

Details Matter: The Ninth Circuit Reverses a Tax Perjury Conviction Because the Government Could Not Prove the False Returns Were Filed.

Yesterday, fortune smiled on Steven Boitano; the Ninth Circuit reversed his conviction on three felony counts of tax perjury under Section 7206(1) of the Internal Revenue Code, which had generated a thirty-six month prison sentence. *United States v. Boitano*, 2015 U.S. App. LEXIS 14096 (9th Cir. June 12, 2015).

Mr. Boitano was an accountant who prepared tax returns and represented clients in tax audits, but didn't file his own returns over a period from 1991 to 2007. The IRS undertook an examination of Mr. Boitano in 1992/1993 and again in 2004, but he still failed to file his returns. *Boitano*, 2015 U.S. App. LEXIS 14096, slip op. at *2. The IRS therefore referred Mr. Boitano's case to its Special Enforcement Program, which is a unit in the Small Business/Self-Employed Division of the IRS that focuses on potential cases of tax fraud; specifically, it is focused upon "examining those cases which significantly impact the public and assisting in the investigation and prosecution of prominent or notorious individuals who attempt to evade or defeat the tax system." I.R.M. 4.16.1.1.3 (06-14-2011).

Nick Connors, a revenue agent from Special Enforcement, requested a meeting with Mr. Boitano concerning his failure to file returns for tax years 2001 through 2007 (generally, the IRS will only ask non-filers for six years of returns absent aggravating factors such as illegal source income). A series of meetings followed, and at the third meeting, Mr. Boitano dug himself in a little deeper, handing the agent returns for 2001 through 2003 reflecting estimated tax payments that had not been made. *Boitano*, 2015 U.S. App. LEXIS 14096, slip op. at *3. Mr. Connors stamped the returns to reflect receipt and wrote "delinquent return secured by exam" on each of them. *Id.*

Connors realized that the IRS had no records of any estimated tax payments. As a consequence, he did not send the returns to the relevant service center and confronted Mr. Boitano with the discrepancy. Mr. Boitano "physically got a little pale" and indicated that he could not explain the discrepancy. *Id.* Mr. Connors then sent Boitano a letter requesting that he either substantiate the estimated payments claimed or provide corrected information along with an explanation of why he believed the information he had put on the returns was correct at the time he signed them. *Id.*, slip op. at *3-*4. Mr. Boitano never responded.

Boitano was charged with three counts of tax perjury under Section 7206(1) of the Code, which provides that a taxpayer who "willfully" signs a return under penalty of perjury "which he does not believe to be true and correct as to every material matter" is guilty of a felony. I.R.C. § 7206(1). After he was convicted, Mr. Boitano moved for acquittal or a new trial, arguing that the evidence did not show that the returns were filed, but the district court denied the motion in light of Agent Connors' testimony that the returns were filed when Boitano handed them to him. *Id.*, slip op. at *5.

On appeal, something unusual happened: the government reversed field and acknowledged that the record did not support a finding that the returns were filed, conceding that Mr. Connors' trial testimony was incorrect. *Id.*, slip op. at *6-*7. Instead, the government argued that the conviction should be sustained because filing was not a necessary element of the offense. As the Ninth Circuit had previously held that filing was a necessary element to sustain a conviction,

the panel was compelled to reverse. *Id.*, slip op. at *7-*11 (citing *United States v. Hanson*, 2 F.3d 942, 944 (9th Cir. 1993)).

While Mr. Boitano's felony conviction was overturned, he is not in the clear; Boitano was also convicted on multiple misdemeanor counts of willful failure to file a tax return under Section 7203 of the Code and was sentenced to five months imprisonment on those charges.

It is hard to have much sympathy for the defendant here; the prior IRS examinations should have been enough for him to recognize that he needed to address his delinquent returns, particularly given his status as an accountant. And his decision to prepare false tax returns while under examination is inexplicable.

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