



# A GUILTY PLEA IN A TAX EVASION CASE MAY NOT SUSTAIN A CIVIL TAX DEFICIENCY

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Bohdan Senyszyn was an IRS revenue agent who dabbled in real estate with a local developer. After the developer filed a civil case alleging he had embezzled from their ventures, the IRS took a hard look at Mr. Senyszyn's tax returns:

- As part of the investigation, an IRS agent concluded that Mr. Senyszyn had embezzled \$252,726 from the developer and failed to report it.
- Senyszyn was charged with tax evasion (among other crimes) in an information filed in September 2007.
- Simultaneously, Mr. Senyszyn agreed to plead guilty; his plea agreement provided that he "knowingly and willfully did not include about \$252,726.00 in additional income that he acquired in 2003."
- Senyszyn entered a plea of guilty in accordance with his plea agreement. *Senyszyn v. Comm'r*, 146 T.C. No. 9, 2016 U.S. Tax Ct. LEXIS 10, \*6-\*8 (March 31, 2016) (*Senyszyn II*).

After Mr. Senyszyn's conviction became final, the IRS issued a notice of deficiency for the 2003 tax year on February 15, 2011, assessing Mr. Senyszyn and his wife with significant additional tax and penalties. The deficiency was driven by a determination that he had \$252,726 in unreported income for 2003, consistent with his plea agreement. *See id.* at \*1. In Tax Court, however, the government's case foundered.

The IRS had an initial setback when the court refused to grant its summary judgment motion; the Tax Court reasoned that "[a]lthough the existence of an underpayment in tax is a necessary element of tax evasion under section 7201, the determination of an exact liability evaded is not." *Senyszyn v. Comm'r*, T.C. Memo 2013-274, \*9, 2013 U.S. Tax Ct. Memo LEXIS 283 (Dec. 2, 2013) (citations omitted). Although Mr. Senyszyn had stipulated to the failure to report a specific amount of income in his plea agreement, the Tax Court held that such a stipulation "does not collaterally estop the taxpayer from challenging that amount in a subsequent civil proceeding." *Id.* at \*10 (citations omitted). The court did, however, observe that the Mr. Senyszyn's plea agreement was "strong evidence of the deficiency amount." *Id.* And the Tax Court did hold that Mr. Senyszyn was collaterally estopped from challenging either the applicability of the

fraud penalty under Section 6663(a) of the Internal Revenue Code or the availability of the fraud exception to the normal three-year assessment limitations period. *Id.* at \*11-\*15.

When the case went to trial, the IRS again argued that the prior plea agreement was sufficient to sustain the deficiency, but the court rejected that contention once more. *Senyszyn II*, 2016 U.S. Tax Ct. LEXIS 10 at \*12. While the government argued that Mr. Senyszyn had not presented any credible evidence to show that the amount of income listed in his plea agreement was incorrect, the Tax Court viewed the case differently.

The agent who had calculated the amount listed in the plea agreement appeared at trial. At that time, he acknowledged that Mr. Senyszyn was entitled to offset any income attributable to withdrawals from the account he and the developer controlled to the extent that he returned funds to that account: “To the extent that we hit you for anything that came out of that trust account to you, well, then the other side of the coin is it’s only fair to say that if anything came from you back to that account, that should be a credit to you.” *Id.* at \*6.

Ultimately, the agent’s testimony demonstrated that he had failed to take account of \$595,900 that Mr. Senyszyn had transferred into the relevant trust account in the relevant tax year. *Id.* at \*18. While the IRS was able to identify an additional \$250,000 transfer to Mr. Senyszyn, the court concluded that the amounts he had repaid exceeded the amounts he had taken, and it held the deficiency could not be sustained based upon the evidence presented at trial. *Id.* at \*18-\*20.

Next, the Tax Court considered whether collateral estoppel from the prior guilty plea would suffice to sustain *some* deficiency despite the contrary evidence. Initially, the Tax Court recognized that “some tax deficiency” was a necessary element to sustain a conviction for tax evasion, but noted that the existing case law did not suggest there was some minimum amount. *Id.* at \*23-\*24. In light of the “broad discretion” it enjoyed in applying collateral estoppel under *Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), the court then addressed whether the application of collateral estoppel would serve the doctrine’s purposes. *Senyszyn II*, 2016 U.S. Tax Ct. LEXIS 10 at \*24-\*25. The Tax Court concluded that the application of collateral estoppel was not appropriate for two reasons:

- *First*, it posited that the application of collateral estoppel would not further judicial efficiency since it was required to hear the case already to determine the amount of the deficiency. at \*26.
- *Second*, it concluded that the failure to apply collateral estoppel “would not ‘undermine reliance on judicial action.’” (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)). Here, the court reasoned that any inconsistency between Mr. Senyszyn’s prior conviction and the determination that there was no tax deficiency “would result not from conflicting findings by different courts but from Mr. Senyszyn’s entry of a guilty plea to a charge that the evidence—at least as presented to us—would not support.” *Id.* at \*26-\*27 (footnote omitted).

And since there was no deficiency, no penalty could apply. *Id.* at \*27.

Later, the IRS sought reconsideration on the question of collateral estoppel, a request which the Tax Court recently rebuffed: “We remain convinced that no purpose would be served by upholding a nominal deficiency—one that respondent apparently concedes would be contrary to the evidence—merely because the legal preconditions to the application of collateral estoppel are satisfied.” *Senyszyn v. Comm’r*, T.C. Memo 2016-137, \*16, 2016 U.S. Tax Ct. Memo LEXIS 135 (July 21, 2016) (footnote omitted).

The lesson for civil tax practitioners: carefully break down the elements established in a prior criminal proceeding in assessing the client’s civil tax issues; just because he is guilty does not mean there must be

a deficiency. By the same token, Mr. Senyszyn's case should not be read too broadly, as it seems virtually certain that a conviction following trial would have resulted in a completely different outcome.



By: **Jim Malone**

Jim Malone is a tax attorney in Philadelphia. A Principal at Post & Schell, he focuses his practice on federal, state and local tax controversies. [Learn more about Post & Schell's Tax Controversy Practice >>](#)

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