Blogs
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Last week, U.S. District Court Judge Shira Scheindlin of the Southern District of New York ordered disgorgement of $187.7 million in *U.S. Securities and Exchange Commission v. Wyly et al*, and further estimated that the amount will balloon to between $300 million to $400 million after the SEC recalculates pre-judgment interest.

The award, to be paid by Sam Wyly and the estate of his brother Charles Wyly, was measured in part by calculating the amount of **taxes** that the Wylys should have paid on unlawful gains. This is a case of first impression, as no court has ever approved this methodology for calculating unjust profits, and it has resulted in one of the largest SEC awards against individual defendants.

On May 12, 2014, a jury found the Wyly brothers liable for violating federal securities laws by establishing a group of offshore trusts and subsidiary entities, which were used to trade shares of companies on whose boards the Wylys sat. The court noted that there was "ample evidence" that the purpose of the fraud was to "preserve the preferential tax treatment on secret offshore profits for as long as possible." The Wylys argued that calculating disgorgement based on unpaid taxes was improper because the Secretary of Treasury has exclusive authority to assess and collect taxes, and the SEC's disgorgement creates the potential for duplicative recovery, as the Wylys are currently under an IRS audit. The court disagreed, reasoning that "disgorgement is a discretionary and equitable remedy aimed at preventing unjust enrichment," rather than an assessment of tax liability. Nonetheless, the court ordered that, as a matter of equity, any amounts disgorged in this case "should be credited towards any subsequent tax liability determined in an IRS civil proceeding."

The court was also unmoved by the Wylys' argument that the award will force them to file for bankruptcy, stating that disgorgement "would have no deterrent value if defendants could avoid it by spending their unlawful gains before the government discovers the fraud." However, the court acknowledged that the award is "staggering" and "more than sufficient to deter future violations," and therefore declined to impose additional penalties sought by the SEC.

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