

# Washington Law Review

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Volume 59  
Number 4 *New Deal Symposium*

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11-1-1984

## Constitutional Protection for Creative Tax Shelter Promoters: Ninth Circuit Restricts the Government's Arsenal of Power—United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 104 S. Ct. 2363 (1984)

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### Recommended Citation

Beryl N. Simpson, Recent Developments, *Constitutional Protection for Creative Tax Shelter Promoters: Ninth Circuit Restricts the Government's Arsenal of Power—United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), cert. denied, 104 S. Ct. 2363 (1984), 59 Wash. L. Rev. 927 (1984).

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**CONSTITUTIONAL PROTECTION FOR CREATIVE TAX SHELTER PROMOTERS: NINTH CIRCUIT RESTRICTS THE GOVERNMENT'S ARSENAL OF POWER—*United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984).**

In *United States v. Dahlstrom*,<sup>1</sup> the Ninth Circuit Court of Appeals reversed the criminal tax fraud convictions of five tax advisers.<sup>2</sup> The defendants had been convicted for developing and promoting a program in which a United States taxpayer shifted taxable income to a controlled trust in a tax-haven country.<sup>3</sup> The Ninth Circuit held that, as a matter of law, the promoters of the foreign trust arrangement could not be convicted of counseling fraud because the particular scheme had not yet been declared fraudulent.<sup>4</sup> Through its decision the court has restricted the government's campaign against abusive tax shelters, and placed a constitutional limit on the powers available to the government for use against the promoters of creative tax shelters.

Part I of this Note outlines the mechanics of the foreign trust arrangement. The legal background of the case is presented in Part II, followed in Part III by the reasoning of both the majority and the dissent. Part IV analyzes the decision,<sup>5</sup> concludes that the court misapplied the fair-notice protection of the fifth amendment to reverse the convictions, and discusses the potential effects of the decision on the government's tax compliance enforcement program as recently strengthened by Congress.<sup>6</sup>

## I. THE FOREIGN TRUST ORGANIZATION ARRANGEMENT

Five defendants were convicted by a jury and sentenced to prison for conspiring to aid or counsel the preparation of fraudulent income tax returns.<sup>7</sup> The defendants, acting as tax advisers, consultants, and preparers,

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1. 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984).

2. *Id.* at 1424.

3. *See infra* Part I.

4. 713 F.2d at 1428.

5. This Note analyzes only the issue of reversing the convictions on the fifth amendment ground that the evidence was insufficient to sustain a finding of the requisite intent to defraud. The decision also involved two other issues, which are beyond the scope of this Note: (1) the first amendment rights of the promoters to advocate such a scheme; and (2) the question of when preparation or presentation of a tax return occurs. *Id.*

6. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C.). *See infra* notes 105-07 and accompanying text.

7. *United States v. Dahlstrom*, 713 F.2d 1423, 1425 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984). The defendants were tried on seven counts. Count I charged all defendants with conspiracy to defraud the government, in violation of 18 U.S.C. § 371 (1982). Counts II through VII

had advocated the use of foreign trust organizations (FTO's) as a means to reduce United States income tax. The tax shelter program<sup>8</sup> promoted by the defendants required the establishment of three trusts in a country that did not tax trust income. The taxpayer served as trustee of Trust One, which existed only to act as trustee of Trusts Two and Three. The taxpayer engaged a foreign individual to create the foreign trusts, but appointed no independent trustees. The taxpayer funded the trusts with income-producing assets, thereby shifting taxable income to the foreign country, and subsequently received the trust profits back as a tax-free "gift."<sup>9</sup> Thus, the taxpayer at all times had complete dominion over the assets and activities of all trusts involved.

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charged one or more of the defendants with aiding or counseling the preparation of fraudulent tax returns, in violation of 26 U.S.C. § 7206(2) (1982).

8. The tax shelter arrangement developed by Dahlstrom, which he and the other defendants had promoted since 1976, did not involve the typical sale of a partnership interest in a tax shelter. Instead, the defendants sold memberships in the American Law Association (ALA). None of the defendants were attorneys or certified public accountants; Dahlstrom therefore began to operate through the ALA, a membership organization, after being permanently enjoined from practicing law in Missouri in 1974. Brief of Appellant Dahlstrom at 3, *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984). In 1977 both Dahlstrom and the ALA were enjoined from the practice of law in Washington. *Id.* at 8.

Taxpayers who bought memberships attended two-day seminars, paying a fee ranging from \$6,000 to \$12,000. At the seminars the members received instruction in setting up foreign trusts and the necessary forms for trust formation. 713 F.2d at 1425. They also received a "taxpayer defense program"—the suggested approach to take when the Internal Revenue Service (Service) audited their tax returns. *Id.*

The taxpayer defense program consisted of instruction on lawful actions to take if the Service attempted to audit the taxpayers, including insisting on tape recording all meetings and refusing to provide any information unless the Service answered 30 questions that the ALA had set forth in a form letter. Brief of the Appellee at 20, *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984).

9. 713 F.2d at 1425-26. In one version of the scheme, the taxpayer transferred assets to Trust Three. A frequently used asset was the packet of materials received from the ALA. Trust Two then purchased the packet from Trust Three for \$50,000, reselling it to the taxpayer at no gain. The taxpayer claimed a tax deduction of \$50,000 under I.R.C. § 212 (1982), on the theory that the payment was deductible as tax advice.

At that point the \$50,000 profit was in Trust Three, which had no United States source income since the payment came from Trust Two, a foreign trust. Trust Three was not subject to tax in either country. Trust Two had United States source income but it also had an offsetting deduction, so a United States non-resident tax return filed for Trust Two would reflect no taxable income. Other versions of the scheme involved the transfer of inventory or other property of the taxpayer, the sale and leaseback of business assets, or the provision of managerial services by Trust Three.

The final step in the plan involved returning the profits to the taxpayer. Trust Two borrowed the \$50,000 from Trust Three, issuing a demand note. Trust Three made a "gift" of the note to the taxpayer—I.R.C. § 102 (1982) excludes gifts from gross income, and *id.* § 2501 provides a gift tax exemption for gifts of intangible property by a non-resident alien to a United States citizen. The taxpayer then collected on the note from Trust Two, thus reacquiring the \$50,000 free of tax. An alternative method involved a demand loan from Trust Three to the taxpayer. In actuality, the cash never left the possession or control of the taxpayer and the transactions were mere paper entries.

For a discussion of the ALA program, as well as its predecessor family trust schemes, see Taxation

## II. LEGAL BACKGROUND

### A. *Criminal Tax Fraud*

#### 1. *Tax Avoidance vs. Tax Evasion*

Tax fraud is a uniquely difficult crime to recognize. It begins at some point on a continuum that runs from legitimate tax avoidance, by prudent arrangement of one's financial affairs, to outright tax evasion such as falsification of a tax return. Tax avoidance is the acceptable and open use of the tax provisions to reduce tax liability.<sup>10</sup> Tax evasion, on the other hand, generally involves misrepresentation, subterfuge, camouflage, concealment, or an attempt to obscure events.<sup>11</sup> It is difficult, however, to identify the point at which a tax avoidance scheme becomes sufficiently devious or deceitful to be considered criminal. The inability of both the courts<sup>12</sup> and Congress<sup>13</sup> to clearly distinguish the two concepts further confuses the area.

The distinction ultimately turns on the taxpayer's state of mind. The criminal tax fraud statutes require willfulness, a specific intent to evade tax.<sup>14</sup> The requisite intent must frequently be determined inferentially, by an analysis of such circumstantial evidence as the degree of concealment, artifice, or device.<sup>15</sup> While certain activities overtly demonstrate the intent to evade,<sup>16</sup> that intent is not always easily recognized.

Courts have avoided defining or delimiting "fraud" in their decisions<sup>17</sup> because to do so would promote compliance with the letter rather than the spirit of the law and reward subtle and ingenious circumventions. For this same reason, Congress does not specifically define fraud in the tax

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Section of the Washington State Bar Association, *The "Family Trust" Tax Scam, A Special Report*, Wash. St. Bar News, March, 1981, 31, 35-38.

10. See generally H. BALTER, *TAX FRAUD AND EVASION* § 2.03 (4th ed. 1976).

11. R. PAUL, *STUDIES IN FEDERAL TAXATION* 16-17 (1937).

12. See, e.g., *Libson Shops, Inc. v. Koehler*, 353 U.S. 382, 388 (1957) (Court used both terms when discussing carryover of net operating losses); *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451, 454-55 (1950) (Court used both "avoided" and "evasion" when discussing taxation of a corporate sale).

13. See, e.g., I.R.C. §§ 269, 552 (1982) (terms used together).

14. See *infra* text accompanying note 36.

15. See, e.g., *United States v. Mecham*, 422 F.2d 838, 838 (10th Cir. 1970) (the issue of criminal intent or guilty knowledge is usually a question of fact for the jury to determine, for it is seldom susceptible of proof by direct evidence).

16. The Supreme Court has stated that willful attempt to evade could be inferred from "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income . . . any conduct, the likely effect of which would be to mislead or conceal." *Spies v. United States*, 317 U.S. 492, 499 (1943).

17. *Id.*

statutes.<sup>18</sup> Courts have applied this reasoning in mail fraud<sup>19</sup> and securities fraud<sup>20</sup> cases as well as tax fraud decisions. Mail fraud decisions hold that the presence or absence of fraud must be determined from the particular facts.<sup>21</sup> The securities decisions state that when a defendant is on trial for a new type of fraud the verdict should not turn on the absence of a previously litigated fact pattern precisely on point; that absence may be a tribute to the ingenuity and cupidity of those involved but should not provide an escape from the penal sanctions of the law.<sup>22</sup>

## 2. *Characteristics of Tax Evasion Schemes*

Fraud is frequently perpetrated by cloaking a transaction in the form of an acceptable tax avoidance arrangement. To expose the transaction, the government may invoke the sham transaction doctrine,<sup>23</sup> analyzing the economic substance of the arrangement rather than its form.<sup>24</sup> The entire series of events is then telescoped into its bare elements—what was actually accomplished, and how does the tax law treat such means and ends? Under the sham transaction doctrine, the court will completely disregard the transaction when assessing tax liability. To escape application of the doctrine the transaction must be at least partially motivated by a business objective other than tax avoidance.<sup>25</sup> The Supreme Court has not indicated, however, the precise level of business purpose required.<sup>26</sup>

Even though the transaction will be disregarded for civil tax liability

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18. *Id.*

19. *See, e.g.,* United States v. Toney, 605 F.2d 200, 205 (5th Cir. 1979), *cert. denied*, 444 U.S. 1090 (1980); Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941). For a discussion of the expansion of judicial interpretations of the mail fraud statute, see generally Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM CRIM L. REV. 423 (1983).

20. *See, e.g.,* United States v. Brown, 555 F.2d 336 (2d Cir. 1977). There are no set rules for defining fraud under the securities laws. For examples of acts that have been held to constitute fraud, see 1 FED SEC L. REP (CCH) ¶ 4845.035 (§ 17(a)) (1982); 2 FED SEC L. REP (CCH) ¶ 22,781.025 (§ 10(b)) (1980).

21. *See* Foshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934).

22. United States v. Brown, 555 F.2d 336, 339–40 (2d Cir. 1977).

23. *See* Higgins v. Smith, 308 U.S. 473, 477 (1940) ("The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute.").

24. *See infra* note 74.

25. *See* Frank Lyon Co. v. United States, 435 U.S. 561 (1978) (holding a sale and leaseback arrangement a sham); Knetsch v. United States, 364 U.S. 361 (1960) (indebtedness underlying interest deduction held to be a sham).

26. Gans, *Re-examining the Sham Doctrine: When Should an Overpayment be Reflected in Basis?* 30 BUFFALO L. REV. 95, 105 n.37 (1981).

purposes, a sham cannot always be attacked as criminal. Tax law is complicated, complex items can be treated in various ways, and innocent errors are frequently made. If an error is innocently made, or results from a difference of opinion between the taxpayer and the Service, criminal liability will not lie.<sup>27</sup>

### *B. Notice Requirement of Specific Intent Crimes*

A sham transaction can result in criminal liability only if the perpetrator had prior notice that the transaction was illegal.<sup>28</sup> This “principle of legality” in criminal law is derived from the notice requirement of the fifth amendment’s guarantee of due process of law, which mandates that a person be given fair notice as to what constitutes illegal activity so that behavior can be conformed to the requirements of the law.<sup>29</sup> The principle prohibits both *ex post facto* legislation and *ex post facto* judicial construction of a statute.<sup>30</sup> Thus, not only the statute but the relevant judicial gloss must be established at the time of the infraction.<sup>31</sup>

In keeping with the principle of legality, criminal statutes are to be strictly construed according to their specific terms. Fraud statutes, however, are intentionally written in general terms, so that they cannot be easily circumvented. Generality is acceptable because specific culpable

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27. *Spies v. United States*, 317 U.S. 492, 496 (1943) (the purpose of the law is not to penalize frank differences of opinion or innocent errors made in spite of the exercise of reasonable care).

28. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27–64 (2d ed. 1960).

29. *Id.* Courts have consistently held that a statute, as modified by judicial gloss, must be written so that a person of common intelligence can properly interpret the statute and understand how it will be applied. *See, e.g., Dunn v. United States*, 442 U.S. 100, 112 (1979) (conviction for false statement reversed because statute did not “plainly and unmistakably” proscribe the conduct); *Lambert v. California*, 355 U.S. 225, 229 (1957) (felon registration ordinance could not be applied unless it included actual knowledge of the duty to register); *United States v. Harriss*, 347 U.S. 612, 617–18 (1954) (lobbying statute upheld because it sufficiently specified the included offenses so that the court could apply it); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (statute prohibiting “being a gangster” invalidated because it did not provide sufficiently specific notice).

In *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm’n*, 620 F.2d 900 (1st Cir. 1980), the First Circuit evaluated the standard of notice to be applied when the perpetrators are members of a select group of persons with specialized knowledge. *Id.* at 907 (drawing on the Supreme Court’s decision in *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926)). The language of the statute should be judged in light of the particular commercial practice of those charged, in order to determine whether the statute would clearly identify the conduct proscribed.

30. The specific constitutional prohibitions apply strictly to criminal statutes, not to judicial interpretations. *Calder v. Bull*, 3 Dall. 386 (1798).

31. The Supreme Court has invoked the due process clause to expand the constitutional prohibition against *ex post facto* legislation to include *ex post facto* judicial construction of a statute. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *Pierce v. United States*, 314 U.S. 306, 311 (1941) (“judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness”).

intent is an essential element of the crime.<sup>32</sup> One who acts without a bad motive will automatically fall outside the sanctions of the statute. Thus, the statutory provisions cannot become a trap for those who act in good faith.<sup>33</sup>

The Supreme Court has considered the lack of specificity in the tax fraud statute and held that it contains no unworkable standards.<sup>34</sup> The crime consists of three elements: (1) the defendant must have aided, assisted, procured, counseled, advised, or caused the preparation or presentation of a tax return; (2) the return must have been false or fraudulent as to a material matter; and (3) the defendant's acts must have been willful.<sup>35</sup> The element found lacking in *Dahlstrom* was willfulness—the “voluntary, intentional violation of a known legal duty.”<sup>36</sup> Applying the general requirement of willfulness to a tax promotion, the promoter commits fraud if the transaction advocated has no business purpose (that is, has no substance or is a sham), the promoter knew that the arrangement was a sham, and the promoter intended to assist taxpayers in the evasion of legally required taxes by use of the sham.

The jury then is faced with three questions of fact: (1) whether the tax program in a particular case was devoid of economic substance; (2) whether the defendants knew of the program's invalidity; and (3) whether the defendants actually intended to assist the taxpayers to defraud the government.<sup>37</sup> The appellate court need only decide whether the record evidence could reasonably support the finding of guilt beyond a

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32. See Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV L. REV 77, 85 (1948).

33. See, e.g., *United States v. Ragen*, 314 U.S. 513, 524 (1942); *Gorin v. United States*, 312 U.S. 19, 27–28 (1941); *United States v. Alford*, 274 U.S. 264, 267 (1927).

34. *United States v. Ragen*, 314 U.S. 513 (1942). The Court in *Ragen*, dealing with the predecessor to § 7206, noted that the statute does not delegate policymaking powers to the court or jury by merely requiring them to apply the statute to a particular action, nor does it call upon the jury to exercise superhuman powers or to speculate on the actions performed. The statute does not leave open a wide inquiry, whose scope no one can foresee or guard against. It does not punish or penalize acts merely because the court or jury determines them to be unjust or unreasonable.

35. *United States v. Dahlstrom*, 713 F.2d 1423, 1426–27 (1983), cert. denied, 104 S. Ct. 2363 (1984); *United States v. Perez*, 565 F.2d 1227, 1233–34 (2d Cir. 1977); *United States v. Crum*, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976).

36. 713 F.2d at 1427 (relying on the Supreme Court's decision in *United States v. Pomponio*, 429 U.S. 10, 12 (1976)). The Court in *Pomponio*, and also in *United States v. Bishop*, 412 U.S. 346 (1973), refined and clarified the definition of “willful” as used in § 7206; no evil motive is required, merely the motive for an intentional violation of the law. *Pomponio*, 429 U.S. at 12. The Ninth Circuit, in *United States v. Brooksby*, 668 F.2d 1002, 1004 (1982), held that the term “willful” requires proof of a specific intent to do something that is forbidden by law; “more than a showing of careless disregard is required.” See also *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979); *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974); *infra* notes 42–45 and accompanying text.

37. A conviction for a criminal offense requires that every element of the offense be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

reasonable doubt,<sup>38</sup> considering the evidence in the light most favorable to the prosecution.<sup>39</sup>

*C. Prior Case Law Applying Tax Fraud Statutes*

In applying the tax fraud statutes to determine willfulness, courts must focus on the intent of the taxpayer or adviser. When the court finds a fraudulent transaction and convicts the defendant, but the defendant at the time of the action had reason to believe in its validity, convictions have been reversed for lack of notice. The seminal Supreme Court case in the area is *James v. United States*,<sup>40</sup> in which the Court reversed the fraud conviction of a taxpayer who did not report embezzled funds as taxable income. James based his defense on a prior Court ruling that embezzled funds were not taxable.<sup>41</sup>

The Fourth Circuit followed the *James* decision in *United States v. Critzer*,<sup>42</sup> reversing the conviction of a taxpayer who did not report rental income. The defendant was relying on advice from the Bureau of Indian Affairs that rental income from Indian lands was not subject to income tax.<sup>43</sup> The Fifth Circuit, in *United States v. Garber*,<sup>44</sup> also drew upon *James* in reversing the conviction of a taxpayer who failed to report the proceeds from the sale of blood plasma. In *Garber*, however, the specific question of taxability of blood plasma proceeds had not been previously decided, so the appellate court remanded the case to the trial court for further consideration of expert testimony on the state of the law and for determination of the defendant's intent.<sup>45</sup>

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38. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

39. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

40. 366 U.S. 213 (1961).

41. *Commissioner v. Wilcox*, 327 U.S. 404 (1946). The decision in *James* overturned *Wilcox*, declaring embezzled funds taxable, 366 U.S. at 221, but reversed James' conviction on fair notice grounds, *id.* at 221–22.

42. 498 F.2d 1160 (4th Cir. 1974).

43. Critzer twice received written statements from the Bureau of Indian Affairs that the Department of the Interior believed that the income from her holdings was exempt from income tax. *Id.* at 1161.

44. 607 F.2d 92 (5th Cir. 1979).

45. Garber's conviction was originally affirmed, but upon a rehearing en banc a split Fifth Circuit reversed the conviction and remanded, holding (1) that "when the law is vague or highly debatable the defendant—actually or imputedly—lacks the requisite intent to violate it," that willfulness requires knowledge of a legal duty, and that a "criminal proceeding is an inappropriate vehicle for pioneering tax law," *id.* at 97–100.

Rather than reverse on legal grounds, however, the *Garber* court remanded the case to the trial court to determine whether willfulness could be inferred from the defendant's actions. *Id.* The *Garber* dissent pointed out the inconsistency of the majority opinion. If willfulness depends on the taxpayer's state of mind and motivation, then the testimony of an expert witness on the taxability of the



In contrast to the *James* line of cases, a line of circuit court decisions has upheld convictions for tax fraud, even in instances where the application of the law was unclear, when the lack of clarity arose from the lack of any decision on the question rather than from a contrary ruling on the question. The Ninth Circuit upheld a jury conviction for willful intent to evade tax in *United States v. Clardy*.<sup>46</sup> Clardy, a tax adviser, prepared returns claiming a deduction for prepaid interest; the returns were found fraudulent because the purported underlying debt had no economic substance.<sup>47</sup> The Seventh Circuit, in *United States v. Baskes*,<sup>48</sup> likewise affirmed the conviction of an attorney who had devised a unique plan to funnel his client's capital gain to a foreign trust by means of prearranged commodity transactions.<sup>49</sup> Finally, just a few months prior to the *Dahlstrom* decision, the Second Circuit, in *United States v. Ingredient Technology Corp.*,<sup>50</sup> upheld the conviction of a corporation and its president for using the LIFO inventory method to fraudulently decrease the corporation's income.<sup>51</sup> In none of these cases did the court hold that the defendant failed to receive proper notice, even though the specific scheme had not previously been declared illegal by the courts.<sup>52</sup>

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payments is irrelevant. The trial court had originally found guilty intent without considering expert testimony. *Id.* at 112 (Tjoflat, J., dissenting).

46. 612 F.2d 1139 (9th Cir. 1980).

47. *Id.* at 1152. The court found no economic validity to the debt underlying the purported interest payment. In response to Clardy's argument that the question of whether or not interest is paid is a tax issue not free from doubt, the Ninth Circuit upheld the jury instruction, which stated:

If you find from the evidence that transactions do not exist except in form and are otherwise unreal or sham, you are to consider whether the defendant willfully engaged in such conduct for the purpose of procuring, counseling, advising, or preparing or presenting false federal income tax returns . . . .

*Id.* at 1152-53. Thus, the Ninth Circuit allowed the jury to determine first the sham nature of the transactions, and then the intent of the defendant.

48. 687 F.2d 165 (7th Cir. 1981).

49. *Id.* at 167. The foreign commodity transactions had no economic validity. When Baskes argued that he could not have intended to violate § 7206(2) because the law was unclear, the court replied that "[t]he evidence amply supports the jury's conclusion that the transactions were shams and that Baskes was well aware of their illegality." *Id.* at 169.

50. 698 F.2d 88 (2d Cir.), *cert. denied*, 103 S. Ct. 3111 (1983).

51. The court held that there was no substantive increase in inventory; the supplier had already agreed to repurchase the inventory immediately after year-end. The supplier pleaded guilty to two counts of aiding in the presentation of a fraudulent return under § 7206(2). *Id.* at 92 n.1. The court held that intent could be inferred from a secret agreement between Ingredient and the supplier, and by the fact that the plan was not revealed to Ingredient's auditors or attorneys. *Id.* at 96.

52. The Second Circuit, in *Ingredient*, specifically rejected the claims of due process, stating that "of course it is immaterial that 'there is no litigated fact pattern precisely in point.'" *Id.* at 96 (quoting from *United States v. Brown*, 555 F.2d 336, 339-40 (2d Cir. 1977)).

### III. THE *DAHLSTROM* COURT'S REASONING

On appeal, the *Dahlstrom* court reversed the jury verdict, holding that the evidence was insufficient to sustain a conviction of the crimes charged.<sup>53</sup> The court stated that the dispositive issue in this case was “whether the evidence shows that appellants acted with the specific intent to violate section 7206(2).”<sup>54</sup> In reversing, the court held that the defendants could not have intended to violate a “known legal duty” since they had no way of knowing that the tax shelter program they were promoting was in fact fraudulent. They could not have known of its fraudulence because their particular program was not the subject of any clearly relevant precedent.<sup>55</sup> The court stated that the recent Tax Court decision of *Zmuda v. Commissioner*,<sup>56</sup> which held the FTO scheme invalid, should not have been considered since it was decided after the allegedly criminal activities occurred.<sup>57</sup>

The court rejected what it considered to be the government’s major contentions: that the FTO’s had no economic substance and were blatant shams, and that the “taxpayer defense program” provided to the ALA members was inconsistent with a belief in the legality of the plan.<sup>58</sup> The court relied on the testimony of the government’s own witness to show that the trusts were valid legal entities and thus had economic substance.<sup>59</sup> The court explained that the defendants could not have known that the FTO’s were invalid because their validity was “still a highly debatable issue.”<sup>60</sup> The court interpreted the uncertainty regarding the validity of the FTO’s as a contradiction to the government’s contention that the defendants clearly knew of the arrangement’s illegality.<sup>61</sup>

The court concluded that, since the legality of the FTO arrangement was unsettled by any clearly relevant precedent, the defendants, as a

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53. *United States v. Dahlstrom*, 713 F.2d 1423, 1427 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984).

54. *Id.*

55. *Id.* at 1428.

56. 79 T.C. 714 (1982); *see infra* note 75.

57. 713 F.2d at 1427.

58. *Id.* The court disposed of a third contention of the government, that certain statements made by one defendant indicated guilty knowledge of the other defendants, by ruling the evidence inadmissible hearsay. The exception in FED. R. EVID. 801(d)(2)(E), regarding coconspirators, did not apply since the government had not independently proved conspiracy. 713 F.2d at 1428.

59. 713 F.2d at 1427.

60. *Id.* A former regional counsel for the Service testified that a number of tax practitioners had approached his office because they were confused about the laws regarding foreign trusts. In response to the perceived confusion, the Deputy Director of the Service issued a position paper on the use of foreign trusts.

61. *Id.*

matter of law, lacked the required intent to violate the law.<sup>62</sup> The Ninth Circuit reiterated the Fifth Circuit's statement in *Garber*, that a "criminal proceeding pursuant to section 7206 'is an inappropriate vehicle for pioneering interpretations of tax law.'" <sup>63</sup> The purpose of the criminal tax law is not to "penalize frank difference of opinion,"<sup>64</sup> and the court concluded that there was a frank difference of opinion between the defendants and the government; therefore, the intent required by the criminal statute could not have existed.<sup>65</sup>

The *Dahlstrom* court also rejected the government's second contention, that advocating a "taxpayer defense program" indicated an intent to defraud.<sup>66</sup> Relying on the government's concession that the defensive actions advocated were not unlawful, the court concluded that the defendants' advocacy would not translate into awareness of the illegality of the FTO arrangement.<sup>67</sup>

In his dissent, Judge Goodwin pointed out that substantial evidence existed to support the jury's verdict.<sup>68</sup> He reasoned that the government did not rely on *Zmuda* but on "settled principles of tax law regarding sham 'gifts' and transactions" to provide notice that the FTO transactions were illegal.<sup>69</sup> The purported gifts in the FTO scheme were invalid because the taxpayers at all times controlled the activities of the trusts.<sup>70</sup> After

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62. *Id.* at 1428 (relying on *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974)).

63. *Id.* at 1428 (quoting *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979)).

64. *United States v. Bishop*, 412 U.S. 346, 360 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943)).

65. 713 F.2d at 1428. However, the court left open the possibility of civil penalties.

66. *Id.* For a discussion of the taxpayer defense program, see *supra* note 9.

67. 713 F.2d at 1428.

68. *Id.* at 1430 (Goodwin, J., dissenting).

69. *Id.* In support of the sham transaction doctrine Goodwin cited, among other cases, *Knetsch v. United States*, 364 U.S. 361 (1960) (nonrecourse loans secured by annuities had no economic substance and payments made were not deductible as interest), and *Gregory v. Helvering*, 293 U.S. 465 (1935) (transfer of assets pursuant to a plan of reorganization disregarded for tax purposes since the assets had no relation to the business of the corporations).

70. In support of his conclusion on the nature of the gifts, Goodwin relied upon *Royce v. Commissioner*, 18 T.C. 761 (1952) (gift of rental property to parents not valid because parents agreed to return the property), and *Jackson v. Commissioner*, 32 B.T.A. 470 (1935) (gift of corporate stock was revocable—income taxed to donor). 713 F.2d at 1430 (Goodwin, J., dissenting).

Judge Goodwin noted "obvious" knowledge of tax evasion on the part of the defendants, as evidenced by numerous recommendations to ALA members including the use of false identification numbers on trust bank accounts; the establishment of multiple trusts to make transactions more difficult to trace, the use of "copy-not" pens when signing checks so that signatures would not appear on bank microfilm records, and the use of fictitious names on the trust accounts and on non-resident tax returns filed in the United States. *Id.*

Goodwin also saw evidence of knowledge of illegality in the requirement that participants sign an affidavit agreeing not to aid the government in any civil, criminal, or administrative action against the promoters, and not to provide the government with any information about their relationship with the promoters. *Id.*

deciding that the notice provided by established tax law was constitutionally adequate, Judge Goodwin stated that it was obvious from the evidence of subterfuge that the defendants knew their program was illegal.<sup>71</sup>

### IV. ANALYSIS

#### A. *The Invalidity of the Transactions*

The *Dahlstrom* court exalted form over substance, entirely ignoring the sham transaction doctrine and settled principles of trust tax law. The court based its decision on the valid existence of the foreign trusts.<sup>72</sup> The court's reliance on their existence was misplaced, however, since trust existence does not lend validity to trust transactions. It is not the jural existence of the trusts that controls but their purpose and the way they are utilized. This is true under both the sham transaction doctrine<sup>73</sup> and conventional trust tax law.<sup>74</sup>

The transactions carried out by means of the foreign trusts were subject to attack on several grounds. In civil suits decided after the alleged criminal activity, the Tax Court ruled that the entire arrangement was a "sham," that it had no economic substance, and that all activities involving the trusts should therefore be disregarded in determining the tax

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71. 713 F.2d at 1430 (Goodwin, J., dissenting).

72. 713 F.2d at 1427.

73. See, e.g., *Furman v. Commissioner*, 45 T.C. 360, 363-64 (1966), *aff'd*, 381 F.2d 22 (5th Cir. 1967) (trust that was valid under Florida law was not recognized for tax purposes—physician placed property in a trust that lacked economic substance). When the form of the transaction has not, in fact, altered any cognizable economic relationship, the courts will look through the form and apply the tax law according to the substance of the transaction. This rule applies regardless of whether or not the trust entity is recognized under state law. *Id.*

74. In order to determine the true grantor and beneficiary in trust tax law, courts look to the economic realities of the trust, disregarding its legal form and ostensible trustee, beneficiary, and grantor. *Bixby v. Commissioner*, 58 T.C. 757, 788-91 (1972). The criteria for determining the validity of a transfer of income producing property to a trust are: (1) the grantor must not retain substantially the same control over the property that was held before the transfer; (2) all transactions between the grantor and the trust must be in writing and at arm's length; (3) the arrangements between the grantor and the trust, after the original transfer, must have a bona fide business purpose; and (4) the grantor must not maintain a disqualifying equity interest in the transferred property. *Mathews v. Commissioner*, 61 T.C. 12 (1973), *rev'd*, 520 F.2d 323 (5th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). Although the Fifth Circuit reversed the Tax Court decision in *Mathews*, the Tax Court has continued to apply the criteria in other circuits, and the Ninth Circuit adopted the *Mathews* criteria in *May v. Commissioner*, 723 F.2d 1434, 1436 (9th Cir. 1984).

Applying the *Mathews* criteria to the FTO plan, the transferors clearly failed not one but all four of the requirements: (1) the grantors maintained complete control over the property since there were no independent trustees; (2) none of the transactions were at arm's length prices, the shift of income was accomplished by paying exorbitant prices for goods and services; (3) the only purpose of the taxpayer in dealing with the trust was to defeat income tax; and (4) the grantor at all times maintained an equity interest in the assets (if any) of the trust.

liability of the individual or corporation that created and used the trusts.<sup>75</sup> The transactions could also have been attacked under traditional trust tax law.<sup>76</sup> Under no view could the foreign trusts, even as valid entities, prevent the taxation of the income to the taxpayer who established and benefited from them.

In *Dahlstrom*, the first consideration, whether a transaction is without a business purpose, and therefore a sham, should have been a question of fact for the jury. The question involves an analysis of the economic substance of the transactions, and of whether the taxpayer has any business purpose other than tax avoidance. The law in this area is not uncertain,<sup>77</sup>

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75. The Service proceeded against several taxpayers who followed Dahlstrom's program, disallowing the deductions claimed on their individual or corporate tax returns. The Service has successfully upheld the disallowances in civil proceedings. The Tax Court, in *Zmuda v. Commissioner*, 79 T.C. 714 (1982), *aff'd*, 731 F.2d 1417 (9th Cir. 1984), *Professional Serv. v. Commissioner*, 79 T.C. 888 (1982), and *Akland v. Commissioner*, 46 T.C.M. 51 (1983), held that FTO transactions were devoid of economic reality. The fees paid were not allowed as deductions, and negligence and fraud penalties were assessed against the taxpayers.

Although the civil rulings were made after the activities of the defendants, the law applied by the Tax Court, regarding sham transactions and trust taxation, was available to the defendants.

76. Even if the trusts were accepted as valid entities and the transactions were considered to have substance, the trusts would have been treated as either grantor trusts or business trusts. The establishment of a grantor trust, even in a foreign country, will generally result in all income being currently taxable to the grantor. I.R.C. §§ 674(a), 677, 679 (1982); *see also Corliss v. Bowers*, 281 U.S. 376, 378 (1930) (income of a revocable trust will be taxed to the grantor even though paid to a beneficiary). Thus, any income shifted to Trust Three would still be taxable to the United States taxpayer.

The trusts established by the ALA members were purportedly business trusts, also known as "Massachusetts Trusts" or common law trusts. *Akland*, 46 T.C.M. at 53. They are a form of business organization, an arrangement whereby property is conveyed to trustees to be managed for the benefit of the holders of beneficial certificates. 12A C.J.S. BUSINESS TRUSTS 2 (1980). The certificates entitle the holders to share ratably in the income, and in any proceeds upon termination. The trust operates as a corporation, and is in fact treated as a corporation for tax law purposes. I.R.C. § 7701 (1982); *see also Hecht v. Malley*, 265 U.S. 144, 153 (1924) (Congress clearly intended to extend the corporate income tax to organizations doing business as associations). When a trust is taxable as a corporation it is also subject to the controlled foreign corporation rules of I.R.C. §§ 951-964 (1982). Any income of the trust would be taxed to the beneficiary either when earned, *id.* § 951, or, at the latest, when any distribution is received, *id.* § 955. The purported "gifts" would be taxed either as a withdrawal of previously taxed income or as a dividend.

Alternatively, the income of the trusts would be subject to reallocation by the Service, which has the authority to allocate income, deductions, and credits between a United States taxpayer and any related foreign entity, as necessary to clearly reflect income. I.R.C. § 482 (1982). Because the trusts have no assets and no activities, all income should be allocated to the taxpayer under § 482.

The transactions were also vulnerable to attack under the assignment of income doctrine, which states that an individual cannot avoid tax on an item of income by merely assigning the right to receive the income without also transferring the property from which the right arises. Income from property is taxed to the owner of the property; income from services is taxed to the one who performs those services. The fruits of labor or property may not be "attributed to a different tree from that on which they grew." *Lucas v. Earl*, 281 U.S. 111, 115 (1930). The income funneled to Trust Three was earned by the United States taxpayer, either through personal efforts or through the sale or use of property.

77. *See supra* Part IIA2.

only the individual fact patterns vary. The Tax Court has consistently ruled that the FTO transactions are invalid,<sup>78</sup> and the Ninth Circuit recently affirmed the *Zmuda* decision, holding that the transactions had neither economic substance nor business purpose.<sup>79</sup> The court found “no real difference” between those two rules;<sup>80</sup> they “share the same rationale” and elevate substance over form. Merely structuring a transaction to satisfy formal legal requirements, as the ALA members did by establishing valid foreign trusts, does not require the government to give legal effect to a transaction whose sole purpose is to evade tax.<sup>81</sup> Thus, the case must turn on facts, as determined by the jury; the *Dahlstrom* jury found that the transactions, as promoted by the ALA, had no business purpose or economic substance.<sup>82</sup>

The business purpose question focuses on the goals of the ALA clients, and Dahlstrom contended that his personal guilt or innocence should not turn on the business purpose or tax evasion purpose of his clients.<sup>83</sup> His contention is correct—his guilt should turn on his intent to counsel fraud. But the jury was instructed that they were to judge his intent, as inferentially established by his activities, and their decision of fact should not be disregarded.

Furthermore, regardless of any business purpose of the FTO’s, under trust tax law the gift of trust assets back to the grantor was a taxable event. The taxpayer transferred assets to a foreign trust, then the trust gave the proceeds from the sale or use of those assets back to the taxpayer.<sup>84</sup> Even assuming the foreign trusts were valid entities and the trust with positive income was not subject to United States tax,<sup>85</sup> the taxpayer still had complete control over the assets of all three trusts. That control

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78. See *supra* note 75.

79. *Zmuda v. Commissioner*, 731 F.2d 1417 (9th Cir. 1984). Judge Goodwin, who dissented in *Dahlstrom*, was on the panel that affirmed *Zmuda*.

80. *Id.* at 1420.

81. *Id.* at 1421.

82. Although the trusts were valid entities, the jury found their use fraudulent, apparently rejecting Dahlstrom’s contention that some case law supported the position that the FTO arrangement was valid. Brief of Appellant Dahlstrom, *supra* note 8, at 25. The principal case relied on by the defendants in their substance-versus-form argument is *Bass v. Commissioner*, 50 T.C. 595 (1968). Dahlstrom’s brief states that “The ALA program is very similar to the program adopted by the taxpayer in *Bass v. Commissioner*.” Brief of Appellant Dahlstrom, *supra* note 8, at 25 n.30. The parallels between the *Bass* arrangement and the FTO program, however, are tenuous.

The Tax Court concluded in *Bass* that the controlling factor is not the personal purpose (tax avoidance) of the taxpayer/shareholder who creates the entity. Rather, it is whether the purpose is to be accomplished by an entity that is carrying out a substantive business function, or engaging in substantive business activity. 50 T.C. at 601.

83. Brief of Appellant Dahlstrom, *supra* note 8 at 26.

84. See *supra* Part I.

85. *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2363 (1984).

included the power to transfer assets from the trust to the taxpayer in the form of a tax-free note.<sup>86</sup> Thus, even if the ALA members had used their FTO's for some valid business purpose, the eventual transfer of assets was a taxable event, and the characterization of that transfer as a non-taxable gift or loan was ineffective.<sup>87</sup>

### B. *Lack of Notice—Intent to Evade*

The *Dahlstrom* court misapplied prior case law by following the reasoning of *James* and its progeny, rather than following *Clardy*, *Baskes*, and *Ingredient*.<sup>88</sup> The James and Critzer criminal tax fraud convictions were reversed for lack of notice based on legal uncertainty.<sup>89</sup> Contrary to *Dahlstrom*, the taxpayers there were relying on affirmative statements from the government regarding a transaction's taxability.<sup>90</sup> The *Dahlstrom* court applied the *James* rationale inappropriately by analogizing the legal uncertainty in *James* and *Critzer*, where the question was whether the income was taxable, to the factual uncertainty in *Dahlstrom*, where the question was whether the circumstances fell within established tax laws.<sup>91</sup> The validity of the FTO transactions could be determined by applying established tax law to the factual situation. Referring such a factual question to the jury in no way violated the defendant's fifth amendment right to notice.

The court should have instead applied the rationale of its own decision in *Clardy*—that, although the specific fact pattern involved has not been

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86. *Id.* at 1426.

87. See *supra* note 76. The dissent recognized that the transactions advocated by the defendants were "sham transactions to evade taxes." *Id.* at 1430 (Goodwin, J., dissenting). Judge Goodwin declared that the purported gifts of notes back to the trustors should be disregarded "because the taxpayers controlled the transactions of their trusts." *Id.*

88. For a discussion of these cases, see *supra* notes 46–52 and accompanying text. The *Dahlstrom* opinion does not mention any of these cases. The court's disregard of all three cases is difficult to understand. *Clardy* was a recent Ninth Circuit case relied on by both parties in their briefs, and *Ingredient* was issued only months before *Dahlstrom* and would clearly limit *Garber*, one of the cases on which the *Dahlstrom* court primarily relied.

89. *James v. United States*, 366 U.S. at 221–22; *United States v. Critzer*, 498 F.2d at 1162.

90. See *supra* notes 46–48 and accompanying text.

91. 713 F.2d at 1427. The court saw the subsequent release of an IRS position paper on the FTO's as an indication of the unclear status of the law. See *supra* note 61 and accompanying text. Yet the law regarding foreign trusts was not unclear, only the application of that law to the *Dahlstrom* facts. Moreover, the taxation of foreign trusts is a highly technical area in tax law, thus it is neither surprising nor significant that a number of attorneys and accountants had questions concerning it. The practitioners' uncertainty as to the treatment of the FTO's does not indicate confusion or conflict within the government as to the validity of the arrangement, nor does it evidence a government belief that the *Dahlstrom* scheme was valid. See *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96 n.8 (1983) (issuance of a revenue ruling in 1979 does not signify a lack of clarity in the law in 1975).

litigated, the jury can properly determine the defendant's guilt.<sup>92</sup> Thus, even if the legal result of a particular factual situation is unclear, the taxpayer may still be convicted if there is sufficient evidence from which the jury can find that the defendant had a willful intent to evade.<sup>93</sup> The *Dahlstrom* jury found that willful intent to evade.

Just as in *Clardy*, *Baskes*, and *Ingredient*, adequate notice was available to the *Dahlstrom* defendants, through general case law on fraud and sham transactions.<sup>94</sup> The same information was available to them that was used by the Tax Court when it ruled that the FTO transactions were baseless shams. Had the *Dahlstrom* court ruled properly on the question of notice and reached the question of intent, it would have found sufficient evidence to support the jury's finding of a willful intent to evade.

Intent to evade tax is generally proven by inference;<sup>95</sup> thus, the trial court evaluated the actions of the defendants to infer their intent. By making willfulness an element of the crime, Congress reduced the specificity required of the statute, intentionally giving the jury wide latitude in

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92. See *supra* note 47. *Clardy* can perhaps be distinguished from *Dahlstrom* because the Supreme Court had previously ruled on the propriety of an interest deduction in *Knetsch v. United States*, 364 U.S. 361 (1960), affirming a Ninth Circuit decision, *Knetsch v. United States*, 272 F.2d 200 (1960). However, the relationship between the interest deductions in *Knetsch* (on the purchase of annuity savings bonds) and the interest deductions in *Clardy* (on the purported purchase of land at greatly inflated prices) requires no more tenuous analogy than would relating *Dahlstrom's* trusts to the family trusts struck down in *Wesenberg v. Commissioner*, 69 T.C. 1005 (1978).

93. *United States v. Clardy*, 612 F.2d 1139 (9th Cir. 1980); see also *United States v. Garber*, 607 F.2d 92, (5th Cir. 1979); see *supra* note 45 and accompanying text. The *Dahlstrom* court quoted the Fifth Circuit's conclusion in *Garber* that "when the law is vague or highly debatable the defendant—actually or imputedly—lacks the requisite intent to violate it." 713 F.2d at 1428. The *Garber* situation is parallel to that in *Dahlstrom*; the question of taxability of the proceeds had not been judicially determined, just as the validity of the FTO arrangement had not been determined. Yet the facts of *Garber* distinguish it from *Dahlstrom*: the activity was clearly defined and understood; *Garber's* actions were not attacked as "shams"; the only question was whether the income was taxable. In *Dahlstrom*, the activities promoted were intentionally myriad, complex, and difficult to trace, and the principal question was whether the purported form of the activity would prevail over its substance. *Dahlstrom* and his co-defendants went to elaborate lengths to hide and obfuscate the transactions because those transactions, when viewed as a whole, demonstrated that nothing substantive occurred.

94. *Dahlstrom* and his co-defendants were holding themselves out as tax consultants when they conducted their "seminars." They purported to have studied the laws regarding foreign trusts extensively, and claimed knowledge regarding tax fraud provisions; they should, presumably, be held to the specialized knowledge standard of the class in which they placed themselves. See *supra* note 29. The "commercial practice" in which they operated suggests that they be held to the specialized meaning of fraud as used in § 7206(2), i.e., they should be held to have known that the FTO transactions had no economic substance.

The fact that neither *Dahlstrom* nor the other defendants were licensed accountants or attorneys should not be controlling. Cf. *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197 (1926) (unlicensed chiropractor judged by the standards applied to a licensed chiropractor); see also *W. PROSSER & W. KEETON, THE LAW OF TORTS* § 36, at 226 (5th ed. Student ed. 1984).

95. See *supra* note 16.



determining the motivation of the defendants.<sup>96</sup> The dissent enumerated several instances where the defendants advised subterfuge, evidencing their doubts about the validity of the transactions.<sup>97</sup> The jury apparently thought that such subterfuge does not indicate a “frank difference of opinion.”<sup>98</sup> By ignoring the instances of subterfuge and ruling that the evidence was insufficient to show a willful intent to evade taxes, the Ninth Circuit invaded the province of the jury.<sup>99</sup>

### C. *The Effect of the Dahlstrom Decision*

The Ninth Circuit was “convinced that the legality of the tax shelter program advocated by the [defendants] in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment.”<sup>100</sup> In holding that the law regarding the fraudulence of FTO’s was “completely unsettled,” and that therefore the defendants could have no intent to defraud, the *Dahlstrom* court has created the rule that a novel tax evasion scheme cannot provide grounds for criminal charges unless a statute specifically covers the scheme or there has been a ruling in a prior civil tax case.

If this standard is to be adopted, then the developers and promoters of any creative tax scheme will be constitutionally protected from prosecution until the scheme can be tested in Tax Court, a period of perhaps several years.<sup>101</sup> Such a standard would reward the ingenuity of the

96. See *supra* text accompanying notes 32–33.

97. See *supra* note 70.

98. *Spies v. United States*, 317 U.S. 492 (1943); see *supra* note 27.

99. Further manifestations of Dahlstrom’s intent that were disregarded by the court included the “taxpayer defense program” provided to the ALA members. See *supra* note 8. The government argued that the program was inconsistent with a belief in the legality of the tax shelter program. The court found nothing in the taxpayer defense program to indicate intent to defraud, since the individual actions recommended to the taxpayers were all legal in themselves. 713 F.2d at 1428. This evidence, however, should be considered in connection with all the other evidence, which cumulatively goes to the subjective intent, rather than looking, as the Ninth Circuit did, at the surface legality of the pieces of the whole.

Another indication of intent pointed out in the dissenting opinion was the requirement that all participants sign an affidavit agreeing not to aid the government in any action against the defendants. *Id.* at 1430 (Goodwin, J., dissenting). The fact that the promoters insisted on such a promise is relevant evidence of intent, even though the promise would likely be unenforceable as contrary to public policy. See WILLISTON ON CONTRACTS § 1630A (3d ed. 1972). Judge Goodwin thought it “obvious” that the defendants knew that they were advising tax evasion. 713 F.2d at 1430 (Goodwin, J., dissenting).

100. 713 F.2d at 1428.

101. The opinion implies that a position statement by the Service, such as a regulation, or a revenue ruling that the particular scheme has no economic substance and is a sham, would provide the requisite notice. *Id.* at 1427, 1428. This raises a question whether the Service really has (or should have) that degree of legislative authority in a criminal area, but the issue is beyond the scope of this Note.

perpetrators, something the Second Circuit has warned against.<sup>102</sup> The taxpayers who purchase or subscribe to the new schemes will receive no similar protection, since the civil tax laws, including the assessment of negligence and fraud penalties, are applied retroactively with no notice requirement.

In setting this standard, the Ninth Circuit seems to be searching for a non-existent bright line on the tax avoidance-evasion continuum. Such a bright line would require either complete specificity in the tax fraud statutes or judicial decisions on each new scheme that is developed. The first is an impossibility. The second is administratively infeasible because of delay, and as a policy consideration it is detrimental to the voluntary compliance system.<sup>103</sup> Moreover, a bright line is not necessary to provide tax advisers with adequate notice, as the *Clardy* and *Baskes* cases demonstrate.

It is now the law in the Ninth Circuit that, until a particular scheme has been ruled invalid, the promotion of or participation in that scheme is not criminal. This new interpretation of the criminal tax law may sound the death knell to one phase of the government's tax compliance program. At least in the Ninth Circuit, the government's prosecution of tax advisers and tax evaders will be limited to those participating in schemes previously ruled upon. As a matter of law, no other prosecutions can even reach the jury to determine intent.

Other means, however, are available to the government to continue its campaign against abusive tax schemes. The fraud statute under which Dahlstrom was convicted has withstood challenges for over sixty years,<sup>104</sup> and the government should continue to prosecute when sufficient notice has been given. In addition, the Service has an arsenal of civil

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102. *United States v. Brown*, 555 F.2d 336, 339–40 (2d Cir. 1977).

103. Not only would present perpetrators promote their programs with impunity, but present law-abiding citizens would become further dissatisfied with the tax system, and the illegal tax protest movement would continue to grow. For recent discussions on the tax protest movement, see Henry, *Noncompliance with U.S. Tax Law—Evidence on Size, Growth, and Composition*, 37 *THE TAX LAWYER* 1 (1983); Comment, *The Tax Protest Cases: A Policy Approach to Individual Constitutional Rights*, 19 *CAL. W.L. REV.* 351 (1983).

104. *United States v. Damon*, 676 F.2d 1060, 1062–63 (5th Cir. 1982) (court specifically rejected defendant's contention that the statute is vague and overbroad); *Kaplan v. United States*, 241 F.2d 521, 522 (5th Cir.) (court rejected the defendant's claim that the statute is unconstitutional), *cert. denied*, 354 U.S. 941 (1957); *United States v. Borgis*, 182 F.2d 274, 277 (7th Cir. 1950) (the statute is framed to make liable those individuals who help others evade their tax liability); *United States v. Kelley*, 105 F.2d 912, 917 (2d Cir. 1939) (the plain purpose of the statute was to reach the advisers of those taxpayers who prepared their own returns).

The use of § 7206(2) to single out attorneys, certified public accountants, and enrolled agents for prosecution was held constitutional in *United States v. Sullivan*, 369 F. Supp. 568 (D.C. Mont. 1974), *mem.*, (9th Cir. Oct. 25, 1974).

penalties that has been greatly strengthened since 1982.<sup>105</sup> These penalties should reduce the willingness of taxpayers to follow the more devious and questionable programs. Tax counselors, too, should be reluctant to advise such programs due to recently increased liability.<sup>106</sup> These sanctions are civil, rather than criminal; therefore, the required level of proof is less stringent.<sup>107</sup> In addition, the civil sanctions do not require the willfulness that the criminal statute does.

The government prosecuted Dahlstrom and his co-defendants for conspiracy as well as tax fraud; when the fraud charge failed, the conspiracy conviction likewise could not stand. An alternative approach for the government to take when prosecuting similar activities would be to charge the promoters with other crimes,<sup>108</sup> such as mail fraud,<sup>109</sup> misrepresentation,<sup>110</sup> or aiding and abetting the willful concealment of a material

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105. I.R.C. §§ 6653(a), 6653(b) (1982) (penalties for civil negligence and fraud were increased by 50% of the interest payable); *id.* § 6651 (introduced a penalty tax of 10% of any substantial underpayment of tax); *id.* § 6702 (introduced a \$500 civil penalty on any individual who files a frivolous document (tax protest return)); *id.* § 6652 (changed the computation of interest to daily compounding).

The Deficit Reduction Act of 1984, Pub. L. No. 98-369 (codified in scattered sections of 26 U.S.C.), added § 6621(d) to increase the interest assessable on tax underpayments attributable to tax-motivated transactions. Effective as of the date of enactment of the bill, July 18, 1984, the interest will compound at 120% of the standard interest rate provided in § 6621.

106. Stricter sanctions against advisers include penalties specifically aimed at tax shelter promoters. I.R.C. § 6700 (1982) (any promoter or tax adviser who knows or has reason to know that a tax return is false or fraudulent as to any material matter, shall be penalized the larger of \$1000 or 10% of the gross income derived from such activity); *id.* § 6701 (new aiding and abetting penalties of \$1000 per return available for use against anyone directly involved in the presentation or preparation of any false or fraudulent document); *id.* § 7408 (a promoter of abusive tax shelters can now be enjoined from further participation in activities subject to penalty under § 6700).

The Deficit Reduction Act of 1984, Pub. L. No. 98-369 (codified in scattered sections of 26 U.S.C.), increased the promoter penalty under § 6700 to the greater of \$1000 or 20% of the gross income derived from the activity, effective July 18, 1984. It also extended injunction authority to cover persons engaging in conduct subject to § 6701.

The Service in 1983 issued a Revenue Procedure in which they outlined a program to identify and investigate abusive tax shelter promotions and apply §§ 6700 and 7408 even before any tax returns are filed. Rev. Proc. 83-78, 1983-2 C.B. 595.

107. I.R.C. § 6703 (1982) provides that, in any proceeding to determine whether any person is liable for the penalties of § 6700 or § 6701, the burden of proof shall be on the government, but the proof need not be beyond a reasonable doubt.

108. The Supreme Court ruled in 1926 that the specific provisions of the Internal Revenue laws did not preclude application of the general criminal code to tax-related offenses. *United States v. Noveck*, 273 U.S. 202, 207 (1927). The Court has maintained that position. *Lofts and Lofts*, 243 T.M., *Tax Crimes: False Statements Under the United States Criminal Code (Part I)* A-16 (1970).

109. The mail fraud statute, 18 U.S.C. § 1341 (1982), has not presented the obstacles that the *Dahlstrom* court found presented by the tax fraud statute. The mail fraud statute is frequently combined with other fraud statutes to increase the penalties. The flexibility and broad reach of the mail fraud statute facilitate its use by the Service.

110. Section 10(b) of The Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 15 U.S.C. §§ 78a-78j(b) as amended. The crime of misrepresentation can only be charged against the seller of a security. In *Dahlstrom* only advice was sold, not securities. Many abusive tax shelters do

fact.<sup>111</sup> Alternatively, promoters of abusive shelters may be subject to attack on a different front—they may be sued by their own clients for misrepresentation<sup>112</sup> or malpractice.<sup>113</sup>

By granting broader constitutional protection to creative promoters, the *Dahlstrom* decision may seriously hamper the government's recently strengthened compliance enforcement program. The solution to the problem created by this decision does not, however, lie in a change in the criminal tax statutes. Other circuits may still follow the lead of *Clardy*, *Baskes*, and *Ingredient* and find the requisite intent even without a prior ruling on the specific scheme. Even the Ninth Circuit may be able to distinguish the result of *Dahlstrom* and follow *Clardy* when a similar prior civil case can be found. Although *Dahlstrom* may have curtailed the government's ability to apply its full arsenal of power in the abusive shelter area, many avenues of attack are still available.

## V. CONCLUSION

The Ninth Circuit, in *Dahlstrom*, has provided constitutional protection for creative tax shelter promoters, through an unwarranted extension of the fifth amendment right of fair-notice. The *Dahlstrom* court relied on

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involve the sale of a security, however, and this statute may be invoked if there are any untrue statements of, or omissions of, material facts. The rule allows wide latitude for prosecution for the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security.

111. 18 U.S.C. § 2 (1982) provides that an aider or abettor of crimes against the United States is punishable as a principal. *Id.* § 1001 provides that anyone who knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a document containing any false, fictitious or fraudulent statement shall be subject to a \$10,000 fine or imprisoned for up to five years. The statute does not require that the government rely on the false statement or misleading document, nor that the government suffer any financial loss. The concealment statute, with its less stringent intent requirement, is readily applicable to a *Dahlstrom* situation. The Ninth Circuit previously sustained a conviction for making false statements to an Internal Revenue agent, holding sufficient a jury instruction that bad faith and evil motive are not required, and holding that the specific intent to defraud is not required. *United States v. Neely*, 300 F.2d 67 (9th Cir.), *cert. denied*, 369 U.S. 864 (1962). The court specifically differentiated "willful" in the criminal concealment statute from "willful" as used in the Internal Revenue Code, stating that "willful" in the first instance required only that the act be done deliberately and with knowledge. *Lofts and Lofts, supra* note 108, A-3, A-4.

112. Action is allowed for negligent misrepresentation; no intent to deceive is required. *W. PROSSER & W. KEETON, supra* note 94, § 107 at 705–06. Even if made with a belief in the validity of the program, a promotion may be negligent if sufficient care is not taken to ascertain the facts, or if there is an absence of the skill or competence required by a specific business or profession. *Id.* at 745.

113. Closely related to misrepresentation, and also grounded on negligence, would be a suit for malpractice, involving violation of a duty by the promoter toward the client, loss to the client, and a causal connection between the violation and the harm. This remedy is clearly available against a licensed accountant, attorney or securities dealer; it is not so clearly available against one such as *Dahlstrom* who is merely a self-professed tax adviser. *Id.* § 30, at 143. Even if *Dahlstrom* did not have the knowledge of a tax expert, as he claimed he did, he may be held to that level of expertise. *Cf. Brown v. Shyne*, 242 N.Y. 167, 151 N.E. 197 (1926); *supra* note 94.

the established principle that a defendant cannot, as a matter of law, have the requisite intent to evade tax when the tax effect of a transaction is unclear. By applying that principle improperly, the court raised a question of fact—whether a particular transaction is fraudulent under existing law—to constitutional proportions. Though the tax fraud statute will survive the decision, and though the government still has substantial civil weaponry available for use against abusive tax programs, decisions of this ilk are incorrect and only add to taxpayer unrest, encouraging further aggressive maneuvering and evasion by disgruntled taxpayers.

*Beryl N. Simpson*