UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v.-	:	15 Cr. 397 (JMF)
HARRY FALTERBAUER,	:	
Defendant.	:	

GOVERNMENT'S SENTENCING MEMORANDUM

PREET BHARARA
United States Attorney
Southern District of New York
Attorney for the United States of America

David M. Abramowicz & Sarah E. Paul
Assistant United States Attorneys
- *Of Counsel* -

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 17, 2016

By ECF
The Honorable Jesse M. Furman
United States District Judge
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: United States v. Harry Falterbauer,
15 Cr. 397 (JMF)

Dear Judge Furman:

The Government respectfully submits this letter in advance of the sentencing of defendant Harry Falterbauer (the "defendant"), currently scheduled for February 24, 2016.

For the reasons set forth below, the Government submits that a sentence that includes a term of imprisonment within the applicable Guidelines range of 10 to 16 months' imprisonment is appropriate. In the event that the Court is not inclined to impose such a sentence, the Government respectfully submits that an appropriate sentence should include some meaningful loss of liberty, whether in the form of either a period of incarceration, community confinement, or home confinement.

I. Falterbauer's Criminal Conduct

From November 1988 to April 2008, the defendant maintained a secret, undeclared bank account in Liechtenstein (the "Undeclared Account") at Liechtensteinische Landesbank AG ("LLB-Vaduz").[1] Throughout that period, he hid the Undeclared Account from the Internal Revenue Service (the "IRS"), and failed to pay taxes on income the account generated. As a

[1] In July 2013, LLB-Vaduz entered into a Non-Prosecution Agreement ("NPA") with the Office of the United States Attorney for the Southern District of New York in connection with LLB-Vaduz's participation in a conspiracy to defraud the IRS, file false federal income tax returns, and evade federal income taxes with respect to accounts held at LLB-Vaduz by U.S. taxpayers from 2001 through 2011.

result, the IRS lost thousands of dollars in taxes that the defendant should have paid, but did not. The Undeclared Account reached a high balance of approximately $1.59 million in 2007, and was worth more than $1.1 million when the defendant closed it in 2008.

The defendant opened the Undeclared Account under his own name in November 1988. He identified himself to an LLB-Vaduz representative as a United States citizen and a resident of Florida, presenting his United States passport. Once his identity was verified, however, LLB-Vaduz assigned the account a reference number—Nrkto. 130828—that was thereafter used exclusively to refer to the Undeclared Account in order to mask the accountholder's identity. The defendant periodically initiated transactions involving the Undeclared Account. In May 2003, he helped arrange the transfer of approximately $482,000 to a different account in Liechtenstein. Later that year, he sent $20,000 from the Undeclared Account to an individual in Switzerland. And in November 2007, the defendant directed LLB-Vaduz to release $1 million pursuant to another individual's instructions.

The defendant took affirmative steps to prevent LLB-Vaduz from disclosing the account to the IRS. In August 2003, he completed a signed affidavit and other paperwork at LLB-Vaduz declaring that he was a United States citizen and stating that he was not authorizing LLB-Vaduz to disclose his name to United States tax authorities.

Although the Undeclared Account held a balance of more than $1.1 million when it was closed in 2008, the defendant knowingly and willfully failed to file a Report of Foreign Bank and Financial Accounts ("FBAR") disclosing that he had a foreign bank account with a value of greater than $10,000 for calendar year 2008. He had, however, filed an FBAR for calendar year 2001 reporting a different, less valuable account he held at UBS. For the calendar years 2006 through 2008, the defendant evaded more than $15,000 in taxes related to the funds in the Undeclared Account.

II. The Investigation, Guilty Plea, and Guidelines Calculation

In the wake of widespread news reports about the investigation of taxpayers who concealed assets at UBS and other foreign banks beginning around 2008, thousands of United States taxpayers attempted to remedy their past misconduct by applying to enter an IRS voluntary disclosure program. The defendant was not among them. Instead, the IRS remained unaware of the defendant's Undeclared Account until in or about 2013, when LLB-Vaduz gave the U.S. Attorney's Office more than 200 unredacted account files, including the defendant's, relating to U.S. taxpayers with undeclared accounts.

IRS agents from New York interviewed the defendant in Florida on April 18, 2013. The defendant answered their questions about the Undeclared Account with lies. Initially, he denied ever opening an account at LLB-Vaduz. When the agents showed him documents proving otherwise, the defendant confessed to having opened it, but claimed to have do so for someone else. The agents asked the defendant for the other person's name; he claimed not to know it.

In an unsolicited email message he sent an Assistant United States Attorney in June 2014, the defendant admitted having lied to the agents. He wrote, "I know that I was dishonest when I got served at my house, however, I was in shock and startled as you can imagine and I would like to apologize to the agents who interviewed me, especially since they were very professional and courteous."

In the same message, the defendant claimed, among other things, that "[a] large portion of the money" in the Undeclared Account "came from pre-taxed income and was reported on my income taxes prior to leaving the country." He repeated the "large portion" language elsewhere in the message, noting that he faced a potential fine of approximately $800,000, representing half the total high balance of the Undeclared Account, and stating that "a large portion of this deriv[ed] from U.S. taxed income."

The defendant was arrested on July 21, 2015, and entered a plea of guilty before Your Honor to Count One of Indictment 15 Cr. 397 (JMF) on November 10, 2015. Based on the defendant's conduct, and pursuant to the terms of the plea agreement entered into by the parties, the defendant's Guidelines range is 10 to 16 months' imprisonment.[2] The defendant also agreed to pay at least $15,013.52 in restitution to the IRS, representing the tax losses for the final three calendar years in which the defendant maintained the Undeclared Account, as well as a civil penalty of at least $794,500.

III. The Appropriate Sentence

The Government submits that a sentence within the applicable Guidelines range, or, at a minimum, a sentence that includes some loss of liberty—whether in the form of a period of incarceration, community confinement, or home confinement—is appropriate in light of the defendant's decades-long efforts to conceal the Undeclared Account and the need for deterrence of the type of sophisticated, difficult-to-detect tax offense the defendant committed.

A. The Nature and Circumstances of the Offense

For more than two decades, the defendant took calculating steps to conceal his interest in the Undeclared Account and thus avoid his tax and reporting obligations. By his own explanation, he opened the account to conceal assets in the event he was sued. (*See* PSR ¶ 25). Year after year after the opening it in 1988, the defendant failed to disclose the Undeclared Account's existence on his income tax returns or, as he did for a less valuable account he held at UBS, by filing an FBAR. Nor did he pay taxes on income the Undeclared Account generated as its balance swelled to seven figures. In 2003, the defendant prepared and signed an affidavit

[2] The Guidelines calculation does not include a two-level obstruction-of-justice enhancement based on the defendant's false statements to federal agents in April 2013. The Government does not believe that the statements, which were not made under oath, "significantly obstructed or impeded the official investigation or prosecution of the instant offense," as required to warrant the enhancement absent a conviction on a separate count for the defendant's obstructive conduct. U.S.S.G. § 3C1.1, Application Notes 4(G) & 5(B).

expressly refusing to authorize LLB-Vaduz to disclose his interest in the Undeclared Account to U.S. tax authorities. The defendant maintained the Undeclared Account until 2008, when bank secrecy laws that U.S. taxpayers had long used to conceal assets abroad began to crack. Rather than taking steps to right his wrong after closing the account, such as by applying to enter a voluntary disclosure program or filing amended returns, the defendant again failed to report his interest in the Undeclared Account on the 2008 tax returns he filed in 2009. When federal agents asked him about the Undeclared Account in 2013, the defendant lied in a further effort to conceal his criminal conduct.

The defendant had ample wealth, opportunity, and knowledge to comply with tax and reporting requirements, or, even after opening and maintaining the Undeclared Account for some time, to change course and make the disclosure and payments needed to avoid criminal liability. He nonetheless persisted in his deception.

B. General Deterrence

Deterrence is important in tax cases generally, but perhaps especially in cases involving the hard-to-detect offense at issue here.

As the Guidelines make clear, "[b]ecause of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators." U.S.S.G. ch. 2, part T (intro. cmt.).

The defendant is a Florida resident who, like most Americans, enjoyed benefits from the taxes honestly and accurately paid by others. He nonetheless decided to skirt his own responsibilities to the tax system and the IRS by hiding money overseas. His success in concealing his interest in the Undeclared Account for more than two decades underscores the difficulty U.S. authorities have in detecting undeclared foreign accounts. A sentence sufficient to promote deterrence is essential to ensure others are not tempted to exploit bank secrecy laws in a similar manner.

C. The Defendant's Arguments

The Government certainly agrees that the Court should take into account the defendant's general background and characteristics when imposing a sentence. However, some arguments in the defendant's sentencing memorandum of February 11, 2016 (the "Def. Mem."), mischaracterize his conduct.[3]

[3] Some language in the defendant's submission arguably suggests, in breach of the plea agreement, that the Court consider departing from the Guidelines range. (*See, e.g.*, Def. Mem. 3 ("The PSR does not identify any factors that may warrant a downward departure and, although Mr. Falterbauer and counsel believe such factors do exist, we will identify those factors under 18 U.S.C. § 3553 in requesting a sentence below the advisory guideline range." (emphasis

The defendant's current characterization of the source of funds deposited into his Undeclared Account is inconsistent with his prior statements on that subject. His sentencing submission states that he "deposited after-tax income into the account." (Def. Mem. 1). But in his June 2014 email message to a federal prosecutor, the defendant twice stated that a "large portion" of the deposited funds had been taxed. That suggests that another portion of the funds had not been. The Government does not know what percentage of the Undeclared Account's deposits represented income that had already been taxed.

The defense submission's statements that the defendant "has done everything possible to quickly resolve his criminal liability in this case," and that he "has been trying to resolve the matter for over a year with communication from the government" (Def. Mem. 5), exaggerate the defendant's eagerness to accept responsibility and plead guilty. Federal agents first contacted the defendant to discuss the Undeclared Account in April 2013. After lying to them, but before his arrest in this case, the defendant communicated with the Government through prior counsel and, after firing that attorney, by emailing an Assistant United States Attorney directly. He was ultimately indicted in June 2015, however, because he was unwilling to plead guilty before then. To be clear, the defendant had every right to require the Government to bring this case to a grand jury, and to wait as long as he did to plead guilty. He should not be punished in any way for exercising those rights, and the Government agrees that the stipulated Guidelines calculation is correct to credit him for accepting responsibility. But given the timeline of what occurred, the Government disputes the defendant's suggestion that he is entitled to additional leniency for doing "everything possible to quickly resolve his criminal liability."

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omitted)); *id.* at 9 (noting, following a discussion of the defendant's age and health issues, that age and physical condition "may be considered as sentencing factors" pursuant to Section 5H1.4 of the Guidelines, which addresses downward departures)). The Government, like the Probation Department, has not identified any basis for a departure.

IV. Conclusion

The Government respectfully submits that, on the facts of this case, a sentence that includes a Guidelines term of imprisonment is appropriate. If the Court is not inclined to impose such a sentence, the Government respectfully submits that the defendant's sentence should include some meaningful loss of liberty, whether in the form of a period of incarceration, community confinement, or home confinement.

Respectfully submitted,

PREET BHARARA
United States Attorney

By: /s/
David M. Abramowicz / Sarah E. Paul
Assistant United States Attorneys
Telephone: (212) 637-6525 / 2326

cc: Bradford Cohen, Esq. (via ECF)