

U. S. DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
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UNITED STATES DISTRICT COURT

FEB 15 2007

WESTERN DISTRICT OF LOUISIANA

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SHREVEPORT

SHREVEPORT DIVISION

UNITED STATES OF AMERICA

\* CR. NO. 06-50164-01

VERSUS

\* 26 U.S.C. § 7201(Tax Evasion)

TOMMY K. CRYER

\* JUDGE HICKS

\* MAGISTRATE JUDGE HORNSBY

**GOVERNMENT'S IN GLOBO RESPONSE TO DEFENDANT'S  
MOTIONS TO DISMISS, MOTION TO COMPEL DISCOVERY, AND  
MOTION IN LIMINE**

COMES NOW the United States of America by and through its attorney, the United States Attorney for the Western District of Louisiana, and respectfully states the following:

1.

On October 25, 2006, the Grand Jury indicted the defendant for tax evasion violations under 26 U.S.C. § 7201.

2.

Before this Court are four motions to dismiss (the government has previously responded to the first motion), motion to compel discovery, and motion in limine. For reasons stated below, these motions should be denied.

**Defendant's Second Motion to Dismiss**

3.

The defendant claims that the indictment should be dismissed because the Secretary of the Treasury failed to comply with the Administrative Procedure Act (APA) by not publishing certain information in the Federal Register. This claim is meritless.

4.

The defendant's reliance on the APA is misplaced. The purpose of the APA is to "set up procedures which must be followed in order for *agency rulings* to be given force of law." Hotch v. United States, 2212 F.2d 280, 283 (9<sup>th</sup> Cir. 1954)(emphasis added); see also United States v. Kahn, 753 F.2d 1208, 1222 n. 8 (3d Cir. 1985) (finding that the claim that the failure of the IRS to publish interpretive guidelines in Federal Register violates Title 5, U.S.C. § 552(a)(1)(D), is "totally devoid of merit").

The defendant in this case was not charged with violating a regulation. The defendant was charged with violating a criminal statute enacted by Congress, 26 U.S.C. § 7201. In a similar evasion case, United States v. Bowers, 920 F.2d 220, 221-23 (4<sup>th</sup> Cir. 1990), the Court stated that in order for the defendant to invoke the APA as a defense to a criminal tax evasion charge, the defendant had to show "(1) the statutes provided no notice of obligations to pay taxes, (2) the IRS forms and offices were secret- although 200 million Americans know about them, and (3) the defendant, who had previously filed returns, had forgotten about the required forms and the IRS offices."

The defendant in this case, who is a practicing attorney, and who has paid taxes and filed returns in the past, cannot credibly represent to this Court that he did not appreciate or understand his obligation to pay taxes. As such, the defendant's Second Motion to Dismiss should be denied.

#### **Defendant's Third Motion to Dismiss**

5.

In this motion, the defendant claims that he did not create the Trust referenced in the indictment to evade his tax obligation and that the Trust did not yield any taxable

income. These are disputed fact issues that will be presented to a jury at trial. Therefore, it is inappropriate to resolve these disputed fact issues via the defendant's motion to dismiss. As such, this motion should be denied.

**Defendant's Fourth Motion to Dismiss**

6.

The defendant asserts various tax protester claims in this motion. Courts have rejected and discredited these claims. They are without merit.

The Sixteenth Amendment of the U.S. Constitution provides " Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." The "income derived by any source" language in the Sixteenth Amendment has been viewed by the Supreme Court as the basis of Congress' intent to "exert in this field the full measure of its taxing power." See Commissioner v. Gleanshaw Glass Co., 346 U.S. 426, 429-30 (1955).

7.

Title 26 United States Code, Section 61 broadly defines income to include, but not limited to:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items; (2) Gross income derived from business;(3) Gains derived from dealings in property;(4) Interest;(5) Rents;(6) Royalties;(7) Dividends;(8) Alimony and separate maintenance payments; (9) Annuities;(10) Income from life insurance and endowment contracts; (11) Pensions; (12) Income from discharge of indebtedness; (13) Distributive share of partnership gross income; (14) Income in respect of a decedent; and (15) Income from an interest in an estate or trust.

Based on the broad definition of income under Section 61, the defendant's claim that the income generated from his law practice and the interest from the trust do not fit this definition is without merit. See Commissioner v. Kowalski, 434 U.S. 77 (1977) (payments are considered income where the payments are undeniably accessions to wealth, clearly realized, and over which a taxpayer has complete dominion); Londale v. Commissioner, 661 F.2d 71, 72 (5<sup>th</sup> Cir. 1981)(rejecting taxpayer's contention that the "exchange of services for money is a zero-sum transaction") Reading v. Commissioner, 70 T.C. 730 (1978), aff'd, 614 F.2d 159 (8<sup>th</sup> Cir. 1980)(monies received from the sale of one's services constitute income within the meaning of the Sixteenth Amendment).

8.

Thus, the defendant's claims that his revenues are not covered under Tax Code or that the revenues from his law practice are not taxable, or similar claims, is without merit. Also, the defendant's claim that the revenues he derived from his "fundamental right" to pursue his occupation is equally without merit.

9.

Finally, courts have rejected similar claims that income derived within in one of the "several states" are not subject to federal taxation. See O'Driscoll v. I.R.S. 1991 U.S. Dist LEXIS 9829, at 5-6 (E.D. Pa. 1991) (ruling that "despite [taxpayer's] linguistic gymnastics, he is a citizen of both the United States and Pennsylvania, and liable for federal taxes"); United States v. Sloan, 939 F.2d 499, 500 (7<sup>th</sup> Cir. 1991) (rejecting argument that taxpayer was not subject to federal taxation because he was a citizen of Indiana); United States v. Gerads, 999 F.2d 1255, 1256 (8<sup>th</sup> Cir. 1993) (rejecting taxpayers' claim that they were not subject to federal taxation because he was not a

citizen of the United States but rather a "Free Citizen of the Republic of Minnesota", and, imposing sanctions "for bringing this frivolous [claim] based on discredited tax protestor arguments). Therefore, defendant's claim that the federal government lacks the power to tax his income is without merit.

10.

In sum, the defendant presents this Court with pages upon pages of protester arguments that courts have previously rejected and discredited, and, factual issues that should be decided by a jury at trial. Therefore, the defendant's motions to dismiss should be summarily DENIED.

**Motion to Compel Discovery**

11.

The defendant moves this Court to compel the government to produce discovery. On or about December 13 2006, the government permitted virtually open file discovery by allowing the defendant to inspect and review documentary items in United States Attorney's Office. These items included, but not limited to, subpoenaed reports and business records, tax documents, and summaries of witness interviews. Out of the volumes of the discovery the government permitted the defendant to review, the government withheld "Witness Folder No. 8."

Without revealing the contents in this response, "Witness Folder No. 8" is an intra-department legal advisory memoranda. This item is clearly not discoverable because it is work product covered under Fed. R. Crim. Proc. 16(a)(2). Rule 16(a)(2) "does not authorize the discovery or inspection of reports, memoranda, or other governmental documents made by the attorney for the government or other government agents in

connection with the investigation or prosecution of the case.” Furthermore, this memo does not contain Brady or Giglio material. Therefore, the defendant’s motion to compel should be denied.

Notwithstanding, the Government will provide the Court a copy of “Witness Folder No.8 “ for *in camera* inspection, in compliance with a court order.

### **Motion in Limine**

12.

Finally, the defendant moves in limine to preclude the government from making improper remarks, arguments, or comments in the presence of the jury.

Contrary to the defendant’s assertion, the government may refer to the defendant as a “tax protester” in its opening statement or closing argument. See United States v. Bergman, 813 F.2d 1027, 1029 (9<sup>th</sup> Cir. 1987) (finding the term “tax protestor” a permissible shorthand reference to such activities); United States v. Turano, 802 F.2d 10, 12 (1<sup>st</sup> Cir. 1986)(observing that the term “tax protestor” was not vague, as the defendant’s acts and statements in evidence at trial provided the jury with sufficient understanding of the meaning of the term); see also United States v. Reed, 670 F.3d 622, 623 (5<sup>th</sup> Cir. 1982)(referring to defendant’s tax return as “protest return”); United States v. Carlson, 617 F.2d 518, 519, 524 (9<sup>th</sup> Cir. 1980) (referring to the defendant as a tax protester).

Furthermore, the defendant’s attitudes and philosophies toward the IRS and the payment of taxes goes to the element of willfulness. United States v. Hogan, 861 F.2d 312, 316 (1<sup>st</sup> Cir.1988)(holding that district court’s instruction permitting the jury to consider the defendant’s attitude toward the IRS as evidence of willfulness was not

error): Reed, 670 F.2d at 623 (“Evidence of a person’s philosophy, motivation and activities as a tax protester is relevant and material to the question of intent”); United States v. Brown, 591 F.2d 307, 311 (5<sup>th</sup> Cir. 1979) (defendant’s status as a “tax protester” and the statements he made regarding the payment of taxes buttressed the circumstantial evidence on the willfulness of his actions).

13.

The government does not intend to make an improper appeal to the pecuniary interests of the jury. The government does, however, intend to introduce relevant and probative evidence of the defendant’s willfulness, including his own pecuniary interest in failing to file tax returns or pay income tax. Evidence that the defendant received large amount of income is probative of the defendant’s financial motivation in failing to file tax returns or pay taxes. See United States v. Bohrer, 807 F.2d 159, 161-62 (10<sup>th</sup> Cir. 1986) (substantial gross income is evidence of willfulness).

14.

Therefore, the defendant’s motion in limine should be denied

**Conclusion**

WHEREFORE, the government prays that defendant's motions to dismiss, motion to compel discovery, motion in limine be summarily DENIED.

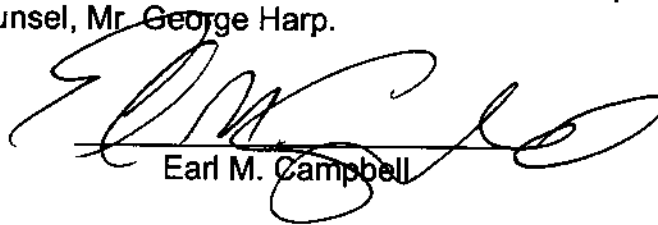
DONALD W. WASHINGTON  
United States Attorney



EARL M. CAMPBELL  
Assistant United States Attorney  
300 Fannin Street, Suite 3201  
Shreveport, Louisiana 71101  
(318)676-3600

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Government's In Globo Response has been provided to defense counsel, Mr. George Harp.

  
Earl M. Campbell