Columns

The uneven playing field in criminal tax cases

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by Neal Nusholtz | Michigan Bar Journal

Reuben G. Lenske was an attorney in Portland, Oregon, convicted in a 1963 bench trial for tax evasion for the years 1955, 1957, and 1958. The criminal tax investigation of Lenske started in May 1959. Lenske's conviction was reversed by the U.S Court of Appeals for the Ninth Circuit essentially because the court thought his trial was unfair.[1]

In his indictment, Lenske was alleged to have owed as much as 27 times more than the amounts that he was proven at trial to have owed:

YEAR	AMOUNT ALLEGED PER INDICTMENT	AMOUNT PROVEN AT TRIAL
1955	$11,465.74	$414.78
1957	$19,412.88	$1,006.18
1958	$7,746.85	$2,682.99

HIDE AND SEEK

During his criminal investigation, Lenske handed over all the documents or files requested by the special agent and allowed those records to be examined at his law office. To prevent Lenske from knowing which evidence might be used against him, the special agent would secrete papers in his briefcase, photocopy them elsewhere, and return the documents after lunch or the next morning. In its majority opinion, the Ninth Circuit thought the government had blindsided and overwhelmed Lenske:

> The evidence related to some 90 properties, numerous business transactions, of which the record does not indicate the number, and "thousands, thousands" of documents. … The indictment gave no information as to which of his 90 properties, his numerous transactions, his thousands of documents, would be involved in the trial of the case. He knew that the Government had copies of all of his records and documents, because he had given them to the Government's agents. He knew that they had

been studying them for two and one-half years. But even if he, like them, had had at his disposal all the resources of the United States, its Federal Bureau of Investigation and other investigating agencies, he could not have sought out and interviewed all the potential witnesses to all of his activities, to determine from which direction the attack would come, and then prepare his evidence to meet the attack. It would tax the imagination to conjure up a more frightening and frustrating situation than that in which his government has placed this citizen.[2] (The district court had denied Lenske's motion for a bill of particulars.)

TESTIMONY OF A FED.R.EVID. 1006 SUMMARY WITNESS

The *Lenske* court thought the proceeding was unfair because it placed a large burden of proof on the defendant to disprove every single allegation of fraud or be found guilty:

> It may be asked what harm is done … putting everything into a chart showing increased net worth and having the Special Agent testify that it was prepared under his supervision and is right. There is still opportunity for cross examination and for witnesses for the defense.
>
> What is wrong … is that such a process is outrageously unfair. The Government uses its resources, here for two and one-half years, to build up its case and its charts. It then gets its indictment. The taxpayer still has no notice of wherein he is charged with criminal conduct. …
>
> [T]he Government has not assumed the burden of proving, beyond a reasonable doubt, that he is guilty. It has assumed only the burden, with its unlimited resources and time, of preparing a mass of documentary evidence and charts incomprehensible to a layman, all prepared by the Government itself, and saying to the taxpayer, "Your task is to prove that all of what is contained in the charts is false, not merely that it is 96% false, but that it is all false. You do not have the time nor the resources that the Government had, but that is your misfortune."[3]

The *Lenske* case was a net worth case where income is deduced by examining the expenditures of the defendant and comparing the total expenditures to the amount reported on the tax return. Net worth proofs can cause a shifting of the burden of proof to a defendant on the factual question of whether expenditures were made from non-taxable funds. To prevent that shifting of the burden of proof, the government under *U.S. v. Holland* is required to investigate leads furnished by a taxpayer that are "reasonably susceptible of being checked, [and] which, if true, would establish the taxpayer's innocence."[4] The Ninth Circuit complained that the government had no obligation to furnish Lenske with evidence discovered by the government that would have been helpful to his case.[5] Lenske's trial had preceded the decision in *Brady v. Maryland*, which required government production of exculpatory evidence.[6]

The special agent's report to his superiors recommending Lenske's prosecution for tax evasion said that the Portland Police Department and the Portland FBI office believed Lenske was a communist and he wanted to form a local chapter of the Lawyer's Guild, a national organization of left-wing attorneys. The report included a copy of Lenske's letter to a newspaper condemning U.S. policy in Cuba, Laos, and China.

The Ninth Circuit reversed Lenske's conviction, explaining why in an unpublished opinion under the heading "Witch-Hunt":

> This court will not place its stamp of approval upon a witch-hunt, a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. This court will not be so used.[7]

On motion for reconsideration, the unpublished opinion was withdrawn, revised, and later published.[8] In the published opinion, citing the "witch hunt" as reason for reversal was replaced with a reversal due to the uncertain manipulation of depreciation.[9]

Getting a conviction reversed based on the motives of the investigator is probably limited to situations where the playing field at trial is so uneven that those motives become a controlling factor in who gets convicted. Criminal tax cases can fall into that category.

AGGRESSIVE TAX POSITIONS

The prosecutorial tactics in the *Lenske* case — overloading and surprise at trial — can be found in any criminal trial, but tax cases have a unique feature. The definition of income can be a matter of opinion. Whether facts alleged by a prosecutor constitute a tax crime can be a matter of subjective interpretation. The government need only provide reasonable notice of what conduct is subject to criminal punishment.[10]

An example of an allegation that is a matter-subjective interpretation is *United States v. Harris*.[11] In that case, twin sisters were convicted for not reporting as income $500,000 they had been given by a wealthy widower. Since tax law was not clear about whether such gifts are taxable, the conviction was overturned.

In a criminal tax case, the government can gain a tactical advantage by mixing dubious allegations of a tax crime with legitimate criminal allegations. In a 1981 case,[12] the Illinois attorney general was convicted for not reporting income from personal use of campaign funds, fraudulent travel reimbursements, and bribes. He was also convicted for not reporting the income his girlfriend had earned from her job at the Chicago Stadium Corporation — one that the attorney general had arranged with a patron for her to have, and one for which she had not done any work. Not many, if any, tax preparers would think to include income paid to a girlfriend under such circumstances or even ask about it. By adding an allegation that the Illinois attorney general should report income from a job he had gotten for his girlfriend, the government could tarnish the defendant and turn something into evidence of a crime which by itself would not ordinarily have been criminal conduct.

CONCLUSION

Defense counsel in a criminal tax case is up against a formidable opponent — one the *Lenske* court called "the strongest litigant in the world":

> The Government is the strongest litigant in the world … It thus seemed outrageous to counsel for "the strongest client in the world" that that client's citizen adversary should have even a moment's notice of what a witness would say to his detriment, or

should be armed as government counsel was armed, with the prior statements of the witness, with which to confront him if he departed from them.[13]

No panacea can address all the issues that can arise while defending a criminal tax charge, but one precaution that would address some of the above concerns is having a defensible tax return based upon the evidence admitted at trial. As to whether a return should be amended to correct errors, one criminal defense counsel has said he obtained an acquittal after both amending the tax return to correct errors and paying the tax due on the amended return.[14] "An amended return, of course, may constitute an admission of substantial underpayment, but it will not ordinarily constitute an admission of fraud."[15]

All income tax litigation is centered on how the tax return should have been prepared. A tax return prepared for trial would be a check on the government's summary witness.

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ENDNOTES

1. *Lenske v United States*, 383 F2d 20, 21-22 (CA 9, 1967).

2. *Id.*

3. *Id.* at 24.

4. *Holland v United States*, 348 US 121, 129; 75 S Ct 127; 99 L Ed 150 (1954) and *United States v Rifkin*, 451 F 2d 1149, 1153 (CA 2, 1971).

5. *Lenske v United States*, 383 F2d at 22–23.

6. *Brady v State of Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See also *Kyles v Whitley,* 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

7. *Lenske v United States*, unpublished opinion of the United States Court of Appeals for the Ninth Circuit, issued October 5, 1966 (Case Nos 19,539 and 20,448), p 2.

8. *Lenske v United States*, 383 F2d at 27 n 1.

9. *Id.* at 26–27.

10. *Comm's v Glenshaw Glass Co*, 348 US 426, 429-30; 75 S Ct 473; 99 L Ed 483 (1955) and 26 USC 61.

11. *United States v Harris*, 942 F2d 1125, 1131 (CA 7, 1991).

12. *United States v Scott*, 660 F2d 1145 (CA 7, 1981).

13. *Lenske v United States*, 383 F2d at 22.

14. Weinstein, Pay the Taxes, Dammit! 59 Mich B J 686 (1980).

15. *Badaracco v Comm'r of Internal Revenue*, 464 US 386, 399; 104 S Ct 756; 78 L Ed 2d 549 (1984).

Neal Nusholtz practices in all areas of tax controversies, including IRS audits and appeals, pre-indictment criminal investigations, tax court and federal district court litigation, and appeals to the U.S. Court of Appeals for the Sixth Circuit. A graduate of Oberlin College and Thomas M. Cooley Law School, he was selected in 1999 by Corp! magazine as one of the top ten business attorneys in southeastern Michigan.