

On March 29, 2013, the Federal District Court for the District of Hawaii acquitted James Pflueger, a retired automobile dealer, on all of the four counts of the indictment alleging tax fraud and conspiracy following a two and one half week trial. At the Government's request the Court previously dismissed the additional count against Mr. Pflueger alleging a willful failure to file a foreign bank account reporting form (FBAR).

The criminal indictment centered around IRS allegations that Mr. Pflueger engaged in conspiracies with his accountant and others to defraud the Government relating to his personal taxes as well as those of his son and his former auto dealership, including the use of a foreign bank account and a foreign trust. Others included in the indictment previously pled guilty; his former accountant testified at trial as a cooperating witness for the Government.

The District Court found that the Government failed to establish the evidence supporting the allegations and acquitted Mr. Pflueger of all charges.

Mr. Pflueger's defense trial team was led by Steven Toscher of Hochman, Salkin Rettig Toscher and Perez, PC in Beverly Hills, CA and included Edward M. Robbins, Jr., Lacey Strachan, Kurt Kawafuchi, Richard Speier, and Gary Howard, CPA. Mr. Robbins is the former Chief of the U.S. Attorney's Tax Division in Los Angeles, CA. Mr. Kawafuchi is the former Director of the State of Hawaii Department of Taxation. Mr. Speier, who served as the expert summary witness, is the former Deputy Chief of the Criminal Investigation Division of the Internal Revenue Service in Washington, DC. Mr. Howard was the testifying forensic accountant on behalf of Mr. Pflueger.

The defense team praised the Court for not being persuaded by unsupported allegations and innuendos presented by the Government during the trial. Steven Toscher, speaking on behalf of the defense team and James Pflueger stated "Mr. Pflueger is innocent of all the charges. The verdict acquitting Mr. Pflueger of all charges is a tribute to our system of justice demonstrating that notwithstanding the almost unbridled power and unlimited resources of the federal government to accuse, they sometimes wrongly accuse without sufficient evidence."

Mr. Toscher acknowledged that the Government rarely loses criminal tax prosecutions. This is believed to be the first unsuccessful prosecution relating to the use of foreign bank accounts in the Government's ongoing international enforcement efforts. The Government must objectively and carefully select the cases to prosecute - the mere presence of a foreign bank account and foreign trust does not mean there has been a tax crime - an assumption which seemed to blindly guide the prosecution of Mr. Pflueger, an innocent man.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	)	CR. NO. 10-00631 LEK
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JAMES HENRY PFLUEGER,	(02) )	
	)	
Defendant.	)	
_____	)	

**(1) ORDER ON DEFENDANT’S MOTIONS FOR  
JUDGMENT OF ACQUITTAL AND (2) VERDICT IN NON-JURY TRIAL**

The Court held a nine day non-jury trial in this matter from February 13, 2013 through February 26, 2013. Before the Court are Defendant James Henry Pflueger’s oral motions for judgment of acquittal, and the Court’s verdict, pursuant to Federal Rule of Criminal Procedure 23(c), on Counts 1, 2, 9, and 10 of the Indictment.

**I. MOTIONS FOR JUDGMENT OF ACQUITTAL**

The defense moved pursuant to Federal Rule of Criminal Procedure 29(a) for a judgment of acquittal first at the close of the Government’s evidence on February 21, 2013, and renewed the motion at the conclusion of all of the evidence on February 26, 2013. The Court reserved its decision on the motions pending the conclusion of the entire case.

Federal Rule of Criminal Procedure 29 provides that “the court on the defendant’s motion must enter a judgment of

acquittal of any offense for which the evidence is insufficient to sustain a conviction." A Rule 29 motion should be denied if, "[v]iewing the evidence in the light most favorable to the government," the court determines that "any rational jury could have found [the defendant] guilty of each element of the crime beyond a reasonable doubt." United States v. Nevils, 548 F.3d 802, 805 (9th Cir. 2008) (citations omitted) (brackets in original).

First, with respect to the original motion made at the close of the Government's case, viewing the evidence in the light most favorable to the Government, the Court concludes that a rational trier of fact could find each element of each crime beyond a reasonable doubt. Second, with respect to the renewed motion made at the close of the entire case, viewing the evidence in the light most favorable to the Government, the Court also concludes that a rational trier of fact could find each element of each crime beyond a reasonable doubt. The Court HEREBY DENIES both the original Rule 29(a) motion and the renewed motion.

## **II. VERDICT**

### **A. Count 1 & Count 2: 18 U.S.C. § 371 (Conspiracy)**

Counts 1 and 2 of the Indictment charge Defendant with conspiring to defraud the United States by impeding and impairing the lawful function of the Internal Revenue Service in violation of 18 U.S.C. § 371. Section 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall [be guilty of a crime against the United States].

18 U.S.C. § 371.

To prove the crime of conspiracy to defraud the United States, the Government must prove the following elements beyond a reasonable doubt:

- a. An agreement between two or more persons;
- b. To defraud the United States by obstructing the lawful functions of the IRS;
- c. By deceitful and dishonest means;
- d. One member of the conspiracy performed at least one overt act for the purposes of carrying out the conspiracy; and
- e. The defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993); Ninth Circuit Model Criminal Jury Instruction - 8.21 (2010 Edition).

With respect to Counts 1 and 2 relating to the reporting of income from the payment of personal expenses and the Hacienda sale, the Court finds that the Government has not met its burden of proving beyond a reasonable doubt that there was an agreement between Defendant and the alleged co-conspirators, Mr. Kurata, Charles Alan Pflueger, or Mr. Duban, to defraud the United States by obstructing the lawful functions of the IRS by deceitful or dishonest means as charged in the Indictment.

Nor did the Government establish beyond a reasonable doubt the intent element, that the Defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it. The crime of conspiracy includes an intent element which requires the Government to show that each member of the conspiracy had knowledge of the object of the conspiracy and joined the conspiracy intending to achieve that object. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Krasovich, 819 F.2d 253, 255 (9th Cir. 1987).

**B. Counts 9 & 10: 26 U.S.C. § 7206(1) (False Tax Returns)**

Counts 9 and 10 charge the Defendant with willfully subscribing to a false tax return in violation of 26 U.S.C. § 7206(1). Count 9 addresses Defendant's Form 1040 filed for the 2004 tax year and relates to the personal expenses. Count 10 addresses Defendant's Form 1040 filed for the 2007 tax year and relates to the Hacienda sale.

In order to establish a violation of § 7206(1), the Government must prove each of the following elements beyond a reasonable doubt:

- a. The defendant made and subscribed a return, statement, or other document that he or she knew was false as to a material matter;
- b. The return, statement, or other document contained a written declaration that it was made under the penalties of perjury; and
- c. In filing the false tax return, the defendant acted willfully.

United States v. Bishop, 412 U.S. 346, 350 (1973); United States

v. Pirro, 212 F.3d 86, 89 (2d Cir. 2000); United States v. Scholl, 166 F.3d 964, 979-80 (9th Cir. 1999); Ninth Circuit Model Criminal Jury Instruction - 9.39 (2010 Edition).

The Court finds that the Government has not established these elements beyond a reasonable doubt. In particular, the Government has not established the element of willfulness.

In order to prove that the defendant acted "willfully," the government must prove beyond a reasonable doubt that the defendant knew federal tax law imposed a duty on him, and the defendant intentionally and voluntarily violated that duty.

A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully even if his understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant did not have a good faith belief that he or she was complying with the law.

Ninth Circuit Model Criminal Jury Instruction - 9.42 (2010 Edition).

"Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Cheek v. United States, 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed.2d 617 (1991).

[C]arrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he

was not violating any of the provisions of the tax law. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist.

Id. at 202, 111 S. Ct. 604. The rationale behind the subjective standard in Cheek is to avoid criminalizing unwitting violations of the complicated and extensive tax laws.

United States v. Bishop, 291 F.3d 1100, 1106 (9th Cir. 2002).

The Court HEREBY finds Defendant not guilty on all of the Counts charged in the Indictment.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, March 20, 2013.



/S/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge

**UNITED STATES OF AMERICA V. JAMES HENRY PFLUEGER; CR. NO. 10-00631 LEK; (1) ORDER ON DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL AND (2) VERDICT IN NON-JURY TRIAL**