

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 08-20916-CR-GRAHAM/TORRES

HELIO CASTRONEVES,

Defendant.

_____ /

**DEFENDANTS' MOTION FOR MISTRIAL BASED UPON SUPPLEMENTAL
JURY INSTRUCTION REFERRING TO PENSKE AS "EMPLOYER"**

Helio Castroneves and Katiucia Castroneves, through their undersigned counsel, move this Honorable Court to declare a mistrial based upon the supplemental instruction to the jury referring to Penske as "employer", and as grounds therefore state:

1. On Friday, April 10, 2009 the jury submitted the following question:

"Better define: when does "unconditional vested right to income" occur."

2. On Monday, April 13, 2009 the jury requested that it be supplied a copy of the transcripts of the testimony of tax attorneys Fred Feingold and Mark Berg.

3. On Tuesday April 14, 2009 the jury submitted the following questions.

1. Legally define: "beneficial owner" how it pertains to a corporate entity.

2. Legal define: “deferral of income” specifically are there requirements and/or limitations to make a “stop payment” a “deferral of income.”

3. Does asking someone with whom you’ve entered into a contract with to “stop payment” before contract commences count as a “deferral of income.”

4. The Court reviewed the defendants proposed answers to the three subject questions. A photocopy of the proposed answers are attached hereto as Exhibit “A”.

5. Over defendants’ objection, the Court rejected the defendants proposed answers and decided not to provide an answer to the jury’s first question. The Court stated to the jury that it was responding to the jury’s second and third questions with the following supplemental instruction:

A taxpayer has perfect legal right to agree that he is not to be paid until some subsequent year, or that the payments are to be spread out over a number of years. Where such an agreement is entered into between an employer and employee prior to the time when the employee has acquired an absolute and unconditional right to receive payments and where the request amounts to a binding agreement between the parties so that **the employer, in this case Penske**, has a legal right to refuse making payments except in accordance with the term of the agreement, then the doctrine of constructive receipt does not apply and the taxpayer is not required to report the income until the same actually is received by him.”

A photocopy of the transcript is attached hereto as Exhibit “B”

6. The Court did not provide the defendants with a copy of the Court’s intended supplemental instruction before the Court instructed the jury. When defense counsel sought to object **after** the Court instructed the jury, the Court noted that the objections were preserved.

7. Defendants object to the characterization of **Penske as the “employer”** and the statement that the contractual relationship between the parties to the agreement in this case that may give rise to a constructive receipt is a relationship of employee and employer.

8. Seven Promotions, Inc. is a party to the licencing agreement. Penske Corp. is the only other party to the licensing agreement. There is no employee - employer relationship between these parties.

9. If there is an issue of constructive receipt of income under the licensing agreement it would be an issue of constructive receipt to Seven Promotions, Inc.

10. By suggesting to the jury that Penske is the employer and the constructive receipt issue relates to an employer - employee relationship, the jury is left with impression that the constructive receipt issue would cause income to Helio Castroneves. It is implied that Penske Company is the employer of Helio Castroneves.

11. The answer to the question also incorrectly suggests that income to Seven Promotions is income to Helio Castroneves. This is only correct if the jury finds that Seven Promotions is a controlled foreign corporation and Helio Castroneves owns more than 51% of the company's stock.

_____ 12. The jurors have now been told that the request to stop payment has to constitute a binding agreement between the employer and employee. However, in the instant case Alan R. Miller was a third party to the licensing Agreement between Seven Promotions and Penske Company. The actions of a third party, who is not an

agent of the parties to the contract, do not create constructive receipt of income to the parties to the contract, in this case Seven Promotions, Inc.

13. The issues discussed above, including whether Seven Promotions, Inc. had constructive receipt of income in 2000, 2001 and/or 2002, are questions of fact that are solely for the jury to determine.

WHEREFORE, the Castroneves defendants respectfully move for mistrial. In the alternative, the Castroneves defendants request that their answers to the jurors three questions as set forth in Exhibit "A" hereto be given to the jury together with instruction that the jury should disregard the answers provided by the Court on April 14, 2009 and should return the written answer provided to it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Scott A. Srebnick

SCOTT A. SREBNICK, ESQ.