



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*United States District Courthouse
300 Quarropas Street
White Plains, New York 10601*

September 22, 2014

Jeremy H. Temkin, Esq.
Morvillo Abramowitz Grand Iason & Anello P.C.
565 Fifth Avenue
New York, New York 10017

Re: *United States v. Ernest D. Davis*, 14 Cr. _____

Dear Mr. Temkin:

This prosecution and the protection against prosecution, with respect to tax offenses, set forth below are subject to the approval of the Tax Division, Department of Justice.

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York (“this Office”) will accept a guilty plea from Ernest D. Davis (“the defendant”) to Counts One and Two of the above-referenced two-count information. Count One charges the defendant with willful failure to file a U.S. Corporate Income Tax Return, Form 1120, for the 2003 tax year, in violation of Title 26, United States Code, Section 7203. Count Two charges the defendant with willful failure to file a U.S. Individual Income Tax Return, Form 1040, for the 2011 tax year, in violation of Title 26, United States Code, Section 7203. Each charge carries a maximum term of imprisonment of one year; a maximum term of supervised release of one year; a maximum fine of \$100,000; a \$50 mandatory special assessment; and the costs of prosecution. In addition, as noted below, the Court may impose an order of restitution.

The total maximum term of imprisonment on Counts One and Two is two years.

It is understood that, at least two weeks prior to the date of sentencing, the defendant shall file an initial U.S. Corporate Income Tax Return for the calendar year 2003 for 14-16 Sandford East, Inc. and will pay any past taxes due and owing to the Internal Revenue Service (“IRS”) relating to that return, including any applicable penalties on such terms and conditions as will be agreed upon between the defendant and the IRS. In addition, the defendant agrees to file accurate amended U.S. Individual Income Tax Returns, Forms 1040, and/or initial U.S. Corporate Income tax Returns, Forms 1120, for the calendar years 2006 through 2012. The defendant further agrees to pay past taxes due and owing to the Internal Revenue Service (“IRS”) for calendar years 2003 and 2006 through 2012, including any applicable penalties on such terms and conditions as will be agreed upon between the defendant and the IRS.

Pursuant to 18 U.S.C. §§ 3663(a)(3) and 3663A(a)(3), the defendant further agrees to pay restitution to the IRS for the amount of additional tax due as a result of the filing of the U.S.

Corporate Income Tax Return for the calendar year 2003 for 14-16 Sandford East, Inc., as described in the immediately succeeding paragraph and as determined by the IRS. The restitution amount shall be paid according to a plan established by the Court. If the Court orders the defendant to pay restitution to the IRS for failure to pay tax, either directly as part of the sentence or as a condition of supervised release or probation, the IRS can use the restitution order as the basis for a civil assessment. *See* 26 U.S.C. § 6201(a)(4)(C). Neither the existence of a restitution payment schedule nor the defendant's timely payment of restitution according to that schedule will preclude the IRS from administrative collection of the restitution-based assessment, including levy and distraint under 26 U.S.C. § 6331.

In consideration of his plea to the above offenses, the defendant, E. Daniel Davis Corporation and 14-16 Sandford East Inc. will not be further prosecuted criminally by this Office and, with respect to tax offenses, the Tax Division, Department of Justice, for any crimes relating to 1) his willful failure to file a U.S. Corporate Income Tax Return, Form 1120, for the 2003 tax year, in violation of Title 26, United States Code, Section 7203, as charged in Count One of the Information; 2) his willful failure to file a U.S. Individual Income Tax Return, Form 1040, for the 2011 tax year, in violation of Title 26, United States Code, Section 7203, as charged in Count Two of the Information; 3) his failure to file corporate returns and his filing of false personal returns for tax years 2002 through 2012 based on his failure to report rental and other income and expenses; and 4) his failure to report the proceeds of the sale of 14-16 Sandford on his 2003 U.S. Individual Income Tax Return, Form 1040, which he filed on or about February 1, 2005, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Count(s) against the defendant. This Agreement does not provide any protection against prosecution except as set forth above. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant agrees to waive any and all defenses based on statute of limitations in connection with Count One of the Information to the extent any such defense exists.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The November 1, 2013 Guidelines Manual applies to this case.
2. U.S.S.G. Section 2T1.1 applies to the offenses charged in Counts One and Two of the Information. Pursuant to U.S.S.G. §§ 2T1.1(a)(1) and 2T4.1(C), because the total tax loss, including relevant conduct, is greater than \$5,000 but not more than \$12,500, the base offense level is 10.

3. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a).

In accordance with the above, the applicable Guidelines offense level is 8.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history and is therefore in Criminal History Category I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated Guidelines range is 0 to 6 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 8, the applicable fine range is \$1,000 to \$10,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court *sua sponte* consider any such departure or adjustment.

The parties agree not to seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, or suggest that the Court *sua sponte* consider a sentence outside of the Stipulated Guidelines Range.

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced; (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the

Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 0 to 6 months' imprisonment, and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any restitution amount that is less than or equal to \$12,500, and the Government agrees not to appeal any restitution amount that is greater than or equal to \$5,000.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

It is further agreed that should the conviction(s) following the defendant's plea(s) of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office and, to the extent set forth above, the Tax Division, Department of Justice.

Apart from any written Proffer Agreement(s) that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By: _____
Kathryn Martin/ James McMahon
Assistant United States Attorneys
(914) 993-1963/1936

APPROVED:

Perry Carbone
Deputy Chief, White Plains Division

AGREED AND CONSENTED TO:

Ernest D. Davis

DATE

APPROVED:

Jeremy H. Temkin, Esq.
Attorney for Ernest D. Davis

DATE

ADDENDUM

The following alternative language may be appropriate under the circumstances of a case:

[Agreement without precedential value.] The parties understand that this Agreement reflects the special facts of this case and is not intended as precedent for other cases.

[Where narcotics safety valve might apply but the defendant has not yet asked for safety-valve relief.] Notwithstanding any of the foregoing, the parties agree that, in the event the defendant seeks to qualify for relief from the mandatory sentencing provisions of Title 21 pursuant to Title 18, United States Code, Section 3553(f), and/or for a reduction in sentence pursuant to U.S.S.G. §§ 2D1.1(b)(16) and 5C1.2, and information furnished by the defendant at meetings with the Government and/or evidence obtained directly or indirectly therefrom supports a higher Guidelines range than that to which the parties have stipulated above, the Government: (i) will not be bound by the above-referenced stipulations regarding the appropriate sentencing range; and (ii) may offer into evidence, in connection with sentencing and for purposes of calculating the appropriate Guidelines range, statements made by the defendant at meetings with the Government.

[Bail revocation agreement for crimes of violence, offense where maximum sentence is life or death, or narcotics offense where the maximum term of imprisonment is ten years or more.] The defendant hereby agrees that any bail conditions set by the Court in this matter shall be revoked, and the defendant remanded to the custody of the United States Marshal, upon the acceptance of his/her guilty plea by a United States District Judge or upon the recommendation by a United States Magistrate Judge that the guilty plea be accepted by the District Court, whichever occurs first.

[DNA waiver: Limited to exceptional circumstances and requires supervisory approval.] By entering this plea of guilty, the defendant also waives any and all right the defendant may have, pursuant to 18 U.S.C. § 3600, to require DNA testing of any physical evidence in the possession of the Government. The defendant fully understands that, as a result of this waiver, any physical evidence in this case will not be preserved by the Government and will therefore not be available for DNA testing in the future.