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To be Argued by:
ANDREW L. FREY

**United States Court of Appeals
for the
Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

– v. –

DOV SHELEF and WILLIAM RUBENSTEIN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR DEFENDANT-APPELLANT
DOV SHELEF**

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INTRODUCTION

The government devotes less than half of its brief to the legal issues presented by this appeal. Instead, it goes on at length about facts that are largely immaterial to the appeal, seeking to paint a negative picture of Shellef and Rubenstein in a transparent effort to persuade this Court to ignore the legal errors that tainted the trial. It is in this vein that the government discusses (GB 4-6, 11)¹ Shellef's immigration status, his purchase and sale of adhesives, and misleading claims of irregularities in his dealings with Rubenstein.

The government's desire to engage in legally irrelevant smears is highlighted by its repeated references to the fact that some of the CFC-113 sold to domestic suppliers ended up being used to produce methamphetamine. GB 14, 18, 25. In fact, the government conceded, and the court found, that there was no evidence Shellef had reason to believe the CFC-113 was being used for methamphetamine (A809), and this highly prejudicial fact was rightly excluded from evidence at trial and has no proper place in this appeal.² Much like the improper and highly prejudicial joinder in this case, discussed below, the government seeks generally to

¹ "GB" refers to the government's brief, "SB" to Shellef's opening brief.

² The government insists that it "refrained" from bringing this subject up before the jury (GB 14), but the record reveals that the government attempted (unsuccessfully) to inject the issue at trial (A801-802, A809).

blacken Shellef's name with reference to allegations unrelated to the charges of conviction or to the legal issues in the case.

I. FACTUAL MATTERS

We refer this Court back to our original statement of the case and the facts (SB 5-15) to counterbalance the government's skewed portrait. Indeed, the government's entire "Statement of Facts" is filled with inaccurate and misleading (but largely irrelevant) statements. To refute them all would consume the allotted space for this Reply. Some of the most striking are as follows:

- The government propounds a theory that Shellef had already intended to resell the Allied CFC-113 domestically as of the end of 1997 (GB 15-17). But that has no support and makes no sense: Shellef did not in fact do so then, and, indeed, did not make his first domestic sale of Allied CFC-113 until September 14, 1998 (A759). Tellingly, the government ignores the undisputed evidence that Shellef refused in April-May 1997 to make a domestic sale of CFC-113 that would have earned him \$350,000. Though Shellef had Allied material meeting the order requirements, he did not sell it because he believed that domestic sales were not permitted under the Allied contract then in effect. A382-385; A848.
- Similarly, the government's hypothesis that Shellef's purported rejection in early 1998 of "Allied's offer to let him out of the contract if the government of Israel did not buy the CFC-113" was "because he intended to sell the CFC-113 domestically and knew Allied would not sell to him for domestic resale" (GB 17) is belied by the facts. Shellef's testimony was that although he had some indication in late 1997 that he might no longer be able to sell

directly to the Israeli government, he hoped to work out a licensing agreement with a company that could export to Israel, which was why he did not want to end the contract with Allied. A849. Again, if Shellef had intended to sell domestically at that time, he would have done so, and not waited until well *after* the June 1998 expiration of the extended original agreement, and *after* he had informed Allied of the Israeli regulatory changes. A759, A1138. See SB 7-9. Furthermore, Shellef had made a prepayment under the contract, which had not been recouped; accepting Allied's purported offer would have caused Shellef substantial out-of-pocket loss. A932-933.

- The government's bald assertion (GB 24-25) that Allied first became aware of the registration requirement when the government notified it of its investigation of the methamphetamine labs is false. Among the documents excluded under the district court's erroneous pretrial ruling were ones showing Allied's awareness as early as 1993 of the regulations requiring that export sales be documented in order to qualify for tax-exempt status. See Shellef' April 7, 2004, Reply Memorandum of Law at 3 n.4 & Exhibit 11; A12.
- The government's statement (GB 25) that the district court "allowed the defense to bring out the fact that Allied (and Elf) owed the tax and to examine the government's witnesses for any bias that might derive from that tax liability" is seriously misleading. The jury was allowed to believe that the unpaid tax liability arose from misrepresentations by the defendants. It did not know that Elf and Allied were liable for the excise tax because they failed to comply with the law. Shellef was repeatedly prevented from cross-examining as to bias on this issue. A407-408, A457, A485, A612.

II. MISJOINDER OF COUNTS³

The indictment (A26-58) reveals, and the government does not deny, that the 1996 tax offenses underlying Counts 2 and 3 predate, entirely, the alleged conspiracy, money laundering, and wire fraud. See GB 51. This renders joinder of Counts 2 and 3 with the excise tax and wire fraud counts entirely improper. The government's response regarding misjoinder (GB 49-54) is striking for its failure to engage the issues. Perhaps most telling is the complete failure to mention, let alone distinguish, the most closely related precedent of this Court, *United States v. Halper*.

A. Counts 2 And 3 Did Not Arise Out Of “The Same Act Or Transaction” As The Remaining Counts

The government devotes (GB 51) one halfhearted and conclusory paragraph to the question of misjoinder of Counts 2 and 3, asserting that the joinder was proper “because the charges were ‘based on the same act or transaction.’”⁴

³ Shellef joins in co-defendant Rubenstein's arguments insofar as they pertain to Shellef's contentions.

⁴ The government argues (GB 51) that joinder is governed by Rule 8(a). Our opening brief (SB 21-22) cited this Court's cases ruling that joinder of offenses in a multi-defendant trial is reviewed under Rule 8(b). See also 1A Wright, Federal Practice and Procedure, Criminal 3d § 144 (“the propriety of joinder in cases where there are multiple defendants must be tested by Rule 8(b) alone and * * * Rule 8(a) has no application”). Regardless, the point is immaterial here because the government defends the joinder based only on “the same act or transaction” language common to both Rules.

Although our entire joinder argument concerned the propriety of joining the 1996 tax counts, not the 1999 count, with the rest of the indictment (SB 21), the government skirts the issue by lumping the 1996 and 1999 tax counts together as “tax charges” (GB 51). The only “link” the government can point to between the “tax charges” and the other charges is that the income at issue all derived from Shellef’s business (GB 51).

In fact, it is *undisputed* that the money earned on domestic sales—which alone formed the basis of the conspiracy, wire fraud, and money laundering charges—had nothing to do with the 1996 counts.⁵ The government’s assertion that the 1996 CFC sales “were part of the circumstances leading up to the conspiracy” (GB 51) does nothing to bridge this gap; the government’s phrasing amounts to little more than saying that 1996 was a year “leading up to” 1999. So it bears repeating that no part of the conspiracy or wire fraud occurred during the time-period relevant to the 1996 tax counts: the first overt act charged in the conspiracy indictment occurred on July 14, 1997, and the wire fraud was alleged in the indictment to have begun in September 1998, while the latest date alleged as

⁵ There was, of course, an overlap between the domestic sales and the *1999* tax count, which perhaps explains why the government’s discussion of the issue lumps the tax counts together rather than facing the relevant, but more difficult, task of explaining how the 1996 tax counts could properly be joined with the conspiracy and wire fraud counts. Again, we do not argue that joinder of the 1999 tax counts with the non-tax counts was improper.

part of Counts 2 or 3 is May 19, 1997. A37, A42, A45. Accordingly, this case bears no relation to the paradigmatic Rule 8(b) joinder case, in which the joinder requirements are satisfied because “the Government alleges the existence of an overall conspiracy linking the various substantive crimes charged in an indictment.” *United States v. Lech*, 161 F.R.D. 255, 256 (S.D.N.Y. 1995) (Sotomayor, J.); *id.* (“It is well settled * * * that two separate transactions do not constitute a ‘series’ within the meaning of Rule 8(b) ‘merely because they are of a similar character or involve one or more common participants’”) (quoting *United States v. Bradford*, 487 F.Supp. 1093, 1094 (D. Conn. 1980) (Cabranes, J.)).

The fact that the “tax charges” and the other charges bear some relation to the same business is not enough. *Halper*, which remains controlling precedent in this Court, flatly rejected an argument that income tax counts can be joined with other counts as part of the “same act or transaction” because the unreported income derived from the same business; that it did not derive from the illegal activity underlying the non-tax counts was fatal to the joinder. See 590 F.2d at 429; SB 24-26. The government offers no basis for distinguishing *Halper*.

B. The Improper Joinder Was Not Harmless

In arguing that Shellef “does not demonstrate substantial prejudice as a result of the joinder of the tax charges” (GB 52), the government focuses exclusively on the purported admissibility of evidence tending to prove the

misjoined counts in a trial limited to the other counts (GB 52-53). Its argument is wholly unpersuasive.⁶ In a trial on the 1996 income tax counts, evidence of the conspiracy, wire fraud, or money laundering (all activity alleged to have *begun* after the relevant time period for the income tax counts), would not have been admissible 404(b) evidence, and the same is true *vice versa*. Even if, somehow, such evidence could have been admitted, a limiting instruction would have been necessary to prevent improper use of such evidence as propensity evidence (see SB 31-33).

Though the government does not contest its burden of establishing harmlessness, it attempts to dispatch Shellef’s prejudice argument with a single paragraph containing only conclusory assertions. It begins with the irrelevant point that “[e]vidence of the 1996 tax offenses would have been admissible in a separate trial on the 1999 offenses, and vice versa” (GB 52). But Shellef’s argument is not about joinder of the 1996 and 1999 income tax counts; it is about joinder of the 1996 income tax counts with the non-tax counts. The government continues:

In a separate trial on the tax counts, evidence of the CFC-113 sales—which would have proved the conspiracy, wire fraud, and money laundering charges—clearly would have been admissible. And in a separate trial on the conspiracy, wire fraud and money laundering charges, evidence proving the tax counts would have

⁶ Significantly, the government has abandoned the justification it offered in the district court—that the evidence was admissible to show *modus operandi*. See SB 27-31.

been admissible. For example, evidence that Shellef failed to report on tax returns the funds deposited into the undisclosed bank accounts would have rebutted Shellef's contention that funds were set aside to pay the invoices Shellef expected Allied to issue with respect to the domestic sales. (GB 52-53.)

The government is again trying to blur its response to the claimed misjoinder of the 1996 tax counts by referring only to "tax counts" and making claims that apply primarily, if not exclusively, to the 1999 count. In a trial on the 1996 tax counts, evidence of CFC-113 sales occurring after the relevant time-frame of those counts would not have met even the threshold relevance requirement, let alone the more exacting test of FRE 404(b). And in a trial on the non-tax counts, the government provides no rationale other than the possibility of rebuttal evidence. By supplying a hypothetical that merely suggests that the evidence *could* be admissible as *rebuttal* evidence, the government effectively concedes that evidence of the tax counts would be inadmissible in the case-in-chief in a separate trial on the conspiracy, wire fraud, and money laundering counts. A harmless standard based on the possibility of evidence of misjoined counts being admissible as rebuttal evidence in a trial on other counts would hinge the permissibility of joinder on the creativity of the government in coming up with a rebuttal evidence hypothetical. And even under the proposed hypothetical here, there seems little basis for admission of evidence of the 1996, as opposed to 1999, tax counts.

In any event, the government does not actually claim that evidence of the conspiracy, wire fraud, and money laundering would have been admissible in a trial on the “tax counts,” but rather that “evidence of *the CFC-113 sales*—which would have proved the conspiracy, wire fraud, and money laundering charges—clearly would have been admissible.” GB 52 (emphasis added). But even if evidence of CFC-113 sales during 1999 period could somehow have been admitted at a separate trial of the 1996 counts, it does not follow that such evidence “would have proved the conspiracy, money laundering, and wire fraud” charges. Evidence directly going to the conspiracy, wire fraud, and money laundering—for example, Anne Madden’s testimony that Shellef falsely indicated that he could continue to make sales to Israel—was, while highly prejudicial, totally irrelevant to the 1996 tax counts and certainly could not have qualified for admission under FRE 404(b).

Even if one were to accept in its entirety the government’s chain of admissibility connections, it would still not avoid reversible error. The government entirely fails to address the argument (SB 31-33) that the absence of a limiting instruction requires reversal. In *United States v. Turbide*, 558 F.2d at 1062 & nn. 8 & 9, the finding that misjoinder of defendants was harmless relied heavily on such a limiting instruction.⁷

⁷ Even if the 1999 tax count could be joined with the non-tax counts, and if evidence of the 1996 tax counts could be introduced vis-à-vis the 1999 tax count—concessions Shellef of course does not make—that still would not render the

Ultimately, the government’s farfetched admissibility argument cannot obscure how severely the improper joinder prejudiced Shellef by undercutting his credibility. This is a case that turned on credibility. Shellef maintained that Allied understood throughout the latter part of 1998 that he could no longer sell to Israel, and only a single piece of uncorroborated testimony by Madden contradicted this (A468-469). The joinder allowed the government to group unrelated charges together to paint a picture of criminal propensity, with prejudice from the misjoinder flowing in all directions—precisely what the joinder rules were designed to prevent.

III. THE CONSPIRACY CONVICTION

A. The Indictment Failed To Allege Conduct Constituting A Conspiracy To Defraud The IRS

The government mischaracterizes our argument regarding the legal sufficiency of the indictment by asserting that “Shellef takes the position that he could, with impunity, deceive Allied as to one of the requirements for making an export tax-exempt (i.e., that the CFC-113 be exported), as along [*sic*] as other requirements (e.g., IRS registration) were not satisfied.” GB 38. This erroneously suggests that we contend that Allied’s mere failure to comply with the excise tax

joinder harmless. Evidence of the 1996 tax counts in such a situation would still have no relationship to the non-tax counts, and its admission would require two limiting instructions: (1) that it could be considered only vis-à-vis the 1999 count, but not the other counts; and (2) that it could not be used as propensity evidence. See FRE 105; *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988).

regulations immunizes Shellef. Our argument is different and narrower: the indictment failed to allege any conduct that should have had the slightest effect on payment of the tax, let alone “inevitably hinder[ing]” (see SB 44) the functions of the IRS.

As noted in our opening brief, Allied always had the tax liability and owed the government taxes on *all* sales to defendants, even those that were ultimately exported by defendants, because Allied never qualified any of its sales to defendants for export. Qualification required both registration and the obtaining of a certificate of export, neither of which Allied timely sought, and neither of which Shellef ever falsified or misrepresented to Allied (see SB 5-6).

A conviction for conspiracy on facts like these is unprecedented. Had defendants committed some deception that would have provided Allied or Elf with a good-faith basis for nonpayment of the tax, that of course would be a different story. As discussed in Shellef’s opening brief (SB 41-43), there are such cases. But there is no case that looks remotely like this one. The government never alleged that Shellef or Rubenstein did anything that could have led Allied to believe that its sales to defendants were qualified for export and therefore not subject to the excise tax.

The government never directly engages this argument. Its only response is to point to cases that suggest that the ends of the conspiracy need not be attainable.

GB 39. But the sole Second Circuit case it invokes stands only for the proposition that a conspiracy can be valid even if facts unknown to the defendants render its objectives unattainable. In *United States v. Giordano*, 693 F.2d 245 (2d Cir. 1982), the defendants were convicted of conspiring with government agents to blow up a fictitious building. The question in the case was whether there was the requisite connection to interstate commerce to establish federal subject-matter jurisdiction. This Court explained (*id.* at 250):

The district judge thought that it would be impossible to establish the necessary link to interstate commerce for a business property that exists only in the “minds of government agents.” But a “misapprehension” by the conspirators as to facts that make it impossible for them to commit the crime that is the object of the conspiracy does not make the conspiracy less culpable.

Thus the defendants in *Giordano* undertook acts that would have brought about the destruction of a building but for the sting. Here, by contrast, misrepresenting the character of the sales had no natural tendency to produce non-payment of the tax, let alone to “inevitably hinder” (SB 44) that occurrence.

This case is not different in principle from one in which the defendants “conspire” to stick pins in a voodoo doll of Allied’s tax director in hopes that such action would produce nonpayment of the tax. Put another way, the unattainable nature of this conspiracy did not turn on facts unknown or misapprehended by Shellef and Rubenstein. The indictment simply alleged that “[i]n reliance upon

Dov Shellef's representations in the Allied Signal Contract, as well as other representations that Shellef made, Allied Signal did not collect any excise tax from Shellef and did not pay any excise tax to the Internal Revenue Service on these sales to Shellef" (A30). But, of course, even if all that were true, reliance upon Shellef's representations still did not excuse Allied's tax obligations, Shellef having done nothing to cause Allied properly to conclude that the sales were qualified for export under the regulations and therefore tax-exempt.

By pointing to inapposite cases like *Giordano*, the government avoids acknowledging its inability to locate a *single* case of this Court upholding a conspiracy-to-defraud conviction under circumstances remotely similar to these.⁸ "When a person of ordinary intelligence has not received fair notice that his contemplated conduct is forbidden, prosecution for such conduct deprives him of due process." *United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986).⁹

⁸ The government also ignores the point that not only did Shellef have no duty to pay the excise tax, but he was under no duty to disclose that he was selling domestically. The government is, in effect, using the conspiracy statute to render criminal something Congress has implicitly allowed. See SB 42.

⁹ Furthermore, so long as there is doubt whether the conspiracy statute is capacious enough to capture Shellef's conduct, the rule of lenity would apply. See SB 45-46.

B. The Evidence Was Legally Insufficient To Sustain The Conspiracy Conviction

The government failed to prove that the defendants had the specific intent to hinder enforcement of the excise tax. The government contends that “there can be no reasonable doubt that the excise tax was very much on defendants’ minds when they agreed to the course of conduct proven in this case.” GB 46. But awareness of the tax does not equal intent to hinder its payment. In fact, all of the behavior the government points to as establishing intent is perfectly consistent with having an intent to obtain and sell the CFC-113 with a full expectation that the tax would be paid by Allied and reimbursed by Shellef.¹⁰ Shellef was required to reimburse Allied for excise taxes under the contract (A433), and he testified that he was aware of this obligation (A831).

The government argues that Shellef induced the sale “at a tax-free price,” sold at a “tax-paid price,” caused the paperwork “to falsely indicate that the CFC-113 was exported and/or reclaimed,” and “lied to * * * customers and told them the tax had been paid” (GB 46). The fact that Shellef induced the sale “at a tax-free price” indicates nothing, because if, as the government alleges, Shellef

¹⁰ The government asserts (GB 45 n.3) that this argument is inconsistent with the contention we make, in challenging the wire fraud convictions, that the evidence failed to show that Allied would have refused to sell CFC-113 to Shellef in the Fall of 1998 for domestic resale. But the focus in one instance is on Shellef’s motivations, and in the other on Allied’s state of mind; the arguments are therefore not inconsistent at all.

misrepresented that he was purchasing for export because he believed Allied might not sell to him for domestic re-sale, the sale price would have been tax-free as a side-effect. Also, Allied might have sold at a tax-free price and later sought reimbursement once it paid the tax it was obligated to pay. As for the paperwork, which originated with Rubenstein's employees, it applied only to Elf sales and was no evidence of an intent to hinder enforcement of the excise tax because it was exchanged only between Rubenstein's company and Shellef (A494; GX 406) and *was never shown to Elf or the IRS.*¹¹ And selling at a "tax-paid price" is fully consistent with an expectation that Allied would seek reimbursement for payment of taxes. Similarly, Shellef's assurances to domestic buyers that the taxes "had been taken care of" (A562) or that his seller was paying the tax (A377) would be consistent with an expectation that Allied would pay the tax and seek reimbursement. In short, there is no way that this evidence supported a finding beyond a reasonable doubt that Shellef and Rubenstein schemed to cause nonpayment of the excise tax. See *D'Amato*, 39 F.3d at 1256 ("the government must do more than introduce evidence at least as consistent with innocence as with guilt" (internal quotation marks omitted)).

¹¹ This is another fact that the government paints in a misleading light, referring to references to "for export only" and "reclaimed" on "accompanying paperwork" (GB 15) as though they had some bearing upon Allied's payment of the tax.

IV. THE WIRE FRAUD CONVICTIONS

If *either* of the government’s two theories of wire fraud—its “No-Sale Theory” or its “Tax Liability Theory”—is legally insufficient, Shellef’s conviction must be vacated. See SB 53. The government does not argue otherwise.

A. The No-Sale Theory Of Wire Fraud

The government contends, in the words of the indictment, that Allied “would not have sold [to Shellef] had it known that Shellef in fact intended to sell the product domestically” (A46). But this Court has made clear that simple fraud to induce a sale, without more, is not enough to support a wire fraud charge. The government’s theory would criminalize garden-variety commercial disputes, for which the traditional remedy is state private law.

Our opening brief discussed (SB 59-60) *Starr* and *Regent Office Supply*, two cases that the government ignores; there, this Court rejected conspiracy theories based upon fraudulent inducement of sales, concluding that the misrepresentations made did not contemplate actual harm. *United States v. Schwartz*, despite the government’s contentions, is not to the contrary. Though *Schwartz* does indicate that full monetary compensation for goods does not automatically immunize a transaction from a wire fraud charge, the government blithely skates over a key element of *Schwartz*, which is that the sale at issue was of a *type* that the seller would *never* willingly enter into—a sale to a customer who would export illegally.

See 924 F.2d at 420–21. The seller in *Schwartz* would sell its product only if a buyer could “guarantee” certain conditions that ensured that the purchased devices would not be used to violate the arms export laws and regulations. *Id.* In fact, the *Schwartz* Court was explicit that the misrepresentations “were not simply fraudulent inducements to gain access to * * * equipment.” *Id.* at 421. Here, it is undisputed that Allied regularly engaged in sales of CFC-113 for domestic resale. Selling to Shellef for domestic resale was not a *type* of transaction that Allied would not willingly undertake.

What these three cases make clear is that fraudulent inducement must be accompanied by some contemplated harm to the victim to constitute wire fraud. The No-Sale Theory here posits nothing more than that Shellef “never intended to honor his promise to export * * * and that he induced Allied to ‘sell additional amounts of virgin CFC-113 to Poly Systems that it would not have sold had it know that Shellef intended to sell the product domestically.’” GB 40 (quoting Indictment at A46). In *Novak*, 443 F.3d at 159, this Court was explicit: “An intent to harm a party to a transaction cannot be found where the evidence merely indicates that the services contracted for were dishonestly completed.” It is clear from these cases that Shellef’s alleged misrepresentation and fraudulent inducement of Allied’s sale of the CFC-113 to him was not enough to support a theory of wire fraud.

The government distinguishes *Novak* as a case about factual, not legal sufficiency (GB 42). This is, in the present context, a distinction without a difference. The difference would be significant where the facts alleged in the indictment constitute a crime but the evidence fails to prove those facts. But the kinds of facts that *Novak* held insufficient to prove the crime are the kind alleged in the indictment here; if they show no crime, as *Novak* and other cases teach, then an indictment charging a crime based on such facts is legally insufficient.

B. The Evidence Was Insufficient To Support The No-Sale Theory

The prosecution presented absolutely no evidence that Allied would have refused to sell to Shellef had it known that he might resell domestically. The government's attempt to refute this point (GB 46-48) only makes it abundantly clear.

Here is what the government points to as showing that Allied would have refused to sell to Shellef for domestic resale: (1) general testimony that Allied restricted sales geographically; (2) evidence that Shellef and Allied agreed that Allied would not sell CFC-113 in Shellef's designated foreign territory; (3) evidence that one of Shellef's domestic buyers attempted to buy directly from Allied but was directed to go through a distributor; and (4) evidence that Allied was poised to sue Shellef if he did not pay for the contracted CFC-113 (GB 47-48). But these facts did not allow a rational jury to conclude that Allied would have

refused to make Shellef a domestic distributor so that he could fulfill his contractual obligations. The government's elaboration of the last fact only highlights the level of supposition required to leap the inferential gulf here. "If Allied had been amenable to making Shellef a domestic distributor in 1998, Allied, eager to get the material sold, would have raised the possibility itself. Indeed, if there had been a viable possibility that Allied would make Shellef an authorized domestic distributor in 1998, Shellef himself would have pressed the issue." GB 48. Noticeably absent from this series of conjectures is a *single* citation to any trial evidence. There was no testimony or other evidence that Allied's purported threat to sue Shellef if he did not pay for the contracted CFC-113 suggested an unwillingness to make him a domestic resale partner. No one testified that Allied would not have sold to Shellef for domestic resale in 1998, and there was simply no adequate basis for finding that Allied would not have done so.

C. The Tax Liability Theory Of Wire Fraud

Under the indictment, the alleged objective of Shellef's scheme was to "induce[] Allied Signal to continue to sell the product to [Shellef] without paying the excise tax * * * or including the tax in the price it charged * * * even though Allied Signal remained liable to the Internal Revenue Service for payment of the tax." A46. Thus, Shellef's scheme was alleged only to induce Allied *not* to collect or pay the tax it owed the government, and therefore the scheme could not, as a

matter of law, have deprived Allied of any money or property. Even if the scheme had proved unsuccessful and Allied ultimately paid the tax it owed, it is uncontested that it would have had a contractual right to reimbursement by Shellef. That scenario too results in no loss of property by Allied. Furthermore, Allied was responsible to pay the excise tax no matter where Shellef sold the material, unless Allied qualified its sales for export, so Shellef's alleged misrepresentation did not impose tax liability on Allied that it otherwise would not have had.

Under the government's tax liability theory, therefore, either Shellef's scheme would have achieved its objective of preventing Allied from collecting or paying a tax, or it would have failed, in which case Allied would have paid the tax and been reimbursed by Shellef. Noting the contractual right to reimbursement, the government argues that "in wire fraud cases, it is the scheme itself, rather than its success, that is the required element for conviction." GB 44 (quoting *United States v. Gotti*, 459 F.3d 296, 331 (2d Cir. 2006)). Precisely. The government makes no attempt to square this proposition with the reality that, under the allegations in the indictment, a successful scheme cost Allied nothing.¹²

¹² Even if the deficiencies of the government's tax liability theory could somehow be overlooked, there was insufficient evidence to support such a theory. There was no evidence that Shellef would not have reimbursed Allied, as required under contract, if it had paid the tax it owed and billed Shellef, and therefore there was no evidence "that some actual harm or injury was contemplated by the schemer." *D'Amato*, 39 F.3d at 1257 (quoting *Regent Office Supply Co.*, 421 F.2d at 1180).

Our opening brief raised another flaw in the Tax Liability Theory, to wit, that a prosecutable fraud requires that the defendant have sought to *obtain* money or property from the victim (SB 68 n.15), but in this case the money would either have been paid to the government or retained by Allied. The government has no answer to this problem with its theory.

V. ERRONEOUS EVIDENTIARY RULINGS

Plainly, an understanding of the excise tax regulations is essential to evaluating the knowledge, intentions, and credibility of all persons involved in this case. Nevertheless, the district court excluded all evidence concerning the excise tax regulations (A241-42). The government tries to shift the focus away from the dramatic prejudicial impact of this ruling by suggesting that all that was excluded was “evidence regarding the failure of Elf and Allied to obtain IRS registration numbers required to make *export* sales exempt from the excise tax.” GB 30. This characterization severely understates the scope of the excluded evidence and its potential impact.

The exclusion did not pertain just to evidence of the companies’ knowledge and actions, but also to general evidence of the IRS registration requirements and of the defendants’ own knowledge of those requirements (A241-42). Because the defendants were not allowed to explore the source of Elf’s and Allied’s tax liability, the jury had no notion of the functioning of the excise tax regulations.

The government claims that this does not matter because the registration requirements pertained to “*export sales*” (GB 30) while the charged conspiracy “related solely to the tax owed by the manufacturers because of defendants’ *domestic sales*” (GB 31). But Allied was obligated to pay excise taxes on *all* sales *unless* they were qualified for export. Understanding when and by what process a party can relieve itself of a duty to pay an excise tax is absolutely essential to understanding how and where the duty to pay excise tax is imposed. It thus becomes highly significant that Shellef did nothing to indicate to Allied that its sales to him were qualified for tax exemption: that is, even assuming he misled Allied as to where he intended to sell, he did not mislead it as to whether he had registered as an exporter, did not supply an export certificate, and did not even claim that domestic sales had actually been made internationally. In other words, Shellef did nothing upon which Allied could “rel[y] * * * in good faith” to justify nonpayment of the tax. See 26 C.F.R. 52.4682-5(d)(1)(i)(C)(2). This entire case, even on the government’s own theories, is incoherent without this backdrop.

A. The Excluded Evidence Was Clearly Probative Of Shellef’s Intent

The government claims that the excluded evidence was not probative of Shellef’s intent, arguing that our evidentiary challenge “distill[s] down to a contention that evidence of the IRS registration requirements was relevant to the following defense theory: that a person intending to defraud the IRS as to the

excise taxes would have provided Allied and Elf with falsified IRS registration numbers and other false export documents in order to give the manufacturer a seemingly valid basis to believe it could qualify its sales for tax-free treatment” (GB 35). The government further suggests (GB 35) that the excluded evidence was irrelevant because the case was about domestic sales, which could not be qualified for exemption. These contentions wholly misconceive our argument, which was not that a different scheme could have been more successful or that the evidence supported some immunity regarding domestic sales because of Allied’s noncompliance with the exemption requirements, but that the excluded evidence called into question whether there was a culpable intent to cause nonpayment of the tax, an essential element of the government’s case.

Knowledge of the excise tax regulations was relevant to the alleged conspirators’ intent because if either Shellef or Rubenstein knew the requirements established by those regulations, they would have known that merely misrepresenting an intent to export would not have “inevitably hinder[ed]” payment of the tax, making it far less plausible that they conspired to achieve that result. And as Rubenstein’s opening brief makes clear (RB 34-46), the excluded evidence included Rubenstein’s efforts to comply with the excise tax regulations in connection with Elf sales, which showed Rubenstein’s contemporaneous knowledge of those regulations. Of course, if Rubenstein lacked the intent to

conspire, there could be no conspiracy, and both defendants' conspiracy convictions would be unsustainable.

The nature of the excise tax regulations also bore on intent to commit conspiracy and wire fraud because the process by which a manufacturer qualified sales for export supported the likelihood that Allied would pay the tax and bill Shellef for reimbursement, as Shellef testified he expected Allied to do. A831. The exclusion deprived the jury of essential evidence to evaluate this explanation for his activity. Exclusion of Allied's October 1999 letter to Shellef (discussed below) asking for proof of export also significantly undermined a key defense—Shellef's assertion that he lacked the fraudulent intent to misrepresent that sales would be for export. The fact that Shellef continued to sell domestically after receipt of this letter, and did not falsify documents in response to it or falsely claim that the sales had been international, supports Shellef's contention that he did not believe he was obligated to export the Allied CFC-113 after June 30, 1998.

B. Excluded Evidence Was Essential To Shellef's Right Of Confrontation

In trying to depict the defendants as having been sufficiently able to explore bias, the government mischaracterizes and selectively quotes the record. What the jury did not know, and what defense counsel were not allowed to explore *throughout* the jury trial, was the *reason* why Elf's and Allied's tax liabilities went unpaid—their own failure to comply with the law, which was unaffected by

Shellef's alleged misrepresentations. See A485 ("I found on more than one occasion whether Allied Signal knew about the export tax – the excise tax, rather, and the registration requirements is not probative of what Mr. Shellef – whether Mr. Shellef made domestic sales. And I will keep it consistent. I will not let you explore that area with this witness."); see also A395-398, A407-408, A452-457, A611-612.

The district court's repeated insistence that Allied's noncompliance with the regulations was irrelevant because this case was about domestic sales ignored the substantial tax liability and penalties Allied faced for its noncompliance with the procedures in qualifying export sales, and ignored the fact that Shellef's alleged "misrepresentation" could have had no impact on Allied's excise tax obligations. Allied's failure to comply with the regulatory requirements created a risk that Allied itself (or its employees) could be held responsible. In these circumstances, Allied and its responsible employees, Dorsey and Madden, had every incentive to blame their own wholesale failure to comply with the tax regulations on Shellef.

Contrary to the government's contentions (GB 31-34), Shellef had no opportunity to explore these substantial bias issues at trial. In the sidebar and Dooley testimony quoted by the government (GB 32), the district court allowed defense counsel to ask an Elf employee what he knew about Elf's tax liability. See A399. This limited allowance was set against the backdrop of the district court's

exclusion of key evidence. A395-399. The district court adhered to its ruling that evidence of the *reason* for Elf's nonpayment of the excise tax, its failure to comply with the excise tax qualification procedures, was off limits.

The credibility of Allied's employees, particularly Madden (see SB 78-79), was critical to the government's case, providing the *only* uncorroborated evidence that Shellef had informed Allied in the fall of 1998 that he was able to export to Israel (A468-69). The district court excluded the October 1999 letter sent by Allied's Lou Dorsey *after* Allied became aware of the government's investigation (A607), informing Shellef that Allied had neither qualified any Shellef sales for export nor paid the excise tax due, and asking Shellef to provide it with proof of export for his sales (A1144-1145). The district court also excluded an internal Allied memorandum from the same time period which noted the "significant liabilities for excise taxes, associated penalties and interest" for failure to comply with the tax procedures. A1215.

What the government inexplicably characterizes as a "second invitation to explore bias and credibility" (GB 33) during the testimony of Dorsey was nothing of the sort. In response to defense counsel's argument that the letter from Dorsey to Shellef was relevant to challenging Dorsey's credibility because it indicated the danger to Allied of opening a "Pandora's box" of unpaid prior taxes and penalties based on unqualified export sales (A454), the court reaffirmed its decision to

exclude the letter. In the passage quoted in the government’s brief, the district court explained that it did not see how the letter “applied to domestic sales,” and found the letter to be “consistent with the government’s position, and * * * really not relevant on the issue of credibility.” A457. The district court determined that any inferences as to Dorsey’s credibility “can be dealt with, I think, fairly, in terms of asking the witness questions, *but not pertaining to the letter and the registration requirements* and some of the domestic sales inferences that you are asking this jury to make.” *Id.* (emphasis added). The district court’s “invitation to explore bias and credibility,” therefore, unequivocally excluded any line of credibility attack that would look at Allied’s failure (or the failure of its employees) to attempt timely compliance with the qualification requirements for tax-exempt sales.

By excluding evidence demonstrating the source of Elf’s and Allied’s tax liability, the district court prevented the defendants from exploring the incentives of Elf and Allied employees to blame defendants for their own failures. The decision to focus the blame for such failures on defendants may have contributed materially to the fact, also withheld from the jury, that the government never collected from Allied any of the taxes it owed. Compounding the district court’s error in excluding this evidence was the fact that Shellef had no other viable line of attack on the credibility of Allied’s witnesses.

VI. THE COUNT 3 SENTENCE

The government erroneously asserts (GB 56) that the objection to the 60-month sentence on Count 3 was not raised below and is to be reviewed only for plain error. In fact, Shellef moved the district court to reconsider that sentence on exactly the ground raised on appeal. See Shellef Resentencing Letter, filed March 31, 2006; A24.

On the merits, the government misapprehends our point. Our challenge to the sentence is germane only if the non-tax counts are reversed but the income tax convictions are affirmed, in which event the sentence on Count 3 would control the length of Shellef's imprisonment. The government offers no basis for upholding the Count 3 sentence in such circumstances.

Dated: October 17, 2006

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

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Names of attorneys served, together within the names of the clients represented and the attorney's designated addresses.

S. Robert Lyons, Esq.
U.S. Department of Justice
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Sworn to before me this
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Names of attorneys served, together within the names of the clients represented and the attorney's designated email addresses.

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Sworn to before me this
17th day of October, 2006

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