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2nd Circ. OKs Rare Rule 33 Retrial Over Biz Tax Filings

By Ben Conarck

Law360, New York (May 08, 2015, 5:08 PM ET) -- In a rare move on Friday, the Second Circuit backed a New York federal court's decision to hand a new trial to a Peruvian immigrant found by a jury to have willfully filed false tax returns over concerns about the testimony of a government witness, among other issues.

Tomas Olazabal was found guilty in March 2014 of submitting false tax returns, a conviction he successfully countered in June with a Rule 33 motion for a new trial, one that federal prosecutors appealed to the circuit court. The decision by prosecutors to call as a witness the owner of the accounting company that Olazabal used to prepare payroll and taxes for his construction company, rather than the employee he dealt with on a day-to-day basis, underscored many of the criticisms raised against the government's case.

"Upon consideration of this problematic evidence and review of the record as a whole, we conclude that the district court did not abuse its discretion in granting Olazabal's Rule 33 motion," the three-judge panel wrote.

Vinoo P. Varghese, Olazabal's attorney, told Law360 on Friday that he could only find three other instances in which the Second Circuit upheld the granting of Rule 33 motions.

"There are very few cases that actually get up to appeal, because there are so few of them granted," Varghese said.

Renan 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 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.

But 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 on the good faith of his accountant’s advice and therefore did not possess the unlawful intent required to find him guilty of tax fraud.

Among the issues the district found with Mazorra’s testimony was apprehension about whether he would have remembered a 30-minute conversation with one of thousands of clients without supporting documentation, the opinion said.

“The court also viewed with skepticism that Olazabal never informed MBS of his cash receipts, since Olazabal acted with a ‘total lack of evasion ... when he cashed checks at KS,’ suggesting that he did not intentionally attempt to conceal this income for tax purposes either,” the opinion said.

In light of the “obvious disproportionality” between the gross receipts and reported compensation, the district court concluded that MBS 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.”

Varghese, who has represented Olazabal in the six years since the investigation began, said the case “wasn’t close” in terms of facts and speculated that the government only won in the first place because they falsely claimed Olazabal was motivated by greed, despite none of the evidence supporting that insinuation.

“He wasn’t sending other people to cash checks; he gave his Social Security number, ID, driver’s license ... he was completely upfront about that,” Varghese said. “He also deposited some of that money back into his bank account. If you’re trying to cheat on your taxes, you’re not going to put the money back in your bank account.”

Varghese added that he has not yet spoken to the government to determine the status of the case.

A representative of the government did not immediately return a request for comment.

Olazabal is represented by Vinoo P. Varghese of Varghese & Associates PC.

Mark S. Detterman, Gregory Victor Davis and Frank P. Cihlar are handling the case for the government.

The case is U.S. v. Olazabal, case number 14-2676-cr, in U.S. Court of Appeals for the Second Circuit.

--Editing by Brian Baresch.

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