**22.1 Attempt to Evade or Defeat Income Tax**

**(26 U.S.C. § 7201)**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with [*specify charge*] in violation of Section 7201 of Title 26 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

 First, the defendant owed more federal income tax for the calendar year [*specify year*] than was declared due on the defendant’s income tax return for that calendar year;

 Second, the defendant knew that more federal income tax was owed than was declared due on the defendant’s income tax return;

 Third, the defendant made an affirmative attempt to evade or defeat such additional tax; and

 Fourth, in attempting to evade or defeat such additional tax, the defendant acted willfully.

**Comment**

 *See* Instruction 22.6 (Willfully—Defined) as to “willfully” in the context of prosecutions for violations of Title 26.

 The elements of attempted tax evasion under 26 U.S.C. § 7201 are stated in *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007), as follows: (1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *Id*. (citing *Sansone v. United States*, 380 U.S. 343, 351 (1965); *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990)). “A tax deficiency occurs when a defendant owes more federal income tax for the applicable tax year than was declared due on the defendant’s income tax return.” *Id.* At 1073.

 The first element requires the government to prove there was a tax deficiency, but the deficiency need not be “substantial.”  *Marashi*, 913 F.2d at 735.

 “A defendant may negate the element of tax deficiency in a tax evasion case with evidence of unreported deductions.” *Kayser*, 488 F.3d at 1073-74 (rejecting argument that defendant was precluded from offering evidence that is inconsistent with information he reported on his tax returns).

 When a corporation makes a distribution to a stockholder initially characterized as a “distribution,” that “distribution” may subsequently be legitimately characterized as a non-taxable “return of capital” if the corporation has no earnings. *Boulware v. United States*, 552 U.S. 421, 430-31 (2008).

 A defendant accused of tax evasion is not entitled to a lesser included offense instruction based on § 7203 if the act constituting evasion was the filing of a false return. *Sansone*, 380 U.S. at 351-52. In addition, because failure to file a return is an element of a § 7203 failure to file charge but is not an element of a § 7201 tax evasion charge, the offense of failure to file is not a lesser included offense of tax evasion. *United States v. Nichols*, 9 F.3d 1420, 1422 (9th Cir. 1993). *See* Instruction 6.14 (Lesser Included Offense); Instruction 22.2 (Willful Failure to Pay Tax or File Tax Return).