CALIFORNIA CONTINUING EDUCATION, INC

PRESENTS

TAX EVASION 2017

by

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Premise: "There are less cases, but still several areas of controversy related to Tax Evasion.

TAX EVASION 2017

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I. Restitution-Tax Dual Assessments

In 2010, Public Law No. 111-237 amended IRC 6201 to provide that the Service shall assess and collect the amount of restitution ordered in a tax case for failure to pay any tax imposed under the Internal Revenue Code in the same manner as if such amount were such tax. The law applies to restitution orders entered after August 16, 2010.

This has meant that the same dollar loss imposed on a citizen convicted in a federal criminal tax case as restitution is also to be imposed and collected as a tax debt as part of the IRS' regular tax collection activity. Each dollar of collection reduces both restitution and its associated tax debt. Its a little like having two collectors trying to enforce the same debt from two different directions, but the two are not equal.

Restitution is administered through the courts' probation office. The probation office is not only concerned with restitution, but also of a laundry list of enforcement conditions typical for ex-prisoners. Reporting, restrictions in what the probationers can and cannot do, who they can and cannot associate with, drug treatment, urine testing, and much more. Probation is more intimately involved with every aspect of the probationer's life than a spouse. As between the probation office and the IRS, the probation office is closer, more in control, and has the right to verify almost every aspect of the probationer's life. The probation office knows exactly how much the probationer can pay because it knows the probationer's job and living costs.

Summary of Provisions:

(1) IRC 6213(b) enables a notice of assessment of restitution (no notice of deficiency) nopetition to Tax Court.

(2) IRC 6501(c) to address the unlimited assessment period for restitution-based assessments (RBAs).

(3) Tax debt for restitution ordered payable to the Service creates two separate debts for the same liability

(4) The liability cannot be collected twice.

(5) First debt is a "restitution judgment" collection administered by DOJ Financial Litigation Unit (FLU).

(6) Second debt is the "restitution-based assessment" (RBA) for the same debt, to be collected by IRS as if a tax.

Since the DOJ Probation office has the most complete and highly reliable picture of the taxpayer, its assessment of the probationer's "ability to pay" will probably be controlling. However, IRS' own procedure does not contemplate automatic cooperation.

In Dicker v. Commissioner (Dkt 12007-16L Order dated 12/12/17), after assessment, a CDP proceeding was instituted in an effort to coordinate the IRS function with the DOJ probation. IRS moved for summary judgement. The taxpayer's representative, who had represented the taxpayer in the criminal case was effectively unavailable to fully engage the IRS, or to help coordinate between DOJ and IRS. One contributing factor to the confusion may have been that the criminal defense attorney had filed a form 2848 during the criminal case. Even though the he criminal case was over, the power of attorney journeyed on to cause IRS to communicate only with the criminal attorney, who had little to do with the Collection Due Process IRS-DOJ conformity motivation objective for the taxpayer. After an initial contact between the attorney and IRS, the attorney was unreachable. The CDP settlement officer logged over a half dozen calls to the attorney, requested completion of Form 433-A, and finally made the assessment after being frustrated by the lack of responses. Some commentators have suggested the

form 2848 power of attorney should have been limited to criminal maters, or that form 8821 (request to provide information) may have been more helpful. There was some direction by the client at the beginning of the process that he knew the power of attorney in favor of his criminal attorney was in place and that there was some direction to others that his criminal attorney would be leading the effort to coordinate the CDP hearing to include probation department input. "It was agreed that she would coordinate arrangements with other related third parties in order to confirm the taxpayer's ability to pay."

This case points to two important points that should not be missed. (1) practitioners must plan for the termination of their roles. If this means handing either back to the client or to another practitioner, there needs to be coordination and agreement. In this case, the client could have had an unambiguously clear shift of responsibility followed by arrangements to terminate and initiate new powers of attorney. (2) This case illustrates the onerousness of the restitution system in both federal and state courts, in that controversy over the amounts of restitution are not well fought out because criminal attorneys aren't as well versed in fighting to establish tax loss (or other sorts of restitution tax losses). In cases where counsel is appointed, a tax evasion case is assigned from a panel and the panel member may not be as familiar with tax principles and is more willing to capitulate on tax loss because there is no other point of reference available.

But to have created a system where the taxpayer is slammed a second time with a second sourcing of a same burdensome debt is like building on extra noise for the same damage. Tax assessment in truth requires the DOJ collection to share its information with the IRS, and there is nothing in the system that causes this to happen automatically. The vast majority of restitution cases involve an insolvent taxpayer (or else the restitution would be paid a few weeks after conviction or after appeal). Independent assessment for restitution is just another grind requiring interposition of a tax professional to juggle a CDP and coordinate it with federal probation, or else the restitution taxpayer will experience a stereo noise from a single tax debt.

The take-away from this case is a reminder to withdraw / hand-off when case control needs shifting to elsewhere.

II. Single Taxpayer Conspiracy Controversy

I often talk about the two taxpayer conspiracy to defraud the government under 18 U.S.C. 371. I talk about how it can sometimes be better for an unaided taxpayer to take care of their business alone, even if they botch things badly through ignorance, than to include someone in the process. Examples include having someone help with a taxpayer's transactions to having a professional prepare and file your taxes. Its dangerous because the elements of proof in a conspiracy are generally considered easy to establish.

26 U.S.C. 7212(a) has been called a single taxpayer conspiracy statute. It imposes criminal liability on anyone who "corruptly obstructs or impedes or endeavors to obstruct or impede the due administration of the internal revenue code. In a non-tax, state police setting, its been called "contempt of cop" (see California Penal Code §166). Contempt of cop is easy to violate. You need to be in a position to affect law enforcement at a time when they are doing something. The IRS version puts taxpayers in a position to affect the tax system simply by being here, and the question comes to: (a) "Is the IRS doing something" or (b) "does the taxpayer know that the IRS is doing something".

A recent case of United States v. Marinello, 839 F.3d 209, 222 (2d Cir. 2016) was heard by the Supreme Court based upon the circuit split between the alternatives (a) and (b) above. Marinello is a taxpayer that failed to file tax returns over an extended period of time. A string of misdemeanors was charged along with a 26 U.S.C. 7212(a) felony charge ($5000 fine and 3 years in prison). The taxpayer urged his 2nd Circuit to follow the 6th circuit's narrow view stated in U.S. v Kassouf 144 F.3d 952 (6th Cir. 1998) requiring a taxpayer to have

obstructed or impeded a pending IRS action (subpoena, civil examination, criminal tax investigation) **of which the taxpayer was aware**, in order to trigger the 26 U.S.C. 7212(a) omnibus clause.

Since the 1st, 2nd, 9th & 10th circuits don't require taxpayer awareness to trigger the 26 U.S.C. 7212(a) omnibus clause, the split was sufficient for the Supreme court to grant certiorari in June 27, 2017. Just previous in May, 2017, the Fifth Circuit Joined Majority of circuits deciding that § 7212(a) Requires No Pending Investigation (5/24/17)In United States v. Westbrooks, ___ F.3d ___, 2017 U.S. App. LEXIS 9073 (5th Cir. 2017). Westbrooks is a little closer to there being investigative notice, since Westbrooks was manager for one tax business in Charlotte, NC which came under investigation in 2009. For not producing a sufficient level of business documents for 2005-2009 in Charlotte, Westbrooks was found guilty of criminal contempt. Westbrooks then drew an indictment for her own tax business in Houston based upon conduct occurring from 2004-2009, which included submitting the returns that falsely stated low income for the business she managed in Charlotte. Westbrooks moved to dismiss the obstruction (7212(a)) count based upon there not being an ongoing IRS investigation or proceeding during the obstructive conduct in Texas.

However, if a taxpayer operates two similar businesses (although owning only one), would not an investigation into one business be enough to invoke 7212(a) for any misconduct regarding the second business? What about the same types of misconduct in two extremely similar businesses? It may be that a reversal in United States v. Marinello might not help Tamny Denise Westbrooks.

The take-away from this case is to avoid obstruction, especially when a hint of investigation is detected.

III. IRS Agent Solicitation v. Gratuity - Lesser Related, not Lesser Included

United States v. Hurley, (9th Cir. 2017) involved conviction of a former IRS agent under 18 USC. § 201(c) for receiving a gratuity. Hurley was indicted under 18 USC. § 201(b). § 201(c) (2 year imprisonment period), has been erroneously reported in my opinion as a "lesser included" offense of § 201(b)(15 year imprisonment period).

§ 201(b)(2) has language that indicates a somewhat bilateral contract:
official;
("directly or indirectly **corruptly** demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally");
(or for any other person or entity,)
(**in return for)**
(A) being influenced in the performance of any official act;
(B) being influenced to commit or aid in the committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or
(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

§ 201(c)(1)(B) has language that indicates a somewhat unilateral contract:
official;
("directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally");
("**for or because of any official act performed or to be performed**").

In addition to the unilateral/bilateral difference, § 201(b)(2) creates a "past tense," already performed nature. The term "corruptly" is not found in § 201(c)(1)(B) and it is the subtraction from the more harsh statute to arrive

at the less harsh statute. The phrase (**in return for)** in § 201(b)(2) is completely different from the ("**for or because of any official act performed or to be performed**") language in § 201(c)(1)(B).

The Hurley appeal was based upon attacking the less punitive statute as not justified by the facts in the case. The case language about "invited error" and the defendants omission to re-urge a motion for judgement of acquittal tend to detracts from the teaching of a well established principles outlining "lesser included" offenses and "lesser related" offenses and their operation. California criminal law can be used as an example.

A "lesser included"offense is one in which the greater offense cannot be committed without committing the lesser offense. Put another way, all of the elements of the lesser offense must be found in the greater offense. A "lesser related" offense is an offense that is closely related to the charged crime, but lacks the elemental inclusion that would make the less severe offense a "lesser included" offense. (See California Criminal Law, Procedure & Practice (2011) §32.8)

Neither the defendant nor the state can unilaterally insist on instruction for a "lesser related" offense, but they may both agree to it under California Law & Procedure. When they agree, and it is included, a conviction under a "lesser related" offense cannot be challenged on appeal (People v. Birks (1998) 19 C4th 108, 136 n19).
The take-away from this case is that a "related case" inclusion is tantamount to a waiver of fact support.

IV. The Dangers of a Narrative Indictment

Most federal indictments, but especially tax evasion indictments set forth without specifics beyond a neutral recitation of elements relating to the elements of the statutes involved. Matters outside the elements of the crime are considered "surplusage." The Federal Rules of Criminal Procedure include a rule (rule 7) under which a defendant can motion for the surplus language to be removed.

The Magistrate Judge hearing motions in the case of United States v. Larkin, 2017 U.S. Dist. (D NV 2017) made an order on the motion on January 24, 2017 repeated the surplusage, and commented that "While acknowledging that these paragraphs do not state the elements of tax evasion under 26 U.S.C. § 7201, the Government argues that the paragraphs are relevant matters that the Government intends to prove at trial and therefore should not be stricken.

The Magistrate Judge went on to emphasize that "even if the jury is shown the indictment, they are warned that it is not evidence in any event, and so it really does not matter and is not harmless. One cite: *United States v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983), the court held that defendant was not prejudiced by providing the indictment to the jury because "[t]he trial court properly instructed the jury both at the outset and completion of trial that the indictment is not evidence against the accused and affords no inference of guilt or innocence."

If the surplusage is not struck, and since the jury has a right to see the indictment, several things will happen and none are good for the defendant. The jury will use it as an index, or a map, and regardless of whether an item of evidence is admitted, the indictment outline will be treated as highly reliable organization source. The prosecution will have advocative narrative in the jury room to take care of every instance of confusion, doubt, or lapse in putting the facts together.

On January 24, 2018, defendant Maria Larkin, 55 was convicted of tax evasion for unpaid employment taxes and was sentenced to a year and a day in prison, and required to pay $ 1.2 million in restitution to the IRS.

The take-away from this case is a reminder that tax practitioners will be pursued vigorously.

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