

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

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vs.

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CRIMINAL NO. MJG-13-0519

JUDIANNE HORN

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DECISION RE: RESTITUTION

Defendant Judianne Horn ("the Defendant") has pleaded "guilty" to one count of aiding and assisting in the preparation and filing of false tax returns in violation of 26 U.S.C. § 7206(2). The Court has before it the parties' respective positions regarding the amount of restitution, if any, to be required as part of the sentence imposed herein.

The Court has held a hearing, considered the evidence of record, made factual findings based on the evidence, and had the benefit of the arguments of counsel.

I. INTRODUCTION

As discussed herein, a district court's issuance of a restitution order in a tax prosecution will generally<sup>1</sup> result in a Restitution Based Assessment ("RBA"). Therefore, unless the

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<sup>1</sup> 26 U.S.C. § 6201(a)(4)(A) states: "The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of Title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax."

full amount of restitution can be paid immediately, the RBA largely substitutes the Internal Revenue Service ("I.R.S.") for the district court in regard to payment of the restitution obligation. For example, an RBA effectively eliminates the power of the district court to provide for periodic payments of restitution in amounts determined by the court subject to revision should the defendant's financial circumstances change.

When, as in the instant case, the defendant is a tax return preparer<sup>2</sup> the restitution sought is based upon the tax liabilities of others. This creates a substantial level of complexity for determining the amount of restitution to be imposed and imposes a substantial management burden on the I.R.S. and the Court to monitor, not only the application of restitution payments made by the defendant but also collections made by the I.R.S. from the taxpayers whose liabilities are the subject of the restitution order.

While there may be cases in which it is appropriate to issue a restitution order causing an RBA against a tax return preparer,<sup>3</sup> the instant case is not one of these.

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<sup>2</sup> Or another type of defendant who is found responsible for the underpayment of tax by others.

<sup>3</sup> For example, a case in which prompt, full payment can be required.

II. DISCUSSIONA. The Offense Conduct

The parties have stipulated that the Defendant, a tax return preparer, provided 16 clients (8 single filers and 8 joint filers) with Forms 1040 that listed false deductions on Schedule A and/or false business losses on Schedule C. The clients filed these returns, which substantially understated the tax liabilities that would have been reported on the returns in the absence of the false statements, to the extent set forth in the following table:

Client(s)	2006	2007	2008	2009
J.N. & V.N.	\$12,565	\$13,785	\$22,937	N/A
W.W.	\$3,690	\$3,104	\$4,471	\$6,396
T.S.	\$5,816	\$4,823	\$5,759	\$4,146
S.G. & E.G.	\$3,343	\$6,767	\$24,163	\$14,433
J.P. & R.P.	\$6,421	\$2,350	\$3,698	\$2,749
R.M.	\$2,706	\$3,903	\$2,318	\$2,047
S.S.	\$2,265	\$697	\$2,410	N/A
P.S.	N/A	N/A	\$30,461	\$1,170
R.O.	\$8,141	\$8,599	\$6,109	\$6,994
J.P.	N/A	\$2,383	\$850	\$1,135
O.R. & V.R.	\$1,358	\$7,218	\$5,610	\$7,464
T.S.	\$11,243	\$7,742	\$7,525	N/A

The total underreporting of income tax liability reported by the Defendant's clients with regard to the 42 listed federal income tax returns was \$281,764.

B. The Sentencing Guideline vs. Restitution Loss Amounts

There is a difference - critical in the instant context - between the determination of the "loss" attributable to a defendant's criminal conduct for purposes of calculating the Sentencing Guidelines and for purposes of determining restitution.

1. Determining "Loss" for Guideline Purposes

The parties have stipulated that the loss amount to be used for calculating the Sentencing Guidelines Offense Level determination is \$281,764,<sup>4</sup> thereby adding 12 levels to the pertinent Base Offense Level. That loss amount would not change - for Offense Level purposes - regardless of any post-offense change in circumstances that would reduce or eliminate the actual financial loss to the victim - the I.R.S. Thus, the "loss" for purposes of the Offense Level determination relating to, for example, W.W.'s 2009 federal income tax return would remain \$6,396 even if the I.R.S., after the offense was

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<sup>4</sup> I.e., more than \$200,000 and less than \$400,000. U.S.S.G. §§ 2T1.4(a), 2T4.1(G).

committed, obtained payment in full of the \$6,396 and sustained no actual financial detriment.

2. Determining "Loss" for Restitution Purposes

The function of restitution is to require a defendant to restore to the victim of a crime the loss caused by the defendant's criminal conduct. A restitution award is not to be issued for punitive purposes or to provide the victim with a profit. Thus, the amount awarded as restitution should not exceed the loss to the victim actually caused by the defendant.

In the context of a false federal income tax return, the actual loss to the I.R.S. for which restitution should be paid is the deficit in tax collected with regard to the return in question - i.e., the amount of tax that would have been reported due on an accurate, correct tax return and paid, reduced by the amount collected by the I.R.S. with regard to that return. Therefore, a sentencing court's determination of loss for restitution purposes would start with a determination of the tax liability that would have been reported on a properly filed return, which would include all proper deductions (even those not originally claimed).<sup>5</sup> This would be reduced by the tax

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<sup>5</sup> The Court is not now addressing the details of the tax determination proceeding, such as the parties' respective burdens of production of evidence and the allocation of the burden of proof.

amount reported to the I.R.S. on the false return to yield the actual tax loss that could be used as the total amount of restitution. Then, there would be reductions in the restitution balance due as the I.R.S. received payments and applied them to the tax liability understatement for the return in question.

The complexity of the restitution loss determination will, of course, depend upon the number and complexity of the substantive tax issues presented in a particular case. In the instant case, it is necessary to make the determination with regard to 16 taxpayers and 42 returns, as to each of which the I.R.S. has proposed multiple adjustments. For example, as to the 4 income tax returns filed by W.W., the I.R.S. Income Tax Discrepancy Adjustments Form 4549 presents a total of 29 adjustments.

Defense counsel could be accused of a failure to provide effective assistance unless he/she reviewed the I.R.S.'s proposed adjustments to each of these 42 returns, presumably with the assistance of a qualified tax professional.<sup>6</sup> Moreover, it appears that the Defendant should - if not must - be provided a reasonable opportunity to determine if there were any reasonable arguments for offsetting adjustments, such as available unclaimed deductions. Hence, there should be - if not

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<sup>6</sup> At Government expense for a defendant represented by appointed counsel.

must be - some process whereby the Defendant would have access to records and potential witnesses regarding possible offsetting adjustments.

Of course, as a practical matter in many cases, such as the instant one, a defendant's inability to pay any substantial amount of restitution renders the proceedings to determine the precise amount of restitution loss an academic exercise.

### 3. The Restitution Based Assessment

The Government states that the I.R.S. can, and will, make a Restitution Based Assessment ("RBA")<sup>7</sup> against the Defendant should the Court issue a restitution order. The Court will assume that it can do so.<sup>8</sup>

When the I.R.S. makes an RBA against a criminal defendant, the restitution liability is assessed as a tax, immediately subject to the full panoply of I.R.S. collection powers<sup>9</sup> and to the full array of "add-ons" imposed on delinquent taxpayers - e.g., interest and late payment penalties.

However, when issuing a restitution order that does not result in an RBA, a sentencing court can exercise its discretion

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<sup>7</sup> 26 U.S.C. § 6201(a)(4)(A).

<sup>8</sup> The Court notes that there may be reasonably debatable issues regarding the ability of the I.R.S. to make an RBA in a tax return preparer case.

<sup>9</sup> Including the ability to levy on any property of the defendant.

and decide whether to set a fixed date for payment in full or a schedule for partial payments consistent with the court's finding regarding the defendant's financial circumstances. Often, when a defendant does not have the ability to make full payment immediately, a sentencing court will defer all, or part, of the payment obligation during the time a defendant is incarcerated and will set a periodic payment schedule with the first payment due when the defendant is released from prison. The restitution order can provide that the amount of each periodic payment is subject to change depending upon changes in a defendant's financial circumstances. The sentencing court can require, or waive, the accrual of interest on the unpaid balance. There will be no automatic "late payment penalty" applied to any unpaid balance of the full amount of restitution. Rather, the district court would consider imposing a sanction for a failure to make a restitution payment, taking into account the court's determination of the defendant's financial ability to meet the obligation.

#### 4. Management

The existence of a Restitution Based Assessment ("RBA") will drastically affect the treatment of restitution payments made by a defendant. In the absence of an RBA, a defendant's restitution obligation is reduced, dollar for dollar, as the

defendant makes payments pursuant to the restitution order. However, this is not the case with an RBA because the I.R.S. treats payments made in compliance with a restitution order as "involuntary." Therefore, the I.R.S. will not follow a defendant's allocation of the payment to the principal of a tax due when the payment was required by the district court. Rather, the I.R.S. will allocate the payment as it chooses, for example as between principal tax payments, interest, and penalties.<sup>10</sup> Therefore, a defendant paying \$1,000 pursuant to a restitution order requiring payment of income tax due for 2011, when there has been an RBA, generally will, have less than the full \$1,000 applied to the obligation set forth in the restitution order. The I.R.S. will be able to allocate the \$1,000 payment, for example, first to interest that has accrued on the full restitution balance, then to any late payment penalties, and the residue, if any, applied to the principal. In regard to a restitution payment made by a tax return preparer defendant, the I.R.S. would allocate the payments - in its discretion - among the taxpayers and income tax returns for which restitution would be due.

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<sup>10</sup> Indeed, should the defendant have a tax assessment for a year not covered by the RBA, the I.R.S. may decide to allocate the payment - made pursuant to a court order requiring payment of the years at issue in the criminal case - to tax, penalty, and interest due for some other year altogether.

The I.R.S. should - if not must - enforce the federal income tax laws vis-à-vis the taxpayers who filed (even if innocently) the false returns and obtained unwarranted financial benefits from the I.R.S. The Court notes that, to date, in the instant case, the I.R.S. has chosen to eschew assessing any tax liability against any of the 16 taxpayers who benefitted from the filing of the false returns prepared by the Defendant. Rather, the Government has taken the position that it will not seek to collect income tax underpaid by - or, better put, unwarranted refund payments made to - the taxpayers who filed the false returns.

Nevertheless, unless the I.R.S. can make a decision to grant these taxpayers a gift from the Department of the Treasury, it should seek to have these taxpayers comply with their future tax obligations. Hence, if the Defendant were now to make a restitution payment that is applied to a tax liability of W.W., a taxpayer who obtained more than \$17,000 of unwarranted refunds, it would appear that W.W. would have taxable income in the year of the Defendant's payments.<sup>11</sup>

Thus, the I.R.S. should - and perhaps has a legal obligation to - require that a taxpayer having his/her tax obligation paid by the Defendant include the payment in his/her current income.

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<sup>11</sup> To the extent that the taxpayers' liability to the I.R.S. is satisfied by the Defendant's payments.

Hence, the I.R.S. should monitor continually its application of restitution payments and ensure future tax compliance by the taxpayers to whose tax liabilities the payments are allocated.

Indeed, it appears doubtful that the I.R.S. can, realistically, keep the Defendant and the Court (Probation Officer) informed of its application of Defendant's payments. Moreover, the Government has described no coherent existing, or proposed, practicable process for keeping track of, and advising the Court (Probation Officer) and Defendant of, the status of payments made by, or collected from, taxpayers<sup>12</sup> with respect to tax liabilities included in the restitution amount.

The "bottom line" is that if a tax return preparer defendant is unable to make more than modest partial payment of the restitution obligation, then a restitution order resulting in an RBA would impose a monitoring obligation on the I.R.S. and the Court (i. e., the Probation Officer) that, if at all possible to meet, would cause disproportionate managerial problems for the I.R.S. and the Court.

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<sup>12</sup> I. e., the persons who benefitted from the filing of the false tax returns.

C. The Defendant's Financial Circumstances

The Court finds, from the evidence of record, that the Defendant has no substantial assets, is suffering from severe mental health problems, and has little, if any, prospect of producing, now or in the future, sufficient legitimate income to support herself, much less to pay more than a nominal amount of restitution.

III. CONCLUSION

The Court finds that the complexity of determining the amount of actual loss to the I.R.S., in addition to the disproportionate management burden that a Restitution Based Assessment would impose on the I.R.S. and the Court, renders it inappropriate to issue a restitution order in this case. Even nominal payments of restitution by the Defendant would create a "cascade" of monitoring problems as the I.R.S. would need to allocate each payment between principal, interest, and penalties, allocate the payments among 42 separate tax returns, and assess income tax liabilities on those taxpayers whose tax liabilities were satisfied by the Defendant's payments.

If there were not going to be an RBA against the Defendant, the Court would seek to determine the actual restitution loss<sup>13</sup> and issue a restitution order in the amount determined. However, the Court would not require the Defendant to make any payments prior to the period of supervised release and would set a reasonable monthly payment schedule, subject to adjustment based on future changed financial circumstances.

In the instant case, the Court shall not issue a restitution order.

SO ORDERED, on Friday, January 30, 2015.

/s/ \_\_\_\_\_  
Marvin J. Garbis  
United States District Judge

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<sup>13</sup> The Court would, of course, have to determine an appropriate process to make the restitution loss determination with due regard to the rights of the Defendant.