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Expert Analysis

TAX LITIGATION ISSUES

Supreme Court Clarifies Collateral Consequences of Tax Convictions

In *Padilla v. Kentucky*,[1] the U.S. Supreme Court held that competent criminal defense lawyers must advise their clients of the immigration consequences of pleading guilty, and that a lawyer who fails to explain the risk of deportation associated with a proposed guilty plea has not provided "reasonable professional assistance" to his client. On Feb. 21, 2012, the Supreme Court decided *Kawashima v. Holder*,[2] which resolved a circuit split and held that a conviction for filing a false tax return is a deportable offense. While *Kawashima* removes much of the guesswork from advising an alien client of the collateral consequences of a tax conviction, clients are unlikely to appreciate the clear answer their lawyers will now be able to provide.

By **Jeremy H. Temkin**

Background

Akio and Fusako Kawashima were Japanese citizens and lawful resident aliens of the United States. In 1997, Mr. Kawashima pled guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C. §7206(1), and Mrs. Kawashima pled guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. §7206(2).[3] Four years later, in 2001, the Immigration and Naturalization Service issued Notices to Appear alleging that the Kawashimas were removable because their prior convictions constituted aggravated felonies. After a hearing, an immigration judge agreed and ordered that they be removed to Japan. The Board of Immigration Appeals ultimately affirmed the immigration judge's decision. The Kawashimas timely filed separate petitions for review, which the U.S. Court of Appeals for the Ninth Circuit consolidated.[4]

By statute, an alien convicted of an "aggravated felony" is deportable.[5] In 1994, Congress expanded the definition of an "aggravated felony" to include a laundry list of criminal conduct. Among the offenses added to §1101(a)(43) of Title 8 was subparagraph (M), which expanded the definition of "aggravated felony" to include:

an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

While subparagraph (M)(ii) ("Clause (ii)") clearly encompasses the offense of tax evasion, it was less clear whether other tax crimes were deportable offenses under subparagraph (M)(i) ("Clause (i)"). Agreeing with the U.S. Court of Appeals for the Fifth Circuit, and disagreeing with the U.S. Court of Appeals for the Third Circuit, the Ninth Circuit held that Clause (i) unambiguously applies to tax offenses—such as subscribing to false returns and aiding and assisting in the preparation of false returns—that involve fraud and deceit.[6] Last May, the Supreme Court granted cert in *Kawashima* to resolve the conflict between the Third and Ninth circuits.

Majority Opinion

Before the Supreme Court, the Kawashimas argued both that violations of §§7206(1) and (2) "do not 'involv[e] fraud or deceit' as required by Clause (i)," and "that their convictions under §7206 are not 'aggravated felonies' because tax crimes are not included within Clause (i) at all."[7] Writing for the majority, which included Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Samuel Alito and Sonia Sotomayor, Justice Clarence Thomas rejected both arguments.

First, Justice Thomas noted that "[t]o determine whether [§§7206(1) and (2)] 'involv[e] fraud or deceit' within the meaning of Clause (i)," the Court applies "a categorical approach by looking to the statute defining the crime of conviction, rather than the specific facts underlying the crime." Justice Thomas then reviewed the elements of both §7206(1) and §7206(2), noting that neither statute included the words "fraud" and "deceit" and neither requires the government to establish either fraud or deceit as an element of the offense.

Justice Thomas noted, however, that §7206(1) requires a showing that the defendant willfully made materially false statements, and §7206(2) requires that the defendant act willfully in aiding and assisting in the filing of a document that was false as to a material matter. The Court had little difficulty concluding that acting willfully in connection with the submission of a materially false return involved "deceit" for purposes of Clause (i).[8]

> The Supreme Court decision in 'Kawashima v. Holder' resolved a circuit split and held that a conviction for filing a false tax return is a deportable offense.

Having determined that the offenses in question satisfied Clause (i)'s "fraud or deceit" requirement, Justice Thomas next turned to the interplay between Clause (i), which applies generally to offenses involving fraud or deceit, and Clause (ii), which is limited to the offense of tax evasion. Specifically, the Kawashimas argued that, reading the two clauses together, it is clear that Congress intended to limit Clause (i) to "general, non-tax crimes involving fraud or deceit that causes actual losses to real victims," while Clause (ii) would cover "tax crimes involving revenue losses to the Government."[9]

Justice Thomas rejected the Kawashimas' attempt to draw significance from the distinction between "loss to the victim" referenced in Clause (i) and "revenue loss to the Government" implicated in Clause (ii). Rather, he noted that Clause (i) was expressly limited to tax evasion in violation of 26 U.S.C. §7601, which can only result in "revenue loss to the Government." Justice Thomas concluded

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that "Congress' decision to tailor Clause (ii)'s language to match the sole type of offense covered by Clause (ii) does not demonstrate that Congress also intended to implicitly circumscribe the broad scope of Clause (i)'s plain language."[10]

Next, Justice Thomas addressed the Kawashimas' reliance on the "presumption against superfluities" canon of statutory construction. Based on Clause (ii)'s explicit reference to tax evasion causing a revenue loss of at least $10,000, the Kawashimas argued that, "if Clause (i) covers tax offenses, then Clause (ii) is mere surplusage" since "qualifying convictions for tax evasion under Clause (ii) would also qualify as aggravated felonies under Clause (i), because tax evasion is a crime involving fraud or deceit." Rejecting this argument, Justice Thomas attributed the overlap between Clause (i)'s application to tax offenses generally and Clause (ii)'s specific application to tax evasion to Congress' desire "to remove any doubt that tax evasion qualifies as an aggravated felony."[11]

In reaching this conclusion, Justice Thomas noted that "fraud" and "deceit" are neither mentioned in §7201 nor elements of the offense. Relying on *United States v. Scharton*,[12] a 1932 case addressing the applicable statute of limitations, Justice Thomas noted that it is theoretically possible to commit the offense of tax evasion without making a misrepresentation. Thus, the Court "conclude[d] that the specific inclusion of tax evasion in Clause (ii) was intended to ensure that tax evasion pursuant to §7201 was a deportable offense. Clause (ii) does not implicitly remove all other tax offenses from the scope of Clause (i)'s plain language."[13]

Finally, the Kawashimas argued that, before Congress included subparagraph (M) in the list of aggravated felonies, the Sentencing Commission had drawn a distinction between "offenses involving fraud or deceit" and "offenses involving taxation." Based on this historical fact, the Kawashimas claimed that Congress had intended to adopt the Sentencing Commission's distinction between general fraud crimes (covered in both former §2F1.1 of the Guidelines and Clause (i)) and tax offenses (covered in §2T1.1 of the Guidelines and limited to tax evasion in Clause (ii)). Rejecting this argument, Justice Thomas noted that Clause (ii) "does not refer to all offenses 'involving taxation, but rather is limited to tax evasion under §7201'"[14]

The Dissenting Opinion

Writing a dissent joined by Justices Stephen Breyer and Elena Kagan, Justice Ruth Bader Ginsburg noted that "[i]f the two proffered constructions of subparagraph (M) are plausible in roughly equal measure," the Court should "construe the statute in the Kawashimas' favor."[15] Justice Ginsburg then analyzed the two clauses of subparagraph (M), noting that "[i]f Clause (i) is construed to apply to tax crimes, then Clause (ii)'s discrete inclusion of tax evasion would add nothing, for tax evasion is itself an offense that, in all actual instances of which the Government is aware, 'involves fraud or deceit.'"[16]

Referring to tax evasion as the "capstone" of a wide range of criminal tax offenses, Justice Ginsburg found it "understandable that Congress would single out tax evasion, as it did in Clause (ii), specifically designating it, and no other tax crime, an 'aggravated felony' for deportation purposes." Justice Ginsburg then derided the majority's reliance on *Scharton*, which she described as "long-obsolete" and "a cryptic, thinly reasoned opinion, one that did not influence subsequent federal-court description of the crime of tax evasion." According to Justice Ginsburg, "[t]he suggestion that Congress may have worried about *Scharton* when framing legislation over 60 years later is hardly credible."[17]

Justice Ginsburg next disagreed with the majority's suggestion that tax evasion, specifically evasion of payment, can be committed without fraud or deceit, describing such a scenario as "imaginary." Justice Ginsburg concluded her analysis of the canon that statutes should be construed to avoid superfluity by noting that "Congress' aim in drafting §1101(a)(43) was to determine which crimes are sufficiently serious to warrant the 'drastic measure' of deportation, and which are not," adding that the most likely scenario is that "Congress did not intend to include tax offenses in [Clause (i)], but instead drafted that provision to address fraudulent schemes against private victims, then added [Clause (ii)] so that the 'capstone' tax offense against the Government also qualified as an aggravated felony."[18]

Justice Ginsburg added that the Court's interpretation of Clause (i) as covering tax offenses other than evasion would subject aliens convicted of a wide range of tax crimes to deportation. Significantly, according to Justice Ginsburg, under the Court's interpretation of Clause (i), even violations of tax laws that qualify as misdemeanors under state and federal law could qualify as "aggravated felon[ies]."[19] While the suggestion that a misdemeanor can qualify as an "aggravated felony" seems counter-intuitive, unlike several subparagraphs of §1101(a)(43) that refer to specific statutes or threshold periods of imprisonment, Clause (i) applies to all offenses involving fraud and deceit resulting in the loss of $10,000 or more; it is not limited to offenses punishable by more than one year in prison.

Finally, Justice Ginsburg noted that expansion of Clause (i) to include tax offenses other than tax evasion, will complicate plea discussions in criminal tax cases involving aliens. Recognizing the significance of immigration consequences to defendants contemplating pleading guilty, Justice Ginsburg noted that, "[i]f a §7206 charge carries the same prospect of deportation as a §7201 charge, then an alien's incentive to plead guilty to any tax offense is significantly reduced."[20]

Conclusion

While the correct interpretation of Clause (i) may have been subject to legitimate debate before *Kawashima*, regardless of whether one agrees with the majority's resolution of that debate, the Supreme Court has spoken. Under *Padilla*, defense lawyers negotiating plea agreements in state and federal criminal tax cases must advise their alien-clients of the immigration consequences of the proposed guilty plea. It is, however, doubtful that defendants will view the increased clarity provided by *Kawashima* as a good thing and it remains to be seen whether, as Justice Ginsburg predicts, the harsh collateral consequences of pleading guilty to even reduced charges will make it more difficult to resolve tax cases without trial.

1. 130 S. Ct. 1473 (2010).
2. 2012 WL 58277 (2012).
3. The facts underlying the Kawashimas' convictions are not set forth in either the Ninth Circuit or the Supreme Court decisions.
4. Kawashima v. Holder, 615 F.3d 1043, 1051-52 (9th Cir. 2010).
5. See 8 U. S. C. §1227(a)(2)(A)(iii).
6. Kawashima, 615 F.3d at 1054; see Brackney, "Between a Rock and a Hard Place, Immigration Consequences of a Criminal Tax Conviction," Criminal Justice at 11, 13-14 (Fall 2010) (discussing Ki Se Lee v. Ashcroft, 368 F.3d 218 (3d Cir. 2004), Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. 2009), and Kawashima).
*7. 2012 WL 58277, *4.*
*8. Id. at *4-5.*
*9. Id. at *5.*
*10. Id. at *6.*
11. Id.
12. 285 U.S. 518 (1932).
*13. Kawashima, 2012 WL 58277, *6-7.*
*14. Id. at *7.*
*15. Id. at *9 (Ginsburg, J., dissenting).*
16. Id.
*17. Id. at *10-11.*
*18. Id. at *12.*
19. Id.
20. Id.