Roger Ver Case — Motion to Dismiss notes

- states Ver and DOJ were in discussions for years over his taxes and that while they were in discussions, the DOJ secretly indicted Ver. —> would like more info on this (pg. 11)

- the introduction says that the indictment against Ver should be dismissed for two reasons (pgs. 11-12)

1. The charges are unconstitutional —> the "exit tax" violates the Apportionment Clause and the Due Process Clause of the Constitution
2. The USG violation of Ver's attorney-client privilege and the government's prosecution based on misleading/incomplete facts
   - Claims that the indictment relies on selective quotations and selective omissions (pg. 13)

- the key issue for Ver and his advisors was how to value his and his affiliates entities' BTC holdings (pg. 15, L4)

- Law Firm 1 instructed Ver to assign the BTC in the wallets that he and his companies controlled into (1) BTC Ver believed to be owned by his companies and (2) BTC Ver believed to be owned by himself personally —excluding BTC in those wallets that were owned by others. (Quote, pg. 16, L12)
- Ver followed this advice
- But all of the BTC were maintained in a group of wallets without a coin-by-coin designation of ownership, basis, or other data that might be kept for a capital asset (as opposed to a currency). (Quote, pg. 16, L16)
- Ver repeatedly informed his advisors that he could not unscramble the egg to figure out which BTC "belonged" to which entity, as opposed to the amount of money used to acquire BTC for or through a given company. (Quote, pg. 16)

- In an act of good faith, Ver chose to allocate all the BTC to himself personally (which was the more expensive approach) this would require payment on both transfer taxes and exit taxes (pg. 16, L23)
- “However, Ver’s idea was rejected in favor of allocating BTC among companies and conducting corporate appraisals—a task now painted as criminal notwithstanding the complete lack of regulatory clarity for crypto accounting and reporting, and notwithstanding his professionals’ advice.” (quote, pg. 16-17)
- “The BTC owned by Ver’s companies—MemoryDealers U.S. and Agilestar— were included as assets of those companies and incorporated into the appraisal of those companies conducted by Appraiser 2. Ver’s accountants provided Appraiser 2 with “the companies’ financial records,” which listed BTC purchases in the ordinary course, and Appraiser 2 used those financial records, tax returns, other documents, and his expertise to prepare valuations that included BTC valued at approximately $1.4 million, making the combined value of the two businesses approximately $6.6 million.” (Pg. 17, L3-10)

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Statement (Form 8854) for tax year 2014 “underreported the fair market values of MemoryDealers and Agilestar,” Ind. ¶ 27.g, none of the lawyers who reviewed the appraiser’s report objected or warned Ver that the valuation was too low. As discussed in more detail below, this approach to accounting and reporting BTC was perfectly reasonable given the lack of statutory clarity around the tax treatment of digital assets that persists to this day.” (Quote, pg. 17, L3-18)

- Lawyer 1 advised Ver to obtain an appraisal of BTC that accounted for the effect of selling those BTC all at once, and based on that advice, Ver approached Appraiser 2 to appraise BTC that were not assigned to his US companies (referenced in indictment pg. 14, para 27e xviii and in exhibit 8) (semi-quote, pg. 17 L19-21)
    - He emphasized that they would have to appraise the value of BTC in an illiquid market because that is what existed in 2014
    - Appraiser 2 then began preparing the valuation for the BTC in question but this was shortcircuited

“That valuation process was short-circuited when Ver’s lawyers learned that the BTC not accounted for in the valuation of Ver’s U.S. companies were, in fact, owned for tax purposes by MemoryDealers Japan, an affiliate of MemoryDealers U.S. owned by Ver’s romantic partner, a Japanese citizen and resident. Ver’s lawyers contemplated the potential entity ownership of Ver’s BTC before consulting with Ver regarding that potential approach.” (Pg. 18, L3)

- after the Jan 2016 email exchanges from exhibit 11 Ver then “filed a tax return memorializing what his counsel told him had occurred under the rules of the tax code: his provision of the wallet’s passcode and use of MemoryDealers Japan’s account to trade constituted a gift of the resulting BTC to the owner of MemoryDealers Japan.” (Pg 18 L20-24)

** “Because Ver’s lawyers advised him that he did not need to pay taxes on MemoryDealers Japan’s property and advised him that the BTC Ver considered personal were in fact MemoryDealers Japan’s property, those BTC were not listed on the May 4, 2016 U.S. Nonresident Alien Tax Return (Form 1040NR) for tax year 2014. Ind. ¶ 27.f”

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Year 2017 (begins on pg. 19)

- it states the indictment’s 2017 allegations are contrary to the real-time advice Ver received from his legal counsel and accounting professionals
- The govt accuses Ver of intentionally failing to report capital gains that was acquired when memory dealers US and agile star shut down in 2017 and their assets were transferred to ver (semi-quote) pg. 19

- Regarding Ver’s 2017 taxes and tax prep, the doc states, “In light of the fact that Employee 1 had not issued Ver a 1099-DIV for 2017, and Ver’s belief that he did not need to pay taxes upon the sale of his pre-existing BTC assets post-expatriation, he confirmed that no distributions had been made in 2017.” (Pg. 20 L6)

- exhibit 14 emails are given additional content on pg. 20 L4-19

<u>Ver attorney-client privilege discussed</u>
(pg. 21) The Government Violates Attorney-Client Privilege and Its Own Policies

“Department policy requires significant scrutiny by Department supervisors and safeguards against abuse prior to the questioning of a subject’s attorney or the service of compelled process on an attorney.

Justice Manual § 9- 13.410. An unannounced interrogation by on-duty, armed, federal agents immediately prior to the service of compelled process strongly suggests that this investigative step fell outside of Department policy or supervisory approval. Unsurprisingly, this "technique" has resulted in the collection of privileged material that remains subject to litigation.8"

footnote: "Should Ver be required to appear, he intends to move to dismiss based on the use and derivative use of information coerced through the agents' unlawful interview of Ver's lawyer. Because such a motion will likely require an evidentiary hearing at which Ver would have a right to be present, such a motion must be delayed until after the Spanish courts rule on the government's extradition request. By citing to the documents that the government has already used to seek its indictment, Ver does not waive or forgo any such motion or the underlying privilege related to the legal advice Ver received in connection with the process of expatriating and filing his 2014 tax returns."

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The Indictment and Ver's Arrest in Spain (discussed pg. 22)

- the USG has never articulated the tax owed by Ver despite Ver engaging the govt in discussions seeking to resolve the matter
- instead of counting those discussions in good faith and while Ver's prior counsel was under the impression that discussions were ongoing, an indictment was returned by a grand jury on feb. 15, 2024

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The Arguments (pg. 23)

- claim the charges are unconstitutional as they rely on a tax that is a violation both the 16th amendment and the due process clause of the 5th amendment
- Claim that the charges rely on “impermissibly vague laws (that at all relevant times) provided no basis for a person of reasonable intelligence to understand the proper application of tax laws to digital currencies and they rely on the govt’s persistent trampling on basic rights and notions of fair play.” (Pg. 23, L2-7)

generally the doc argues that the exit tax is unconstitutional because it is 1)apportioned 2)direct and 3) not excepted by the 16th amendment and 4) infringes on the fundamental right to expatriate (more details below)

- argues that the exit tax is unconstitutional
  - Claim that is presents and unjustified burden on the fundamental right to expatriate
  - A covered expatriate is required to pretend they sold all of their personal and real property on the day before expatriation for its fair market value and is then taxed on the imaginary gain from that pretend sale

- according to the US constitutional article 1, section 9 “‘[T]axes on personal property [are] direct taxes” that “must be apportioned among the several States’” (pg. 23 L14)

“The Sixteenth Amendment creates a limited exception for direct taxes on incomes derived from any source. That exception does not apply to the exit tax. The exit tax is unapportioned, direct, and not exempted by the Sixteenth Amendment. The tax, moreover, presents an unjustified burden on the fundamental right to expatriate. For all of these reasons, the exit tax is unconstitutional.” (Pg. 23, L17)

1) argues that the exit tax is unapportioned. According to the 16th amendment (?), direct taxes must be apportioned — “apportionment requires measures ensuring the tax collected from each state is in proportion to it population.” The exit tax doesn’t require this and is thus unapportioned. (Pg 24)

2) argues that the exit tax is direct — states that the exit tax imposes a direct tax because it applies regardless if the owners transfers or engages in any particular use or enjoyment of the assets (pg. 24)

“Direct taxes are those that are ‘levied upon or collected from persons because of their general ownership of property [and] which fall[] upon the owner merely because he is owner, regardless of the use or disposition made of his property.’”

- a tax on property in all of its uses is direct
- An indirect tax is imposed “upon a particular use or enjoyment of property or the shifting from one to another or any power or privilege incidental to the ownership or enjoyment of property.”

- The exit tax applies to “the increase in value of assets that continue to be held” without any transfer, use, or enjoyment.
- “While the expatriating individual may be changing locations, the exit tax applies to assets like real property, stock, and allegedly BTC that do not move or undergo any event whatsoever.”

3) the exit tax is not excepted by the 16th amendment

- it argues “For an unapportioned direct tax, like the exit tax, to be constitutional, it must satisfy the Sixteenth Amendment.”
- The 16th amendment requires proof that the amount being taxed qualifies as “income” to the tax payer (pg. 24)

- “The constitutionality of the exit tax therefore turns on whether the unrealized increase in value of property is an “income.” An unrealized and potentially temporary increase in value is not income, and as a result, the exit tax is unconstitutional.” (Pg. 25)
    - Continues with very technical background info (pg. 25-26)

4) the exit tax is unconstitutional infringement on the right to expatriate
- the right to leave the US is fundamental and all Americans have a constitutional right to voluntary expatriation

“Because the right to expatriate is a fundamental right, a substantial restriction on that right is subject to strict scrutiny and may only survive if narrowly tailored to promote a compelling government interest.” (Pg. 26 L19)

“U.S. law prohibits the government from extending certain trade benefits to certain other countries if they deny their citizens “the right or opportunity to emigrate” or “impose[] more than a nominal tax on emigration.” 19 U.S.C. § 2432(a).12 In light of the standard chosen by Congress as necessary to protect fundamental human rights in other nations, it would be anomalous to conclude that U.S. law can “impose[] more than a nominal tax” on expatriates.

But the current exit tax attempts to do just that: demanding millions of dollars from expatriates in taxation that would not apply to anyone else.” (Pg. 28 L1-9)

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B. <u>The Indictment Rests on Impermissibly Vague Statutory Foundations</u> (pg. 29)

“The government’s charges against Ver rest on an attempt to impart a semblance of “clarity” regarding cryptocurrencies’ tax treatment offered by the IRS in March 2014 to activities occurring prior to March 25, 2014. The lack of any rules in effect at that time deprived Ver of notice and rendered the law unconstitutionally vague.” (Pg. 29 L6-10)

1) Bitcoin’s Regulatory Uncertainty and the Tax Code’s Vague Provisions
- prior to March 25, 2014, there was no official IRS or other governmental guidance on US tax clarification on BTC

“With no precedent or applicable guidance, taxpayers were, prior to that date, without a basis to track BTC holdings as “property,” under the exit tax or any other provision of U.S. tax law, that would later require a fair-market value analysis—a state of affairs that the government now weaponizes against Ver.”

- cites legal precedent “In our constitutional order, a vague law is no law at all.” (Pg. 20 L1)

"Courts may thus find a statute unconstitutionally vague “for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” (Pg. 30, L9-13)
- argues Ver was one of the first people who attempted in good faith to track and pay taxes on virtual currency assets, while at the same time thousands of other people with virtual currency withheld that info form the IRS and made no effort to pay taxes on it
    - The govt then prosecutes Ver and those the others received a warning letter (or amnesty) “until the vagueness marginally dissipated in 2019” (pgs. 30-31)

- “US tax law describes a finite number of ideal transactions —> ownership and disposition of indebtedness, corporate stock, or precious metals.”
    - For the described transactions, the law has a set of operative tax rules, “whenever there is a new asset or transaction for which there is no specific guidance issued, it becomes necessary to determine which “idealized” category that new asset or transaction it fits most neatly into.” (Pg 31)

- the USG acknowledged this difficulty (but not the DOJ or IRS) in the case of cryptocurrencies and specifically BTC during the early years (pg. 32)

- references the GOA report of 2013 which is referenced in the context of the fact that the USG acknowledged the difficulty surrounding accounting for BTC (pg. 32 L4)

1. Foreign currency

- subject to special rules under the US tax code. Gain or loss from the disposition of a foreign currency is ordinary instead of capital
- Argues to treat BTC as a foreign exchange (provides a technical explanation) (pgs. 33-34)

“it was and remains reasonable to treat BC as a foreign currency for U.S. tax purposes entirely at odds with the indictment's apparent assumption as to the "proper" treatment and reporting of BTC.” (Pg. 34 L1-3) also refs indictment para 13, 34

2. Non-currency capital assets

- “Property, other than foreign currency, that is held for investment or personal use, and not as business inventory, generally is a capital asset for U.S. tax purposes”. (Pg. 34, L6)

“Although BTC is not a stock or security within the meaning 16 of the Tax Code, the Tax Court has applied the principles of the regulations to 17 commodity futures, which are treated as commodities (and not stock or securities) 18 for U.S. tax purposes.33 Treating BTC as a capital asset, therefore, would permit taxpayers to identify which lots of BTC they sold and otherwise require FIFO accounting.” (Pg.34-35)

3. Financial instruments

- here it comments on the uncertainty of the underlying legal framework against which the indictment would seek to hold Ver criminally liable

2) Notice 2014-21 Warrants No Deference and Does Not Remedy the Tax Code’s Vagueness

- “Notice 2014-21 reflects the IRS’s post-Ver-extradition view the tBTC is property and not virtual currency— a view that was and remains hotly disputed. (Pg. 25 L14) ”

- “as property, according to the guidance, BTC would be typically treated as a capital asset for individual investors who do not hold it as inventory.”
- Claims Notice 2014-21 does not attempt to explain why BTC is not a foreign currency and incorrectly asserts that BTC “does not have legal tender status in any jurisdiction” which is not true as it does have legal tender status “in a growing number of jurisdictions
    - Claims this raises questions about the validity of notice 2014-21

“By its own terms, Notice 2014-21's reasoning no longer warrants excluding BTC from the category of foreign currency, but even were that not so the Supreme Court's recent decision in Loper Bright invites the Court to set aside the IRS’s unfounded "guidance" and recognize the

fundamentally uncertain status of digital assets and cryptocurrency under the U.S. tax code." (Pg. 36 L8)

3) The indictment charges and impermissibly vague offense

- the tax code is also impermissibly vague as to the proper treatment of etc — this vagueness puts taxpayers who are acting in good faith in an untenable position. The unanswered questions on the US tax treatment of BTC lead to different approaches to tax basis tracking and reporting positions by difference tax payers and tax professionals (pg. 37)
    - "The reasonable possibility of these multiple approaches renders the indictment an attempt to criminalize conduct in the face of a fundamentally unclear statutory regime."
    - "While the indictment's charges are themselves filed under the mail fraud statute and various sections of Title 26, each of those charges incorporates the Tax Code. Repeatedly, the indictment references the Tax Code as a means of defining the substance of tis charges. See indictment para 13, 14, 18
    - "At the bottom, the indictment claims that Ver failed to disclose the 'number and value of bitcoins he owned,' without once grappling with the Tax Code's lack of any provision that would make reporting in such a manner necessary." (Pg. 37)

<u>C. The Government's Selective Quotation and Disregard of Exculpatory Evidence Warrants Dismissal</u>

- claims that the indictment incorporates by reference and selectively quotes several communications and documents that when understood in the entire context (and in full) exonerate Ver
- Claims the indictment is a result of interference in Ver's attorney-client privilege and a violation of the DOJ's own procedure

“As recounted above, the government's grand jury presentation, and the resulting indictment, appears to have relied on a pattern of selective presentation of out-of-context, partial quotations to present a false narrative of willful tax evasion.” (Pg. 38 L22-24)

- cites indictment para 27c as portraying Ver as someone who is intent on leaving the USA “after failing to obtain citizenship in…”
- The doc then cites an email between ver and employee 1 (cc’d Return prep 1-3, lawyer 1, appraiser 1) from April 26, 2013 in which Ver’s primary focus was to ensure that his “exit tax payments were as clean as possible with no possible room to have trouble with the IRS” (exhibit 1, misleadingly in indictment para 27c) (pg. 39)

- similarly, the doc quoted in the indictment para 27e vi “is used to claim the that Ver was expressly instructed by his advisors to use a spot price valuation method:” (references paragraph from the indictment pg. 9 — “a few weeks later, Return Prep 1… per bitcoin value.”)

- the motion then argues that this was effectively the opposite of the advice Ver received. “Ver’s advisors determine that a discount should apply (ie that they would not be using the $800/BTC spot price valuation), and recommend that Ver hire an appraiser:” (which is evidenced in another email exchange from lawyer 1 to Ver on Oct. 14, 2015 the email starts with “Dear Roger, We did some additional research on the valuation of your BTC…”) from exhibit 4 and quoted, in part, in indictment para 27e vi (pg. 40)

- claims that the “same game is played” in the indictment paras 27e iv and 27e vii “in which the govt presents Ver as actively avoiding questions from his advisors. The govt knows the full communications reveal Ver grappling with questions that were impossible to answer given the data available to him, and the accounting procedures used

prior to federal guidance defining the tax treatment of BTC. See Exhibit 6 (quoted, in part, in the indictment 27e iv), exhibit 7 (quoted, in part, in indictment 26e vii)" (pas 41-42)

- claim that when presented in context, these comms exculpate Ver and the govts omission of the full context of those comms show the govts attempt to mislead on Ver's intent (pg. 42)

- concludes that the prosecution must end and that the evidence that the govt withheld from the grand jury and which it has recently been provided with make it clear that the indictment was obtained and continues to be prosecuted without fundamental fairness or due process (pg. 42)

- the charges are lodged against a legal background that provides no guidance for a reasonably intelligent person or people highly trained in tax law "as to the limits and proscriptions of the criminal law" (pg 42)

- "the exit tax ignores core constitutional protections against an entire category of taxes" (pg. 42)