

Gimme Shelter

Oct. 17, 2003

If you think the rich don't pay their fair share in taxes, in some cases, you're absolutely right, especially if you're talking about big corporations and wealthy individuals who use questionable tax shelters.

These are complicated financial transactions that involve little risk and exploit technicalities and loopholes in the law for the sole purpose of avoiding taxes. They cost the federal government an estimated \$50 billion a year in lost revenue -- enough to upgrade the electrical power grid or pay for the war in Iraq.

What most people don't know is that a lot of that money that is supposed to go to the government ends up in the pockets of some of the nation's biggest accounting corporations -- the most respected law firms and the richest investment banks. They're the ones who invent, legitimize and market these schemes for their wealthiest clients. **Correspondent Steve Kroft** reports.

Henry Camferdam, a self-made multi-millionaire, was one of those clients. And now, much to his regret, he's somewhat of an expert on tax shelters.

In 1999, Camferdam was running his own computer company in Indianapolis and paying himself a salary of \$200,000 a year. Life was good and about to get much better. A competitor came forward and bought his company.

But he barely had time to count his money before he got a call from his longtime financial adviser, Ernst and Young, the third largest accounting firm in the country.

"They were involved in helping us sell the business, so they intimately knew what was going on," says Camferdam. "They came to us and said, 'Look, instead of paying all these taxes, why don't we do a tax shelter that, in essence, will eliminate all of your taxes.' And when someone says that to you, especially when they're a trusted adviser, you're going to listen."

At a sales pitch at their Indianapolis office, Ernst and Young told Camferdam that the tax shelter was so creative that it would cost him \$1 million in fees. They also said that it was so secret that he couldn't keep any of the literature and would have to sign a non-disclosure agreement.

"Ernst and Young felt very protective of the design of this shelter. And they had a great deal of concern that someone would get this design and steal it from them," says Camferdam, who admits he didn't understand this tax shelter.

Quite honestly, after a half a dozen interviews, neither did we. Except that Ernst and Young called this particular tax shelter Cobra. **60 Minutes** sought out Lee Sheppard, who makes her living explaining tax law for a publication called "Tax Notes."

"The tax law is complex. And people who are tax professionals like to have clients believe they're magicians. It's very flattering," says Sheppard. "It's so complicated. You couldn't possibly understand it. And your head would explode if we had to explain it to you."

Here's how it works. Ernst and Young arranged for Camferdam to buy two offsetting foreign currency options. One \$50 million option bet the Euro would go up; the other a \$50 million dollar bet that the Euro would go down.

Ernst and Young then began moving these two offsetting currency options through a series of hard-to-trace shell companies and partnerships -- a complicated process Sheppard calls basis

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bouncing.

By using a hyper-technical reading of the tax code, Ernst and Young decided that only one of the currency options had to be put on the balance sheet. Thus, it created a corporation with an artificial \$50 million tax loss. That offset the \$50 million profit that Camferdam made selling his business – and as a result, he owed no taxes.

But how did the accountants justify a \$50 million loss on the currency transaction when in fact there really wasn't a loss?

“Ernst and Young, who are experts on the tax law, felt that there was a loophole in the tax law. And through a very complicated, expensive, accounting of this transaction you could avoid the taxes and shelter the gain on it,” says Camferdam. “And as I sit here three years from today, the discussion you and I would have on it would be very short. Because I don't fully understand it.”

Camferdam says he thought it was legal: “Absolutely. And that's what you use those people for. If they tell us not to do something, we don't do it. If they tell us to do something, we do it.”

Ernst and Young said that German financial giant Deutschebank would handle all of the currency trades and financial transactions. But that would cost Camferdam another \$3 million in fees. He would also have to pay for legal advice.

“They had opinion letters from two major law firms in the country, supporting this and saying that this tax shelter was good and it would pass an audit,” says Camferdam. “So with Ernst and Young on top of the two law firms, saying that we should do this, we did it.”

Jenkins and Gilchrist, one of the largest law firms in the country, wrote the principle legal opinion that Ernst and Young provided to Camferdam and other people who bought the Cobra tax shelter. According to court documents, they were also one of the designers of the tax shelter. That stack of papers cost Camferdam another \$2 million.

But Joseph Bankman, a professor at Stanford University Law School and an expert on tax shelters, believes Jenkins and Gilchrist's legal opinion was self-serving.

“You can't make \$2 million a pop and be independent in any meaningful way. I would think they were quite interested in how many people bought that shelter,” says Bankman.

But 75-100 wealthy people did. Bankman says the legal opinion may have made buyers like Camferdam feel better, but in the end it was little more than a sales tool.

“And the sad fact is it doesn't mean anything,” he says, even though Camferdam paid \$2 million for it.

“It certainly improved the salability of it from Ernst and Young's perspective. But when you get in court the case is what it is,” says Bankman. “And if you're trying to take a \$40 million loss on a break-even investment with no business purpose you're almost always going to lose. And that's just what courts have said for a half century now.”

And that's exactly what the IRS decided about Cobra -- it was trying to exploit an ambiguity in the tax code, while clearly violating the spirit of the law.

“The new shelters are just paper transactions. Nothing's created. There's no real investment. There's no risk. There's no possibility of upside or downside,” says Bankman.

It sounds like a fraud. “That's right,” says Bankman. “And I think 20 years ago that's what all the

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reputable firms thought.”

So how did they get into the business?

“Well, a few kind of mavericks without these moral scruples went into the business and they did really well. And their clients didn't get caught,” says Bankman. “And then competitive pressures pushed more and more firms and taxpayers into this arena until finally everybody lost their moral bearing or at least most people did. It became the new norm.”

Bankman says it really changed in the early 1990s, when accounting firms began charging clients a percentage of the money they saved them in taxes, instead of billing them at an hourly rate.

“If it's not illegal, it's pretty close. It's certainly somewhat unethical I think,” says Bankman.

Besides Ernst and Young, the biggest names in accounting, law and investment banking have all been caught promoting abusive tax shelters: KPMG, Price Waterhouse, Merrill Lynch, Bankers Trust, and the now defunct Arthur Anderson, among many others.

Internal promotional documents from one major accounting firm, BDO Seidman, showed just how cynical the tax shelter business has become. In a presentation for people in the in the Tax Department, who called themselves "The Wolf Pack," the firm's partners urged them to focus on one thing – money.

“These people, to the unsophisticated taxpayer, would be like a snake oil salesman 100 years ago,” says Iowa Sen. Charles Grassley, chairman of the Senate Finance Committee.

After last year's corporate scandals, he vowed to hunt down tax cheats everywhere, and he's put the promoters of what he calls "tax shelter scams" at the top of his list.

“The source of the problem are the accounting firms and the law firms that peddle these schemes,” says Grassley. “The legitimacy of it comes from the good name of the accounting firm that markets it.”

The accountants and lawyers who devise these tax shelters would say that their legitimacy comes from the ambiguity of the tax code itself -- and all they're doing is following the letter of the law, as written by Congress.

“You just can't write tax laws precisely enough to avoid the ingenuity of lawyers and accountants to find ways around it. You just can't do that,” says Grassley, who admits that he wouldn't even attempt to explain the tax code, let alone one of these shelters. “I'm chairman of the Committee. I even pay to get my own income taxes done. But when it comes to these schemes, remember, I'm not sure that they're meant to be understandable.”

But what people like Camferdam do understand is the bottom line. Ernst and Young told him he would save \$13 million in taxes. But he ended up paying \$7 million in fees -- not to the government, but to Ernst and Young, Jenkins and Gilchrist, and Deutschebank.

Now the IRS is going after him, for the \$13 million in taxes it says he owes, plus interest and penalties. In response to a demand by the IRS, Ernst and Young turned his name over to the federal government, along with the names of all the other people who bought the Cobra tax shelter. They are all being audited, one by one.

“They've talked like we're the cheats, we're the ones who defrauded the government. We're the ones who maliciously went out and tried to steal tax money from them,’ says Camferdam. “What I don't understand is why they have not gone after Ernst and Young and Jenkins and Gilchrist and

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Deutschebank who designed, marketed and led us into this transaction.”

But that's just not the way the law works, says B. John Williams, who, until recently, was the IRS' chief counsel and top enforcer. He says his agency's powers are limited when it comes to going after people who actually devise tax shelters.

“The law provides that we have to collect from the taxpayer who owes the money. And if that taxpayer has a beef with a professional advisor, the taxpayer can sue them and let the courts sort it out,” says Williams.

But shouldn't they be going after the people who are devising these tax shelters and promoting them?

“Well, we have gone after them within the bounds of the law,” says Williams.

But the bounds of the law are fairly narrow. The IRS went after Ernst and Young this summer, fining them \$15 million for failing to register certain tax shelters.

“The penalties are an infinitesimal piece of the pie right now. So if you compare the gross amount of billions of taxes lost, to the penalties levied, it's 1,000 to one or something,” says Bankman.

Camferdam is suing Ernst and Young, Jenkins and Gilchrist and Deutschebank for \$1 billion, alleging they knowingly lured customers into an “illegitimate tax sham.”

“We didn't expect Ernst and Young to take our money and go walking down the street, never to hear from them again,” says Camferdam.

The accountants at Ernst and Young and the lawyers at Jenkins and Gilchrist gave **60 Minutes** statements saying everything they did was completely legal.

Both firms refused our requests for on camera interviews. But they may have to tell their story to Sen. Grassley. He is holding hearings on the tax shelter business beginning Tuesday, and he is expected to call customers, regulators and promoters to testify.