

The End of the Shell Game

The Role and Function of Public Prosecution

OECD Asia-Pacific Academy for Tax Crime and Financial
Investigation
June 1, 2023

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Overview

- Investigation and Prosecution Challenges;
- Sentencing; and
- Forfeiture and Restitution

Investigation Challenges

PROVING INTENT AND WHERE TO LOOK FOR
EVIDENCE

Intent for US Tax Crimes

- Willfulness has been defined by the courts as a voluntary, intentional violation of a known legal duty. Cheek v. US, 498 U.S. 192 (1991)
- Subjective standard: defendant not required to have been objectively reasonable in misunderstanding of law.
 - Knowledge of the defendant, not the reasonable person. However, jury may consider reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held.

Intent for US Tax Crimes

- “Ignorance of the law is no defense,” unless Congress decrees.
 - In tax cases, ignorance of law is a defense.
- In the US, affirmative defense of taxpayer to assert that she did not know what her duties were under the law, or that she believed that she was in compliance with the law. Even if that belief is outrageous and unreasonable.
- As long as that belief is true, in their heart of hearts, it can be a defense to a tax charge. It does not mean, however, that jury has to believe the story.

Intent for US Tax Crimes

Subjective Standard Circumstantial Evidence

- Willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct.

Proving Intent and Where to Look for Evidence

- 1) Filed Tax Returns
- 2) Bank Records, including accounts, mortgages, loans
- 3) Accountant
- 4) Third Party Clients, Customers, and Other Payors
- 5) Subpoena Defendant's Corporation or Partnership Books and Records (P/L, GL)
- 6) Search Warrants
- 7) Revenue Agent/Audit Files/Collection Files
- 8) IRS Records



Proving Intent and What to Look for in Evidence

- Background, education and experience of TP
- A “deal too good to be true”
- Unreasonableness of defendant’s claims, based in part, on all of the above (objective unreasonableness may be used to prove subjective knowledge) – COMMON SENSE
- Use affirmative acts to show knowledge of duty (If no duty, why hide it from the IRS?)



Proving Intent and What to Look for in Evidence

- Filing a false tax return which omits income or overstates deductions
- Concealing income from return preparer
- Keeping double set of books
- Using false identification information
- Dealing in currency
- Lying to Revenue Agent or Special Agent during audit or investigation; false exculpatory statements
- Creating phony invoices for false expenses
- Sending income to a shell corporation disguised as business expense
- Using nominee bank accounts
- Removal of assets from the reach of IRS
- Placing assets in the names of nominees
- Dealing in currency
- Causing receipts to be paid through and in the name of others
- Causing debts to be paid through and in the name of others
- Paying creditors instead of the government
- Signing and submitting false financial statements to the IRS (ie: Forms 433-A)

One of the nicest ways to grab a jury's attention and which clearly shows a defendant's willfulness...LIFESTYLE – Spent more money on luxury purchases than was reported

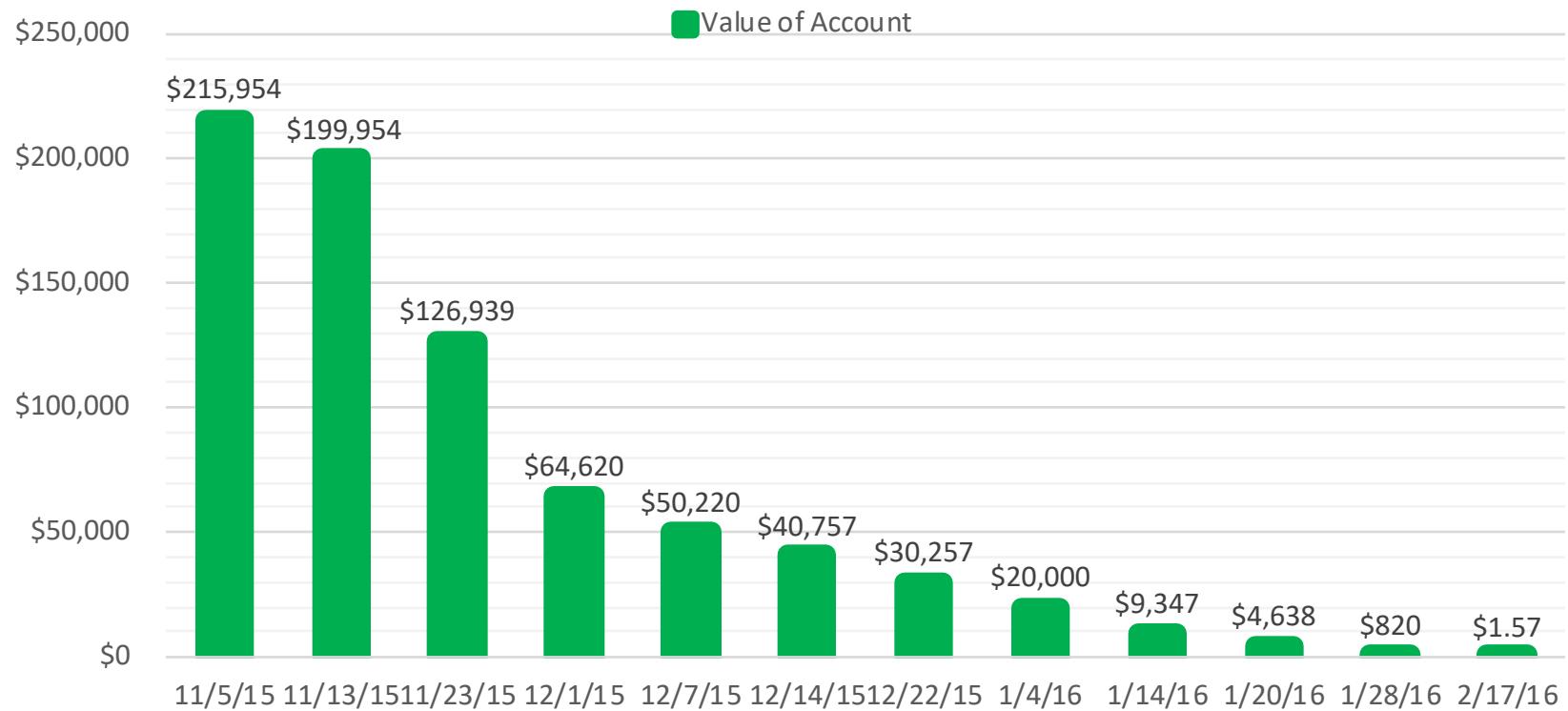




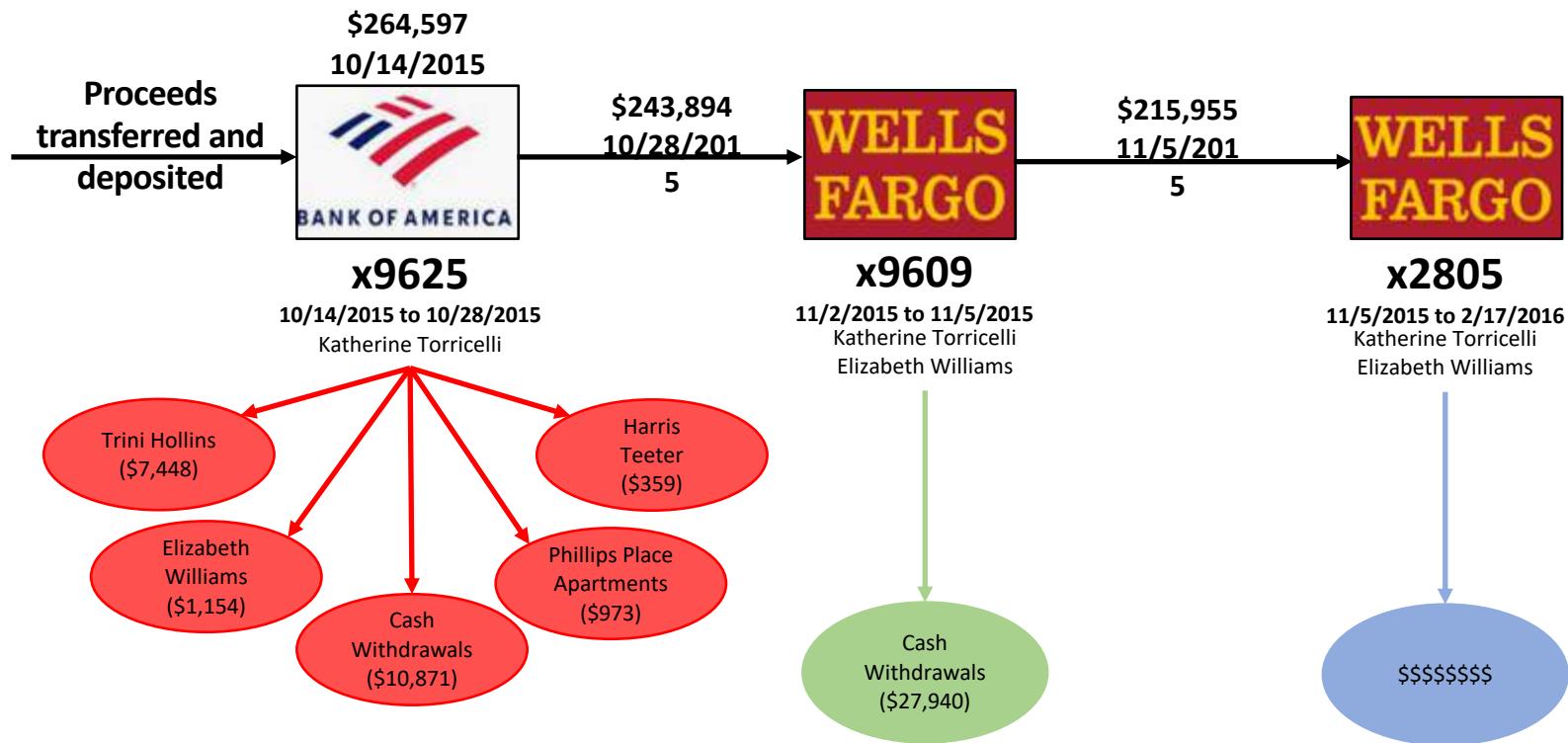
IRS Notices and Correspondence 2015 - 2019

| | |
|----------|--|
| 2/16/15 | Changes made and you owe \$xxxx |
| 10/21/15 | Withholding allowance limited letter sent |
| 11/30/15 | You didn't file a return |
| 1/19/16 | IRS authority to change withholding |
| 1/19/16 | The information you supplied does not support a change to your withholding |
| 7/23/18 | You didn't file a return |
| 12/10/18 | You didn't file a return |
| 12/30/19 | You didn't file a return |

Balances in Wells Fargo Account x2805



MONEY LAUNDERING CONSPIRACY – Financial Transactions



Sentencing

Obtaining Meaningful and Deterrent-Rich Sentences

Unique Challenges

- No individual victims
- Different mix of personal characteristics:
 - older (28% are 41-50, and 50% are over 50; the median age is 50)
 - well-educated
 - often middle class or upper class
 - more commonly white
 - frequently self-employed, or are business owners

- Often able to present positive evidence of “history and characteristics”
- Can sometimes pay full restitution before or at sentencing
- Many judges believe a tax defendant is unlikely to recidivate in the future (except for tax protesters)
- Tax defendants face collateral civil sanctions that do not apply in other white-collar cases

PREPARE FOR SENTENCING DURING THE INVESTIGATION

- Start thinking about sentencing on day one.
- Document **ALL** non-tax crimes the defendant committed.
- Develop and document evidence of self-indulgent spending by the defendant
- Thorough search of all details --bad or disreputable acts

Importance of Deterrence

- IRS enforcement capabilities have been greatly reduced in recent years.
- The one federal felony every American confronts each year.
- We are not all tempted to sell drugs; we are not all in the securities industry or in a position to commit an environmental crime. But we all file tax returns.

Forfeiture and Restitution

Maximizing Asset Recovery

Forfeiture Defined

- Forfeiture is the process whereby law enforcement:
 - Seizes assets (proceeds/property that facilitates crime);
 - Uses administrative and judicial processes to gain title;
 - Provides due process opportunity for third parties to claim title to assets; and
 - Liquidates finally forfeited assets.
 - Forfeiture is *proceeds* and *facilitating property* based.

Restitution Defined

- Restitution is the process whereby law enforcement:
 - Obtains a restitution order recognizing the quantifiable full amount of loss of each victim of a crime; and
 - Find and take D's property or rights to property to pay victims (no tracing! All property or rights to property).
 - Restitution is loss based.

Why do Forfeiture *and* Restitution?

- **Forfeiture** serves to punish the criminal and remove the proceeds and instrumentalities of crime from criminals.
- Available early in the investigation.
- Pretrial seizure warrants and/or restraining orders.
- “Forfeiture is mandatory even when restitution is also imposed. These two aspects of a defendant’s sentence serve distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer

Better Together

- **Restitution** compensates victims of crime for losses incurred to make them whole.
- Post-conviction from plea or verdict to sentencing until paid in full.
- All property is subject to recovery to pay restitution – no requirement of tracing.
- With proper DOJ approvals, forfeited property can be used to pay restitution.

Civil Enforcement Tools

Injunctions

- Fraudulent tax return preparers and tax-fraud promoters can be addressed through civil injunction program.
 - Parallel proceedings
- A civil injunction can bar individuals or businesses from engaging in specified misconduct or from preparing tax returns for others.
- If you're found in breach of the injunction, further criminal action can be taken.
- Enjoined individuals and business are listed publicly on DOJ's website and publicized by IRS.
 - Can also include injunctions as part of plea agreement in criminal case

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Fede

A federal court in the East
preparers and their Detroit
preparation business in the

The civil complaint filed in
Detroit Tax Solution LLC,
fraudulent federal tax return
businesses; falsely claiming
amount of earned income
credits; underreporting wa
the tax returns she prepar
conservatively estimated t
States for tax years 2019 a

According to the court's on
post-judgment discovery t
person for whom they and
January 1, 2019, and (2) p
or created over the next five

Deputy Assistant Attorney

Taxpayers seeking a return
its website for choosing a t
10 tips to avoid tax season

In the past decade, the De
preparers. Information ab
enjoined from preparing r
enjoined persons or busin

Topic(s):
Tax

Component(s):
Tax Division

FOR IMMEDIATE RELEASE

Thursday, February 24, 2022

Justice Department Sues to Shut Down Multistate Tax 'Elimination' Scheme Involving Charitable Remainder Annuity Trusts

On Feb. 23, the United States filed a complaint seeking an order prohibiting John Hugo Eickhoff Jr., Rhonda Kaye Eickhoff, Hoffmann Associates LLC, Aric Elliot Schreiner, Columbia CPA Group LLC, John Williams Gray II and Damon Thomas Eisma from organizing, promoting or selling an allegedly unlawful tax scheme involving the use of charitable remainder annuity trusts (CRATs). The government allegations detail the defendants' involvement with at least 70 CRATs, in a scheme that has resulted in an estimated \$40 million of taxable income going unreported and at least \$8 million in tax revenue losses.

According to the complaint filed in the U.S. District Court for the Western District of Missouri, defendants falsely claim that customers following their CRAT scheme can sell property in a way that eliminates the federal tax on the income generated. Specifically, the government alleges that each defendant participates in one or more of the following steps involved in the scheme: (1) convincing customers to contribute property to a CRAT (usually real property that has gained value over time); (2) unlawfully inflating (stepping-up) the cost basis in the property; (3) selling the property to purchase an annuity; and (4) falsely reporting the annuity payments received by the customers as tax-free distributions of income made by the CRAT. The complaint further alleges that the defendants know or have reason to know that their statements to customers about the supposed tax benefits of the transaction they promote are false or fraudulent.

Deputy Assistant Attorney General David A. Hubbert of the Justice Department's Tax Division made the announcement.

The IRS warns taxpayers to be wary of [scams](#) that involve claiming inflated charitable contribution deductions and recommends anyone who may have improperly claimed such deductions to consult a tax professional. Guidelines for valuing and deducting property donations to charity can be found in Publication 526 and Publication 561, available on [IRS.gov](#).

In the past decade, the Tax Division has obtained injunctions against hundreds of tax return preparer and tax fraud promoters. Information about these cases is available on the Justice Department's website. An alphabetical listing of persons enjoined from preparing returns and promoting tax schemes can be found on [this page](#). If you believe that one of the enjoined persons or businesses may be violating an injunction, please [contact](#) the Tax Division with details.

Topic(s):

Tax

Component(s):

Tax Division

Press Release Number:

22-161

Updated February 24, 2022

Friday, April 21, 2023

Contempt

Jr., a Lieutenant firefighter
a preliminary injunction
\$40,000 in return preparer

ordered him to disgorge
ing or assisting in the
paration activities and
tification number. The
rns, including 36 returns

ade the announcement.

reparer should remain
hoosing a tax preparer, has
' tax preparers, whose
remember when filing

ng options on IRS partner
come is over that threshold,
he IRS has tips on how
n preparation, too.

tax preparers. Information
ons enjoined from
e enjoined persons or

United States v. Dennis Evanson, et. al.

Case Study

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THE FED
U.S. DISTRICT COURT

2005CR00805-TC

11/02/2005

CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA)
) No.
 v. Plaintiff,)
)
 DENNIS B. EVANSON) Count 1: 18 U.S.C. § 371
 BRENT H. METCALF) Counts 2 - 27: 26 U.S.C. § 7201
 STEPHEN F. PETERSEN) Counts 28 - 49: 26 U.S.C. § 7206(2)
 REED H. BARKER) 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C.
 WAYNE F. DEMEESTER) § 2461(c) (Forfeiture Allegation)
 GRAHAM R. TAYLOR)
)
 Defendants.)

Judge Tena Campbell
DECK TYPE: Criminal
DATE STAMP: 11/02/2005 @ 10:32:53
CASE NUMBER: 2:05CR00805 TC

THE GRAND JURY CHARGES:

Defendants – All Professionals

- Dennis Evanson: Convicted (10 years in prison)
 - Leader and organizer of scheme;
 - Attorney licensed in CO and Canada
- Brent Metcalf: (plead eve of trial)
 - CPA (expired license) that promoted and solicited clients into scheme;
 - Operated Cottonwood Financial Services, a licensed financial institution used in the scheme and prepared tax returns for clients
- Wayne DeMeester: Acquitted
 - Account Executive at Wachovia Securities ;
 - Assisted clients with moving fictitious stock into IRA
- Stephen Petersen and Reed Barker: (plead eve of trial)
 - CPAs that promoted and solicited clients into scheme;
 - Prepared tax returns for clients
- Graham Taylor: (plead eve of trial)
 - Attorney who provided legal opinions

The Fraud – Novel Charging

- Section 988 Currency Loss;
- Fraudulent Insurance Expense;
- Fraudulent Capital Loss;
- Fraudulent Stock Purchases (Investment Accounts);
- Mortgage Interest Deductions

- RETURN OF \$\$\$ → Loans from Cottonwood Financial, nominee asset purchases, scholarships for their children

Fees → Proceeds → Forfeiture

- Calculate the difference between what the clients would have paid in taxes without the benefit of the transactions and what they paid in taxes after using the program.
 - Fee varied from 10-30% of the tax savings calculated.
 - For each client referred, the fee was split
- Also charged a “participation fee” of not less than \$19,700 and a \$5,000 subscription fee.

WHEREAS, on August 4, 2008, this Court entered a Preliminary Order of Forfeiture, ordering the Defendant to forfeit the



- Money Judgment in the amount of \$2,774,133.04;