UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA

v. 14:cr-111-01-PB

MENASHE COHEN

GOVERNMENT'S SENTENCING MEMORANDUM

The defendant who pleaded guilty and stands convicted of filing a false tax return under 26 U.S.C. §7206(1) in connection with his repetitive concealment of taxable interest income totaling more than $175,000 over a four year period, has asked the Court to sentence him to a period of probation. For the reasons given below, the government respectfully requests that the Court deny that request and sentence the defendant to a five-month period of imprisonment followed by a three-year period of supervised release to include a special condition of five-months of home detention.

I. FACTS

A. Carpet Sales

From 1985 to 1995, the defendant and his father, Moshe Cohen, owned a retail Oriental carpet business in Keene, New Hampshire. The defendant informally assumed sole control of the business when his father moved to Chicago in 1995. A few months later, the defendant's father moved back to Israel, where he passed away in 2005.

In September 2005, the defendant, the defendant's mother, and his sister, Dalia Cohen, sold the business' Oriental carpet inventory to Suhail Bhatti, purportedly at cost. In exchange, Bhatti agreed to pay the defendant's family $2.1 million over a 10-year-period. The defendant

continued to sell carpets after the business was sold. Bhatti informally returned the carpets to the defendant's family in 2011 because he was not able to make the agreed upon payments to them.

B. Defendant's Tax Returns

The defendant did not file a timely federal income tax return for tax year 2006.

The defendant and his (former) wife filed a timely joint federal tax return for tax year 2007 that failed to report taxable interest income totaling more than $17,250 from two domestic and three foreign bank accounts in which the defendant had personal ownership or beneficial interests.

The defendant did not file a timely tax return for tax year 2008.

Aware that the defendant had been in Israel for extended periods between 2005 and 2009, the accountant who prepared the defendant's 2009 tax return persistently asked him to provide information about any foreign bank accounts in which he held an ownership or beneficial interest. After deflecting several of these requests, the defendant sent the accountant a handwritten note falsely stating that he received less than $150 in interest payments from an account he maintained at Bank Leumi in Israel and interest payments totaling less than $200 from an account he maintained at HSBC Bank in Jersey, a British Crown dependency in the Channel Islands off the coast of the Normandy, France. The accountant responded to this disclosure by telling the defendant that she would not prepare his 2009 tax return if he did not file a Report of Foreign Bank and Financial Accounts, Form TD F 90-22.1 ("FBAR") for his foreign bank accounts with the United States Department of the Treasury.[1]

[1] Under U.S. law, United States citizens who have a financial interest in or signature authority over a financial account in a foreign country with an aggregate value of more than $10,000 at any time during a particular year are required to file an FBAR. Under 31 U.S.C. § 5231 (a) (1) (5) (A), the Secretary of the Treasury is authorized to impose a civil monetary penalty on any person who fails to file an FBAR or files a false FBAR. The amount of the

C. The UBS Account

In 2008, the U.S. Department of Justice ("DOJ") learned that the United Bank of Switzerland ("UBS") may have assisted its U.S. taxpaying customers in concealing undeclared bank accounts located in Switzerland. After it received this information, the DOJ entered into negotiations with UBS about the terms of a Deferred Prosecution Agreement. Additionally, the DOJ initiated a widely-publicized program designed to encourage U.S. taxpayers who owned foreign accounts to voluntarily disclose information about those accounts to the DOJ.

To encourage participation in this program, the DOJ directed that any taxpayer who voluntarily disclosed their ownership of a foreign account and paid the appropriate amount of taxes, penalties and interest, plus a monetary penalty equal to 20% of the highest balance in their foreign account during the previous six years, would not be subjected to criminal prosecution for income tax violations or for failing to file an FBAR. The Department also directed, however, that any U.S. taxpayer who did not make the voluntary disclosure before a foreign bank disclosed information about their account to the DOJ would not be eligible to participate in this "amnesty program."

While the Deferred Prosecution Agreement was being negotiated, UBS did not disclose the identity of its U.S. taxpaying customers, and approximately 30,000 U.S. taxpayers (the defendant was not one of them) voluntarily participated in the DOJ's "amnesty program."

After the Deferred Prosecution Agreement was signed in February 2009, the DOJ received a limited number of records from UBS. Thereafter, the DOJ obtained other documents that related to undisclosed UBS accounts that belonged to U.S. taxpayers in the manner required by a Mutual Legal Assistance Treaty between the United States and Switzerland. As required by

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criminal monetary penalty for filing a false FBAR is an amount that is equal 50% of the highest aggregate balance of the foreign account during the applicable tax year.

treaty, UBS notified 285 of its U.S. taxpaying customers that information about their accounts had been disclosed to the DOJ. From these additional documents, the DOJ learned that an account in Dalia Cohen's name ("the UBS account") for which the defendant was the beneficiary was opened at UBS on August 27, 2001. Shortly thereafter, Cohen's then 19-year-old son, Adar Cohen, was granted a power of attorney over the account. From January 2006 to May 2009, the account had month-end balances that ranged from $886,022 to $1,296,800 and earned taxable interest income totaling $179,180, as follows:

Tax Year	Interest Income
2006	$43,734
2007	$12,803
2008	$77,748
2009	$44,895

The defendant's ownership interest in the UBS account was confirmed by the records provided by UBS. According to these documents, on April 3, 2008, the defendant transferred $952,898 from an account in his name at Cypress Bank in Cypress, to the UBS account. While conducting this transaction, Cohen told a UBS banker that he earned the money that was involved in the transfer by selling Oriental carpets and that he had decided to withdraw the money from the Cypress Bank account because he was unhappy with the bank's service. On April 11, 2008, Cohen transferred $800,000 from the UBS account to his account at HSBC Bank. On the same day, he transferred $100,000 from the UBS account to an account that belonged to his sister, Clara. On July 15, 2008, the defendant transferred an additional $280,000 from the UBS account to an account in his name at TD Bank in New Hampshire.

D. The IRS Audit

In 2011, several months after the defendant's beneficial interest in the UBS account was disclosed to the DOJ, an IRS Revenue Agent, Eric Filiault, was assigned to audit the defendant's income tax obligations for tax years 2006 through 2010.

During the audit, the defendant disclosed activity that occurred in his accounts at HSBC, TD Bank and Citizens Bank, but he did not disclose his ownership interests in the accounts at UBS, Cypress Bank, and Bank Leumi. While subject to the audit, the defendant filed delinquent tax returns for tax years 2006 and 2008 and an amended return for tax year 2009. In these returns, the defendant reported Oriental carpets sales totaling $286,849 and claimed that he did not receive any income from those transactions.

The defendant's belated tax filings conflicted with bank account statements that demonstrate that deposits totaling more than $1 million were made to the defendant's accounts at UBS and TD Bank from 2006 through 2009. When confronted about this apparent inconsistency, the defendant told Filiault that most of the Oriental carpets were sold at cost. During another meeting with Filiault, the defendant incorrectly asserted that even if he sold carpets for a profit he was not required to pay taxes on that income because he inherited the carpets from his father. In any event, neither of these assertions identified the additional source(s) of funds that were deposited to the UBS and TD Bank accounts from 2006 through 2009, nor did they explain why the defendant's tax returns failed to report additional taxable interest income totaling $170,534 that was produced by the accounts at UBS, HSBC, Cypress Bank, Bank Leumi, TD Bank and Citizens Bank during the same four-year period.

Convinced the defendant was not being truthful and that he had probably committed tax-related criminal offenses, Filiault suspended the audit and referred the matter for a criminal investigation.

E. Government's Criminal Investigation

1. Carpet Sales

During its criminal investigation, the government was not able to identify the Oriental carpets the defendant sold, nor were we able to determine the value of the carpets when the defendant assumed ownership of them and when he sold them. Without this evidence, the government is not able prove beyond a reasonable doubt the amount of tax the defendant owed on income he received by selling carpets. Nevertheless, the plea agreement for this case speaks to the defendant's potential obligation to pay taxes on this income by requiring him:

> To cooperate with the IRS in the civil examination, determination, assessment and collection of income taxes related to [his] 2005 through 2009 income tax returns and any related corporate/entity tax returns, and . . . not to conceal, transfer, or dissipate funds or property that could be used to satisfy such taxes, penalties and interest.

To date, the amount of this additional tax liability has not been agreed to and the defendant has not paid any money toward it.

2. FBAR Violation

In February 2012, the defendant filed an FBAR for tax year 2008. While this document accurately reports that the defendant's account at HSBC had a high balance of $812,010 in 2008, it failed to disclose the defendant's beneficial interest in the UBS account, which had a high balance of approximately $1,296,800 in May 2008. As a result of this material omission and because the government cannot prove that the defendant was the only owner of this account,

pursuant to an agreement between the parties, the defendant has paid a civil monetary penalty in an amount, $324,199, that is equal to 25% of the UBS account's high balance in May 2008.[2]

3. Offense of Conviction

As the Court is aware, the offense of conviction (and other relevant conduct under U.S.S.G. §1B1.1) focuses on the defendant's failure to report taxable interest income totaling $170,534 that was produced by the accounts at UBS, Cypress Bank, HSBC, Bank Leumi, TD Bank and Citizens Bank in tax years 2006 through 2009. The undisputed tax loss for this criminal conduct, $28,071, is based on a number of non-binding sentencing stipulations that are explained in paragraphs 22 through 30 of the presentence report. The full amount of the criminal tax loss, plus interest and penalties, has been paid by the defendant.

II. ADVISORY SENTENCING GUIDELINES

The parties agree that the base offense level for the offense is 12 under the Tax Loss Table found at U.S.S.G. § 2T4.1; that a two level enhancement is applied under U.S.S.G. §2T1.1(b)(2) because the offense involved sophisticated means; that a two level downward adjustment is applied under U.S.S.G. §3E1.1(a) because the defendant has accepted responsibility for the offense; that the defendant's CHC is I; and that the advisory guideline sentencing range for this case is 10-16 months in Zone C of the Sentencing Table.

III. ARGUMENT

For several years, the defendant, a successful and sophisticated businessman, engaged in a pattern of conduct that was designed to deceive the IRS in order to evade paying the proper amount of tax on his personal income. As stated, the defendant did not file timely tax returns for tax years 2006 and 2008; he seriously under-reported the amount of his taxable income in his

[2] The defendant also filed FBAR for 2009 that failed to report his ownership interests in the UBS account.

initial 2007 tax return, which he did not sign; he provided false information about his foreign bank accounts to the accountant who prepared his tax return for 2009; and, while being audited by the IRS in 2011, he filed tax returns for 2006 and 2008 and an amended return for 2007 that seriously unreported the amount of his taxable income.

Despite this pattern of deceptive and dishonest criminal conduct, the defendant presents a number of arguments in support of his request for a sentence of probation. For example, he claims that such a sentence is appropriate because "more than 30,000 other U.S. taxpayers in various amnesty programs offered by the Internal Revenue Service, whose conduct is similar to [his] . . . will not face criminal prosecution." This is an odd argument because it suggests that the defendant is entitled to some leniency because, unlike thousands of other taxpayers, he chose not make participate in the DOJ's "amnesty" program in the hope that his ownership of foreign bank accounts would not be discovered. This argument also fails because it does not account for the fact that after the defendant's interest in the UBS account was reported to the DOJ, he continued to try to evade paying the proper amount of tax on his income by filing false tax returns and providing false information about his income to Filiault.

The defendant supports his sentencing request by citing ten other criminal cases where sentences of probation were imposed for offenses that involved the concealment of foreign bank accounts.[3] As presented, this argument has little merit because it incorrectly assumes that a sentencing court's sentencing determination is entirely driven by the type of offense that is committed. As this Court has repeatedly demonstrated, sentencing determinations are influenced by many factors that are unrelated to the crime for which punishment is required. This is particular true where, as here, a defendant stands convicted of "white collar" offense."

[3] The defendant also identifies an eleventh case, *United States v. Heller*, that was prosecuted in the Southern District of New York, where the defendant was incarcerated for 45 days for failing to disclose his ownership a foreign bank account to the IRS.

The defendant's argument that a sentence of imprisonment would "create an unwarranted sentence disparity" is also belied by prison sentences that were imposed in at least 16 other cases that involved the concealment of foreign bank accounts.[4]

The defendant also argues that a sentence of imprisonment in this case would not deter others from committing similar types of offenses because such general deterrence has already been achieved "with the 30,000 voluntary disclosures performed as a result of the UBS matter." This argument has little merit because it ignores the deterrent value of the prison sentences that were given to other defendants who were prosecuted for failing to disclose their foreign bank accounts.

The defendant also contends that a sentence of probation is appropriate because he has paid the full amount of the criminal tax loss, plus interest and penalties, and the full amount of the FBAR penalty. This argument would merit serious consideration if the defendant's efforts to acquire the funds that were needed to pay these obligations involved substantial personal financial or personal sacrifice. Here, the relevance of this laudable conduct to the Court's sentencing determination is severely diminished by the fact that the defendant was able to pay this money by liquidating some of his personal assets, which have a current value of more than $7 million.

V. CONCLUSION

For the foregoing reasons, the government respectfully requests the Court to reject the defendant's requests for a downward variance and sentence of probation, and sentence the defendant to a five-month period of imprisonment followed by a three-year period of supervised release with a special condition of 5 months home confinement. Such a sentence would be

[4] The government has obtained copies of the judgments that were issued in each of these cases.

"sufficient but not greater than necessary," 18 U.S.C. § 3553(a), to deter the defendant from committing other offenses, deter others from committing similar types offenses, protect the public, and promote respect for the law. *See* 18 U.S.C. § 3553 (a) (2).

Dated: March 19, 2015

Respectfully submitted,

JOHN P. KACAVAS
United States Attorney

By: /s/ Robert M. Kinsella
Robert M. Kinsella
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, the foregoing Government's Sentencing Memorandum was filed by ECF and copies were sent by electronic mail to the defendant's counsel, Peter Anderson, Esq., and United States Probation Officer Sean Buckely.

Robert M. Kinsella
Robert M. Kinsella, AUSA