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8 UNITED STATES DISTRICT COURT FOR THE
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA,)
12 Plaintiff,) No. CR-05-00150-CRB
13 v.)
14 JACK E. EASTERDAY,) UNITED STATES' SENTENCING
15 Defendant.) MEMORANDUM
DATE: JULY 11, 2007
TIME: 2:30 P.M.

16 **INTRODUCTION**

17 _____ The defendant has been convicted of 107 counts of failing to pay over employment taxes
18 owed by his nursing home business. The current unpaid trust fund tax loss is \$8,812,617.75.
19 The non-trust fund unpaid taxes is \$5,384,359.65 for a total loss \$14,196,977.40. The total loss
20 with interest is \$17,805,817.01.^{1/} (Weill Decl. Ex. A)

21 The Presentence Investigation Report has calculated the Total Offense Level to be 26
22 based on a tax loss of \$9,123,385. Based on an offense level of 26 and a Criminal History
23 Category of I, the advisory Guidelines range for imprisonment is 63-78 months.^{2/} The Guideline
24 fine range is \$12,500 to \$125,000. The statutory maximum fine is \$250,000. The Probation
25 Office has recommended a prison sentence of 54 months, no fine, and restitution in the amount
26 of \$9,123,385.

27 _____

28 ^{1/} This is the amount of the unpaid tax and interest as of June 29, 2007, which includes payments made since conviction.

^{2/} The total offense level is also 26 for a tax loss of \$8,812,617.75.

**BOTH THE UNPAID TRUST AND NON-TRUST FUND EMPLOYMENT TAXES
SHOULD BE INCLUDED IN TAX LOSS**

Although it will not change the offense level or guideline range, we believe the tax loss is \$14,196,977.40, which includes both the trust and non trust fund unpaid employment taxes. USSG § 1B1.3(a)(2) which governs relevant conduct, provides that the base offense level shall be determined on the basis of “all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.” “Tax Loss” is defined as the total amount of loss that was the object of the offense, USSG § 2T1.1(c)(1). In determining total “tax loss” all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated” U.S.S.G. § 2T1.1. Commentary. (n.2) Since the employer’s portion of the employment taxes was purposefully not paid by the defendant at the same time he failed to pay the employee’s portion of the employment taxes, they should be included in the tax loss for sentencing and restitution purposes; **United States v. Powell**, 124 F.3d 655, 663-666 (9th Cir. 1997); **United States v. Jordan**, 2003 WL 21313168 (4th Cir. 2003). Uncharged conduct can be included to determine tax loss for sentencing purposes. **United States v. Rose**, 20 F.3d 367, 371 (9th Cir. 1994); **United States v. Kienenberger**, 13 F.3d 1354, 1356 (9th Cir. 1994). **United States v. Lyon**, 161 F.3d 15(9th Cir. 1998); **United States v. Meek**, 998 F.2d 776, 781 (10th Cir. 1993).

SENTENCE

In **Rita v. United States**, 2007 WL 1772146 (June 21, 2007) the Supreme Court considered the appropriate standards for appellate review of within - Guidelines sentences under **United States v. Booker**, 543 US 220 (2005). In **Rita** the Supreme Court ruled that: (1) the sentencing judge and the Commission, by statute, are carrying out “the same basic § 3553(a) objectives” (district courts “at retail,” the Commission “at wholesale”), at *7; (2) the Commission’s Guidelines can be assumed to be a “rough approximation” of a sentence that would “achieve § 3553(a)’s objectives,” at *8; (3) the presumption of reasonableness does not violate the Sixth Amendment, at *9-*11; and (4) when the court of appeals reviews a Guidelines

1 sentence, the fact that both the sentencing court and the Commission agree on the sentence
 2 “significantly increases the likelihood that the sentence is a reasonable one,” at *6, because
 3 “when the judge’s discretionary decision accords with the Commission’s view of the appropriate
 4 application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable,”
 5 *id.* at *8.

6 The Sentencing Reform Act directs that “[t]he court shall impose a sentence sufficient,
 7 but not greater than necessary, to comply with the purposes set forth” in the Sentencing Reform
 8 Act. 18 U.S.C. § 3553(a)(emphases added). Those purposes are:

- 9 (A) to reflect the seriousness of the offense, to promote respect for the law, and
 10 to provide just punishment for the offense;
 11 (B) to afford adequate deterrence to criminal conduct;
 12 (C) to protect the public from further crimes of the defendant; and
 13 (D) to provided the defendant with the needed educational or vocational training,
 medical care, or other correctional treatment in the most effective manner . . .

14 18 U.S.C. § 3553(a)(2). We will address only the purposes set forth above in § 3553(a)(2)(A)
 15 and (B).

16 **A. Just Punishment**

17 The concept of “just punishment” requires the court to consider society’s views as to the
 18 appropriate penalties, not just a judge’s own personal instincts. **United States v. Wilson**, 350 F.
 19 Supp. 2d, 910, 917 (D. Utah 2005). As the Senate Report accompanying the Sentencing Reform
 20 Act noted, the court should consider “the public’s standpoint” in developing an appropriate
 21 sentence. S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3258-59. “Moreover, Congress expected
 22 that the Sentencing Reform Act would generally produce sentences that did ‘not differ
 23 substantially’ between similarly-situated offenders. If ‘just punishment’ meant nothing more
 24 than what a single judge thought was just punishment, then such uniformity of penalties would
 25 be impossible.” **Wilson**, 350 F. Supp. 2d at 917.

26 Beginning in the 1980's, when he first began to operate nursing homes, defendant began
 27 to amass large unpaid payroll tax liabilities. Prior to any of the payroll tax liabilities that are the
 28 subject of the superseding information in this case, defendant thwarted IRS efforts to collect

1 payroll taxes within the statutory collections period and the IRS was forced to write off over
2 \$600,000 in unpaid payroll taxes. Defendant thereafter continued to pyramid additional payroll
3 taxes from 1998 through 2005, the subject of this criminal case. Given the significant amount in
4 unpaid taxes, and the time and resources that the IRS has had to expend, the government
5 recommends a prison sentence at the low end of the Guidelines.

6 **B. Adequate Deterrence to Criminal Conduct**

7 Congress has specifically directed that all sentences must “afford adequate deterrence to
8 criminal conduct” and “protect the public from further crimes of the defendant.”^{3/} 18 U.S.C.
9 § 3553(a)(2)(B) & (C). “Essentially, these provisions require the court to determine whether a
10 particular sentence is a cost-effective means of preventing crime, either by deterring potential
11 criminals (general deterrence) or incapacitating criminals who would otherwise have committed
12 more crimes (specific deterrence or incapacitation).” Wilson, 350 F. Supp. 2d at 918.

13 According to public data, the Internal Revenue Service received more than 131 million
14 individual tax returns in 2004. Although those returns yielded over \$1.7 trillion in tax payment,
15 such revenue represents only 85% of the total amount due. Approximately 10 to 20 million
16 Americans fail to properly file their tax returns each year. Annual non-compliance, also known
17 as the “tax gap,” is estimated currently at approximately \$350 billion. To address the tax gap,
18 the IRS employs revenue agents (examiners), revenue officers (collections), and special agents
19 (criminal) investigator). In 2004, the fruits of special agents’ efforts resulted in only 1,461
20 recommendations for criminal tax prosecutions. Thus, if you are among the 10 to 20 million
21 Americans who are not complying with the tax laws, your chances of being criminally
22 prosecuted are slim.

23 While it is difficult to assess the effect of incarceration on specific deterrence in this case,
24 the importance of incarceration to general deterrence is evident and recognized by the

25
26 ^{3/} The concept of deterrence as an element to be considered in imposing punishment
27 for criminal activity has been a factor for centuries. In 360 B.C. Plato in Protagoras said that “he
28 who sees him punished, may be deterred from doing wrong again.” In 1793 Lord Kenyon in
Judgment in Eaton's case said.” It is the perfection of the administration of criminal justice to
take care that the punishment should come to few and the example to many.”

1 Sentencing Commission in the Guidelines range specified for income tax evasion. Failure to pay
2 over withheld trust fund taxes is precisely the type of crime that tempt businessmen like the
3 defendant, especially where the defendant knew that his employees were not harmed because
4 they are credited within the withheld employment taxes even if not paid over. The government
5 is the only one at risk. Their drive to attain power and to aggregate wealth combined with their
6 belief, often rising to arrogance, that they are more clever than any IRS agent whom they might
7 encounter, will tempt them to violate the tax laws, especially if courts do nothing more than slap
8 convicted tax felons on their wrists and only impose monetary sanctions. Congress and the
9 Sentencing Commission have recognized the importance of general deterrence in tax crimes and
10 have promulgated Guidelines ranges commensurate therewith.

11 The public is bombarded with claims that the IRS targets only W-2 earners not rich and
12 successful business persons or corporations. In this case, defendant ran his business on the
13 government's tax dollars (\$14,000,000 in payroll taxes) and thereby achieved personal financial
14 success, having purchased a six bedroom 10,000 square foot home now valued at more than
15 \$2,000,000; pay himself and his spouse millions; send his children to private colleges. The
16 defendant used his companies, nursing home funds, to pay his personal expenses, including legal
17 fees for himself, his children's nanny, housekeeper, the maintenance and remodeling costs of his
18 residence, personal credit card expenses, a monthly pension for his mother who never worked at
19 Westline, a sailboat, sails, and jet-skis. He even funded, with corporate resources, Skilled-Logic,
20 Inc, a software start-up, instead of using those funds to pay the payroll taxes. Defendant also
21 enriched himself by usurping a \$288,000 credit from his nursing homes which he used to repay
22 his personal loans. He used the withheld payroll taxes like an ATM machine for working capital
23 for his business activities. He knew that the IRS would never shut him down to avoid his
24 patients being harmed. He knew this because he had been running his businesses on the
25 government's tax dollars for over twenty years. He believed that he was immune from

1 prosecution as long as he filed accurate payroll tax returns, but not pay what he reported as due.^{4/}

2 Although 18 U.S.C. § 3553(a)(7) allows the Court to consider restitution as a factor in
3 sentencing, that factor should not bear weight on a decision to reduce any sentence in this case.
4 After defendant was charged in this case, payments toward his monumental tax liability were
5 made by the defendant prior to his first sentencing date, before his second trial, and most
6 recently, preceding this sentencing date. The government points out that the nursing homes,
7 which are the source of all funds for the nursing homes *and Westline Management Company*, are
8 managed on a daily basis by administrators. Defendant works at Westline Management
9 Company and not at the nursing homes. The payment of restitution is less affected by
10 defendant's presence than he would like to admit. Moreover, defendant's nursing homes have
11 been delinquent for more than twenty years. Should this Court rely on his payments post-
12 conviction as a basis for leniency, this send the message that payment is grounds for the
13 wealthier defendant to receive a lighter sentence than the indigent one. Evidence of payment is
14 not admissible to negate willfulness at trial. See **United States v. Pang**, 362 F.3d 1187, 1194
15 (9th Cir. 2004)(payments do not vitiate willfulness), *citing*, **Sansone v. United States**, 380 US
16 343, 354 (1965). Likewise, it should not be grounds to impose a more lenient sentence for the
17 wealthier defendant.

18 **IMPRISONMENT**

19 The defendant will claim that he is loved and respected by many; has done many good
20 things for the community; implying he has been punished enough by the public airing of the
21 charges against him, that he should be judged by their perceptions and not those of his jury. In
22 **United States v. Brubaker**, 663 F.2d 764 (7th Cir. 1981) the court was faced with similar
23 arguments when asked to reverse the sentence a 63-year old former bank trust officer who had
24 plead guilty to embezzlement and tax evasion. In affirming the sentence the 7th Circuit at 770:

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26
27 ^{4/} The defendant has apparently refused to provide any personal financial
28 information to the probation officer, making it impossible to determine his financial ability to
pay a fine.

1 Nor, we wish to make it clear, do we affirm in this case
 2 merely on the basis of a wooden deference to the fact that the
 3 sentence was within the statutory limits nor do we do so simply
 4 because the scope of our appellate review here is a narrow one.
 5 We are mindful that at least from the days of pickpockets plying
 6 their trade in crowds observing the hanging of apprehended pick-
 7 pockets, historical evidence may have failed to provide a decisive
 8 answer to the effectiveness of stringent punishment as a deterrent
 9 to similar conduct on the part of others. The defendant here argues
 10 in effect that the mere fact of exposed guilt to one in his position is
 11 Procrustean punishment indeed and that the mere possibility of
 12 criminal disrepute falling on one in a respected community
 13 position is more than sufficient to deter others. It may have done
 14 so in some instances, although it was insufficient in Brubaker's
 15 case. This, of course, is one of the principal difficulties in ever
 16 knowing what is really effective in deterring criminal conduct
 17 because those who have been tempted but have resisted that
 18 temptation are probably generally not inclined to engage in
 19 bruiting about the fact that they would have engaged in criminal
 20 conduct except for the fact that they didn't want to face the
 21 consequences whatever they might be, whether community
 22 disrepute or incarceration.

23 In considering the district court's emphasis on deterrence,
 24 we are also mindful of a somewhat widely held belief, not
 25 diminished by media references, that the person with influence, the
 26 prominent individual, or one who has engaged in white collar
 27 crime is let off with a slap on the wrist while those not in these, or
 28 similar categories are meted out severe penalties. Aside from any
 policy aspect that justice should not only be even-handed, but
 appear to be so, we are unable to say that persons in the position of
 Brubaker who contemplated engaging in wrongful conduct might
 not refrain from doing so if they knew from the punishment
 imposed on others who had succumbed to temptation not only that
 they might forfeit civil respect but that they would also be likely to
 be sentenced to substantial imprisonment.

RESTITUTION

21 The Probation Office recommends that as a condition of supervised release the defendant
 22 be ordered to pay \$9,123,385.^{5/} We contend that the restitution should include both the trust and
 23 non-trust fund portions of the unpaid payroll taxes, plus interest, which amounts to
 24 \$17,805,817.01. The Court has the authority to order restitution as a condition of supervised
 25 release under 18 U.S.C. §§ 3563(b)(3), 3583(d). See United States v. Frith, 461 F.3d 914, 919

26
 27 ^{5/} The trust fund amount owed as of June 29, 2007 is \$8,812,617.75 since it reflects
 28 payments made by the defendant since his conviction.

1 (7th Cir. 2006); United States v. Butler, 297 F.3d 505, 517, (6th Cir. 2002); United States v.
2 Bok, 156 F.3d 157, 167 (2nd Cir. 1998). In addition, restitution can accrue pre-and post-
3 judgment interest. United States v. Patty, 992 F.2d 1045, 1050 (10th Cir. 1993). United
4 States v. Smith, 944 F.2d 618, 626 (9th Cir. 1991); United States v. Rochester, 898 F.2d 971,
5 983 (5th Cir. 1990); See also United States v. Hoyle, 33 F.3d 415 (4th Cir. 1994) (holding that
6 interest may be include in restitution award, but that principal only may be used to determine
7 guideline range and this inconsistency is permissible.) "Foregone interest" has also been held to
8 be a compensable loss. United States v. Reece, 62 F.3d 1426 (Table), 1995 WL 460416 (9th
9 Cir. 1995) The United States should be treated like any other fraud victim. The government's
10 actual loss includes not only the tax, but also the foregone interest.

11 THE GOVERNMENT'S RECOMMENDATION

12 The congressionally mandated purposes set forth in the Sentencing Reform Act -
13 promoting respect for the law, providing just punishment, and affording adequate deterrence
14 against future criminal conduct - support the sentence of imprisonment of 63 months, 3 years
15 supervised release and restitution of \$17,805,817.01. Such a sentence would be just and possibly
16 deter others from using employment taxes for their own personal or business purposes rather
17 than pay them over to the government.

18 Respectfully submitted,

19 SCOTT N. SCHOOLS
20 United States Attorney

21 Date: July 5, 2007

22 /s/ Jay Weill
23 JAY R. WEILL
24 Assistant United States Attorney
25 Chief, Tax Division
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