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 COUNTS 14-22 OF THE SUPERSEDING INDICTMENT

The United States, through counsel undersigned, hereby responds to defendant Gary Kaplan's Motion to Dismiss Counts 14 to 22 of the Superseding Indictment and Incorporated Memorandum of Law (Doc. #450).

I. GARY KAPLAN IS LIABLE FOR THE WAGERING EXCISE TAX DUE ON BETS PLACED WITH THE GAMBLING ENTERPRISE

Kaplan contends that he cannot be charged in Counts 14-16 with attempting to evade and defeat the federal wagering excise tax, in violation of 26 U.S.C. § 7201. According to Kaplan, he was not responsible for paying this tax because the wagers were not either accepted in the United States, or placed by a person who was in the United States with a person who was a citizen or resident of the United States, as is required by 26 U.S.C. § 4404.

Kaplan correctly notes that an excise tax on wagers is imposed by 26 U.S.C. § 4401(a). This tax provides for a 0.2% tax on wagers which are authorized by state law, and a 2% tax on unauthorized wagers. Kaplan does not contend that the wagers at issue in this case were authorized by state law.

The territorial scope of the federal excise tax on wagering is limited by 26 U.S.C. § 4404, which states as follows:

> The tax imposed by this subchapter shall apply only to 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 of the United States.

Gary Kaplan was subject to the federal wagering excise tax in accordance with 26 U.S.C. §4404(2)(A) with respect to bets placed by persons within the United States which were placed with companies that he controlled because corporations may not be used to commit fraud on a shareholder's behalf. Kaplan cannot and does not deny that he was a citizen of the United States at all times pertinent herein, and that he owned and controlled the companies named in Counts 14-16 during the periods referred to in the superseding indictment. As a result, he was responsible for the payment of federal wagering excise taxes on wagers which were not authorized by state law that were placed by persons in the United States with companies which he controlled.

Courts have not hesitated to pierce the corporate veil to prevent a shareholder from using corporate entities to violate the law and engage in fraudulent activities. The Supreme Court recently recognized this principle in United States v. Bestfoods, 524 U.S. 51, 62 (1998), where it said:

> [T]here is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain

wrongful purposes, most notably fraud, on the shareholder's behalf.

Id. at 62.

The Supreme Court in Bestfoods cited two of its prior opinions in support of this bedrock principle of corporate law. In Anderson v. Abbott, 321 U.S. 349, 362 (1944), the Supreme Court said:

> [T]here are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied. Mr. Chief Judge Cardozo stated that a surrender of that principle of limited liability would be made "when the sacrifice is so essential to the end that some accepted public policy may be defended or upheld.".... The cases of fraud make up part of that exception.

Id. at 362.

The Court in Bestfoods also cited Chicago, Milwaukee & St. Paul Railway Co. v. Minneapolis Civic Association, 247 U.S. 490, 501 (1918), for the following proposition:

> While the statements of the law thus relied upon are satisfactory in the connection in which they are used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies....In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

Id. at 501.

Thus, the Supreme Court has been willing to disregard corporate forms when it is apparent that corporations are being used for wrongful purposes. Lower courts have also imposed liability on corporate shareholders when they have determined that the shareholders have used their corporations to violate or disregard the law. United States v. Sutton, 795 F.2d 1040, 1060 (TECA 1986), United States v. Arizona Fuels Corp., 638 F.2d 239, 244 (TECA

1980), cert. denied, 451 U.S. 985 (1981); United States v. Nynex, 788 F.Supp 16, 18 (D.D.C. 1992)("[T]he courts will disregard the corporate form where the notion of legal entity is used to protect fraud or crime.")

The principle of disregarding corporate entities has been applied in tax matters where shareholders have attempted to shield themselves from personal liability through the use of corporations. In Wolfe v. United States, 798 F.2d 1241, 1243-44 (9th Cir. 1986), the Ninth Circuit held that an individual can be held liable for taxes owed by a corporation under the alter ego doctrine. Under the alter ego doctrine, a corporation can have a valid business purpose and at the same time be so dominated by its owner that the corporate form could be disregarded to avoid an injustice. The court also noted that, under the law of Montana (where the corporation at issue in Wolfe was located) a corporation will be disregarded where it is used to evade a public duty, such as the payment of taxes.

Missouri courts also disregard corporate entities when a corporation is used as a means of accomplishing a fraud or committing an illegal act. State on inf. of McKittrick v. Koon, 201 S.W. 2nd 446, 455 (Mo. 1947); Mobius Management v. West Physician Search, L.L.C., 175 S.W. 2nd 186, 188 (Mo. App. E.D. 2005). This principle applies in Missouri state criminal as well as civil cases. State v. Garrette, 699 S.W. 2nd 468, 492 (Mo. App. S.D. 1985).

Similarly, in Valley Finance, Inc. v. United States, 629 F.2d 162, 171-72 (D.C. Cir. 1980), the Internal Revenue Service (IRS) seized assets of a corporation which was wholly owned by a single shareholder in order to satisfy a tax debt owned by the shareholder. The IRS seizure was based on its determination that the company was a mere alter ego of the taxpayer. In upholding the seizure, the court said:

> Courts have not hesitated to ignore the fiction of separateness and approve a piercing of the corporate veil when the corporate device frustrates clear intendment of the law....The Government's inability otherwise to satisfy legitimate tax debts clearly may form a sound basis for such disregard of corporate form.

Id. at 171-72.

Counts 14-16 of the superseding indictment allege that Kaplan owned and controlled various entities which did business in the United States, and which received taxable illegal wagers in amounts in excess of one billion dollars during each of the time periods stated in these counts. These counts also allege that Kaplan engaged in tax fraud by attempting to evade and defeat the validly imposed federal wagering excise tax imposed on this criminal gambling activity.

Gary Kaplan should not be able to evade federal wagering taxes merely by choosing to engage in his unlawful gambling business through the use of corporations. The Supreme Court and numerous lower courts have rejected attempts by wrongdoers to shield themselves from having to comply with the law by means of corporations. A corporation is a creature of the law and organized under the authority of the sovereignty in which it was chartered. Because a corporation is established by law, it should not be used as a means to violate the law.

Based on the conduct alleged in the superseding indictment, this Court should pierce the corporate veil and allow the government to prove that Kaplan attempted to evade and defeat the federal wagering excise tax imposed upon the unauthorized and illegal wagers which were accepted by corporations which he controlled.

Based on this theory, Kaplan's arguments regarding the nature of the bets and the applicability of the regulations regarding the federal wagering excise tax are irrelevant. This court should overrule Gary Kaplan's motion to dismiss Counts 14-16 on the ground that no wagering tax was due because Kaplan cannot shield himself from liability for validly imposed federal wagering excise taxes on his illegal and unauthorized wagers merely by the fact that he chose to do business through corporations.

II. THE SUPERSEDING INDICTMENT PROPERLY CHARGES KAPLAN WITH AN AFFIRMATIVE ACT OF EVASION AS REQUIRED BY THE TAX EVASION STATUTE

A. The superseding indictment charges Kaplan with "causing and directing that the wagering funds be sent outside the United States," which is a sufficient affirmative act of evasion under 26 U.S.C. § 7201

Gary Kaplan contends that Counts 14-16 of the superseding indictment do not allege an affirmative act of evasion because the act of evasion stated in each of these counts, directing that the wagering funds be sent outside of the United States, occurred before the existence of any tax deficiency.

In order to prove a charge of tax evasion under 26 U.S.C. § 7201, the government must establish three elements: the existence of a tax deficiency, willfulness, and an affirmative act of evasion or attempted evasion of the tax. Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Willis, 277 F.3d 1026, 1030 (8th Cir. 2002); United States v. Brooks, 174 F.3d 950, 954 (8th Cir. 2002).

Kaplan cites only one case in support of his contention that conduct which occurred before the imposition of a tax deficiency cannot constitute an affirmative act of evasion, United States v. Romano, 938 F.2d 1569 (2nd Cir. 2002). In Romano, the defendant attempted to travel from the United States to Canada with $359,500 in cash in his possession on November 17, 1983. When he was questioned by an American law enforcement official after Canada denied him entrance, the defendant gave evasive answers as to the amount of money in his possession. The money subsequently was seized because the defendant failed to complete the proper monetary declaration form before going to Canada. The defendant also failed to file an income tax return to report his income during 1983. The defendant and his wife were eventually convicted of income tax evasion under 26 U.S.C. § 7201 for the calender year 1983 "by concealing and attempting to conceal from the Internal Revenue Service the nature and extent of their income and the location thereof." Id. at 1571. On appeal, the Second Circuit reversed the defendant's conviction because none of the acts of evasion found by the district court, either taken alone, or in combination with each other, established an attempt to evade taxes.

The first act of evasion which the district court found as a basis for holding that the defendant was guilty of tax evasion was that the defendant attempted to transport the money to Canada without reporting it. According to the Second Circuit, this action could not be an affirmative act of evasion sufficient to support a conviction under 26 U.S.C. §7201 because the defendant was under no obligation to disclose the amount of money to the IRS when he was trying to take the money to Canada. The Second Circuit also rejected the district court's determination that the defendant's evasive answers when he was questioned at the border, and his failure to file an income tax return, constituted affirmative acts of evasion.

After holding that none of these actions were acts of evasion, the Second Circuit analyzed whether any of these acts in combination with each other could establish the affirmative act of evasion element of the offense. The court said that the defendant could not have been evading taxes when he attempted to leave the country with a large amount of currency because his tax year was still open, and, at that time, he did not owe any income taxes to the IRS.

Gary Kaplan is attempting to analogize the situation in Romano to the tax charges contained in Counts 14-16, but the circumstances are different. In Romano, the court rejected a finding that the act of taking money out of the country without reporting it was an act of evasion because there was no obligation to report this money to the IRS at the time the conduct occurred.

On the other hand, in the instant case, the specific affirmative act of evasion which is alleged in Counts 14-16 is the defendant's "causing and directing that the wagering funds be sent outside the United States." There is nothing in this specific act that involves reporting to the IRS or anyone else. As a result, Romano is distinguishable from Kaplan's situation. The fact that there may have been no wagering tax deficiency when Kaplan directed that wagering funds be sent out of the United States is irrelevant because, unlike in Romano, Kaplan is not being accused of failing to report to the IRS.

In addition, in contrast to Romano, where the alleged acts of evasion were not directly connected with the tax which the defendant was accused of evading, in the instant case, Kaplan's direction that the wagering funds be sent out of the United States was an integral part of his attempt to evade and defeat the federal wagering excise tax. The requirement that gamblers send money to foreign locations had the effect of making it impossible for the IRS to collect the lawfully imposed federal wagering excise taxes, and therefore, constituted an affirmative act of evasion within the meaning of 26 U.S.C. § 7201.

B. There is no requirement that the affirmative act of evasion occur prior to the determination of the tax deficiency

Moreover, Kaplan is incorrect as a matter of law in contending that an act of evasion must occur after the imposition of tax liability under 26 U.S.C. § 7201. In United States v. King, 126 F.3d 987 (7th Cir. 1997), the defendant provided false W-4 forms to his employer during the years 1983, 1984 and 1987 in which he claimed that he was exempt from withholding. The defendant did not file tax returns for any year after 1983. He was eventually charged with income tax evasion under 26 U.S.C. § 7201 for the years 1989 through 1993. The affirmative acts of evasion which were alleged for each of those years were the false W-4 forms which the defendant submitted to his employer during 1983, 1984 and 1987.

On appeal, the defendant in King contended that the affirmative acts in the indictment had to have been committed at or about the time that the offense was alleged to have occurred. The Seventh Circuit rejected this argument, and held that the fact that the W-4 forms were presented many years prior to the dates in which the tax deficiencies at issue were imposed did not preclude the finding that the submission of these forms constituted affirmative acts of evasion. The court said:

> The indictment properly alleged that King's offenses occurred on the due dates of his returns for the prosecution years. A § 7201 offense is not complete until a tax deficiency exists, and a deficiency will not arise until the due date of the return....And, as we will discuss below, the act of filing and maintaining on file a false Form W-4 carries over to future years if the defendant files with the requisite intent to evade taxes.

Id. at 992.

After distinguishing Romano, the Seventh Circuit accepted the government's argument that the filing of a false W-4 form could constitute an affirmative act of evasion for future tax years if the government could prove that the defendant submitted the form with the requisite intent to defraud. The court concluded, as follows:

> In short, the submission of a false Form W-4 constitutes an affirmative act of tax evasion for later years where the taxpayer intended to escape withholding for those years.

Id. at 993. The Seventh Circuit reiterated its holding, as follows:

> As we have already made clear, it is not necessary for an affirmative act of evasion to have occurred on the offense date alleged in the indictment in order to obtain a conviction under § 7201.

Id. at 995.

Similarly, in United States v. Jungles, 903 F.2d 468 (7th Cir. 1990), in 1980, the defendant, who had been employed as a salesman in a family business for 15 years, decided that he would no longer pay taxes, and submitted an "Independent Contractor Agreement" to the company for whom he worked. This agreement provided that the company would no longer withhold taxes from the defendant's wages. The defendant was subsequently charged with evading income taxes for the years 1981-1986.

On appeal, the defendant in Jungles contended that a lawful act such as entering into an independent contractor agreement with his employer could not serve as an affirmative act of evasion in support of a conviction under 26 U.S.C. § 7201. The Seventh Circuit disagreed, as it said:

> Under the facts which are presented for our review, a rational jury could reasonably conclude that Jungles' decision to enter into the "independent contractor agreement" was motivated by his desire to evade the taxes which he owed. Other evidence presented by the government at trial certainly supported that conclusion. Accordingly, we find that the evidence with regard to this "affirmative act" was sufficient to support the conviction.

Id. at 474.

In Jungles as in King, there was no question that the affirmative acts of evasion which established the § 7201 charges occurred much earlier than the dates when the tax deficiencies were determined for the tax years in each of those charges. Nevertheless, the fact that the tax deficiency had not been determined at the time of the affirmative act of evasion did not preclude a conviction under § 7201.

This Court should overrule Kaplan's motion to dismiss Counts 14-16 of the superseding indictment on the ground that these counts failed to state an affirmative act of evasion. Each of the counts alleged that Kaplan attempted to evade and defeat the federal wagering excise tax "by causing and directing that the wagering funds be sent outside the United States." This affirmative act of evasion is sufficient to prove tax evasion under 26 U.S.C. § 7201 because there is no requirement that a tax deficiency exist prior to the date of the affirmative act of evasion.

III. COUNTS 17 THROUGH 22 STATE AN OFFENSE UNDER 26 U.S.C. § 7212(a)

Kaplan contends that Counts 17-22 of the superseding indictment which charge him with corruptly obstructing the internal revenue laws, in violation of 26 U.S.C. § 7212(a) (hereinafter "§ 7212(a)") should be dismissed. The basis of each of these counts is that Kaplan directed employees of bookmaking operations to direct gamblers to send money for opening and funding sports wagering accounts to third parties who were located outside of the United States, in order to obstruct and defeat the administration of the tax laws.

Gary Kaplan contends that these counts should be dismissed because they do not allege that he was aware that there was a pending IRS proceeding or investigation at the time that the instructions were given, and that merely directing persons to send money to third persons does not violate the internal revenue laws. However, as will be shown below, a prosecution under § 7212(a) does not require that the defendant be aware of a pending tax proceeding or investigation at the time of the obstructive conduct, and Kaplan's actions in directing his customers to send money out of the country had the effect of obstructing the properly imposed federal wagering excise tax on his illegal gambling activity.

The relevant portion of § 7212(a) is as follows:

> 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 or 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....

Kaplan was charged under the second clause of § 7212(a), which begins, "or in any other way corruptly...."

A. A prosecution under 26 U.S.C. § 7212(a) does not require that the defendant be aware of an ongoing proceeding or investigation under the Internal Revenue Code

The basis of Kaplan's argument is that in United States v. Aguilar, 515 U.S. 593, 598-600 (1995), the Supreme Court imposed a requirement in a case involving one of the federal obstruction of justice statutes, 18 U.S.C. § 1503, hereinafter referred to as "§ 1503," that the government prove that the defendant have knowledge that his actions are likely to affect an ongoing judicial or grand jury proceeding in order to obtain a conviction under that statute. The relevant portion of 18 U.S.C. § 1503 is as follows:

> (a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be punished as provided in subdivision (b).

Kaplan then relies upon the Sixth Circuit's majority opinion in United States v. Kassouf, 144 F.3d 953 (6^{th} Cir. 1998), which extended the reasoning of the Supreme Court in Aguilar to a prosecution under 26 U.S.C. §7212(a). The defendant in Kassouf was charged with violating § 7212(a) by failing to keep records necessary to determine the tax consequences of business transactions, and by transferring funds between bank accounts, thus making it difficult for the IRS to discover and trace his activities. In addition, the defendant was accused of affirmatively misleading the IRS by filing tax returns which failed to disclose these transactions, the bank accounts and other assets involved in the transactions, as well as the interest earned on those accounts.

In upholding the dismissal of the § 7212(a) charge, the majority opinion in Kassouf said that if it would uphold the indictment in that case, it would be criminalizing conduct which was, in fact, legal, as follows:

> 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.

Id. at 957.

However, the situation is completely different in the instant case. There was nothing legal about the gambling activity in which Kaplan engaged in the United States. Counts 17 through 22 allege that the gambling businesses referred to in those counts were unlawful. Kaplan's actions in directing his customers to send money to third persons who were located outside of the United States were intended, at least in part, to make it impossible for the IRS to collect the validly imposed federal wagering excise tax on his illegal gambling activity with persons located in the United States.

After noting that § 1503 has "almost identical language" as § 7212(a), the majority opinion in Kassouf required the government to allege and prove the existence of a pending IRS action of which the defendant was aware in order to obtain a conviction under §7212(a). Id. at 956. However, the statutory language of § 1503 differs from § 7212(a) in one crucial respect. In § 1503, the concern is whether the defendant's actions influenced, obstructed or impeded the "due administration of justice." On the other hand, § 7212(a) deals with efforts to obstruct or impede the "due administration of this title [Title 26]."

This distinction between the two statutes is reflected in their ultimate purposes. The objective of § 1503 is the prevention of efforts to obstruct "the due administration of justice." Justice is administered by means of judicial and grand jury proceedings carried out under the supervision of courts. On the other hand, the objective of § 7212(a) is the prevention of efforts to obstruct the "due administration of this title" [Title 26]. As has been recognized in a number of court decisions which will be discussed below, the administration of Title 26, which contains the internal revenue laws, involves far more than audits, investigations and administrative and judicial proceedings. It comprises the innumerable activities which constitute the means by which revenue is generated to finance the operations of the United States Government. Since the administration of Title 26 is not strictly limited to enforcement matters, it is illogical to limit the scope of § 7212(a) to situations involving investigations or proceedings of which the defendant was aware.

This distinction between the scope of § 7212(a) and § 1503 was emphasized in a district court opinion which rejected the reasoning of the lower court opinion in Kassouf that was subsequently affirmed by the Sixth Circuit.[1] In United States v. Armstrong, 974 F.Supp. 528 (W.D. Va. 1997), a National Basketball Association (NBA) referee received first class or full price coach airline tickets which he "down graded" to lower cost tickets in order to travel to games. The defendant retained the difference in price which constituted income for tax purposes. Although the referee flew at the most economical fares available, he caused a travel agency to issue him "bogus" first class or full price coach ticket stubs, receipts and invoices

[1] The citation of the district court opinion in Kassouf is United States v. Kassouf, 948 F.Supp. 36 (N.D. Ohio 1996).

which he submitted to the NBA as proof of his actual travel expenses. This had the effect of substantially understating the defendant's income and causing the NBA to fail to withhold the proper amount of taxes. The defendant was eventually charged with obstructing and impeding the due administration of the tax laws, in violation of § 7212(a).

Relying on the district court opinion in Kassouf, which drew an analogy between § 7212(a) and § 1503, Id. at 37-38, the defendant in Armstrong contended that § 7212(a) is limited to conduct which endeavors to obstruct or impede a pending audit or investigation known to the defendant. The court in Armstrong stated that the district court opinion in Kassouf, citing Aguilar, had noted that statutes such as §1503 had long been construed to require the existence of a judicial proceeding of which the defendant had notice as a precondition to the commission of the offense. 948 F.Supp. at 37.

However, the court in Armstrong rejected an analogy between § 7212(a) and § 1503 because the statutes are aimed at preventing different harms, as follows:

> This court disagrees with the district court in Kassouf that § 1503 is analogous to § 7212(a). While most Americans do not have judicial proceedings pending against them at any given moment, each year, we are required to file federal income tax returns and forms, and pay any taxes due to the IRS. Since the filing of income tax returns and forms and the collection of taxes is part of the administration of the tax laws, and such activities can be obstructed or impeded, the court does not believe that § 7212(a) is limited to corrupt conduct which endeavors to obstruct or impede a pending IRS audit or investigation known to the defendant.

Id. at 536, fn. 14.

The court in Armstrong also noted that a number of appellate decisions, such as United States v. Hanson, 2 F.3d 942 (9th Cir. 1993); United States v. Mitchell, 985 F.2d 1275 (4th Cir. 1993); United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004

(1992), had all affirmed convictions under § 7212(a) for conduct that did not involve a pending IRS audit or investigation. The court in Armstrong concluded as follows:

> The court can think of no other reason for defendant to submit false travel receipts and invoices to the NBA other than a corrupt intent to cause the NBA to under report his income to the IRS and withhold insufficient taxes. Such conduct is clearly intended to obstruct or impede the due administration of the internal revenue laws, and therefore the allegations in Count I are clearly sufficient to support a charge under § 7212(a).

Id. at 537-38.

Similarly, Counts 17 through 22 allege that Kaplan directed that employees of various unlawful sports books instruct their customers to send money for opening and funding sports wagering accounts to third parties who were located outside of the United States. This conduct had the effect of removing money which should have been available for the payment of validly imposed federal wagering excise taxes from the United States, thereby making it impossible for the IRS to collect the taxes due and owing on Kaplan's unlawful wagering activity. As a result, the superseding indictment properly charges Kaplan with violating 26 U.S.C. § 7212(a).

The reasoning of the district court opinion in Kassouf was also rejected in United States v. Toliver, 972 F.Supp. 1030 (W.D. Va. 1997), another case involving an NBA referee who submitted false travel receipts. In Toliver, the court noted the district court opinion in Kassouf but rejected its holding, as it said:

> I do not find the fact that Toliver's conduct was not illegal per se or that it occurred prior to the filing of false returns dispositive of the issue of section 7212(a)'s applicability. To form the basis of an obstruction charge, conduct need not be either illegal or successful.

Id. at 1035.

The dissenting opinion in Kassouf also recognized the distinction between § 1503 and §

7212(a). According to the dissent, § 1503 predates § 7212(a) by many years. As a result, if Congress would have wanted § 7212(a) to be interpreted in the same manner as § 1503, it would have used identical language in § 7212(a). However, the dissent states:

> Section 1503 was in effect long before § 7212(a) and the due "due administration of justice" wording of § 1503 has consistently been construed to require affected judicial proceedings. It is only logical, therefore, to conclude that if Congress wished 26 U.S.C. § 7212(a) to be interpreted in an identical fashion, identical language would have been inserted into that statute. In its wisdom, our nation's legislative body chose, however, to distinguish the requirement of the statutes by use of broader language in § 7212(a). Pursuant to those provisions, it is not only the administration of "justice" that is protected from undue obstruction, but the very administration of the myriad duties performed under the Title.

Id. at 960. The dissent concluded as follows:

> Although no federal court of appeals appears to have addressed directly the precise issue now before us, every sister circuit that has examined the reach of 26 U.S.C. § 7212(a) has accepted the principle that the provisions of that subsection do not require the government to prove the existence of an ongoing or pending tax investigation or proceeding....I see no reason for us now to rush into the breach to create an analytical split on this question.

Id. at 960-61.

Moreover, the Sixth Circuit itself has limited Kassouf to its precise holding and facts. In United States v. Bowman, 173 F.3d 595, 600 (6th Cir. 1999), the Sixth Circuit held that §7212(a) applied to a scheme whereby the defendant sent false 1099 and 1096 forms to the IRS in an effort to cause the IRS to investigate his creditors. The court in Bowman noted that the filing of false tax forms was not legal when undertaken. Similarly, Kaplan's actions in causing gamblers in the United States to engage in illegal sports wagering also violated numerous federal and state gambling statutes. The effect of Kaplan's direction that the gambling funds be sent to persons outside of the United States was to make it impossible for the IRS to collect the lawfully imposed federal wagering excise tax on these bets.

The Sixth Circuit in Bowman also cited the majority opinion in Kassouf which noted that Title 26 encompasses a vast range of activities of the Internal Revenue Code, as follows:

> Such activities include "mailing out internal revenue forms; answering taxpayers' inquiries; receiving, processing, recording and maintaining tax records, payments and other taxpayers' compliance with their obligations."

Bowman, 173 F.3d at 600.

Unlike the investigations and prosecutions that comprise the "due administration of justice," protected by § 1503, the activities which are part of the administration of Title 26, as described in Kassouf and Bowman, go far beyond matters which may ultimately wind up in court or adversarial proceedings, and include the purely administrative functions of the IRS. As the court in Armstrong recognized and as the Sixth Circuit in Bowman ultimately concluded, a restriction of § 7212(a) to situations where there is a pending proceeding or investigation of which the defendant is aware is an unwarranted limitation of the statute. See also United States v. Stein, 429 F.Supp. 2d 633, 638 (S.D.N.Y. 2006) (indictment under § 7212(a) does not require nexus linking defendant's conduct to pending IRS investigation or defendant's knowledge of such investigation).

Defendant Gary Kaplan relies upon the Eighth Circuit's opinion in United States v. Dykstra, 991 F.2d 450 (8th Cir. 1993), in an effort to inject a pending proceeding requirement into § 7212(a). In Dykstra, the defendant was convicted of violating § 7212(a) by sending false Form 1099s to various officials who played a role in collecting federal taxes from him. The Eighth Circuit noted that in interpreting § 7212(a), courts have often resorted to the obstruction of justice provision of Title 18. Id. at 454.

However, it is important to note the context in which this statement in Dykstra arose.

The specific issue which was being decided by the Eighth Circuit in Dykstra was whether the applicable sentencing guideline was the obstruction of justice guideline or the guideline for obstructing or impeding officers. All that the Eighth Circuit held in Dykstra was that a conviction under § 7212(a) was similar to a conviction for obstruction of justice under Title 18 for Sentencing Guidelines purposes.

Kaplan also notes that the Eighth Circuit in Dykstra compared § 7212(a) to 18 U.S.C. § 1505 (hereinafter referred to as "§ 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 department or agency of the United States." (emphasis added)

However, a comparison of § 1505 and § 7212(a) supports the government's position that a pending proceeding or investigation is not a necessary element of § 7212(a). In § 1505, the statute specifically requires that there be a "pending proceeding" before a federal department or agency. It is apparent that when Congress wanted to impose a "pending proceeding" requirement as an element of a federal obstruction of justice statute, it certainly knew how to do so.

B. There is no requirement in a prosecution under 26 U.S.C. § 7212(a) that the act which is alleged to have obstructed or impeded the due administration of the internal revenue laws be illegal, per se

Kaplan also argues that his direction to his employees to direct their gambling customers to send money to third parties located outside of the United States did not directly violate the internal revenue laws, and therefore cannot be the subject of a prosecution under § 7212(a). This assertion has been directly refuted in a number of cases which have held that actions in violation of § 7212(a) need not be illegal in and of themselves.

For example, in United States v. Popkin, 943 F.2d 1535 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992), the Fifth Circuit rejected a contention that the term "corruptly," as used in § 7212(a), requires that the act which is alleged to violate the statute be, in and of itself, corrupt, as it held that an otherwise lawful act could violate the statute by being carried out for a corrupt purpose or in a corrupt manner.

Relying on United States v. Reeves, 752 F.2d 995, 998-1001 (5th Cir.), cert. denied, 474 U.S. 834 (1985), the court in Popkin held that "corruptly" means "those acts done with the intent to secure an unlawful benefit either for oneself or for another." Id. at 1540. The Fifth Circuit in Popkin concluded:

> We agree with the definition adopted in Reeves. It comports with our view that "corruptly" was used in § 7212(a), as in the general obstruction of justice statute, to prohibit all activities that seek to thwart the efforts of government officers and employees in executing the laws enacted by Congress.

Id. at 1540. Thus, the focus under § 7212(a) is not whether or not the act which is alleged to have been in violation of § 7212(a) was itself illegal, but whether or not this act was done with the intent to obstruct the administration of the internal revenue laws.

Other cases also reject Kaplan's contention that an act must be illegal in and of itself or in violation of the internal revenue laws to be the basis of a prosecution under § 7212(a). In United States v. Bostian, 59 F.3d 474, 479 (4th Cir. 1995), the Fourth Circuit held that "actions need not be illegal to violate § 7212(a)." Id. at 479. See also United States v. Mitchell, 985 F.2d 1275, 1278-79 (4th Cir. 1993) (relying upon Reeves and Popkin in holding that actions need not be illegal to fall within the scope of § 7212(a)); Tolliver, at 1035 ("To form the basis of an obstruction charge, conduct need not be either illegal or successful.")

The Eighth Circuit has interpreted the term "corruptly" in the context of a § 7212(a) prosecution in a manner which is consistent with the Fifth Circuit's definition of "corruptly," from Popkin, quoted above. In Dykstra, the Eighth Circuit quoted from United States v. Yagow, 953 F.2d 423, 427 (8th Cir. 1992), another § 7212(a) prosecution which defined "corruptly" as "an effort to 'secure an unlawful advantage or benefit,' and, in particular, to secure a financial gain." 991 F.2d at 453. There is nothing in this definition of "corruptly" which requires that the act which is alleged to have obstructed the administration of the internal revenue laws be illegal, in and of itself. Rather, the focus is on whether the intent of the conduct, regardless of whether or not the conduct itself was in violation of the law, was to "secure an unlawful advantage or benefit" such as a financial gain.

In this situation, Gary Kaplan's direction to his employees to direct gamblers to send money to third persons outside of the United States fits squarely within the Eighth Circuit's definition of "corruptly" for purposes of § 7212(a). Kaplan's action had the effect of removing this money from the jurisdiction of the United States, thereby making it impossible for the IRS to collect the validly imposed federal wagering excise tax on the illegal wagers which Kaplan's companies accepted from persons located within the United States. This Court should overrule Kaplan's motion to dismiss counts 17-22 of the superseding indictment because each of those counts sufficiently allege a violation of § 7212(a).

Respectfully submitted,

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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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