

With Taxes, Don't Rely On Messi Defenses

By Robert W. Wood

Spain's high-stakes criminal tax trial of footballer Lionel Messi and his father has concluded, although no verdict has yet been released. In many circles, a conviction of Messi's father is expected, since he was pulling more of the strings. His star-athlete son might escape a criminal conviction, but he might not. Whatever happens, there will surely be appeals and further proceedings.

No matter what, the dollar impact and worry for the athlete has already been large. There is the direct dollar impact of taxes, penalties, interest, legal and accounting fees. Then, there are all of the ancillary potential indorsement income ramifications, and other consequences. They may be very hard to tally.

Lionel Messi's primary defense is that he did not read the documents, and did not understand what was being done in his name. To some extent, he must ask his father to take the fall, although his father in turn has pointed the finger at former managers and agents. It is hard not to find such a defense appealing and quite believable, particularly for the athlete.

With over \$70 million in annual income, Messi is number four of top earning athletes according to Forbes. Such a person can hardly be expected to understand many of the financial nuances that their athletic talent may inspire. Yet he and his father Jorge Horacio Messi could still face jail. Messi's claims that he never looks at the contracts he signs may ring true, but is that enough?

That defense usually is not enough with the IRS, even in court. Messi and his father are accused of using offshore shell companies to avoid taxes on 4.16 million euros (\$4.7 million) of Messi's income. It did not help that Messi's name came up again in the Panama Papers.

Plus, the "I didn't know" defense can be a tough sell. Most people — even U.S. lawmakers — do not prepare their own tax returns. But in civil tax cases and criminal ones, the taxpayer is usually responsible for whatever is on the form, and what is not.

The client *should* review the return, and the return preparer should *ask* the client to verify that all figures are correct, that the correct boxes are checked, and so on. The taxpayer must sign under penalties of perjury, and should clearly should review the return before signing. But some taxpayers read almost nothing, and electronic filing has arguably made the problem worse.

There is a marked contrast between the mechanics of paper versus electronic filing. A taxpayer with traditional paper tax return filing at least must *sign* the return before mailing, and that imports a certain amount of due diligence. With e-filing, there is no signature in the traditional sense, for taxpayer or preparer.

Will the tax return be printed out, or just visible on the computer screen? The taxpayer must sign a signature authorization form (Form 8879) that recites that the taxpayer has reviewed the electronic return, it is accurate, etc. But shortly before filing, changes may be made, and the authorization form may be signed days before. The final return may be significantly different from what the client saw.

Even if the "I didn't read it" defense is true and can be proven, it often does not work. Courts have consistently ruled that taxpayers have a duty to read their returns. As early as 1928, courts have held that the taxpayer still has a duty to read the return and make sure all income is included. See *Mackay v. Commissioner*, 11 B.T.A. 569 (1928).

Saying you relied on your tax adviser often fails too. Reliance on a tax preparer is not a defense to penalties if your cursory review of the tax return would have revealed errors. See *Metra Chem Corp. v. Commissioner*, 88 T.C. 654 (1987). One of Messi's biggest problems

is secrecy, and that may be hard to mesh with claims that, on some level, he did not know what was going on.

For a high profile person, secrecy may not primarily be about taxes. In some cases, it may not be about taxes at all. But still, as the Panama Papers have shown, secrecy in any context is viewed with increasing suspicion. Robo-signing may be too. It was used as a defense during the bank foreclosure crisis, and not always successfully. And it is even less likely to work with tax returns.

The U.S. has always taxed worldwide income, but it turns out more Americans had secret offshore accounts than ever could have been imagined. Government victories in civil and criminal tax cases have been astonishing, which makes the continued presence of the IRS voluntary disclosure (amnesty) programs all the more alluring. Since 2009, more than fifty thousand Americans have participated in IRS amnesty programs for offshore accounts.

Any taxpayers who have failed to come forward clearly face even bigger risks now. FATCA, the Foreign Account Tax Compliance Act, requires foreign banks to reveal American accounts holding over \$50,000. Apart from reporting worldwide income, Americans must file financial disclosure forms known as FBARs. Penalties for failure to file can be far worse than tax evasion penalties.

It is harder to claim ignorance now, and there is a new focus on willfulness. But what is considered willful can be subjective, and many taxpayers may want to sugarcoat their facts. It can be easy to forget about the cash money belt or the frequent transfers of amounts just under \$10,000 to avoid detection. No matter how innocent you may feel in your heart, a purpose to disobey the law can be inferred by conduct meant to conceal. It's one reason these are troubling facts:

1. Setting up trusts or corporations.
2. Filing some forms but not others.
3. Reporting one account but not another.
4. Using another passport.
5. Telling your bank not to send statements.
6. Using code words in communications.
7. Visits in person.
8. Cash deposits and withdrawals.
9. Moving money from one bank or country to another.
10. Not telling your return preparer.

If you have some of these factors, is it OK if your advisers told you to do it? As with the "I didn't know" defense in Messi's case, "they made me do it" is also unlikely to absolve you. For Americans, and increasingly for just about everyone worldwide, the key today is *transparency*.

In Messi's case, Spanish prosecutors focused on secrecy. They say the scheme relied upon hiding the names of the real owners of companies registered in the U.K., Switzerland, Uruguay and Belize. The deal was structured to keep his name hidden. Money was routed through U.K. and Swiss companies and then to companies in Uruguay and Belize to make it opaque.

Already in U.S. administrative cases with the IRS and tax prosecutions, trusts and companies are under fire. The IRS and DOJ use these common devices to enhance the earmarks of willfulness that may be present. In many ways, the cover-up is worse than the crime. Layers of entities and secrecy can make innocent activity willful, meaning penalties or jail.



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