

TAX FRAUD CASE REPORT

Volume 101

From The Desk of David M. Garvin, Esq.

January 2010

United States v. Aaron 2009 U.S. App.Lexis 28383 (6th Cir. Dec. 28, 2009)

Mr. Aaron appealed from his conviction on seventeen counts of making and subscribing a false document pursuant to 26 U.S.C. section 7206(1). Aaron gambled at various Detroit casinos. Each time he won more than \$1,200 he was requested to provide his social security number for the W-2G.

Aaron provided a false social security number on at least 965 occasions.

On appeal Aaron argued that his trial counsel was ineffective for not requesting a good-faith jury instruction. He also argued that the trial court erred by not instructing the jury on his good-faith defense.

The trial court gave the following instruction: "Any person who willfully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter shall be guilty of an offense. The elements of this offense are as follows, (1) the defendant made and subscribed a return, statement or other document which was false as to a material matter; (2) the return, statement or other document



*Helio Castroneves and his attorney
David M. Garvin at the 2009
Indianapolis 500*

United States v. Castroneves Case No. 08-20916-CR (So. Dist. Florida 2009)

The highest profile tax case of 2009, was *United States v. Helio Castroneves*, three time Indianapolis 500 winner and *Dancing With The Stars* winner.

Mr. Castroneves was represented by Florida Bar Certified Tax Attorney David M. Garvin and co-counsel Roy Black. Katiucia Castroneves was represented by Howard Srebnick and Scott Srebnick. The attorneys worked together as a team.

United States v. Aaron (continued)

contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement or other document to be true and correct as to every material matter, and (4) the defendant falsely subscribed to the return, statement, or other

document willfully, with the specific intent to violate the law."

Because Aaron failed to object to the jury instructions during trial, the 6th Circuit reviewed the jury instructions only for plain error.

To demonstrate a "plain" error the defendant must show (1) an error, (2) that is plain, and (3) that affects his fundamental rights. The court will correct the error only if the error seriously affected the fairness, integrity, or public reputation of the trial .

The Supreme Court has held that, in criminal tax cases, "the statutory willfulness requirement is the voluntary, intentional violation of a known duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991). Willfulness can be negated by a showing that the defendant had a good faith belief that he was not violating any of the provisions of the tax law.

The 6th Circuit found that Aaron's defense, that he provided a false social security number to prevent identity theft, did not meet the *Cheek* requirement.

The convictions were affirmed.

United States v. Parker 2009 U.S. App. Lexis 28042 (5th Cir. Dec. 21, 2009)

Thomas and Margaret Parker appealed their convictions for filing

(Continue)

TAX FRAUD CASE REPORT

Volume 101

From The Desk of David M. Garvin, Esq.

January 2010

United States v. Parker (Continued)

false tax returns and for filing returns in violation of IRS Code sections 7206(1) and 7203. To support a conviction for filing a false tax return under section 7206 (1) the evidence must be sufficient to show that: (1) the defendant willfully made and subscribed to a materially false tax return; (2) the return contained a written declaration that it was made under penalties of perjury; and (3) the defendant did not believe that the return was true as to every material matter.

Parker argued that he did not “willfully” defraud the government. He asserted that he had “legitimate confusion” but his argument ignored the fact that a CPA informed Parker that he owed taxes. Further, Parker acknowledged the debt by entering an installment agreement.

Thus the record supported the finding that Parker knew that the 1040-x returns he filed under reported his income.

Section 7203 requires a showing that (1) taxpayer was required to file a return; (2) that he failed to file a return; and (3) that the failure was willful.

The evidence established that Parkers had substantial income from multiple sources. The evidence that Mrs. Parker was guilty of complicity in the tax fraud

was established through a former IRS agent testifying as an expert.

The agent testified that she interviewed Mrs. Parker and identified her notes from the interview. The evidence was admitted as a hearsay exception.

Mrs. Parker could have avoided the conviction and possibly the indictment by simply exercising her 5th amendment rights. Her misguided belief that if she cooperated, the IRS would leave her alone is a mistake made by many taxpayers and inexperienced professionals.

United States v. Poltonowicz 2009 U.S. App. Lexis 26257 (3th Cir. Dec. 2, 2009)

Taxpayer appealed his conviction for conspiracy to defraud the United States by counseling the filing of false tax returns. Defendant was on audiotape informing a potential client that he knew exactly how to claim fictitious deductions without getting caught. The tax loss was \$400,000 based upon the returns that had been audited and the trial court noted statistical evidence involving approximately 20,000 returns prepared by the defendant.

The 3rd Circuit upheld the convictions under 18 USC section 371 as well as 26 USC section 7206 and found that the sentence based upon all criminal activity whether or not contained in the indictment was appropriate.

It should be noted that the Federal Sentencing Guidelines in all tax cases are controlled by tax loss. See section 2B4.1. As a result, felony convictions often result in the same sentence as misdemeanor convictions. For example, see *United States v. Wesley Snipes*.

This is the result of the IRS policy to indict at least three taxable years when possible and the court’s ability to order consecutive sentences in misdemeanor cases and concurrent sentences in felony tax cases.

United States v. Abdul Khanu 2009 U.S. Dist. Lexis 120035 (Dist. Col. Dec. 23, 2009)

Khanu was convicted of one count of conspiring to defraud the United States in violation of 18 USC 371, three counts of tax evasion under 26 USC 7201, and eighteen counts of preparing false employment tax returns under 26 USC 7206(2). Khanu operated several nightclubs in Washington, D.C. He allegedly skimmed from the cash receipts and paid employees in cash to avoid payroll taxes. Khanu made several large cash expenditures including a swimming pool, driveway, and furniture for his home. Khanu did not testify at trial. However, the government read into evidence excerpts of

(Continue)

TAX FRAUD CASE REPORT

Volume 101

From The Desk of David M. Garvin, Esq.

January 2010

United States v. Abdul Khanu (Continued)

testimony he had previously provided to the government.

After the IRS executed a search warrant the business practice of paying employees cash stopped.

The CPA testified that he was unaware of various business practices of Khanu. However, he did state that he had told Khanu that money paid to promoters should not be included as the club's income. As a result, the defendant received a good faith reliance on the advice of an accountant instruction relating to that advice. The court also instructed the jury that Khanu's good faith belief was a defense to the element of willfulness, an essential element to all tax crimes.

A bulk of the government's case was presented through the IRS Agent as a summary witness. The agent testified as to the changes in Khanu's net worth and the fact that Khanu made over \$3,000,000 of expenditures but only had \$778,464 available. This suggested over \$2,000,000 of unreported income.

Khanu moved pursuant to Rule 29 for judgment of acquittal. The court noted that all evidence must be viewed in a light most favorable to the government and the motion must be denied if the evidence is sufficient to permit a rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. In other words, a judgment of acquittal is warranted

only when there is no evidence upon which a reasonable mind might find guilt beyond a reasonable doubt. However, the judge must not let the jury act on what would necessarily be only surmise and conjecture, without evidence.

Because the court reserved ruling on the Rule 29 motion made at the close of the government's case, the court must make its decision based upon the evidence presented at the time the motion was made.

The court also considered the evidence after the defendant's case. The court found that sufficient evidence as to each of the essential elements of the crime charged had been presented and denied the motion.

United States v. Campbell 2009 U.S. Dist. Lexis 116794 (W.D. Mich. Dec. 15, 2009)

Campbell was a former partner in the law firm of Miller, Canfield, Paddock, & Stone. He was the director of the Kalamazoo offices. During 1999 through 2006 he allegedly agreed to promote and sell fraudulent tax shelters in the form of "loss of income" insurance policies issued by offshore companies. The payments were tax deductible. However, 85% of the premiums were returned in a nontaxable manner.

Campbell was ordered to make restitution for the tax loss he caused under the Mandatory Victims Restitution Act. The

government attempted to increase the amount after sentencing. However, the court declined to increase the amount of restitution after sentencing.

Landess v. C.I.R. 2009 U.S. App. Lexis 27321 (10th Cir. Dec. 15, 2009)

Landess did not file tax returns for 2000 through 2003. However, the IRS received 1099s from third parties. As a result the IRS asserted a tax deficiency and several penalties.

Landess timely filed for a collection due process hearing. However, Landess failed to raise any substantive issues for the court to consider. As a result, the tax court's decision upholding the tax deficiency and the penalties was affirmed.

Ganin v. United States 2009 U.S. Dist. Lexis 121154 (Dist. Conn. Dec. 30, 2009)

Joseph Ganin, the former mayor of Bridgeport, Conn., was convicted on seven counts arising from activities which occurred during his tenure as mayor. The convictions included racketeering, conspiracy, mail fraud and filing false tax returns.

On appeal Ganin argued that he was denied due process during the trial because the government

(Continue)

TAX FRAUD CASE REPORT

Volume 101

From The Desk of David M. Garvin, Esq.

January 2010

Ganin v. United States (Continued)

failed to disclose secret side deals it had made with two of the chief cooperating witnesses.

Ganin was found to have awarded favorable contracts while he was mayor in exchange for "fees" paid to him and his wife. Ganin's primary argument on appeal was that the government had committed a Brady violation by failing to produce an escrow agreement by the government in favor of a cooperating witness.

government had failed to turn over the actual escrow agreement because the government had disclosed the existence of the escrow agreement in its Giglio list prior to trial.

The holding in Brady was not violated since the defendant was aware that the issue may have warranted some additional investigation. The court further found that Ganin had failed to establish that the issues raised on appeal were material to the outcome.



The Tax Fraud Case Report

The Tax Fraud Case Report is a news letter reflecting the latest tax fraud cases. The content is not legal advice and should not be relied upon.

Taxpayers and their professionals are encouraged to contact a Florida Bar Certified Tax Specialist with criminal trial experience before making any decision concerning a matter with the IRS that may become criminal in nature.

The court found that there was no Brady violation even though the government had failed to turn over the actual escrow agreement because the government had

For more information contact

**David M. Garvin, Esq.
200 S. Biscayne Blvd.
Suite 3150**

Miami, FL. 33131

Tel: (305) 371-8101

E-mail: ontrial2@aol.com

Website: davidmgarvin.com