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TAX LITIGATION ISSUES

Establishing a 'Cheek' Defense Through Expert Testimony

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To obtain a conviction on criminal tax charges, the government must prove the defendant acted "willfully." In *Cheek v. United States*, 498 U.S. 192 (1991), the Supreme Court held that to satisfy this burden the government must "prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Over the past 30 years, defendants have sought to negate the government's evidence of willfulness both through their own testimony and by presenting other evidence that they held a good faith belief that their conduct was lawful.

Courts have recognized that, where willfulness forms a critical component of the defense, defendants are entitled to wide latitude in introducing evidence showing their lack of criminal intent. See *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979). In practice, however, defendants have struggled to present expert testimony as part of a *Cheek* defense. This column analyzes recent Circuit Court decisions rejecting claims that defendants were improperly deprived of their ability to present a *Cheek* defense through expert testimony.

'Cheek v. United States'

In *Cheek*, the defendant, John Cheek, admitted that he stopped filing income tax returns and took various steps to avoid having any taxes withheld from his salary but testified that he did so based on his understanding that the federal income tax laws were invalid. Cheek claimed he developed that understanding by attending a series of seminars that included speeches by lawyers, and he produced a letter from an attorney opining that the Sixteenth Amendment did not authorize taxation of wages.

The district court instructed the jury that "an objectively reasonable good-faith misunderstanding of the law would negate willfulness," but that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense."

After the U.S. Court of Appeals for the Seventh Circuit affirmed the ensuing conviction, the Supreme Court reversed, holding that the government must "negat[e] a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." As framed by the court, "the issue is whether, based on all the evidence, the government has proved that the defendant was aware

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of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable."

The court added that while a district court could "exclude evidence having no relevance or probative value with respect to willfulness," it added that "it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision."

While the defendant in *Cheek* was able to testify to the bona fides of his belief that his income was not subject to taxation, many defendants are unable to testify, and defense counsel frequently need to rely on cross-examination of the government's witnesses to lay a factual predicate for arguing that the government failed to prove the element of willfulness. Over the years, defendants have also sought to present expert testimony to bolster defenses predicated on their lack of willfulness.

'United States v. Herman'

In 2019, Michael and Cynthia Herman were charged with having conspired to defraud the United States and filing false tax returns. The indictment alleged that the Hermans had failed to report $570,000 in cash receipts from three restaurants they owned and had improperly deducted approximately $94,000 in personal expenses that had been paid by the businesses.

Neither of the Hermans testified at trial, but they sought to call an accounting expert to testify that the accountant who had prepared their returns had overstated actual gross receipts for two of the Hermans' restaurants by $409,000 and that he had identified additional business expenses (also totaling approximately $94,000) that the Hermans paid from their personal accounts. The district court excluded the expert's testimony, concluding it was irrelevant and would confuse the jury.

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On appeal, Cynthia Herman argued that the exclusion of the expert's testimony deprived her of the ability to present evidence of her mental state and that the proffered evidence would have enabled the jury to conclude that she had not willfully violated tax laws but instead was just bad at bookkeeping. In *United States v. Herman*, 997 F.3d 251 (5th Cir. 2021), the U.S. Court of Appeals for the Fifth Circuit affirmed the conviction.

The court first addressed the expert's proffered testimony regarding the accountant's error in overstating the businesses' gross receipts, concluding that it was "unrelated to the Hermans' failure to fully disclose their cash receipts" and therefore would not have been probative as to either defendants' intent. Conceding that evidence that the Hermans had paid business expenses with personal funds appeared to be related to the government's allegation that they had improperly deducted personal expenses paid for with business funds, the court acknowledged that the jury could have plausibly inferred from the expert's testimony that the defendants were sloppy bookkeepers, an inference that would tend to negate willfulness for the false return charges.

While noting that *Cheek* "lends some credence" to this argument, the Fifth Circuit ultimately found that "*Cheek* is not on point because the Hermans are not claiming ignorance of the tax laws but rather that they made many mistakes in their efforts to comply with the tax law." Based on this distinction, the court deferred to the district judge's determination that the probative value of the expert's testimony would have been substantially outweighed by the risk of jury confusion.

'United States v. Prezioso'

A defense based on lack of willfulness can intersect with an argument that a defendant relied on the advice of his accountants. In *United States v. Prezioso*, 782 Fed. Appx. 586 (9th Cir. 2019), the defendant was charged

with filing false tax returns predicated on his having improperly deducted personal expenses that he paid through his business. At trial, Walter Prezioso claimed that the omissions on his tax returns were not willful because he relied on the advice of his accountants, who had access to the company's books and knew the business paid his personal expenses. The government, however, disputed the adequacy of Prezioso's disclosures to his accountants, alleging that Prezioso had concealed the true nature and extent of these expenses and failed to disclose to his accountants that the company-paid expenses were not included in his W-2 income.

To bolster his advice-of-accountant defense, Prezioso sought to call an expert to testify that a client's disclosure that his company was paying personal expenses would have triggered a competent accountant to investigate whether those payments were properly reported to the IRS. In an unpublished opinion, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's exclusion of the expert testimony, concluding that the conduct of the defendant's accountants "ha[d] no bearing on" the defendant's willfulness.

The court also affirmed the district court's jury charge regarding Prezioso's advice-of-accountant defense, which instructed the jurors that "[u]nlawful intent has not been proved if the defendant, before acting, made full disclosure of all material facts to an accountant, received the accountant's advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith." In doing so, the court rejected Prezioso's argument that, under *Cheek*, the instruction should have included a caveat "that an incomplete disclosure to an accountant is sufficient if made in good faith."

'United States v. Davis'

Finally, in *United States v. Davis*, 863 F.3d 894 (D.C. Cir. 2017), a return preparer was charged with offenses relating to her preparation of numerous returns with invented or exaggerated charitable contributions or business losses. Prior to trial, Sherri Davis proffered the testimony of a forensic psychiatrist who testified at an evidentiary hearing that Davis suffered from ADHD and opined that people with ADHD are easily distracted and error prone. The expert, however, lacked knowledge of Davis's tax preparation business, routine job responsibilities, or even the charged crimes and thus could not link her ADHD to the conduct at issue (i.e., making up deductions out of whole cloth). Under the circumstances, the district court concluded that the testimony would present "theories of defense more akin to justification," without constituting a defense with respect to her mens rea.

Defendants in criminal tax cases face an uphill battle to present evidence supporting a 'Cheek' defense. Given that not every defendant can testify on her own behalf, practitioners need to identify alternative ways of persuasively challenging the government's evidence of willfulness.

On appeal, the U.S. Court of Appeals for the D.C. Circuit rejected the defendant's challenge to the district court's exclusion of the expert testimony, which she claimed undermined her ability to demonstrate her lack of willfulness. The court affirmed the district court's ruling, taking pains to note that the expert had testified during a pretrial hearing that individuals suffering from ADHD "often are prevaricators" or "liars," thus raising the specter of whether the testimony would have furthered any bona fide defense.

Conclusion

Defendants in criminal tax cases face an uphill battle to present evidence supporting a *Cheek* defense. Given that not every defendant can testify on her own behalf, practitioners need to identify alternative ways of persuasively challenging the government's evidence of willfulness. While there may be circumstances in which this can be done through expert testimony, the case law makes clear that establishing a lack of willfulness through expert requires establishing a direct link between the proffered testimony and the defendant's state of mind.