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Jury Clears Construction Biz Owner In Retrial On Tax Charges

By **Shayna Posses**

Law360, New York (November 18, 2015, 9:46 PM ET) -- The Second Circuit's rare decision to back a federal court ruling ordering a new trial panned out for a construction company owner who was previously found to have willfully filed false tax returns when a New York federal jury acquitted him on all charges Tuesday.

The jury found Tomas Olazabal not guilty on two charges of filing false tax returns after less than two hours of deliberation, reversing a March 2014 conviction he successfully countered later that year with a Rule 33 motion for a new trial based on concerns about the testimony of a government witness and other issues. Federal prosecutors appealed the new trial order, but the Second Circuit **affirmed the decision** in May.

Vinoo P. Varghese, Olazabal's attorney, told Law360 on Wednesday that he has found only three other cases in which the Second Circuit upheld the granting of Rule 33 motions.

Even winning a case against the U.S. Internal Revenue Service's criminal tax division is a rarity, Varghese said, pointing to statistics provided by O'Connor Davies LLP principal David Gannaway — called as an expert in the retrial. According to Gannaway, 95 percent of the cases brought by the criminal tax division end in guilty pleas, Varghese said. Of the 5 percent that go to trial, the government wins 95 percent.

But in the case against Olazabal, U.S. District Judge Brian M. Cogan determined that the original jury's conviction constituted a manifest injustice in June 2014. Though the government insisted on a retrial despite their "weak" case, Varghese said, Tuesday's verdict vindicates his client, serving long-delayed justice.

"For six years, the IRS and the DOJ criminal tax division in Washington, D.C., targeted a hard-working, honest American immigrant from Peru," the attorney said. "Mr. Olazabal, in the face of daunting odds against him, fought for his liberty and persevered."

During the first New York federal court trial, Renan A. Mazorra, owner of Mazorra Business Services, testified that he met with Olazabal for only half an hour or so each year to complete his corporate tax returns for the fiscal years in 2007 and 2008, according to the Second Circuit's May opinion. During those meetings, it was revealed that Olazabal's reported compensation numbers were low, especially in light of his reported annual gross receipts, the order said.

In both instances, Mazorra testified that he did not ask why the construction company paid so little in salaries in comparison with its earnings, and further said that Olazabal did not tell him about the company's use of KS Financial, a third-party check-cashing service, according to the opinion.

Taking the stand in his own defense, Olazabal disputed Mazorra's claims, saying that he informed the tax preparers that he used cash to pay some of his workers and used a check casher as well, according to the opinion. Both Mazorra and the employee Olazabal dealt with more directly told

him "not to worry about it," the opinion said.

In evaluating the evidence and the credibility of the witnesses, the district court found the testimony of Mazorra problematic in that it was "neither complete nor credible, while Olazabal's testimony was, by contrast, more credible," the opinion said. The district court concluded that Olazabal was merely relying in good faith on his accountant's advice and therefore did not possess the unlawful intent required to find him guilty of tax fraud.

In light of the "obvious disproportionality" between the gross receipts and reported compensation, the district court concluded that Mazorra Business Services must have been a "tax preparation mill" that remained willfully ignorant of the cash transactions to avoid devoting time and resources to preparing accurate returns, the opinion said.

"Indeed, this failure to probe the existence of unreported cash transactions was particularly puzzling given Mazorra's professional background as the former owner of a check-cashing business," the opinion said. "Further, because the government chose not to call MBS employee Lorena LeTellier, who interacted more regularly and directly with Olazabal, these weaknesses in Mazorra's testimony remained unmitigated."

While Varghese said he thought the government would drop the case after the Second Circuit's ruling, the DOJ indicated an intention to retry the dispute. The attorney said he requested a meeting with the agency's tax heads to discuss the possible retrial but was denied.

The government declined to comment. Messages left with Mazorra Business Services were not immediately returned late Wednesday.

After a trial that spanned about a week and a half, the jury found Olazabal not guilty on charges of filing false tax returns for 2007 and 2008 on Tuesday. Judge Cogan issued a judgment of acquittal on the same day.

Olazabal is represented by Vinoo P. Varghese and Joseph M. Caiazzo of Varghese & Associates PC, and co-counsel Dennis J. Ring.

DOJ tax division attorneys Tino M. Lisella and Brittney Campbell handled the case for the government.

The case is U.S. v. Olazabal, case number 1:13-cr-00467, before the U.S. District Court for the Eastern District of New York.

--Editing by Jeremy Barker.

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