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Catching "Big Tuna": How the Seventh Circuit Finally Reeled in Anthony Accardo

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COMMENTS

Catching “Big Tuna”: How the Seventh Circuit Finally Reeled in Anthony Accardo

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I. INTRODUCTION

Those inside the Chicago organized crime “Outfit”¹ called boss Anthony Accardo, whose weapon of choice was a baseball bat, “Joe Batters.”² As the reputed heir to Al Capone’s organized crime syndicate in Chicago,³ Accardo was also known by the Outfit’s term for president—“The Enforcer.”⁴ And after he caught a 400-pound tuna off the coast of Florida in the early 1950s, the press began to call Accardo “Big Tuna.”⁵ No matter what other people called him, law-enforcement officials called him a criminal. They claimed that during his long career Accardo was responsible for numerous crimes, including murder, while supervising the Outfit’s vast array of illegal activities.⁶

Until his death of natural causes⁷ in May, 1992, at the age of 86, Accardo steadfastly maintained that he was merely a well-to-do busi-

1. Lee A. Daniels, *Anthony Accardo, Long a Figure in Mob World, Dies in Bed at 86*, N.Y. TIMES, May 29, 1992, at B7.

2. *Id.*

3. *Hoodlum of Distinction*, N.Y. TIMES, July 12, 1958, at 16.

4. OVID DEMARIS, CAPTIVE CITY 5 (1969).

5. Daniels, *supra* note 1.

6. *Id.* A member of “the Chicago Crime Commission, a private watchdog group, said Mr. Accardo’s long life stemmed from his rule that organized crime in Chicago stay away from drug trafficking.” *Id.* Another source indicated that the reason why the “Outfit” suffered much less gangland-style violence than New York organized crime was that various New York crime families feuded among themselves, but the Chicago “Outfit” remained a single, unified family under Accardo. See Edward Walsh, *Letter from the Big Tuna’s Home Town*, WASH. POST, May 31, 1992, at A6.

7. Walsh, *supra* note 6.

nessman.⁸ He also boasted that, despite many encounters with police, he "never spent a night in jail."⁹ His record of untouchability appeared to be in jeopardy in 1982, when he and fifteen co-defendants stood trial on charges of RICO (Racketeer Influenced and Criminal Organizations) conspiracy.¹⁰ The charges stemmed from alleged activities involving kickbacks from a labor union insurance program.¹¹ Once again, Accardo emerged victorious—the jury acquitted him of all charges.

He pushed his luck too far by claiming a deduction from his income taxes for the legal fees he had incurred in his successful defense against the racketeering charge. Under some circumstances, such a deduction would be allowable, but in Accardo's case, the IRS denied the deduction.¹² The United States Tax Court upheld the denial,¹³ and the Court of Appeals for the Seventh Circuit affirmed.¹⁴

The Tax Court relied on a standard theory of tax law in denying the deduction, and the Seventh Circuit added a justification generated by RICO case law. In their decisions, both courts carefully followed established precedent. But with a more expansive reading of the precedent, either court could have allowed Accardo's tax deduction. Such a concession would have required more generosity than either court apparently felt toward this particular taxpayer. To explain why both courts reached negative decisions, and how they could have done just the opposite, this Note first explores Accardo's criminal history and how that history would quite naturally dissuade any court from showing generosity in Accardo's case. Next, the Note examines the circumstances under which a tax deduction for legal expenses might be permitted, as well as the two arguments used by the courts to deny Accardo's deduction. This Note concludes that, although both the Tax Court and the Seventh Circuit applied standard law, these courts' decisions may have had as much to do with the identity of the taxpayer as they had to do with legal theories. Anthony Accardo was

8. Daniels, *supra* note 1.

9. *Jury Acquitted Accardo Right from the Start*, MIAMI NEWS, June 19, 1982, at 4A. However, Accardo's *New York Times* obituary suggests otherwise. "[O]n Lincoln's birthday in 1945, driving through downtown Chicago, [Accardo] was picked up for questioning in a gambling case. Because the courts were closed for the holiday, Mr. Accardo had to remain in jail until the next day." Daniels, *supra*, note 1.

10. The relevant portion of the RICO statute applied to these co-defendants provides that it is "unlawful for any person employed by or associated with any enterprise engaged in interstate commerce, to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1988).

11. *Accardo v. Commissioner*, 942 F.2d 444, 446 (7th Cir. 1991).

12. *See infra* part V.

13. *Accardo v. Commissioner*, 94 T.C. 96 (1990).

14. *Accardo v. Commissioner*, 942 F.2d 444 (7th Cir. 1991).

not a sympathetic plaintiff, and after many years of being lenient, the courts may have decided that enough was enough.

II. WHO WAS ANTHONY J. ACCARDO?

Born in 1906 in Chicago,¹⁵ Anthony Joseph Accardo supposedly started his mob career as Al Capone's bodyguard and chauffeur,¹⁶ and was allegedly one of the triggermen in the St. Valentine's Day Massacre in 1929, when the Capone gang eliminated the rival gang of Bugs Moran.¹⁷ Accardo rose rapidly in the ranks of Capone's organization.¹⁸ After the long and bloody battle for supremacy in Chicago-area organized crime—known as the War of Sicilian Succession—between the group led by Al Capone and another group led by the Genna brothers, the Capone group eventually emerged victorious.¹⁹ Among the top Capone officers were Frank Nitti, Sam Giancana, and Anthony Accardo.²⁰

When Capone went to prison for income tax evasion in 1932, Accardo reportedly became second in command to Capone's heir, Paul "The Waiter" Ricca.²¹ When Ricca was imprisoned in 1943, Accardo became "chief."²² He maintained that post until 1956, when he willingly stepped down in favor of Sam Giancana, because the Internal Revenue Service was becoming "annoyingly curious" about Accardo's sources of income.²³

Accardo's lengthy criminal record listed more than twenty-seven arrests, including charges of carrying concealed weapons, gambling, extortion, kidnapping, and murder.²⁴ The Chicago Crime Commission blacklisted him as one of twenty-eight Public Enemies in 1931,²⁵ and he was considered "one of the top mafiosi in the nation."²⁶ When Accardo appeared in 1951 before the Senate Special Committee to Investigate Organized Crime, he refused to divulge anything but his name and thereby incurred a citation of contempt of Congress, which was later dropped.²⁷ In a 1958 appearance before the Senate Select

15. *Hoodlum of Distinction*, *supra* note 3.

16. *Jury Acquitted Accardo Right from the Start*, *supra* note 9.

17. WILLIAM F. ROEMER, JR., ROEMER: MAN AGAINST THE MOB 1-2 (1989).

18. *See id.* at 2.

19. AUGUST BEQUAI, ORGANIZED CRIME: THE FIFTH ESTATE 35 (1979).

20. *Id.*

21. *Hoodlum of Distinction*, *supra* note 3.

22. *Id.*

23. DEMARIS, *supra* note 4, at 5.

24. *Id.* at 322.

25. *Id.*

26. *Id.* at 323.

27. *Jury Acquitted Accardo Right from the Start*, *supra* note 9.

Committee on Improper Activities in the Labor or Management Field, Accardo invoked Fifth Amendment protection against self-incrimination nearly 150 times.²⁸

Until his most recent tax problems, Accardo enjoyed a remarkably successful relationship with the Seventh Circuit Court of Appeals. In 1960, for example, he was convicted by a jury of making false statements on his income tax return and sentenced to six years in prison and a \$15,000 fine.²⁹ But on appeal, the Seventh Circuit reversed the conviction, citing prejudicial newspaper publicity during the trial.³⁰ On remand, Accardo was acquitted of the falsification charges.³¹

Another example of the Seventh Circuit's favorable treatment of Accardo occurred in 1978, when his home in River Forest, Illinois was burglarized.³² Accardo never reported the burglary to the police, but several people described by the government as "known burglars"³³ began turning up dead, with wounds apparently inflicted by ice picks.³⁴ The Department of Justice and the FBI obtained a warrant to search Accardo's home for evidence related to the disappearance of Accardo's handyman, who had reported the burglary to Accardo and who had also been a witness before a grand jury investigating Accardo.³⁵ During the search, FBI agents seized \$275,000 in cash found in a basement vault in Accardo's home.³⁶ But reasoning that the cash had no nexus to an on-going criminal proceeding, the Seventh Circuit ordered the cash returned to Accardo.³⁷ No charges were ever filed in the ice pick murders of the suspected burglars.³⁸

III. THE RICO CHARGE AND THE TAX DEDUCTION

Organized crime has historically been heavily implicated in illegal activities involving labor unions, including the Laborers Interna-

28. *U.S. Jury Acquits Reputed Crime Figure in Union Embezzling Trial*, N.Y. TIMES, June 19, 1982, at 8.

29. *Jury Acquitted Accardo Right from the Start*, *supra* note 9; *United States v. Accardo*, 298 F.2d 133, 134 (7th Cir. 1962).

30. *Accardo*, 298 F.2d at 139.

31. ROEMER, *supra* note 17, at 94. FBI agents suggested that two of the judges on the Seventh Circuit Court of Appeals might have been bribed ("susceptible to an approach") in this case. *See id.*

32. *United States v. 1407 Ashland Avenue*, 603 F.2d 1231, 1232 (7th Cir. 1979).

33. *Id.* at 1232.

34. Art Petacque & Phillip J. O'Connor, *Mob's "Cops" Hunt Hit Men*, CHI. SUN TIMES, Jan. 24, 1988, at 36, *microformed on NewsBank Vol. XIX Feb. 1988 LAW 15:G2* (NewsBank, Inc.).

35. *1407 Ashland Avenue*, 603 F.2d at 1233.

36. *Id.*

37. *See id.* at 1234.

38. *See Petacque & O'Connor, supra* note 34.

tional Union of North America (LIUNA), which represents thousands of unskilled and semiskilled laborers in the construction industry.³⁹ Within the LIUNA, organized crime has reportedly used its influence to obtain workers' benefit funds, provide no-show jobs for members involved in organized crime, pay the personal expenses of union officials, gain access to the political process, and manipulate the construction market.⁴⁰

In 1981, a federal grand jury in Florida indicted Alfred Pilotto, president of the union's Chicago local and a "territorial boss" of Chicago organized crime,⁴¹ along with fifteen co-defendants, and charged them with conspiracy to violate RICO laws.⁴² One of Pilotto's co-defendants was Anthony Accardo. It looked as if the United States government had finally found a way to reel in "Big Tuna."

The indictment charged the defendants with racketeering activities against local LIUNA health and welfare funds, activities that consisted of setting up insurance companies and inducing the LIUNA locals to funnel business to them.⁴³ The conspirators then looted the pool of assets generated by the high insurance premiums charged by the union.⁴⁴ The Justice Department asserted that fifteen cents of every dollar paid by LIUNA members "just disappeared."⁴⁵

The indictment alleged that the defendants unlawfully conspired to receive and make payments concerning LIUNA's employee welfare benefit plans.⁴⁶ It further maintained that Accardo's role in the conspiracy was to "agree to and support the operation of a kickback scheme,"⁴⁷ and that the insurance business of LIUNA "would be controlled by 'the family' with . . . Accardo controlling the midwestern United States."⁴⁸

Included in the indictment were allegations of forfeiture as authorized by RICO.⁴⁹ The allegations read:

39. *U.S. Jury Acquits Reputed Crime Figure in Union Embezzling Trial*, *supra* note 28.

40. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE EDGE: ORGANIZED CRIME, BUSINESS AND LABOR UNIONS* 153 (1986).

41. *Id.* at 151.

42. *United States v. Caporale*, 806 F.2d 1487, 1497 (11th Cir. 1986).

43. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *supra* note 40, at 161.

44. *Id.*

45. *Jury Acquitted Accardo Right from the Start*, *supra* note 9.

46. Indictment at 7, *United States v. Accardo*, No. 81-230-CR-ALH (S.D. Fla. filed June 3, 1981).

47. *Id.* at 8.

48. *Id.* at 16.

49. *Id.* at 18-19. The RICO statute provides that anyone who violates 18 U.S.C. § 1962, the substantive portion of RICO:

shall forfeit to the United States . . . (1) any interest the person has acquired or maintained in violation of section 1962[, and] (2) any (A) interest in; (B) security

The interests of the defendants subject to forfeiture to the United States include any and all proceeds of the pattern of racketeering alleged in Count One and any and all interests, securities, claims, and property and contractual rights acquired through the use of these proceeds, including \$2,064,066.32 paid and received as kick-backs as set forth in [the indictment].⁵⁰

Finally, the indictment contended that "[t]he defendants are jointly and severally liable to the United States for this forfeiture."⁵¹

Five of the defendants' cases were severed; eleven went to trial and eight defendants were convicted and sentenced.⁵² Three walked out of the courtroom acquitted—one of them was Anthony Accardo.⁵³

It cost him, though; Accardo's legal expenses topped \$224,500.⁵⁴ Subsequently, he claimed the expense as a deduction on his income tax returns for 1981 and 1982. He deducted legal fees of \$17,500 and \$207,000 respectively, which were incurred in defending against the RICO charge.⁵⁵ Accardo relied on I.R.C. § 212(2), which permits deductions of funds expended "for the management, conservation, or maintenance of property" in the course of business.⁵⁶ Accardo contended he had incurred the legal fees to protect his assets (i.e., several certificates of deposit totaling over \$1.5 million) from the joint and several forfeiture liability he faced.⁵⁷

of; (C) claim against; or property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1988).

50. Indictment at 18.

51. *Id.*

52. *United States v. Caporale*, 806 F.2d 1487, 1497. The convictions were affirmed on appeal. *Id.* at 1519. Two days before the trial began, however, Defendant Pilotto narrowly escaped death in a "mob hit" on a Chicago area golf course. *United States v. Guzzino*, 810 F.2d 687, 690 (7th Cir. 1987). The murder attempt was bungled so badly that the Seventh Circuit Court of Appeals, affirming the convictions of the would-be hit men, wrote: "Were this attempted murder case not so serious, a recitation of some of its facts might suggest a Marx Brothers skit instead of a relationship to organized crime." *Id.* at 689.

53. *Jury Acquitted Accardo Right from the Start*, *supra* note 9. One of the jurors at that trial later disclosed that the decision to acquit Accardo had been made on the first of the jury's ten days of deliberation. *Id.*

54. *Accardo v. Commissioner*, 942 F.2d 444, 446 (7th Cir. 1991).

55. *Accardo v. Commissioner*, 94 T.C. 96, 98 (1990).

56. I.R.C. § 212(2) (West 1992).

57. *Accardo*, 94 T.C. at 98-99.

IV. TAX DEDUCTIONS FOR EXPENSES ARISING FROM ILLEGAL ACTIVITY

The federal income tax system, in theory, pays no attention to whether income and deductions are generated through legal or illegal activities.⁵⁸ The tax is a "tax on net income, not a sanction against wrongdoing."⁵⁹ In fact, during the Senate debate in 1913 on the bill that ultimately became the income tax law, amendments that would have limited deductions to those incurred in a lawful trade or business were rejected.⁶⁰ So, in theory, a taxpayer must report illegal as well as legal income, and may deduct expenses incurred in obtaining illegal as well as legal income.

However, this general theory of indifference to illegality in the tax law has not always held true in practice. In fact, until 1966, a tax deduction for attorney's fees incurred in an *unsuccessful* defense against criminal charges was disallowed for reasons of public policy.⁶¹ Such deductions were thought to frustrate government attempts to stop illegal action by giving a form of subsidy to the offender.⁶²

This changed in a landmark case, *Commissioner v. Tellier*,⁶³ where the United States Supreme Court established that public policy no longer precluded a tax deduction for legal expenses incurred in an unsuccessful criminal defense. The taxpayer in *Tellier* claimed a tax deduction as a business expense for legal fees incurred in his unsuccessful defense against securities and mail fraud charges.⁶⁴ The Court found it was the taxpayer's constitutional right to employ a lawyer to help in his defense. "No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense."⁶⁵ Thus, *Tellier* established that if a tax deduction for legal expenses were to be disallowed, it would have to be for reasons other than public policy.

Subsequently, the Internal Revenue Code (I.R.C.) outlawed tax deductions for bribes to government officials or any illegal bribes or kickbacks,⁶⁶ fines and similar penalties,⁶⁷ and treble damages for vio-

58. MICHAEL D. ROSE & JOHN C. CHOMMIE, *FEDERAL INCOME TAXATION* 70 (3d ed. 1988).

59. *Commissioner v. Tellier*, 383 U.S. 687, 691 (1966).

60. *Id.* at 691.

61. Daniel I. Labowitz, Comment, *Deductibility of Legal Expenses*, 33 ALB. L. REV. 123, 127 (1968).

62. *Id.* at 127.

63. 383 U.S. 687 (1966).

64. *Id.* at 688-89.

65. *Id.* at 694.

66. I.R.C. § 162(c) (1988).

67. *Id.* § 162(f).

lation of antitrust laws.⁶⁸ Similarly, the I.R.C. today prohibits any deductions for expenses incurred in trafficking in illegal drugs.⁶⁹

Unlike the I.R.C.'s provision for deductibility of medical and dental expenses,⁷⁰ there is no specific provision regarding the deductibility of legal fees. There are only two ways in which a taxpayer may justify a deduction for legal expenses. First, under I.R.C. § 162, legal expenses may be deductible if they are "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."⁷¹ That is, the legal expenses are deductible if they arise from the trade or business from which the taxpayer earns her income.

Second, if the taxpayer's legal expenses are incurred in some income-producing way that is not her primary trade or business, for example in stock ownership or rental real estate, she may be able to deduct those expenses under § 212. That section allows deductions for "ordinary and necessary expenses paid or incurred during the taxable year (1) for the production or collection of income; (2) for the management, conservation, or maintenance of property held for the production of income; or (3) in connection with the determination, collection, or refund of any tax."⁷² Unlike medical expenses, which are deductible although purely personal, legal expenses incurred as a personal expense are not deductible;⁷³ they must arise from some profit-seeking activity.

When Anthony Accardo claimed a tax deduction for legal expenses incurred in his defense against the RICO claim, he did not attempt to use § 162, which would have required him to show that the expenses were incurred in carrying on a trade or business. "[I]ndeed," sniffed the Seventh Circuit, "we have no idea what his business is because [Accardo] refused to answer the [IRS'] interrogatory concerning his occupation, citing the Fifth Amendment privilege against self-incrimination."⁷⁴ For Accardo to claim that his legal expenses were incurred in carrying on a trade or business would be tantamount to an admission of guilt under the racketeering charge.

Instead, Accardo claimed a deduction under § 212, arguing that his legal fees were incurred to manage, conserve, or maintain income-producing property within the meaning of § 212(2). Accardo's argu-

68. *Id.* § 162(g).

69. *Id.* § 280E.

70. *Id.* § 213.

71. *Id.* § 162(a).

72. I.R.C. § 212 (West 1992).

73. See I.R.C. § 262 (1988).

74. *Accardo v. Commissioner*, 942 F.2d 444, 448 (7th Cir. 1991).

ment was this: if he had been convicted of the RICO charge, he would have faced joint and several liability for forfeiture of over \$2 million.⁷⁵ Accardo listed among his assets three certificates of deposit of \$500,000 each, the interest from which provided his income.⁷⁶ He argued that a RICO conviction would have meant forfeiture of the certificates of deposit, thus depriving him of income-producing property.⁷⁷ Therefore, he reasoned, the legal expenses had been incurred to protect that income-producing property, and should have been deductible under § 212(2).⁷⁸

V. THE TAX COURT'S "ORIGIN OF THE CLAIM" THEORY

The Tax Court rejected Accardo's argument, and instead agreed with the IRS that Accardo's legal fees were a non-deductible personal expense.⁷⁹ Distinguishing legal expenses deductible as business or profit-seeking expenses under § 162 or § 212 from non-deductible personal legal expenses has long been an unclear area of tax law. The Tax Court's decision in Accardo's case reflects that lack of clarity.

*Kornhauser v. United States*⁸⁰ was the first Supreme Court case dealing with the question whether legal expenses incurred in a lawsuit can be a deductible profit-seeking expense. The taxpayer successfully defended a claim by a former business partner that fees paid to the taxpayer were for services rendered during the existence of a partnership. The Court held that the expenses of defending that lawsuit were deductible, even though the taxpayer was no longer a partner in the business at the time of the suit.⁸¹ The Court ruled that "where a suit or action against a taxpayer is *directly connected* with, or . . . proximately resulted from, his business, the expense incurred is a business expense."⁸²

The "directly-connected" test of *Kornhauser* was modified in *Lykes v. United States*,⁸³ where a taxpayer had given gifts of stock to his wife and children and had paid what he thought was the appropriate amount of gift tax.⁸⁴ When the IRS notified him of a tax deficiency, the taxpayer, through his attorney, contested the ruling. The

75. *Id.* at 447.

76. *Accardo v. Commissioner*, 94 T.C. 96, 98 (1990).

77. *Accardo*, 942 F.2d at 446.

78. *Id.* at 448.

79. *Accardo*, 94 T.C. at 100.

80. 276 U.S. 145 (1928).

81. *Id.* at 151.

82. *Id.* at 153 (emphasis added).

83. 343 U.S. 118 (1952).

84. *Id.* at 119.

taxpayer later claimed a tax deduction for his attorney's fees, asserting that if he had to pay the increased gift tax, he would have to liquidate his stock holdings to do so. Therefore, he argued, the attorney's fees were incurred to maintain the income-producing stock.⁸⁵

The Court denied the deduction on the ground that, although the taxpayer might have suffered the *consequence* of a loss to his income-producing property, the legal expenses had their *origins* in a personal, and therefore non-deductible, transaction (i.e., the taxpayer's gifts).⁸⁶ Thus, the Court adopted the origins test for distinguishing business from personal expenses.⁸⁷ Under the origins test, if the origins of the expense are for business or profit-seeking activity, the expense is tax-deductible. However, if the origins are personal, like those of the taxpayer in *Lykes*, the deduction will be denied, despite the fact that the consequences of the claim might have a substantial effect on the taxpayer's business or other profit-seeking activity.⁸⁸

In the same year, however, the Court of Appeals for the Eighth Circuit reached a different result in *Baer v. Commissioner*,⁸⁹ where the court allowed a deduction for legal fees incurred in arranging a divorce property settlement, permitting the taxpayer to retain a controlling stock interest in a corporation. The court held that the immediate purpose of the legal fees was preservation of income-producing property: the taxpayer had to retain his stock interest to preserve his position as president of the corporation, as well as to continue receiving his dividend income. If he had to pay the lump-sum alimony his wife was seeking, he would have to sell the stock and thus lose his salary and dividends.⁹⁰

Had the court applied the origins test as in *Lykes*, it might have found the origins of this taxpayer's legal expenses to lie in the divorce property settlement—a personal expense. Instead, the *Baer* court ruled it was the *consequences* of the litigation that made the tax deduction allowable—precisely the conclusion rejected in *Lykes*.⁹¹

In *United States v. Gilmore*,⁹² the U.S. Supreme Court attempted to reconcile the conflicting approaches to distinguishing business from personal legal expenses. Gilmore's legal expenses had, like Baer's,

85. *Id.*

86. *Id.* at 124.

87. Douglas P. Krause, Note, *The Deductibility of Legal Expenses*, 82 COLUM. L. REV. 392, 394 (1982).

88. *Id.* at 394-95.

89. 196 F.2d 646 (8th Cir. 1952).

90. *Id.* at 649-50.

91. Krause, *supra* note 87, at 394.

92. 372 U.S. 39 (1963).

been incurred in divorce litigation contesting his wife's claims to his stock interest in three corporations. Because the taxpayer held a controlling interest in the corporations, he was able to maintain the position of president and principal managing officer of each company, earning substantial dividends and salaries.⁹³ If his wife's claim were successful, the consequences would be to place the husband's livelihood in jeopardy⁹⁴—a situation very much like that in *Baer*.

But in *Gilmore*, the Court rejected the analysis used by the Eighth Circuit in *Baer*. The Court denied *Gilmore*'s deduction of legal fees, reasoning that the wife's claims stemmed from the personal marital relationship and not from any profit-seeking activity.⁹⁵ Thus, the Court returned to the origins test of *Lykes*, concluding that "the origin and character of the claim with respect to which an expense was incurred . . . is the controlling basic test of whether the expense was 'business' or 'personal.'"⁹⁶

The *Gilmore* Court noted that the consequences test of *Baer* was inequitable, in that it would make deductibility dependent on the taxpayer's ability to pay the claim against him out of non-income-producing property.⁹⁷ If payment of the legal expenses required the taxpayer to liquidate income-producing property, the consequences test would render those legal expenses tax deductible. But if the claim could be paid from non-income-producing assets, the consequences test would yield the opposite result. The Court termed this "capricious," and concluded that the origins test would avoid such "unequal treatment."⁹⁸ The origins test has been broadly applied since *Gilmore* in distinguishing business from personal expenses.⁹⁹ However, perhaps because the *Gilmore* Court did not specify that the origins test should be the exclusive method for distinguishing business from personal expenses, several courts of appeals have decided cases using what appears to be the consequences test.

For example, in *Dolese v. United States*,¹⁰⁰ an unusual divorce petition named as party defendants three companies wholly owned by the husband. The petition accused the husband of threatening to deplete and dissipate the assets of the companies to deprive the wife of her rights. The companies sought to deduct their share of the legal

93. *Id.* at 40-41.

94. *Id.* at 42.

95. *Id.* at 44.

96. *Id.* at 49.

97. *Id.* at 48.

98. *Id.*

99. Krause, *supra* note 87, at 396.

100. 605 F.2d 1146 (10th Cir. 1979).

and other expenses paid in the course of the litigation.¹⁰¹

Dolese presented a "reverse *Gilmore*": whereas in *Gilmore* the suit was a divorce against the husband, with the potential effect of depleting the husband's corporate assets, in *Dolese* a portion of the suit was against the corporation to compel preservation of the corporate assets, with the potential effect of increasing the wife's property settlement under the divorce. The *Dolese* court ruled that "most of the expenditures here arose directly out of the divorce action,"¹⁰² a circumstance that made the expenditures non-deductible in *Gilmore*. Nevertheless, in *Dolese*, the Tenth Circuit found that the expenses were deductible to the extent they were incurred in connection with the profit-making activities of the corporate taxpayer.¹⁰³ Thus, even though the claim originated in a divorce action, the court found that the business consequences of the litigation justified the tax deduction.

The Fourth Circuit also used a consequences test in *Kopp's Co. v. United States*,¹⁰⁴ where a corporation attempted to deduct legal expenses arising out of an automobile accident that occurred when the principal shareholder's son was driving his father's company car for personal reasons.¹⁰⁵ The court reasoned that, because the company was directly exposed to the risk of a judgment which amounted to more than sixteen times the company's book value, and because the company's bank and major suppliers had frozen its credit lines in view of the possible judgment, the company's expenses incurred in defending itself constituted a business expense.¹⁰⁶ The court allowed the company's deduction of legal fees even though the claim arose from a non-business automobile accident and only the consequences, not the origin, of the claim were business-related.

Similarly, in *Naporano Iron & Metal Co. v. United States*,¹⁰⁷ a corporate employer paid a settlement to one employee who had been assaulted by another employee. That payment was held deductible as an expense of litigation.¹⁰⁸ Although the case had been settled out of court, the assaulted employee had intended to name the corporation as a party defendant in his litigation.¹⁰⁹ The U.S. Claims Court, specifically distinguishing *Gilmore*, pointed to "the direct exposure to the

101. *Id.* at 1149.

102. *Id.* at 1151.

103. *Id.* at 1151-52.

104. 636 F.2d 59 (4th Cir. 1980).

105. *Id.* at 60.

106. *Id.* at 60-61.

107. 6 Cl. Ct. 422 (1984).

108. *Id.* at 432.

109. *Id.* at 425-427.

risk of a monetary judgment.”¹¹⁰ Although the claim originated from a personal confrontation between two employees, the possible consequence of the company’s liability was sufficient to render its legal expenses deductible.¹¹¹

In Accardo’s case, the Tax Court relied on the origins test to find that his expenditure for legal fees was a non-deductible, purely personal expense. Accardo’s claim, the Tax Court held, “arose in connection with [his] alleged racketeering activities, rather than in connection with the certificates of deposit. . . . Forfeiture of the certificates of deposit . . . was merely a possible *consequence* of a failure to defeat the claim.”¹¹² The Tax Court determined that the origin of Accardo’s claim was the RICO charge. If Accardo had been found guilty of racketeering, he might indeed have had to forfeit the certificates of deposit. But, the court held, that possible forfeiture was not the origin of Accardo’s claim but merely a possible consequence of a conviction.¹¹³

The Tax Court’s conclusion could be challenged on two grounds. First, the origins test was not the only method the court might have used to determine whether Accardo’s legal expenses were deductible. Instead, the Tax Court might have followed the example of the Fourth and Tenth Circuits and the U.S. Claims Court¹¹⁴ and concluded that the consequences of the RICO charge against Accardo would be the loss of income-producing property. The certificates of deposit were directly connected to the RICO charge, as required by the broad holding of *Kornhauser*.

Alternatively, because the origins test provides no guidance for characterizing the origin of a claim that involves both personal and business elements, the Tax Court arguably was insufficiently specific in its conclusion that the origin of Accardo’s claim was his alleged racketeering activities. In a criminal action such as this, the true “origin” of the claim is logically the indictment.¹¹⁵ In this case, the final

110. *Id.* at 431.

111. *Id.*

112. *Accardo v. Commissioner*, 94 T.C. 96, 100 (emphasis added).

113. *Id.*

114. *See supra* notes 100-11 and accompanying text.

115. In another case, the Tax Court ruled that the origins test “does not contemplate a mechanical search for the first in the chain of events which led to the litigation.” *Boagni v. United States*, 59 T.C. 708, 713 (1973) (footnote omitted). That might cast doubt on the use of the indictment as the origin of Accardo’s claim. However, the Tax Court continued, “[c]onsideration must be given to the issues involved, the nature and objectives of the litigation, the defenses asserted, the purpose for which the claimed deductions were expended, the background of the litigation, and all facts pertaining to the controversy.” *Id.* That enlarged view is easily broad enough to encompass the indictment as part of the origin of Accardo’s claim.

five paragraphs of the indictment specifically seek a forfeiture judgment of over \$2 million, for which the defendants would be jointly and severally liable.¹¹⁶ In other words, the forfeiture threat was very much part of the origin of Accardo's tax claim. Had he been found guilty (as eight of his co-defendants were), he would have been required to satisfy a substantial portion of that judgment (as eight of his co-defendants did).

The fact that the indictment did not specifically identify Accardo's certificates of deposit as forfeitable property is not meaningful. Of course, if the indictment *had* specified the certificates as forfeitable property, Accardo's tax case would have been very different because the connection of the legal expenses to the certificates would then have been undeniable. But because these defendants were jointly and severally liable for the forfeiture, the effect on the certificates was the same as if the indictment *had* identified them as forfeitable property. The Government was claiming over \$2 million from these defendants, and did not specify where they would be expected to get it. For Accardo, a guilty verdict surely would have meant loss of his certificates of deposit.

The Seventh Circuit's opinion in this case inadvertently points out the illogical result of the origins test as applied to Accardo. According to the court, Accardo's less fortunate co-defendants who were convicted of the RICO charge were able to take a business deduction for their legal fees. That is, because of their convictions, those co-defendants were deemed to be in the "business" of racketeering. They would therefore be entitled to a tax deduction for legal fees incurred as part of that business.¹¹⁷ Accardo, however, was acquitted of the racketeering charge; therefore, he was found not to be in the "business" of racketeering and thus, could not claim a business deduction for his legal fees.¹¹⁸

But all of the co-defendants were indicted under the same indictment; therefore, all had the same "origin of claim." If the consequences of the claim are irrelevant, as the Tax Court maintained, and all that matters is the origin, it should be correspondingly irrelevant that three co-defendants were eventually found not guilty (and therefore entitled to no business deduction) while eight were convicted (and therefore entitled to the business deduction). By differentiating the tax treatment of those defendants who were convicted from the

116. Indictment at 18-19, *United States v. Accardo*, No. 81-230-CR-ALH (S.D. Fla. filed June 3, 1981).

117. *Accardo v. Commissioner*, 942 F.2d 444, 448 (7th Cir. 1991).

118. *Id.* at 448.

tax treatment of those who were acquitted, the court here is either ignoring the origins test and looking at the consequences while claiming to do the opposite, or is inadvertently revealing the gross inadequacy of the origins test as a distinguishing standard.

VI. THE APPEALS COURT'S FORFEITURE PROBLEM

The Seventh Circuit, unlike the Tax Court, found no need to address the difficulties inherent in the origins test. Whether the possible forfeiture of the certificates of deposit was an origin or a consequence of the legal expenses did not matter to the Seventh Circuit because "forfeiture of these certificates of deposit was not even a consequence of a successful RICO claim" against Accardo.¹¹⁹ The Seventh Circuit relied on the Tax Court's unsupported assertion that Accardo did not obtain the funds used to purchase his certificates of deposit from the alleged racketeering activities for which he was indicted.¹²⁰ Therefore, the certificates represented no interest acquired or maintained in violation of the RICO Act. Hence, the forfeiture provision of that Act did not encompass the certificates of deposit.¹²¹

The Tax Court had not reached that conclusion; indeed, the Tax Court specifically stated that forfeiture of the certificates of deposit was a possible consequence of a guilty verdict.¹²² Interestingly, the Seventh Circuit's opinion claims that "[t]he non-forfeitability of the certificates of deposit represents an argument that has been overlooked by both sides in this appeal."¹²³ The Seventh Circuit apparently believed the government's failure to mention the non-forfeitability of the certificates to be either an inadvertent or a carefully planned omission. In reality, however, both Accardo and the government likely believed that the certificates were forfeitable; as case law has shown, they probably were.

"[T]he RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."¹²⁴ "[T]he forfeiture provision was intended to serve all the aims of RICO . . . 'to punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.'"¹²⁵ RICO provides a remedy of immensely broad scope, and

119. *Id.* at 449.

120. *Accardo v. Commissioner*, 94 T.C. 96, 99 (1990).

121. *Accardo*, 942 F.2d at 448.

122. *Accardo*, 94 T.C. at 100.

123. *Accardo*, 942 F.2d at 447.

124. *Russello v. United States*, 464 U.S. 16, 26 (1983).

125. *Id.* at 27-28 (quoting 116 CONG. REC. 18,955 (1970)).

RICO forfeiture is broadly imposed.

Although under other federal statutes a forfeiture proceeding is *in rem* against the property, under RICO the forfeiture is *in personam* against the defendant and is part of the punishment for the crime.¹²⁶ "Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property, 'it follows the defendant. . . .'"¹²⁷

The original posture of the Seventh Circuit as to RICO forfeiture was that if a defendant had spent all of her forfeitable assets by the time the verdict was rendered, there was nothing left for the defendant to forfeit.¹²⁸ However, after an Eleventh Circuit decision holding that the government did not have to trace money received by defendants as kickbacks in connection with real estate transactions,¹²⁹ the Seventh Circuit overruled its earlier position, concluding that the government is not required to trace the path of the illegal proceeds to identifiable assets to satisfy the forfeiture.¹³⁰ "It . . . does not matter whether the government recovers the identical dollars that the defendant received in violation of section 1962, as long as the amount that the defendant acquired in violation of the statute is known."¹³¹

In Accardo's case, the indictment alleged that the interests of the defendants subject to forfeiture included any and all proceeds of the alleged racketeering activity and any and all interests, securities, claims, and property and contractual rights acquired through the use of these proceeds.¹³² According to the indictment, those proceeds included \$2,064,066.32 paid and received as kickbacks.¹³³ Because the amount the defendants acquired in violation of the RICO statute was known, it did not matter whether the government recovered the actual \$2,064,066.32 received as kickbacks. What mattered was that the defendants, if found guilty, had to forfeit \$2,064,066.32 to the gov-

126. *United States v. Ginsburg*, 773 F.2d 798, 800 (7th Cir. 1985).

127. *Id.* at 801.

128. *See United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984).

129. *United States v. Conner*, 752 F.2d 566 (11th Cir. 1985).

130. *Ginsburg*, 773 F.2d at 801; *see also* ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEPARTMENT OF JUSTICE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 99 (2d ed. 1988).

131. *Ginsburg*, 773 F.2d at 801. After *Ginsburg* was decided, the RICO statute was amended to provide that if any property acquired in violation of § 1962 cannot be located, or has been transferred, sold, placed beyond the jurisdiction of the court, substantially diminished in value, or commingled with other property, "the court shall order forfeiture of any other property of the defendant up to the value to the property" originally sought to be forfeited. 18 U.S.C. § 1963(m) (1988).

132. Indictment at 18, *United States v. Accardo*, No. 81-230-CR-ALH (S.D. Fla. filed June 3, 1981).

133. *Id.*

ernment. If Accardo had been among those found guilty, he would have to forfeit some or all of the specified amount—and if his contribution came from cashing in his certificates of deposit, so be it.

It is important to keep in mind that the indictment alleged that the defendants were jointly and severally liable to the United States for the forfeiture.¹³⁴ When Accardo's convicted co-defendants appealed their convictions, the Eleventh Circuit stated that the question whether a RICO forfeiture could be imposed jointly and severally was an issue of first impression.¹³⁵ The Eleventh Circuit noted that although joint and several liability had never been imposed before in a criminal case, the nature of a RICO conspiracy violation and the legislative history of the RICO forfeiture provision indicated that joint and several liability was not only consistent with the purpose of RICO forfeiture, but in some cases might be necessary to achieve the aims of the legislation.¹³⁶

According to the Eleventh Circuit, if the government could prove the amount of the proceeds (as it did here) and identify a finite group of people receiving the proceeds (as it also did here), it would defeat the purpose of RICO to hold that the proceeds could not be forfeited just because the government could not prove which specific defendant received how much of the money.¹³⁷ There was no question that the monies paid to the corporations in Accardo's case were forfeitable proceeds; the Eleventh Circuit held that in this context, joint and several liability was simply a collection device.¹³⁸

To the extent that tracing of forfeitable property among defendants is impossible, forfeiture of the total amount of money or property can be sought from each defendant.¹³⁹ A judgment against Accardo could have been satisfied from other properties owned by him, including the certificates of deposit.¹⁴⁰ Given the broad nature of RICO forfeitures and the joint and several liability found in this case, there is no question that, if Accardo had been found guilty, his certificates of deposit would have been in grave jeopardy.

134. *Id.*

135. *United States v. Caporale*, 806 F.2d 1487, 1506 (11th Cir. 1986).

136. *Id.* at 1507.

137. *Id.* at 1508. Other courts have followed the lead of the Eleventh Circuit in permitting joint and several liability in RICO forfeitures. *See, e.g.*, *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1301 (6th Cir. 1989); *United States v. Benevento*, 663 F. Supp. 1115 (S.D.N.Y. 1987).

138. *Caporale*, 806 F.2d at 1508.

139. Karla R. Spaulding, "Hit Them Where It Hurts": *RICO Criminal Forfeitures and White Collar Crime*, 80 J. CRIM. L. & CRIMINOLOGY 197, 258 (1989).

140. *See Benevento*, 663 F. Supp. at 1119.

VII. CONCLUSION

After a lifetime of staying one step ahead of the law, including several successful encounters with the Seventh Circuit, Anthony Accardo's luck ran out when he attempted his tax deduction for legal expenses. There is no question that in announcing its reliance on the origins test, the Tax Court conformed to mainstream, if not always workable, tax law. But it cannot be denied that the origin of Accardo's claim could differ from that found by the Tax Court, or that the Tax Court could have thrown caution to the winds and applied the consequences test.

The Seventh Circuit, for its part, appeared to be determined not to let Anthony Accardo get away with anything, and it ignored important and relevant case law on RICO forfeiture to arrive at its conclusion. Perhaps the Seventh Circuit was expressing its frustration over the apparent inability of *any* court to punish Accardo for a lifetime of crime. Perhaps the court was repulsed by Accardo's "chutzpah" in claiming a tax deduction after having escaped a conviction under the very statute enacted specifically to apprehend people like him. Whatever its motivation, the Seventh Circuit appears to have resolved that even though it could not find a way to impose criminal penalties on Accardo, he was under no circumstances to receive any favors from the court. "Big Tuna" would not swim away a winner this time.

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