TAX EVASION CASES STUDY

by

Curtis L. Harrington

HARRINGTON & HARRINGTON

P.O. Box 91719, Long Beach, CA 90809-1719
(562) 594-9784, Fax: (562) 594-4414
http:/www.patentax.com E-mail: curt@patentax.com PATENTAX®

A
PATENTAX®
PRESENTATION

Disclaimer: Educational Only: This outline is Educational Only and no part of this presentation can be considered as federal or state tax advice, opinion, or position and is not intended or written to be used, and may not be used, for the purpose of (I) avoiding tax-related penalties under the internal revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein, nor (iii) constituting guidance on any tax or criminal matter. Cases listed are for educational purposes and have not been checked to see if they have been overturned on appeal. Do not rely upon these cases until or unless they have been Shepardized.

I. Background

Cases in this outline originate in the territory of the 9th Circuit Court of Appeals. Most of the cases were indicated for publication by the 9th circuit in 2013 and are summarized, often using the court's own words, for brevity and ease of reading. On the whole, the 2013 published cases indicated some of the most outrageous evasive behavior and lop-sided lack of either (1) records or (2) analysis of records I have seen. Records, considered simply, can be a two-edged sword for the accused tax evader. Lack of records can be easily clothed by the government as part of a plan to cover up a trail of evidence of the crime. Conversely, good records provide thousands of mathematical pivot points which can be characterized in millions of ways, inviting a battle of the experts. Where the trial reduces itself to a battle of the experts, the government likely has an edge given its access to a wide variety of expert employees.

Most criminal prosecutions benefit from the lack of sophistication of the defendants. Lack of sophistication expresses itself in (1) a belief that adopting one fiction can exempt or justify skirting the system, (2) simple inability to understand all of the elements of the system, & (3) lack of ability to avoid discovery of the scheme (especially where it involves an extended group of cooperators).

For each of the cases presented, there are dozens of plain, simple, unpublished appeals, and perhaps many other cases where appeal waivers were filed. These cases, admittedly anomalies, will however

illustrate some useful factors to keep in mind to possibly help avoid future evasion entanglements.

II. The Cases

==========

RULON FREDERICK DeYOUNG, ON HABEAS CORPUS (E.D. CA m 01/07/2013)
(LATE, STRANGE HABEAS PETITION)
ORDER TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS under 28 U.S.C. § 2241.

FACTS:
On August 25, 2010, Petitioner pleaded guilty and was convicted in the United States District Court for the District of Utah, of four counts of violating 26 U.S.C. § 7201 (attempt to evade or defeat tax) and one count of violating 26 U.S.C. § 7212(a)(corrupt or forcible attempts to interfere with administration). Petitioner was sentenced to a term of thirty-six months. Petitioner alleges the legal underpinnings of 26 U.S.C. § 7201 have been repealed.

Ruling: Such a challenge must be brought in a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255,(challenge the legality of Petitioner's conviction) not in a habeas corpus petition pursuant to § 2241.(**manner, location, or conditions of that sentence's execution**) petition.

Petitioner takes pains in his petition to note that "he is not challenging his sentence," However, Petitioner now brings this habeas petition, in which he is clearly challenging the legality of his conviction. The only purpose of such "repeal of § 7201 argument," is to challenge the legality of Petitioner's conviction in a round-about way.

A federal prisoner who wishes to challenge the validity or constitutionality of his conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. In contrast, a federal prisoner challenging the **manner, location, or conditions of that sentence's execution MUST bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.**

Apparently in an oblique acknowledgment of this legal reality, Petitioner contends that he has no other legal avenue than § 2241 since § 2255 is inadequate and ineffective. Although Petitioner does not explain in any detail why § 2255 is inadequate or ineffective, **he alludes to the fact that the one-year filing deadline for a § 2255 petition has passed**.

Further, a 36 month sentence at the 87% rate is 31.3 months. Assuming he was sentenced about September 1, 2010, his release date would have been released in April 2013. This "late in the sentence habeas," if granted, might not have been in time to make any meaningful sentence reduction.

In Ivy v. Pontesso, 328 F.3d 1057 (9th Cir. 2003), the Ninth Circuit held that the remedy under a § 2255 motion would be "inadequate or ineffective" if a petitioner is **actually innocent**, **but procedurally barred from filing a second or successive motion under § 2255.** Ivy, 328 F.3d at 1060-1061. That is, relief pursuant to § 2241 is available when the petitioner's claim satisfies the following two-pronged test: "(1) [the petitioner is] factually innocent of the crime for which he has been convicted and, (2) [the petitioner] has NEVER had an 'unobstructed procedural shot' at presenting this claim." Id. at 1060.

Tests include: (1) whether petitioner's claim 'did not become available' until after a federal court decision." Harrison v. Ollison, 519 F.3d 952, 960 (9th Cir. 2008), cert. denied (2008). (basically, petitioner's claim 'did not arise until after he had exhausted his direct appeal and first § 2255 motion);' AND (2) whether the law changed 'in any way relevant' to petitioner's claim AFTER that first § 2255 motion."

In other words, it is not enough that the petitioner is presently barred from raising his claim of innocence by motion under § 2255. He must **never have had the opportunity to raise it by motion**. As in Ivy, Petitioner cannot establish any relevant intervening change in the law since his 2010 conviction that would trigger the savings clause, **nor has he established that he could not have raise these claims in his original appeal or, at the very least, in a proper motion pursuant to § 2255 in the sentencing court.** In this case all of the alleged illegalities in the instant conviction existed prior to the trial and subsequent appeal, if any, and thus could have been raised at the very least in a motion pursuant to § 2255.

Moreover, **Petitioner has failed to show he is actually innocent of the charges against him**. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." "**[A]ctual innocence means factual innocence, not mere legal insufficiency**," and "in cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." The "core idea" expressed in these cases is that the petitioner may have been imprisoned for conduct that was not prohibited by law. Congress has determined that **second or successive § 2255 motions may not contain statutory claims**.

Comments and Observations

Generally: This case re-emphasizes that the ability to have any sort of post conviction relief, the technical rules for habeas corpus must be followed to the letter.

1. Accused citizens often plead quickly and only much later on, after they are convicted, begin to think about fighting substantively. Using a "wrong" statute to try to get a meritorious case before a judge is understandable. Using a "wrong" statute, before a "wrong court" to try and bring a "tax protester" type argument before a federal judge borders on insanity.

2. I note that the case appears to have been filed in 2012 possibly near at the end of the sentence, and it appears as if the opinion is likely issued after the sentence has been completed. If the defendant was almost finished with his sentence, this may simply have been a parting protest.

3. This example demonstrates how difficult it is to even have the smallest chance to prevail after a conviction, and that a full consideration should be paid to developing the case for doubt, or else to consider conviction a truly final status. This case also reminds that post conviction habeas has been severely restricted. The fact that the substantive claim was not really discussed, the fact that the court went to great lengths to cite the cases relating to the restrictions on habeas restrictions, which are very likely well-used boilerplate to deal with & dispose of a great number of habeas petitions, WITHOUT dealing with any substantive issues.

==========

USA v. Thomas R. Jennings No. 11-50315 Filed April 3, 2013
USA V. David J. Feuerborn No. 11-50325 Filed April 3, 2013

FACTS:
Thomas Jennings and David Feuerborn owned and operated Environmental Soil Sciences, Inc. ("ESS"). They purported to possess technology that could separate oil from dirt and other materials without producing hazardous waste. Defendants solicited funding from investors, offering equity in ESS and forecasting billions of dollars in revenue, and raised nearly $16 million. ESS hired a vendor, Eco-Logic Environmental Engineering, to develop machinery that would use the purported technology to capture oil. ESS paid Eco-Logic Engineering approximately $2.5 million dollars.

Meanwhile, Defendants opened and maintained a separate bank account of their own named simply "Ecologic." Defendants wrote checks from the ESS business account and deposited them into the Ecologic account. A check to the Ecologic account would often contemporaneously mirror a legitimate payment to Eco-Logic Engineering. Defendants deposited more than $2.5 million from the ESS account into their Ecologic account. They never told

ESS investors, accountants, or board members about the Ecologic account.

ESS generated no substantial revenues. But the Ecologic account funded Defendants' new homes, cars, and cash payments to family members. Defendants did not report that money to the IRS as income. Defendants were both convicted by a jury of conspiring to defraud the United States under 18 U.S.C. § 371. Jennings was individually convicted of four counts of subscribing to **false tax returns under 26 U.S.C. § 7206(1)**. Feuerborn, who had not filed tax returns for the years in question, was individually convicted of four counts of **tax evasion under 26 U.S.C. § 7201**. Thus, but for the bank account and phoney invoices, it would have been a straight tax evasion case.

However, When calculating the advisory sentencing range under the Sentencing Guidelines, the probation office recommended in its presentence report a two-level enhancement under section 2T1.1 of the Guidelines based on Defendants' use of "**sophisticated means**" to accomplish their crime. The district court agreed & applied the **two-level enhancement** because defendants' use of the Ecologic account disguised income as company expenses in a manner that was "more complex" than found in a typical tax fraud case.

The enhancement resulted in an offense level of twenty-four and a recommended sentencing range of fifty-three to sixty-one months of imprisonment under the Guidelines. The district court sentenced each Defendant to forty-eight months in prison, a little below the low end of the Guideline range. (Note: The guideline ranges have a spacing between each of the levels which increases depending upon the level. In other words, the increase in months going from level 31 to 32 (13 added months) is greater than the increase in months going from level 21 to 22.(four added months).

The panel affirmed the district court's application of a "sophisticated means" enhancement under U.S.S.G. § 2T1.1(b)(2) in determining two defendants' sentences following convictions for tax fraud. The panel held that conduct need not involve highly complex schemes or exhibit exceptional brilliance to justify a sophisticated means enhancement, and that the defendants' efforts to conceal income by using a bank account with a deceptive name was sufficiently sophisticated to support application of the enhancement.

The court of appeals reviewed the district court's interpretation of the Guidelines de novo. U.S. Sentencing Guidelines Manual § 2T1.1(b)(2) (2010) application Note 4 explains that the term "sophisticated means," for purposes of subsection (b)(2), "means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Convicted taxpayers argue that they did not employ means as sophisticated as those listed in the application note because they did not create corporate shells or offshore accounts.

Court of Appeals held that the enhancement properly applies to conduct less sophisticated than the list articulated in the application note. The method employed by Defendants here reflected a sophisticated effort to conceal income. They syphoned money from ESS to themselves through a bank account that they named "Ecologic." The use of that name was no accident. It mimicked the name of the company's primary vendor, Eco-Logic Environmental Engineering. Payments to the Ecologic account thus appeared to be payments to Eco-Logic Engineering for legitimate business expenses. No legitimate reason for Defendants' use of an account with the name "Ecologic" was established. Defendants contend that the enhancement should not apply to them because the Ecologic account was opened under Jennings's real name and social security number. But the fact that the concealment might not have been total does not mean that there was no effort at concealment or that the method employed was not sophisticated. Application of the enhancement does not necessarily turn on the scheme's likelihood of success in remaining undetected.

Use of Jennings's real name and social security number might have made it somewhat less likely that the diversion of funds would go undetected, but the scheme could have been figured out only by someone who knew that the Ecologic account was controlled by Jennings, or who knew to look at both the ESS records and the Ecologic account ownership records. Someone looking only at ESS's records would not have been able to tell that payments to the Ecologic account went to an account actually controlled by Jennings. Someone looking only at the Ecologic account records would not know that the funds deposited in that account were not proper business receipts. Further, the convicted taxpayers also argue that they opened the account for legitimate purposes and regularly used it for ESS business but that does not alter our conclusion, either. **The fact that an account was also used for lawful**

payments does not immunize its use for improper purposes.

Observations

1. The use of a published opinion to address an important aspect that the court wants to communicate to the public helps to emphasize it. In the end, it may be that any affirmative act beyond simply not filing or not filing & paying tax will draw an enhancement for "sophisticated means". It is the judiciary's signal that additional punishment will be imposed for camouflaging & hiding. At the margin of going from level 22 to level 24, the two-level enhancement added 10 months to the sentence.

2. The means involved a separate bank account that was created for the purpose of hiding the fraud. Use of other company name trademark wise (look-alike = sound-alike = spell-alike = smell-alike; means that the convicted citizens risked discovery by their associate), so part of the "sophisticated means" probably also meant the hiding of any reference to the account's existence. Further, if the state has a DBA statute, Jennings probably violated it by doing business (name of the account) under a name that is not his own, possibly to avoid applying for a DBA and having it publish. Thus the bank could have raised a fuss about the account, and it may be that such problem was "tamped down" through influence or further collusion.

3. I have not seen any cases yet that attempt to measure the degree of illegality of the "sophisticated means" as a relative threshold test. The guidelines manual "execution or concealment of an offense" should probably be updated with examples to illustrate acts in advance of the "offense". It would seem to me, logically, that acts taken in advance of an offense should be more severely viewed than acts done after an "offense"

==========

USA v. WANLAND NO. CR. S-09-008 LKK E.D. CA **ORDER** (E.D. CA 05/06/13)

FACTS:
Accused citizen WANLAND earlier obtained a discharge in bankruptcy (unknown chapter) and is later indicted for (1) 35 counts of tax evasion, (2) fraudulent removal or concealment of property subject to levy, and (3) failure to file income tax returns . WANLAND **attempts to use his discharge as grounds for dismissing the indictment**. Expanded facts are not stated and this case focuses on WANLAND's creative bases for attempts at dismissal.

BANKRUPTCY IS NO SHIELD:
After indictment, WANLAND argued that the counts of the Indictment are foreclosed by the bankruptcy court's final judgment discharging the Defendant's debts and liabilities to the Internal Revenue Service (TAX DISCHARGE). WANLAND also raises issue preclusion "**because the Government failed to (1) raise the claims in the indictment during the bankruptcy proceedings to prevent non-dischargeability**", and/or (2) "**failed to stay the bankruptcy proceedings pending the outcome of the current criminal matter**," the Government should be precluded from pursuing a criminal action for assets and tax liabilities the bankruptcy court already discharged.

The Government opposes, arguing that the bankruptcy proceedings against Defendant "did not and could not have addressed his criminal liability and, therefore, the bankruptcy proceeding cannot now preclude the current criminal prosecution. (Note that Stern v. Marshall was not mentioned)

In a short review of "Res judicata, or claim preclusion," the court explains that it usually prohibits lawsuits on any claims that (1) were raised or (2) could have been raised in a prior action. Res judicata applies when there is: **(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties.** Further, and specifically with regard to bankruptcy, 11 U.S.C. § 523(a)(1)(C) provides that "[a] discharge . . . of this title does not discharge an individual debtor from any debt . . . with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." (Note that a discharge is a general document, and its not

However, the court held that **claim preclusion does not apply where the claim in question could not have**

been brought in the prior proceeding due to limitations on the prior court's jurisdiction. A discharge in bankruptcy entered in a bankruptcy proceeding to which the IRS is a claimant does not, under the doctrine of res judicata, preclude a subsequent criminal prosecution for bankruptcy fraud when the IRS never pursued a claim to set aside the discharge in bankruptcy on grounds of fraud". .----> **The fresh start afforded debtors in bankruptcy does not include release from jail.**

IMPROPER LEVY & 12(b)(6)

Defendant moved to dismiss Counts 2-32 of the Superseding Indictment, RE 26 U.S.C. § 7206(4) based on its requirement that goods or commodities removed or concealed by the defendant are subject to levy under 26 U.S.C. § 6331.

That statute provides, in part, that: If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax."

Levy may also be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer . . . of such officer, employee, or elected official. 26 U.S.C. § 6331(a) (2011).

PARTNERSHIP DISTRIBUTION ARGUMENT FAILS

Defendant argued that, because he was a partner, as opposed to an "officer" or an "employee," and received disbursements of partnership profits, as opposed to "salary or wages," the Government is unable to meet its burden of proof . However, the first sentence of § 6331(a), which the Defendant does not address, applies to "any person liable to pay any tax" who "neglects or refuses to pay the same." This provision of the statute applies to delinquent taxpayers generally, regardless of their particular employment status.

As an allegedly delinquent taxpayer, Defendant falls within the ambit of those persons subject to § 6331(a). [the only property exempt from levy is that listed in § 6334(a) . . . consisting of certain personal articles and provisions].

RULE ON PRETRIAL MOTIONS

Rule 12(b) of the Federal Rules of Criminal Procedure permits consideration of any defense "that the court can determine **without a trial of the general issue**." Fed.R.Crim.P. 12(b)(2). A pretrial motion is generally capable of **determination before trial if it involves questions of law rather than fact**. The district court must decide the issue raised in the pretrial motion before trial if it is "entirely segregable" from the evidence to be presented at trial.

However, **if the pretrial motion raises factual questions** associated with the validity of the defense, the **district court cannot make those determinations**. Doing so would "invade the province of the ultimate finder of fact."

BEWARE CHALLENGE TO ELEMENT BECOMING SUFFICIENCY OF EVIDENCE CHALLENGE

Generally, Rule 12(b) motions are appropriate to consider "such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, [and] **lack of jurisdiction**." Defendant's arguments challenge the Government's ability to prove that his **employment status and character of payment** fall within the ambit of 26 U.S.C. § 6331(a). **His motion to dismiss therefore constitutes a premature challenge to the sufficiency of the Government's evidence tending to prove a material element of 26 U.S.C. § 7206 (4)**.

Put another way, the motion to dismiss presents at least partially factual disputes as to the actual nature of Defendant's employment status and the character of his payment. *These factual disputes are not ENTIRELY SEGREGABLE FROM THE EVIDENCE to be presented by the Government at trial on the "general issue" of the case.* MOTION DENIED.

STATUTE OF LIMITATIONS

Defendant moved to dismiss Counts 2-32 of the Superseding Indictment based on an argument that the statute of limitations for violations of 26 U.S.C. § 7206(4), as provided by 26 U.S.C. § 6531, is three years. Held: the "six-year statute of limitations applies and thus the charges are timely filed.

26 U.S.C. § 6531, setting forth the relevant statute of limitations for criminal prosecutions based on the Internal Revenue Code, provides as follows: "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years for offenses involving the defrauding or **attempting to defraud** the United States or any agency thereof.

Key is removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, **with intent to evade or defeat** the assessment or collection of any tax imposed by this title. This means that even if you get a discharge, that property is still in play. (There is no discharge "exemption" for property and presumably post-discharge property that may be liable for tax for this year's fraud may not be hidden)

United States v. Workinger, 90 F.3d 1409 (9th Cir. 1996), provides the leading precedent: "Section 6531(1), by its own terms, does not require that a defendant be expressly indicted for tax fraud, but any offense which "involves" defrauding the United States in any manner. § 6531(1) covers all offenses where fraud is an essential ingredient (relating to tax). Workinger makes it clear that 26 U.S.C. § 7206(4) falls within the ambit of 26 U.S.C. § 6531(1), and thus, carries a six-year statute of limitations.

Comments and Observations

Generally: This case makes it clear that although generally the IRS is civilly dominated by the bankruptcy system, that criminally, no civil system determination can generally affect it. Further, in bankruptcy, in seeking discharge of tax debts, three paths may be followed.

(1) if the claim is made (by either IRS or by the debtor on IRS' behalf) and if discharge occurs, the debtor goes forward with not affirmative assurance that the tax is discharged, and is only certain that discharge is in question if the IRS continues to try and collect. Collection can trigger further contact with the IRS and the debtor can seek a resolution or an answer as to why they are not dischargeable.

(2) The IRS insolvency unit can be contacted (they prefer to work by informal contact) during bankruptcy and some form of acquiescence regarding dischargeability can be sought. An indication of acquiescence can save the taxpayer and the IRS from having to engage in a formal Adversary Proceeding. Acquiescence confirmations save the government a lot of time and save the debtor a lot of money.

(3) If no Acquiescence confirmation is given, or if a negative indication is given, the debtor can file a formal adversary proceeding and litigate points of disagreement with the IRS' insolvency unit.

As a result of the above, it can be seen that there is no real assurance that the government positively engages, much less may become aware of the debtor or the debtor's extent of activity.

1. Would the result have been different if WANLAND had somehow managed to cause the district court to "withdraw the reference" to the bankruptcy court under 11 U.S.C. §157(d) by motion?

2. Actually, a reading of this order and the facts in this published order are a bit misleading. The timing is as follows:
March 27, 2007: Bankruptcy petition is filed by WANLAND.
January 8, 2009: The government issues a single count indictment against WANLAND.
June, 2011: bankruptcy discharge issued
January 26, 2012: a 32-count superseding indictment issues.

As can be seen, the criminal indictment was on a parallel track with the bankruptcy case from early 2009-mid 2011, 2.5 years. Would it have helped to file a motion for withdrawal of the reference?

3. A verdict was rendered on September 13, 2013 WANLAND was found guilty of 33 of 35 counts in the indictment.

4. Given the parallel nature of the proceedings, WANLAND was justified in seeking relief from the criminal indictment, because what occurred in the parallel track was simultaneous civil and criminal action:

(a) the civil bankruptcy investigation was obviously used to feed the criminal case, and especially the 32-count indictment of January 26, 2012.

(b) the trustee or the government could have moved to withdraw the reference and made a more intelligent finding on what was owed, what was paid, and what was evaded-- using the pretense of hiding behind an article I court to gather information while at the same time issuing indictments through an article III court makes it look as if the *reason* that no government agency moved to withdraw the reference was for that reason.

5. The analysis of the WANLAND order of early 2013 made it seem as if an "ignorant" bankruptcy had occurred earlier in time, which it did not. Had the bankruptcy occurred and been completed before the indictment, more credence would have been lent to the separation between Article I and Article III courts.

6. This case also stands for the proposition that mixing a bankruptcy with criminal activity is generally always a bad idea. Would it have been better to take other action, such as an assignment for the benefit of creditors? What about the level of records available? What if the assets were simply handed out to creditors and to allow them to scramble for them? Was it the filing of the bankruptcy that supplied the government all of the leads and data that it needed to file the criminal case?

7. WANLAND's "profits partner can't be levied" theory is fairly weak. Based upon the appeals case reading alone, it is uncertain the maturity and type of profits available and when they may were distributed. Some judgement holders must wait (charging order) until some entities such as partnerships, make a distribution. However, when under personal attack for tax evasion, the raising of an entity theory as a shield possibly invites the government to think about the extent to which the entity may have colluded in the past. Monies from an entity would have been subject to IRS seizure under either a charging order or by levy, so its difficult to see the value of the opposition to levy, unless--- someone or the entity desired to get the entity closer to activities surrounding the criminal case.

==========

USA v. WILLENA STARGELL No. 11-50392 (1st opinion w/drawn) Filed August 2, 2013
FACTS:
After completing a course on tax preparation and receiving state (CTEC) certification, Stargell began preparing taxes for Liberty Tax Service (LTS) in Moreno Valley, California. LTS terminated Stargell's employment in 2003, and Stargell began her own tax preparation business, called Liberty Bell Tax Service (LBTS).

Agent Marquez prepared summary chart based upon his review of 143 tax returns, of Stargell that demonstrated that each of the 143 tax returns contained either false wage or false withholding figures, and that the vast majority contained both false wage and false withholding figures.

While operating LBTS, Stargell prepared federal income tax returns containing false statements and engaged (somehow) in schemes to obtain refund anticipation loans (RALs) from banks based on these fraudulent returns.

(Counts 1 to 6) fraud by wire affecting a financial institution
(Counts 7 to 12) aiding and assisting in the preparation of a false return
(Counts 13 to 15) fraud by wire
(Counts 16 to 18) aggravated identity theft.

Because the wire fraud that was the predicate to the aggravated identity theft did not occur until after 18 U.S.C.

§1028A's enactment date,(July 15, 2004) the panel rejected the contention that the jury "may have" convicted the defendant based solely on pre-enactment conduct.

Before sentencing, the district court held two evidentiary hearings to determine loss and restitution. At the latter hearing, Kay Otani, former counsel for Stargell, testified as a witness. Stargell's current counsel, the district court, and the government inquired as to Otani's method of calculating loss and restitution, what documents he sought to obtain from the government, how those documents would have assisted or disadvantaged him, and what was ultimately provided to him.

At the conclusion of the hearing, the district court found an offense level of twenty-two, a criminal history category of I, and an advisory guideline range of forty-one to fifty-one months. The district court imposed a $1200.00 special assessment, restitution in the amount of $362,796.07, and incarceration for forty-two months. [Note, following U.S.S.G. 2T1.1, a tax loss of > $400,000 (based upon $598,657.00. theoretical loss) corresponds to level 20, and two levels are added for being a tax preparer]

The evidence at trial established preparation of federal income tax returns containing false statements and engaged in schemes to obtain refund anticipation loans (RALs) from banks based on these fraudulent returns. The panel held that new or increased risk of loss is sufficient to establish that wire fraud "affects" a financial institution within the meaning of 18 U.S.C. §1343, and that there was sufficient evidence for a rational jury to conclude that the defendant's fraudulent returns exposed the banks to an increased risk of loss.

Stargell contends that the government failed to prove that such counts "affected" a financial institution"and that the IRS refunds of $276,331.74 before it stopped the remaining refunds. Intended loss is used instead of actual loss and so the defendant carries the $598,657.00 tax loss (1) which is reasonable (under U.S.S.G. § 2T1.1 cmt. n.1.3), & (2) at sentencing, the onus was on Stargell to establish a lower tax-loss amount based on the entitled refund, <u>but she did not</u> at trial or on appeal. **(This emphasizes the point that expert testimony regarding exact tax-loss [as well as deduction expenditures that could theoretically have been deducted] should be established prior to trial / plea and certainly introduced during sentencing.)**

Differences between the withdrawn opinion of August and the superseding opinion of October may indicate a concern about having gone too far with the original assertions AND perhaps some erosion in the faith of the original characterization and reliability of the data:

1. "increased risk of loss" with: -- obtain refund anticipation loans "affected" banks,...
Is there a lesser implied threshold for "affected" than for "increased risk of loss."

2. This phrase was changed: "143 tax returns contained either false wage or false withholding figures, and that the vast majority contained both false wage and false withholding figures."
The replacement statement is :--143 tax returns contained false wage or withholding figures.--
(Perhaps the majority of returns, upon further inspection, DIDN'T have both? or maybe the data was more exculpating as to the defendant at second glance)

3. This phrase was changed: "Yet, the banks only lost money with respect to two of the four counts of fraud charged in the indictment: Count 1 ($4,995.22) and Count 4 ($6,013.00).
The replacement statement is: --Yet, the banks only lost money on one of the four fraudulent returns: Count 4 ($6,013.00). (Overall, after a second look the data was found to weigh much less against the defendant, yet the data was not objected to at trial and the trust on the reliability of the data may have been misplaced by the court in its first opinion).

4. Some language was changed regarding the meaning of "affects", and how "increased risk of loss" comes to mean "affects" which then comes to mean " new or increased risk of loss":
The original language: "
"Our sister circuits have defined the term "affects" within the meaning of a similar statute, 18 U.S.C. § 3293(2), to

include new or increased risk of loss to financial institutions."
Is replaced by the following:
--The increased risk of loss presented by fraudulent terms is sufficient to "affect" a financial institution. Regarding the definition of "affects" in 18 U.S.C. § 1343, we join our sister circuits in defining such term to include new or increased risk of loss to financial institutions. (**Couldn't a new risk be a smaller risk?**)--

Comments and Observations

Generally: This case has a significant number of factors that were both present and absent.

1. It is believed that shotgun-breadth techniques were used to make analyses, and I did not see mention that 143 sets of clients were interviewed in depth to assure that **the clients** did not misrepresent their income or deductions to a tax preparer. I also did not detect whether any **"intake forms"** existed for the clients where the client states their income and deductions. Lack of a record, in this case, will usually be damaging to an aggressive preparer. Records should have been kept reflecting information the taxpayer clients provided and it should have matched the returns.

2. Former Attorneys can testify (seemingly here as a quasi-expert) and this may be a wake-up call for defendants who abuse and "burn through" attorneys who do substantive technical work on cases. The prior trial attorney who testified about technical matters was surely a sore point with the defendant, but more realistically it is certain that any technical analysis was probably performed, and colored heavily with inside information.

(a) Assuming that the client was forthcoming with the original attorney, that original attorney's *understanding* of the case and its data was learned through the confessive disclosure of the accused citizen and given the human tendency to replicate understanding and not question data which appears to be consistent with a stated plan or configuration, very likely never tested *any* of the data points in the returns and probably assumed (along with the government compiler of data) that every possible error was a fraudulent variance.

An independent expert who had no knowledge of facts revealed under attorney client privilege would likely have been *more willing* to make a broader interpretation of the variances seen. An *attorney* testifying was under a duty not to mislead the court and **practically could not have ignored knowledge given under attorney client privilege at the risk of misleading the court**.

(b) As a matter of human nature, I do not believe that tax technicians can study and discuss the data, choices of preparation, and really; the *art* of preparing a tax return without large and significant communication, and that communication *had* to be tainted by the attorney's knowledge gained while the defendant was a client. Really, they are talking about the very must subtle, detailed aspects of nature of judgement.

At minimum the preparers make all sorts of assumptions about inputs which might naturally be expected to occur based upon inputs they are given -- they do not "stop" the tax preparation process where one piece of data is missing or incongruous, or else only a very few returns would be filed by paid preparers. But, knowing the answer (via knowledge from information given in the attorney-client relationship), **implodes any reasonable professional doubt that would have otherwise been available to the defendant.**

(c) One skilled in mathematics can transmit a great deal of information without saying a word. Identifying numbers and performing mathematical operations on them on a simple piece of paper can transmit volumes about "what the former attorney knew." An answer can be obtained by rigorous analysis, or, the answer can be given to you to suggest the manner in which you work in reverse to interpret the starting numbers.

(d) Further, the variance of any set of data need to be examined through a statistically determined threshold. It is well known that taxes owed can vary even among the most honest preparers. Although many returns are done by machine, machines can differ, the manner in which the input is formatted can differ and, as already stated, a number of tax preparers can arrive at different tax liability based upon a same input set. A threshold should have been set with due consideration to the statistical confidence level, and it might have been, but for the elimination of uncertainty in the testifying attorney and certainly based upon the prior attorney's

knowledge. If only the most severely deviant returns would have been selected and verified, a much greater focus could have been attained by both the prosecution and the defense regarding only those returns for which it could be positively stated that.

(e) Further, lawful, honest tax preparers can vary based upon both the time spent in interviewing the client, the amount charged the client and how it is charged, the competency of the preparer, and for reasons of altruism. A tax client who brings a pack of children to the tax preparer and complains about not being able to have enough money to buy sufficient food, can have a powerful influence on the most honest of tax preparers. How many "breaks" can a preparer give a client & still clearly remain on the non-fraudulent side of the line?

I'm not suggesting that there are not a number of greedy and incompetent preparers, but I am convinced that regulation of return preparers through the recently failed Registered Return Preparer Program championed by IRS head of Office of Professional Responsibility isn't the more secure and safest solution.

3. Even though the government is allowed to put on an amorphous "grid" of evidence, it is difficult to attack, & it is clear that any substantive defenses of details in this "grid"be raised and raised with specificity, *possibly independent of* the evidence introduced at trial. If the trial attorney misses the opportunity to present evidence at trial, is there a conflict not to dig deeper, if possible, at sentencing?

4. Note the assumption of the court on the fraudulent refunds: (1) "most" were probably fraudulent, (2) any refunds that were legitimate and not fraudulent probably were not going to be returned anyway. Both of these factors apply differently to the charges and the loss to two classes of victim (a) the government and (b) former clients. There does not appear to be an additional 24 months added for "Identity Fraud" and this elements of the sentence seems absent.

5. The adoption of the term "new" as an alternative to "increased" is troubling. Risk need not be a scalar quantity. Internal correlations within a data set can increase risk for certain data profiles more than others and shrink for other profile types. Had our sister circuits developed the term "new positive risk" or similar there would be much less of a problem. Any alternative to the phrase "increased risk" is not necessary.

6. There were several opportunities in this case which may have been missed, and the case perhaps went too far as to the 143 return data before those opportunities could be explored:

(a) Should the criminal defense attorney have analyzed 143 returns to see which ones were at variance with the best or even average skilled tax return preparer? (Experiments have been done with common facts and in which a number of preparers on the same facts might formulate a number of returns having significant variances between them).

(b) Did the criminal defense attorney hire an expert to verify & test the tabular results of the prosecution expert?

(c) Was there a preparer's intake form available to consider with returns that were highly variant?

(d) If a high variance constitutes fraud, did anyone verify that the high variance beyond a reasonable doubt?

(e) Was the REASON for the 143-return magnitude of analyzed data? Was the prosecution simply trying to overwhelm the Defense team? Would an outside analysis have been prohibitively expensive? Reimbursable?

(f) What was the REASON that at least one random sample set was not drawn for a deep investigation?

7. Also disturbing was the statement " Stargell....engaged in schemes to obtain refund anticipation loans (ostensibly for her clients)." I can't tell from the opinion "how" Stargell engaged in schemes. Was Stargell in a conspiracy with clients to defraud the bank and split the proceeds? Was Stargell engaged in a conspiracy with someone at the bank? Why was there no conspiracy charge?

8. How does this case speak to honest practitioners who, through genuine altruistic caring about their clients,

push the envelope of benefit for their clients? Will practitioners begin having clients swear that they will not avail themselves of any refund anticipation loans as a condition of the practitioner preparing their returns?

9. The RTRP program struck down by the courts, and which will likely re-arise with new legislation might have eliminated many cases like this. Where the return preparers have to work for, and educate themselves into a position of privilege

==========

USA v. PIROUZ SEDAGHATY (PETE SEDA) No. 11-30342 Filed August 23, 2013

FACTS:
Pirouz Sedaghaty (known as Pete Seda) filed a falsified a 2000 charitable organization tax return in order to attempt to conceal knowledge of his support of an independence movement in Chechnya, a republic in the Caucasus mountains of southern Russia.

In the 1990s, Al-Haramain (AH) was one of Saudi Arabia's largest non-governmental organizations, with more than fifty offices worldwide distributing humanitarian aid and funding religious education & was known as the "United Way" of Saudi Arabia. But in addition, some AH offices distributed funding and other support to terrorists. The United Nations implemented sanctions against selected AH offices in 2002. As a result of the negative publicity the Saudi government had dissolved AH altogether. That same year, the United States designated former AH principals Aqil Al-Aqil and Soliman Al-Buthe and the U.S. chapter of AH as "Specially Designated Global Terrorists" subject to financial sanctions because of their role in providing financial support to terrorist groups.

Seda first came under investigation by the FBI and the IRS because of his role in the U.S. chapter of Al-Haramain. In the 1970's Seda had moved from his native Iran to Ashland, Oregon, and, after attending Southern Oregon University, he became a well-known arborist in the city. Seda developed a desire to help others understand Islam and to help build bridges within the community. Seda co-founded the Qur'an Foundation (QF) with his friend David Rodgers, who had grown up in Ashland. QF hosted public lectures and distributed the Qur'an locally and to prisons who requested copies.

While Rodgers was working on an unrelated matter in Saudi Arabia, he was approached by AH officer Al-Buthe, who suggested that AH could help supply Qur'ans for the QF Ashland effort.

In 1997, AH & QF entered into a partnership to "promote peace through understanding of Islam" and Al-Buthe and Seda opened AH's only U.S. branch ("AH-U.S."). Al-Aqil became the U.S. branch's president, with Al-Buthe as treasurer, & Seda as secretary. Seda opened a bank account for AH-U.S. at Bank of America and successfully applied for tax-exempt status. In late 1999, both AH & AH-US solicited funds for aid to Chechnya. Although the efforts of AH were done under the supervision of the Saudi government and through a separate entity the government created, the Saudi Joint Relief Committee, **at trial it was disputed whether these efforts were truly humanitarian in nature or a cover to fund the mujahideen operating in Chechnya**.

In February 2000, an engineer and construction executive in England, Dr. Mahmoud Talaat El-Fiki, (EF), contacted AH saying that he wanted to donate $150,000 for Chechen relief. AH instructed EF that he could wire the money for "the poor, orphans and refugees" in Chechnya to AH at its Al-Rajhi Bank account in Riyadh, Saudi Arabia, or to AH-US at its Bank of America account in Ashland.

EF transferred $150,000 to the AH-U.S. account in Ashland on February 24, 2000. On March 7, Al-Buthe traveled from Saudi Arabia to Oregon. Seda and Al-Buthe went together to a branch of Bank of America in Ashland on March 10 and met with the branch manager to withdraw **$130,000 in travelers checks**. The following day, Seda **withdrew a $21,000 cashier's check** made out to Al-Buthe. Al-Buthe later returned to Saudi Arabia, **cashed the travelers checks at his bank, and deposited the cashier's check into his personal account, where he often commingled personal money with AH funds**. (On the civil side, this would have clearly been "private inurement" and exactly the lack of controls that the nonprofit laws and rules were meant to address & control.)

The counter check signed by Seda bore the notation "Soliman" and the actual cashier's check deposited by Al-Buthe bore the notation "Donation for Chichania Refugees." At trial, the significance of Al-Buthe's use of travelers checks was contested. The government characterized the use of travelers checks, as opposed to a less-expensive wire transfer, as highly suspicious and argued that it made the transfer of funds more difficult to trace.

The defense pointed out that Al-Buthe regularly brought funds in the form of travelers checks to the United States for AH's operating expenses and reported those checks to U.S. Customs, so his use of travelers checks was not unusual, nor did it correlate with an effort to conceal the movement of funds. What happened to the money after Al-Buthe cashed the travelers checks and deposited the cashier's check was also disputed. Seda's attorneys argued that it was given to AH and deposited in Al-Rajhi Bank account number 9889, which was used for humanitarian relief in Chechnya. The government represented that "[a]n AH employee took most of El-Fiki's money to a representative of Abu 'Umar [a leader of the Chechen mujahideen], to be smuggled into Chechnya, claiming it was for needy Chechen families."

In June 2000, Al-Buthe returned to Ashland, reporting to U.S. Customs $300,000 in travelers checks from AH-US for the purchase of a building in Springfield, Missouri, to serve as a prayer house. Having already made an initial deposit of $60,000, AH-U.S. then paid $318,291 to complete the purchase of the Springfield building.

Four days after the September 11, 2001, terrorist attacks, several FBI agents came to speak with Seda. The interviewing agent testified that Seda had volunteered information about AH-U.S.'s purchase of the Springfield property and told him AH-U.S. had paid between $300,000 and $325,000, reflecting the closing price. One month later, Tom Wilcox, Al-Haramain-U.S.'s accountant and a former IRS agent, filed a **Form 990** for Al-Haramain-U.S. for the year 2000, **reviewed and signed by Seda**. Filing a Form 990 is an annual reporting requirement for tax exempt organizations. The Form 990 was inaccurate in several respects.

Line 57a inaccurately represented the cost of the Missouri building purchase as $461,542 **because the $130,000 withdrawn by Al-Buthe was marked as a payment for the prayer house.** Line 1 underestimated the donations that **AH-U.S. had received because it mis-designated the $21,000 check to Al-Buthe as a returned donation**. Line 22, representing **outgoing donations, was also inaccurate because it failed to record whatever portion of the $150,000 El-Fiki donation was transferred to Al-Haramain.**

In 2004, the government (1) obtained a **warrant to search for financial records and communications** pertaining to the preparation of the 2000 Form 990; & (2) Al-Buthe's failure to report the $150,000 he was carrying when he left the country. The government searched Seda's house, which doubled as the Al-Haramain-U.S. office and prayer hall, and seized nine computers together with books, videos, and religious materials. **The district court denied his motion to suppress the seized evidence.**

The defense argued that because the donation merely passed through Al-Haramain-U.S. on its way from El-Fiki to Al-Haramain in Riyadh, none of the mistakes are material because the tax code did not require the "pass-through" to be recorded at all.

The grand jury indicted Seda, Al-Buthe, and Al-Haramain in a three count indictment:
Count One: 18 U.S.C. § **371** conspiracy to defraud the U.S. via crimes of counts Two and Three;
Count Two: filing a false Form 990, in violation of 26 U.S.C. § **7206**(1);
Count Three charged Al-Buthe with **failure to file a Currency and Monetary Instrument Report** (CMIR) form when he left the United States with $150,000, in violation of 31 U.S.C. § **5316**(a)(1)(A).

The central issue at trial was whether the **errors on the Form 990 were willful**. The prosecution's theory was that Seda wanted to fund the Chechen mujahideen and intentionally reported false information to his accountant in an effort to cover up the diversion of El-Fiki's donation to the mujahideen. The primary defense theory was that Wilcox was responsible for these careless mistakes, that Seda had given the money to Al-Buthe to give to Al-Haramain, and that Seda was transparent and forthright with Wilcox, the FBI, and the public about the disposition of Al-Haramain's U.S.'s funds and his desire to provide humanitarian aid to refugees in Chechnya.

When the IRS questioned Wilcox in June of 2003 about the price of the building as reported on the 2000 tax return, with someone preparing purchase costs in Quickbooks based the purchase price in the tax return on that schedule. At trial, however, **Wilcox admitted that he had actually been the one to code the $130,000 withdrawal of travelers checks as related to the building purchase and that he had created the schedule with the erroneous purchase price**. He maintained, however, that the schedule was based on Seda's instructions as to how to categorize the checks. The parties vigorously debated evidence related to the "money trail."

Al-Buthe's cashing and deposit of the travelers checks in Saudi Arabia & into his own account was the extent of tracing possible and the government said that Al-Buthe's actions were consistent with his misappropriation of some funds and diversion of others to fund the mujahideen. Seda attempted to introduce receipts documenting his transfer of the donation to Al-Buthe, and Al-Buthe's transfer of the donation to Al-Haramain for Chechen relief, but he was unable to authenticate the records.

To establish willfulness, the government called two former members of the Ashland prayer house: David Gartenstein-Ross and **Barbara Cabral**. Among other subjects, the government questioned Gartenstein-Ross about the distribution of Qur'ans to prisoners, donations made to support Kosovan refugees, and fund-raising at the prayer house for two individuals planning to go to Kosovo to fight against the Serbs. Cabral, a convert to Islam who abandoned the religion before trial, described the mosque and prayer services at the Al-Haramain-U.S. prayer house in Ashland as well as Seda's marriage to a Russian-speaking wife.

Providing the only direct evidence of Seda's alleged desire to fund the Chechen mujahideen, Cabral testified that Seda solicited funds for the mujahideen in Chechnya after Cabral and others from Oregon joined Seda in a pilgrimage to Mecca sponsored by Al-Haramain. In addition to the witnesses from the prayer house, the government introduced a number of exhibits seized in the search, including videos related to the Chechen mujahideen, religious edicts regarding support for the Chechen mujahideen, plus emails Seda received and websites Seda visited about Chechnya.

The government also introduced an email from Seda to Al-Buthe titled "What support?" that reproduced an excerpt of a published interview with Chechen mujahideen leader Ul-Khattab stating: "I'm sorry to say there is not a single Islamic charity organization active inside Chechnya at present. Only the Red Cross is present in Chechen towns and cities. Therefore, we advise the Muslims in the Muslim countries to take a sincere stand with the Mujahideen in the land of the Caucasus.

The government produced an "Islamic / political" operative , Evan Kohlmann, who had no direct knowledge of the facts of the case, to depict connections between Al-Haramain officials and figures such as Ul-Khattab and Osama Bin-Laden. The jury also watched a violent video provided by Kohlmann of a training camp for the Chechen mujahideen. At closing, the prosecution referred to the director of the Saudi Joint Relief Committee as Bin-Laden's "best friend."The prosecution also insinuated a connection between Seda and violent jihad, that sending Qur'ans to U.S. prisoners was an effort to get hateful, crazy jihad stuff into prisons.

The jury convicted Seda of conspiracy to defraud the United States and filing a false return on behalf of a tax exempt organization. He was sentenced to thirty-three months' imprisonment, three years of supervised release, and restitution to the Department of the Treasury of $80,980.

After trial but before sentencing, the government produced reports and notes for twelve previously undisclosed interviews the FBI conducted with government witness Barbara Cabral and her husband Richard Cabral. Among other things, the notes and reports revealed to the defense for the first time that the **FBI had paid Richard Cabral $14,500 over the course of the investigation, that at least one of those payments was made in the presence of Barbara Cabral, and that the FBI had made an offer of payment to Barbara Cabral before trial.**
Seda filed two separate motions for a new trial based upon: (1) prosecution's appeal to prejudice and (2) related to the Brady violation. The district court denied both motions.

The panel held that the government violated its obligations pursuant to Brady v. Maryland by withholding significant impeachment evidence relevant to a central government witness. The panel affirmed in part and

reversed in part a criminal judgment and remanded for a **new trial in a tax fraud case.**

Classified material inspection was another basic stumbling block in the case that involved significant amounts of classified materials and in camera, ex parte reviews as well as classified proceedings. The 9th Circuit panel was not persuaded by the defendant's arguments regarding (1) handling of the classified material, (2) the district court's evidentiary decisions, (3) the notion that the government was one-sided in its effort to obtain evidence abroad, or (4) his view that the government's characterization of the evidence rose to the level of a constitutional violation.

The panel held that the government violated its obligations pursuant to Brady v. Maryland by withholding significant impeachment evidence relevant to a central government witness.

After reviewing the classified record, the panel determined that the district court erred in approving an inadequate substitution for classified material that was relevant and helpful to the defense. The panel held that the substitution did not satisfy the requirement in the Classified Information Procedures Act, 18 U.S.C. app. 3 § 6(c)(1), that the summary "provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." **The panel also concluded that the search that the government conducted of the defendant's computer hard drives went well beyond the explicit limitations of the warrant, and remanded to the district court to consider the appropriate scope of items seized and whether the exclusionary rule should apply.**

Considering the errors both individually as well as cumulatively in light of the evidence as a whole, the panel concluded that the errors were prejudicial. The panel filed concurrently, under appropriate seal, a classified opinion with respect to the substitution.

Comments and Observations

Generally: This case was at the height of the 9-11 storm. It was a nonprofit and thus the tax loss to the government would have been expectedly low, and thus conspiracy was the mainstay of the case, with tax loss presumably being based upon taxation of the amounts that presumably went to the mujahideen.

1. This was a long opinion which unusually repeated an extensive litany of facts, probably for the purpose of showing in detail the excesses of government prosecution in this case.

2. There is no doubt that the feelings about 9/11 influenced the fervor this case from the very beginning, with that fervor being expressed by facts of the case not favorable to the reasonableness of the prosecution's case, nor pursuit of its case.

3. Even though not stated in the opinion, it is well known that the statutes governing non-profit law in the U.S. provide for foreign charitable giving, deductions and rules for use of donated funds on the same footing as exists for charitable donations in the U.S. The view that U.S. law should disfavor donations outside the U.S. is exemplified by the problems in this case of authentication of documents and receipts which would have reliably established the fate of the donated funds.

4. It is clear that the 9th Circuit panel was outraged by the government's handling of the case, yet rather than preface a reversal on specific prosecutorial excesses, OR the degree of government overreaching, the main trigger for reversal an new trial was a mere $15,000 paid to one of the "former friend", "non-indicted & clean" informants. Basing the reversal on the degree of outrageous "overreaching" might have provided some case law future basis for inhibiting government action against more extreme defendants.

5. The fact that the 9th Circuit panel gave a strong suggestion that some of the "evidence" in the search of the defendant's home be suppressed as going too far afield of the warrant, amplifies its impression of this case. Use of "evidence" of "what a defendant believes in"is one of the main 4th amendment limitations that has been historically periodically conveniently ignored when the political winds turn against unpopular groups.

==========

USA v. Cohen (I) No. 12-10240 Filed August 22, 2013 & Amended October 7, 2013

FACTS:
Samuel Cohen posed as a wealthy philanthropist "interested in donating sixty million dollars to charitable causes". He arranged a meeting with the Vanguard Public Foundation, a charitable organization, on the pretext of making a donation. But instead of donating, Cohen extended an offer to the Vanguard's donors to sell them some of his shares in Ecast, Inc., a company he co-founded. Cohen represented that Ecast was about to be acquired by Microsoft and that the value of Ecast shares would soon jump up to the Microsoft price of $30 per share. Cohen offered to sell his Ecast shares for $3.50 per share, ostensibly conditioning his offer on the donors' "promise to give half their profits to charity."

In fact, Cohen had been terminated from his position at Ecast, he did not actually transfer any of his Ecast shares to the purchasers, he never informed Ecast that he sold any shares, and the evidence at his criminal trial showed that Ecast was not in talks with Microsoft or any other buyer. After a jury trial, a federal jury found Cohen guilty of fifteen counts of wire fraud in violation of 18 U.S.C. § 1343, eleven counts of money laundering in violation of 18 U.S.C. § 1957, and three counts of tax evasion in violation of 26 U.S.C. § 7201. The appeal relates only to the correctness of the sentence.

The district court applied a two-level sentence enhancement for those who misrepresent that they are acting on behalf of a charitable organization, per U.S. Sentencing Guidelines § 2B1.1(b)(9)(A). STANDARD OF REVIEW
We review de novo the district court's interpretation of the Sentencing Guidelines for abuse of discretion, and we review the district court's factual findings for clear error.

1. Held:
(a) applicability of the charitable enhancement does not change because the defendant only purported to act in the interest of the charitable organization. (Guidelines commentary is authoritative in interpreting the text of a guideline 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.'" The U.S. Sentencing Guidelines provide a two-level enhancement "[i]f the offense involved . . . a misrepresentation that the defendant was acting on behalf of a charitable . . . organization." U.S.S.G. § 2B1.1(b)(9).

But the commentary also explains that the enhancement is aimed at defendants who take advantage of "the generosity and charitable motives of victims." Further, the commentary explains that "[t]aking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. Rather, defendants who exploit victims' charitable impulses . . . create particular social harm." Focus of inquiry must be on defendant's motivation for making prohibited misrepresentation rather than victims being motivated, in part, by self-interest.

(b) it is also not significant that the victims may have been motivated, in part, by a desire to profit personally. The panel explained that the defendant's conduct qualifies for the enhancement because, by presenting the investment opportunity as his means of donating to the charitable organization, the defendant misrepresented that he was acting "to obtain a benefit on behalf of" the charitable organization.

Here, Cohen pretended to be interested in diverting potential profit to charity and represented that the donors' investment would inure to the benefit of a charity. Cohen's conduct qualifies for the enhancement because, by presenting the investment opportunity as his means of donating to the Vanguard Foundation, Cohen misrepresented that he was acting "to obtain a benefit on behalf of" the Vanguard Foundation. U.S.S.G. § 2B1.1 cmt. n.7(B).
The district court did not abuse its discretion in applying sentencing enhancement U.S. Sentencing Guidelines § 2B1.1(b)(9)(A) to its calculation of Cohen's sentence.

Comments and Observations

Generally: Charities are natural tools for fraud and tax evasion often due to the voraciousness of the cash flows that charities can consume, and the large sums that those in the charity game are used to dealing with.

1. Even mentioning an intent regarding charity, apparently, is enough to trigger the two-level enhancement.

2. Except for the charity, this would have been an ordinary tax fraud case. This opinion approaches the size and issue narrowness of an unpublished opinion, and was likely published as a high profile warning.

==========

USA v. RUSSELL PIKE No. 12-10479 Filed September 30, 2013

FACTS:
Pike forward dated a stock purchase agreement. The likely effect of this is that it would potentially conceal the liability by making it appear as if he received cash for his shares in 2007 rather than 2006. Pike sold his own personal shares: his name appeared as the seller on multiple stock purchase agreements, the money was wired to his individual bank account, and he treated all of the proceeds that he transferred to Xyience as retiring his debt to the company and creating a loan payable to himself on his subsequent tax returns and his personal bankruptcy filing. (I note that bankruptcy fraud was not charged)

Contentions of error on Appeal:
Pike contends that he did not commit an affirmative act of tax evasion under Sansone because forward dating a stock purchase agreement "does not have the requisite effect of reducing the stated tax liability."

Following a six-day bench trial, Russell Pike was convicted of one count of tax evasion in violation of 26 U.S.C. § 7201 and sentenced to 52 months' imprisonment. Pike appeals his conviction and sentence. AFFIRMED

The elements of tax evasion are "will-fulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax." Pike contends that he did not commit an affirmative act of tax evasion because forward dating a stock purchase agreement "does not have the requisite effect of reducing the stated tax liability."

Pike correctly points out that his tax liability is based on the date he received payment for his shares, not the date specified in the agreement, but Pike fails to understand that forward dating an agreement is an affirmative act of evasion. An "affirmative willful attempt may be inferred from . . . any conduct, the likely effect purchase agreement would not change Pike's tax liability, but it would potentially conceal the liability by making it appear as if he received cash for his shares in 2007 rather than 2006.

We have upheld convictions under § 7201 where the defendant attempted to conceal his tax liability even though the act of concealment did not alter the underlying liability. The district court's finding that Pike attempted to forward date a stock purchase agreement is sufficient to support the conclusion that Pike committed an affirmative act of evasion.

Pike also argues that the lawyers who represented him at trial were constitutionally ineffective. He first asserts that his counsel failed to elicit testimony from tax attorney Peter Rinato that he allegedly advised Pike not to file a tax return in October 2007. But Pike's attorney Kevin Leik asked Rinato whether he "g[a]ve any more information to Russell regarding his taxes" after April 2007 and Rinato answered "No."

Furthermore, the district court separately concluded that Pike acted wilfully by attempting to forward date a stock purchase agreement for tax reasons and informing others that he knew that he owed taxes on the transaction. The evidence supports the district court's conclusion that Pike acted willfully even if Rinato told him not to file a tax return before October 15, 2007.

Next, Pike alleges that his lawyers neglected to impeach the credibility of government witnesses Karim Mastakiya and Kirk Sanford. But Pike's lawyer Leik tried to cross-examine them about their own alleged involvement in fraud and tax evasion. The court sustained an objection to the introduction of the testimony over Leik's protest. Additionally, any error attributable to Leik did not prejudice Pike because government witness Bill Underhill offered cumulative testimony about Pike's efforts to evade his tax obligations, and his credibility was not in doubt.

Pike also contends that his lawyers erred by not calling Carol Evelyn Brown as a defense witness. Regardless of their reasons for not doing so, the decision did not prejudice Pike. Pike claims that Brown would have testified that he did not sell his personal stock, but rather he engaged in nominee transactions whereby he acted as an intermediary through whom Xyience stock was sold to new investors. But this theory was developed by Pike at trial and rejected by the district court in light examination by the government, Brown testified that she issued stock certificate number 11, among others, to Pike and then transferred some of the shares represented by that certificate to other investors at Pike's request. Any testimony Brown offered to the effect that Pike was not selling his own personal shares would therefore have flatly contradicted her own prior testimony, which was supported by ample documentary evidence.

Finally, Pike alleges a host of other shortcomings by trial counsel, including unfamiliarity with federal practice and deficient preparation. But Pike does not indicate how he was prejudiced by these additional instances of alleged ineffectiveness. His counsel's various shortcomings did not meaningfully affect the outcome of Pike's trial. Furthermore, the district court did not abuse its discretion by refusing to hold an evidentiary hearing or reopen the record to address Pike's ineffective assistance claims. Pike submitted numerous post-trial declarations, and his new lawyers ably argued them before the court denied Pike's motion for a new trial. "The decision to hold a hearing or to proceed by affidavit as done here is within the sound discretion of the trial court. . . . thus, no abuse of discretion in evidence was insufficient to support the motion.".

Pike's various contentions that the district court erred in sentencing him to 52 months' imprisonment also lack merit. We assume arguendo that the district court needed to find by clear and convincing evidence that the tax loss suffered by the government exceeded $1 million to support Pike's sentence. The government introduced evidence that, **under the most conservative assumptions**, Pike owed more than $1.1 million in tax on his stock sales during 2006.

Overwhelming evidence indicates that Pike sold his own personal shares: his name appeared as the seller on multiple stock purchase agreements, the money was wired to his individual bank account, and he treated all of the proceeds that he transferred to Xyience as retiring his debt to the company and creating a loan payable to himself on his subsequent tax returns and his personal bankruptcy filing. But even if Pike sold Xyience stock as a nominee and wrongly retained the proceeds, he still owed tax on these ill-gotten gains.

The district court did not abuse its discretion by refusing to hold an evidentiary hearing on the tax loss calculation. Pike's new counsel presented affidavits in support of his position and argued them before the court at sentencing. The court addressed and rejected Pike's contention that he sold Xyience treasury stock rather than his personal stock at every stage of the trial, including sentencing. The judgment of the district court is AFFIRMED.

Comments and Observations

Generally: As I understand it, the taxpayer tried to move the realization of a tax event forward by one year, out of 2006 and into 2007. This is despite the uncontested observation that the same tax would be owing in 2007. It is my position that if the government did not punish movement from one year to another, then what would have stopped a 2 year push? Or 3? Most time manipulations have the potential for much more damage than was the potential in this case.

1. This very simple case illustrates the severity that can come with (a) date changing documents, (b) shifting tax realization events by a short time period, and (c) that such severity can't be mitigated by showing that the net tax effect to government was a "wash transaction"

2. $1.1 million in tax, assuming a 35% rate means that the transaction was probably on the order of $3 million. $3 million is a significant size of transaction to move forward by one year.

3. Complaints about the aggressiveness of his attorneys and the attorney's ability to make witnesses "say what they are supposed to" is beyond ridiculous. Why not appeal because the Judge didn't make the witnesses testify "as they were supposed to"?

4. Once the later dated document was established and the amount of the transaction was proven, this case was all but foreclosed. Stock trades and the timing of same is easy to establish.

==========

USA v. David Kahre, Donna Kahre & Alexander Loglia District of Nevada Filed December 5, 2013
No. 09-10471, No. 09-10528, No. 09-10529

FACTS: citizens David & Donna Kahre and Alexander Loglia were purportedly involved in a conspiracy to avoid the payment of payroll and income taxes by devising a payroll system pursuant to which employees received their wages in gold and silver coins, which were later exchanged for cash. Envelopes of various coins were paid to employees having face amounts equal to 1/8 of the amount of pay that was due and earned by the employee.

In a separate, second transaction, the same envelope of coins that were paid to the employee was exchanged for cash. The testimony of a foreman, who earlier pled guilty to tax evasion, all employees were required to sign an independent contract agreement in order to receive their pay, he and the other employees were paid in gold and silver (also referred to as "gold certificates or gold chips") on a weekly basis, based on a system developed by David Kahre and administered by Lori Kahr as follows: each week, the foreman received a single gold coin which he immediately exchanged for an envelope containing his $500 weekly salary in cash. All employees were required to accept payment in gold or silver coins, which coins were later exchanged for cash.

The foreman and other employees never received W-2 forms reflecting wages, and no deductions were made for income tax purposes. In the devised system, the foreman confirmed payroll payments after consulting payroll sheets generated by Lori Kahre and at the final exchange, payrolls were met with cash payments. The foreman testified that he remembered that there was no employee who actually retained the gold or silver coins as wage payments (the coins seemed to be used as "chits" or "chips" which were recycled. The appellant's paymaster, who had also earlier pled guilty to tax evasion was employed in Kahre's payroll office for five years, and who also was required to sign the independent contractor agreement and who had her wages paid under the same system stated that "if an employee retained the gold or silver coins, the coins' fair market value was deducted from the cash wages due" (to reflect the loss of value of the coins which was in excess of the coins' face. It was further alleged that with respect to the amount of cash which eventually made its way into the hands of the employees that "Kahre allegedly **withheld** "sixty percent of the employees' payroll. . . ." [tax evasion/under-the-table profit?]

Further, the Appellants marketed their "coin exchange" "payroll service" to other contractors and charged an administrative fee for its use. Appellants were involved in providing leased employees to various contractors, using their "coin exchange" "payroll service" in exchange for cash.

In terms of the "tax loss" attributable to Appellants two special agents offered testimony. IRS Special Agent Ryan Rickey testified that, between 1999 and 2003, Kahre's companies paid $22,382,760.42 in wages. Between 1998 and 2003, the companies using Robert Kahre to administer their payrolls paid a total of $95,042,952.14 in wages and that Robert Kahre received $14,100,087.10 in fees. Agent Rickey also testified that return filing histories reflected that Robert Kahre did not file any tax returns between 1991 and 2006.

IRS Revenue Agent Sue Cutler estimated that, between 1999 and 2002, Kahre's companies paid Kahre a total salary of $1,956,738, and Kahre earned $14,100,087.10 in fees from other companies using his payroll services, and that Kahre owed $2,049,172.97 in income taxes. Because Robert Kahre did not file any employment taxes for his businesses from 1999 to 2003, Agent Cutler calculated an additional tax liability of $7,082,138.54.

Lori Kahre filed false returns from 1996 to 1999, and did not file any returns between 2000 and 2006; and Loglia did not file returns from 1998 to 2006.

In his testimony, Robert Kahre explained that he developed his payroll system after the IRS seized his property and

equipment from a failed business. Kahre met John Nelson (Nelson), who authored books and taught classes about the IRS and the monetary system, and Nelson's ideas influenced Kahre to develop the payment system at issue. According to Kahre, he developed his gold payroll system because the United States government had debauched the national currency and utilized inflation to confiscate the wealth of U.S. citizens. Kahre relied on court cases and the Gold Bullion Coin Act of 1985 that approved gold coins as legal tender.

Kahre devised the independent contractor agreements to reflect that the IRS was a foreign agent for the World Bank and the International Monetary Fund (IMF). In Kahre's view, by collecting taxes for the IRS, employers illegally served as foreign agents for the World Bank and IMF. Kahre relied on several federal statutes, regulations, and "Presidential Documents" in the process of developing his payroll system to avoid the collection of taxes on behalf of foreign agents.

Loglia testified that, like Kahre, he was influenced by Nelson's ideas about monetary history and monetary policy. Loglia believed that Congress approved the use of gold coins as an alternative to paper currency. Because of his interest in gold payments, Loglia agreed to work for Kahre, and stopped filing tax returns in 1993, since his income, calculated in accordance with the face value of the gold and silver coins, was below the filing threshold. Loglia believed that there was legal precedent supporting the gold payment system, and he calculated his income based on the coins' face value on the ground that coins can be legally used to pay debt.

Loglia was of the view that federal statutes and the Gold Bullion Coin Act of 1985 supported the gold payment system considering that coins were approved legal tender, and that gold clause contracts were legally authorized. Lori Kahre testified that she started to work for her brother, Robert, in 1988. **In 1993, Kahre commenced** paying Lori her wages in silver dollars, and Lori thought the coins were legal tender based on Congressional acts. Lori was persuaded that the coins were legal tender **because a coin shop did not collect taxes when exchanging cash for the coins,** and the companies utilizing Kahre's payroll system never challenged the transactions. Initially, Lori filed tax returns based on the face value of the silver coins. In 2000, Lori determined that she received between $63 and $125 wages per week, based on the face value of the coins. **Because her wages calculated on the face value of the coins were below the threshold for filing taxes, Lori did not file any tax returns between 2001 and 2006**.

Combined with the tax losses from the payroll scheme, the government set the total potential tax loss at $57,435,803.52. The jury found Kahre guilty on all counts. Loglia was acquitted of conspiracy, but convicted on the remaining counts. The jury found Lori guilty on all counts with the exception of one count of willfully attempting to evade or defeat tax. PSR recommended a total offense level of 39, with a guideline sentencing range of 262 to 327 months' imprisonment.

Note: Robert Kahre was arrested a pursuant to a state bench warrant for failure to appear, and agents seized $230,913 in cash in his possession which was provided to the IRS to satisfy Kahre's "unpaid federal income tax liabilities. Kahre's motion to suppress evidence seized when Kahre was arrested at Bank of the West was moot because the seized evidence was not used at trial & was used to offset Kahre's tax liabilities.

Note: Further complicating the case with non-substantive matters, On October 30, 2003, several plaintiffs, including the Kahres, filed a Bivens action against the federal prosecutor & others for improperly orchestrating an illegal raid of Kahre's properties, arresting Kahre & stealing $230,913 in cash from him. The Bivens action was dismissed.

Note: During a first trial, the jury was unable to reach verdicts, and the government subsequently filed the Third Superseding Indictment. (This is noteworthy, and the published case did state what additional charges were added in this third indictment).

BASES FOR APPEAL

(1). Kahre's Motions To Suppress: Based on Kahre's conduct, Agent Halper stated that there was probable cause to believe that Kahre was engaged in a conspiracy to evade taxes and to interfere with the administration of the tax laws by the IRS. Any defects in the warrant were cured by Fed. R. Crim. P. 41(e) (1996) in which the warrant and the affidavit are viewed as a whole, allowing the affidavit to cure any deficiencies in the naked warrant."

(2) Appellants' Motions To Disqualify the Prosecutor For Conflict of Interest : Denied

(3) Appellants' Motions To Dismiss the Indictments Based on the Gold and Silver Coins' Valuation rather than face value: Held, Ninth Circuit precedent, as well as that of other courts including the Tax Court, required taxation of the coins at fair market value, and the district court observed that the tax code and corresponding Treasury regulations treated property, such as gold and silver coins used as compensation for services rendered, as taxable at fair market value.

(4) Sentencing PSR recommended a total offense level of 39, with a guideline sentencing range of 262 to 327 months' imprisonment. During the sentencing hearing, the district court determined that a base offense level of 30 was supported by the trial testimony and relevant conduct, and rejected Kahre's objection that the applicable guideline range was 51 to 63 months. The PSR also recommended an upward adjustment for obstruction of justice in light of Kahre's false trial testimony, and denial of a downward adjustment for acceptance of responsibility. objection that the applicable guideline range was 51 to 63 months. The district court held that there was ample support for an obstruction of justice enhancement, and that a downward adjustment for acceptance of responsibility was unwarranted. The district court concluded that the recommended restitution amount was supported by the jury's findings and the evidence at trial. After deciding that a downward variance was warranted, the district court sentenced **Kahre to 190 months' imprisonment and three years of supervised release**. The district court also ordered $16,060,104.72 in restitution with $10,891,791.72 "to be jointly and severally owed by co-defendants." The district court sentenced **Lori to seventy-two months' imprisonment, four years of supervised release**, and $31,900 in restitution, and sentenced Loglia to twenty-six months' imprisonment, three years of supervised release, and $83,000 in restitution. CONVICTIONS CONFIRMED.

Comments and Observations

Generally: The configuration of this scheme enabled a SIGNIFICANT amount of evasion. Contractors seem to have an opportunity and motivation to try to make cash from every shortcut, especially the IRS evasion shortcut.

1. These three appellants were true believers and pushed through to trial in a mistaken belief that they could convince the jury that their beliefs and system would justify their acquittal. The fact that the jury in a first trial was unable to reach a verdict indicates that, despite the unusual "tax protestor" based challenge, that jurors are not as in tune with the tax system as prosecutors would prefer. It also seems as if the 3rd superseding indictment might have (and somewhat unfairly) been a "bid-up" to insure a conviction. I'd rather have seen the government do a better job with indictments that they had settled upon before the first trial. They get moral points for sticking to their story, but no "cooperation" points.

2. Their battles chosen upon which they appealed reflects their beliefs that the government is the cause of their problems. Instead of "chips" of a face value, if Appellant's had to pay the payroll in weight of pure gold that he had to buy at market rates, the loss of the profitability element of the scheme from the pretense of paying employees in low dollar face denomination coins might have made it obvious that the benefit of the scheme came predominantly in its failure to pay lawful tax. Their complete avoidance of U.S. currency could have mitigated half of the elements in this messy case.

3. The "tax protester" elements of the underlying cases and this appeal tend to camouflage any "more subtle" points that might have otherwise been identifiable. The points appealed, (1) suppression of a judicially executed search warrant, (2)District Court's Determination of Tax Valuation Based on the Fair Market Value of the Gold and Silver Coins instead of their face value, (3) of Bivens-type motion to disqualify the prosecutor and (4) exclusion of evidence of Appellants' good faith belief that the wage payments were not taxable.

4. The use of a nominal value intermediary for conversion to U.S. currency may foreshadow coming cases that may appear in future regarding "bitcoin" and other computer based non-governmental currency.

==========

USA V. Arturo Huizar-velazquez, Southern District of California Filed July 2, 2013
No. 11-50237

Vacating a sentence imposed for importing wire hangers without paying the proper duties and remanding, the panel held that the district court erred by applying U.S.S.G. § 2C1.1 (bribery) rather than U.S.S.G. § 2T3.1 (smuggling). Regarding amount of loss, the panel left to the district court on remand the question of which duty rates apply to which hangers under the proper sentencing guideline. Customs & Border Patrol (CBP) sentencing report was used.

Arturo Huizar-Velazquez pleaded guilty to importing wire hangers without paying the proper duties. In 2008, the United States imposed anti-dumping duties on Chinese steel wire hangers to combat perceived "dumping" in the United States. Wire hangers from exporters who did not apply for and receive separate rates were subject to a "PRC-Wide" rate of 187.25 percent.

Huizar-Velazquez evaded these duties by purchasing hangers in China, importing them to the United States for shipment to Mexico, and then repackaging the hangers in Mexico and stamping them "Made in Mexico" so that he could then sell them duty-free in the United States, under the North American Free Trade Agreement. The 55-count indictment alleged, inter alia, conspiracy to defraud the United States by interference with governmental functions (18 U.S.C. § 371) and entry of goods by means of false statements.(18 U.S.C. § 542) (Dumping is the sale or likely sale of goods at less than fair value, per 19 U.S.C. º 1677)

The district court applied Sentencing Guidelines º 2C1.1 and accepted the government's position that Huizar-Velazquez illegally avoided approximately $3.5 million in tax and interest. The district court sentenced Huizar-Velazquez to 70 months' imprisonment and ordered roughly $3.5 million in restitution and forfeiture of $4.2 million.

Conspiracy to Defraud by Interference with Governmental Functions. was the wrong guideline to apply. The official commentary to § 2C1.1 generally addresses corruption of government officials, not evasion of import duties by smugglers trying to fool rather than corrupt government officials. Had Huizar-Velazquez bribed Customs and Border Protection agents to let his shipments through, that would be a § 2C1.1 case. Sneaking shipments past Customs agents to evade duties is not subject to as harsh a punishment as bribing Customs agents. The district court should have used Sentencing Guidelines § 2T3.1, entitled "Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property."

In terms of "Amount of Loss," the government's expert witness calculated the loss using a duty rate of 187.25 percent using normal values data. Huizar-Velazquez offered to prove, by invoices, wire transfer documents, and a spreadsheet based on them, that three of the five Chinese companies he bought from were subject to the much lower "anti-dumping duty" of 55.31 percent. **The government's expert refused to consider this evidence**, justifying her refusal with the explanation that "in cases of fraud such as this one, it is the practice of "CBP" to require more than invoices and documentation of wires to establish the true identity of the manufacturer." **A few weeks before sentencing, unbeknownst to counsel and the court, the duty was retroactively reduced to 1.71 percent for three companies from which Huizar-Velazquez claims to have purchased more than three-quarters of the hangers. The government's expert did not tell the district court or counsel about this huge reduction, did not testify at sentencing, so she was not subject to cross examination.** VACATED and REMANDED for re-sentencing.

Comments and Observations

Generally: Even for non-income tax, testing of (1) charge details &, (2) value elements is important.

1. Is the important aspect of the prosecution the common control of the completed scheme of action? Was the double-entry into the U.S. an important factor? What if the original importation into Mexico had been (1) direct and (2) by an unrelated party?

2. It is an eye-opener to consider that a nearly 200% protective tariff (but protecting which industry or company) could result in both (1) a penalty to the U.S. consumer, AND (2) a penalty on the taxpayer for the expenditure of court resources and Bureau of Prison resources for a 5-6 year sentence for a buyer and seller of "wire."

==========

USA V. Davonya Kusan Grant Central District of California Filed August 15, 2013
No. 12-50209

Defendant was Arrested April 20, 2001 and charged with 18 U.S.C. 287 (False, Fictitious or Fraudulent claims) based upon the search of a bag recovered from a stolen vehicle. Grant pleaded guilty in 2005 to knowingly filing false federal income tax returns, asked for leniency in sentencing, arguing that her mother and children relied on her as the family's sole care giver. The original sentence was five years of probation (12 months of home monitoring)(400 hours of community service) & restitution ($29,117) (and to comply with probation rules), which seems reasonable under Sentencing Guideline § 2B1.1. Loss numbers not available in the records, but between $10,000 and $30,000 it should start at level 6 and add 4 to make 10 and then perhaps subtract 2 assuming defendant was cooperative to yield 8, the normal level for probation.

The panel affirmed a judgment revoking probation and the sentence imposed upon beyond the original expiration date because the defendants failure to make a required report a change of residence, rendered her a fugitive, tolling her probation term. A defendant assumes fugitive status when he "fails to comply with the terms of his supervised release, which includes moving residences without telling his probation officer."

Grant complied with probation until early 2010. When the probation office did not receive Grant's required written reports, the probation officer made several attempts to contact her at home, left a card, and then heard from a neighbor that Grant had moved several months earlier, so the probation officer to filed a violation report in July 2010, alleging several probation violations.

Probation sought and obtained a bench warrant for Grant's arrest on July 26, 2010 on the grounds: (1) Grant failed to pay restitution ($29,117); (2) Grant failed to file a written report for May and June 2010; (3) Grant failed to report to probation within 72 hours of any move and had "absconded from supervision." and (4) that Grant had also failed to report a later occurring felony plea to unauthorized credit card use (learned after her arrest).

At Grant's revocation hearing the government dropped allegations 2 and 3; Grant admitted to 1 and 4 (failure of restitution and commitment of further crimes). Grant again asked for leniency in sentencing, due to her role as her family's care giver. The district court revoked Grant's probation, sentenced her to a term of 18 months incarceration and 3 years of supervised release. The record demonstrates Grant's fugitive status & the Revocation Hearing fell within the Probation Term and revocation of Grant's probation was not an abuse of discretion. AFFIRMED.

Comments and Observations

Generally: There may be a tendency to view tax crimes as "not really criminal" and "not as serious as other crimes."

1. The original probation may have been a significant gift of empathy to the defendant, or simple expediency but it may not have been appreciated. Further, the fact that the original arrest occurred in 2001, and that final disposition occurred in 2005, and that the arrest warrant issued in 2010, should give the Defendant a bit of fatigue; after all this appeal of 2013 represents a 12 year journey for what was charged as a maximum 5 year imprisonment crime. After sentencing in Feb. 2006, probation should have ended Feb 2011, just 7 months after the issue date of the warrant.

2. There may have been good reasons for getting into trouble later on (credit card abuse motivated by poverty), but this case emphasizes that supervision is imposed both as a punishment, but also as a lifeline in the event of needing help. Documentation of changed circumstances, sickness, need for money, etc. could have been communicated early to probation and the result would have likely been that none of the four charges would have occurred.

3. If the restitution amount had equaled tax loss, the level under the guidelines might well have been level 12, reduced to 10 for cooperation, and thus two additional levels which could have made it more difficult to obtain probation. So, one important aspect of this case might be a strategy of encouraging (or bargaining for) fraud on the government to be placed in the non-tax category to save a couple of levels in sentencing. These 2 levels were only worth one month of time, but the level of 8 or less indicates a strong probation possibility.

Curtis L. Harrington

Office: **HARRINGTON & HARRINGTON**
P.O. Box 91719, Long Beach, CA 90809-1719 **patentax.com**
Tel. (562) 594-9784; Fax (562) 594-4414 curt@patentax.com **PATENTAX®**

Specialty: High Technology Patent / Trademark / Intellectual Property Law & Taxation

Education: **B.S.** Chemistry - Auburn University (1974)
M. S. Electrical Engineering - California State University Long Beach (1990)
M.S. Chemical Engineering - Georgia Institute of Technology (1977)
J.D. - University of Houston School of Law (1983)
M.B.A. - University of Oklahoma (1985)
LL.M. *Taxation* - University of San Diego School of Law (1997)

Admitted to Practice: Supreme Courts of California, Arizona, Texas, & Nevada
U.S. Supreme Court; U.S. District Court, Central District of California
Internal Revenue Service U.S. Patent and Trademark Office
U.S. Court of Appeals for the Federal, Fifth & Ninth Circuits
California Dept. of Real Estate - Broker, Los Angeles County California EMT-Basic
U.S. Tax Court FCC-Commercial & Amateur Extra
Certified by The State Bar of California Board of Legal Specialization: Taxation

Languages Japanese Language Proficiency Examination, (Japan Foundation), Level 4; Kanji Proficiency Exam (Kanji Aptitude Testing Foundation) Level 7, recognized by Japan Ministry of Education, mastery of 640 kanji; some technical Russian reading ability.

Patents Prepared Prepared and prosecuted more than 150 patents, in the electrical, chemical & mechanical technologies and designs ; specialty areas: optics, fiber optics, cryogenics electromagnetics, medical instrumentation & computers.

Litigation Associate counsel in patent & trade secret litigation; Municipal Court Judge pro tem & Superior Court Mediation program Attorney-Client fee Dispute Arbitrator, Long Beach Bar Association; Patent Panel, American Arbitration Association.

Teaching Adjunct Law Professor, Golden Gate University School of Law, LL.M. Taxation Program; Georgia Institute of Technology - previously taught heat and mass transfer laboratories, and analog and digital computer laboratory.

Member: Current Member: State bars of California, Texas, Arizona and Nevada; Currently Vice-Chair of the California State Bar Board of Legal Specialization (2013-2014) member (2011-2014); Central District Consumer Bankruptcy Attorney Association; Fellow, National Tax Practice Institute; Past Member: Member (Chair 2010-11) of the California Bar Taxation Advisory Committee of the California State Bar Board of Legal Specialization (2006-2011); Southern California Bankruptcy Inn of Court; Long Beach Bar Association, (Bd. Governors, 1994-95); Orange County Bar Assn, Taxation Section, (Co-Chair Technology Law Section 1996); National & California Society of Enrolled Agents (Orange Co. Chapter Pres. 2003-2004); Registered Parliamentarian - National Association of Parliamentarians; Business Management Committee of SEMA (1997-98); CA Bar: CEB Advisory Committee (1999-2000); Taxation Section Executive Committee (2002-2005); Income & Other Tax subcommittee (Chair 2000-2002); Special Master, California State Bar Association for Search Warrants under Penal Code §1524 (2001-2002).