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Former BDO Seidman CEO Acquitted of Tax Shelter Charges, Attorney Convicted

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Summary by taxanalysts

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Full Text Published by taxanalysts

A federal jury on October 31 acquitted former BDO Seidman CEO Denis Field of all charges that he led and participated in purported fraudulent tax shelters.

Field's codefendant, Paul M. Daugerdas, a former partner at Jenkens & Gilchrist, was convicted on seven of 16 counts, including tax shelter fraud conspiracy, tax evasion, and mail fraud. (Indictment.)

Field and Daugerdas were indicted in 2009 along with several others (including former Jenkens & Gilchrist partner Donna Guerin and former Deutsche Bank Alex.Brown bankers David Parse and Raymond Brubaker) on charges that from 1994 through 2004 they committed tax fraud conspiracy and related crimes arising out of abusive tax shelters allegedly promoted by Jenkens & Gilchrist, BDO, and the bank. Those abusive shelters -- including short sales, short options strategy, swaps, and HOMER -- were allegedly marketed and sold to hundreds of wealthy individuals seeking to avoid taxes and generated more than $7 billion in false and fraudulent tax losses, according to a March release from the Justice Department. (Prior coverage.)

Field, Daugerdas, Guerin, and Parse were convicted in May 2011 in the U.S. District Court for the Southern District of New York, while Brubaker was acquitted of all charges. (Prior coverage.)

However, Field, Daugerdas, and Guerin were later granted a retrial after it came to light that a juror had misrepresented her personal and professional background during voir dire for their first trial. (Prior coverage.)

Guerin pleaded guilty in September 2012 to conspiracy and tax evasion charges and was sentenced by Judge William H. Pauley III on March 1, 2013, to eight years in prison. She was also ordered to pay $190 million in restitution and to forfeit $1.6 million.

The retrial of Field and Daugerdas began September 9. Jury deliberations began October 29 and concluded the afternoon of October 31. The jury acquitted Field of all charges, finding that the government did not prove that he conspired to evade billions of dollars in federal income tax.

"We are so grateful that Mr. Field had a second opportunity to defend himself and finally prove to an incredibly intelligent, attentive jury his complete and utter innocence of these charges," said Field's attorney, Sharon L. McCarthy of Kostelanetz & Fink LLP. (Field was also represented by César de Castro of the law firm of César de Castro.)

Following his acquittal, Field quickly moved to unfreeze his assets that were seized or otherwise restricted by the government during the action.

Field's acquittal in the retrial is another setback for the government in its pursuit of criminal convictions against accused promoters of abusive tax shelters. In November 2012, two attorneys with Ernst & Young LLP had their conspiracy and tax evasion convictions overturned by the Second Circuit following their conviction in 2010. (*United States v. Coplan*, No. 10-583-cr (2d. Cir. 2012). Prior coverage.)

A 'Very Unusually Tried Case'

While disappointed in the outcome, Daugerdas's attorney Brian D. Linder of Clayman & Rosenberg LLP said that he was grateful the jury rejected the government's attempt to criminalize what the government had previously characterized as the largest tax shelter fraud in history. Daugerdas was also represented by Henry Mazurek of Clayman & Rosenberg.

Linder said that it was a "very unusually tried case." The government concentrated on the sheer amount of tax that was evaded, but the jury decided to focus on substantive issues, like economic substance, he said. "I think it's actually pretty clear that the jury essentially based its guilty verdict on a couple of transactions," Linder said.

"We believe that the jury convicted [Daugerdas because of] the way in which the transactions were implemented, rather than the concept of whether or not there were appropriate losses taken or whether . . . the design of the shelters was proper," Linder said.

Linder added that the evidence connecting Daugerdas to those transactions was "very thin" and would form the basis of his client's appeal.

Linder noted that during jury deliberations, the jury examined the meaning of the annual accounting rule, which he said "was unheard of in a criminal case."

Daugerdas faces a statutory maximum of 58 years at sentencing, Linder said. Judge Pauley presided over both trials.

Ronald Cimino, deputy assistant attorney general in the Justice Department Tax Division, said in a release that the Daugerdas verdict "reaffirms the principle that an individual who utilizes his expertise, training and skills to create and market fraudulent tax schemes will be prosecuted to the full extent of the law and ultimately held accountable for the crimes that he committed."

Unusual Cases

Jasper L. Cummings, Jr., of Alston & Bird LLP noted the novelty of Daugerdas's conviction. He said Daugerdas would be only the second practicing law firm attorney to go to prison in these types of tax shelter cases who hadn't pleaded guilty. The other attorney currently serving a prison sentence after contesting his charges at trial is R.J. Ruble, Cummings noted. (Prior coverage.)

Cummings also expressed his trepidation with convictions in tax shelter cases if the government seeks a conviction based solely on an attorney's improper legal analysis given to a client when designing a tax shelter.

"I'm afraid that what happens in these convictions is rather than focusing on the lie, the government wants to quibble with the legal analysis [of legal opinions]," Cummings said. He noted that the EY attorneys whose convictions were later overturned by the Second Circuit were convicted at the trial court level on a jury instruction that the attorney's legal analysis violated the economic substance doctrine.

"To me, that's not a crime, that's a lawyer's dispute. . . . If you don't have a lie, you probably [shouldn't] go to jail. The legal analysis would have to be pretty bad to rise to the level of criminality," Cummings said.

Regarding Field, Edward M. Robbins Jr. of Hochman, Salkin, Rettig, Toscher & Perez PC noted the difficulty in obtaining an acquittal in the face of multiple tax-related conspiracy counts in federal court. "I looked at the . . . docket sheet for the entire case and wondered how much it cost Mr. Field for his acquittal," Robbins said. "I'd say at least a couple of million dollars. That's what it takes to beat a case like this at trial."

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