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Expert Analysis

'Conscious Avoidance' and Government's Burden of Proving Willfulness

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Most criminal statutes require that the government establish that the defendant acted with a defined mental state, or mens rea. In light of the general rule that ignorance of the law is no defense, mens rea requirements commonly focus on the defendant's knowledge regarding the circumstances surrounding his actions. For example, to prove a defendant guilty of a narcotics offense, the government must prove he knew he was in possession of an illegal substance.[1]

Frequently, jurors in criminal cases are instructed that they can find a defendant had the requisite mental state if he acted with "conscious avoidance" or "willful blindness" to a particular fact. Thus, in a drug case, assuming there is a factual predicate,[2] the jury may be instructed that it can find the defendant acted with the requisite knowledge based on his efforts to avoid learning the illegal nature of the substance in his possession.

The application of the conscious avoidance doctrine in criminal tax cases is complicated by the requirement that the government prove that the defendant voluntarily and intentionally violated a known legal duty.[3] This burden differs from general intent crimes in that it requires the government to prove the defendant knew his conduct was illegal. Two recent cases, one from the U.S. Supreme Court and one from the U.S. Court of Appeals for the Third Circuit, provide a framework for reevaluating the application of the conscious avoidance doctrine in criminal tax cases.

In *Global-Tech Appliances Inc. v. SEB S.A.*,[4] the Supreme Court adopted the willful blindness test for the first time, albeit in a civil patent infringement case. And separately, in *United States v. Stadtmauer*,[5] the Third Circuit rejected a challenge to the willful blindness instruction based on the government's heightened burden in criminal tax cases.

'Conscious Avoidance'

The doctrine of conscious avoidance has been applied by courts to "hold that defendants cannot escape the reach of [criminal statutes that require proof that they acted knowingly or willfully] by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."[6] Thus, where a defendant argues that he was unaware of a specific fact and there is evidence supporting the instruction, the conscious avoidance charge permits a jury to find the defendant acted with the requisite mental state if (1) he "was aware of a high probability" that the fact existed and (2) he "acted with deliberate disregard of the facts," unless (3) it finds the defendant "actually believed" that the fact did not exist.[7] Thus, in a drug case, the government may argue (and the jury may find) that the defendant knew he was in possession of narcotics based on evidence he accepted a container from an individual he knew was involved in narcotics trafficking and that he stored the container in a hidden place.[8]

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'Global-Tech'

While conscious avoidance has long been applied by federal district and circuit courts in criminal cases, the Supreme Court first addressed the doctrine in *Global-Tech*, which it decided this past term. In *Global-Tech*, the jury found the defendant liable for having induced the infringement of plaintiff's patent. The trial court rejected the defendant's post-trial motion to set aside the verdict on the grounds that there was insufficient evidence that it had actual knowledge of the plaintiff's patent. On appeal, the U.S. Court of Appeals for the Federal Circuit also rejected the defendant's argument, concluding that while there was no direct evidence that the defendant actually knew of the plaintiff's patent, there was adequate evidence that the defendant "deliberately disregarded a known risk" that plaintiff had a patent, which the court called "a form of actual knowledge" sufficient to satisfy the statute.

On certiorari, the Supreme Court held that liability for inducing infringement of a patent requires proof that the defendant knew that the induced acts constituted patent infringement.[9] While agreeing with the defendant "that deliberate indifference to a known risk" is not the applicable legal standard, the Court affirmed the Federal Circuit's judgment because the evidence supported a finding of the defendant's knowledge under the doctrine of willful blindness.

Recognizing that it had never specifically approved reliance on willful blindness to justify a finding of knowledge, the Court noted that the concept had been invoked by prosecutors after its 1899 decision in *Spurr v. United States*,[10] in which a bank officer was found to have acted "willfully" in certifying a check drawn against insufficient funds where he purposely kept himself "ignorant" of whether there was sufficient money in the drawer's account. In addition, the Court observed it previously had relied on the Model Penal Code's definition of willful blindness "as a guide in analyzing whether certain statutory presumptions of knowledge comported with due process" and that the doctrine had been "embraced" by every federal circuit court of appeals (with the possible exception of the District of Columbia Circuit) to apply to a wide range of criminal statutes.

Although each circuit had articulated the willful blindness doctrine differently, the Supreme Court found two basic requirements: "(1) the defendant must subjectively believe there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning that fact."[11] Applying this standard, the Court found that the test applied by the Federal Circuit was insufficient because it did not require "active efforts by an inducer to avoid knowing about the infringing nature of the activities."

In its opinion, the Court noted two rationales for the conscious avoidance doctrine. First, that willfully blind defendants are just as culpable as those with actual knowledge; and second, that "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts."[12]

In a lone dissent, Justice Anthony M. Kennedy opined that the majority's conclusion that willful blindness will suffice where knowledge is required is "a mistaken step," noting that "[w]illful blindness is not knowledge; and judges should not broaden a legislative proscription by analogy." Justice Kennedy took issue with the majority's reliance on a "moral theory," explaining that even if a defendant who acted with willful disregard can be characterized as "equally blameworthy" as a defendant who acted with actual knowledge, the consequence for such

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wrongdoing should be determined by the Legislature that drafted the statute requiring knowledge, rather than by courts creating a moral equivalence. Finally, Justice Kennedy expressed concern that the majority's decision effectively endorsed the willful blindness doctrine for all federal criminal cases involving knowledge without any input from the criminal defense bar, "which might have provided important counsel on this difficult issue."

Willful Blindness in Tax Cases

The Supreme Court has held that, in light of the complexity of the criminal tax laws, in order to establish that the defendant acted "willfully," the government must prove: (1) that the law imposed a duty on the defendant; (2) that the defendant specifically knew of this duty; and (3) that he voluntarily and intentionally violated that duty.[13] In *Cheek v. United States*, the Court amplified this requirement, holding that a defendant cannot be convicted if he had a good-faith belief that he was not violating the tax laws because he was ignorant of the law, misunderstood it, or believed that the duty did not exist. This is true "whether or not the claimed belief or misunderstanding is objectively reasonable."[14] The Supreme Court made clear, however, that in determining whether the defendant held his belief in good faith, "the jury would be free to consider any admissible evidence from any source showing that [the defendant] was aware of his duty."[15]

In light of this heightened mens rea requirement, the application of the conscious avoidance doctrine raises unique issues in criminal tax cases. Prior to *Cheek*, the doctrine had been applied to permit a jury to find that the defendant knew of his duties under the tax laws.[16] In this regard, courts have viewed the defendant's knowledge of tax law as "a *fact* to be proved as part of the government's case."[17] A recent case from the Third Circuit illustrates the application of the willful blindness doctrine in a criminal tax case and suggests that little has changed in the wake of *Cheek*.

In *United States v. Stadtmauer*, the defendant Richard Stadtmauer was convicted of willfully aiding in the filing of materially false or fraudulent tax returns for a number of real estate partnerships based on improper and overstated business deductions. To prove these charges, the government was required to show that Mr. Stadtmauer knew that the expenditures at issue were improperly claimed as business expenses, that they were not deductible under the tax laws, and thus that the returns were false and fraudulent.[18]

At trial, the U.S. District Court for the District of New Jersey instructed the jury that the element of knowledge "may be satisfied by inferences drawn from proof that the defendant closed his eyes to what would otherwise have been obvious to the defendant." Accordingly, the jury could find "that the defendant knew that the tax returns at issue were false or fraudulent as to a material fact based on evidence…that proves beyond a reasonable doubt that the defendant was aware of a high probability that the tax returns at issue were false and fraudulent as to a material matter; and two, that defendant consciously and deliberately tried to avoid learning about this fact or circumstance." The trial court further instructed the jury that the element of knowledge could not be satisfied if the defendant "actually believed that the returns did not contain false and fraudulent material items."[19]

On appeal, Mr. Stadtmauer claimed that, under *Cheek*, the government is "categorically and unequivocally require[d]…to prove 'actual knowledge of the pertinent legal duty'" in tax cases and that the district court's willful blindness instruction improperly allowed the jury to treat his "knowledge of the law (e.g., how the Tax Code required a particular expenditure to be recorded on a tax return) the same as it treated his knowledge of the facts (e.g., whether an expenditure reported on the return was [] fabricated)." Asserting that willful blindness falls short of the standard articulated in *Cheek*, Mr. Stadtmauer argued, "[e]ither the defendant knew of the relevant legal duty, or he did not. To say that he remained unaware of the duty, even by conscious effort, is to say that he did not know of the duty."[20]

After finding that the defendant's knowledge of the tax laws is a fact that the government must prove beyond a reasonable doubt,[21] the Third Circuit rejected Mr. Stadtmauer's reliance on *Cheek*, holding that the Supreme Court did not intend to "exempt criminal tax prosecutions from [the] general rule" that willful blindness "cannot become a safe harbor for culpable conduct."[22] The Third Circuit reached this conclusion even though *Cheek* did not address the propriety of a willful blindness instruction and the Supreme Court had not specifically upheld the doctrine at the time of the *Stadtmauer* decision.[23]

While the Third Circuit in 'Stadtmauer' concluded that the government can rely on willful blindness to satisfy its heightened burden of demonstrating the requisite mens rea in criminal tax cases, defense counsel will almost certainly continue to challenge the application of the conscious avoidance charge in criminal tax cases in the hopes that the Supreme Court addresses the issue.

Moreover, the Third Circuit distinguished the defendant in *Cheek*—who stopped filing federal income tax returns based on his purportedly sincere belief that the tax laws were unconstitutional and that his actions were lawful—from an individual who deliberately avoids learning of a legal duty. The Third Circuit found that "[b]y definition, one who *intentionally* avoids learning of his tax obligations is not a taxpayer who 'earnestly wish[es] to follow the law,' or fails to do so as a result of an 'innocent error[] made despite the exercise of reasonable care.'"[24]

The Third Circuit followed the lead of several other circuit courts of appeals,[25] concluding that allowing the jury to infer a defendant's knowledge of tax law through evidence of willful blindness "does not run afoul of *Cheek*" because *Cheek* counsels that a belief that one is complying with the tax laws must be held in "good faith," even if objectively unreasonable. "[A] person who deliberately evades learning his legal duties has a subjectively culpable state of mind that goes beyond mere negligence, a good-faith misunderstanding, or even recklessness."[26]

Conclusion

In his *Global-Tech* dissent, Justice Kennedy focused on both the absence of congressional authority for substituting a defendant's actual knowledge of his legal obligations with evidence of other "equally blameworthy mental states," and the danger of addressing criminal law issues in civil patent cases. While the Third Circuit in *Stadtmauer* concluded that the government can rely on willful blindness to satisfy its heightened burden of demonstrating the requisite mens rea in criminal tax cases, defense counsel will almost certainly continue to challenge the application of the conscious avoidance charge in criminal tax cases in the hopes that the Supreme Court addresses the issue.

1. *United States v. Abreu*, 342 F.3d 183, 187-88 (2d Cir. 2003).
2. See Elkan Abramowitz and Barry A. Bohrer, "Conscious Avoidance: A Substitute for Actual Knowledge?" New York Law Journal (May 1, 2007) (discussing ways in which government can demonstrate a factual predicate for conscious avoidance charge).
3. *Cheek v. United States*, 498 U.S. 192, 199-200 (1991).
4. 131 S. Ct. 2060 (2011).
5. 620 F.3d 238 (3d Cir. 2010).
6. 131 S. Ct. at 2068-69.
7. Sand, Modern Federal Jury Instruction-Criminal, P 3A.01, Instruction 3A-2.
8. *Abreu*, 342 F.3d at 188.
9. 131 S. Ct. at 2068.
10. 174 U.S. 728 (1899).
11. 131 S. Ct. at 2070.
12. Id. at 2069.
13. 498 U.S. at 201.
14. Id. at 202.
15. Id.
16. See, e.g., *United States v. Hogan*, 861 F.2d 312 (1st Cir. 1988) (willful blindness instruction permitted to show defendant "was aware of his responsibility to pay taxes and consciously avoided knowledge of his tax liability"); *United States v. MacKenzie*, 777 F.2d 811 (2d Cir. 1985) (willful blindness instruction proper to show company executive and general manager had knowledge of the fact that their employees were employees and not independent contractors; from this, knowledge of legal duty to withhold taxes from money paid to employees could be inferred).
17. *United States v. Schiff*, 801 F.2d 108, 113 (2d Cir. 1986) (emphasis in original) (citing *United States v. Pomponio*, 429 U.S. 10, 12 (1976)).
18. 620 F.3d at 254.
19. Transcript of Proceedings, *United States v. Stadtmauer*, No. 2-050cr-249-3, at 30:77, line 15 - 30:78, line 15 (D.N.J. May 27, 2008). See also *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (Second Circuit conscious avoidance charge contains actual belief exception).
20. Brief for Appellant, *United States v. Stadtmauer*, No. 09-1575 (3rd Cir. May 20, 2009).
21. 620 F.3d at 254.
22. 620 F.3d at 255-56.
23. The Third Circuit relied on the U.S. Court of Appeals for the Eleventh Circuit's decision in *United States v. Dean* in reaching this conclusion. In *Dean*, the Eleventh Circuit opined that the Supreme Court "indicated in *Cheek*, albeit, not in so many words [that] the law would not countenance [willful] blindness." 487 F.3d 840, 851 (11th Cir. 2007). Specifically, the Eleventh Circuit referred to the Supreme Court's statement in *Cheek* that, "We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions." *Cheek*, 498 U.S. at 206.
24. 620 F.3d at 256 (emphasis in original) (citing *Cheek*, 498 U.S. at 205 (internal quotations and citations omitted)).
25. The First, Eighth, and Eleventh circuits have specifically upheld the application of a willful blindness instruction post-*Cheek*. See *United States v. Anthony*, 545 F.3d 60 (1st Cir. 2008); *Dean*, 487 F.3d 840 (11th Cir. 2007); *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991). Two other federal circuits, the Fifth and Seventh, have approved the willful blindness instruction in tax evasion cases since *Cheek*, without specific reference to the Supreme Court's decision. See *United States v. Hauert*, 40 F.3d 197 (7th Cir. 1994); *United States v. Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994).
26. 620 F.3d at 256.