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NY Right To Investigate Trump Consulting Fees For Tax Fraud

By **Daren Firestone** (November 25, 2020, 5:04 PM EST)

The New York Times recently reported that Manhattan District Attorney Cyrus Vance Jr. and New York Attorney General Letitia James are both investigating tax write-offs on millions of dollars in consulting fees by the Trump Organization.[1] These fees include \$747,622 paid to TTT Consulting LLC, a company reportedly co-owned by presidential adviser Ivanka Trump, who disclosed receiving that exact amount from TTT Consulting in 2017.[2]



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Ivanka, perhaps shaken by the thought that she and her family might face charges her father can't pardon away, has angrily tweeted that the investigations are "harassment pure and simple," continuing, "They know very well that there's nothing here and that there was no tax benefit whatsoever."

But no serious tax investigator would take her word for it. And subpoenas reportedly issued by New York authorities are an appropriate first investigative step.

Investigators are likely seeking bank and corporate records to determine who, in addition to Ivanka, received the \$26 million in consulting fees that Donald Trump has written off since 2010.[3] Then, they will likely scrutinize tax returns to determine what, if any, taxes the recipients paid on the fees.

If there really was, as Ivanka has suggested, no aggregate tax loss to the state, that might be the end of the inquiry, since a politically sensitive tax case with no tax loss will prove unattractive to any enforcement agency, civil or criminal. That said, it's hard to think of a reason other than a tax advantage for the Trump Organization to pay Ivanka as a consultant, when she was an officer of the company and should have, in the normal course, received the income as salary or a bonus.

A more likely explanation: Ivanka was able to offset the income, for example, using prior business losses, as her father reportedly did to erase the tax obligation on hundreds of millions of dollars.[4]

If there is a significant tax loss, criminal investigators with the Manhattan District Attorney's Office will then focus in on whether Ivanka or any other so-called consultants acted willfully, that is, in intentional violation of a known legal duty.[5]

New York law delineates a number of tax fraud acts, including filing false returns and evading taxes, all of which must be carried out willfully to warrant conviction.[6] Even civil investigators for the New York attorney general will need to show a state of mind similar to willfulness — an intent to evade tax — if they want to pursue payment, penalties and interest on taxes outside the typical three-year civil statute of limitations.[7]

Recognizing the importance of proving willfulness — or its civil near-equivalent — Alan Garten, the Trump Organization's general counsel, released a statement in response to the Times article: "Everything was done in strict compliance with applicable law and under the advice of counsel and tax experts."

Advice of counsel is a perennial defense to allegations of tax fraud. If a tax professional told the Trump Organization that it was proper to pay Ivanka, or anyone else, as a consultant, then it will be

difficult to prove the company and its officers acted willfully.

Even so, investigators must scrutinize the advice given. In October 2016, the Times reported that the way Trump carried forward his business losses to offset taxable income was "so legally dubious his own lawyers advised him that the Internal Revenue Service would most likely declare it improper if he were audited."^[8]

To find out if Ivanka or the Trump Organization received similar advice on consulting fee arrangements, investigators will want to subpoena communications — particularly tax advisory opinion letters, but also emails and texts — from the Trump Organization as well as Trump's accountants at Mazars USA or any other accounting or legal firm that may have provided relevant tax advice (excluding privileged advice provided in anticipation of litigation).

Investigators will also want to interview the tax professionals the Trumps consulted as well as Trump insiders like Trump Organization Chief Financial Officer Alan Weisselberg, who previously testified in the Stormy Daniels case under a grant of immunity, and Trump attorney and fixer Michael Cohen, who told Congress last year that Donald Trump had refused to release his tax returns to prevent tax experts from "ripping [them] to pieces," thereby cueing an audit, "taxable consequences, penalties and so on."

Investigators should ask these witnesses if, for example, the Trumps ignored unfavorable advice, sought out experts who could be relied on to tell them what they wanted to hear, or leaned on experts to deliver conveniently erroneous opinions.

New York authorities appear interested in getting to the bottom of the matter. And they should.

As Trump leaves office, partisans will clamor for and against any number of possible criminal charges — e.g., campaign finance crimes related to the Stormy Daniels and Karen McDougal payments, or obstruction of justice in the Mueller investigation. But Vance and James should put politics aside and treat this matter like any other tax fraud case.

With the specter of a preemptive presidential pardon hanging over any potential federal tax investigation and the IRS likely hamstrung by fear of Republican backlash if it initiates a parallel tax fraud investigation, New York authorities may be in the best position to uphold the rule of (tax) law.

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[1] <https://www.nytimes.com/2020/11/19/nyregion/trump-fraud-investigations-taxes.html>

[2] https://www.citizensforethics.org/wp-content/uploads/legacy/2018/12/TRUMP-IVANKA_2018-Annual-Report_Pending-Certification20180611.pdf

[3] <https://www.nytimes.com/2020/09/27/us/trump-taxes-takeaways.html>

[4] https://www.nytimes.com/2016/11/01/us/politics/donald-trump-tax.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region@ion=top-news&WT.nav=top-news&_r=0

[5] *Cheek v. United States*, 498 U.S. 192 (1991).

[6] N.Y. Tax Law § 1801, et seq. (McKinney 2009).

[7] N.Y. Tax Law § 683(c)(B) (McKinney 2018).

[8] https://www.nytimes.com/2016/11/01/us/politics/donald-trump-tax.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&ion=top-news&WT.nav=top-news&_r=0

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