

TAX SECTION

New York State Bar Association

Report on Venue of Criminal Prosecution for
Tax Crimes Alleged under Article 37 of the New York State Tax Law
and Support for Proposed Legislation under A 9282 and S 7921.

June 13, 1990

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TAX SECTION

New York State Bar Association

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June 13, 1990

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Re: Venue for Tax Crimes - S. 7921, A. 9282

Gentlemen:

Enclosed is a Report in respect of proposed legislation concerning venue for prosecution of crimes charged under Article 37 of the New York Tax Law.

The Report enthusiastically supports the proposed legislation which would provide fundamental fairness and due process to defendant-taxpayers and essentially conform State criminal procedural law to that of Federal law.

We fully support this proposed legislation and urge its enactment.

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NEW YORK STATE BAR ASSOCIATION
TAX SECTION

Joint Report by the
Committee on New York State Tax Matters and
Committee on Criminal and Civil Tax Penalties

Report on Venue of Criminal Prosecution for
Tax Crimes Alleged under Article 37 of the
New York State Tax Law and Support for
Proposed Legislation under A 9282 and S 7921.

June 13, 1990

New York State Bar Association,
Tax Section,
Committee on New York State Tax Matters and
Committee on Criminal and Civil Penalties,
Report on Proposed Legislation Concerning Venue for
Prosecution of Crimes Alleged under
Article 37 of the New York State Tax Law.¹

The New York State Department of Taxation & Finance ("Tax Department") as part of the 1985-86 Tax Amnesty Program promised increased efforts to prosecute criminal tax evasion. The Omnibus Tax Equity and Enforcement Act of 1985 increased many of the penalties for criminal tax evasion from misdemeanor to class E felony penalties. The Tax Section issued a report generally favorable to the then proposed legislation under the Omnibus Act and many of the Tax Sections's recommendations and comments were adopted in the final version of that law, (See, The Tax Section's Report on the Proposed Omnibus Tax Equity and Enforcement Act of 1984, December, 1984).

The Tax Section applauds and encourages the State's effort at increased enforcement. However, the increased enforcement efforts have highlighted a serious problem with the venue rules for criminal tax prosecutions. Many State taxpayers are deprived of a fair trial simply due to prosecutorial discretion in selecting where the prosecution is to take place. Taxpayers are routinely required to defend themselves many miles from their home and incur needless travel and lodging expenses for counsel,

¹ This report was drafted by Robert Plautz. Helpful comments were provided by Arnold Y. Kapiloff, James A. Locke, Lawrence S. Feld, James Mahon and Bernard Sheri.

witnesses and themselves. In addition, evidence necessary for a proper and fair defense is frequently located near where the taxpayer lives or works. Without such evidence, a taxpayer is deprived of a fair trial. We recommend enactment of legislation (S.7921 and A.9282) to cure this inequity.

Current Law

The general rule of current law for venue of criminal prosecutions is that a crime may be prosecuted in any county where it occurs. See, N.Y. CPL Art. 20. Since a tax return is eventually filed in Albany (typically by mailing), prosecution for allegedly filing a false return can be prosecuted in Albany County, although the taxpayer may never have been in Albany County.

New York law also provides that a taxpayer may be prosecuted in any county criminal court where the act charged is "...one of omission to perform a duty imposed by law, which duty either was required to be or could properly have been performed in such county.", CPL 20.40(3). Consequently, a prosecution for failure to file a return with intent to evade taxes (which for venue purposes is treated as a crime of omission), may be brought in any such county, e.g., Albany County since that is where the return is to be filed.

The Tax Department does not prosecute tax crimes. It refers cases it deems worthy of criminal prosecution to an appropriate

prosecuting agency---either the State Attorney General or a local District Attorney. The Tax Department has sole discretion in selecting which agency shall prosecute. If the case is referred to the State Attorney General, prosecution may be in any county of the State where the crime was allegedly committed, including Albany County. If, however, the case is referred to a local district attorney, the local district attorney is limited to bringing actions only in the "...county for which he [or she] shall have been elected or appointed", N.Y. County Law § 700(1).

If the Tax Department refers the case to a county district attorney, the case will usually be in a convenient venue for the taxpayer (i.e., where he or she lives or works). When a referral is made to the Attorney General, the taxpayer is subject to the discretion of the Attorney General in establishing venue.

Federal Law as a Model

The general rules for venue of criminal prosecutions for crimes other than tax crimes are identical on both the Federal and State levels. See, 18 USC § 3237. However, Congress has recognized the potential for abuse under the general rules and has enacted specific legislation relating to venue for tax crimes. 18 USC § 3237(b).

Under 18 USC § 3237(b) a taxpayer has an absolute right to have a prosecution under § 7203 of the Internal Revenue Code for non-filing a return be brought in the district of the taxpayer's residence when the crime is alleged to have occurred. Moreover, a

taxpayer is generally provided this same right in the case of certain false filing tax crimes under §7201, et seq. However, the right is not applicable to false filing cases if the prosecution is based on acts in addition to the mailing of the return. For example, if a taxpayer who resides in the Eastern District of New York is alleged to have committed acts of fraud involving his or her business in the Southern District, since the prosecution is not based "solely on a mailing", the taxpayer could not force the trial to be held in the Eastern District if the Government chose to prosecute in the Southern District.

Federal courts have consistently held that 18 USC § 3237(b) is absolute. See, e.g., United States v. Ostrer, 458 F.Supp. 540 (S.D.N.Y. 1978):

...[18 USC § 3237(b)] has been interpreted to give defendants charged with the enumerated offenses an absolute right to have charges tried in the district of their residence. (Duffy, J.)

In United States v. Youse, 387 F.Supp. 132 (E.D.Wisc. 1975), it was held:

The intent of Congress in passing §3237(b) was to permit a defendant to be tried in the district of his residence, thus avoiding the necessity of a defendant charged with specified violations...from having to defend a charge in the district chosen by the Government. A motion under § 3237(b) is not directed to the court's discretion, but rather Congress intended that defendants be given an absolute right to be tried...in the district of their residence regardless of considerations of convenience. Id., at 134.

Proposed Legislation under Assembly Bill A 9282 and Senate Bill s 7921 in order to Prevent Abuses.

We believe it is inherently unfair to require a taxpayer to defend criminal charges hundreds of miles from his or her home or place of business. To prevent abuse under current law and insure a fair trial to all taxpayers, legislation having bipartisan support has been introduced in the current term of the New York Legislature under Assembly Bill No. A 9282 and Senate Bill No. s 7921.

The Bill gives the taxpayer the absolute right to be prosecuted in his or her county of residence if the crime alleged is false filing or non-filing, unless there is an actual evidentiary nexus between the crime and the county selected for prosecution by the prosecuting agency.

The Bill reads:

Notwithstanding subdivisions one, two, and three of this section, an offense described in article thirty-seven of the tax law which is begun in a county other than the county in which the defendant either resided at the time the alleged offense was committed or in which the defendant conducted business which was an element of the alleged offense, shall upon motion of the defendant in the county in which the prosecution is begun, be prosecuted in such county of residence or business, provided that this motion is filed within forty-five days after arraignment of the defendant upon indictment, information, misdemeanor complaint or felony complaint.²

² The Committees would have preferred that the Bill more closely conform to Federal law under 18 USC § 3237(b). The Committees nonetheless believe that the Bill as drafted accomplishes the goal we seek.

The exception to the statute is provided by the statutory language of, "...other than the county in which the defendant conducted business which was an element of the alleged offense, ...". The purpose of the exception is similar to that discussed earlier concerning the analogous Federal tax venue legislation, namely, it prevents a taxpayer from forcing a change of venue to the county of the taxpayer's residence if the alleged acts of fraud occurred in a different county.

The Bill would essentially conform State law with Federal law. We believe the Federal rule provides fundamental fairness and due process and a similar rule should apply to anyone charged with a criminal violation of State tax law.

Other Considerations.

Before the Omnibus Tax Equity and Enforcement Act was enacted, Section 695(e) of the Tax Law, which was limited only to the evasion of personal income taxes, provided that a prosecution "...may be conducted in any county where the person or corporation to whose tax liability the proceeding relates resides, or has a place of business," This language was not included in the Omnibus Tax Equity and Enforcement Act. As a result, one case has held that the deletion of this language means that the Legislature intended that, at least with respect to personal income taxes, all prosecutions must be brought in Albany County and that a prosecution brought in any other must be dismissed for lack of venue. People v. Fioretti, NYLJ 7/12/88. We

regard the Fioretti decision as an aberration and wrongly decided.

However, the District Attorneys' Association is concerned that the holding of the Fioretti case may be adopted by other courts and has suggested legislation that would overrule the Fioretti reasoning and allow for prosecution "...in any county where a person ... resides, or has a place of business, or from which such person receives any income, or in any county in which any such crime is committed."

Our proposal is consistent with the suggested legislation of the District Attorneys' Association and we support it along with support of Bill A 9282 and S 7921.

Conclusion

For the foregoing reasons, the Executive Committee of the Tax Section recommends adoption of Bill A 9282 and S 7921.