

## Criminal Charges

### *1-16 Tax Controversies: Audits, Investigations, Trials § 16.07*

#### **§ 16.07 Recent Compliance Initiatives in Criminal Tax Prosecutions**

##### **[1] Prosecutions of Cases Involving Offshore Accounts**

In recent years, the Department of Justice has focused heavily on the criminal prosecution of taxpayers using undeclared offshore bank accounts to evade their United States income tax obligations. n203 Indeed, the Department recently announced that such prosecutions are its "top priority" for the foreseeable future. n204 The government's efforts to prosecute United States taxpayers owning undisclosed foreign accounts has been aided by a number of recent developments, including the proliferation of whistleblowers at the banks themselves, n205 recent court decisions abrogating the *Fifth Amendment* privilege against self incrimination with respect to foreign bank account information, n206 and the enactment of the Foreign Account Tax Compliance Act ("FATCA"), which requires foreign banks to provide information about United States account holders to the United States government and is scheduled to be fully implemented by December 31, 2015. n207

The Justice Department's focus on prosecuting those who engage in tax non-compliance through the use of offshore accounts is designed to work hand in hand with the IRS's civil voluntary disclosure program for offshore accounts. As part of the voluntary disclosure program, taxpayers voluntarily disclose the existence of their secret offshore accounts to the IRS prior to the government's own discovery of the accounts, and pay eight years of back taxes and civil penalties in exchange for which the government essentially promises not to prosecute the disclosing taxpayer. n208 Using this carrot and stick approach, the government has touted its ability to maximize the collection of outstanding tax, interest, and penalties owed to the government from taxpayers with hidden foreign accounts. n209

The Justice Department's heavily publicized prosecution of criminal cases involving offshore accounts extends not only to prosecuting the account owners, but also to prosecuting bankers, banks, and advisers that facilitate the evasion of U.S. income taxes owed by their U.S. clients. n210 For example, the government has prosecuted attorneys who facilitated their client's use of offshore bank accounts by creating foreign trusts, foundations, or corporations to hide the offshore accounts. n211 The government also has prosecuted accountants for their role in knowingly preparing false tax returns for clients with foreign accounts, or otherwise assisting in the concealment of those accounts. n212 The government has also prosecuted numerous foreign bankers and foreign financial advisors for assisting U.S. customers in hiding their accounts. n213 Finally, the government has not shied away from criminally prosecuting the foreign banks themselves. n214 The types of criminal charges that the government has successfully pursued in such cases have been wide ranging. Some of the cases against the United States account holders--typically those cases involving relatively small undeclared accounts or those cases with few complicating factors--have only involved charges of filing a false tax return under *IRC § 7206* or failing to file a Report of Foreign Bank and Financial Accounts (an "FBAR") form under *31 USC § 5322*. n215 The more egregious criminal tax cases brought against United States account holders have involved charges of tax evasion under *IRC § 7201*, and/or conspiracy under *18 USC Section 371*. n216 The criminal cases brought against the bankers, attorneys, advisors, and banks have typically centered on conspiracy charges. n217 The government's criminal prosecution of offshore account holders and enablers is poised to extend beyond just those with Swiss bank accounts. For example, the government has recently publicized both its attempts to obtain information from Indian banks regarding United States-based account holders, n218 as well as its prosecution of individuals with offshore accounts at those Indian banks. n219 Some believe that the government is now poised to bring prosecutions against United States owners of undisclosed foreign accounts at banks in Israel. n220

## [2] Prosecutions Against Tax Return Preparers

The Department of Justice recently placed an emphasis on prosecuting tax preparers who fraudulently aid taxpayers in evading taxes. n221 These criminal cases typically involve allegations that the tax return preparer fraudulently and repeatedly overstated the deductions taken on his or her clients' tax returns. n222 In conjunction with its well publicized efforts to prosecute such tax preparers, the government typically seeks court orders barring those individuals from preparing tax returns for remuneration in the future. n223 The Justice Department's efforts have been bolstered by recent IRS rules requiring tax return preparers to register with the IRS, n224 and forthcoming IRS rules requiring tax return preparers to pass a competency test administered by the IRS. n225

## [3] Identity Fraud and Theft

In late 2012, the Tax Division announced that it was making it a high priority to prosecute individuals--including in some instances tax preparers--engaged in "stolen identity refund fraud," which involves the filing of "wholly fraudulent tax returns without the named taxpayer's knowledge or consent," for the purpose of stealing falsely obtained refund monies. n226 The Tax Division has also begun heavily publicizing indictments and convictions involving stolen identity refund fraud. n227

## [4] Economic Substance Doctrine in Criminal Tax Cases

The economic substance doctrine has played an increasingly prominent role in criminal tax cases.

The doctrine provides that tax deductions are not permitted if they result from a transaction with no economic substance, i.e., a transaction whose only real effect is to create favorable tax consequences. n228 In determining whether a transaction has "sufficient economic substance to be respected for tax purposes," courts review "both the 'objective economic substance of the transactions' and the 'subjective business motivation' behind them." n229 Thus, the economic substance doctrine purportedly weeds out "sham transactions," i.e., transactions whose sole purpose is to generate an improper deductible tax loss for the taxpayer. n230

Because the economic substance doctrine purportedly weeds out unlawful sham transactions, it has been increasingly used in the criminal prosecution of promoters of allegedly fraudulent tax shelters, and in the prosecution of legal and accounting professionals who issue opinion letters in connection with such tax shelters.

In the mid 1980s, courts severely limited the application of the economic substance doctrine to criminal tax cases because of its apparent vagueness--which created the possibility of criminal convictions based on the violation of uncertain or debatable areas of the tax law. Thus, for example, in *United States v. Dahlstrom*, n231 the court, although not rejecting the application of the economic substance doctrine in a criminal tax shelter case, held that the defendants could not be held criminally liable for knowing that their tax shelters lacked economic substance unless they were put on notice *ex ante*, either by the IRS or by court decisions, that either the specific tax shelters they planned on implementing, or ones that were very similar, were deemed illegal. The court therefore held that the government failed to establish criminal intent because it could not cite a case disapproving of a tax shelter similar to the defendants' which preceded the defendants' activities. Similarly, in *United States v. Mallas*, n232 the court reversed the defendants' convictions for tax evasion arising out of their development of a tax shelter program. The court held that because the propriety of the allegedly unlawful deductions at the heart of the tax shelter was "a point of law that is 'vague or highly debatable,'" defendants' conviction could not stand because a "willful" violation of the tax law cannot occur where the law at issue is so uncertain. n233 The court suggested that because both the government and the defense presented reasonable interpretations of the law governing the deduction at issue, this was the sort of case that should be resolved solely in the civil tax arena. n234 By the late 1980s, however, arguments by defendants that the economic substance doctrine was too vague of a rule to serve as the basis of a criminal tax conviction were being rejected. Thus, in *United States v. Heller*, n235 the district court dismissed the indictment against the

defendants--which charged that they "devised and implemented fraudulent tax shelters"--because, according to the district court, the defendants could not have formed the requisite "criminal intent" due to the "absence of a prior Internal Revenue Service statement or court opinion condemning schemes precisely like [defendants], as well as ... 'legal uncertainty' as to the tax consequences" of the tax shelter "scheme." The Eleventh Circuit reversed, reasoning that the "rule against sham transactions for tax avoidance is quite well-settled" and citing the economic substance doctrine as the means of determining if a transaction was a sham. The court noted, however, that defendants were free to present evidence that they themselves believed that there was "legal uncertainty" regarding their conduct. n236 A similar result was reached in *United States v. Richards*. n237 There, the defendants were convicted of conspiracy to defraud the United States, by selling a tax shelter plan in which the investors subleased a portion of a uranium claim for \$5,000, sold an option to purchase the investors' interest to a third-party option holder for \$20,000, and then claimed a \$25,000 tax deduction. Although the defendants argued that they had insufficient warning that their conduct was illegal and that there was insufficient evidence to show that they had an intent to defraud the government, the Ninth Circuit disagreed. The appellate court observed that the "law is well settled" that "[w]hen there is no economic substance to a tax avoidance plan, it is a sham transaction," that "sham transactions are illegal," and that a "person who is 'involved in orchestrating the generation of the questionable tax deduction' has engaged in conduct beyond mere advocacy of a tax shelter program." n238 Likewise in *United States v. Iles*, n239 the defendant argued that he did not have fair notice that his conduct in promoting numerous tax shelters was illegal. The court rejected that argument, reasoning that "[t]he 'generic tax shelters' of the sort promoted by [defendant] have long been held to lack economic substance and clearly cannot support deductions and tax credits." n240 In *United States v. Richey*, n241 the defendant, a former IRS agent convicted of selling an allegedly illegal tax shelter, argued that it was "absolutely unnecessary" for the trial court to ask the jury to consider the economic substance of the tax scheme. The Ninth Circuit, however, ruled that such an instruction was essential, reasoning that because the difference "between tax evasion and avoidance ... turns on the economic substance of the relevant transactions, it was necessary to discuss economic substance." By the 1990s, the use of the economic substance doctrine in the criminal prosecution of tax shelter promoters became more frequent. n242 By the mid 2000s, as part of an effort to further curtail the marketing and sale of allegedly abusive tax shelters, n243 the government began expanding the scope of its tax shelter prosecutions to include lawyers and accountants who wrote opinion letters in connection with such shelters--a directional shift that also expanded the role of the economic substance doctrine in criminal tax cases. Thus, in 2008, a jury convicted attorney Raymond J. Ruble, along with Robert Pfaff and John Larson, two former KPMG accountants, of criminal tax evasion in connection with their involvement in allegedly abusive tax shelter products promoted by the KPMG accounting firm and others n244--a case that the government once touted as the "the largest criminal tax case ever filed." n245 The conviction of Pfaff was especially noteworthy because the principal allegations against him were that he designed the tax shelters and that he provided secondary opinion letters in connection with the shelters. n246 On appeal, the defendants argued, *inter alia*, that the economic substance doctrine was too vague to support their convictions because it was not sufficiently "knowable." The Second Circuit rejected that argument, reasoning that "[v]agueness of the law does not *ipso facto* negate a jury finding of willfulness," and that the "economic substance law is not unconstitutionally vague: [i]t has been applied in criminal cases before, and (as discussed) is not unsettled in the way Appellants contend." n247 Similarly, in *United States v. Daugerdas*, n248 which involved the prosecution of accountants and attorneys accused of promoting allegedly unlawful tax shelters and providing opinion letters in connection with those shelters, the court held that the indictment was not deficient because it alleged that the tax shelters provided no reasonable possibility of profit and therefore lacked economic substance and business purpose. The court reasoned that the economic substance doctrine is "straightforward: a transaction lacking economic substance cannot give rise to a tax deductible loss," and that "[t]he economic substance doctrine is properly applied in a criminal case." n249 Despite the increased use of the economic substance doctrine in tax shelter cases, the Second Circuit noted, as recently as 2012, that there is inconsistency among the Circuits in defining the parameters of the economic substance doctrine. The Second Circuit, itself, has defined the doctrine inconsistently. n250 The court nonetheless approved the continued use of the economic substance doctrine in criminal prosecutions involving tax shelters, stating that "[d]espite these inconsistencies, we return to the premise that a transaction lacks economic substance if it 'can not ... with reason be said to have purpose, substance, or utility apart from [its] anticipated tax consequences.'" n251 The Health Care and Education Reconciliation Act of 2010 codified the economic substance doctrine in new *Section 7701(o) of the Internal Revenue Code*. n252 Although the codification of the doctrine was

intended to apply only in the assessment of civil penalties, it is possible that it may have a spillover effect in criminal tax prosecutions. n253

#### FOOTNOTES:

(n1)Footnote 203. United States taxpayers with an interest in a foreign bank account must (i) if over \$10,000, file Treasury Department Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (the "FBAR"), (ii) check the box on Schedule B of IRS Form 1040 relating to ownership, signatory or other authority over a foreign bank, security or financial account, and (iii) properly report on IRS Form 1040 all income generated by the foreign account. See § 17.03, *infra*, for a discussion of the FBAR reporting requirement. The willful failure to file a required FBAR is a crime (see 31 USC § 5322) as is the willful filing of a false FBAR (see, eg, 18 USC § 1001) or the filing of a tax return that is false because the taxpayer willfully failed to check the box on Schedule B of Form 1040 regarding an interest in a foreign account, and/or failed to report all of the income generated from the foreign account (see IRC § 7206(1)). Beginning in 2008, as a result of the Justice Department's investigation of Union Bank of Switzerland ("UBS") as an alleged haven for United States income tax evaders, the United States government began prosecuting numerous United States taxpayers who allegedly used foreign accounts to evade their United States income tax obligations, as well as advisors and foreign bank representatives who allegedly aided the taxpayers. See discussion at § 17.03[1], *infra*.

(n2)Footnote 204. See United States Department of Justice Website, *Offshore Compliance Initiative* (October 15, 2012) (available at [http://www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm)) ("The Tax Division's top litigation priority is the concerted civil and criminal effort to combat the serious problem of non-compliance with our tax laws by U.S. taxpayers using secret offshore bank accounts--a problem that a 2008 Senate report concluded costs the U.S. Treasury at least \$100 billion annually"); United States Department of Justice Website, *What We Do* (October 15, 2012) (available at [http://www.justice.gov/tax/what\\_we\\_do.htm](http://www.justice.gov/tax/what_we_do.htm)) ("Significant recent Tax Division initiatives include the following: Attacking the use of 'secret' foreign bank accounts to evade taxes ... Enforcing IRS summonses for records of offshore credit card transactions ... Initiating criminal investigations of suspects in offshore tax evasion cases").

(n3)Footnote 205. See, eg, David Kocieniewski, *Whistle-Blower Awarded \$104 Million by I.R.S.*, *New York Times* (September 11, 2012) (former UBS banker Bradley Birkenfeld receives \$104 million whistleblower award from IRS for revealing secrets of the Swiss banking system).

(n4)Footnote 206. See Christopher M. Ferguson, *The Required Records Doctrine: The Fifth Amendment Privilege Under Attack*, *Journal of Taxation* (October 2011) ("As part of its wave of investigations into undisclosed overseas bank accounts following its deferred prosecution of UBS AG, the Department of Justice (DOJ) has invoked the required records doctrine, a rarely used exception to the *Fifth Amendment*, to compel foreign account holders to produce records of their accounts over their *Fifth Amendment* act-of-production objections. Thus far ... the government ... has been successful in these efforts"). See also § 10.04, *supra*, for a discussion of the erosion of the *Fifth Amendment* privilege as it pertains to foreign bank account records.

(n5)Footnote 207. See IRS Announcement 2012-42, *Timelines for Due Diligence and Other Requirements under FATCA* (Oct 25, 2012); see also § 17.04, *infra* (discussing the reporting requirements under FATCA).

(n6)Footnote 208. See § 14.08, *supra* (discussing the civil voluntary disclosure program).

(n7)Footnote 209. See United States Department of Justice Website, *Offshore Compliance Initiative* (October 15, 2012) (available at [http://www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm)) ("But the outcome cannot be measured in litigation results alone. This enforcement effort has dealt fabled Swiss bank secrecy a devastating blow and provided tools that should yield information on thousands of additional U.S. offshore account holders who have undisclosed accounts at UBS and other banks. Moreover, the publicity surrounding the Tax Division's enforcement action and the subsequent settlement has already produced dramatic behavior changes. The IRS credits these two agreements with prompting an unprecedented number of taxpayers--nearly 18,000 in the 18-month period concluding in February

2011, in contrast to the fewer than 100 typical in previous years--to 'come in from the cold' and voluntarily disclose to the IRS their previously hidden foreign accounts and also to agree to pay hundreds of millions of dollars to the U.S. Treasury. The continuing prosecutions of foreign-account holders and their facilitators created a favorable atmosphere for the IRS to roll out a second voluntary disclosure program on February 8, 2011").

(n8)Footnote 210. See Department of Justice Website, *Offshore Compliance Initiative* (October 15, 2012) (available at [http://www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm)) ("The prosecution results so far have been encouraging: To date, approximately 150 investigations of offshore-banking clients have been initiated, of which 36 client cases have been charged, with 31 guilty pleas having been entered, 2 convicted after trial, and 5 awaiting trial. A number of facilitators who helped clients hide assets offshore at UBS and other banks have been indicted, resulting in 13 bankers and 2 attorneys being charged and awaiting trial, and one advisor and one banker being charged and convicted. In addition, investigations have been opened into numerous additional offshore banks across the world").

(n9)Footnote 211. See Department of Justice Press Release, *UBS Clients and Tax Attorney Indicted in Phoenix for Hiding Assets in Secret Foreign Bank Accounts* (January 30, 2012) (attorney Christopher M. Rusch and others charged with conspiracy to defraud IRS by concealing millions of dollars in assets in numerous secret Swiss bank accounts held at UBS) (available at <http://www.justice.gov/tax/2012/txdv12136.htm>); Department of Justice Press Release, *Swiss Banking Executive and Swiss Lawyer Charged with Conspiring to Defraud the United States: Defendants Aided Wealthy Americans Conceal Assets in Secret Swiss Bank Accounts* (August 20, 2009) (available at <http://www.justice.gov/tax/txdv09825.htm>) (Swiss attorney Matthias Rickenbach indicted for conspiring to assist wealthy American clients in concealing offshore accounts by establishing sham offshore entities).

(n10)Footnote 212. See, eg, Department of Justice Press Release, *Three Tax Return Preparers Charged with Helping Clients Evade Taxes by Hiding Millions in Secret Accounts at Two Israeli Banks* (June 15, 2012) (indicting accountants David Kalai, Nadav Kalai, and David Almog for allegedly conspiring to defraud U.S. by preparing U.S. individual income tax returns that did not disclose the clients' foreign financial accounts, and by opening offshore companies to assist clients in hiding offshore accounts) (available at <http://www.justice.gov/tax/2012/txdv12762.htm>).

(n11)Footnote 213. See, eg, Department of Justice Press Release, *Swiss Financial Advisor Indicted for Conspiring with More Than 60 U.S. Taxpayers to Hide More Than \$184 Million in Swiss Bank Accounts* (July 21, 2011) (Beda Singenberger, a foreign financial advisor, indicted for conspiracy with U.S. clients with offshore Swiss accounts) (available at [http://www.justice.gov/tax/usaopress/2011/USAO\\_SDNY\\_07212011.pdf](http://www.justice.gov/tax/usaopress/2011/USAO_SDNY_07212011.pdf)); Department of Justice Press Release, *Swiss International Bank's Former Head of North America Offshore Banking, Others Charged with Conspiracy: Superseding Indictment Alleges Defendants Helped U.S. Taxpayers Hide Assets in Secret Accounts* (July 21, 2011) (discussing indictment against various bankers at Credit Suisse in Switzerland) (available at <http://www.justice.gov/tax/txdv11957.htm>); Department of Justice Press Release, *Manhattan U.S. Attorney Charges Former UBS Banker And Financial Adviser with Conspiring to Hide More than \$215 Million in Swiss Bank Accounts* (August 4, 2011) (former UBS banker Gian Gisler indicted for conspiring with U.S. clients to hide more than \$215 million in offshore accounts at UBS and later at other Swiss banks) (available at <http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf>); Department of Justice Press Release, *Banker Pleads Guilty to Helping American Real Estate Developer Evade Income Tax on \$200 Million* (June 19, 2008) (former UBS banker Bradley Birkenfeld pleads guilty to conspiring with a wealthy American client to conceal \$200 million in secret accounts at UBS) (available at <http://www.justice.gov/opa/pr/2008/June/08-tax-550.html>). Former UBS banker Bradley Birkenfeld subsequently received a \$104 million whistleblower award from the IRS for revealing the dirty secrets of the Swiss banking system to the U.S. government. See David Kocieniewski, *Whistle-Blower Awarded \$104 Million by I.R.S.*, New York Times (September 11, 2012).

(n12)Footnote 214. See, eg, Department of Justice Press Release, *Swiss Bank Indicted on U.S. Tax Charges: Wegelin Bank Allegedly Conspired To Hide More Than \$1.2 Billion from the IRS* (February 2, 2012) (Swiss private bank Wegelin & Co. indicted for conspiring with U.S. taxpayers and others to hide more than \$1.2 billion in secret accounts and the income these accounts generated from the IRS)

(available at <http://www.justice.gov/tax/2012/txdv12153.htm>); Department of Justice Press Release, *UBS Enters into Deferred Prosecution Agreement: Bank Admits to Helping U.S. Taxpayers Hide Accounts from IRS; Agrees to Identify Customers & Pay \$780 Million* (February 18, 2009) (Swiss bank UBS entered into a deferred prosecution agreement on charges of conspiring to defraud the U.S. by impeding the IRS; UBS agreed to (i) stop providing banking services to U.S. clients with undeclared accounts, (ii) pay a \$780 million fine, and (iii) provide certain U.S. customer names to the U.S. government) (available at <http://www.justice.gov/opa/pr/2009/February/09-tax-136.html>).

(n13)Footnote 215. See, eg, Department of Justice Press Release, *South Florida Retired Businessman Pleads Guilty to Failing to Disclose Assets Held in Swiss Banks* (May 30, 2012) (Wolfgang Roessel pleads guilty to filing a false tax return by not reporting Swiss bank accounts he maintained at UBS; high balance in accounts was approximately \$4-5 million) (available at <http://www.justice.gov/opa/pr/2012/May/12-tax-692.html>); Department of Justice Press Release, *Seattle UBS Client Pleads Guilty to Filing a False Tax Return* (December 20, 2010) (Arthur Joel Eisenberg pleads guilty to filing a false tax return related to Swiss bank accounts he maintained at UBS; high balance in accounts were approximately \$3.1 million) (available at <http://www.justice.gov/usao/waw/press/2010/dec/eisenberg.html>); Department of Justice Press Release, *UBS Client Pleads Guilty to Filing False Tax Return, Hid \$8 Million in Secret Swiss Bank Accounts* (July 28, 2009) (Jeffrey P. Chernick pleads guilty today to charges of filing a false tax return related to Swiss bank accounts he maintained at UBS and other Swiss banks; high balance in accounts were approximately \$8 million) (available at <http://www.justice.gov/opa/pr/2009/July/09-tax-729.html>).

(n14)Footnote 216. See, eg, Department of Justice Press Release, *Diamond Merchant Sentenced in Manhattan Federal Court to One Year and One Day in Prison for Conspiring to Hide \$7.1 Million in Swiss Bank Accounts and Evade Nearly \$400,000 in Taxes* (November 9, 2011) (Richard Werdiger sentenced for conspiring to defraud IRS by hiding more than \$7.1 million at UBS, filing false federal income tax returns, and evading nearly \$400,000 of taxes; especially egregious factors included using sham entities, opening and closing multiple accounts, using codenames to contact UBS regarding the accounts) (available at <http://www.justice.gov/usao/nys/pressreleases/November11/werdigerrichardsentencingpr.pdf>); Department of Justice Press Release, *Former UBS Client Pleads Guilty in Manhattan Federal Court to Hiding \$4.9 Million in Swiss Bank Accounts* (December 22, 2010) (Ernest Vogliano pleads guilty to filing false federal income tax returns and conspiring to defraud IRS by hiding \$4.9 million at UBS; especially egregious factors included using shell corporations, transferring monies from UBS to a small Liechtenstein-based bank that did not have offices in the United States after widespread news reports concerning the U.S. government's criminal investigation of UBS, withdrawing hundreds of thousands of dollars from his UBS accounts in the form of travelers checks, and mailing travelers checks in separate envelopes to himself in New York to evade detection by U.S. authorities) (available at <http://www.justice.gov/usao/nys/pressreleases/December10/voglianoernestpleapr.pdf>); Department of Justice Press Release, *California UBS Client Indicted for Hiding Assets in Secret Swiss Bank Accounts* (November 19, 2010) (Bernard Goldstein indicted for conspiracy to defraud IRS, filing false tax returns and failing to file FBARs, in connection with UBS account; although high balance in accounts was approximately \$2 million, especially egregious factors included using sham corporations, signing IRS forms and UBS equivalent forms falsely stating that sham corporation was the owner of the account, and, withdrawing money from account after UBS disclosed that the account was under criminal investigation by the U.S. government) (available at <http://www.justice.gov/tax/txdv101327.htm>).

(n15)Footnote 217. See, eg, David Voreacos and Susannah Nesmith, *Ex-UBS, Credit Suisse Banker Bagios Set to Change Plea*, Bloomberg Businessweek (October 17, 2012) (former Swiss banker Christos Bagios was charged with conspiracy to "assist U.S. customers in concealing assets and income from the U.S. government, including the IRS"); Department of Justice Press Release, *UBS Clients and Tax Attorney Indicted in Phoenix for Hiding Assets in Secret Foreign Bank Accounts* (January 30, 2012) (attorney Christopher M. Rusch and others charged with conspiracy to defraud IRS by concealing millions of dollars in assets in numerous secret Swiss bank accounts held at UBS) (available at <http://www.justice.gov/tax/2012/txdv12136.htm>); Department of Justice Press Release, *Manhattan U.S. Attorney Charges Former UBS Banker And Financial Adviser with Conspiring to Hide More than \$215 Million in Swiss Bank Accounts* (August 4, 2011) (former UBS banker Gian Gisler indicted for conspiring

with U.S. clients to hide more than \$215 million in offshore accounts at UBS and later at other Swiss banks) (available at <http://www.justice.gov/usao/nys/pressreleases/August11/gislergianindictmentpr.pdf>); Department of Justice Press Release, *Swiss Financial Advisor Indicted for Conspiring with More Than 60 U.S. Taxpayers to Hide More Than \$184 Million in Swiss Bank Accounts* (July 21, 2011) (foreign financial advisor Beda Singenberger indicted for conspiracy with U.S. clients with offshore accounts) (available at [http://www.justice.gov/tax/usaopress/2011/USAO\\_SDNY\\_07212011.pdf](http://www.justice.gov/tax/usaopress/2011/USAO_SDNY_07212011.pdf)); Department of Justice Press Release, *Banker Pleads Guilty to Helping American Real Estate Developer Evade Income Tax on \$200 Million* (June 19, 2008) (former UBS banker Bradley Birkenfeld pleaded guilty to conspiring with a wealthy American client to help the client evade paying \$7.2 million in taxes by concealing \$200 million in secret accounts at UBS) (available at <http://www.justice.gov/opa/pr/2008/June/08-tax-550.html>).

(n16)Footnote 218. See Department of Justice Press Release, *Justice Department Asks Court to Allow IRS to Seek HSBC India Bank Account Records: Records Would Be Used to Identify U.S. Residents Who Evade Paying Federal Taxes* (April 7 2011) (available at <http://www.justice.gov/tax/txdv11439.htm>).

(n17)Footnote 219. See, eg, Department of Justice Press Release, *Wisconsin Neurosurgeon Convicted of Filing False Tax Return and Failing to File Report of Foreign Bank Accounts* (August 23, 2012) (Arvind Ahuja convicted of one count of filing a false 2009 individual income tax return and one count of failing to file a FBAR form for secret offshore account at HSBC in India) (available at <http://www.justice.gov/opa/pr/2012/August/12-tax-1043.html>); Department of Justice Press Release, *HSBC India Client Indicted for Tax Evasion and Failing to Report Foreign Bank Accounts: Failed to Report More Than \$1.3 Million of Income* (November 17, 2011) (Ashvin Desai indicted on three counts of tax evasion, two counts of willfully aiding the preparation of materially false tax returns and three counts of failing to file FBAR reports in connection with allegedly secret offshore accounts at HSBC in India) (available at <http://www.justice.gov/tax/txdv111504.htm>); Department of Justice Press Release, *New York Woman Pleads Guilty to Filing a False Tax Return; Did Not Report Her HSBC India Bank Account Held \$8.3 Million* (April 13, 2011)

(Josephine Bhasin pled guilty to filing a false income tax return that did not report her ownership of an account at HSBC India) (available at <http://www.justice.gov/tax/txdv11467.htm>).

(n18)Footnote 220. See, eg, Eamon Javers, *Tax Shelters: Why Israel Could Be the Next Switzerland*, CNBC (June 19, 2012) ("Sources tell CNBC the new case is just the beginning of a potential series of indictments, which may snare some of the wealthy American clients who have hidden money in Israel").

(n19)Footnote 221. See United States Department of Justice Website, *What We Do* (October 15, 2012) (available at [http://www.justice.gov/tax/what\\_we\\_do.htm](http://www.justice.gov/tax/what_we_do.htm)) ("Significant recent Tax Division initiatives include ... Investigating and prosecuting tax return preparers who willfully prepare false tax returns ... Working with IRS to conduct training on gathering evidence about fraudulent return preparers"). See §§ 4.06, 16.02, 16.04, *supra*, and 16.08[1], *infra*, for a discussion of criminal sanctions applicable to tax return preparers.

(n20)Footnote 222. See, eg, Department of Justice Press Release, *Alabama Return Preparers Sentenced to Jail for Tax Conspiracy* (July 27, 2012) (tax preparers "James E. Moss and Avada L. Jenkins" found "guilty of conspiracy and aiding and assisting the preparation of false tax returns" that "fraudulently inflated the amount of refunds due to the customers") (available at <http://www.justice.gov/tax/2012/txdv12937.htm>); Department of Justice Press Release, *Texas Return Preparer Sentenced to Jail for Preparing False Tax Returns* (July 24, 2012) (tax return preparer Eddy L. Lovely pleads guilty to aiding and assisting in the preparation of false tax returns; Lovely "prepared tax returns that contained fabricated Schedule C losses for businesses that the taxpayers did not own or operate, as well as false or inflated Schedule A deductions for charitable contributions and other expenses") (available at <http://www.justice.gov/tax/2012/txdv12915.htm>); Department of Justice Press Release, *Long Island, N.Y., Tax Return Preparer Sentenced to 37 Months for Tax Fraud* (July 24, 2012) (tax return preparer Howard Levine pleads guilty to obstructing the internal revenue laws and aiding in the preparation of false income tax returns for clients, based on allegations that many of "the tax returns prepared by Levine ... were false and contained fictitious deductions, business expenses and corporate losses created by Levine") (available at <http://www.justice.gov/tax/2012/txdv12547.htm>).

(n21)Footnote 223. See United States Department of Justice Website, *What We Do* (October 15, 2012) (available at [http://www.justice.gov/tax/what\\_we\\_do.htm](http://www.justice.gov/tax/what_we_do.htm)) ("Significant recent Tax Division initiatives include ... Shutting down fraudulent tax return preparers ... Seeking civil injunctions to bar fraudulent return preparers from preparing returns"); see also Department of Justice Press Release, *Federal Court Bars Three Pennsylvania Men from Preparing Tax Returns* (September 14, 2012) ("A federal court in Philadelphia has permanently barred Deron O. Joe of Darby, Pa.; Edmund G. Dassin of Lansdowne, Pa.; and James M. Tokpawhiea of Philadelphia from preparing federal tax returns for others, the [Justice Department] complaint alleged that the defendants ... prepared fraudulent federal income tax returns that intentionally understated customers' tax liabilities ... In the last decade, the Justice Department's Tax Division has obtained hundreds of injunctions to stop tax fraud promoters and unscrupulous tax return preparers") (available at <http://www.justice.gov/tax/2012/txdv121122.htm>); Department of Justice Press Release, *Federal Court Shuts down Florida Tax Return Preparers* (August 9, 2012) ("A federal court in Miami has permanently barred Sharon Angulo and Claudia Zuloaga ... from preparing federal tax returns for others ... Angulo and Zuloaga help customers use Internal Revenue Service (IRS) Forms 1099-OID to report fictitious income tax withholding ... The IRS lists return preparer fraud as one of the Dirty Dozen Tax Scams for 2012") (available at <http://www.justice.gov/tax/2012/txdv12989.htm>).

(n22)Footnote 224. See Internal Revenue Service Website, *Registered Tax Return Preparer (RTRP) Information* (Updated: August 4, 2012) (available at [http://www.irs.gov/Tax-Professionals/Registered-Tax-Return-Preparer-\(RTRP\)-Information](http://www.irs.gov/Tax-Professionals/Registered-Tax-Return-Preparer-(RTRP)-Information)) ("If you prepare Forms 1040 for compensation, you must follow recently enacted requirements for federal tax return preparers. Most individuals must become Registered Tax Return Preparers (RTRP) under these new rules ... RTRPs have the right to prepare and sign tax returns and claims for refund. RTRPs also may represent clients before the IRS during audits of tax returns they prepare").

(n23)Footnote 225. See Internal Revenue Service Website, *Registered Tax Return Preparer (RTRP) Information* (Updated: August 4, 2012) (available at [http://www.irs.gov/Tax-Professionals/Registered-Tax-Return-Preparer-\(RTRP\)-Information](http://www.irs.gov/Tax-Professionals/Registered-Tax-Return-Preparer-(RTRP)-Information)) ("The IRS is currently phasing in new rules requiring tax return preparers to pass the new RTRP competency test. Existing tax return preparers generally have until December 31, 2013, to pass the new test and to officially become an RTRP").

(n24)Footnote 226. Tax Division Directive 144 (September 18, 2012) (" For purposes of this Directive, 'Stolen Identity Refund Fraud' is defined as cases involving a fraudulent claim (or attempted claim) for a tax refund wherein the fraudulent claim for refund (i.e., tax return) is in the name of a person whose personal identification information appears to have been stolen or unlawfully used to make the claim, and the claim is intended to benefit someone other than the person to whom the personal identification information belongs. Stolen Identity Refund Fraud cases also include the negotiation (or attempted negotiation), possession, or transfer, of refund proceeds resulting from the above-defined scheme").

(n25)Footnote 227. See, eg, Department of Justice Press Release, *Barbados National Sentenced to Prison for Using Stolen Identities to Obtain Tax Refunds* (November 7, 2012) (Andrew J. Watts sentenced to 114 months in prison for devising and executing a stolen identity federal income tax refund fraud scheme, where Watts filed over 470 false federal income tax returns in the names of deceased taxpayers seeking fraudulent refunds in excess of \$120 million, with Watts either signing the name of the deceased taxpayer to the tax return, or falsely listing himself as the deceased taxpayer's representative); Department of Justice Press Release, *Alabama Woman Pleads Guilty to a Sophisticated Million Dollar Identity Theft Scheme* (October 31, 2012) (Antoinette Djonret pleaded guilty to conspiring to file false tax returns and aggravated identity theft; government alleged that Djonret and her co-conspirators stole identities of various taxpayers, filed more than 1,000 false tax returns that claimed more than \$1.7 million in fraudulent tax refunds using the stolen identities, and then used an elaborate network of individuals to launder the tax refunds to prepaid debit cards used by Djonret and her coconspirators); Department of Justice Press Release, *Georgia Tax Return Preparer Pleads Guilty to Stolen Identity Refund Fraud Crimes* (August 17, 2012) (tax preparer Willie C. Grant pleaded guilty to filing a false claim for tax refund, theft of government money and aggravated identity theft; government alleged that Grant used many of his former clients' names and Social Security numbers to file false federal income returns in their names and without their knowledge, intentionally claimed false tax refunds on those returns, and directed the IRS

either to electronically deposit the false refunds into his personal or business bank accounts or to issue paper refund Treasury checks which he then cashed or deposited into his personal or business bank accounts).

(n26)Footnote 228. See *Coltec Indus v US*, 454 F3d 1340, 1352 (Fed Cir 2006) ("economic substance doctrine ... require[s] disregarding, for tax purposes, transactions that comply with the literal terms of the tax code but lack economic reality"); *Nicole Rose Corp v Commr*, 320 F3d 282, 284 (2d Cir 2002) ("transaction lack[s] economic substance, and, therefore, [i]s without effect for Federal income tax purposes ... if it has no business purpose or economic effect other than the creation of tax deductions."); *US v Daugerdas*, 759 F Supp 2d 461, 465 (SDNY 2010) ("[t]he doctrine's fundamentals are straightforward: a transaction lacking economic substance cannot give rise to as tax deductible loss").

(n27)Footnote 229. *ACM Pshp v Commr*, 157 F3d 231, 247 (3d Cir 1998) .

(n28)Footnote 230. See *Prati v US*, 603 F3d 1301, 1309 (Fed Cir 2010) (noting that it was proper for Tax Court to "equate[] lack of economic substance with 'sham transaction' "); *Estate of Carberry v Commr*, 933 F2d 1124 (2d Cir 1991) (equating transaction "without 'economic substance' " to "a sham"). See also § 15.03[8], *supra*, for a discussion of the codification of the economic substance doctrine and its application in civil tax cases.

(n29)Footnote 231. 713 F2d 1423 (9th Cir 1983) .

(n30)Footnote 232. 762 F2d 361 (4th Cir 1985) .

(n31)Footnote 233. 762 F2d 361, 363 (4th Cir 1985) .

(n32)Footnote 234. 762 F2d 361, 364 (4th Cir 1985) .

(n33)Footnote 235. 866 F2d 1336 (11th Cir 1989) .

(n34)Footnote 236. 866 F2d 1336 (11th Cir 1989) .

(n35)Footnote 237. 892 F2d 1047 (9th Cir 1989) .

(n36)Footnote 238. The court went on to observe that there was sufficient evidence at trial to establish both that the transactions lacked economic substance and that defendants knew that the transactions were illusory, since the defendants created offshore corporations that served as the option holders for the tax shelter plan, and then arranged multiple fictitious payments from those offshore corporations to give the appearance that the payments needed to justify the investors' \$25,000 tax deductions were actually being made. *US v Richards*, 892 F2d 1047 (9th Cir 1989) .

(n37)Footnote 239. 906 F2d 1122, 1127 (6th Cir 1990) .

(n38)Footnote 240. *US v Iles*, 906 F2d 1122, 1127 (6th Cir 1990) .

(n39)Footnote 241. 874 F2d 817 (9th Cir 1989) .

(n40)Footnote 242. See, eg, *US v Noske*, 117 F3d 1053 (8th Cir 1997) (jury instructed on "economic substance doctrine" in connection with prosecution of tax shelter promoter); *US v Scott*, 37 F3d 1564, 1575-76 (10th Cir 1994) (same); *US v Manko*, 979 F2d 900 (2d Cir 1992) (same).

(n41)Footnote 243. See United States Department of Justice Website, What We Do (October 15, 2012) (available at [http://www.justice.gov/tax/what\\_we\\_do.htm](http://www.justice.gov/tax/what_we_do.htm)) ("Significant recent Tax Division initiatives include ... Halting the spread of abusive corporate tax shelters ... Prosecuting professionals who knowingly promoted and facilitated illegal tax shelter transactions that defrauded the IRS").

(n42)Footnote 244. See Lynnley Browning, *3 Convicted in KPMG Tax Shelter Case*, NY Times (December 17, 2008).

(n43)Footnote 245. See Department of Justice Press Release, *Superseding Indictment of 19 Individuals Filed in KPMG Criminal Tax Fraud Case* (October 17, 2005).

(n44)Footnote 246. See David Bario, *Last Man Standing: Case Against Tax Lawyer Who Worked for KPMG Proceeds*, *The American Lawyer* (September 28, 2007).

(n45)Footnote 247. *US v Pfaff*, 2010 US App LEXIS 26854 (2d Cir Oct 26, 2010) .

(n46)Footnote 248. *759 F Supp 2d 461 (SDNY 2010)* .

(n47)Footnote 249. *US v Daugerdas*, *759 F Supp 2d 461, 465 (SDNY 2010)* . In May, 2011, several of the defendants in the *Daugerdas* case were convicted. See Patricia Hurtado and Chris Dolmetsch, *Chicago Lawyer Daugerdas Found Guilty in Tax Shelter Trial*, Bloomberg News (May 24, 2011). In June, 2012, several of those defendants were granted a new trial based on egregious juror misconduct. Bob Van Voris, *Juror Lies Trigger New Trial for Three in Tax-Fraud Case*, Bloomberg Businessweek (June 4, 2012).

(n48)Footnote 250. *US v Coplan*, *703 F3d 46 (2d Cir 2012)* ("The law of economic substance, it must be said, is not a model of clarity. ... the economic substance doctrine 'has been applied differently from circuit to circuit and sometimes inconsistently within circuits.'").

(n49)Footnote 251. *US v Coplan*, *703 F3d 46 (2d Cir 2012)*. The court concluded that so long as the jury charge in a criminal tax case involving the economic substance doctrine focuses on the reasonable possibility of making a profit, it is sufficient. *Id.* ("Given the presence of the reasonableness standard in our early formulations of the economic substance doctrine, we now hold that the District Court's 'no reasonable possibility that the transaction would result in a profit' instruction ... accurately stated the law" on economic substance).

(n50)Footnote 252. Section 1409(a) of the Health Care and Education Reconciliation Act of 2010 (PL 111-152).

(n51)Footnote 253. For a detailed discussion on the codification of the economic substance doctrine in the civil context, see § 15.03[8], *supra*.