IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

DEFENDANT GARY KAPLAN'S MOTION TO DISMISS COUNTS 14 TO 22 OF THE SUPERSEDING INDICTMENT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Counts 14 to 16 of the Superseding Indictment allege that Gary Kaplan committed tax evasion relating to a wagering excise tax. Under the express terms of the statutory limitations on its territorial and personal reach, the wagering excise tax does not extend to the wagers alleged. The Superseding Indictment also fails to allege the required affirmative act of evasion. Counts 17 to 22 allege that Kaplan interfered with the administration of the revenue laws, but the Superseding Indictment fails to allege Kaplan's knowledge of a pending IRS proceeding or investigation, or how the alleged activity interfered with the administration of the revenue laws.

ARGUMENT

I. COUNTS 14 TO 16 DO NOT ALLEGE A VIOLATION OF 26 U.S.C. § 7201 BECAUSE NO WAGERING EXCISE TAX IS DUE.

Counts 14 to 16 allege[1] that Kaplan attempted to evade and defeat the wagering excise tax[2] in violation of 26 U.S.C. § 7201, which criminalizes attempting to "evade or defeat any tax

[1] Counts 14 to 22 do not cross-incorporate any other paragraphs of the indictment, and thus each of these counts must be evaluated on its own language.

. . .or the payment thereof." But there can be no violation of 26 U.S.C. § 7201 because no wagering excise tax was due by Mr. Kaplan.

An excise tax on wagers is imposed by 26 U.S.C. § 4401(a), which provides for a 0.2% tax on state-authorized wagers and a 2% tax on unauthorized wagers. The territorial extent of this excise tax is limited by 26 U.S.C. § 4404 to those wagers:

> (1) accepted in the United States, or
> (2) placed by a person who is in the United States
> (A) *with a person* who is a citizen or resident of the United States,
> or
> (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

(emphasis added)

Thus, all wagers *accepted* in the United States are subject to the excise tax. Wagers *placed* in the United States, however, are only subject to the excise tax if they are also (1) *accepted* in the United States, (2) *placed* with a person who is a U.S. citizen or resident, or (3) *placed* in a wagering pool or lottery conducted by a person who is a U.S. citizen or resident. If a wager does not fall within these territorial limitations, it is not subject to the excise tax. 26 U.S.C. § 4404. Counts 14 to 16 do not allege that any wagers were *accepted* in the United States or *placed* by a person in the United States under either of the circumstances cited in paragraphs (2)(A) or (B) and therefore no wagering excise tax is due. Because no wagering

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[2] "There is, of course, a fundamental difference between an income tax and an excise tax, both with respect to what is taxed and the source of the power to tax. [An excise tax is] an indirect tax, and has no reference to earnings or income, except that the sum of such earnings or income may (as anything else may) be made the measure of the tax. An income tax, on the contrary, is a direct tax imposed upon the thing called income. . . ." *United States v. Philadelphia, B. & W. R.R. Co.*, 262 F. 188, 190 (E.D. Pa. 1920).

excise tax is due, allegations that Kaplan attempted to evade and defeat the wagering excise tax in violation of 26 U.S.C. § 7201 must be dismissed.[3]

A. No Wagers Were Accepted In The United States Under 26 U.S.C. § 4404(1).

The indictment does not allege that any wagers were accepted in the United States. Counts 14 to 16 only allege that "entities doing business in the United States, had and received taxable wagers." Merely doing business in the United States does not overcome the specific territorial restriction of § 4404, which, in relevant part, requires that wagers be accepted in the United States.

The plain language of 26 U.S.C. § 4404 makes clear that a wager can be "*placed*" and "*accepted*" in two different places. All wagers "accepted" in the United States are covered by § 4404(1), but only certain wagers "placed" in the United States are covered by § 4404(2). If a wager "placed" in the United States were also automatically "accepted" in the United States, § 4404(2) would serve no purpose because all wagers under § 4404(2) would fall under § 4404(1). The statute therefore contemplates that wagers can be "placed" in the United States and "accepted" outside the United States.

Wagers placed by a person in one jurisdiction with an entity in another jurisdiction are "*accepted*" in the latter jurisdiction. *See United States v. Truesdale,* 152 F.3d 443 (5th Cir. 1998) (bets placed by persons in the United States by dialing telephone numbers in the Caribbean were not accepted in the United States regardless of fact that financial transactions related to those bets were conducted in the United States); *see also Lescallett v. Commonwealth*, 17 S.E. 546, 548 (Sup. Ct. Va. 1893) (wager telegraphed by person in Richmond to New York

[3] Kaplan also seeks by separate motion to dismiss counts 14 to 22 for lack of venue. *See* Kaplan's Motion to Dismiss Tax Counts for Lack of Venue (filed Aug. 13, 2007).

is accepted in New York); *State v. Oldham*, 98 S.W. 497, 500 (Sup. Ct. Mo. 1906) (wagers telephoned by person in Missouri to Kansas are accepted in Kansas).

Counts 14 to 16 describe wagers that were placed in the United States with telephone numbers or internet servers in Antigua and Costa Rica and accordingly were accepted in Antigua or Costa Rica. As the Fifth Circuit in *Truesdale* made clear, the existence of other related business activities in the United States has no effect on the location where wagers are accepted. 152 F.3d at 444-45. Since all of the operations for receiving wagers described in the indictment are alleged to have been located outside of the United States, that is where any alleged wagers were accepted for purposes of the excise-tax statute.

Indeed, the indictment repeatedly confirms that the alleged wagers were allegedly accepted outside the United States:

- Paragraph 1 – "In approximately 1995, Gary Kaplan moved the illegal gambling business to Aruba . . ."
- Paragraph 1 – "services accept[ed] sports wagers from gamblers in the United States." Does not allege services accepted sports wagers in the United States.
- Paragraph 1 – "Kaplan relocated the gambling operations to Antigua, and then to Costa Rica . . ."
- Paragraph 19 – "The Gambling Enterprise operated a number of Internet web sites, hosted on servers located outside the United States . . . ."
- Paragraph 25 – "the Enterprise operated Internet web site and telephone gambling services from facilities physically located in San Jose, Costa Rica."
- Paragraph 27 – "These bets . . . were transmitted via interstate and international telephone lines, and computer connected to the Internet." Bets were transmitted internationally.
- Paragraph 32 – The enterprise used "interstate and international telephone and computer wire communications to illegally accept and record millions of sports wagers from gamblers in the United States." Wagers traveled on international wires and are not alleged to have been accepted in the United States.
- Paragraph 33 – The enterprise had physical facilities in Costa Rica, and other locations outside the United States.

- Paragraph 37 – Instructions for opening a wagering account state money should be sent to various locations outside the United States.
- Paragraph 39 – Wagers were transmitted "between the State of Missouri and the country of Costa Rica."
- Paragraph 44 – "Internet and telephone service gambling businesses [were] located outside the United States . . . ."

There is no indication in the indictment that wagers were accepted in the United States. Therefore the wagers do not fall within the territorial extent of 26 U.S.C. § 4404(1).

While this territorial limitation is clear from the face of the statute, any ambiguity must be resolved to limit rather than expand the scope of the tax. As the Supreme Court has repeatedly held, interpretation of tax statutes must be construed against the government. *Gould v. Gould*, 245 U.S. 151, 153 (1917) ("In case of doubt they are construed most strongly against the Government, and in favor of the citizen."); *see also United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) ("At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter.").

B. No Wagers Were Placed With A Person Who Is A Citizen Or Resident Of The United States Under 26 U.S.C. § 4404(2)(A).

The indictment also fails to allege that any wager was placed by a person in the United States with a person who is a citizen or a resident of the United States under § 4404(2)(A), providing another reason that no excise tax is owing. Counts 14 to 16 allege that at various times taxable wagers were received by BETonSPORTS.COM, BetonSports (Antigua), Millennium, Jaguar, Infinity, Gibraltar, MVP, Wagermall, Bettorstrust, and Rockisland. Each of these entities is listed as a legal entity in Paragraph 20(a) of the indictment, with the

exception of Wagermall.[4] Wagermall.com is listed in Paragraph 20(c) as a *de jure* entity operating under an Internet-associated brand or trade name, but Wagermall is not listed in paragraph 20 of the indictment.

"Person" as defined under 26 U.S.C. § 7701(a)(1) includes companies and corporations. "United States person" is defined under 26 U.S.C. § 7701(a)(30) as (A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation. "The term 'domestic' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations." 26 U.S.C. § 7701(a)(4). "The term 'foreign' when applied to a corporation or partnership means a corporation or partnership which is not domestic." *Id.* § 7701(a)(5).

Nowhere does the indictment allege that any of the entities receiving wagers are citizens or residents of the United States or domestic legal entities organized under the laws of the United States. In fact, the indictment repeatedly alleges that the entities are foreign. *See* Superseding Indictment ¶ 20; *supra* Section I.A.1. Whether an entity is foreign or domestic depends on where it is organized. Thus, the allegation that the entities did business in the United States does not affect their status as foreign entities. Just like the innumerable foreign business entities that do business in the United States every day, these foreign entities are not converted to domestic entities by allegations that they did business in the United States. The citizenship of the owners or operators of a company or corporation is also irrelevant to its status as foreign or domestic. There is no indication that these entities were shams or alter egos of

[4] The entities are listed in counts 14 to 16 using generic names such as "Infinity," where paragraph 20 indicates the more precise name of the legal entity such as "Infinity Sports International, Corp." Paragraph 20(c) says BETonSPORTS.COM is also known as BetonSports, and there are several legal entities in paragraph 20(a) with the name BetonSports.

Kaplan. Each was in fact a legitimate, viable, legal entity under the laws of the jurisdiction in which it was formed.

Moreover, the indictment does not allege that any wagers were placed with Kaplan. In fact, counts 14 to 16 specifically allege that the wagers were received by the foreign legal entities. The allegation that Kaplan owned, operated, and controlled the entities does not alter the conclusion that the alleged wagers were placed with foreign entities. There is no statutory or regulatory basis for the allegation that Kaplan is personally liable for excise taxes as the alleged owner, operator or controlling person of foreign entities which are not liable for such taxes.

Finally, the imposition of a tax on the United States-based income of foreign corporations cited in 26 U.S.C. § 882 does not convert such foreign entities to domestic entities for purpose of § 4404. The territorial extent of the wagering excise tax in § 4404(2) is limited to wagers placed with United States citizens or residents.

Since the indictment fails to allege, as it cannot, that wagers were placed with "a person who is a citizen or resident of the United States," there is no basis for finding that a wagering excise tax was owing under § 4404(2)(A).

C. No Wagers Were Placed In A Wagering Pool Or Lottery Conducted By A Person Who Is A Citizen Or Resident Of The United States Under 26 U.S.C. § 4404(2)(B).

The indictment does not allege that wagers were placed in a wagering pool or lottery. The indictment never uses the term "pool" or "lottery", and the activity alleged in the indictment is inconsistent with the common understanding of "wagering pools" and "lotteries." The indictment repeatedly alleges the entities accepted "sports wagers" and "sports bets."

For the purpose of the wagering excise tax, "wager" is defined as:

> (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

26 U.S.C. § 4421(1)[5]. Wagering pools and lotteries are narrower subsets of gambling activity that do not encompass all wagers, and do not encompass the types of wagers alleged in counts 14 to 16.

"Wagering pool" does not have a statutory definition, but the regulations state that "[a] wagering pool conducted for profit includes any scheme or method for the distribution of prizes to one or more winning bettors based upon the outcome of a sports event or a contest, or a combination or series of such events or contests, provided such wagering pool is managed and conducted for the purpose of making a profit" 26 C.F.R. § 44.4421-1(c)(1); *See also* IRS Form 730. The Ninth Circuit addressed the difference between wagers and wagering pools when interpreting a Nevada gaming statute in *United States v. Berent,* 523 F.2d 1360, 1361 (9th Cir. 1975) (citation omitted):

> The government's argument is that the term "sports pool" as understood under the Nevada statute covers all methods of gambling on the outcome of sporting events, including bookmaking. Construing this criminal statute narrowly, as we must, we cannot accept this contention. In common usage the term "pool" connotes a particular gambling practice, an arrangement whereby all bets constitute a common fund to be taken by the winner or winners. This is distinct from the practice of bookmaking.

Clearly, "wagering pool" is not a catchall phrase, but is commonly used to describe a specific type of wagering that does not include typical sports wagers.

Similarly, a "lottery" does not encompass all wagering activity. "Lottery" is defined for purposes of the wagering excise tax to include "the numbers game, policy, and similar types of

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[5] It should also be noted that a "wager" for the purposes of the excise tax is limited to wagers placed with respect to sporting events or contests and wagers placed in a lottery.

wagering." 26 U.S.C. § 4421(2); 26 C.F.R. § 44.4421-1(b)(1). The instructions to IRS Form 730 also define lottery to include "the numbers game, policy, punch boards, and similar types of wagering. In general, a lottery conducted for profit includes any method or scheme for the distribution of prizes among persons who have paid or promised to pay for a chance to win the prizes. The winning prizes are usually determined by the drawing of numbers, symbols, or tickets from a wheel or other container or by the outcome of a given event." These definitions reinforce the common usage of the term "lottery" that does not include all wagers, such as wagers placed on sporting events.

As the court in *Berent* noted, "wagering pool" does not encompass all wagers. 523 F.2d 1360. Similarly, "lotteries" do not encompass all wagers. *See* 26 U.S.C. § 4421. The indictment does not allege any activity that could be construed as the operation of a wagering pool or lottery, therefore the allegations in counts 14 to 16 do not fall within the territorial reach of 26 U.S.C. § 4404(2)(B).[6]

Any ambiguity created by the IRS's regulations contained in 26 C.F.R. § 4404-1(a) cannot expand the reach of the wagering excise tax beyond the unambiguous territorial limitations of the statute. 26 C.F.R. § 4404-1(a) provides that

> all wagers made within the United States are taxable irrespective of the citizenship or place of residence of the parties to the wager. Thus, the tax applies to wagers placed within the United States, even though the person for whom or on whose behalf the wagers are received is located in a foreign country and is not a citizen or resident of the United States.

This regulatory language does not use the "*accepted*" or "*placed*" language of the statute but rather provides that any wagers *made* within the United States are subject to the tax. The

[6] Even if a wagering pool or lottery was conducted, it was not conducted by a citizen or resident of the United States because all wagering activity was conducted by foreign legal entities. *See supra* Section I.B.

regulation's use of the term "made" creates confusion because that word is not used in the statute. *See* 26 U.S.C. § 4404. For the regulatory language to be read consistently with the statute, as it must be *Foltz v. United States*, 458 F.2d 600, 602-03 (8th Cir. 1972), it must be inferred that the wager is not only placed, but also accepted in the United States. The second sentence that says "[t]hus, the tax applies to wagers placed within the United States" must include the inference from the previous sentence that the wager made in the United States is both placed and accepted in the United States.

The regulation's examples clarify the ambiguous language in the regulation. *See* 26 C.F.R. § 44.4404-1(b). Example (1) can be read consistently with both the regulation and the statute:

> A syndicate which maintains its headquarters in a foreign country has representatives in the United States who receive wagers in the United States for or on behalf of such syndicate. For the purposes of section 4404, such wagers are considered as accepted within the United States, the syndicate is considered to be in the business of accepting wagers within the United Sates, and such wagers are subject to the tax. This is true regardless of the nationality or residence of the members of the syndicate.

Id. (emphasis added). This example illustrates the regulation's concern with the citizenship and residence of parties to a wager, but clearly states what paragraph (a) neglects to: that the wagers are received and accepted in the United States.

Example (2) further clarifies the regulatory language:

> A Canadian citizen employed in Detroit, Michigan, telephones a horse race bet to a bookmaker who is a United States citizen with his place of business located in Windsor, Canada. The wager is taxable since it is made by a person within the United States with a person who is a United States citizen.

Id. The logical inference is that if the bookmaker was a Canadian citizen the wager would not be taxable. This reflects what is clear in the statute: not all wagers placed within the United States are taxable—only those that are also accepted within the United States, are placed with a

United States citizen or resident, or are placed in a wagering pool or lottery conducted by a United States citizen or resident. *See* 26 U.S.C. § 4404.

IRS Form 730, used to report payment of the excise tax on wagers, further clarifies that the agency does not intend to expand the territorial limits of 26 U.S.C. § 4404 (assuming that it could). *Cf. United States v. Lachman*, 387 F.3d 42, 54 (1st Cir. 2004) (agency interpretations are relevant where reflected in public documents). Under the heading "What is taxed," Form 730 states "[t]he tax applies only to wagers accepted in the United States or placed by a person who is in the United States with a person who is a U.S. citizen or resident." The form does not support a contention that all wagers placed in the United States are taxable regardless of where they are accepted or who accepts them.

Of course, no matter how the regulation could possibly be interpreted, § 4404 is clear on its face, and the regulations have no power to amend it. *See Koshland v. Helvering*, 298 U.S. 441, 446 (1936). Furthermore, the Supreme Court has held that IRS regulations relating to taxes are often internally inconsistent and improperly attempt to expand the scope of the statute. *See United States v. Calamaro*, 354 U.S. 351, 358-59 (1957). In *Calamaro*, which was decided under the predecessor statute to § 4401, the Supreme Court held that the regulations as they relate to the scope of persons liable to pay the occupational portion of the wagering excise tax are "no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute." *Id.* at 359.

II. COUNTS 14 TO 16 DO NOT ALLEGE A VIOLATION OF 26 U.S.C. § 7201 BECAUSE THERE IS NO AFFIRMATIVE ACT OF EVASION.

The elements of a § 7201 offense are willfulness, the existence of a tax deficiency, and an affirmative act of evasion. Failing to file a tax return or to pay a tax due are insufficient; there must be an affirmative act. *Sansone v. United States*, 380 U.S. 343, 351 (1965). As

demonstrated above under § 4404, the indictment fails to allege that any wagering excise tax was due and accordingly there can be no tax deficiency, a necessary element of the § 7201 counts. In addition, the Indictment fails to allege other critical elements of a § 7201 offense.

A. Directing That Funds Be Sent Outside The United States Before A Tax Is Due Is Insufficient To Allege An Affirmative Act Of Evasion.

The only affirmative act alleged in counts 14 to 16 is that defendants caused and directed funds to be sent outside the United States. Elsewhere in the indictment, in allegations not incorporated into these counts, it is clarified that these funds were directed to be sent outside the United States to open and fund wagering accounts. Superseding Indictment ¶¶ 31, 44. But at the time instructions were given to send funds outside the United States, no wagers could have yet been made with those funds, and the excise tax on wagers is not due until after a wager is made. Therefore, at the time the affirmative acts in counts 14 to 16 took place, there was no related tax deficiency.

The Second Circuit has held that transporting money outside the United States prior to a tax deficiency is not an affirmative act of evasion. *United States v. Romano*, 938 F.2d 1569, 1574 (2d Cir. 1991). In *Romano*, the defendant attempted to take $359,500 in cash from the United States into Canada in his car on November 17, 1983. He was stopped and gave evasive answers regarding the amount of money in the car. The money was seized because he had not filled out the proper monetary declaration before crossing the border. In 1984, he failed to file a 1983 income-tax return. *Id.* at 1570. The government alleged he had committed an affirmative act of evasion under § 7201, but the circuit disagreed and remanded for dismissal of the indictment because, at the time he attempted to transport the money into Canada, Romano had no obligation to disclose the existence of that money to the IRS because the tax year was still open. *Id.* at 1572.

The alleged affirmative acts in counts 14 to 16 are essentially identical to the alleged act in *Romano* where the indictment was remanded for dismissal because there was no affirmative act of evasion. Counts 14 to 16 allege that Kaplan caused and directed funds to be sent outside the United States. In *Romano*, the indictment alleged that the defendant attempted to transport currency outside the United States. 938 F.2d 1569. In both counts 14 to 16 and *Romano*, there was no tax deficiency at the time the alleged affirmative act took place. *Id.* at 1572. Like in *Romano*, the government has failed to allege an affirmative act of evasion under § 7201 in counts 14 to 16, therefore they must be dismissed for failure to allege a tax deficiency or an affirmative act of evasion.

III. COUNTS 17 TO 22 DO NOT ALLEGE A VIOLATION OF 26 U.S.C. § 7212(a).

Counts 17 to 22 allege that Kaplan corruptly interfered with the administration of the internal revenue laws by directing that money for opening and funding wagering accounts be sent to third party recipients in violation of 26 U.S.C. § 7212(a).[7] As explained above, however, the wagers placed in this case are not subject to taxation. There can therefore be no violation of 26 U.S.C. § 7212(a), because there are no revenue laws to be interfered with. And even assuming that there were applicable revenue laws to be interfered with, instructing persons to send money to third parties would not constitute corrupt interference because there was no

[7] "**Corrupt or forcible interference.** Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $ 5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $ 3,000, or imprisoned not more than 1 year, or both. The term 'threats of force', as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family." 26 U.S.C. § 7212(a).

pending IRS proceeding or investigation of which Kaplan was aware at the time the instructions were given, and the instructions are not a direct violation of the internal revenue laws.

A. "Corrupt Interference" Must Be Construed Narrowly.

The term "corruptly" in § 7212(a) has been defined in this circuit as "an effort to secure an unlawful advantage or benefit." *United States v. Dykstra*, 991 F.2d 450, 453 (8th Cir. 1993) (citing *United States v. Yagow*, 953 F.2d 423, 427 (8th Cir. 1992)). But recent developments in the law concerning § 7212(a) and other obstruction-of-justice statutes have significantly narrowed the interpretation of corrupt interference. How "corruptly" is interpreted in other obstruction-of-justice statutes is significant because courts have commonly held that 26 U.S.C. § 7212(a) should be construed similarly to other criminal obstruction-of-justice statutes, particularly 18 U.S.C. § 1503. *See Dykstra*, 991 F.2d at 454.

The development of what constitutes "corrupt interference" in obstruction-of-justice statutes started as early as 1893 when the Supreme Court held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." *Pettibone v. United States*, 148 U.S. 197, 206 (1893) (discussing U.S. Rev. Stat. § 5399[8]). In 1990, the Eighth Circuit noted that "[c]ourts have construed the criminal offense of obstructing justice, 18 U.S.C. § 1503, to apply only to conduct occurring after the commencement of formal judicial proceedings." *United States v. Werlinger*, 894 F.2d 1015, 1017 n.3 (8th Cir. 1990). In 1995, two years after this Court's decision in *Dykstra*, the Supreme Court specifically addressed

[8] "Any person who corruptly endeavors to influence, intimidate or impede any witness or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, is punishable by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both." U.S. Rev. Stat. § 5399.

the scope of 18 U.S.C. § 1503 and held that there is a nexus requirement—"that the act must have a relationship in time, causation, or logic with the judicial proceedings." *United States v. Aguilar*, 515 U.S. 593, 599 (1995).[9] In *Aguilar*, the defendant, knowing there were pending grand jury proceedings, lied to an FBI agent who later testified before a grand jury. The court held that defendant did not violate § 1503, reasoning that in order for there to be a violation of § 1503 the action of the defendant "must have the natural and probable effect of interfering with the due administration of justice," and that "[i]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* "[U]ttering false statements to an investigating agent who might or might not testify before a grand jury" is insufficient to establish a violation of § 1503. *Id.* at 600. The defendant's knowledge of pending grand-jury proceedings was insufficient to conclude that he knew his false statements would be provided to the grand jury. *Id.* at 601. The *Aguilar* court did state that delivering false documents or testimony to a grand jury would violate § 1503, but that giving false testimony to an investigating agent who has not been subpoenaed is too speculative, and does not satisfy the nexus requirement necessary to establish a violation of § 1503. *Id.*

Based on its history of interpreting § 7212(a) similarly to § 1503, the Sixth Circuit addressed the scope of § 7212(a) in light of the Supreme Court's holding in *Aguilar*. In *United States v. Kassouf*, 144 F.3d 953 (6th Cir. 1998), the indictment alleged that the defendant violated § 7212(a) by neglecting to keep records necessary to determine the tax consequences of transactions he conducted for his personal benefit through his partnerships, making it more

[9] The Supreme Court cited *Aguilar* when addressing the obstruction of justice statute, 18 U.S.C. § 1512(b), in *Arthur Andersen*. *Arthur Andersen*, however, is not as helpful in interpreting § 7212(a) because as the court noted, "the parties have pointed us to two other obstruction provisions, 18 U.S.C. §§ 1503 and 1505, which contain the word 'corruptly.' But these provisions lack the modifier knowingly, "making any analogy inexact." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 n.9 (2005).

difficult for the IRS to discover and trace his activities "by transferring funds between bank accounts before making expenditures", and "affirmatively misl[eading] the IRS by filing tax returns which failed to disclose the transactions, the bank accounts and other assets, and the interest earned on those accounts." *Id.*

The government argued that "the omnibus clause of § 7212(a) broadly prohibits all corrupt efforts to impede the administration of the tax laws, including schemes to disguise and conceal current financial transactions in order to evade tax obligations and prevent IRS detection and scrutiny." *Id.* at 955. The Sixth Circuit disagreed and affirmed the district court's dismissal of the § 7212(a) count for failure to state an offense, holding that the count did not allege, as an element of the offense, that there was a pending proceeding or investigation by the IRS of which the defendant was aware. *Id.* at 960.

The circuit relied on the Supreme Court's reasoning in *Aguilar* that analyzed the "nearly identical language" in § 1503. *Id.* at 957. The circuit noted that some courts have applied § 7212(a) where there was no pending investigation or proceeding, but that all of the circuit decisions doing so were decided before *Aguilar*. *Id.* at 956.

The *Kassouf* court reasoned that "were we to permit the allegations in [the § 7212(a) count] to stand, we would be imposing liability for conduct with even less of a causal connection than that rejected by the Supreme Court in *Aguilar*. We would be permitting the IRS to impose liability for conduct which was legal (such as failure to maintain records) and occurred long before an IRS audit, or even a tax return was filed. The speculative nature of this 'obstructive' conduct is readily apparent, and we agree with the district court that the statute cannot be construed to prohibit it. Because [the internal revenue code] encompasses such routine actions as even the Government points out, imposing liability for actions committed

before a person knew of an investigation or proceeding, would open them up to a host of potential liability of conduct that is not specifically proscribed." *Id.* at 957.

Language in the Eighth Circuit supports the holding in *Kassouf*. In *Dykstra*, the Eighth Circuit compared § 7212(a) to 18 U.S.C. § 1505, which prohibits "corrupt endeavors to influence, obstruct, or impede the due administration of the law under which any *pending proceeding* is being had before any federal department or agency." 991 F.2d at 454 (emphasis added).

The Sixth Circuit continued its discussion of § 7212(a) in a case where the defendant knowingly supplied false information to the IRS to harass his creditors at a time when no IRS proceedings or investigations were underway. *United States v. Bowman*, 173 F.3d 595, 599 (6th Cir. 1999). The circuit affirmed defendant's convictions reasoning that in these circumstances it was not necessary for the government to allege a pending investigation or proceeding of which defendant was aware because unlike the activity in *Kassouf*, "[t]he filing of false tax forms is not legal when undertaken; it is not speculative; it is specifically designed to cause a particular action on the part of the IRS." *Id.* at 600.

In 2004, the Sixth Circuit confirmed that *Bowman* did not overrule the holding in *Kassouf* that in order for there to be a violation of 26 U.S.C. § 7212(a), there must be a pending IRS proceeding or investigation of which defendant is aware. Rather, *Bowman* created an exception to that general rule for circumstances that directly interfere with the revenue laws, such as filing false returns. *See United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004) (defendant, whose girlfriend was being tried for tax evasion, filed a fraudulent petition to place an IRS agent assigned to the case into involuntary bankruptcy. The IRS had a pending action against defendant's girlfriend of which defendant was aware.).

The Ninth Circuit has also followed the development of "corrupt interference", citing *Aguilar* and holding that a § 7212(a) indictment must allege a nexus between the corrupt endeavor and the administration of the tax laws. *United States v. Metteer*, 118 Fed. Appx. 135, 135-36, 2004 U.S. App. LEXIS 23803 (9th Cir. Feb. 10, 2004) (unpublished) (indictment sufficient where it alleged defendant was "aware of Internal Revenue Service inquiries into his tax liability" when he actively tried to hide his interest in income and assets through misleading means). In a previous case, the Ninth Circuit had held that § 7212(a) does not require knowledge of a pending IRS proceeding or action, but in the facts of that case the defendant had lied to the accountant preparing a company's tax forms. *United States v. Double*, Nos. 99-50319, 99-50320, 2000 U.S. App. LEXIS 33989, at *3-4 (9th Cir. Dec. 11, 2000) (unpublished). This activity, like the conduct in *Bowman*, directly interferes with the revenue laws and therefore is a valid exception to the general rule that there must be a pending IRS investigation or proceeding of which defendant is aware to establish a § 7212(a) violation.

This circuit has not addressed the scope of § 7212(a) since the Supreme Court's holding in *Aguilar*, but its holdings are nevertheless consistent with the recent developments in the law. Indeed, it has never affirmed a conviction under § 7212(a) where there was no pending investigation or proceeding of which defendant was aware and defendant was not involved in the filing of false tax forms. *See United States v. Williams*, 644 F.2d 696, 701 (8th Cir. 1981) (conviction affirmed where defendant "physically assisted the willfully false filings" of co-defendants' false W-4 forms); *Dykstra*, 991 F.2d at 451-52 (conviction affirmed where IRS proceedings were pending against defendant who had failed to pay taxes from 1977-1980 and defendant filed false forms with the IRS to harass "several internal revenue officials, a U.S. Marshall, two federal district court judges and many other individuals who played a part in the

tax assessment, levy and collection process"); *United States v. Yagow*, 953 F.2d 423, 424-27 (8th Cir. 1992) (conviction affirmed where defendant "sent bogus bills and IRS forms to [harass] more than 100 people" who had been involved with the liquidation of his property in bankruptcy); *United States v. Rosnow*, 977 F.2d 399, 402-03 (8th Cir. 1992) (convictions affirmed without discussion where defendants submitted false IRS forms to harass individuals involved in repossessing defendants' property after default on various loans).

Under the current state of the law, to allege a violation of § 7212(a), the Government must allege that there is a pending investigation or proceeding of which defendant is aware. There is no such allegation in counts 17 to 22. There is an exception to this general rule where the action directly violates the internal revenue laws, such as the filing of false tax forms, but there is no allegation of this either. The instructions to send money offshore in counts 17 to 22 are similar to the conduct in *Kassouf* that was found insufficient to satisfy a § 7201(a) violation where defendant, among other things, transferred funds between bank accounts before making expenditures. 144 F.3d 952. Unlike the filing of false tax forms in other cases where a § 7212(a) conviction has been affirmed without the existence of pending proceedings, the instructions in counts 17 to 22 do not directly violate the internal revenue laws.

Even if this court rejects the development of the law regarding how the omnibus clause of § 7212(a) should be interpreted, the allegations do not establish a violation of 26 U.S.C. § 7212 under the historical view that "corruptly" means "an effort to secure an unlawful advantage or benefit." There is no indication in counts 14-16 of how instructing persons to send money to a third party assists in securing an unlawful advantage or benefit. In fact, the indictment leaves it entirely to speculation how instructing persons to send money to third parties interferes with the administration of the internal revenue laws.

The Eighth Circuit has never extended the scope of § 7212(a) to cover activity like that alleged in counts 17 to 22 that so speculatively relates to the administration of the internal revenue laws, and under the current constricting of the scope of obstruction of justice statutes, it would find little support for doing so in this case, especially since, for the reasons set forth above, no excise tax is due.

CONCLUSION

For all the above reasons, Counts 14 to 22 must be dismissed.

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