
Cheesesteak Shop Owner Appeals Sentencing Add-On

by Nathan J. Richman

The district court should have omitted the sentencing enhancement for a tax conspirator encouraging others to violate the internal revenue laws, according to the opening appellate brief of a recently sentenced Philadelphia cheesesteak shop owner.

The appellant's 20-month sentence should be reversed and the case returned to the district court for resentencing without the two-level enhancement under section 2T1.9(b)(2) of the U.S. sentencing guidelines, according to the May 22 appellate brief in *United States v. Lucidonio*.

The appellant's attorney, Ian M. Comisky of Fox Rothschild LLP, told *Tax Notes*, "In our case, the enhancement was applied with respect to a well-known sandwich shop with a cash payroll in Philadelphia. Our position is that the enhancement should not be applied absent 'active encouragement' and was intended to apply to tax protest groups and shelter promoters where there was a unique threat to the tax system as a whole. It was not intended to apply to cash payroll schemes."

Nicholas Lucidonio and his father pleaded guilty in 2022 to a tax conspiracy charge stemming from their operation of the South Philadelphia cheesesteak restaurant, Tony Luke's (Lucidonio's father's name is Anthony Lucidonio Sr.). Lucidonio worked at the restaurant founded by his father since it opened in 1992.

The odor wafting out of Tony Luke's that caught the IRS's attention was rampant cash dealings. The government accused the Lucidonios of operating cash payroll to evade employment taxes and of hiding substantial cash receipts.

Lucidonio said the case grew out of a contentious business relationship involving an estranged relative and franchising rights. Family members were so angry over the matter that they filed civil suits, and a couple of them took records from Tony Luke's and gave them to the government as confidential informants.

The government originally charged the Lucidonios with tax conspiracy under 18 U.S.C. section 371, tax evasion under section 7201, and aiding in the filing of false tax returns under

section 7206(2). The Lucidonios unsuccessfully challenged the tax conspiracy charge, asking the court to expand the new section 7212 tax obstruction requirements from *Marinello v. United States*, 584 U.S. 1 (2018), to that charge as well.

Sentencing Menu

Not only did the Lucidonios later plead guilty to that tax conspiracy charge, but Nicholas also left the *Marinello* argument out of his appeal. Instead, he is challenging only one aspect of his sentence: the inclusion of a two-level sentencing calculation enhancement under section 2T1.9(b)(2).

Section 2T1.9 of the guidelines describes how to calculate a section 371 tax conspiracy charge sentence. The provision includes two specific offense characteristics. One calls for a four-level enhancement if the offense involves violence (and isn't relevant here), and the other is a two-level enhancement for conduct "intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue."

As related in his appellate brief, the district court calculated Lucidonio's guidelines sentence recommendation by starting with a \$1.3 million tax loss, subtracting three levels for acceptance of responsibility and two for the new so-called zero-point offender amendment for defendants sentenced for their first offenses, and adding two for the encouragement enhancement. The result was a total offense level of 17 and an advisory range of 24 to 30 months in prison.

The district court ordered a below-guidelines sentence of 20 months in prison. Without the enhancement Lucidonio is challenging, the offense level would be 15, which corresponds to an 18-to-24-month suggested sentence.

Spoiled Legal Reasoning

Lucidonio argued that the district court's interpretation of the encouragement enhancement could make it applicable in most tax prosecutions involving multiple participants. That interpretation "is overbroad and is inconsistent with the plain text, history, and purpose of the provision. It is also at odds with

the way in which the enhancement has been applied in the more than thirty years since its enactment," he asserted.

The encouragement enhancement is meant for defendants whose purpose in committing their crimes is to promote independent violations of the tax law, as would be seen in tax return preparer and tax shelter promoter cases, Lucidonio argued. While the Third Circuit should agree that the limitation to active encouragement is apparent on the face of section 2T1.9(b)(2), the comment to that provision listing shelter promoters and so-called tax protesters as examples of appropriate cases further makes that point, he said.

"Nicholas Lucidonio did not actively counsel or instruct any employees not to report their cash wages. Nor did he undertake any other affirmative conduct to encourage anyone else to violate the tax laws. Rather, Mr. Lucidonio participated in a cash payroll scheme where his only purpose in doing so was to enable Tony Luke's to evade employment taxes that it otherwise would have owed to the IRS," the brief asserts. "Just because his conduct may have passively or indirectly led to other individuals violating the tax laws does not mean that he is subject to a sentencing enhancement punishing active conduct encouraging additional violations."

Lucidonio's statutory argument again invoked *Marinello*, this time reasoning by analogy to the Supreme Court's distaste for overbroad reading of statutes. "It cannot be that the Sentencing Commission intended a two-level enhancement to apply in every run-of-the-mill tax fraud case simply because a defendant's conduct may have contributed in some way to someone else's violation," he claimed.

Turning to the history of the encouragement enhancement, Lucidonio noted that prosecutors haven't used it much in payroll tax cases, and he speculated that it may have come up in his case in response to the zero-point reduction.

After invoking the rule of lenity, Lucidonio turned to the facts presented at sentencing and claimed that they shouldn't have been sufficient to sustain the encouragement enhancement.

The court based the encouragement enhancement on the allegation that Tony Luke's

paid employees only partly by check and left the extra cash payments off their W-2s.

That only proved an intent to evade Tony Luke's payroll tax liabilities and failed to show an intent to encourage the employees to separately violate the tax laws, Lucidonio argued. For the encouragement enhancement to apply, the government should have proven the latter intent, he concluded.

The appellant in *United States v. Lucidonio*, No. 24-1285 (3d Cir. 2024), was represented by Comisky and Matthew D. Lee of Fox Rothschild LLP. ■