

TAX LITIGATION ISSUES

Expert Analysis

Financial Considerations for Sentencing in Federal Tax Prosecutions

In addition to time in prison, defendants convicted of financial crimes in federal court are usually subject to fines and restitution. While the focus of most sentencing hearings is the length of any period of incarceration to be imposed, defense counsel need to consider and address the potentially substantial monetary penalties that can apply. Last month, the U.S. Court of Appeals for the Second Circuit decided *United States v. Adams*, 955 F.3d 238 (2020), which addressed not just the calculation of tax loss for purposes of the U.S. Sentencing Guidelines, but also the availability and extent of restitution orders and fines. As such, *Adams* is an important reminder of the wide range of issues affecting criminal tax defendants at sentencing.

JEREMY H. TEMKIN is a principal in Morvillo Abramowitz Grand Iason & Anello P.C. DEVIN CAIN, counsel at the firm, assisted in the preparation of this article.

By
Jeremy H.
Temkin



'United States v. Adams'

In October 2017, David Adams pled guilty to a six-count indictment that charged him with three counts of subscribing false tax returns in violation of 26 U.S.C. §7206(1); two counts of tax evasion in violation of 26 U.S.C. §7201; and one count of attempting to interfere with the administration of the internal revenue laws in violation of 26 U.S.C. §7212(a). These charges arose out of a 14-year-long “concerted campaign to obstruct the IRS’s efforts to collect his delinquent tax payments and secure overdue tax returns.” After the Probation Department for the District of Connecticut calculated the total tax loss to be approximately \$4.87 million, the Honorable Vanessa L. Bryant sentenced Adams principally to 90 months’

imprisonment and the full amount of the loss (\$4.87 million) in restitution payable to the IRS.

On appeal to the Second Circuit, Adams argued that the district court erred by including accrued interest and penalties in the tax loss for purposes of computing the applicable sentencing guidelines. As relevant, the commen-

‘Adams’ is an important reminder of the wide range of issues affecting criminal tax defendants at sentencing.

tary to §2T1.1 of the Sentencing Guidelines provides that the “tax loss” for Guidelines purposes “does not include interest or penalties, except in willful evasion or payment cases under 26 U.S.C. §7201 and willful failure to pay cases under 26 U.S.C. §7203.” Considering the question to be one of first impression, the Second Circuit looked to the Seventh Circuit’s decision in *United States v. Black*, 815 F.3d 1048 (2016), which

held that interest and penalties could be considered where “the object of the offense is to avoid the tax, penalties, and interest.”

Applying the logic in *Black*, the Second Circuit held that “the exception permitting interest and penalties to be included in the tax loss calculation” for cases involving evasion of payment or failure to pay “can be applied based on uncharged relevant conduct constituting violations of those statutes.” By focusing on the defendant’s conduct, which included lying to and manipulating his accountant, filing extension requests with false information, falsely claiming to have made payments and fraudulently claiming financial distress, the court of appeals refused to apply a narrow distinction between whether the defendant attempted to evade assessment or payment (which Adams had advocated) and instead referred to evasion more broadly.

Restitution in Tax Cases

In challenging the restitution portion of his sentence, Adams first argued that restitution is permissible only where authorized by statute and that the restitution provisions of 18 U.S.C. §§3663 and 3663A do not apply to offenses under Title 26. In that regard, the Second Circuit agreed that the district court had exceeded its authority in ordering that the restitution

start “immediately.” However, noting that it had “repeatedly held that district courts may impose restitution in Title 26 cases as a condition of supervised release” pursuant to 18 U.S.C. §3583(d), the court modified Adams’ judgment so that his restitution obligation would begin upon release from custody.

Adams next challenged the extent of the restitution order, which included tax liabilities for years outside of the specific counts charged in the indictment, claiming both that he had not been alerted to the scope of the potential restitution order at

Although not at issue in ‘Adams,’ counsel should be aware that 26 U.S.C. §6201(a)(4) authorizes the IRS to assess and collect restitution ordered pursuant to 18 U.S.C. §3556 as tax.

the time of his guilty plea and that restitution should be “limited by the loss charged in the count of conviction.” The court rejected the first argument noting that Adams had not objected to the restitution order in a timely fashion and had failed to demonstrate that he was entitled to relief under the plain error test. Because Adams’ obstructive conduct impacted otherwise uncharged years, the court of appeals also held that the district court appropriately ordered restitution for the full amount of the IRS’s losses.

Although not at issue in *Adams*, counsel should be aware that 26

U.S.C. §6201(a)(4) authorizes the IRS to assess and collect restitution ordered pursuant to 18 U.S.C. §3556 as tax. While §6201(a)(4), on its face, does not encompass restitution ordered as a condition of supervised release, the Tax Court has thus far failed to distinguish between orders of restitution pursuant to §3556 and restitution imposed as a condition of supervised release pursuant to §3583(d). See, e.g., *Carpenter v. Commissioner*, 152 T.C. 202 (2019).

Maximum Statutory Fines for Violations of Title 26

Adams separately argued that he should be allowed to withdraw his guilty plea because, in connection with his plea allocution, the government had improperly stated that he faced a maximum fine under Title 26 of the greater of twice the gross gain, twice the gross loss or \$100,000, as opposed to the greater of twice the gross gain, twice the gross loss or \$250,000 as set forth in 18 U.S.C. §3571. The court concluded that because Adams was told that the IRS’s loss exceeded \$4.7 million any error was meaningless.

Left unaddressed in *Adams* is whether fines in criminal tax cases are governed by the provisions of Title 26, which only apply to tax cases, or Title 18, which governs criminal cases generally. The answer is found in 18 U.S.C. §3571(e), which specifies that a statutory provision that fixes a fine below the level set forth in §3571 will only apply where

the statute specifically “exempts the offense from the applicability of the fine otherwise applicable under this section.” In other words, because neither §7201 nor §7206 expressly precludes application of Title 18’s fine provision, the \$250,000 maximum fine applies unless it is less than the alternative fine of twice the gross gain or twice the gross loss attributable to the defendant’s conduct. *See United States v. Stanley*, No. 15-cr-271, 2016 WL 1417883 (W.D. Mo. Feb. 2, 2016); *United States v. Marron*, No. 93-cr-90, 1996 WL 677511 (E.D. Pa. Nov. 22, 1996).

What Findings Are Necessary To Impose an Alternative Fine?

As noted above, when he entered his guilty plea, Adams was advised of the alternative fine provision set forth in §3571(d). *Adams*, however, did not have occasion to address what standard should be applied by a court invoking that provision.

In *United States v. Zukerman*, 710 F. App’x 499 (2d Cir. 2018), the defendant pled guilty to one count of tax evasion and one count of corruptly obstructing the administration of the internal revenue laws. At sentencing, the Honorable Analisa Torres of the U.S. District Court for the Southern District of New York imposed a 70-month period of incarceration and ordered Zukerman to pay \$37.5 million in restitution and a \$10 million fine.

Zukerman, whose plea agreement permitted him to appeal a

sentence imposing a fine above the Guidelines range of \$25,000 to \$250,000, sought relief from the Second Circuit. After noting that tax offenses are “‘reviewed especially deferentially’ to allow for sentencing disparities ‘based on the factors identified in [18 U.S.C.] §3553(a),” the court of appeals acknowledged that the district court had “endeavored to explain its reasoning orally at the sentencing hearing and in its written statement of reasons,” but concluded that the record remained “unclear as to why and how it settled on \$10 million as the fine amount.” Recognizing that no precise standards exist to assess a district court’s non-Guidelines sentence, the court remanded the case to allow the district court to explain the sentence sufficiently to allow appellate review.

Judge Torres subsequently issued a 16-page Supplemental Memorandum that cited a variety of aggravating factors that she believed warranted the fine, including the fact that Zukerman had previously been investigated for tax fraud and had been able to avoid prosecution in that case by paying a six-figure fine. Judge Torres further explained that the \$10 million fine reflected the difference between the total tax loss (\$45 million) and the amount of restitution ordered (\$37.5 million) with potential accumulated interest. Finally, the court noted that Zukerman had the wherewithal to

pay the fine given his substantial personal wealth and had paid the restitution with corporate funds.

In *United States v. Zukerman*, 897 F.3d 423 (2d Cir. 2018), the Second Circuit affirmed the fine, noting that, in light of the \$45 million tax loss, §3571(d) authorized a fine “far larger than what was actually imposed.” It then reviewed each of the reasons provided by the district court and, after warning against “[f]ocusing on each facet of the district court’s reasoning individually,” concluded that they were sufficient in their totality.

Conclusion

Defendants charged with tax offenses face a series of potential financial penalties at sentencing. On their face, the relevant provisions of Title 26 and the Sentencing Guidelines appear relatively favorable to tax defendants. *Adams*, however, cautions that those apparent advantages will often prove of little benefit. While defense counsel frequently have to “pick their battles” at sentencing, they need to be aware of and address the financial penalties that can be imposed, and not focus solely on the period of incarceration.