

Practitioners See Potholes on Rettig's Road to Sentencing Court

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By Nathan J. Richman

IRS Commissioner Charles Rettig's interest in addressing a court during sentencing on a tax crime raises questions of authority, unintended consequences, and efficiency.

Rettig [recently said](#) that he wants to go to a sentencing in a traditional tax crime case "to let the court and the country know the importance of criminal prosecutions."

Practitioners who spoke with *Tax Notes* agreed with Rettig's goal but raised concerns about the process and dangers of his stated method.

Joseph A. DiRuzzo III of DiRuzzo & Co. said that Rettig, as part of the Treasury Department, wouldn't likely have his own freestanding authority to participate in a criminal trial. Those cases take place in district courts where the Justice Department controls representation of the government.

John M. Colvin of Colvin + Hallett said that even with the selection of an appropriate case for the commissioner's message, such a high-profile appearance could backfire if the sentencing judge takes it as a sign of government overreaction to the particular defendant.

Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP noted that an appearance by the commissioner might affect only the individual case at issue — in other words, emphasizing the government's interest in one defendant to one judge.

Getting in the Door

DiRuzzo said that when he heard Rettig's idea, his first response was, "What case, what court, and how do you do that?"

In addition to actual independent litigation authority, DiRuzzo also questioned whether the commissioner would have freestanding legal authority under the crime victims' rights statute (18 U.S.C. section 3771) to represent the United States government as the victim. He noted that the government is already represented by the prosecuting attorneys in the case.

Both DiRuzzo and Ungerman noted that Rettig could avoid the issue of his authority to appear of his own volition by persuading the Justice Department prosecutor on a case to call him as a witness.

However, all three practitioners said there would be a question regarding the relevance of

Rettig's testimony about the general issue of tax evasion.

Sentencing is a highly individualized process, especially after the Supreme Court held that the sentencing guidelines are advisory rather than mandatory in *Booker v. United States*, 514 U.S. 220 (2005).

That means Rettig's testimony might not pass muster under the Federal Rules of Evidence provisions weighing relevance against prejudice.

DiRuzzo said that if he was the defense attorney in a case Rettig wanted to appear in, he would make the relevance objection to that testimony, but added that judges have a lot of discretion in that area.

Colvin said he would argue that the importance of general deterrence regarding tax crimes is already well known, so Rettig's comments on that wouldn't add much to the proceeding.

Case Selection

Ungerman said that the importance of Rettig's specific knowledge of the case may make a tax shelter promoter or a tax return preparer case a better fit than a simple evasion case, perhaps one in which a doctor hides money in an undeclared offshore bank account.

Both Colvin and DiRuzzo also pointed to tax return preparer prosecutions as appropriate venues.

Colvin said that Rettig should keep two concerns in mind when choosing a sentencing at which to appear. He said the case should be a meaningful one presenting systemic issues, and the commissioner should be wary of his appearance backfiring such that the sentencing sees the government as trying to put a thumb on the scale.

Regarding the latter point, Colvin pointed to President Trump's comments on Bowe Bergdahl, who was spared prison time after pleading guilty to desertion.

A tax protester case might be a bad choice for a commissioner's appearance because of both the potential political overlap and the possibility of raising their credibility, Colvin added.

Case selection could be fraught not merely because any judge might find an appearance by the commissioner to be heavy handed, but also if the particular judge is suspicious of the IRS, Ungerman said. Other judges might be receptive to the commissioner's message, and as a former tax litigator, Rettig would present well in front of a judge, he added.

Why Me?!

DiRuzzo also suggested Rettig find a large, multi-defendant case similar to racketeering cases involving organized crime. The commissioner might make more of an impact on the American public with a press conference announcing that sort of elaborate tax prosecution than with a simple appearance at one sentencing, he said.

Ungerma highlighted the piecemeal effect of Rettig testifying at a criminal sentencing. Such an appearance would “send a strong message to the sentencing judge that the IRS is very interested and passionate about the ultimate sentence handed down in that particular case,” he said.

While he was unsure that a press conference might make much of a difference, the IRS Criminal Investigation division has gotten better at attracting publicity using press releases, Ungerma said.

Colvin’s preference for Rettig to appear in a tax return preparer case also extended to getting a lot out of the commissioner’s time commitment. Any one preparer can be a much bigger threat to the tax system than an isolated individual tax evader, he noted.