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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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*
UNITED STATES OF AMERICA *
* 08-CR-36-01/13-PB
v. * October 22, 2008
* 11:00 a.m.
ANIBAL ACEVEDO-VILA, *
et al. *
* * * * *

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

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1 trying to clarify them during this telephone call.

2 Ms. Dominguez, Mr. Berenson asserts in his
3 supplemental filing with respect to the tax counts that
4 the government has disclaimed any intention to prove at
5 trial that line 22 of Mr. Acevedo-Vila's 1040 in the
6 years identified in the counts was false, and in your
7 supplemental filing, you seem to assume and premise your
8 argument solely on the theory that the unreported income
9 was Puerto Rican sourced income and would not have to be
10 reported on line 22.

11 So I want to understand. I think he's right,
12 but in the oral argument you said that you had -- I
13 think you characterize it as a technical argument, that
14 some of the unreported income was U.S. sourced income
15 and would have to be reported on line 22 and that you
16 might be trying to argue at trial that the -- that line
17 22 was, in fact, false because it did not include
18 unreported U.S. sourced income.

19 So I'd like you to try to help me understand
20 your position. Are you, as Mr. Berenson suggests, going
21 to proceed at trial exclusively on the theory that the
22 unreported income was Puerto Rican sourced income, or
23 are you intending to try to prove at trial that
24 unreported income was at least in part U.S. sourced
25 income that should have been reported on line 22?

1 MS. DOMINGUEZ: Yes. Good morning, your
2 Honor. I apologize to you and Mr. Berenson. I have
3 bronchitis and I'm a little bit hoarse; so it may be
4 difficult to understand me.

5 Your Honor, while the representations that I
6 made to you during the hearing are true, that there is a
7 technical argument available to us that results from the
8 commingling of U.S. sourced contributions with accounts
9 here in Puerto Rico from which money was taken from
10 Acevedo-Vila, we are not going to be proceeding on that
11 argument.

12 I can represent to the Court that our theory
13 is exclusively that Puerto Rican sourced income that
14 should have been reported in the U.S. tax return was not
15 reported and that that is the essence of the false tax
16 return charge.

17 THE COURT: Well, that's very helpful to me,
18 and one of the things I like about your work in this
19 case, Ms. Dominguez, is that when I do try to ask for
20 clarification, you give me straight answers. So I
21 really appreciate that because it's difficult to try to
22 make sense of some of the complicated aspects of this
23 case without the assistance of counsel. So that answer
24 is very helpful to me and will, I think, speed my
25 resolution of the tax counts.

1 I do have a second question then, and it's,
2 again, trying to make sure that I understand the theory
3 on which the government is proceeding.

4 As I'm understanding your view then, it is
5 that the unreported income that you intend to prove at
6 trial is unreported Puerto Rican sourced income, first,
7 and I think you've just confirmed that, and second, that
8 your position is that that unreported Puerto Rican
9 sourced income would, in fact, have a material effect on
10 the computation of Mr. Acevedo-Vila's federal taxes for
11 the reasons you've identified in your supplemental
12 filing, and third, I understand your position to be that
13 the indictment that was returned sufficiently notifies
14 Acevedo-Vila of your the theory on which you intend to
15 proceed because you, in addition to referencing line 22,
16 reference the allegedly false Puerto Rican returns that
17 were in part attached to the federal returns. Your
18 theory being that your reference to that -- the
19 allegedly false Puerto Rican returns is the false
20 filing, and the false filing is material to the
21 computation of the tax because it affects the
22 computation of deductions and AMT in the way in which
23 you described in your supplemental filing. Have I got
24 your theory correct on those points.

25 THE COURT: Judge, that is essentially

1 correct. We do believe the unreported income should not
2 have been reported on line 22 but should have been
3 reported on both the foreign tax credit form and the
4 alternative minimum tax forms in the lines that we've
5 identified in our motion.

6 To the extent that the count is not I think
7 well drafted, I would concede that, your Honor, and I
8 take responsibility for that. Even though I did not
9 draft it, it was my responsibility to ensure that it was
10 properly done. If given the chance, I probably would
11 have identified the other lines where the income from
12 Puerto Rico should have been reported. Although my
13 suggestion to the Court was that the indictment as
14 fairly read, 26 and 27, says that the income -- the only
15 income that was reported on line 22 and does not suggest
16 that the additional income should have been reported on
17 line 22, but I concede that it does not indicate where
18 it should have been reported.

19 However, I do believe that the fact that the
20 Puerto Rican tax returns were attached and that the
21 indictment does indicate that there was income that was
22 omitted from that Puerto Rican return does put the
23 defendant on notice that the unreported income is Puerto
24 Rican sourced.

25 We do also claim that the unreported Puerto

1 Rican sourced income does have an effect on the
2 allegations of itemized or standard deductions for
3 Acevedo-Vila and the termination of the taxable income
4 and the foreign tax credit as well.

5 THE COURT: And I think I understand
6 everything you're saying. There's one point I want some
7 additional clarification on. Mr. Berenson makes the
8 argument that given the theory that you now are
9 proceeding on, that the indictment as charged does not
10 give him adequate notice of the charge as you now
11 understand it and that you didn't specify what was false
12 about the return in a way that was sufficient to give
13 him notice. Is your response to that that the answer to
14 that question is that you did give him sufficient notice
15 by referencing the false Puerto Rican tax returns that
16 were attached to the federal returns?

17 MS. DOMINGUEZ: Judge, again, in all candor to
18 the Court, I believe the count should have specified the
19 other areas in the federal return where the income
20 should have been included, and it does not.

21 THE COURT: And as a result, you have a
22 problem with notice then because the indictment, at
23 least the way it would have to be reasonably construed,
24 would be referencing line 22 and not the other lines
25 that you are now identifying in your briefing.

1 MS. DOMINGUEZ: That is correct, your Honor.

2 THE COURT: Okay. Your position though would
3 be -- and I assume -- because Mr. Berenson didn't make
4 these arguments with respect to the conspiracy count,
5 that even if 26 and 27 go out for lack of notice, that
6 doesn't affect the validity of the conspiracy charge
7 which is not premised on the specific theory set forth
8 in 26 and 27.

9 MS. DOMINGUEZ: That's correct, your Honor.
10 And further, I mean, the government believes that if
11 it's a matter of drafting, that that is a matter that
12 can be corrected, but there is still the issue of
13 materiality, and we would look to the Court for guidance
14 on the issue of materiality before going through the
15 steps of seeking a new indictment with the substantive
16 tax counts and moving to join.

17 THE COURT: Okay. I'm not sure I'm going to
18 be able to deliver that to you at the present time. If
19 what you're asking is evaluate the legal merit of my
20 alternative theory; that is, the AMT, foreign tax
21 deduction theory, I'm not sure that I can do that
22 without seeing an actual indictment because it's a
23 little bit speculative. If your indictment as charged
24 is not sufficient, the response should be for me to
25 dismiss it without prejudice to your right to seek a new

1 indictment with respect to those charges.

2 MS. DOMINGUEZ: I understand, your Honor. I
3 only say that because the issue of materiality is also
4 another issue that's raised by Mr. Berenson.

5 THE COURT: Yeah. And I understand. Whether
6 it -- I guess what I see is the notice problem precedes
7 the analysis of the materiality problem, but I will take
8 a look at it, and if I can provide guidance to the
9 parties, I certainly don't want to have anybody waste
10 their time on proceeding with theories that won't
11 ultimately be viable.

12 MS. DOMINGUEZ: And, Judge, were we to do
13 anything on that, we certainly wouldn't be doing
14 anything until after November the 4th.

15 THE COURT: Okay. Well, I think at this
16 point -- I'm working full speed as hard as I can on this
17 stuff, but the parties should not anticipate rulings
18 from me one way or the other in this matter before
19 November 4th. I will get them out when I get them done,
20 but I'm working on all of them at one time with my law
21 clerks as my time permits, and they are very complicated
22 problems that the parties have presented me with, and I
23 think everyone would want me to take the time I need to
24 make sure I get it right rather than to try to rush out
25 any ruling. So I will get them out as quickly as I can,

1 but whatever guidance I give you, it won't be until I'm
2 satisfied that I've carefully analyzed the arguments
3 that the parties have presented.

4 Mr. Berenson, you have remained silent because
5 I haven't put any questions to you, but if there's
6 anything you want to say, I'd certainly be happy to hear
7 it.

8 MR. BERENSON: Great. Thank you, your Honor.
9 Just a couple of very quick points, most of which I
10 suspect won't be news to you.

11 With respect to the threshold issue of notice,
12 I just want to emphasize that the issue is not nearly
13 notice in a due process sense, but it's really the guts
14 of the grand jury right as well. The particularization
15 of charges in an indictment serves not only to help the
16 defendant prepare for trial, but also to ensure that the
17 grand jury actually passed on the actual theory of
18 criminality underlying the case.

19 THE COURT: I agree with that. I was using
20 notice as a shorthand for the entire set of arguments
21 that underlie your vagueness challenge.

22 MR. BERENSON: I thought so, but I just wanted
23 to be clear just in case.

24 The second point I wanted to make is with
25 respect to Count 25. In our supplemental submission you

1 will see in footnote one that we have argued that if
2 Counts 26 and 27 go, at least depending on the theory
3 that your Honor would adopt for that, Count 25 may need
4 to go as well, and then of course in our original set of
5 briefs we have arguments applicable to Count 25 also.

6 The various arguments with respect to Count
7 25, both presented in the initial brief and reflected in
8 kind of the transitivity argument as it were in footnote
9 one, are not as strong with respect to Count 25 as they
10 are with respect to Counts 26 and 27, but we wouldn't
11 want it to be taken for granted that Count 25 can
12 necessarily stand either on its own or especially if 26
13 and 27 go as well.

14 THE COURT: I understand that and we -- my law
15 clerk and I were talking about that footnote earlier
16 this morning. It may be -- and I'm certainly going to
17 take a look at it because I think both you and Ms.
18 Dominguez would like as much guidance from me as I could
19 give you as to my views on these matters, but it may
20 well be that I will require supplemental briefing to the
21 extent that your client wants to argue that 25 should be
22 dismissed for the same reason, because as you
23 acknowledge, the vagueness argument is a different
24 argument with respect to that count than it is from 26
25 and 27, and to get at a challenge on a similar basis to

1 25, you probably would have to get into an assessment of
2 the parties' positions with respect to the government's
3 alternative theory of liability here and because -- I
4 think you will acknowledge, these arguments with respect
5 to these charges have been on somewhat shifting grounds
6 because the government -- and I think very candidly and
7 appropriately -- when it saw problems with its initial
8 approach has moved somewhat, which has caused you to
9 move somewhat, which has caused the briefing to be less
10 than complete with respect to how this might apply to
11 25, and I'm not likely to take on that difficult
12 analysis with respect to 25 without full briefing.

13 I recognize your footnotes there. I'm
14 certainly going to take a look at it. If I can give an
15 answer that I have a high degree of confidence in, I
16 will give it, but if I can't, I may need you to provide
17 a subsequent round of briefing directed specifically to
18 that count because, frankly, I think the analysis is
19 somewhat different and it really hasn't been fully
20 briefly.

21 MR. BERENSON: Yeah, that would be just fine,
22 your Honor. You're right. If at the end of the day you
23 do elect to dismiss 26 and 27 because of the notice
24 issue, that really is a different ground that wouldn't
25 flow transitively into 25, and you would be confronted

1 with these more complicated materiality type arguments
2 as well as arguments we raised against Count 25 in order
3 to be able to make a decision about that count.

4 THE COURT: Yeah. And just so you understand
5 my general views about these matters, whenever an
6 assessment of the viability of a count can in any way
7 depend upon the sufficiency of the evidence that the
8 government can marshal in support of that count, I will
9 not grant a motion to dismiss and instead require the
10 issue to be raised at the judgment as a matter of law
11 stage after the government's case is over because I --
12 while that is burdensome to a defendant, it makes my
13 ruling much more reliable because I understand the
14 fullness of the evidence that the government is
15 marshaling to support the charge.

16 So if you were to succeed on a challenge to 25
17 on the basis that you've identified, you'd have to
18 convince me that under no set of facts could the charge
19 be legally sufficient, and that's a hard thing to do.

20 MR. BERENSON: It is, your Honor, and if I
21 were you, I would obviously take the exact same
22 approach. I think it's the right approach. We have
23 occasionally made a factual point or two in these
24 briefs, usually in a footnote to set it off from the
25 legal arguments, but we are certainly not intending in

1 any way to argue sufficiency of the evidence with
2 respect to any of these counts.

3 The final point that I wanted to make in a
4 sense goes indirectly to the sufficiency of the evidence
5 and responds to Ms. Dominguez's question about
6 materiality, and this is that if Counts 26 and 27 were
7 to be dismissed, in order for the government to pursue
8 its alternative theory, I believe that approval from the
9 tax division at Main Justice would be required, and I
10 think that is probably the firm in which the decision on
11 materiality would need to be made first. I'm sure Ms.
12 Dominguez is confident that she can convince her
13 colleagues in the tax division that these new theories
14 are material, but particularly in light of today's news
15 about Governor Palin's campaign wardrobe, I'm a little
16 more dubious, and certainly we would make an effort to
17 convince the Department of Justice that the false return
18 theories just certainly shouldn't be pursued.

19 THE COURT: I understand that Governor Palin
20 from news reports intends to donate her clothing to
21 charity, which might affect the analysis a little bit.

22 MR. BERENSON: It might or it might not. I
23 haven't thought that one all the way through.

24 THE COURT: To the extent it's even her
25 clothing. If it's the RNC that's intending to donate it

1 to charity, that might affect the analysis that it never
2 really was her clothing. It was just purchased by the
3 RNC, used by her, and then disposed of by the RNC.

4 MR. BERENSON: I don't want to make too much
5 of Governor Palin at this point because even though I
6 think there are pretty strong similarities between what
7 happened to her and what happened to the governor, I
8 don't think either set of facts is fully explored or
9 fully understood at this point, but I think we would
10 certainly try to convince the Department of Justice that
11 the optics of pursuing the governor on a theory of
12 non-reporting clothing, which accounts for 80 percent of
13 the stuff he's alleged not to have reported, it would
14 certainly not be good if they don't also intend to take
15 similar positions with respect to Governor Palin.

16 THE COURT: I'll leave that one to the lawyers
17 and what you decide to do at trial and what
18 communications you may want to have with the tax
19 division. I don't think it really affects my analysis
20 at this point, but I understand what you are saying.

21 MR. BERENSON: Yeah. I mentioned it only
22 because if you do not feel yourself in a position to
23 resolve or give guidance on the materiality issue at
24 this point, I think there is some chance that
25 discussions between counsel and the tax division before

1 any new charges along these lines would be authorized
2 might be sufficient to keep that issue out of your
3 courtroom once and for all.

4 MS. DOMINGUEZ: Judge, let me just say,
5 without debating the issue of the clothing, I can think
6 of very significant differences, but I won't get into
7 the merits of those issues at this point. These are not
8 alternative theories. These were the theories on which
9 the indictment was approved. The counts were not
10 properly drafted. They weren't artfully drafted. So
11 this is not a new theory of prosecution that would have
12 to be moved through the ranks of the tax division again.

13 THE COURT: All right. Well, I don't think I
14 need to hear more about that. I think it's certainly
15 something that the lawyers may continue to discuss among
16 themselves, and I assume Mr. Berenson will pursue that
17 with you directly.

18 But I do appreciate your very clear responses.
19 It shows why when I do have a problem it makes sense to
20 try to get the lawyers on the phone right away and end
21 my confusion, because, believe me, I've had about
22 24 hours of very unpleasant confusion trying to make
23 sure I understood what the parties' positions were, and
24 you've cleared it up in 15 minutes of discussion on the
25 phone.

1 While I have you, let me make one other
2 request. I have received the voluminous English
3 translations of the regulations that the parties have
4 submitted. I didn't anticipate when I asked for that
5 how much material you'd be submitting, and I do have a
6 law clerk going over them, but I think given the volume
7 here, it may make sense to give each of you an
8 opportunity, if you so choose, in a brief of very --
9 limited to, say, five pages to simply draw my attention
10 to any references in those materials that you contend
11 are relevant.

12 Before they were translated, I think your
13 views were that neither of you saw anything in there
14 that was potentially relevant to the analysis. Now that
15 you have English translations, I don't know whether your
16 views have changed, and I want to give you a chance to
17 point out to me any provisions in those materials that
18 you think may bear on the analysis.

19 Would you be willing to do that? Look through
20 them, if there's something in there that you think is
21 relevant, simply in a very summary way identify for me
22 and explain why you think it's relevant.

23 MR. BERENSON: Your Honor, would this be just
24 materials in addition to those already cited and
25 discussed in the main brief?

1 THE COURT: Yes. Because I haven't looked at
2 the submission you made recently, but my law clerk is
3 working on it, and he told me it's quite lengthy, and
4 there were English translations of documents that you
5 submitted at my request. And it's only with respect to
6 those documents that I'd be asking for any supplemental
7 briefing, and I would be asking not for any kind of
8 extended argument, but just for you to say, Judge, we
9 think the following provisions are relevant and to
10 identify them with a citation that I can then go and
11 focus carefully on those provisions. I just don't want
12 to overlook something that either of you may think is
13 relevant.

14 MR. BERENSON: Well, what you have, your
15 Honor, in that joint submission is everything. As we
16 understood your request, you'd wanted the entire
17 electoral law, any and all regulations, administrative
18 interpretations and judicial interpretations. So that
19 is, I believe, the entire body of Puerto Rico law
20 relating to the electoral law. Vast, vast majority of
21 it has I think nothing to do with the particular issues
22 in dispute here. From our exercise in going through
23 that and obtaining the translations, I don't believe
24 that we identified any provisions other than those
25 identified by the parties in the original briefs that

1 would likely have any material bearing on your
2 deliberations or decisions. I don't want to waive my
3 right to submit something without consulting with my
4 colleagues first who looked at that all more carefully
5 than I did, but I think the initial briefs of both sides
6 pretty much did direct the Court to the operative
7 provisions, particularly if you include all the
8 discussion and oral argument.

9 THE COURT: Okay. I absolutely do not need
10 any further briefing with respect to any citation to
11 Puerto Rican law that was made in the initial briefs. I
12 have that and understand that law. I had English
13 translations of that law and understood it.

14 What I was more interested in making sure that
15 I understood was whether there were any administrative
16 regulations or administrative interpretations or Puerto
17 Rican judicial interpretations of the statutes that had
18 any bearing on my analysis because, as everyone
19 understands, I'm being asked to construe and apply
20 provisions of Puerto Rican law. If there had been an
21 authoritative interpretation of that law by the Puerto
22 Rican Supreme Court or even administrative
23 interpretations, either regulatory or in some quasi-
24 judicial decision, that were relevant, I would certainly
25 want to take those into account.

1 But what I hear you to be saying, Mr.
2 Berenson, at least in your initial thinking about it, is
3 that you don't think there's anything like that in that
4 set of materials that have been submitted to me.

5 MR. BERENSON: I don't think so, your Honor,
6 but why don't we consult with Ms. Dominguez and her
7 colleagues, and we can probably fairly quickly decide
8 collectively whether there's anything not already cited
9 to you in the briefs and arguments that we think has any
10 bearing, and if so, you know, we'll either make a joint
11 submission directing your attention to those additional
12 items, if any, or separate ones.

13 MS. DOMINGUEZ: Judge, while I agree with Mr.
14 Berenson that there is nothing exactly on point, I think
15 there is language in that material that might be helpful
16 to the Court in making the distinction as to whether it
17 was a regulatory function or not. So we would like to
18 avail ours of that opportunity and we would gladly
19 confer with Mr. Berenson on that.

20 THE COURT: Why don't you two talk about it,
21 and if you can make a joint submission, that's fine. If
22 you want to make separate submissions, that's fine, but
23 let's have it by the end of the week, this week. And
24 I'd ask you to keep it brief, no extensive argument.
25 Simply identify the provisions with an explanation as to

1 why you think it has some potential relevance, and that
2 will just allow me to make sure I don't miss something
3 in going through a very large volume of materials.

4 MR. BERENSON: Would a submission something
5 along the lines of 28(j) letter in the appellate court
6 be appropriate?

7 THE COURT: Well, since I haven't been an
8 appellate lawyer for fifteen years, Mr. Berenson,
9 refresh my memory as to what that is.

10 MR. BERENSON: This is when there's new
11 authority that arises after the additional briefs have
12 been filed, and basically the rule in the Court of
13 Appeals is you don't make any argument. What you do is
14 you say to the Court, the Court needs to be aware of the
15 following new or additional or supplemental authority
16 that have come to the attention of counsel. There's a
17 citation, and then there's an indication of which
18 argument that new authority is relevant to, but it
19 avoids actually making argument.

20 THE COURT: You have exactly what I have in
21 mind. That's it. If you can do something like that for
22 me, either jointly or individually if you can't agree on
23 a joint submission, and do it by the end of the week. I
24 will make my own analysis of the regulations, but it
25 would be helpful if either of you see something in there

1 that you specifically want to draw my attention to.

2 MS. DOMINGUEZ: Okay.

3 THE COURT: I appreciate that. Thank you
4 again for making yourselves available. I apologize for
5 making you speak while you are struggling with
6 bronchitis. I will look for that submission and
7 continue to work as hard as I can on getting these
8 things out, and we still will probably have to set an
9 oral argument date for argument on the defendant's
10 challenges to the new counts, but I haven't even had a
11 chance to begin to focus on that yet. First I'm going
12 to get through the current motions to dismiss, and then
13 I will look at those and we can talk about when we will
14 have oral argument on them.

15 MR. BERENSON: Okay. Your Honor, may I
16 briefly raise one housekeeping matter?

17 THE COURT: Yes.

18 MR. BERENSON: Along with the motion to
19 dismiss the second indictment, we also filed a motion
20 seeking grand jury discovery. That motion was denied by
21 Magistrate Judge Kravchuk on the 20th, earlier this
22 week. We had understood we would have an opportunity to
23 reply and that the due date was the 21st for the reply
24 brief. We went ahead and filed that reply brief
25 yesterday, notwithstanding Judge Kravchuk's denial of

1 the motion, with a request that she at least review the
2 reply, and if anything in it caused her to reconsider
3 her ruling, that she do so.

4 So I just wanted to make you aware of that
5 since it had been a slight hiccup in the process. Our
6 deadline for appealing the initial adverse ruling for
7 appealing that to you is November the 3rd and -- but I
8 was just concerned that since the filing of the reply
9 came in after the denial of the motion to which it
10 related, that it might escape Judge Kravchuk's
11 attention. We were going to place some calls to
12 chambers to try to guard against that, but as long as we
13 had you on the phone I thought we would mention it.

14 THE COURT: I will have my clerk contact Judge
15 Kravchuk's clerk and make sure that that filing is drawn
16 to her attention. As to what action, if any, she
17 decides to take with respect to it, it will be totally
18 up to her, but I will make sure it isn't something
19 that's overlooked, and it's something that could be
20 difficult, especially since my principal docketing clerk
21 is out with pneumonia this week and was out last week as
22 well. But I will make sure that the matter is brought
23 to Judge Kravchuk's attention, and of course, I will
24 leave it to her to decide what, if anything, to do with
25 respect to the filing, and if you pursue some kind of

1 challenge to her ruling, I will address it in the
2 ordinary course.

3 MR. BERENSON: Thank you very much, your
4 Honor.

5 THE COURT: Anything else?

6 MS. DOMINGUEZ: No, thank you, your Honor.

7 THE COURT: All right. Thank you again for
8 making yourselves available on short notice.

9 (Adjourned at 11:35 a.m.)

10 C E R T I F I C A T E

11

12 I, Diane M. Churas, do hereby certify that the
13 foregoing transcript is a true and accurate
14 transcription of the within proceedings, to the best of
15 my knowledge, skill, ability and belief.

16

Submitted: 10/27/08

17

18 /s/ Diane M. Churas ___
DIANE M. CHURAS, CSR, CRR

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