UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. S1-4:06CR00337 CEJ/MLM**
v.	)	
	)	
BETONSPORTS PLC, et al.,	)	
	)	
Defendants.	)	
	)	

GOVERNMENT'S RESPONSE TO DEFENDANT GARY KAPLAN'S MOTION TO DISMISS TAX COUNTS FOR LACK OF VENUE

The United States, through counsel undersigned, hereby responds to defendant Gary Kaplan's Motion to Dismiss Tax Counts for Lack of Venue (Doc. #458).

INTRODUCTION

Defendant Gary Kaplan contends that Counts 14-22, all of which charge tax offenses, should be dismissed for lack of proper venue in the Eastern District of Missouri. Counts 14-16 charge that Kaplan attempted to evade and defeat the federal wagering excise tax which was due and owing on wagers accepted by companies that he controlled during the time periods set forth in these counts, in violation of 26 U.S.C. § 7201. Counts 17-22 charge that Kaplan corruptly obstructed and impeded and endeavored to obstruct and impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a) and 18 U.S.C. § 2.

As will be shown below, although a defendant has the right to be tried in the proper venue, a count in an indictment is not required to allege facts which establish why venue is appropriate for that count. Accordingly, an indictment cannot be dismissed for improper venue unless it is clear from the face of the indictment that venue can never be proper in the district where the charges were brought.

Moreover, each of the tax evasion and obstruction counts state that venue for these crimes was in the Eastern District of Missouri and elsewhere. Since the allegations in the indictment must be taken as true for purposes of determining a motion to dismiss, there is no basis for dismissing Counts 14-22 at this time because any determination to the contrary would require a trial on the merits which is not appropriate at this stage of the proceedings.

ARGUMENT

I. KAPLAN'S MOTION TO DISMISS THE TAX COUNTS OF THE INDICTMENT IS PREMATURE BECAUSE EACH COUNT STATES THAT VENUE IS PROPER IN THE EASTERN DISTRICT OF MISSOURI AND BECAUSE A DETERMINATION OF PROPER VENUE MUST BE MADE AT TRIAL SINCE NO DEFECT AS TO VENUE IS APPARENT FROM THE FACE OF THE INDICTMENT

Kaplan's motion to dismiss Counts 14-22 of the indictment for improper venue was brought pursuant to Rule 12 of the Federal Rules of Criminal Procedure. Rule 12(b)(2) provides that a party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

In deciding a pretrial motion for dismiss for improper venue, the court may consider only the indictment, and all of the allegations must be taken as true. United States v. Mendoza, 108 F.3d 1155, 1156 (9th Cir.), cert. denied, 522 U.S. 938 (1997); United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996); United States v. Chen Biao, 93 F.Supp.2d 1042, 1044 (S.D.Cal. 1999).

The Eighth Circuit has held that when the lack of proper venue is apparent on the face of the indictment, venue objections are waived if not raised prior to trial. United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979). In Black Cloud, the indictment alleged that the defendant, a convicted felon, received a firearm in North Dakota. As a result, the Eighth Circuit held that venue was apparent from the face of the indictment and a motion to dismiss for

improper venue did not need to be raised by a pretrial motion, but rather, could be raised at the close of the evidence. Id. at 272. The Eighth Circuit said:

> Where lack of venue is apparent on the face of the indictment, venue objections are waived if not made prior to trial....However, when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the government rests its case, the objection is timely if made at the close of the evidence.

Id. at 272.

Similarly, in United States v. Netz, 758 F.2d 1308, 1311-12 (8th Cir. 1979), the indictment charged the defendant with importing cocaine into the Western District of Missouri. Once again, the Eighth Circuit held that when venue is apparent from the face of an indictment, the defendant did not have notice of a defect and need not have raised the issue in a pretrial motion.

Two examples of situations where improper venue was apparent from the face of the indictment are the Supreme Court cases which Kaplan cites in his motion to dismiss. In United States v. Cabrales, 524 U.S. 1, 6-8 (1998), the Supreme Court upheld the dismissal of a charge of money laundering under 18 U.S.C. §§ 1956(a)(1)(B)(ii) and 1957, which was brought in the Western District of Missouri, because it was apparent from the face of the indictment that all of the money laundering activity occurred in Florida, not withstanding the fact that the specified unlawful activity which generated the laundered funds occurred in Missouri.

Similarly, in United States v. Johnson, 323 U.S. 273, 277-78 (1944), the Supreme Court affirmed a dismissal of an information which charged using the mails to bring dentures into a state where the person who made the cast thereof was not licensed to practice dentistry. The Supreme Court held that the crime was completed when the sender "used" the mails at the place

of shipment, and, as a result, venue was not proper at the location of the recipient.

In both Cabrales and Johnson, it was clear that venue was not proper simply from the face of the charging documents. However, Counts 14-22 each allege that Kaplan's wrongful conduct occurred in the Eastern District of Missouri. Kaplan cannot contend otherwise at this stage of the proceedings because that would require a trial on the merits of the case. There is nothing on the face of Counts 14-22 which would provide any basis for holding as a matter of law at this time that venue is not proper in the Eastern District of Missouri as alleged in these Counts.

The government intends to prove at trial that venue is proper in the Eastern District of Missouri for Counts 14-22.[1] As a result, Kaplan's motion to dismiss Counts 14-22 for improper venue is premature because a resolution of this issue cannot be made until after the government presents its evidence at trial as to whether venue for these counts is proper in the Eastern District of Missouri.

II. COUNTS 14-22 SHOULD NOT BE DISMISSED FOR IMPROPER VENUE BECAUSE AN INDICTMENT IS NOT REQUIRED TO STATE THE FACTS WHICH ESTABLISH WHY VENUE IS APPROPRIATE IN A PARTICULAR DISTRICT

Kaplan also contends that Counts 14-22 should be dismissed because those counts do not allege facts which show that the charged offenses occurred in the Eastern District of Missouri.

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[1] Kaplan suggests that venue for the tax evasion offenses (Counts 14-16) lies in Ohio because wagering excise tax returns are to be mailed to Cincinnati, Ohio. One could imagine Kaplan's displeasure if he was forced to face trial on the tax evasion charges in Ohio, and on the remaining counts in Missouri. He almost certainly would have filed a motion to consolidate all charges in one district, rather than having to face charges in two different locations. The government brought all of the charges in the superseding indictment in one court so that Kaplan would not have to deal with contemporaneous criminal cases in multiple jurisdictions.

In making this argument, Kaplan misunderstands the need for proof of proper venue at a trial, which the government recognizes is a constitutional imperative, with the need for an indictment to state the facts which establish why venue is appropriate in a particular district. However, as will be shown below, there is no requirement that the facts which establish why venue is appropriate in a particular district must be alleged in an indictment.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure sets forth what must be alleged in an indictment, in relevant part, as follows:

> **(1) In General.** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated....

Although Rule 7(c)(1) mandates that an indictment or information state the essential facts which constitute the offense, there is no requirement that venue itself or the facts upon which proof of venue will be established at trial must be alleged in the indictment. In United States v. Votteller, 544 F.2d 1355, 1361 (6th Cir. 1976), the defendants were charged with various federal gambling offenses. One of the defendants contended that the count of the indictment which charged him with violating 18 U.S.C. § 1955 was defective for failure to allege venue. The Sixth Circuit disagreed, noting that Rule 7(c)(1) does not require venue to be alleged in the indictment.

The court in Votteller cited its previous decision in United States v. Branan, 457 F.2d 1062, 1065-66 (6th Cir. 1976), in which two defendants objected that certain counts of the indictment failed to allege where the offenses were committed. The Sixth Circuit noted that a

person has an absolute right under the Constitution to be tried in the location where the crime is alleged to have been committed and that a conviction can be reversed when the government failed to prove venue.

However, in rejecting the defendants' contention that the failure of the indictment to allege proper venue was a basis for reversing their convictions, the court in Branan said that, "[t]he necessity for proof of venue does not, however, require an allegation of venue in the indictment itself." Id. at 1065. In support of its holding, the Sixth Circuit in Branan relied upon the Eighth Circuit's decision in Hemphill v. United States, 392 F.2d 45, 47 (8th Cir. 1968), in which the court said, [a]llegations of ... venue are no more essential elements of an indictment than the name of a purchaser of narcotics." Id. at 1066-67.

The leading case on the issue of pleading venue in an indictment is Carbo v. United States, 314 F.2d 718, 733 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). In Carbo, the defendants contended that certain substantive counts which alleged that the defendants engaged in threatening communications failed to state an offense because these counts did not contain any allegation regarding venue.

The Ninth Circuit rejected this argument and held that an indictment does not require a statement of venue, as follows:

> Rule 7(c) does not require venue to be pleaded. Since it is waivable, it is not an essential fact constituting the offense charged. Defendants have the right to be tried in the proper forum, not the right to be charged with the proper venue.

Id. at 733.

In United States v. Arteaga-Limones, 529 F.2d 1183, 1188 (5th Cir.), cert. denied, 429 U.S. 920 (1976), the court relied on Carbo in rejecting a contention that a conviction should be

overturned because the indictment failed to allege the district where the offense was committed. According to the Fifth Circuit:

> Defendants had the right to be tried in the district and division where the offense was committed, not the right to be *told* they would be tried there. (emphasis in original)

Id. at 1188.

Carbo and Branan were relied upon by the First Circuit in United States v. Honneus, 508 F.2d 566, 5708 (1st Cir. 1974), cert. denied, 421 U.S.948 (1975), where the court rejected a contention that the indictment was defective for failure to allege where the offense took place. In Honneus, the court said that it was well established that an indictment is not legally sufficient for failure to include an allegation regarding venue.

An attempt to dismiss an indictment for failure to allege venue was rejected in United States v. Weishaupt, 167 F.Supp. 211, 212-13 (E.D.N.Y. 1958). In Weishaupt, the defendants argued that one count of the indictment should be rejected for failure to state the venue of the crime. This contention was rejected, as follows:

> There is no merit in the defendant's claim that Count 5 of the indictment is defective because of its failure to state the venue of the alleged crime. Rule 7(c) of the Federal Rules of Criminal Procedure prescribes the "Nature and Contents" of an indictment. It neither expressly nor impliedly provides that the venue of the alleged offense be stated. It requires, in pertinent part, that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ... It need not contain ... any other matter not necessary to such statement." Even an error in or the omission of the statute or regulation alleged to have been violated, provision for the citation of which is made in the Rule, is not ground for the dismissal of the indictment, except for reasons not here relevant.

Id. at 212.

Similarly, Counts 14-22, which allege tax evasion and obstruction of the due

administration of the Internal Revenue laws, should not be dismissed for failure to allege venue. Although not required to do so by Rule 7(c)(1) of the Federal Rules of Criminal Procedure, the indictment states that each of these counts occurred in the Eastern District of Missouri and elsewhere.

Venue for tax evasion charges, in violation of 26 U.S.C. § 7201, is proper in any district where the defendant engaged in an affirmative act with a tax evasion motive. United States v. Humphreys, 982 F.2d 254, 260 (8th Cir.1992), cert.denied, 510 U.S. 814 (1993); United States v. Marchant, 774 F.2d 888, 891 (8th Cir.1985), cert.denied, 475 U.S. 1012 (1986); United States v. Slutsky, 487 F.2d 832, 839, cert.denied, 416 U.S. 937 (1986); United States v. Stein, 429 F.Supp.2d 633, 643 (S.D.N.Y. 2006); United States v. Strawberry, 892 F.Supp. 519, 521 (S.D.N.Y. 1995).

Counts 14-16 each allege that Kaplan committed an affirmative act of evasion by causing and directing that wagering funds be sent out of the United States.[2] This direction had the effect of removing funds from the United States which could have been used for the payment of the validly imposed federal wagering excise taxes on wagers which Kaplan's companies accepted from persons located in the United States. The government will prove at trial that persons who were located in the Eastern District of Missouri were directed to send money to third persons located outside of the United States in order to gamble with companies which Kaplan controlled. Kaplan's actions in causing individuals located in the Eastern District of Missouri to send money

[2] In its response to Kaplan's motion to dismiss Counts 14-22 (Doc. #___), the government provided the court with a basis to reject Kaplan's contention that his direction to gamblers to send money outside of the United States did not constitute an affirmative act of evasion sufficient to sustain a charge of attempting to evade or defeat the federal wagering excise tax, in violation of 26 U.S.C. § 7201.

out of the country were sufficient affirmative acts of evasion to establish venue for Counts 14-16 in the Eastern District of Missouri.

Similarly, in United States v. Marsh, 144 F.3d 1229, 1242 (9th Cir. 1998), the Ninth Circuit held that in a case under 26 U.S.C. § 7212(a), the crime of endeavoring to impede the IRS is complete when the endeavor is made. According to the court in Marsh, venue is determined by the location of the endeavor to impede.

Counts 17-22 of the indictment allege that Kaplan directed that money for opening and funding sports wagering accounts be directed to third party recipients who were located outside of the United States. The government will prove at trial that all the persons referred to in these counts whom Kaplan directed to send money for gambling purposes out of the country were located in the Eastern District of Missouri. Once again, Kaplan's actions in directing individuals who were located in the Eastern District of Missouri to send money out of the United States which should have been used for the payment of the validly imposed federal wagering excise tax constituted sufficient acts intended to obstruct and impede the administration of the Internal Revenue laws in order to establish venue for Counts 17-22 in the Eastern District of Missouri.

CONCLUSION

Although there is no requirement that venue be alleged in an indictment, nevertheless Counts 14-22 of the indictment state that venue for these counts is in the Eastern District of Missouri. Kaplan's motion to dismiss Counts 14-22 for improper venue should be overruled at this time because no defect in venue is apparent from the face of the indictment and any decision as to venue should be deferred until trial when the government will have the opportunity to present its evidence on the issue of venue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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