenue). With this in mind, Part IV.A introduces relevant basics about tax crimes before the remainder of Part IV discusses the unique issues presented by fictitiously overstating taxable income.

As noted throughout this Article, the situations we address are shams-in-fact, as opposed to lawful tax planning.[132] Parts I, II, and III offer tax planning opportunities a taxpayer may legally engage in (e.g., timing *actual* sale of stock). The focus of this Article instead is on when the taxpayer *fictitiously* engages in that behavior (e.g., lying

129. Ping He, *A Typological Study on Money Laundering*, 13 J. MONEY LAUNDERING CONTROL 15, 24 (2010). *See* Barstow, Craig & Buettner, *supra* note 118. In Fred Trump's shifting of profits to his children, there was also non-tax benefit. *Id.* Fred Trump justified his obtaining higher rents from tenants because his operating costs were considered higher after being marked up by the children's entities. *Id.*

130. *See, e.g.*, Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

131. Instead of using an entity, a less sophisticated criminal might operate these activities in her own name as a sole proprietor (i.e., submit a Schedule C with her tax return that lies in describing the business). This is not an overstatement as that term is used throughout this Article because taxable income is accurate. However, such a taxpayer could still be vulnerable to tax perjury charges. *See, e.g.*, United States v. Jacobson, 547 F.2d 21, 24 (2d Cir. 1976) (lender reporting interest income as miscellaneous income; misplacement on return was still a violation of § 7206(1)). Tax perjury and § 7206(1) are discussed *infra* notes 147–52 and accompanying text.

132. Kirchman v. Comm'r, 862 F.2d 1486, 1492 (11th Cir. 1989) (defining shams-in-fact as "transactions that never occur . . . [i.e.] transactions that have been created on paper but which never took place").

about the year the stock was sold). In other words, the focus here will be on tax crimes (including tax evasion), not mere tax avoidance. "[Tax e]vasion typically is described as activity that is fully illegal, such as failing to file tax returns or hiding income and assets from the tax authorities. [Tax a]voidance, by contrast, usually involves employing legal maneuvers, sometimes called 'loopholes,' to reduce the amount a taxpayer owes."[133] There is generally "no difficulty in recognizing a course of conduct . . . that has transgressed beyond the point of avoidance and entered the area of evasion[, which] is the elimination or reduction of taxes through fraudulent means."[134] The Supreme Court reminds us that in a tax evasion case the government "enforce[s] by the criminal process in the familiar manner" to other criminal cases.[135]

A. General Background on Tax Crimes

Fraud is not defined in either the Code or Treasury regulations.[136] The IRS's Fraud Handbook defines fraud generally as "deception by misrepresentation of material facts . . . which results in material damage to one who relies on it and has the right to rely on it[,]"[137] which is consistent with how fraud is defined in tort law.[138] The Handbook then focuses on tax fraud, which is "often defined as an intentional wrongdoing, on the part of a taxpayer, with the specific purpose of evading a tax known or believed to be owing."[139]

The Code has several criminal provisions potentially applicable to this Article's overstatement settings. The "hierarchy of tax offenses

133. Steven A. Bank, *When Did Tax Avoidance Become Respectable?*, 71 TAX L. REV. 123, 123 (2017).

134. SYDNEY A. GUTKIN & DAVID BECK, TAX AVOIDANCE VS. TAX EVASION (1958). "The distinction between avoidance and evasion is fine, yet indefinite . . . . Evasion . . . involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events or to make things seem other than they are." I.R.S. Criminal Investigation, IRM, 9.1.3.3.2.1 (Sept. 10, 2017), https://www.irs.gov/irm/part9/irm_09-001-003#idm140038589942368 [https://perma.cc/C8HU-BBLV].

135. Spies v. United States, 317 U.S. 492, 495 (1943). The burden of proof for a civil evasion case is lower as there is "no burden on the Government to prove its case beyond a reasonable doubt." *Id.*

136. Knight & Knight, *supra* note 65, at 196.

137. I.R.S. Fraud Handbook, IRM 25.1.1.2(1) (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-001 [https://perma.cc/44M3-S5D6].

138. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977).

139. I.R.S. Fraud Handbook, IRM 25.1.1.2(2).

[are] set forth in §§ 7201-7207, inclusive . . . ."[140] The first of these offenses is the so-called "tax evasion" statute, section 7201, which states that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title . . . shall . . . be guilty of a felony . . . ."[141] Section 7201 is:

> Recognized by the [Supreme] Court as the "climax of this variety of sanctions" and as the "capstone of a system of sanctions . . . calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.[142]

The Supreme Court has held that the elements of section 7201 are willfulness, existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax.[143] Although this Article focuses on criminal behavior (i.e., the fictitious overstatement of income), it is important to note that tax evasion may result in both civil and criminal penalties.[144] For example, there is a 75% (or 100%) civil penalty on any part of an underpayment of tax required to be shown on a return that is attributable to fraud.[145]

As discussed in this Article and elaborated below, not every overstatement of income leads to a tax loss for the government. For example, the settings in Part I.B typically led to overpaid taxes because of reported income that never existed so as to receive a non-tax benefit. Even the settings in Parts II and III, respectively, lead to taxpayer overstatements of tax in at least one year or for a wrong party. While the inability to prove a tax shortfall means that there is not a tax evasion case, there may be a false return or other case.[146]

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140. United States v. Bishop, 412 U.S. 346, 359 (1973). *See also* Sansone v. United States, 380 U.S. 343, 349 (1965) (noting that "there can be no doubt that the lesser–included offense doctrine applies" in appropriate cases in this sequence).

141. I.R.C. § 7201(2020). The fine is up to $100,000 ($500,000 if a corporation) and/or imprisonment of up to five years. *Id.*

142. *Bishop*, 412 U.S. at 359 (citing Spies v. United States, 317 U.S. 492, 497 (1943) and *Sansone*, 380 U.S. at 350–51).

143. *Sansone*, 380 U.S. at 351. The term "deficiency" may be confusing because it has a special meaning in other areas of tax law. John A. Townsend, *Tax Evaded in the Federal Tax Crimes Sentencing Process and Beyond*, 59 VILL. L. REV. 599, 605 (2014).

144. *See, e.g.*, I.R.S. Fraud Handbook, IRM 25.1.1.2.3(3) (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-001 [https://perma.cc/44M3-S5D6].

145. I.R.C. § 6663(a) (2020). If the government cannot show fraud, then the accuracy penalty is 20%. I.R.C. § 6662. Because the actions described in Parts I to III are fictitious, our focus remains on tax crimes, although much of this Article is also helpful in analyzing civil penalty cases.

146. DEP'T OF JUST., CRIMINAL TAX MANUAL § 8.07[1] (2015), https://www.justice.gov/tax/file/629241/download [https://perma.cc/L4QB-G5UP] at https://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0 [https://perma.cc/777J-V9JD].

Penalties that might apply in the absence of a tax shortfall include section 7206(1), which is the so-called "tax perjury" statute.[147] It provides that any person who:

> willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony. . . .[148]

Section 7206(1) penalizes the filing of a false tax return "even though the falsity would not produce tax consequences."[149] The "materiality question bears no relation to the monetary amount involved."[150] Its purpose is not:

> [S]imply to ensure that the taxpayer pay the proper amount of taxes . . . . Rather, that section is intended to ensure also that the taxpayer not make misstatements that could hinder [IRS] in carrying out such functions as the verification of the accuracy of that return or a related tax return.[151]

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147. *See, e.g.*, DARRELL MCGOWEN, DANIEL G. O'DAY & KENNETH E. NORTH, CRIMINAL AND CIVIL TAX FRAUD: LAW, PRACTICE, PROCEDURE 546 (1986); John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 HOUS. BUS. & TAX L.J. 260, 264 (2009). Section 7206(1) is referred to as the "tax perjury statute" because it makes the "falsehood itself a crime." DEP'T OF JUST., CRIMINAL TAX MANUAL § 12.03, https://www.justice.gov/sites/default/files/tax/legacy/2013/05/30/CTM%20Chapter%2012.pdf [https://perma.cc/7FZF-SGN5].

148. I.R.C. § 7206(1) (2020) (fine up to $100,000 ($500,000 if a corporation) and/or prison up to three years, together with costs of prosecution). The actual fine could be "considerably less" because of federal sentencing guidelines, which tie fines to the tax loss; when overstatements of income do not produce a tax loss, the range of fines is a fraction of the amounts listed in the Code. Boise, *supra* note 97, at 173.

149. United States v. Tsanas, 572 F.2d 340, 343 (2d Cir. 1978), *cert. denied*, 435 U.S. 995 (1978). Note that even if a tax shortfall existed, the government may instead pursue § 7206(1) charges. *See, e.g.*, Kathleen H. Musslewhite, *The Application of Collateral Estoppel in the Tax Fraud Context: Does It Meet the Requirement of Fairness and Equity?*, 33 AM. UNIV. L. REV. 643, n.7 (1984) ("Although § 7201 has traditionally been the primary criminal fraud section, the government has increased its prosecution of violations under § 7206(1) . . . because the statutory elements are easier to establish.").

150. Iafe et al., *supra* note 96, at 903 (citing many cases).

151. United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984) (citing cases). *See also* DEP'T OF JUST., CRIMINAL TAX MANUAL § 12.10[1], https://www.justice.gov/sites/default/files/tax/legacy/2013/05/30/CTM%20Chapter%2012.pdf [https://perma.cc/7FZF-SGN5] (stating "material" matter includes one that influences IRS in carrying out its functions); Chitwood, Haase & Halpern, *supra* note 96, at 1375 ("[M]aterial if it has the potential for hindering the IRS's efforts to monitor and verify the tax liability in question.") (citing many cases). Materiality relating to "any item having a natural tendency to influence or impede the IRS in ascertaining the correctness of the tax reported or in verifying or auditing the returns of the taxpayer" is sometimes called the "DiVarco definition." Jennifer Gibbons, *Proof of Tax Deficiency—The Silent Element in False Statements Charges?*, 50 ARIZ. L. REV. 337, 345 (2008) (citing United States v. DiVarco, 484 F.2d 670 (7th Cir. 1973)

The Justice Department's Tax Division prefers to bring tax cases under the Code (even if other more broadly applicable provisions such as 18 U.S.C. section 1001 apply).[152]

Section 7207 is also potentially relevant. It provides that "[a]ny person who willfully delivers or discloses to the [IRS] any . . . return . . . known by him to be fraudulent or to be false as to any material matter, shall be fined [and/or] imprisoned."[153] Because its penalties are far less severe than section 7206(1), in essence section 7207 provides for a misdemeanor charge for filing a fraudulent return.[154] Just as with a section 7206(1) felony charge, section 7207 does not require an attempt to evade or defeat taxes.[155] The Department of Justice has a policy against charging under section 7207, thus it has "rarely been used by the government; it usually prefers to attempt to prove felony even when section 7207 is more clearly applicable."[156] In the analyses in Part IV below, we will not separately address section 7207; generally the reader may equally apply any section 7206(1) discussion, such as in the case of a prosecutor pursuing a lesser version of tax perjury.

Some settings described in this Article relate to actions by one party in connection with another party's overstatement of income. Section 7206(2), which is sometimes called the "aiding and abetting statute,"[157] leads to the same felony results as section 7206(1). Section 7206(2) addresses cases in which a party "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the [Code] of a [tax] return . . . ."[158] Section 7212 may also be relevant. It provides,

(holding that lying about source of income is material even though no understatement of income occurred)).

152. Dep't of Just., Criminal Tax Manual § 12.02, https://www.justice.gov/sites/default/files/tax/legacy/2013/05/30/CTM%20Chapter%2012.pdf [https://perma.cc/7FZF-SGN5]. If technical defenses are likely to be raised to § 7206(1), prosecutors should consider bringing charges under other statutes, such as 18 U.S.C. § 371 (conspiracy) or 18 U.S.C. § 1001 (false statements). *Id. See infra* notes 161–70 and accompanying text.

153. I.R.C. § 7207 (2002) (stating a consequence of prison for up to one year and fines up to $10,000 or $50,000 if a corporation).

154. Brittany Yantis et al., *Tax Violations*, 55 Am. Crim. L. Rev. 1773, 1800 n.213 (2018).

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

156. McGowen, O'Day & North, *supra* note 147, at 573 (submitting that a false schedule is better as a § 7207 charge).

157. Dep't of Just., Criminal Tax Manual § 13.03, https://www.justice.gov/sites/default/files/tax/legacy/2012/12/05/CTM%20Chapter%2013.pdf [https://perma.cc/V9JW-KSBA] (citing cases).

158. I.R.C. § 7206(2) (2020). This provision does not just apply to tax preparers. *See, e.g.*, United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976) (holding that a beaver breeder at the heart of a tax shelter scheme was an aider and abettor when party to taxpayer backdating investments in the shelter scheme).

in relevant part, that "[w]hoever corruptly . . . obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined" and/or "imprisoned."[159] This crime is sometimes called the "tax obstruction" crime.[160]

The general provisions in 18 U.S.C. are sometimes relevant in tax-related cases.[161] While section 1001 punishes falsification of a material fact,[162] the government in tax cases normally prosecutes submission of a false tax return under section 7206(1), not section 1001.[163] (Because section 1001 "generally is co-extensive with" section 7206(1), we do not discuss it separately here.)[164] The government may also seek to charge under 18 U.S.C. sections 286[165] and/or 287,[166] which apply to fraudulent claims against the government. For example, the government may pursue sections 286 and 287 approaches against tax preparers when the willfulness requirement of the Code is not easy to prove.[167] In 2012, for example, the government obtained guilty pleas

159. I.R.C. § 7212(a) (2020) (generally up to three years and/or $5,000 fine).

160. Townsend, *supra* note 147, at 264.

161. Knight & Knight, *supra* note 65, at 179. Section 7206(1) is "less stringent in application" than the "general perjury statute," 18 U.S.C. § 1621(2) (2020). Iafe et al., *supra* note 96, at 901. It provides that "whoever . . . in any declaration, certificate, or under penalty of perjury as permitted under [28 U.S.C. § 1746 (i.e., unsworn declarations under penalty of perjury)], willfully subscribes as true any material matter which he does not believe to be true, is guilty of perjury. . . ." 18 U.S.C. § 1621(2) (2020).

162. 18 U.S.C. § 1001 (2020) ("[W]hoever, in any matter within the jurisdiction of . . . [the U.S.] Government . . . knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined . . ." and/or imprisoned up to five years).

163. McGowen, O'Day & North, *supra* note 147, at 590. *See also supra* note 152 and accompanying text; Dep't of Just., Criminal Tax Manual § 24.03, https://www.justice.gov/sites/default/files/tax/legacy/2015/03/27/CTM%20Chapter%2024.pdf [https://perma.cc/RJ3C-8S5L]. In criminal tax context, § 1001 is normally used for false documents or statements submitted to IRS agents during audit or investigation; generally it is not used in cases of false statement on return because, if the return is signed under penalty of perjury, "as most are, § 7206(1) . . . is considered a more appropriate charge." *Id.*

164. *See* Boise, *supra* note 97, at n.88.

165. "Whoever enters into any agreement, combination, or conspiracy to defraud the [U.S.] . . . by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined" and/or imprisoned. 18 U.S.C. § 286 (2020).

166. "Whoever makes or presents to any [U.S. representative] . . . any claim upon or against the [U.S.] . . . knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned" and fined. 18 U.S.C. § 287 (2020).

167. Nancy B. Nichols, *Criminal Prosecution of Tax Return Preparers*, 6 Am. Tax Ass'n J. Legal Tax Rsch. 24, 30 (2008).

in a $100 million scam involving fabricating income and withholding via fraudulent 1099-OID forms filed with the government, where taxpayers would then seek the excess withholding as a refund.[168] In more elaborate arrangements involving multiple parties, there could also be conspiracy charges under 18 U.S.C. section 371.[169] Because the criminal tax statutes do not include a statute for conspiracy, the government typically charges tax-related conspiracies under section 371, the general conspiracy statute.[170]

In search for fraudulent intent, the courts and IRS frequently refer to "badges of fraud;" none of these, however, explicitly address overstating income.[171] This is not surprising as most tax cases involve understating income. Also, the few academic articles that identify their own examples of the tax and non-tax benefits of overstating taxable income have not run the entire set of overstatement scenarios through a tax crime analysis. We now turn to analyzing how the Code's tax crime provisions summarized above could apply to alternative ways taxpayers engage in fictitious overstatement of taxable income.

In short, each version of the fictitious taxable income overstatement case described in this Article is subject to a potential section

168. Press Release, *Georgia Woman Pleads Guilty to Tax Fraud*, OFF. OF THE U.S. ATTORNEYS (Apr. 10, 2012), https://www.justice.gov/archive/usao/mow/news2012/wilson_jennifer.ple.html [https://perma.cc/M88A-H35C]. While this is a fictitious overstatement of income case, it is also a fictitious overstatement of prepaid taxes (i.e., withholding). Several other 1099-OID cases are summarized at *1099-OID Tax Fraud Scheme*, U.S. DEP'T OF JUST. (Jan. 9, 2015), https://www.justice.gov/usao-wdmo/1099-oid-tax-fraud-scheme [https://perma.cc/EKL5-J4NC].

169. "If two or more persons conspire either to commit any offense against [U.S.], or to defraud [U.S.], and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined" and/or imprisoned. 18 U.S.C. § 371 (2020). One of the 1099-OID scam cases, *1099-OID Tax Fraud Scheme, supra* note 168, was also charged under § 371. *See, e.g.*, United States v. Cyster, 2014 U.S. Dist. LEXIS 155397 (W.D.N.Y. 2014).

170. Nichols, *supra* note 167, at 31. Tax cases brought under this statute are sometimes called "Klein conspiracies." I.R.S. Criminal Investigation, IRM 9.1.3.4.8.2 (Sept. 10, 2017), https://www.irs.gov/irm/part9/irm_09-001-003#idm140038547929440 [https://perma.cc/NC65-ZWEY]. *Klein* addressed co-conspirators who organized multiple foreign entities to carry on a liquor business to minimize income tax. United States v. Klein, 247 F.2d 908 (2d Cir. 1957).

171. The most recent Tax Court case listing badges has eleven, the first of which is *understating* income and the rest do not explicitly mention overstating income. Kohan v. Comm'r, T.C. Memo 2019-85 (2019). *See also* I.R.S. Fraud Handbook, IRM 25.1.2.1, 25.1.2.3 (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-002 [https://perma.cc/GPS7-XDBE] (stating that badges are also called "indicators of fraud" and none include overstating income).

7206(1) charge against the overstater, even if excess taxes are paid.[172] In other words, in *all* the fictitious taxable income overstatement cases described in this Article—whether tax savings or tax costs ensue—the overstating taxpayer is violating section 7206(1)'s purpose, which is to ensure they not make misstatements that could hinder the IRS from carrying out its functions.[173] An auditor is hindered in reviewing an entire tax return if there are items on it that actually do not exist. For example, such amounts could distort ratio or trend analysis during audit screening or performance.[174]

It is not always as clear how to apply the other Code provisions—such as the more punishing section 7201—to overstatement cases. Investigators, prosecutors, and defense counsel need to carefully analyze the particular setting in which overstatement occurs to identify the correct statutory route, as addressed below.

B. Overstating Revenue and Gain Sale Versus Understating Deductions and Loss Sale

Before applying the Code's tax crime provisions to the fictitiously overstated taxable income settings in Parts I, II, and III, it is important to distinguish reporting fictitious revenue or gain from sales of property (thereby overstating taxable income) from deliberately omitting legitimate deductions or loss property sales (thereby likewise overstating taxable income). While this Article generally applies to either method of overstating taxable income, it is more likely that taxpayers can more easily succeed in their taxable income overstatement scams by understating deductions or loss sales rather than overstating revenue or gain sales. There are two reasons why the methods used to fictitiously overstate taxable income is important.

First, overstating revenue or gains is an act of commission, whereas omitting deductions or losses is an act of omission. This dis-

172. This is also the view of Professor Boise in his look at publicly traded firms that conform taxable income to inflated financial reporting earnings.

> Can a taxpayer commit 'tax fraud' by paying too much tax to the Treasury? As it turns out, the answer is that it is indeed possible, for several reasons. First, in simplest terms, fraud means deception . . . . Tax fraud is therefore deception with respect to one's tax liability. This is the sense in which the term is used in I.R.C. § 7206(1), which is under the title 'Fraud and False Statements' and simply prohibits the willful filing of a false tax return . . . .

Boise, *supra* note 97, at n.23.

173. See *supra* note 151 and accompanying text.

174. *See, e.g.*, I.R.S. Examining Process, IRM 4.10.3 (Sept. 13, 2017), https://www.irs.gov/irm/part4/irm_04-010-003 [https://perma.cc/283F-BWWB] (e.g., profit margin ratio).

tinction may in some cases be critical because the Supreme Court has stated that to be convicted of a felony (as opposed to misdemeanor), an act of omission is not considered by itself to be willful.[175] For example, merely passive neglect in omitting deductions is not an affirmative act.[176] The taxpayer may have the potential evidentiary benefit of the government's inability to show willfulness in eschewing deductions, which does not apply in the case of overstating gross income. After all, not taking a deduction because he innocently forgot he had a particular business expense is not as culpable as creating a fictitious Schedule C. A taxpayer could also argue that he consciously eschewed deductions due to the administrative burden of tracking receipts or to cloak with privacy his medical information and charitable targets (or even to lessen the risk of triggering an annoying audit).[177]

Second, overstating gains or revenue offers the government an easier chance to uncover the wrong: it is staring the audit team or other investigators in the face. For example, inventing an entirely fictitious Schedule C business[178] is creating something out of whole cloth, as opposed to already having a Schedule C but overstating taxable income by merely omitting some deductions from Schedule C. Furthermore, omitting deductions is likely more difficult for an auditor to detect when solely looking at the tax return.

As a general proposition, a court should find fictitiously creating revenue or a gain sale is, at a minimum, violative of section 7206(1) as it is difficult to imagine a taxpayer's defense. On the other hand, omitting deductions or loss sales might require levels of proof (e.g., state of mind and evidence of eschewed deductions) difficult for the government to attain, or to even detect in the first place.

175. Spies v. United States, 317 U.S. 492 (1943). *Spies* "has interpreted the second element of § 7201 offenses to require a 'positive attempt . . .' rather than merely passive neglect. Thus an affirmative act to evade tax must be a commission, rather than an omission." Iafe, *supra* note 96, at 880. *See also* I.R.S. Fraud Handbook, IRM 25.1.1.2(1) (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-001 [https://perma.cc/44M3-S5D6].

176. Iafe, *supra* note 96, at 880 (citing many cases). Willful but passive neglect could be a misdemeanor. *Spies*, 317 U.S. at 499.

177. Ballard, O'Neil & Samelson, *supra* note 54; Beams & Seago, *supra* note 65; Maule, *supra* note 67, at 142–43. Another innocent reason for not taking a deduction could be the taxpayer lost the receipts and did not want to report an estimate. *See* James J. Rigos, *Applying the AICPA's Professional Standards to Tax Practice: Best Practices for Minimizing Risk and Penalties*, CPA J. (Mar. 2017), https://www.cpajournal.com/2018/03/22/icymi-applying-aicpas-professional-standards-tax-practice/ [https://perma.cc/7N9K-4FC7] (addressing when preparer may use client estimates).

178. This is a common example of how many exploit the negative MTR advantage caused by the EITC. *See supra* notes 27–38 and accompanying text.

It is important to remember that this Article is concerned about fictitiously overstating taxable income, whether accomplished by overstated revenue/gain sales or omitted deductions/loss sales. However, if a taxpayer is omitting deductions because they are *also* omitting revenue, this is outside the scope of this Article, which is about overstating *taxable* income. For example, if a taxpayer omits deductions because she is also omitting revenue, that is likely an understatement case. For this reason, Court decisions that point to omitted deductions as an indicator that there might be omitted income are not in this Article's scope.[179]

C. Overstating Taxable Income That Never Existed

Let us first view through a tax fraud prism the case of overstating taxable income that never existed so that the taxpayer can benefit from negative MTR or reduce tax through becoming eligible for a certain tax character.[180] The government could charge tax perjury (e.g., section 7206(1)). It can also charge section 7201 because the taxpayer has wrongly reduced their tax, whether it be in the one year of overstated income or by helping reduce taxes in other years, such as in the Roth IRA or hobby examples.[181] These will also be in addition to other taxpayer penalties specifically designated for certain Code sections, such as EITC abuses.[182]

In the refundable credit cases, at first blush there is a potential issue in applying section 7201 to cases in which the income tax before EITC/ACTC is less than the EITC/ACTC, such that the taxpayer receives a refund greater than their tax pre-payments. This occurs because such a taxpayer literally cannot violate section 7201, which requires a taxpayer "evade or defeat any tax."[183] After all, the taxpayer has not evaded or defeated a tax to the extent of the excess refundable credit over her income tax. In other words, how can the taxpayer be evading a negative amount of tax? However, courts take the view that tax evaded is a "deficiency," as that term is defined in section

179. For example, *Gaines* notes that a taxpayer's "willingness to give up what would otherwise be allowable deductions strongly suggests the existence of unreported cash income." Gaines v. Comm'r, T.C. Summary Opinion 2003-127, 30 (2003).

180. *Supra* Part I.A.1–2.

181. *Supra* Part I.A.2.

182. The IRS bans a taxpayer from claiming EITC for ten years if he fraudulently claims EITC. I.R.C. § 32(k) (2020).

183. I.R.C. § 7201 (2020) and *supra* notes 141–43 and accompanying text.

6211.[184] While section 7201 should be available for EITC cases with negative tax, a LexisNexis search of court cases reveals no case in which it was charged.[185] Instead, there are cases in which the government uses the general claims provision of sections 286 or 287, which applies because refunds are fraudulent claims on the government. In a search of LexisNexis, only one case appears to have charged section 287 for the taxpayer abusing EITC.[186] On the other hand, there are many cases charging preparers with sections 286 and/or 287,[187] in-

184. DEP'T OF JUST., CRIMINAL TAX MANUAL § 8.07[1] (2015), https://www.justice.gov/tax/file/629241/download [https://perma.cc/L4QB-G5UP]; Townsend, *supra* note 143, at 605 ("[C]ourts – including the Supreme Court [e.g., Sansone v. United States, 380 U.S. 343, 349 (1965)]—often refer to the evaded tax element as tax deficiency."). Instructive is Congress's recent response to the Tax Court *Rand* decision to make clear that in the context of an "underpayment" in non-fraud penalty cases (e.g., 20% penalty), underpayment includes the full EITC/ACTC, not merely tax shielded by EITC. *See* I.R.C. §§ 6664(a), 6211(b)(4) (2020) (computing 20% of underpayment penalty as if EITC is part of underpayment). "The effect of this amendment is to legislatively overrule the Tax Court's decision in *Rand* . . . ." *Recent Developments in Federal Income Taxation: The Year 2015*, 18 FLA. TAX REV. 275, 440. *See* Rand v. Comm'r, 141 T.C. 376, 382 (2013).

185. LEXISNEXIS, https://plus.lexis.com/search/?pdmfid=1530671&crid=dd30c108-05f7-4e82-a58c-76f3ab92e024&pdsearchterms=7201+and+(Earned+and+Income+and+Tax+and+Credit)&pdtypeofsearch=searchboxclick&pdsearchtype=searchBox&pdstartin=&pdtimeline=01%2F01%2F1975to08%2F20%2F2020%7Cdatebetween&pdpsf=date%7Cjur%3A1%3A3%2C1%2C2&pdqttype=and&pdquerytemplateid=&pdsf=&ecomp=24hgk&earg=pdpsf&prid=ad5faefa-02ee-41df-a5d7-058d89639347 [https://perma.cc/9XH6-DRVH] (composing an advanced search for "7201," "Earned Income Tax Credit," "EIC," or "EITC" in the document and sorting by source type: federal cases between Jan. 1, 1995 to Aug. 20, 2020). In what appears to be dicta, one court alludes to § 7201 applying to overstated EITC cases. Moore v. United States, 114 A.3d 646, 656 (D.C. Cir. 2015).

186. United States v. Walker, 2007 U.S. Dist. LEXIS 35017 (N.D. W. Va. 2007) (wherein the government charged § 287 for a taxpayer who allegedly did not have the wages or grandchild she claimed so as to be eligible for EITC and Judge Keeley discarded Defendant's original plea because Judge Keeley did not agree to the alleged facts that were impetus for the plea).

187. *See, e.g.*, United States v. Brown, 2019 U.S. Dist. LEXIS 211220 (D.C. Minn. 2019) (also Section 7206(2)); United States v. Hill, 2018 U.S. Dist. LEXIS 218824 (E.D.N.C. 2018); United States v. Reesor, 10 F. App'x 297 (6th Cir. 2001); United States v. Robledo, 2005 U.S. Dist. LEXIS 43161 (S.D. Tex. 2005); United States v. Franklin, 1998 U.S. App. LEXIS 29539 (6th Cir. 1998). Some preparer EITC cases also lead to disgorgement of profits and restitution. For example, a recent indictment addressed a preparer who would "inflate" or "fabricate" Schedule C earnings. *See* Complaint for Permanent Injunction and Other Relief, United States v. Tucker, 2019 U.S. Dist. LEXIS 86185 (M.D. Fla. 2019) (No. 6:18-cv-1544-Orl-40GJK). In ordering she disgorge $1.6 million of ill-gotten profits, the court referred to "artificially increasing" income. *Tucker*, 2019 U.S. Dist. LEXIS 86185 (ordering additionally a permanent injunction against preparing returns).

cluding one using false W-2 forms[188] and a preparer who was also an IRS tax examiner.[189]

As for cases in which tax costs actually *increase* because taxpayer overstated never existing income on the tax return so as to support an overstatement in non-tax settings, the overstater should nonetheless be subject to section 7206(1), which does not require a tax shortfall. Again, the auditor is hindered in reviewing the tax return whether or not the fictitious overstatement of income leads to less tax.[190]

While this Article focuses on tax crimes, readers should be alert to non-tax laws for a particular subject matter that could also be relevant to wrongdoers who use tax return overstatements to conform to their other overstated reporting. For example, in the case of individuals or private firms conforming their tax returns to fictitiously overstated income on, say, a loan application, the relevant non-tax laws should also be consulted. A colorful example of this is in the case *Bouzanis*, where a broker helped a clearly unqualified loan applicant overstate his income so as to be eligible for a Small Business Administration ("SBA") loan.[191] The buyer/borrower was not pursued on tax charges; instead he was indicted on more serious charges of conspiracy to defraud the SBA, wire and mail fraud, and bankruptcy fraud.[192] The broker, however, was convicted under the Code's aiding and abetting statute, section 7206(2).[193] The court rejected the broker's argument that the restaurant buyer's false overstatement of income was not fraudulent because it was not material.[194] Had the government also pursued section 7206(1) charges against the buyer/borrower, the court would have likely pursued the same logic as it did for the broker's section 7206(2) charge.[195]

188. *Robledo*, 2005 U.S. Dist. LEXIS at *2.

189. *Franklin*, 1998 U.S. App. LEXIS at *4.

190. *See supra* note 151 and accompanying text. An interesting case is *United States v. Fawaz*. The court affirmed the conviction under § 7206(1) for a taxpayer who understated cost of gasoline sold on his income tax return, even though this increased *income* taxes. The Court separately found violation of § 7201 because the taxpayer evaded *excise* taxes on sale of gas. 881 F.2d 259, 264 (6th Cir. 1989).

191. United States v. Bouzanis, 2003 U.S. Dist. LEXIS 3289 (N.D. Ill. 2003).

192. *Id.*

193. *Id.*

194. *Id.*

195. The conviction was overturned on appeal for evidentiary reasons. The Court of Appeals considered three "tax returns": 1) original filed tax return showing too little income to qualify for loan; 2) amended return broker arranged to be prepared and filed with a fictitious Schedule C of $50,000; and 3) fake tax return submitted to SBA with $50,000 of fictitious wages. The Court reversed the conviction because evidence was not beyond a reasonable doubt that the second item (i.e., filed amended return) was actually

D. Overstating Taxable Income in the Taxpayer's Wrong Year

We now turn to the settings of Part II, which are complicated by the fact that the effect of an income overstatement in one year is an understatement in another year. As noted earlier, this Article does not address the many procedural intricacies of an IRS investigation and subsequent criminal prosecution. For example, an auditor who detects an overstatement for one year will presumably flag the other year's tax return for investigation of the mirroring understatement. Also, complicated criminal tax process questions arise, such as whether a taxpayer found guilty of, for example, tax perjury in one year is collaterally estopped from denying it in the related year.[196]

Because the income tax system operates on an annual basis, and because the duty to file a return and pay income tax recurs every year, the attempt to evade tax for a given year is a separate offense from an attempt to evade tax for a different year.[197] It is "well settled" that a separate offense may be committed with respect to each year, such that an attempt for one year is a separate offense from an attempt for a different year.[198]

Let's assume a corporation early in year two is selling a gain asset and discovers it lost a tax planning opportunity by failing to realize that gain in year one. For example, perhaps a relevant carryforward expired in year one,[199] or MTR increased dramatically in year two. The corporation decides to instead fictitiously report the gain on year one's tax return. For year two's return, we clearly have charges possible under both sections 7201 (i.e., tax shortfall) and 7206(1) (i.e., tax perjury). The results for year two are somewhat analogous to court decisions in cases of backdating—where courts find tax fraud in backdating signatures to year one[200]—or deliberately ignoring the

false and the investigator admitted to no attempts to see if it was false. As to whether the filed amended return was false, the Court stated "[p]robably it was, but that is not good enough." United States v. Palivos, 486 F.3d 250, 259 (7th Cir. 2007).

196. *See, e.g.*, Musslewhite, *supra* note 149.

197. *See* IAN M. COMISKY ET AL., TAX FRAUD AND EVASION: OFFENSES, TRIALS, CIVIL PENALTIES ¶ 2.03[1][a] (6th ed. 2014).

198. I.R.S. Criminal Investigation, IRM 9.1.3.3.2.2.2(5) (Sept. 10, 2017), https://www.irs.gov/irm/part9/irm_09-001-003#idm140038547929440 [https://perma.cc/WFD2-BL8B].

199. *See supra* notes 92–94 and accompanying text.

200. *See, e.g.*, United States v. Drape, 668 F.2d 22, 25–26 (1st Cir. 1982) (showing that in year two, the taxpayer arranged to backdate investment in tax shelter to year one to offset an actual gain in year one); United States v. O'Keefe, 825 F.2d 314, 318 (11th Cir. 1987) (backdating promissory notes).

constructive receipt doctrine.[201] However, what about year one, the year of fictitious overstatement? Yes, section 7206(1) applies,[202] but not section 7201, as there is no deficiency for year 1. What if we reverse the facts and instead have the actual sale occur in year 1 but the taxpayer fictitiously reports the sale in year two because, say, MTR has fallen in year two? Again, section 7206(1) applies to both years, but what about section 7201? It would apply in year one, but not year two. But what if the statute of limitations has passed for year one?

In each example above, it may be better to view the offense over two years as one overall action such that we identify a net deficiency. It is "well established that two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme."[203] Under this approach, the tax shortfall is the net effect of years one and two, but how do we calculate this? One author identifies the example of depreciation taken in year one that should have been taken in later years.[204] The author and cited court decision agree with the approach that if MTR is static, there is no tax loss and the only harm to the government is TVM on the tax that the taxpayer wrongly delayed paying.[205] In a case of an MTR difference between the two years, the IRS could use that difference between the two years to calculate the net tax shortfall.

The Criminal Tax Manual favorably cites the proposition of combining more than one year into one charge, although it also alludes to the risk that the taxpayer may argue that a single indictment charging

201. *See, e.g.*, United States vs. Coblentz, 453 F.2d 503 (2d Cir. 1972). Taxpayer claimed to be unaware of the constructive receipt doctrine. His client (government agency) would pay with checks that were able to be cashed for up to five years. He would not deposit the checks until sometimes years later, in which years he would include the checks in taxable income. *Id.* at 504–05.

202. Again, the standard is whether the IRS is being hindered in its review of the year one tax return. *See supra* note 151 and accompanying text. *See also* Boise, *supra* note 97, at 170 ("[If] information is falsified in one return, the IRS must devote additional resources to the determination of which return is correct.").

203. United States v. Shorter, 608 F. Supp. 871, 876 (D.D.C. 1985) (citations omitted). Tax evasion covering several years may be charged in a single count as a course of conduct in circumstances in which the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for these years. *Id.* at 879. It is unclear whether fictitiously moving one item of income from one year to another is a "continuing scheme" of the likes of *Shorter*.

204. Townsend, *supra* note 143, at 626.

205. *Id.*

separate offenses (i.e., years one and two) is duplicitous.[206] The "overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both."[207] Conversely, if the government sought to pursue two different charges (one for year one and one for the affected future year), the defendant could argue that the two charges are multiplicitous. A multiplicitous indictment charges the same offense in two or more counts and may lead to multiple sentences for a single violation, a result prohibited by the Constitution's double jeopardy clause.[208] The most straightforward approach is to charge section 7206(1) for both years. Section 7201 would apply to the year of understated taxable income, with due consideration to the fact that tax was overpaid in the year of overstatement. For example, if MTR is static, defense counsel should object because the government received all its taxes over the course of the years of overstatement and understatement.

Let's now turn to the WorldCom case detailed in Professor Boise's article and provided as a real world case in Part II.B. Recall that WorldCom wrongly capitalized costs (i.e., put on balance sheet) instead of expensing them (i.e., income statement), and to avoid detection it conformed its tax return to this position.[209] Professor Boise focuses on the resulting overpayment of taxes on what he calls WorldCom's "phantom income" or "artificial income."[210] He notes that had the government charged tax perjury under section 7206(1) in the overstatement year, a corporation "guilty of this kind of fraud might pay no more than a few thousand dollars in fines."[211] His article does not explicitly address the subsequent years, when the capitalized costs leave the balance sheet and become expenses on the income statement and tax return, thereby lowering tax on future tax re-

206. Dep't of Just., Criminal Tax Manual § 8.07[2] (2015), https://www.justice.gov/tax/file/629241/download [https://perma.cc/L4QB-G5UP].

207. United States v. Duncan, 850 F.2d 1104, 1108 (6th Cir. 1988) (noting possible adverse procedural risks, such as improper notices, prejudicial evidentiary rulings, double jeopardy, and less than unanimous verdicts).

208. United States v. Pollen, 978 F.2d 78, 83 (3d Cir. 1992).

209. *See supra* notes 99–100 and accompanying text.

210. Boise, *supra* note 97, at 155–58.

211. *Id.* at 149. Boise argues that "one way to more adequately penalize the tax fraud committed" in earnings-inflation cases is to withhold the related tax refund if the overstater seeks a refund after-wards. *Id.* Beyond the scope of this Article is whether a valid argument exists that the government should be required to refund the overpaid tax, as otherwise the government has been unjustly enriched. Boise argues such earnings inflaters will have trouble recovering a refund because of the unclean hands doctrine. *Id.* at 189.

turns.[212] In other words, section 7206(1) should also apply to those latter year(s), which are false because they show deductions that belong to another year. No deficiency exists under section 7201 in the year of capitalization because WorldCom overpaid tax by not deducting the costs. Section 7206(1) would also apply to those latter year(s), which would be false because they presumably deducted those initially capitalized costs (i.e., the latter years list deductions that truly belong to the earlier year of wrongful capitalization). No deficiency exists under section 7201 in the year of capitalization because WorldCom overpaid tax by not deducting the costs. However, in later year(s), WorldCom presumably wrongly deducted the costs that were only deductible in the year WorldCom wrongly capitalized them. As in the example above,[213] section 7201 should apply, with an analysis of lifetime tax lost.

As noted in Part IV.C., readers should be alert to non-tax laws for a particular subject matter that could also be relevant to wrongdoers who use tax return overstatements to conform their other overstated reporting in a wrong year. For example, in the publicly traded firm overstatement cases, such as WorldCom, the government pursued fraud under criminal securities law because of the financial statement overstatement.[214] It is unclear whether the government or civil plaintiffs sought to use the consciously overpaid tax as indicia of *mens rea* under the securities fraud laws.[215]

212. To be clearer, I would not use the term "phantom income" but instead use "temporarily overstated income" because the taxable income was merely accelerated in terms of reporting, eventually the deductions would have been taken on the tax returns. Boise alludes to this distinction. *Id.* at 168 ("As government tax revenues actually are augmented (at least *temporarily*), one might expect courts to find that any false statement on the return would be immaterial.") (emphasis added).

213. *Supra* notes 199–202 and accompanying text.

214. Among others at Worldcom, the CFO and accounting director were indicted under various criminal securities laws, such as 15 U.S.C. §§ 78j(b), 78ff (2020), and 17 C.F.R. § 240.10b–5 (2020). *See, e.g.*, In re Worldcom, Inc. Sec. & Erisa Litig., 2002 U.S. Dist. LEXIS 23172 (S.D.N.Y. 2002). In 2002, the director plead guilty. Litigation Release No. 17842: *Myers and Yates, Two Former WorldCom Executives, Are Permanently Enjoined from Committing Securities Fraud and Other Violations, and Barred from Acting as Officers or Directors of a Public Company*, U.S. Sec. & Exch. Comm'n (Nov. 15, 2002), https://www.sec.gov/litigation/litreleases/lr17842.htm [https://perma.cc/MX4D-CLQA]. In 2004, the CFO plead guilty. Press Release, *SEC Charges Scott D. Sullivan, WorldCom's Former Chief Financial Officer, with Engaging in Multi-Billion Dollar Financial Fraud*, U.S. Sec. & Exch. Comm'n (Mar. 2, 2004), https://www.sec.gov/news/press/2004-25.htm [https://perma.cc/B5G2-K4DR].

215. In the area of securities fraud, scienter means "simply level of fault." Samuel W. Buell, *What Is Securities Fraud?*, 61 Duke L.J. 511, 534 (2011). While scienter is an element of civil actions, the "Supreme Court has never identified the scienter required for a crimi-

E. Overstating Taxable Income for the Wrong Taxpayer

We now turn to settings where a taxpayer B fictitiously overstates taxable income when that income belongs to another taxpayer, A. This Article does not address the many procedural intricacies of an IRS investigation and the subsequent criminal investigation and prosecution. For example, an alert auditor detecting an overstatement for one taxpayer will presumably flag the other taxpayer's tax return for investigation of the mirroring understatement.[216]

As in the other settings, each of A and B are vulnerable to section 7206(1) charges because the falsities on their respective tax returns hinder the IRS's ability to review their returns. The Sixth Circuit has noted that a "false statement is material when it hampers the IRS in verifying . . . *related* returns submitted by the defendant taxpayer or by a business entity in which he or she has a direct interest."[217] In other words, if information is falsified in one party's return, "the IRS must devote additional resources to the determination of which" of the different parties' returns is correct.[218]

Let's now look at which parties will be subject to section 7201. We first review settings in which the shift is done to accomplish tax savings. The IRS's Fraud Handbook points to the common evasion scheme that is false allocation of income.[219] It also lists as an indicator

nal conviction for securities fraud. The lower federal courts have issued dozens of opinions making a mess of the matter." *Id.* at 556.

216. IRS closing processes contemplate these settings. For example, the IRS directs personnel as follows:

> When adjustments are made which increase the tax liability of one taxpayer and the position taken in support of the adjustments requires as a matter of consistency that the tax liability of another taxpayer be reduced, the closing of the case of the taxpayer whose tax liability will be reduced will be withheld until the taxpayer whose liability has been increased agrees to the adjustments proposed and consents to the closing of the case on that basis, [or court] establishes the correctness of the adjustments.

I.R.S. Servicewide Policy Statements, IRM 1.2.1.5.13(2) (Dec. 18, 2019), https://www.irs.gov/irm/part1/irm_01-002-001#idm140099627949312 [https://perma.cc/GW7M-YH6D].

217. United States v. Fawaz, 881 F.2d 259, 264 (6th Cir. 1989) (emphasis added). *See also* United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984) (prohibition on false statements is designed in part to ensure that the IRS is able to verify the accuracy of *related* tax returns) (emphasis added).

218. Boise, *supra* note 97, at 170.

219. I.R.S. Fraud Handbook, IRM 25.1.1.2.4(3) (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-001 [https://perma.cc/QXF2-9SYB]. *See also* I.R.S. Criminal Investigation, IRM 9.1.3.3.2.1 (Sept. 10, 2017), https://www.irs.gov/irm/part9/irm_09-001-003#idm140038547929440 [https://perma.cc/7B8Q-MZTD] ("[T]he facts of a particular investigation may show that . . . one or more of the alleged partners secretly returned his/

of fraud the "Inclusion of income or deductions in the tax return of a related taxpayer, when tax rate differences are a factor."[220] On the face of the statute, one might think that only taxpayer A's return will be vulnerable to section 7201, because only A's tax return has a tax underpayment.[221] However, B can be held liable because section 7201 applies to "any" tax shortfall, not only B's tax shortfall. The Department of Justice's Tax Crimes Handbook states that a person may be prosecuted under section 7201 for willful evasion of another party's tax because the offense of tax evasion is "very broadly defined to include a person's attempt '*in any manner* to evade or defeat *any tax* imposed'. . . . Thus, the statute permits prosecution of one party for the evasion of another party's tax liability."[222]

Frazier is an illustrative case finding the fictitious holder of income-producing assets to have violated section 7201.[223] The Sixth Circuit affirmed the lower court's findings that the evidence was sufficient to show that the accommodating party (Reed) was merely a strawman to hide ownership in a motel and restaurant of the true owner (Frazier), who feared he would lose his assets to the government due to his illegal gambling business.[224] While the case is silent on whether Reed overstated income on her tax return, both Reed and Frazier were convicted under section 7201, as the court referred to Frazier as having evaded taxes.[225] This implies that the ownership in the motel and restaurant were profitable and thus Reed overstated her income.

Let us now look at cases in which the overstatement on another's tax return was done for non-tax reasons. In *Goldman*, one party over-

her share of the profits to the real owner of the business, who, in turn, did not report this income.").

220. I.R.S. Fraud Handbook, IRM 25.1.2.3 (Sept. 10, 2017), https://www.irs.gov/irm/part25/irm_25-001-002#idm140540659944624 [https://perma.cc/H3GA-MBQQ].

221. For example, in *United States v. Beall*, 970 F.2d 343 (7th Cir. 1992), the taxpayer instructed clients to pay his fees to what appeared to be a non-profit organization and he did not file his own tax returns, and thus did not report the income. The Court affirmed the conviction under § 7201, but was silent on whether the organization or its agents committed a tax crime. *Id.*

222. OFF. OF CHIEF COUNS., CRIM. TAX DIV., TAX CRIMES HANDBOOK ¶ 1-1.02[2], at 3, 7 (2009), https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf [https://perma.cc/3PAE-4DU3] (citing cases that include attorney, friend or corporate officer as opposed to actual beneficial owner). *See also* Townsend, *supra* note 143, at 600 (for sentencing, "[e]nablers such as return preparers and promoters can also be charged with tax crimes where the tax evaded [i.e., § 7201] is tax owed by others").

223. United States v. Frazier, 365 F.2d 316 (6th Cir. 1966).

224. *Id.*

225. *Id.* at 317.

stated income by inflating prices to another party, which in turn presumably deducted as cost of goods sold when selling the materials to a governmental agency that was the victim of this mail fraud scheme.[226] The taxpayer argued the falsities in the tax returns were immaterial because they resulted in an overpayment of taxes, but the court upheld the charge of tax fraud under section 7206(1).[227] The court held that materiality can exist even if the end result is that the charged taxpayer paid too much income tax:

> The question then is whether overstatement of income is a material matter. The accuracy of items of taxable income reported on the return of one individual or entity may affect the ability of the IRS to assess the tax liability of another taxpayer. Furthermore, overstated income may shield from scrutiny falsely inflated deductions. Thus, an overstatement of income impairs the ability of the IRS to determine if the correct amount of tax has been paid [citing *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973)].[228]

Greenberg is another case of an income overstatement done for non-tax reasons, although the case has tax issues on all sides that are not fully addressed by the record. On a joint tax return filed by a couple, Mr. Greenberg fictitiously allocated some of his earnings to his spouse to make her appear more credit worthy, while simultaneously underreporting his own income.[229] The court stated that these distortions had the potential for hindering the IRS's efforts to monitor and verify the tax liability of the couple (and one of his entities) and thus found him subject to section 7206(1).[230] The record is silent as to why the wife was not charged. As to section 7201, it was likely not applicable because there was no understatement of income tax. According to the court, they filed a joint tax return in which case the shifted income was still in their joint taxable income. The court was silent about what was likely overpaid self-employment tax paid on the spouse's fictitious income.[231]

Unlike Parts I and II, the settings in Part III all involve other taxpayers.[232] Accordingly, we can expect to find more section 7206(2)

226. United States. v. Goldman, 439 F. Supp. 337, 344 (S.D.N.Y. 1977).

227. *Id.*

228. *Id.*

229. United States v. Greenberg, 735 F.2d 29, 30 (2d Cir. 1984).

230. *Id.*

231. *See supra* note 32 as to SE rates on self-employment income.

232. Overstating taxpayers are also at risk of a § 7212 obstruction charge if sufficient knowledge existed. For example, in the Fred Trump case (*supra* notes 118–21 and accompanying text), it is likely the children were too young to know their income was overstated. But when the strawman is aware, at least one case convicted under § 7212. *See, e.g.*, United

(aider and abettor) charges here. In the Ten Percenter[233] cases, different decisions have applied nearly each of the tax crimes. In one case, the court affirmed conviction under section 7206(1) for the Ten Percenter because he included income and withholding on his own tax return that was not really his.[234] In another case, the court affirmed convictions under section 7206(2) for "actual and true" winners of horse race bets who paid Ten Percenters.[235] And yet other cases found the Ten Percenter themselves guilty of violating Section 7206(2).[236] The records are silent on whether the Ten Percenters included the commission they received in taxable income; if not, there could be a section 7201 charge. The records are also silent on why the actual and true owners were not charged with section 7201 because they evaded tax.[237]

Conclusion

This Article catalogues varying reasons why taxpayers fictitiously overstate taxable income for tax or non-tax benefit purposes and describes many methods used to do so. In some settings, the behavior leads to tax savings; in the other settings, there may actually be tax costs, as a conforming side effect of overstating income for non-tax reasons, such as misleading a lender or investor. Because the tax reporting is assumed to be fictitious in our settings, this Article focuses on how this behavior possibly violates the Code's tax crime statutes. However, the detailed explanations as to the how and why should also be of interest in civil tax penalty cases, be it civil fraud or otherwise. This is because the government may be unable to convince a judge or

States v. Wilson, 118 F.3d 228, 231, 236 (4th Cir. 1997) (attorney convicted of attempting to evade a client's taxes).

233. *See supra* note 123 and accompanying text.

234. United States v. Stovack, 875 F.2d 868 (6th Cir. 1989). The decision states that the Ten Percenter received refunds, which likely occurred because he deducted losing tickets, something that is not mentioned in the case. *Id.* In another case, the court noted that the Ten Percenter deducted losing tickets and thus no tax was due on the fictitiously included winnings. United States v. Petti, 448 F.2d 1257 (3d Cir. 1971).

235. United States v. Haimowitz, 404 F.2d 38, 40 (2d Cir. 1968).

236. *See, e.g.*, United States v. Lincoln, 472 F.2d 1183 (5th Cir. 1973); United States v. McGee, 572 F.2d 1097 (5th Cir. 1978).

237. The answer may lay in the focus on the W-2G form as being the fraudulent act. For example, a Ten Percenter was sentenced for obstruction (presumably § 7212) and false filings (presumably § 7206(1)) in connection with the W-2G forms, with no mention of the income tax returns. *See "Ten-Percenter" Sentenced to One Year and One Day, supra* note 126. United States v. Walsh, 544 F.2d 156 (4th Cir. 1976) (convicting the jockeys and Ten Percenters under § 7206(2) for the fictitious W-2G also).

jury that all the elements of the crime have been met.[238] While this Article does not address non-tax law, parties involved in these areas of law may also find this Article helpful. For example, by understanding why the defendant overstated taxable income, they can better understand if the requisite state of mind exists for the non-tax wrong being charged.

This Article has focused on settings in which taxpayers would deliberately overstate taxable income on U.S. income tax returns. Similar motivation to fictitiously overstate taxable income could occur in other countries. For example, other high tax countries might find taxpayers subject to their income taxes engaging in transfer pricing that fictitiously shifts income to lower taxed countries.[239] States with an income tax similarly provide the same motivation for their taxpayers to engage in the same maneuvers, such as state MTR shopping for where to source taxable income for non-resident taxpayers. A person might fictitiously overstate income in a period of state non-residency when it actually occurred during residency, for example a taxpayer retiring from New York—a state with an income tax—to a state with no income tax, such as Florida.[240]

It is also possible for parties to fictitiously overstate asset values when reporting under tax regimes related to such values. For example, if a taxpayer is below the federal estate tax exemption,[241] her estate ("estate A") may report fictitiously overstated values for her assets because this will conform with increases in the basis of those assets in the hands of the heirs, which reduces income tax when they later sell the assets.[242] Also, if estate A fictitiously includes assets owned by estate B that would have been in excess of B's estate tax exemption limit, then estate B has wrongly saved estate taxes. If these same decedents had instead gifted assets before death, the same incentive exists: the donor with an estate below the exemption fictitiously overstates

238. The higher burden of proof and need to establish requisite intent make it difficult for government to successfully prosecute taxpayers under § 7201 and 7206(1), so the "civil tax fraud provision has become the staple of federal tax evasion and tax fraud prosecutions." Boise, *supra* note 97, at 174–75.

239. *See supra* notes 111–13 and accompanying text.

240. *See, e.g.*, Tim V. Eaton & Brianne Kellner, *Where to Retire? The Tax Implications of Geography in Retirement*, 13 J. Bus. & Econ. Rsch. 145 (2015).

241. *Estate Tax*, Internal Revenue Serv. (Oct. 28, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [https://perma.cc/R5J3-VAEB] ($11,580,000 for 2020).

242. *See* I.R.C. § 1014 (2020).

gifts he gave when those gifts were actually given by a donor whose estate would be above the exemption amount.[243]

Ideally, taxpayers will engage in the tax planning opportunities in Parts I.A, II.A and III.A in ways that do not necessitate fictitiously reporting overstated income. For those who discover after the fact that they missed such a tax planning opportunity, they—and potential aiders and abettors—should hesitate to fictitiously overstate income in light of the analysis of potentially applicable tax crimes discussed in Part IV. The same holds true for those who conform their tax returns to overstated income in non-tax settings, although they need to also be alert to laws that apply in those non-tax settings, such as bank fraud, mail fraud or securities fraud. If a reader of this Article is involved as a defendant, their counsel, or the government in a prosecution for overstatements, this Article will help serve as a roadmap to the nuanced differences that apply to these maneuvers, as well as which Code tax crime provisions may apply.

243. *Id.* Gifts and estates are subject to a federal unified credit, meaning the combined reportable gifts and death transfers are not subject to estate and gift taxes if they total under the limit ($11,580,000 for 2020). *See* Sally P. Schreiber, *IRS Posts 2020 Inflation Adjustments and Tax Tables*, J. ACCOUNTANCY (Nov. 6, 2019), https://www.journalofaccountancy.com/news/2019/nov/2020-irs-tax-tables-inflation-adjustments-201922409.html [https://perma.cc/QQ88-N2UE].