UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. SI4:06CR337CEJ(MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE CONCERNING GARY KAPLAN'S MOTION TO DISMISS TAX COUNTS FOR LACK OF VENUE

This matter is before the court on defendant Gary Stephen Kaplan's Motion to Dismiss Tax Counts for Lack of Venue. [Doc. 458] The government responded. [Doc. 529] Defendant replied. [Doc. 560] In this Motion defendant moves to dismiss Counts 14-16 (tax evasion) and Counts 17-22 (interference with administration of the tax laws) of the Superseding Indictment on the ground of improper venue.[1] In a previous Report & Recommendation (Doc. 625) this court recommended that Counts 14-22 be dismissed. The district court may not agree with the court's recommendation and may order that the tax counts not be dismissed. If that should be the case, this Report & Recommendation addresses whether venue is proper in the Eastern District of Missouri.

[1] Specifically, 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.

Questions of venue in criminal cases are not merely matters of former legal procedure. They raise deep issues of public policy. United States v. Johnson, 323 U.S. 273, 276 (1944).

> The Constitution twice safeguards the defendant's venue right: Article III, § 2, cl. 3 instructs that "Trial of all Crimes. . .shall be held in the State where the said Crimes shall have been committed; the Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." Rule 18 of the Federal Rules of Criminal Procedure, providing that "prosecution shall be held in a district in which the offense was committed," echoes the constitutional demands.

United States v. Cabrales, 524 U.S. 1, 6 (1998).

The law is clear and the parties agree 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. Response (Doc. 529) at 6, Reply (Doc. 560) at 1 citing United States v. Branan, 457 F.2d 1062, 1065 (6th Cir. 1976). Further, there is no dispute that a defendant has the right to be tried in the proper forum, that is, the "right to be tried in the district and division where the offense was committed." United States v. Arteaga-Limones, 529 F.2d 1183, 1188 (5th Cir.); cert. denied, 429 U.S. 920 (1976). When an indictment charges a defendant with multiple counts, "venue must be proper with respect to each count." United States v. Novak, 443 F.3d 150, 161 (2nd Cir); cert. denied, 127 S.Ct. 525 (2006); United States v. Granados, 117 F.3d 1089, 1091 (8th Cir. 1987). Except as otherwise provided by statute, "any offense against the United States begun in one district and completed in another or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a).[2]

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[2] As to offenses not committed in *any* district, there is a specific venue provision which provides that:

> The trial of all offenses begun or committed upon the high seas, or elsewhere

Defendant wages a two-prong attack on venue in this District. First, defendant states Counts 14-22 of the Superseding Indictment do not allege any facts showing that the offense was "begun, continued or completed" within the Eastern District of Missouri. When the government responds that a count in an indictment is not required to allege facts which establish venue for that count and all that is required is that the government prove proper venue at trial, defendant replies that he is entitled to pre-trial determination of the venue issue because otherwise he cannot enforce his fundamental constitutional right except by submitting to trial here and then seeking dismissal at the close of the government's case if the government has failed in its proof of proper venue.

Working backwards through defendant's arguments, with regard to the pretrial determination of the issue, each of the tax counts in the Superseding Indictment contains the statement - - "a general preliminary qualifier" - - that the offense occurred ". . .in the Eastern District of Missouri and elsewhere. . .". In deciding a pretrial motion to 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). See also United States v. Chalmers, 474 F.Supp. 2d 555, 559 (S.D., N.Y. 2007) (When deciding a motion to

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> out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or anyone of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known, the indictment or information may be filed in the District of Columbia.

18 U.S.C. § 3238. To the extent this section is deemed to apply, venue is proper in the Eastern District of Missouri as the district to which Kaplan was first brought after his arrest.

dismiss, a court must accept all factual allegations in the indictment as true. A court should not look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for "the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment"), citing United States v. Alfonso, 143 F.3d 772, 776-77 (2nd Cir. 1998).

When an indictment specifically charges a defendant with commission of a crime in a specific location, venue is apparent on the face of the indictment and venue objections are not waived and objections are timely if made at the close of the evidence at trial. United States v. Black Cloud, 950 F.2d 270, 272 (8th Cir. 1979).

However, defendant argues that determination of this issue should not wait until after the government closes its case because under Fed.R.Crim.P. 12(b) issues that "court can determine without a trial of the general issue" may be raised by pretrial motion and decided by the court. Defendant argues this is the only way to protect his fundamental right to be tried where the alleged offense was committed. The exception to the rule is when an issue is "inextricably interwoven with the evidence about the commission of the offense itself," see United States v. Wilson, 26 F.3d 142, 159 (D.C. Cir. 1986) or "substantially founded upon and intertwined with evidence concerning the alleged offense." See United States v. Shortt Accountancy Corp., 785 F.2d 1148, 1152 (9th Cir. 1986). Although defendant argues that the venue issue "would not require a presentation of any significant quantity of evidence relevant to the question of guilt or innocence," Reply (Doc. 560) at 3, the court finds the opposite is true. The venue issue is completely and inextricably interwoven with evidence about the commission of the tax evasion and obstruction counts and thus a pretrial dismissal on venue grounds would be improper.

Counts 14-16 of the Superseding Indictment allege that defendant Kaplan willfully attempted to evade the wagering excise tax by (1) failing to make wagering excise tax returns by the last day of the month following the month the wagers were accepted, (2) failing to pay the wagering excise tax, and (3) directing that wagering funds be sent outside the United States. Failure to file a return and pay a tax are acts of omission and where a statute provides criminal penalties for the *failure* to do a particular act, venue is proper in the district in which the required act should have been done. United States v. Wray, 608 F.2d 722, 725 (8th Cir. 1979), cert. denied, 444 U.S. 1048 (1980) (citing Johnson v. United States, 351 U.S. 215 (1956)). But the indictment does not - - and could not - - allege that excise tax returns were required to be filed in the Eastern District of Missouri, for the law does not direct that such returns be filed here. Although the indictment does not allege it, it is clear from Internal Revenue Form 730, the Monthly Tax Return for Wagers, that both the return and payment are to be mailed to Cincinnati, Ohio. Accordingly, venue as to these acts lies, if anywhere, in Ohio, not in the Eastern District of Missouri.

The government further alleges that defendant Kaplan caused and directed that wagering funds be sent outside the United States. There are no allegations that persons in the Eastern District of Missouri were directed to send funds outside the United States. Each count alleges evasion of the wagering excise tax that was "due and owing" on the "taxable wagers", each count exceeding $1 billion dollars, that were "had and received" by various entities owned and operated by defendant Kaplan. None of the three tax evasion counts alleges that a single wager on which the excise tax would have been due was placed or accepted in the Eastern District of Missouri. The act of directing persons to send funds outside the United States can constitute an affirmative act of evasion if, and only if, the government can prove it was done with the requisite intent. See R&R (Doc. 625) at 14-15.

This and whether the affirmative act of evasion "continued" in the Eastern District of Missouri are issues of fact to be decided by the jury. See Black Cloud, 590 F.2d at 272 ("Whether the receipt of the firearm in question occurred in the District of North Dakota, so that venue in that district was proper, was a question of fact for the jury."). The "better practice" where venue is disputed is to submit a specific venue instruction to the jury. United States v. Netz, 758 F.2d 1308, 1312 (8th Cir. 1985).

Counts 17-22 deal with Kaplan's attempt to obstruct the due administration of the revenue laws. As with the tax evasion counts, the charged act of obstruction is that defendant Kaplan and others directed that wagering money be sent to third parties outside the United States. None of the counts allege that the persons so directed were in the Eastern District of Missouri.[3] They do not allege that defendant Kaplan did the directing -- they say that Millennium Sportsbook employees (Counts 17, 21 and 22), Gibraltar Sportsbook employees (Counts 18 and 20) and NASA International employees (Count 19) gave instructions to send money to open a wagering account to named third parties in countries outside the United States. Other than the general preliminary qualifier, ". . . in the Eastern District of Missouri and elsewhere. . .", there is no allegation of actions taken in the Eastern District of Missouri. Again, the facts establishing venue in the Eastern District of Missouri are inextricably entwined with the proof of the commission of a violation of 26 U.S.C. § 7212(a).

Because each of the tax counts (Counts 14-22) contains a statement of venue in the Eastern District of Missouri, the court cannot make a pretrial determination that venue here is improper. Although Rule 7(c)(1) mandates that an indictment or information state

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[3] Counts 17-21 allege the "individual" was in the United States. Count 22 merely alleges "an individual."

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. See United States v. Votteller, 544 F.2d 1355, 1361 (6th Cir. 1976) (Rule 7(c)(1) does not require venue to be alleged in the indictment.); United States v. Branan, 457 F.2d 1062, 1065-66 (6th Cir. 1976) ("[t]he necessity for proof of venue does not however require an allegation of venue in the indictment itself.") Significantly the Eighth Circuit has held that [a]llegations of . . .venue are no more essential elements of an indictment than the name of a purchaser" of narcotics. Hemphill v. United States, 392 F.2d 45, 47 (8th Cir. 1968).

The law is quite clear than an indictment does not require a statement of venue. For example in Carbol v. United States, 314 F.2d 718, 733 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964) the Ninth Circuit said "Rule 7(c) does not require venue to be pleaded. Since it is waiveable, 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 forum." The Fifth Circuit agrees: "Defendant 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)." Arteaga-Limones, 529 F.2d at 1188. Although not required to do so by Rule 7(c)(1) of the Federal Rules of Criminal Procedure, the Superseding Indictment in this case states that each of the tax counts occurred in the Eastern District of Missouri. The Superseding Indictment should not be dismissed at this time for lack of venue. The elements of each of the tax counts, as well as proper venue, are issues of fact which must be decided by the jury at trial.

Accordingly,

IT IS HEREBY RECOMMENDED that defendant Gary Kaplan's Motion to Dismiss Tax Counts for Lack of Venue be **DENIED**. [Doc. 458]

The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

/s/Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this 29th day of April, 2008.