Why Not Evasion?

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In this article, Gibson and Pileggi discuss potential reasons why Paul Manafort’s indictment doesn’t include charges of felony tax evasion under section 7201 or felony tax perjury under section 7206(1).

At the beginning, the indictment of Paul Manafort, President Trump’s former campaign manager, reads like a garden-variety tax evasion case: The defendant enjoyed a lavish lifestyle; he hid income through offshore shell companies; he dealt extensively in cash; he lied on mortgage applications; and he failed to disclose foreign bank accounts. Just as readers expect mystery novels to eventually reveal the criminal’s identity, tax professionals might have expected this indictment to conclude with charges of felony tax evasion under section 7201 — or at least felony tax perjury under section 7206(1). But it didn’t.

This unsatisfying aspect of the indictment has led many in the tax community to ask why special counsel Robert Mueller’s team eschewed the tax evasion charges and limited the indictment’s financial crimes to money laundering, failing to file foreign bank account reports, and the obligatory Klein conspiracy. There are two schools of thought to explain this: one focused on the procedural aspects of the indictment and the other on the prosecutors’ strategy.

On the procedural side, observers have pointed out that a prosecutor — even Mueller — must obtain authorization from the Justice Department Tax Division before filing charges under the tax code. Perhaps Mueller didn’t want to seek, or wait for, Tax Division approval before indicting Manafort. Perhaps he was concerned about confidentiality, such as leaks within the Justice Department or the possibility that the October 5 guilty plea of Trump foreign policy adviser George Papadopoulos would become public before Mueller could indict Manafort.

The biggest bombshell of Halloween eve was, after all, not the indictment of Manafort, three-month Trump campaign chair, and Rick Gates, longtime Manafort associate. It was the revelation that Mueller had a cooperating witness who had not only served in the Trump campaign and White House, but also actively sought Russia’s help during the campaign. While most folks expected Manafort to be indicted — some Washington insiders might even have been able to write some of the indictment — no one seems to have had Papadopoulos on their radar.

If Mueller was concerned about premature disclosure of the Papadopoulos cooperation (say that three times fast), it makes perfect sense that he would not want to wait while his agents fully reviewed the financial records to determine whether they could prove tax evasion. In that case, it is entirely likely that sooner or later we will see...
the other Bruno Magli drop in the form of a superseding indictment that includes a half-dozen felony tax evasion counts.

On the other hand, the indictment made public on October 30 contains a few clues about why Mueller may not — and does not plan to — ever charge Manafort with felony tax evasion or even the lesser felony of tax perjury. The main clue may relate to one essential element of a section 7201 charge that the prosecution must prove beyond a reasonable doubt: the existence of a substantial amount of evaded tax. It’s one thing for Manafort to have routed income through shell companies in tax haven countries. It’s quite another to show that the income was his; that it was not reported on his tax return; that it was not offset by legitimate deductible expenses, allowances, and credits; and that the omission was willful. This proof problem is exacerbated by the location of the relevant evidence — the tax havens of Cyprus, the Seychelles, and St. Vincent and the Grenadines. Add to that the difficulty of obtaining admissible evidence about Manafort’s contracts with Ukraine and its former leader Viktor Yanukovych, and a prosecution for tax evasion may have proven impossible as a practical matter.

So why not charge Manafort with signing materially false tax returns under section 7206(1)? After all, the indictment charges that even though he controlled multiple foreign financial accounts — undisputed by Manafort’s defense attorney, Kevin Downing, in his angry denunciation of the indictment — Manafort advised his tax return preparers that he did not have control over foreign financial accounts worth more than $10,000. If true, this would make indefensible any alleged tax perjury stemming from his denying that control on Schedule B of his income tax returns — a veritable slam-dunk for the prosecution.

The answer to that question might lie in the rest of the charges in the indictment. A conviction on any one of those felonies — from money laundering, to failing to register as an agent of a foreign government, to failing to file FBARs, to making false statements — exposes Manafort to a maximum prison term of between five and 20 years. A tax perjury conviction carries “only” a three-year sentence. It may very well be that should the case ever reach a jury, Mueller did not want to give jurors the ability to deliver a compromise verdict, convicting Manafort on the lesser felony of tax perjury and acquitting him on other, more serious charges.

As with any good mystery novel, all should be revealed in due course. But until the book of the Trump campaign has been completed, readers can only make educated guesses about where it all might end.