No. _____

In the
Supreme Court of the United States

THOMAS D. SELGAS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Thomas Selgas was indicted for the second offense in 26 U.S.C. §7201, *i.e.*, evasion of the payment of taxes and for defrauding the United States conspiracy under 18 U.S.C. §371. The indictment covered two periods of time, the years 1998-2002 and the year 2005. The Supreme Court in *Sansone v. United States*, 380 U.S. 343, 351 (1965) listed the elements required to prove a violation of 26 U.S.C. §7201. They were "willfulness; the existence of a tax deficiency, ... and an affirmative act constituting an evasion or attempted evasion of the tax." *Id*. The Circuit courts have been divided as to what the term actually means. Such divisions have resulted in Circuit court decisions that are confusing. Some of which are even contrary to the original intent of *Sansone*. The Petitioner requests the Supreme Court to revisit the term "existence of a tax deficiency" and redefine a "tax due and owing" as an essential element of §7201. Making a "tax due and owing" an element is consistent with all of Title 26 and would prevent convictions of persons who had no "tax due and owing," or where the government failed to prove a "tax due and owing."

The questions presented are:

1. Whether a person charged with only evasion of the payment of taxes under 26 U.S.C. §7201 can be convicted, when there is no tax due and owing.

2. Whether a person can be convicted of conspiracy to defraud the IRS under 18 U.S.C. §371, when there is no tax due and owing.

PARTIES TO THE PROCEEDING

The Petitioner is Thomas D. Selgas, who was one of the Defendants in the District Court and one of the defendants-appellants in the appellate court.

The Respondent is the United States of America, which was the plaintiff in the district court and the plaintiff-appellee in the appellate court.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Appellate Court	*United States v. Green*, 47 F.4th 279 (5th Cir, 2022)[1] Consolidated cases, 21-10651 – John O. Green and 21-10672 – Thomas D. Selgas
District Court	*United States v. Selgas*, Northern District of Texas, No. 3;18:CR-356

There was a proceeding in this Court that is directly related to this case. John O. Green filed a Petition for a Writ of Certiorari, *John O. Green v. United States*, No. 22-508 (Sup.Ct. November 22, 2022). Green's Petition was denied on January 23, 2023.

[1] Petitioner Selgas' appellate case was merged with Green's case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas D. Selgas (Selgas) petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit. The Writ is being requested to resolve the confusion in the Circuits, due to this Court making the "existence of a tax deficiency," an element of proof for criminal offenses under 26 U.S.C. §7201, instead of a "tax due and owing." Changing the element to a "tax due and owing" would be consistent with the Title 26 statutes and prevent convictions of persons who had no "tax due and owing."

CITATION OPINIONS AND ORDERS

The official citation for the Fifth Circuit Opinion is *United States v. Green*, 47 F.4th 279 (5th Cir. 2022). App.1. The unofficial citation or the Fifth Circuit's Denial of the Petition for Rehearing En Banc is *United States v. Green*, No. 21-10651 c//w No. 10.672, (5th Cir. October 4, 2022). App.42. The unofficial citation for the District Court judgment is *United States v. Selgas*, No. 3:18-CR-00356 (ND Tex. June 28, 2021). App.42.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit entered its opinion on August 24, 2022, App.1. The Fifth Circuit entered a denial for a timely Petition for Rehearing on October 4, 2022, App.42. Jurisdiction is conferred to this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Selgas was charged under 18 U.S.C. §371 and 26 U.S.C. §7201. App.44 and 49 respectively. These statutes and other relevant statutes are set forth in the Appendix.

STATEMENT OF THE CASE

A. Jurisdiction of District Court.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231, because the indictment alleged violations of 26 U.S.C. §7201 and 18 U.S.C. §371.

B. Statement of Facts

1. Charges

An indictment was issued on July 18, 2018 against Thomas D. Selgas, Michelle L. Selgas and John O. Green, ROA.32-45.[2] The defendants were charged in Count 1 with a violation of 18 U.S.C. §371, which involved a conspiracy,

> to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the IRS in the ascertainment, computation, assessment, and collection of the revenue: *to wit,* the SELGASES' federal income taxes.

ROA.34.

[2] ROA refers to the Record On Appeal filed with the 5th Circuit in appeal No. 21-10672.

Thomas Selgas was charged in Count 2 with evasion of the payment of income taxes under 26 U.S.C. §7201.

Michelle L. Selgas was charged in Count 3 with evasion of the payment of income taxes under 26 U.S.C. §7201. Michelle was later acquitted of Counts 1 and 3 on January 15, 2020.[3]

2. Facts Related to Evasion of Payment.

Count 2 of the Indictment alleged that Thomas Selgas had evaded the payment of taxes for the years 1998 through 2002 and the year 2005.

3. Facts related to the period 1998-2002.

The IRS reported that Selgas did not timely file valid tax returns for the years 1998-2002. The IRS submitted exhibits of tax deficiencies issued for only the years 1997-2001, ROA.4502-4547.[4] Selgas petitioned the Tax Court twice. The years 1997-2001 were dismissed by the Tax Court for lack of jurisdiction. The Tax Court issued a decision for the year 2002 on November 23, 2005. ROA.6462. In an oral ruling prior to the decision, the court ruled that Selgas was entitled to withholding from his employer ChipData, ROA.6453.

Shortly thereafter Selgas filed tax returns for the years 1998-2001 on April 11, 2006. ROA.4326-4379. These returns were exhibits of the government. The

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[3] The Judgment of Acquittal was not transmitted to the ROA. The Judgment of Acquittal was orally granted at ROA.3277.

[4] Government's Exhibit 28, ROA.4489-4501 for 2002 was not a Notice of Deficiency.

2002 tax return was filed the same day. ROA.3727-3739. The 2002 return was an exhibit presented by Selgas.

The tax returns for 1999-2002 reported wage withholding from ChipData, Selgas' employer. In addition, the returns reported various carryovers, with the 2002 return reporting $14,474 for charity, $49,098 net operating loss and $332,187 capital loss carried over to 2003. ROA.3733 and 3739. The returns for 1998-2002 reported no tax due and owing.

b. Facts related to the year 2005.

Beginning in 2005, and continuing until the date of the Indictment, Selgas filed signed statements, which included checks for each of the respective years. None of the statements, however, were processed by the IRS. Yet, all the checks attached to each yearly Statement were cashed, including the $14,850.00 check for 2005, ROA.3993,[5] which was attached to the 2005 Statement. ROA.3969-3993. The check, made payable to the United States Treasury, was marked as payment for the year 2005. No notices of deficiency were issued for any of the tax years.

3. Facts Related to the Conspiracy Charge.

The indictment listed a series of overt acts alleging that Green and the Selgases committed them to

[5] The government produced an unsigned copy of the 2005 Statement, with each page stamped with the word COPY. The original 2005 Statement was not produced by the government. See Cross-Examination of Steven Dickson, the witness coordinator for the IRS, ROA.127. All the other Statements, 2006-2014, were signed and included payment with the Statement.

defraud the IRS, ROA.35-42. Facts, however, were presented showing that Selgas had filed 1040s for the years 1998-2002 reflecting no tax due for those years. ROA.4326-4379 and ROA.3727-3739. The government also presented many of the statements Selgas filed for the years 2005-2014. Each of these statements included a check for the year for which the statement was filed. The check attached to the 2005 Statement is an example. ROA.3993. The record does not reflect that a Form 4340, Certificate of Assessment and Payment, was presented by the government to show assessments having been made for the years 2005-2014.

REASONS FOR GRANTING THE PETITION

A. Issue of Existence of a Tax Deficiency Versus Tax Due and Owing.

1. Introduction.

Thomas Selgas was indicted in Count 2 for evasion of the payment of taxes, the second offense in 26 U.S.C. §7201. The indictment covered two periods of time, the years 1998-2002 and the year 2005. Selgas asserts the prosecution did not prove the elements of §7201, particularly the element of the "existence of a tax deficiency" for either of the two periods.

Sansone v. United States, 380 U.S. 343, 351 (1965) listed the elements required to prove a violation of 26 U.S.C. §7201. They were "willfulness; the existence of a tax deficiency, ... and an affirmative act constituting an evasion or attempted evasion of the tax." *Id.* *Sansone* also recognized that §7201 included two offenses, the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of

willfully attempting to evade or defeat the *payment* of a tax.

Since 1965 this Court has reaffirmed that the "existence of a tax deficiency" is an element of §7201. See *Boulware v. United States*, 552 U.S. 421, 424 and 432 (2008). But neither *Sansone*, nor *Boulware* were faced with an indictment in which the only charge was an evasion of the payment of taxes. This Court has yet to address an indictment based solely on a charge of evasion of the payment of taxes.

In addition, because *Sansone* used the term "existence of a tax deficiency," the Circuit courts have been divided as to what the term actually means. Such divisions have resulted in Circuit Court decisions that are confusing, some even contrary to the intent of *Sansone*. Thus, there is a need for this Court to resolve the divisions and redefine the previous essential element of the "existence of a tax deficiency" to a "tax due and owing" to accurately reflect the provisions in Title 26.

2. The Legal Definition of Terms Involved.

a. Definition of Tax Deficiency.

A "tax deficiency" is clearly defined in Title 26.

In 26 U.S.C. §6211(a). App.45. A "tax deficiency" is the excess of a tax imposed over the amount shown by taxpayer in his return. Once a tax deficiency is determined, the IRS is required to follow the provisions in 26 U.S.C. §§6211-6215. This requires a Notice of Deficiency (§6212). App.45. After the Notice of Deficiency is issued, the taxpayer has the option of

petitioning the Tax Court. Pursuant to §6213, App.46, the IRS is prohibited from issuing levies, or proceeding in court for collection, until 90 days after the Notice is mailed per §6212. This gives the taxpayer an opportunity to exercise his right to petition the Tax Court. If the taxpayer does petition the Tax Court within the 90 days the IRS is prohibited from collection until the Tax Court decision is final. Thus, any attempt by the IRS to collect a tax deficiency prior to 90 days after the Notice of Deficiency is mailed is unlawful.

Sansone declared the "existence of a tax deficiency" to be an element of §7201. The tax deficiency must exist at the time of the prosecution. If the tax deficiency determined by the IRS has been paid, or satisfied by some credit, the tax deficiency does not exist. Thus, the "existence of a tax deficiency" is a "tax is due and owing" at the time of the prosecution after the tax deficiency has been determined.

b. Definition of Existence.

The IRC does not define the term "existence." Neither have the courts. An applicable definition, though, can be obtained by considering the normal English definition of "existence,".

Merriam-Webster gives a definition of "existence" as an, "actual or present occurrence," https://www.merriam-webster.com/dictionary/existence. Accordingly, when a tax deficiency is paid, or satisfied, it ceases to exist.

Pursuant to 26 U.S.C. §6151. App.44, when a taxpayer files a return and reports the amount of tax owed, it must be paid on April 15th the next year. If the IRS determines that the tax reported is too small, it

calculates a tax deficiency, which is an addition to the amount reported. Thus, when the reported tax owed plus the additional tax deficiency is paid or satisfied, there is no longer an existing tax deficiency.

c. Definition of Tax Due and Owing.

A "tax due and owing" is found in two circumstances in Title 26. Pursuant to §6151 a tax is due and owing on the day the taxpayer is required to file a return. Thus, if a taxpayer does not file a return the tax is due on April 15th the next year. If he files a return and reports a tax, the tax is required to be paid when the tax return is due.

The second time a tax is "due and owing" is found in §6213, §6215 and §6303. If a petition is filed with the Tax Court, §6215 provides that the tax deficiency is to be paid *after* assessment and Notice and Demand. App.47. If no petition is filed, pursuant to §6213, no assessment, levy or court proceeding for collection may be made until 90 after the Notice of Deficiency had been mailed. Pursuant to §6303, a Notice and Demand for payment shall be mailed within 60 days after the making of an assessment. App.47. This is not true under §6151. An assessment is not required when a tax return is not filed, or when a tax return is filed reporting a tax and the tax is not paid.

If a taxpayer petitions the Tax Court, he is not required to pay the tax until after the final decision of the Tax Court and a Notice and Demand is sent to him, pursuant to §6213 and §6215 App.46 and 47 respectively. Also pursuant to §6213, if a taxpayer does not petition the Tax Court after a Notice of Deficiency

is issued, there is no tax due and owing until after the Notice and Demand is sent.

The procedures for the administrative process are well recognized, see, *e.g.*, *Guthrie v. Sawyer*, 970 F.2d 733, 735 (10th Cir. 1992). As the Fifth Circuit in *Perez v. United States,* 312 F.3d 191 (5th Cir. 2002) required:

> Clearly, the IRC predicates the validity of an assessment and collection of an asserted deficiency on the proper notification of the taxpayer of his total tax liability. In other words, the IRS must provide notices of the amount that it claims the taxpayer owes, over and above the amount reported by the taxpayer on his income tax return.[21] This is a cut-and-dry notice requirement - the stuff of basic procedural due process.

FN 21 in *Perez*, cites *Murray v. Comm'r of Internal Revenue*, 24 F.3d 901, 903 (7th Cir. 1994) (discussing deficiency notice requirements for assessed tax deficiencies as contrasted against the collection of assessed taxes based on a taxpayer's return).

§6303, App.47, provides the general rule that the IRS must mail a Notice and Demand demanding payment after an assessment.

Thus, a determination of a tax deficiency is not required where there is a charge of evasion of the payment of taxes based on failing to file, or failing to pay taxes due and owing on April 15th. If, however, the IRS determines a tax deficiency, a Notice of Deficiency is required pursuant to §6212, to allow the taxpayer to petition the Tax Court. Once a Notice of

Deficiency has been mailed the tax taxpayer has a choice to either petition the Tax Court, or not. In either event, the IRS must make an assessment and send a Notice and Demand for payment.

3. Application of Legal Terms to Element of Existence of Tax Deficiency.

a. Supreme Court Cases.

1. In *Sansone*, *supra*, one of the elements was the "existence of a tax deficiency." Sansone was charged with "an attempt to evade income taxes by defeating the assessment," 380 U.S. 354. Sansone had filed false returns, which did not reflect his true income. Sansone also conceded the tax deficiency, which would have been determined pursuant to §6211. Sansone did not pay the tax that was owed by the time of the criminal indictment. Thus, the tax deficiency was in *existence*, having not been paid or satisfied.

2. In *Boulware, supra,* "the existence of a tax deficiency," was accepted as an element of §7201. Boulware was charged with filing false tax returns and diverting his corporate funds without reporting the income on his tax returns 552 U.S. at 426. But the court ruled, citing *Lawn v. United States*, 355 U.S. 339, 361 (1958), "[O]f course, a conviction upon a charge of attempting to evade assessment of income taxes by the filing of a fraudulent return cannot stand in the absence of proof of a deficiency," 552 U.S. at 424.

Boulware reached this conclusion as a reaction to Judge Thomas' concurrence in *United States v. Boulware*, 470 F.2d 938 (2006), wherein he lamented:

> Thus, *Miller*--and now the majority opinion--hold that a defendant may be criminally sanctioned for tax evasion without owing a penny in taxes to the government. Not only does this result indicate a logical fallacy, but is in flat contradiction with the tax evasion statute's requirement of "the existence of a tax deficiency."

Judge Thomas was referring to *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976). *Boulware* granted certiorari based on his comments. This Court ruled that *Miller* constituted "an extreme example of form over substance," 552 U.S. 432. *Boulware* held, "The Circuit thus assumed that a taxpayer like Boulware could be convicted of evasion with no showing of deficiency." The conclusion was "There is no criminal tax evasion without a tax deficiency," *id*. In other words, without proof of the "existence of a tax deficiency," or an actual "tax due and owing," there is no criminal tax evasion.

3. Although a civil case, *United States v. Galletti*, 541 U.S. 114 (2004) is important in understanding a tax deficiency. *Galletti* involved whether an assessment against a partnership also applied to the individual partners. The Court, noted, "'The Federal tax system is basically one of self-assessment,' whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment." *Id*. at 122, quoting 26 CFR §601.103(a) (2003). The Court further found, "In other words, where the Secretary ***rejects the self-assessment of the taxpayer*** or discovers that the taxpayer has failed

to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books." *Id*. (emphasis added) Thus, where the IRS rejects the amount claimed and paid by the taxpayer, it must calculate the correct amount, *i.e.*, determine a tax deficiency, and record the assessment.

b. Confusion in the Circuit Courts.

Shortly after *Sansone*, the Seventh Circuit in *United States v. England*, 347 F.2d 425 (7th Cir. 1965) dealt with an indictment for only evasion of payment of taxes. It did not charge the general evasion of taxes, or the evasion of the assessment of taxes. *England* held that "there is no real distinction to be drawn between a 'tax due and owing' and a tax validly assessed." This statement is incorrect as a matter of law. According to *England*, a charge solely of evasion of payment can be proven only where there is a validly assessed tax deficiency. Per §6151, no assessment is required when there is a failure to file, or a failure to pay reported taxes. However, if there is an assessment per §6211, there is no tax due and owing until after a Notice and Demand for payment, per §6215 and §6303. In other words, the tax is "due and owing," the following April 15th, when there is no filing or payment of reported taxes, there is an automatic assessment. But when there is an assessment, the tax is "due and owing" after the Notice and Demand for payment has been sent.

1.) Cases in Conflict with *Sansone* and *England*.

1. *United States v. Voorhies*, 658 F.2d 710 (9th Cir. 1981) involved evasion of the payment of taxes. The

court rejected Voorhies' argument that the tax deficiency had to be determined and assessed. Instead, the court incorrectly equated "tax due and owing" with a tax deficiency. Per the §6151, however, Voorhies would have been guilty of evasion of the payment of taxes, because he had not filed returns, nor paid the taxes due and owing on April 15th.

2. *United States v. Hogan*, 861 F.2d 312 (1st Cir. 1982), also involved a charge of evasion of the payment of taxes. Like Voorhies, Hogan did not file tax returns, or pay any taxes. Thus, Hogan's taxes were "due and owing" on April 15th "without assessment or notice and demand from the Secretary," per §6151. A tax deficiency per §6211 was not needed to find Hogan guilty of evasion of the payment of taxes.

3. *United States v. Silkman*, 156 F.3d 833 (8th Cir. 1998) is somewhat different. Like Voorhies and Hogan, Silkman did not file tax returns, nor did he pay the tax due and owing. But unlike *Voorhies* and *Hogan* the IRS did issue Notices of Deficiencies and assessed them. The court held that there must be a tax deficiency. But in reality, because Silkman had failed to file and failed to pay, his tax was due and owing on April 15th pursuant to §6151. Therefore, the tax deficiency under §6211 was not required.

4. General tax evasion was the charge in *United States v. Mal*, 942 F.2d 682 (9th Cir. 1991). Mal could have been charged with either the evasion of the assessment of taxes, or the payment of taxes, because he filed false W-4 forms. But Mal was charged with both offenses. Yet, because he failed to file his tax returns and failed to pay the tax due and owing on the

15th of April, he could have been charged only with evasion of the payment of taxes. Because of his failures to file and pay, evidence of a tax deficiency was not required for conviction.

Mal was also in direct conflict with *Sansone*, when it declared that §7201 only included one crime, 942 F.2d at 688.

5. *United States v. Masat*, 896 F.2d 88, 97-99 (5th Cir. 1990) is similar to both *Silkman* and *Mal*. Like Silkman, Masat did not file tax returns, or pay the taxes. Thus, he had a tax due and owing on the 15th of April and no tax deficiency was needed. Also, like Mal, Masat had filed false W-4 forms, which could be treated either as an evasion of payment, or an evasion of the assessment. *Masat* also was in direct conflict with *Sansone*, when it stated, "In truth, there is one crime, the evasion of taxes, and it is of no moment that both assessment and payment might have been evaded, 896 F.2d at 97.

2.) Cases That Appear Consistent with *Sansone* and *England*.

1. *United States v. Farnsworth*, 456 F.3d 394 (3d Cir. 2006) is unusual in that it was an interlocutory appeal and did not address the *Sansone* element of the "existence of a tax deficiency." It only addressed the issue of whether there were two offences in §7201.

Quoting from the Indictment, the court charged Farnsworth with "willfully attempting to 'evade and defeat income tax due and owing by him to the United States of America,'" by failing to file, failing to pay, and concealing "his true and correct income." *Id*. at 396.

Contrary to the Indictment, the court treated it as "income tax evasion." *Id.*

> The question raised in the district court was twofold, whether the indictment charged Farnsworth with both methods of tax evasion[ ]attempted evasion of the *assessment* of taxes and attempted evasion of the *payment* of taxes[ ]as well as whether proof of an assessment is necessary to prove attempted evasion of payment.

Id. (Emphasis in original)

The 3rd Circuit decisions *Farnsworth* relied upon were, *id*. at 397, *McGill* and *McLaughlin*, discussed *infra*. Noting that it had agreed with the defendants' argument in *McLaughlin*, *Farnsworth* stated, 456 F.2d at 402,

> Had the government charged the [defendants] with evasion of payment, it would have had to prove a valid assessment from which the [defendants] hid assets. *United States v. England,* 347 F.2d 425, 430 (7th Cir. 1965). The government did not prove that element.

The government also pointed to *United States v. Dack*, 747 F.2d 1172 (7th Cir. 1984), also discussed *infra*. *Farnworth* also looked to *Silkman* in the Eighth Circuit, stating,

> For example, in rejecting a defendant's theory that proof of a valid assessment is essential to an attempted evasion of payment charge, the Eighth Circuit stated: "[W]e agree with cases

> holding that, while an assessment may be used to prove a tax deficiency in a payment evasion case, an assessment is not a necessary element of a payment evasion charge." *United States v. Silkman,* 156 F.3d 833, 837 (8th Cir. 1998).

The *Silkman* statement is consistent with §6151, where no assessment is required.

The court agreed with the government that "the weight of authority favors its view that an assessment is not required to prove attempted evasion of payment under §7201." *Id* at 403. But it also pointed out the "general lack of clarity in this area" referring to the issue of whether an assessment is required or not. *Id*. In Footnote 8 the *Farnsworth* Court noted that the *McGill* and *McLaughlin* case had some support in *England*, *id*.

Farnsworth, however, ruled that it would follow the "dicta in *United States v. McGill,* 964 F.2d 222 (3d Cir. 1992), and *United States v. McLaughlin,* 126 F.3d 130 (3d Cir. 1997) and ignored the Indictment, which made it clear that the charge was evasion of the payment of taxes by failing to file, failing to pay, and concealing income. The specific charge would have allowed Farnsworth to be convicted without an assessment pursuant to §6151.

2. *United States v. Dack*, 747 F.2d 1172 (7th Cir. 1984) was cited in *Farnsworth*. The court, quoting from the indictment, stated Dack was charged with "attempting to 'evade and defeat . . . income tax due and owing' for the years 1977 through 1981." *Id*. at 1173. The IRS had not made an assessment. Dack

relied on *England*, *supra*. But the *Dack* court did not apply *England* to Dack's circumstances. Instead, it held,

> that *England* did not define a valid tax assessment as a necessary element of tax evasion in every case. Rather, England stands only for the proposition that where, under a peculiar set of facts, a valid tax assessment is a necessary element, the court cannot instruct the jury to find that element as a matter of law. *Id*.

Dack's conviction was based on evading the payment of taxes, when he failed to file a tax return and pay the taxes when due. Pursuant to §6151 an assessment was not required.

3. The court in *United States v. Josephberg*, 562 F.3d 478 (2d Cir. 2009) it cited *England* for "approving jury charge that included the instruction that 'an assessment is prima facie correct.'" *Id*. at 488. In *Josephberg* the IRS did present assessment certificates to show there was a debt and there was no evidence to indicate the debt was paid or satisfied.

4. *McLaughlin*, *supra*, involved evading the assessment of taxes, 126 F.3d at 132. Citing *England*, the court stated, "Had the government charged the McLaughlins with evasion of payment, it would have had to prove a valid assessment from which the McLaughlins hid assets." *Id*. at 136.

The court pointed out that "the McLaughlins were put "on notice that the government would proceed under the evasion-of-assessment theory." *Id*. Thus, an assessment was not required.

5. *Sansone* and *England* were cited in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979). *Sansone* was cited for the requirement of proof of a tax deficiency. *Id*., at 94. The case did not define a tax deficiency, but required proof of it.

England was cited for the principle of requiring the government to prove "every element of the crime beyond a reasonable doubt." *Id*. This principle was enshrined in *Holland v. United States*, 348 U.S. 121, 130 (1954) ("the prosecution must always prove the criminal charge beyond a reasonable doubt.").

In *Garber* the government was required to prove a tax deficiency, because Garber had filed tax returns and paid the taxes on her returns. Thus, because the claim was that the returns were false, but filed, the procedure under §6211(a) had to be proven by the government. *Garber* was reversed, not because of a failure to prove a tax deficiency, but because the government failed to prove willfulness. Thus, the existence of a tax deficiency was not present, because of the failure to prove willfulness.

6. *Farnsworth* cited *McGill, supra.* McGill was charged for evasion of the payment of taxes, 964 F.2d at 225. McGill filed his taxes. They were assessed, but he failed to pay them. Technically, due to §6151, McGill's taxes were due and owing on April 15th. An assessment was not needed. *McGill*, 964 F.2d at 299, citated *Sansone* because the IRS did determine a tax deficiency. But even though the citation was made, it was unnecessary because the tax was owed on April 15th. McGill could have been convicted of evasion of the payment of taxes solely on §6151.

c. Summary of cases.

The Circuit Courts are obviously conflicted by the terminology of the "existence of a tax deficiency" as espoused by *Sansone* as an essential element in both offenses of evading the assessment of taxes and evading the payment of taxes under §7201.

It is clear from §6151 that in cases wherein the defendants did not file a tax return, or did not pay the tax due and owing on the 15th of April, an assessment/tax deficiency is not required. It is also true, if a defendant files a tax return and does not pay the tax due and owing, §6151 does not require a deficiency.

It is also clear from §6211 when a taxpayer files a return, whether deemed false or not, the IRS is required to make a determination of the additional tax due, otherwise known as a tax deficiency. Once the tax deficiency is determined, the taxpayer does not have a tax due and owing until after the IRS sends a Notice and Demand for payment of the tax.

Some Circuit Courts apply the requirement of an "existence of a tax deficiency" where there is a general charge of income tax evasion, not specifically an evasion of the assessment, or of an evasion of the payment. See *Mal*, *supra,* from the 9th Circuit and *Masat*, *supra*, from the 5th Circuit.

Some Circuit Courts are applying the *Sansone* requirement with conflicting results. When the evasion of the payment is a result of failing to file and failing to pay, §6151 would have ensured a conviction in those cases without a tax deficiency. See *Voorhies*, *supra*,

from the 9th Circuit, *Hogan*, *supra,* from the 1st Circuit, and *Silkman*, *supra*, from the 8th Circuit for cases that did not require an assessment. But *Silkman* was a case in which the charge was only the evasion of taxes. *United States v. Schoppert*, 362 F.3d 451, 455 (8th Cir. 2004) later acknowledged that the charge was evasion of taxes and stated further that proof of a deficiency was "proof 'that the taxes were in fact owed,'" quoting *Silkman*.

Several Circuits required a deficiency, see *England*, *supra*, from the 7th Circuit, *Farnsworth*, *supra*, from the 3rd Circuit, *Dack*, *supra*, from the 7th Circuit, *Josephberg*, *supra*, from the 2nd Circuit, *McLaughlin*, from the 3rd Circuit, and *McGill*, *supra*, from the 3rd Circuit. In *McGill*, as noted, the IRS did an assessment that was not needed because the tax was due and owing at the time the tax return was required to be filed. None of these cases discussed that there is a "tax due and owing" requirement under both §6151 and after an assessment.

The *Garber* case, discussed previously, made proper application of §6211, which requires a determination of a tax deficiency. Yet because the government failed to prove willfulness, the existence of a tax deficiency was not present. Thus, the tax was satisfied.

It is clear that the use of the *Sansone* phrase "existence of a tax deficiency" has caused conflicts in the Circuits, resulting in inconsistent rulings. A case that best illustrates the confusion is the 8th Circuit case of *Schoppert*, *supra*.

Schoppert was convicted of evading the payment. He did so by "obtaining assets using a third party's credit card and making false statements to the IRS, 362 F.2d 453. The court noted Schoppert filed timely and accurate returns, but only paid a fraction of the tax owed. *Id*. at 451. The issue was, "whether the tax deficiency element of §7201 may be satisfied only by the existence of a deficiency in the narrow, technical sense." *Id*. at 455.

Schoppert noted that §7201 does not include the term "deficiency." 362 F.3d at 454. *Schoppert* also noted that "the term is only at issue here because judges have used it as a way of explaining the requirements of the statute." The court also noted that the government viewed the term as a "judicial shorthand signifying the requirement that there must be 'tax due and owing.'" *Id*. at 455.

With this understanding *Schoppert* cited three cases that dealt with deficiencies, but noted they were all cases of evasion of the assessment of taxes. *Id*. *Schoppert* also noted that *Silkman* addressed both evasion of the assessment and payment. The court stated,

> We think that our discussion in *Silkman* correctly described § 7201's deficiency element in a generic way that is applicable to both evasion-of-assessment and evasion-of-payment cases: the taxes evaded must have been imposed by the Internal Revenue Code and owed by the taxpayer.

362 F.3d at 456.

Schoppert then cited a number of cases to support the "tax due and owing." One cited case was *McGill*, *supra*, stating, "the Third Circuit has described the deficiency element of §7201 as 'tax due and owing,'" 964 F.2d at 229. Due to Schoppert's "subsequent acts of attempting to evade payment of the taxes that he computed on those returns," 362 F.3d at 456, the court concluded an assessment was not a requirement for conviction. This was because the tax was "due and owing" when the tax return was filed and the tax not paid.

Schoppert is consistent with *Sansone*, which indicated that the "existence of a tax deficiency" was essentially a tax due and owing. Citing *Spies v. United States*, 317 U.S. 492, 499 (1943), this Court found, 380 U.S. at 351,

> As recognized by this Court in *Spies v. United States, supra,* at 499, the difference between a mere willful failure to pay a tax (or perform other enumerated actions) when due under § 7203 and a willful attempt to evade or defeat taxes under § 7201 is that the latter felony involves "some willful commission in addition to the willful omissions that make up the list of misdemeanors."

The Third Circuit in *McGill, supra,* at 299, acknowledged that an element of §7201 involves a "tax due and owing." Thus, in order to prove a violation of §7201 the government must prove there was a tax due and owing.

4. Application to the Selgas Case.

Schoppert made it clear that the shorthand used by the courts for the element of the "existence of a tax deficiency" in §7201, as established by *Sansone*, is not consistent with the language of Title 26. The *Schoppert* case is a 3rd Circuit case and was not followed, or cited, by the 5th Circuit in *Green*.

Selgas argued the issue of a "tax due and owing." See *Green*, *supra*, 47 F.4th at 292. Instead of addressing an "existing tax deficiency," the court acknowledged a tax deficiency was equated with a tax due and owing in *United States v. Schafer*, 580 F2d, 774, 777 (5th Cir. 1978). But *Green*, 47 F.4th at 777, ignored the actual use of the term. Schafer had filed his tax returns and grossly underreported his income. Instead of stating the "existence of a tax deficiency" as an element of §7201, the court stated it was, "(1) an additional tax due and owing." *Id*. An additional "tax due and owing" is the exact definition of a tax deficiency pursuant to §6211. Thus, a formal assessment was required. There was no evidence that an assessment was made, because the conviction was obtained by using the net worth method. *Id*. In other words, even though a tax deficiency was required, since *Schafer* did file his returns and report his tax liability, the government was not required to prove an assessment. Thus, *Schafer* was in direct violation of *Sansone*.

Green ruled that a formal assessment was not required. 47 F.4th at 292. Contrary to that holding, Selgas did not have the "existence of a tax deficiency," or a "tax due and owing."

The Indictment charged Selgas with evasion of the payment of taxes under 26 U.S.C. §7201:

> "THOMAS SELGAS willfully attempted to evade and defeat the payment of substantial income tax due and owing by him for the calendar years 1998 through 2002 and 2005, …"

Thus, Selgas was charged with evading the payment of taxes for two periods of time. But Selgas did not have the "existence of a tax deficiency," or a "tax due and owing" for either of those two periods.

a. No Tax Due and Owing for the Tax Period of 1998-2002.

In relation to the taxes allegedly owed for the years 1998-2002, there was no "***existence*** of a tax deficiency." As stated above, shortly after the Tax Court decisions, Selgas filed tax returns for the years 1998-2001 on April 11, 2006, ROA.4326-4379. The tax returns for 1999-2002 reported wage withholding from ChipData, Selgas' employer.

Also, the tax returns for 1998-2002 reported carryovers to the year 2003. See ROA.3733 and 3739. The returns for 1998-2002 reported no "tax due and owing." Thus, even though there was a tax deficiency, it did not exist at the time of the Indictment. In fact, the tax deficiency was satisfied when Selgas filed his returns and listed the withholding and carryovers credits for those years.

The prosecution claimed the tax returns were false. Account transcripts were admitted showing that withholding from ChipData was originally credited to

Selgas, but reversed two years later. No credit was given for the reported carryover credits. The relevant Selgas returns submitted by the prosecution included a "Reason for Adjustment" stating,

> Taxpayer was examined for this year and a statutory notice of deficiency was issued and contested by Tp. The IRS position was upheld in court. Tp subsequently filed returns which were processed by the campus. These returns reported $0 tax and all previous assessments were abated. ***These returns are contrary to the determination made in tax court*** and were processed in error by the Campus. The abatements in tax, penalty, and interest should be reversed. (Emphasis added)

See ROA.4340 for the language used in the "Reason for Adjustment." The same language was used in each of the years 1998-2001.[6]

The "Reason for Adjustment" did not cite what Tax Court made the determination. Nor did it declare what the determination was. At trial, Revenue Agent Daniel made an effort to support the claim that the tax returns were false. His claim was based on a Tax Court case that allegedly ruled the Selgases were not allowed withholding. On direct examination Agent Daniel read from a Tax Court case of which *Michelle* Selgas was the only party. ROA.2729. Thomas Selgas was not named in that case. Michelle's Tax Court case was No. 18495-04. The Tax Court ruled *Michelle* was not allowed the

[6] While the 1998 tax return did not report withholding, "Reason for Adjustment" was attached by the IRS.

withholding, because "This was addressed by the appeals officer who concluded that the claimed payments had been made but not for petitioner's account." ROA.6358. The payments were by ChipData on behalf of Thomas Selgas.

On cross-examination Daniel was asked to read the portion of the Tax Court hearing for Thomas Selgas' Tax Court case, No. 23425-04, ROA.2734, in which the Tax Court acknowledged the withholding for Selgas in stating,

> so Mr. Selgas, in effect, does get the benefit of the withholding from his wages by Chip Data … and the IRS is of course obliged, as its counsel recognizes, to credit these in due course after the deficiency is determined.

ROA.6453-6454.

Daniel's cross-examination testimony directly contradicted the prosecution's claim that the Tax Court held that both the Selgases were not permitted withholding credits.

Incredulously, even after acknowledging its obligation, the IRS allowed Daniel to file a Federal Tax Lien in 2014 for the year 2002 in the amount of $47,336.95, ROA.4640, which was published to the jury at ROA.2709. The lien was also acknowledged to be recorded in the wrong county and undeliverable, because it was sent to the wrong address in Garland, Dallas County, Texas, ROA.2712-2713. The correct address would have been in Athens, Texas, which is not in Dallas County, but in Henderson County.

§6320 provides for the administrative due process that the person subject to a filed lien be given notice of their right to a Due Process Hearing. The Notice is required to be sent to the last known address. The IRS knew the last known address was in Athens, Texas as of May 17, 2010, ROA.3138.

§6323(f) requires the filing of a lien to be in the location designated by the state. TEX. PROP. CODE §14.002 requires the filing of a lien to be in the county of the residence of the person. The Notice sent by Daniel to Selgas, however, was sent to Garland, Texas, in Dallas County, ROA.4641. But Selgas lived in Athens, Henderson County, Texas, ROA.3138. and had been there for six years. Therefore, the lien filed by Daniel, ROA.4640, was filed in the wrong county, for the wrong property and sent to the wrong address. Thus, the lien and notice were ineffectual and unlawful. Yet, knowing as much, the prosecution still presented it as evidence to the jury to claim that a lien was issued and Selgas owed a tax.

The IRS knew the lien was not appropriate and eventually corrected its mistake by sending a Notice to pay $6,129.71 for the year 2002. This Notice was dated September 2, 2019, ROA.3744, more than a year after the date of the Indictment of July 18, 2018.

In short, the prosecution was unable to produce any evidence that Thomas Selgas was not entitled to the withholding credits from the ChipData payments for the years 1999 through 2002.

In addition to the issue of the ChipData withholding, was the issue of the carryover losses

reported on Selgas' filed returns for 1998 through 2002. These losses were still outstanding, pursuant to the 2002 return, in the amounts $14,474 for charity, $49,098 net operating loss and $332,187 capital loss. ROA.3733 and 3739. The IRS failed to credit them in the posting of the tax returns and the prosecution failed to address them at trial.

Holland v. United States, 348 U.S. 121, 130 (1954) established the principle that "the prosecution must always prove the criminal charge beyond a reasonable doubt." The government may not disregard the explanation of the taxpayer that can be reasonably checked. *Id* at 138. This was acknowledged by the 5th Circuit in *Schafer*, *supra*, 580 F.2d at 777.

The principle was also acknowledged in *Schoppert*, *supra*, 362 F.3d at 455, which cited *United States v. Abodeely*, 801 F.2d 1020 (8th Cir. 1986) for requiring "the government to prove that 'there is a deficiency for the relevant tax year that is due and owing.'"

Green failed to follow *Holland*, *Schafer*, or *Abodeely*. Instead, it allowed the prosecution to ignore the carryover losses claimed in Selgas' filed tax returns. Thus, the prosecution failed to prove the "existence of a tax deficiency" or a "tax due and owing." The deficiencies found by the Tax Court for the years 1998-2002 were no longer in existence. The reporting of the withholding and the carryover losses caused them to be satisfied.

b. No Tax Due and Owing for the Tax Period of 2005.

As stated above, Selgas had filed statements pursuant to §6011 in which he included payments for the taxes he reported on his statements. This was glaringly true with the 2005 Statement. Included with the 2005 Statement was a check for $14,850.00 specifically ear-marked for the year 2005.

Green, which found Selgas guilty of violating the evasion of the payments of taxes for the year 2005, was contrary to three Supreme Court cases.

The first two case are *United States v. Galletti,* 541 U.S. 114*,* 122 (2004) and *Baral v. United States,* 528 U.S. 431, 437 (2000). *Galletti* held that where there is a self-assessment the tax deficiency procedure must be followed. *Galletti* stated,

> "where the Secretary rejects the self-assessment of the taxpayer or discovers that the taxpayer has failed to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books."

Baral, in quoting 26 CFR §301.6315-1, stated "that a remittance of estimated income tax 'shall be considered payment *on account of the income tax* for the taxable year for which the estimate is made.'" (Emphasis in original) Thus, when Selgas paid the $14,850.00, it was a remittance for the year 2005.

The IRS did not credit Selgas for the $14,850.00 for the year 2005. The summary witness for the IRS, Agent Simmons, prepared summary charts for the jury.

The summary chart for 2005 reflected no payments were made despite the fact that a $14,850.00 check was paid. ROA.6531.

The attorney for Michelle Selgas, Helms, questioned Agent Simmons on her tax loss calculations for 2005, ROA.6546-6555. She acknowledged that it showed no payments. ROA.2912. Agent Simmons also prepared tax loss calculations for Thomas Selgas, ROA.6536-6545, which did not show a payment for the year 2005. No payment was reflected in the summary chart. ROA.6531.

Helms had Simmons acknowledge that the $14,850.00 was not posted as payment for 2005. Instead, the IRS posted it for 1997. ROA.2914. The rationalization that Simmons gave for it's being posted for 1997, instead of for 2005, was, "If the check was not clearly marked as to the year it was supposed to go into, they would have put it to the earliest year that there was a balance owed." In other words, the IRS ignored that the check *was* clearly marked for 2005. Thus, the self-assessment for 2005 was not applied, in violation of *Galletti*.

If the IRS rejected the self-assessment of $14,850.00, pursuant to *Galletti*, it was required to proceed with the tax deficiency procedures under §6211, which it did not do. Therefore, there was no tax deficiency, and no Notice and Demand for payment. Thus, pursuant to §§6213 and 6215, Selgas did not have a "tax due and owing" as a matter of law.

The third Supreme Court case, which *Green* ignored was *Boulware*, *supra*. In *Boulware* the government

could not prove the "existence of a tax deficiency," because the government did not investigate whether the distribution from a corporation was a return of capital. *Id*. at 427.

The Supreme Court granted certiorari over the conflict relating to the application of §301, *Id*. at 429. §301 provided that a distribution from a corporation was gross income less any basis. Because the government did not prove there was no basis, it failed to prove a tax deficiency and the conviction was reversed.

The same is true for a partnership. §731(a)(1), App.44, provides that when a distribution is made to a partner the basis is required to be applied.

The exhibits presented by the government indicated that Michelle and Thomas Selgas contributed to the partnership of MyMail a total of 28.614%. Michelle's percentage investment in MyMail was 26.614% per the K-1, ROA.3853. Thomas' percentage of investment in MyMail per the K-1 was 2%, ROA.3876. The amount of the investment was not revealed. Neither did the government investigate whether the distribution from the partnership was above the basis of the investment. Thus, pursuant to *Boulware*, the government failed to prove an "existing tax deficiency," or "tax due and owing" as a matter of law.

Thus, because the alleged deficiencies for 1998-2002 were satisfied by the withholding and the carryover losses, the government failed to prove an "existence of a tax deficiency," more properly called a "tax due and owing," for the years 1998-2002.

Also, because the government failed to treat the payment of $14,850.00 as a self-assessment and did not issue a tax deficiency, or a Notice and Demand for payment, and because the government did not investigate whether there was a return of investment per *Boulware*, the government failed to prove a "tax due and owing" for the year 2005.

Accordingly, because there was no proof of a "tax due and owing" for either of the two periods of time, this Court should grant Selgas' Petition for Writ of Certiorari in order to determine whether the *Sansone* "existence of a tax deficiency" element of §7201 should be revisited to declare a "tax due and owing" as the proper element. Such a clarifying resolution will be consistent with the statutes in Title 26.

B. Issue of Conspiracy to Defraud the IRS

As stated in the Statement of Facts, *supra*, the Indictment listed numerous overt acts the government claimed Selgas and Green participated in to conspire to defraud the IRS. For the Defendants to have committed acts to defraud the IRS, there must have been lawful functions of the IRS that were impeded, impaired, obstructed, and defeated by their acts.

The first issue in this Petition involves whether the element of the "existence of a tax deficiency" as espoused by *Sansone*, should be redefined as a "tax due and owing." Since the alleged conspiratorial acts of the Defendants began in December of 2005, ROA.34, the record must show that they acted against lawful functions of the IRS.

The evasion of payment charge in the Indictment focused on two periods of time, 1998-2002 and the year 2005. Selgas filed tax returns for the years 1998-2002 reflecting no tax liability for two reasons, the withholding payments from ChipData and carryover losses listed for each year. Thus, there was no "existence of a tax deficiency," or "tax due and owing," for the years 1998 to 2002. Accordingly, any activities of the IRS to collect taxes for those years were not *lawful* functions of the IRS, but unlawful.

One specific example exposes the unlawful activities of the IRS, namely the filing of Federal Tax liens for the years 1998-2002 on October 28, 2014. ROA.4640-4662. The filed liens were unlawful for three reasons.

First, the lien for 2002 was directly contrary to the Tax Court hearing in Thomas Selgas' Case No. 23425-04, which *allowed* the withholding. The lien was for $47,336.95, ROA.4640, and reported the assessment to have been made on 4/10/2006. The judge's oral ruling was made on 11/2/2005. ROA.6453. But the IRS totally ignored that ruling.

Second, all of the liens were filed in the wrong county and mailed to the wrong address, making the lien filings unlawful.

Third, all of the lien notices were sent to Garland, Dallas County, Texas, when the Selgases lived in Athens, Henderson County, Texas.

Thus, the liens were filed in violation of §6232(f), App.49, and the notice of the filing of the liens were sent in violation of §6320. App.47.

The second period of time involved the years 2005-2014, specifically the year 2005. The government presented many of the statements filed by Selgas for the years 2005-2014, including the 2005 Statement. Each of these statements included a check for the respective year for which the statement was filed. The check for the year 2005 Statement is an example, ROA.393. The record does not reflect that a Form 4340, Certificate of Assessment and Payment, was presented by the government to show any assessments being made for the years 2005-2014.

As discussed above, *Galletti, supra,* requires the IRS to follow the deficiency procedures when a taxpayer pays taxes for a particular year. In each of the statements filed by Selgas there was a check for the taxes for the particular year.

"[W]here the Secretary ***rejects the self-assessment of the taxpayer*** or discovers that the taxpayer has failed to file a return, the Secretary calculates the proper amount of liability and records it in the Government's books." *id*. at 122 (Emphasis added) Thus, pursuant to *Galletti*, where the IRS rejects the amount claimed by the taxpayer, it must calculate the correct amount, *i.e*., determine a tax deficiency, and record the assessment. The government presented no evidence that Selgas or Green did any act to prevent the IRS from following the tax deficiency procedures.

The IRS did not follow the IRC procedures for determining a tax deficiency for any of the years from 2005 on, especially for the year 2005. There were no overt acts listed or presented at trial which supported the claim that either Selgas or Green interfered in any

way with any functions of the IRS to ascertain, compute, assess, and collect Selgas' revenue.

Therefore, any activity of the IRS against Selgas during this time was not a *lawful* function per §6215. An example of such an unlawful activity conducted by the IRS is its investigation of alleged property transfers.

The prosecution claimed that the Selgases transferred their residence in Athens, Texas to Camp Hendrick Trust to hide assets from the IRS. The government called Billy Jackson, the chief appraiser of Henderson County Appraisal District. Contrary to the claim of transferring property to hide assets, the government had itself provided an exhibit that proved that Selgas had sold the Athens property to Camp Hendrick Trust for valuable consideration. ROA.6080, discussed at ROA.2492.

Even though the government knew the property was sold, Jackson was asked if the property was transferred, and his answer was "yes." ROA.226. In the closing arguments the prosecution misrepresented to the jury, ROA.3332-3333, that Selgas transferred the property to a trust to hide it from the IRS. There was no acknowledgement that the property was sold, and not transferred. The IRS, *via* Daniel, was investigating this in 2014, when he filed the liens. Title 26 did not sanction his investigation. There was no "tax due and owing" for the years 1998-2002, nor any tax due and owing from 2005-2014, since the IRS had not followed the procedures for determining a tax deficiency for any of the years after 2005, including 2005. Until a Notice and Demand for payment was mailed for these years

the IRS was barred from any collection activity, per §6215.

Since there were no activities by the IRS that were lawful, there could be no conspiracy to interfere with the lawful functions of the IRS. Thus, with no "tax due and owing," for either the period of 1998-2002, or any years from 2005 on, there could be no conspiracy.

CONCLUSION

For the foregoing reasons this Court should grant Selgas' Petition and issue a Writ of Certiorari.

Respectfully submitted,

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