Criminal Tax Bulletin

Department of Treasury
Internal Revenue Service

Office of Chief Counsel
Criminal Tax Division

July – September **This bulletin is for informational purposes. It is not a directive.** **2015**

FOURTH AMENDMENT

Sixth Circuit Holds Warrantless Scans of Cards' Magnetic Strips Did Not Violate Fourth Amendment

In ***United States v. Bah***, 794 F.3d 617 (6th Cir. 2015), the Sixth Circuit held that warrantless scans of magnetic strips on credit, debit, and gift cards did not violate the defendants' Fourth Amendment rights because the scans did not constitute a search.

Mamadou Bah ("Bah") and his passenger Allan Harvey ("Harvey") were stopped for speeding. Upon learning that Bah was driving with a suspended license, the police officer arrested Bah, impounded the vehicle, and conducted an inventory search, during which he discovered a number of credit, debit, and gift cards. Subsequently, without obtaining a warrant, another officer used a magnetic card reader to scan the cards and determined that a number of them had been re-encoded with stolen account numbers. Bah and Harvey were indicted for production, use, and trafficking in counterfeit access devices. Claiming Fourth Amendment violations, they moved to suppress the seized cards. The district court denied the motion, and the defendants entered conditional guilty pleas.

On appeal, the Sixth Circuit affirmed the district court's ruling, holding in part that the warrantless scans of the magnetic strips did not constitute a Fourth Amendment search. The court reasoned that the scans did not involve a physical intrusion into a constitutionally protected area, and that there was no reasonable expectation of privacy in the magnetic strips, which were routinely read by third parties at restaurants and stores. The court also distinguished this case from *Riley v. California*, 134 S. Ct. 2473 (2014), in which the Supreme Court held that a search warrant is required to search the contents of a cell phone seized incident to arrest. The Sixth Circuit explained that magnetic strips do not contain the same quality or quantity of personal information that may be found on a cell phone and therefore do not implicate the same privacy concerns.

FIFTH AMENDMENT

Third Circuit Holds Required Records Exception Applies to Foreign Bank Account Records

In ***United States v. Chabot,*** 793 F.3d 338 (3d Cir. 2015), the Third Circuit held that foreign bank account records summonsed by the IRS fell within the required records exception to the Fifth Amendment privilege against self-incrimination.

The IRS issued summonses to Eli and Renee Chabot (the "Chabots"), requesting the production of documents regarding their foreign bank accounts for the years 2006 through 2009. When the Chabots asserted their Fifth Amendment privilege, the IRS amended the summonses, limiting their scope to those documents required to be maintained under 31 C.F.R. § 1010.420. The Chabots continued to assert the Fifth Amendment privilege, and the IRS filed a petition to enforce the amended summonses. The district court granted the petition on the grounds that the required records exception applied.

On appeal, the Third Circuit affirmed the district court's decision, explaining that the records at issue met the Supreme Court's three-pronged test for applying the required records exception: (1) the recordkeeping scheme must have an essentially regulatory purpose; (2) the records must be of a type that is customarily kept by the regulated party; and (3) the records must have "public aspects." *See Grosso v. United States*, 390 U.S. 62, 67-68 (1968). In this case, the Third Circuit reasoned that the purpose of § 1010.420, which applies regardless of whether the accountholder has committed a crime, is essentially regulatory. The Third Circuit also determined that the records sought were customarily kept because reasonable accountholders would retain them in order to access their foreign accounts. Lastly, the court concluded that the records had sufficient "public aspects" because the government circulates data from these records to other government agencies for noncriminal purposes.

EVIDENCE

Ninth Circuit Holds Evidence of State Tax Audit Was Inadmissible to Show Knowledge of Federal Tax Obligations

In ***United States v. Martin***, 796 F.3d 1101 (9th Cir. 2015), the Ninth Circuit held that evidence of the defendant's prior state tax audit was inadmissible to show that she knowingly violated 26 U.S.C. § 7206(1), because the evidence was both irrelevant and unduly prejudicial.

Elaine Martin ("Martin") owned a construction company, MarCon, that installed steel guardrails and concrete barriers on public highways and also sold used materials from its construction sites. Martin deposited the proceeds of the used material sales into a bank account concealed from her external accountants, and she failed to report the income on her personal and company tax returns. In this manner, Martin avoided paying approximately $100,000 in income taxes between 2002 and 2008. Another aspect of Martin's scheme involved fraudulently obtaining government contracts by misrepresenting her assets to qualify for programs designed to aid disadvantaged businesses.

At trial, to prove Martin knew she had a duty to truthfully report her income on her tax returns, the government introduced evidence that, for the tax years 1996 and 1997, Idaho tax authorities had audited Martin for mischaracterizing student loan payments and divorce expenses as farm expenses. Martin was convicted of willfully subscribing false tax returns in violation of § 7206(1) and several fraud-related charges. The district court sentenced her to 84 months' imprisonment and ordered her to forfeit over $3 million.

On appeal, the Ninth Circuit opined that, for purposes of Federal Rule of Evidence ("FRE") 404(b), there was an insufficient connection between the state tax audit (which Martin had settled without conceding liability) and Martin's knowledge of federal tax laws governing the reporting of income. The court further concluded that, even if relevant, evidence of the state tax audit was unduly prejudicial under FRE 403. Therefore, the court held that admission of the evidence was an abuse of discretion, and it vacated Martin's tax convictions and her sentence.

TITLE 26

Ninth Circuit Holds Filing Is an Element of 26 U.S.C. § 7206(1)

In ***United States v. Boitano***, 796 F.3d 1160 (9th Cir. 2015), the Ninth Circuit held that "filing" as defined by IRS regulations is a required element of § 7206(1).

Steven Boitano ("Boitano"), a partner in an accounting firm, failed to file income tax returns for the years 1991 to 2007. After two IRS audits, his case was referred to a revenue agent in the IRS's civil Special Enforcement Program, who met with Boitano several times. During the third meeting, Boitano handed the agent income tax returns for 2001, 2002, and 2003, which were signed under penalty of perjury by Boitano and his wife. The agent stamped the first page of the returns "Internal Revenue Service, SB/SE—Compliance Field, Sep 04, 2009, Area 7, San Francisco, CA," and hand wrote "delinquent return secured by exam" on the first page of each. At Boitano's request, the agent copied the first page of the returns and gave the copies to Boitano as receipts. The agent did not send the returns to the Internal Revenue Service Center for processing because he determined that they falsely reported estimated tax payments the IRS had no record of receiving.

Boitano was indicted and charged with three felony counts for willfully subscribing false tax returns under § 7206(1) and three misdemeanor counts for failure to file taxes under 26 U.S.C. § 7203. He pleaded guilty to the three misdemeanors, but proceeded to trial on the felony charges and was found guilty on all three counts. The district court sentenced him to five months' imprisonment on each of the misdemeanor convictions, to run concurrently, and 36 months' imprisonment on each of the felony convictions, also to run concurrently.

On appeal, the government conceded that there was a single definition of "filing" for both civil and criminal purposes, and that the record did not support the conclusion that the returns in this case had been filed. The government argued instead that, based on the wording of the statute, "filing" as defined by IRS regulations was not an element of § 7206(1). The Ninth Circuit disagreed, holding that it was bound by prior precedent, which listed "filing" as an element of the statute. Accordingly, the court reversed Boitano's § 7206(1) convictions.

Tenth Circuit Holds Government Had Discretion to Charge Tax Evasive Conduct under 26 U.S.C. § 7212(a)

In ***United States v. Sorensen***, 801 F.3d 1217 (10th Cir. 2015) the Tenth Circuit held, *inter alia*, that the government properly charged the defendant under the omnibus clause of § 7212(a), even though his actions arguably included tax evasive conduct.

In 2000, Jerold Sorensen ("Sorensen"), an oral surgeon in California, became involved in a tax shelter scheme promoted by Financial Fortress Associates ("FFA"). Through FFA, Sorensen created six trusts, in whose names he opened a bank account that he controlled. Between 2002 and 2007, he deposited into the account hundreds of thousands of dollars of income from his dental practice. He also transferred ownership of his home, his office building, and other assets to the trusts. No tax returns were ever filed for the trusts, and between 2002 and 2007 Sorensen underpaid his taxes by more than $1.5 million. In 2008, following FFA's advice, Sorensen refused to accept a certified letter from an IRS agent notifying him that he was the target of a criminal investigation. When the same agent came to his office, Sorensen locked the doors and refused her entrance. Sorensen also sent the agent a questionnaire, requesting personal information such as her home address, birthday, and social security number. Sorensen was convicted of violating the omnibus clause of § 7212(a) (corruptly endeavoring to impede the due administration of the internal revenue laws) and sentenced to 18 months' imprisonment.

On appeal, Sorensen argued in part that the government was precluded from charging him with tax obstruction under § 7212(a) because the evidence showed that his conduct amounted to tax evasion under § 7201. The Tenth Circuit disagreed, on the ground that when conduct violates more than one criminal provision, the government may prosecute under either statute. In this case, the court determined that Sorensen's conduct fell within the plain language of § 7212(a), and therefore the charge was appropriate.

On this basis and others, the Tenth Circuit affirmed Sorensen's conviction.

TITLE 18

Ninth Circuit Holds Evidence of Concealment in Offshore Accounts Was Sufficient to Prove Conspiracy

In ***United States v. Hough***, 803 F.3d 1181 (11th Cir. 2015), the Eleventh Circuit held that circumstantial evidence showing the defendant and her husband deposited income into foreign accounts instead of paying taxes on the funds was sufficient to establish the defendant's knowing participation in an agreement to defraud the IRS.

Patricia Hough ("Hough") and her husband David Leon Fredrick ("Fredrick") owned two medical schools in the Caribbean. The operation of the schools and their eventual sale years later resulted in millions of dollars of income that Hough and Fredrick failed to report on their tax returns. Instead, they concealed the income in multiple offshore bank accounts, which were held in the names of foreign entities created for that purpose. Hough and Fredrick were charged with conspiracy to defraud the IRS (*Klein* conspiracy) in violation of 18 U.S.C. § 371 and filing false tax returns in violation of 26 U.S.C. § 7206(1). Fredrick became a fugitive following the indictment, and Hough proceeded to trial. A jury found Hough guilty on all counts, and the district court sentenced her to 24 months' imprisonment.

On appeal, the Eleventh Circuit held in part that the evidence was sufficient to support Hough's conspiracy conviction. The court noted that to convict Hough of a *Klein* conspiracy the government had to prove that: (1) Hough and Fredrick agreed to impede the functions of the IRS; (2) Hough knowingly and voluntarily participated in that agreement; and (3) Hough or Fredrick committed an act in furtherance of the agreement within the six-year statute of limitations. The court further explained that to prove an agreement, the government could rely on circumstantial evidence such as the parties' concerted actions, overt acts, relationship, and the entirety of their conduct. In this case, the court concluded that a reasonable jury could have found Hough knowingly participated in an agreement to defraud the IRS, based on evidence that she and Fredrick followed "a common design" to conceal their income in multiple offshore accounts. Based partly on this conclusion, the Eleventh Circuit affirmed Hough's convictions. The court vacated Hough's sentence, however, to allow the district court to determine the proper tax treatment of the foreign parent entities of the medical schools.

Third Circuit Holds Evidence Was Sufficient to Support IRS Employee's Conviction for Extortion under Color of Official Right

In ***United States v. Fountain***, 792 F.3d 310 (3d Cir. 2015), a case involving fraudulent refund schemes, the Third Circuit held that the trial evidence was sufficient to support an IRS employee's conviction for extortion under color of official right, regardless of whether the employee actually had any influence over the issuance of refunds.

During 2007-2012, Patricia Fountain ("Fountain"), an IRS customer representative, helped orchestrate several schemes to obtain fraudulent tax refunds by filing returns that claimed false credits. Fountain used her knowledge of IRS fraud detection procedures to avoid suspicion. Over time, she and a co-conspirator enlisted various individuals to recruit claimants, who provided their personal information in exchange for a portion of the fraudulent refund claimed. During Fountain's trial, one of the claimants testified that after her return was submitted, she was asked to pay a $400 fee to Fountain, whom she knew to be an IRS employee. The claimant stated that despite her suspicions about the demand for payment, she paid the fee in the hopes of obtaining the promised funds. Other witness testimony indicated that claimants were warned they would be "red-flagged" if they did not pay Fountain's fee. Fountain was convicted on multiple counts of conspiracy, filing false claims, extortion under color of official right, and subscribing to false tax returns in violation of 18 U.S.C. §§ 286, 287, 1951(a) and 26 U.S.C. § 7206, respectively. She was sentenced to 228 months' imprisonment.

On appeal, the Third Circuit noted that a conviction for official right extortion will be upheld if the evidence indicates that: (1) the payor made a payment to the defendant because the payor held a reasonable belief that the defendant would perform official acts in return; and (2) the defendant knew the payor made the payment because of that belief. The court explained that the government need not prove Fountain actually used her IRS position or performed an official act in furtherance of the scheme. Based on evidence that the claimant who testified at trial reasonably believed Fountain would use her IRS position to obtain a refund and that Fountain knew she had been paid for that reason – as well as evidence that the claimant reasonably feared reprisal if she failed to pay – the Third Circuit affirmed Fountain's extortion conviction.

FORFEITURE

Eleventh Circuit Holds Forfeiture of Funds Structured to Conceal Tax Evasion Did Not Violate Excessive Fines Clause

In ***United States v. Sperrazza***, 804 F.3d 1113 (11th Cir. 2015), the Eleventh Circuit held that the district court's order of forfeiture with respect to funds that were structured to conceal taxable income from the IRS did not violate the Excessive Fines Clause of the Eighth Amendment.

Dr. Robert Sperrazza ("Sperrazza") co-owned an anesthesiology practice, which outsourced its billing operations to Physicians Professional Management ("PPM"). On a weekly basis, at Sperrazza's request, PPM mailed him checks received from his patients. Approximately every ten days, Sperrazza cashed between 20 and 50 checks that totaled more than $9,000 but not more than $10,000. Sperrazza told one of his partners that he never cashed checks exceeding $10,000 at one time to avoid "any reports or anything that would involve the regulatory or IRS authorities." Sperrazza also occasionally deposited cash into his bank accounts, in amounts exceeding $9,000 but not exceeding $10,000. After Sperrazza's accountant advised the IRS that Sperrazza had underreported his income by failing to disclose payments from his patients, Sperrazza filed amended returns and paid the taxes owed. He was convicted of three counts of tax evasion in violation of 26 U.S.C. § 7201, and two counts of structuring in violation of 31 U.S.C. § 5324. The district court sentenced him to 36 months' imprisonment and ordered him to forfeit $870,238.99, *i.e.*, the amount of funds structured.

On appeal, Sperrazza argued in part that the order of forfeiture violated the Excessive Fines Clause because it was grossly disproportional to the harm caused by the structuring. Specifically, Sperrazza contended that he had caused minimal harm because he lawfully earned the money he structured. The Eleventh Circuit rejected this argument on the grounds that the structuring decreased the likelihood that the IRS would detect the underlying tax evasion and increased the cost of investigating Sperrazzo's crime. Holding that there was no Excessive Fines violation, the court affirmed the order of forfeiture.

Seventh Circuit Holds Claimant Need Not Prove Legitimate Ownership Interest to Establish Standing

In ***United States v. Funds in the Amount of $239,400***, 795 F.3d 639 (7th Cir. 2015), the Seventh Circuit held that a claimant in a civil forfeiture action need not prove a legitimate ownership interest in the seized property in order to establish standing at the summary judgment stage of the proceeding.

After searching the luggage of John Valdes ("Valdes") during a train trip to Los Angeles, DEA agents seized four bundles of cash totaling $239,400. Valdes told the DEA agents that the money was his; that he had packed it that way; and that he was traveling to California to purchase computers for his computer recycling business. After the government filed a civil forfeiture complaint against the currency, alleging it was furnished or intended to be furnished in exchange for a controlled substance, Valdes and his wife, Tracey Brown ("Brown"), filed claims asserting an ownership and/or possessory interest in the currency. Before Valdes and Brown filed their answers to the complaint, the government served special interrogatories regarding their identities and relationship to the defendant property. Valdes and Brown provided limited responses to the interrogatories, stating that Valdes was the owner of the defendant currency and that it was in his possession when it was seized. The claimants also objected to the scope of the interrogatories. The government then moved to strike their claims and answers, arguing that the claimants failed to respond to the interrogatories and that they lacked standing. The government also moved for summary judgment on the ground that the claimants lacked standing. The district court granted the government's motions.

On appeal, the Seventh Circuit reversed the judgment of the district court, holding that an assertion of ownership combined with evidence that the claimant was in possession of currency when it was seized is sufficient to establish standing at the summary judgment stage of a civil forfeiture action. The court explained that standing must be clearly separated from the merits in civil forfeiture cases so that the government is not relieved of its burden to prove that property is subject to forfeiture. In this case, the court concluded that Valdes and Brown had established standing to assert their claims to the defendant currency.

SENTENCING

Seventh Circuit Upholds Probationary Sentence in Case Involving Unreported Offshore Account

In ***United States v. Warner***, 792 F.3d 847 (7th Cir. 2015), the Seventh Circuit affirmed the defendant's probationary sentence after he pleaded guilty to evading approximately $5.6 million in taxes by hiding assets in a Swiss bank account.

In 1996, H. Ty Warner ("Warner"), the creator of a popular brand of toys, traveled to Zurich, Switzerland and opened an offshore bank account at UBS AG ("UBS"). Within several years, the account contained $93 million. Warner instructed his bankers not to send him correspondence, and he failed to report the account to the IRS. In 2002, Warner traveled to Switzerland to transfer the funds to Zuercher Kantonalbank ("ZKB"), placing the funds in the name of a Liechtenstein shell entity. He instructed UBS not to communicate with him regarding the transfer. At ZKB, Warner's account grew to over $107 million. Warner did not disclose the account on his tax returns, and he failed to pay taxes on the interest income, which amounted to over $24.4 million through 2007. The resulting tax loss was $5,594,877. After learning that the government was investigating UBS, Warner applied to the IRS's Offshore Voluntary Disclosure Program but was rejected because he was already under investigation.

In 2013, Warner pleaded guilty to one count of tax evasion in violation of 26 U.S.C. § 7201 for tax year 2002. As part of the plea, he agreed to pay a civil FBAR penalty of $53,552,248. Although the U.S. Sentencing Guidelines ("U.S.S.G." or "Guidelines") range was 46 to 57 months' imprisonment, the district court sentenced Warner to two years' probation.

On appeal, the Seventh Circuit first determined that Warner's sentence was procedurally reasonable because the district court addressed the sentencing factors under 18 U.S.C. § 3553(a). The appellate court then analyzed the substantive reasonableness of the sentence in light of several mitigating circumstances, including the extent of Warner's charitable works. The court emphasized that the government had requested incarceration in excess of a year and a day, which was below the bottom of the Guidelines range. The court further opined that Warner's payment of the FBAR penalty, which was nearly ten times the amount of tax loss he caused, provided a measure of deterrence. With respect to the need to avoid unwarranted sentence disparities, the court noted that "probation is a common sentence in offshore tax evasion cases." Concluding that the district court did not abuse its discretion, the Seventh Circuit affirmed.

Seventh Circuit Holds Defendant Failed to Show Entitlement to Tax Loss Reduction Based on Unclaimed Deductions

In ***United States v. Black***, 798 F.3d 570 (7th Cir. 2015), the Seventh Circuit held that the defendant failed to meet his burden of showing that the tax loss calculation at sentencing should have been reduced by previously unclaimed deductions.

In 2000, Rex Black ("Black") was audited by the IRS, which assessed approximately $3.9 million in unpaid taxes, penalties, and interest. After Black continued to disregard his tax liabilities, the IRS filed several liens on his properties. In response to each, Black sent the IRS a fraudulent check or registered bill of exchange to extinguish the lien and satisfy his tax debt. Black was convicted of violating 26 U.S.C. § 7212(a) (corrupt interference with administration of tax laws) and 18 U.S.C. § 514(a)(3) (presenting fictitious financial instruments). At sentencing, the court applied U.S.S.G. § 2T1.1 to determine Black's offense level. The court calculated a tax loss amount of over $14 million. Based on a Guidelines range of 70 to 87 months and the sentencing factors under § 3553(a), the district court sentenced Black to 71 months' imprisonment.

On appeal, Black claimed the district court had made several errors in calculating the tax loss. Black contended in part that, pursuant to § 2T1.1 cmt. n. 3, the district court should have reduced the tax loss by purportedly legitimate deductions that had not been credited to Black during the 2000 audit. The Seventh Circuit disagreed, noting that once the government established the tax loss amount, Black had the burden of showing by a preponderance of the evidence that he was entitled to the previously uncredited deductions. The court determined that Black had failed to meet this burden because there was insufficient evidence in the record to establish that at the time of Black's criminal conduct, he could have challenged the audit and reduced his tax liability. Accordingly, the Seventh Circuit concluded there was no error by the district court with respect to this issue. Nonetheless, because the appellate court determined that the district court had made other errors in its tax loss calculation, the Seventh Circuit remanded the case for resentencing.

Eight Circuit Upholds Application of Sophisticated Means Enhancement to Guidelines Calculation for OID Scheme

In ***United States v. Johnson***, 795 F.3d 840 (8th Cir. 2015), the Eighth Circuit held, *inter alia*, that the district court did not err in applying the sophisticated means enhancement to the Guidelines calculation of a participant in an Original Issue Discount ("OID") scheme.

Kimberly Johnson ("Johnson") and Nkosi Gray ("Gray") participated in an OID tax fraud scheme run by Gerald Poynter ("Poynter"). The scheme involved the filing of false tax returns that reported personal debt as interest income from investments, listed large amounts of interest income withheld, and claimed fraudulent refunds for the purportedly withheld amounts. Johnson and Gray were Poynter's clients and, in addition, Johnson was one of Poynter's "branch managers" or "affiliates." In that capacity, Johnson recruited another individual and filled out her 2008 tax return, fraudulently claiming a $61,959 refund, which the IRS issued. Gray himself received a $278,874 refund based on a fraudulent return Poynter prepared, and Gray also filed additional fraudulent returns for other tax years seeking more refunds. Johnson and Gray were each convicted of one count of making a false claim for a tax refund, in violation of 18 U.S.C. § 287. The district court sentenced Johnson and Gray to 48 months' and 60 months' imprisonment, respectively.

On appeal, the Eighth Circuit rejected Johnson's challenge to her conviction and Gray's challenge to his sentence. With respect to Gray's sentence, the court rejected his argument that the district court erred in applying the two-level enhancement under U.S.S.G. § 2T1.1(b)(2) for an offense involving "sophisticated means." Gray argued that the enhancement should not apply because he used his real name and address on his tax returns, filed numerous returns with the IRS, regularly corresponded with the IRS via e-mail and letters, and in no way attempted to shield his identity. The Eighth Circuit disagreed, noting that Gray submitted 11 false filings to the IRS, submitted false background documents to bolster his claims for tax refunds, and warned Poynter via e-mail that the Department of Justice was aware of the OID scheme. The appellate court opined that this conduct was repetitive and more intricate than that of a garden-variety tax offender, and concluded that the district court did not clearly err in applying the enhancement.

Tenth Circuit Holds Nondisclosure of Underreported Income during Investigation Did Not Warrant Enhancement for Obstruction of Justice

In ***United States v. Kupfer***, 792 F.3d 1226 (10th Cir. 2015), the Tenth Circuit held that the defendant's failure to disclose her underreporting of income while she was under investigation for tax evasion was not a proper basis for applying the "obstruction of justice" enhancement to her base offense level under U.S.S.G. § 3C1.1.

Elizabeth Kupfer ("Kupfer") and her husband filed joint income tax returns for 2004-2006, but failed to report over $790,000 in gross income. Kupfer was charged with three counts of tax evasion, in violation of 26 U.S.C. § 7201. During her trial, she admitted that she failed to report a substantial amount of gross income, but denied that she had acted willfully. The jury convicted Kupfer on all counts. At sentencing, the district court's Guidelines calculation included an increase in Kupfer's offense level under U.S.S.G. § 3C1.1 for obstruction of justice, based on her failure to reveal her underreporting of income while she was being investigated. She was sentenced to three years' imprisonment.

On appeal, Kupfer argued in part that the district court erred in its Guidelines calculation because § 3C1.1 was not applicable to her conduct. The government conceded error on this issue and the Tenth Circuit agreed, noting that § 3C1.1 does not apply when defendants tell investigators that they did not commit a crime. In this case, rather than affirmatively state she had not committed a crime, Kupfer "failed to speak up" and disclose her conduct to investigators. The court held that a failure to disclose conduct cannot serve as the basis for an increase in the offense level under § 3C1.1.

The Tenth Circuit affirmed Kupfer's conviction on other grounds but vacated her sentence and remanded for resentencing.

RESTITUTION

D.C. Circuit Holds District Court Erred in Ordering Restitution for Uncharged Conduct

In ***United States v. Udo***, 795 F.3d 24 (D.C. Cir. 2015), the D.C. Circuit held that it was plain error for the district court to order restitution based on losses derived not only from the offenses of conviction but also from uncharged relevant conduct.

Enyinnaya Udo ("Udo") was a CPA who owned a firm that prepared personal tax returns. On behalf of his clients, Udo prepared dozens of returns that claimed fraudulent refunds, based on purported unreimbursed employee expenses. In some cases, the purported expenses exceeded $20,000. Udo also arranged refund anticipation loans for some of his clients and deducted his fee from the loans.

The IRS conducted a sting operation targeting Udo in 2008. An undercover agent posed as a walk-in client seeking assistance in preparing a tax return. After an initial calculation showed that the agent owed taxes, Udo prepared a return claiming $14,684 in unreimbursed employee expenses that had not been mentioned by the agent. This adjustment transformed the agent's tax liability into a tax refund of $1,301.

Udo was ultimately convicted of 25 counts of willfully assisting in the preparation of a materially false tax return in violation of 26 U.S.C. § 7206(2). The loss resulting from the 25 false returns that led to Udo's convictions totaled $74,047. At sentencing, the government requested restitution in an amount based on the 25 false returns underlying the convictions, as well as other false returns that the IRS considered to be part of Udo's criminal scheme. The court ordered Udo to pay restitution of $262,966, the amount requested by the government, as a condition of supervised release. The court also sentenced Udo to 24 months' imprisonment.

On appeal, Udo claimed the district court erred in calculating the restitution order, and the government conceded the error. The D.C. Circuit agreed, noting that the statutes providing for restitution (*e.g.*, 18 U.S.C. § 3583(d)) do not expressly allow a court to order restitution for offenses related to, but distinct from, the offenses of conviction. Accordingly, the court vacated the restitution order and remanded for the district court to reconsider that aspect of Udo's sentence.

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