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Declined to Follow by [United States v. Orrock](#), 9th Cir.(Nev.), January 26, 2022

802 Fed.Appx. 247

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,

v.

Michael GALLOWAY,
Defendant-Appellant.

No. 18-10313

|

Argued and Submitted October
24, 2019 San Francisco, California

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FILED February 6, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of California, [Dale A. Drozd, J., 2016 WL 1719547](#), of four counts of tax evasion. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] the six-year statute of limitations for tax evasion began to run on the date defendant willfully filed his false tax returns;

[2] defendant waived new theory that IRS's warrantless inspection of his financial records violated his private-property interests under the Fourth Amendment; and

[3] District Court's determination that defendant's tax-evasion scheme was sufficiently sophisticated to justify application of the sophisticated-means enhancement was not clearly erroneous.

Affirmed in part, reversed and vacated in part, and remanded.

West Headnotes (3)

[1] **Criminal Law** Commission of offense in general

The six-year statute of limitations for tax evasion began to run on the date defendant willfully filed his false tax returns. [26 U.S.C.A. §§ 6531\(2\), 7201](#).

1 Case that cites this headnote

[2] **Criminal Law** Wrongfully obtained evidence

In absence of showing of good cause for defendant's failure to raise, in his motion to suppress his financial records, his new theory that the IRS's warrantless inspection of his financial records violated his private-property interests under the Fourth Amendment, defendant waived that theory, for appellate

review of district court's denial of his suppression motion. [U.S. Const. Amend. 4](#); [26 U.S.C.A. § 7201](#).

[3] Sentencing and Punishment **Sophistication in commission or concealment**

District court's determination that defendant's tax-evasion scheme was sufficiently sophisticated to justify application of the sophisticated-means enhancement was not clearly erroneous, in the absence of any showing that the court's determination was illogical, implausible, or without support in inferences that could be drawn from the record. [U.S.S.G. § 2T1.1\(b\)\(2\)](#).

Attorneys and Law Firms

***248** [Michael Gordon Tierney](#), Assistant U.S. Attorney, DOJ-USAO, Fresno, CA, for Plaintiff-Appellee

[Devin Burstein](#), Attorney, Warren & Burstein, San Diego, CA, for Defendant-Appellant

Appeal from the United States District Court for the Eastern District of California, [Dale A. Drozd](#), District Judge, Presiding, D.C. No. 1:14-cr-00114-DAD-BAM-1

Before: [MELLOY](#),* [BYBEE](#), and [N.R. SMITH](#), Circuit Judges.

MEMORANDUM**

Defendant Michael Galloway appeals his convictions and sentence for four counts of tax evasion in violation of [26 U.S.C. § 7201](#). He argues that the district court erred in: (1) denying his motion to dismiss Counts 1–3 of the indictment on statute-of-limitations grounds; (2) denying his motion for acquittal on Counts 1–3; (3) denying his motion to suppress his financial records; and (4) applying a sophisticated-means sentencing enhancement. We have jurisdiction under [28 U.S.C. § 1291](#), and we reverse in part, affirm in part, and remand for resentencing.

[1] 1. Galloway argues that the district court erred in not dismissing Counts 1–3 on statute-of-limitations grounds because the indictment was brought more than six years after Galloway filed his 2003, 2004, and 2005 tax returns. We review the district court's decision de novo. [United States v. Sure Chief](#), 438 F.3d 920, 922 (9th Cir. 2006).

The six-year statute of limitations for tax evasion, [26 U.S.C. § 6531\(2\)](#), begins to run in evasion of assessment cases “from the occurrence of the last act necessary to complete the offense.”¹ ***249** [United States v. Carlson](#), 235 F.3d 466, 470 (9th Cir. 2000).² Because tax evasion “is not a continuing offense” for statute of limitations purposes, [Cohen v. United States](#), 297 F.2d 760, 770 (9th Cir. 1962) (quoting [Norwitt v. United States](#), 195 F.2d 127, 133 (9th Cir. 1952)), the offense of tax evasion “is complete as soon as every element in the crime occurs,” see [United States v.](#)

Musacchio, 968 F.2d 782, 790 (9th Cir. 1991). The elements of tax evasion under § 7201 are: (a) “willfulness”;³ (b) “the existence of a tax deficiency”; and (c) “an affirmative act constituting an evasion or attempted evasion of the tax.” *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007).

When Galloway late-filed his 2003, 2004, and 2005 tax returns, he had already incurred a tax deficiency for each year. See *United States v. Voorhies*, 658 F.2d 710, 714 (9th Cir. 1981) (“A tax deficiency exists [by operation of law] from the date a return is due to be filed....”). Therefore, each offense of tax evasion charged in Counts 1–3 was complete when Galloway willfully filed his false tax returns (i.e., each element of tax evasion was thereby satisfied). Because the indictment was brought more than six years after Galloway filed his 2003, 2004, and 2005 tax returns, Counts 1–3 are barred by the statute of limitations. We therefore reverse the district court’s denial of Galloway’s motion to dismiss and vacate his convictions as to Counts 1–3.

2. Because we reverse the district court’s denial of Galloway’s motion to dismiss Counts 1–3 on statute-of-limitations grounds, we need not address Galloway’s claim that the district court erred in denying his motion for acquittal.

[2] 3. Galloway next argues that the district court erred in denying his motion to suppress because the IRS’s warrantless inspection of his financial records violated his private-property interests under the Fourth Amendment. But Galloway “never requested suppression on this ground in the district court,” see *United States v. Guerrero*, 921 F.3d 895, 896–97 (9th Cir.

2019), *petition for cert. filed*, (U.S. Nov. 27, 2019) (No. 19-6825), and therefore *Federal Rule of Criminal Procedure* 12(c)(3) provides that we may only consider his untimely claim if he shows “good cause for failing to present in his pre-trial motion the new theory for suppression he raises in this appeal,” *id.* at 898. Because Galloway failed to show good cause, we affirm the district court’s denial of his motion to suppress.

[3] 4. Galloway lastly argues that the district court erred in applying a two-level sentencing enhancement for “an offense involv[ing] sophisticated means.” See *U.S. Sentencing Guidelines Manual* § 2T1.1(b)(2) (U.S. Sentencing Comm’n 2018). We review the district court’s “application of the Guidelines to the facts for an abuse of discretion, and its factual findings for clear error.” *United States v. Jennings*, 711 F.3d 1144, 1146 (9th Cir. 2013).

The district court made several factual findings upon which it based its application of the sophisticated-means enhancement, none of which Galloway has shown to be clearly erroneous. And because Galloway has failed to show that the district court’s *250 determination that his tax-evasion scheme was sufficiently sophisticated to justify application of the sophisticated-means enhancement “was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record,” *United States v. Torlai*, 728 F.3d 932, 937 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)), we affirm the district court’s application of the Sentencing Guidelines.

We **REVERSE** and **VACATE** Galloway's convictions for Counts 1–3, **AFFIRM** his conviction on the remaining count, and **REMAND** for resentencing.

All Citations

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Footnotes

- * The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).
- 1 Both parties agree that Counts 1–3 charge Galloway with committing tax evasion only by evading the assessment of taxes, and not by evading the payment of taxes.
- 2 The Government's contention that Counts 1–3 are timely because the statute of limitations began to run, not from the filing of the false tax returns, but from the date Galloway lied to the IRS agents about his taxable income—i.e., the last act of evasion—is squarely foreclosed by [Carlson's](#) clear language. See [235 F.3d at 470](#).
- 3 The parties do not dispute that Galloway *willfully* filed his false tax returns.

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