

U.S. v. Marc Berger

A Cautionary Tale for Return Preparers

By Sharon L. McCarthy

On December 14, 2018, former CPA Marc Berger was sentenced to eight months in prison after a federal jury convicted him on three counts of aiding and abetting tax evasion for a client. Berger's fall from grace serves as an important cautionary tale for all return preparers of the need to adhere to high standards of integrity in return preparation, even when faced with difficult clients with complicated business and financial matters.

Berger's Lapses in Judgment

Marc Berger had enjoyed an impeccable 45-year career as a CPA, most recently as chairman of the board at California accounting firm Burr Pilger Mayer (BPM). According to letters

of support submitted in connection with his sentencing, Berger supervised the preparation of all business and individual income tax returns for Burrill and the entities he controlled, including Burrill Life Sciences Capital Fund III, LP. At issue in the criminal case was Burrill's embezzlement of over \$18 million from the fund over a six-year period. The embezzled funds constituted income to Burrill, and his failure to report that income resulted in unpaid individual income taxes of \$4.75 million.

The government's theory of the case against Berger was that he was fully aware of the embezzlement and unreported income, yet prepared and signed false tax returns over a three-year period and took other steps to create support for those false returns.

The government's case against Berger was built upon the most basic of evidence: Berger's billing records, e-mails, and the testimony of his coworkers. Had Berger merely relied—in good faith—upon the representations of his client, it is unlikely that he would have faced criminal charges for Burrill's fraudulent tax reporting, however, Berger appears to have had intimate knowledge of Burrill's business dealings and his books and records. According to his own billing records, Berger had spent time reviewing the fund's operating documents, which stated that loans and prepaid management fees were prohibited. Despite knowing that such transactions were prohibited by the fund, Berger took affirmative steps to recharacterize the nature of the transfers so that they would appear to be loans, and he caused documents to be changed retroactively to support that recharacterization. The result was that the government was able to prove that Berger knowingly aided and abetted Burrill's tax evasion.

In 2007, Burrill started transferring money from the fund to his management companies, and Berger knew that Burrill's finance staff was recording the transfers as management fees and deferred revenue. The government introduced numerous e-mails between Berger and his colleagues at BPM in which they discussed how to treat these transfers and when Burrill would recognize the income. It appears that Berger and his team kicked the can down the road until April 2012, when they realized that Burrill likely had \$8 million in income that had not been reported. Rather than sit the client down and explain the situation, Berger found a way to keep the can rolling: he instructed his colleagues to recharacterize the deferred revenue as a loan and to retroactively change the

of support submitted in connection with his sentencing, Berger was regarded as a straight shooter who used a conservative approach to his work and did not cut corners [*U.S. v. Burrill*, 17 Cr. 491 (N.D. Cal.) (ECF Doc. #234)]. Berger's downfall lay in his representation of G. Steven Burrill, who underreported his income from a biotech investment firm by \$18.2 million over six years, resulting in an underpayment of tax of \$4.75 million. Berger's poor judgment in handling Burrill's tax matters resulted in his conviction.

According to the indictment and case-related filings, Burrill owned and controlled a number of entities that managed invest-



name on Burrill's capital account from "Deferred Revenue" to "Note Payable." Berger also urged Burrill to execute a promissory note to support this new loan theory, and he advised others at Burrill's company to change the language in certain internal documents to reflect that the transfers were loans. The effect of Berger's decision to change the character of the transfers was to deceive the IRS by concealing \$18 million in taxable transfers to accounts controlled by Burrill.

Burrill's Guilty Plea and Berger's Trial

Berger was indicted in September 2017. Prior to his indictment, Berger had voluntarily given testimony before the SEC and had testified as BPM's custodian of records before the grand jury investigating Burrill's tax matters. At the time of his testimony in May 2016, the prosecutors informed Berger that he was not a target of the grand jury's investigation. Berger thus was taken by surprise when, 17 months after he testified before the grand jury, he was arrested at his home by numerous federal and local law enforcement agents.

In December 2017, Burrill entered a guilty plea to one count of investment advisor fraud and one count of filing a false 2010 individual income tax return. Pursuant to Burrill's plea agreement, the agreed-upon tax loss was \$2,912,303, as compared to the \$4.7 million tax loss charged against Berger in his indictment and pursued by the government at his sentencing. Burrill faced a sentence of between 70 and 87 months in prison, and the government urged the court to sentence him to 63 months. On December 4, 2018, Burrill, who was 74 years old at the time, was sentenced to 30 months' imprisonment.

Berger chose to fight the charges against him and proceeded to trial in the Northern District of California. According to press reports, the government painted Berger as an experienced accountant who was aware that Burrill was stealing money and hoped he

would pay it back before investors noticed. Berger's defense attorneys characterized him as an experienced accountant who was tricked by a client who had a reputation for being difficult to work with, claimed that Berger was focused on managing many clients' matters, not just Burrill's, and asserted he had no financial motive to aid Burrill's fraud (Dorothy Atkins, "Jury Convicts Accountant of Aiding Biotech VC in \$18M Fraud," Law 360, July 18, 2018, <http://bit.ly/2FVmShx>).

On July 18, 2018, after a three-week jury trial, Berger was convicted of aiding and abetting the filing of Burrill's false 2010, 2011, and 2012 individual income tax returns, in violation of IRC section

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7206(2). IRC section 7206(2) provides that whoever "willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document" shall be guilty of a felony and be imprisoned for up to three years. As a result of his conviction on three counts of aiding and abetting Burrill's tax fraud,

Berger faced a potential sentence of 63 to 78 months in prison.

Berger's attorneys argued that he should not receive any jail time because the conduct at issue was aberrational from his otherwise upstanding, law-abiding life, and he had already suffered significant damage from the loss of his CPA license, reputation, and ability to earn a living. The government urged the court to sentence Berger to a significant term in custody in order to deter other CPAs from playing the "IRS audit lottery," hoping that fraudulent tax returns would never be reviewed. In its sentencing submission, the government surmised that "it is also likely that CPAs across the United States are committing similar crimes for their clients because they know the IRS has very limited resources, and that it is unlikely a revenue agent would have time to review complicated tax returns and spend months auditing one tax returns [*sic*]."

Five months after his conviction, Berger, who was 68 years old at the time, was sentenced to eight months in prison, one year of supervised release, and a \$20,000 fine. Although he is likely to appeal his conviction, Berger now stands a convicted felon. He has lost his CPA license and is unlikely ever to prepare another tax return.

Not Even Once

While many criminal cases against tax return preparers are for repeated conduct in preparing fraudulent tax returns for numerous clients over a period of years, the case against Marc Berger is a sobering reminder that significant judgment lapses related to a single client can derail a career. It is important to remember that one's reputation for integrity is fragile and impossible to repair once sullied by criminal charges. No client is worth that sort of risk. □

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