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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	CR. No. S-04-435 WBS
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOSEPH BANISTER, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANT BANISTER'S POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO STRIKE PORTIONS OF COUNT I OF THE INDICTMENT

COMES NOW Defendant Joseph Banister (hereinafter "Banister"), by and through his undersigned attorney of record, and respectfully submits these points and authorities in support of his motion pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure for an order striking paragraphs 4, 5, 7, 8, 10-16, 19-27, 30, the last sentence of paragraph 6, the words "to wit: income, social security and Medicare taxes" from paragraph 9, the words "the income, social security and Medicare" from paragraphs 9a and 9b, and the word "huge" in paragraph 20 as surplusage and duplicitous of other charges.

The indictment attempts to charge both conspiracy to defraud as well as specific offense conspiracies and confuses the jury through disguising argument as statements of statutes by

referencing the title of those statutes into the statutes themselves, and mislabeling other statutes. In support of said motion, Banister makes the following showing:

INTRODUCTION

Count I of the indictment alleges at page 4, paragraph 9, a conspiracy between Banister, Walter A. Thompson (hereinafter "Thompson") and others [neither named nor indicted] to defraud the United States by impeding, impairing, obstructing and defeating the lawful IRS functions of ascertaining, computing, assessing and collecting the "income," "social security" and "Medicare" taxes due and owing from the employees of Cencal (Indictment, ¶ 9a), and the "income," "social security" and "Medicare" taxes due and owing from the owner and operator of Cencal, Thompson. (Indictment, ¶ 9b.)

Although the indictment fails to specify by statute number the precise taxes at issue, the indictment does mention "Employers' Quarterly Tax Returns" as well as "income," "FICA," "social security" and "Medicare" taxes at paragraph 6, taxes to be withheld by employers in paragraph 7, and "FICA" "income" and "Medicare" taxes in paragraph 8.

I. THE INDICTMENT MISUSES THE TITLES OF SECTIONS OF THE LAW, WHICH WILL BOTH MISLEAD AND PREJUDICE THE JURY

26 U.S.C. § 7806(b) prohibits inference, implication or presumption of legislative construction to be drawn or made because of location, groupings, table of contents or other descriptive titles found in the Internal Revenue Code. Although politicians may like to title things in ways that look good to the public, under 26 U.S.C. § 7806(b), the title neither limits nor defines the law itself, and although titles are used frequently, they are also misleading.

For example, Chapter 21 of Subtitle C is described as containing law relating to the "Federal Insurance Contributions Act," and Congress comparably titled Section 3101(a) "Old-age, survivors and disability insurance." The tax imposed at Section 3101(a) is, however, just

another income tax; what those taxes are spent on remains within the discretion of our elected politicians. Anyone observing the Social Security debate – about "trust fund" moneys not "really being there" – can witness to that. The government may want to blame Banister and Thompson for depriving Thompson's employees of retirement funds, but that is not what this trial is about, nor should it be.

To illustrate, the indictment misstates the law and misleads the jury by implying that the withholding tax of Chapter 24 is the individual income tax imposed under Subtitle A, when it is not. The public perception, or propaganda behind a tax, has nothing to do with the statutes at issue. Banister's right to a fair trial requires the indictment strictly conform to the language of the statute and that it not contain surplusage and argumentative statements.

A review of the Subtitle C Employment tax structure is instructive.

Chapter 21 Taxes

Income taxes:

> 26 U.S.C. § 3101(a) imposes on the income of every individual a tax measured by a percentage of their wages in respect to their employment.
>
> 26 U.S.C. § 3101(b) imposes on the income of every individual another tax measured by a percentage of their wages in respect to their employment.

Although these are taxes imposed on the income of individuals, they are to be collected by the employer. The employer collects the tax by "deducting" it from the wages of the individual. *See* 26 U.S.C. § 3102(a).

Excise Taxes:

> 26 U.S.C. § 3111(a) imposes an excise tax on employers with respect to having individuals in his employ. The tax is a percentage of the wages he pays.
>
> 26 U.S.C. § 3111(b) imposes another excise tax on employers with respect to having individuals in his employ. The tax is a percentage of the wages he pays.

Chapter 22 Taxes

These are taxes involving employees working for employers who are "carriers." There is no indication in the indictment that it involves Chapter 22 taxes.

Chapter 23 Taxes

26 U.S.C. § 3301 imposes yet a third excise tax on employers with respect to having individuals in their employ. The tax is a percentage of the wages paid. There is no indication in the indictment that this tax is in issue.

Chapter 24 Taxes

26 U.S.C. § 3402 requires employers making payment of wages to "deduct and withhold" upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary.

The type of tax, whether an income tax, an excise tax or some other tax, is not stated. Nor is the tax anywhere "imposed" on anyone. Section 3403 makes the employer liable for the payment of the tax. Section 31 of Title 26, contained in Subtitle A of the Internal Revenue Code pertaining to "income taxes," states the deducted and withheld taxes can be used as a credit against the tax imposed in Subtitle A.[1]

The statutes contained in Chapter 24 do not impose an income tax, nor is the collection of the Chapter 24 tax the collection of the taxes imposed in Subtitle A. The taxes imposed by Subtitle A are to be paid when the Form 1040 is filed, and if not so paid, collection cannot proceed without an assessment having been made and notice and demand having been given. Congress deliberately avoided the confusion the government tries to create in the indictment by calling the Chapter 24 tax an "income" tax. Under the law Congress passed, employers merely deduct and withhold a certain amount of money as instructed under the law; the law subsequently allows a credit from such deducted and withheld taxes against the prospective

[1] In Subtitle A, taxes on "Individuals" are imposed at Section 1; the tax is imposed at different rates on the individual's "taxable income." The individual's status as single, married, head of household, etc., determines which rates are to be applied.

liability, if any, for the completely separate Subtitle A income tax. There is a distinct difference between a credit applied toward a particular tax, and the particular tax itself.

Just as the employer is nowhere made liable for any individual's income tax liability imposed under Subtitle A, so too the employer is not obligated to deduct and withhold the tax if the employee pays the tax himself. *See* 26 U.S.C. § 3402(d). This phraseology deliberately includes any payment by the employee of the individual income tax, because the statute states that the employer "shall not" deduct and withhold the Chapter 24 tax whenever the employee pays "the tax against which such tax may be credited." Further, 26 U.S.C. § 31, contained in Subtitle A of the Internal Revenue Code, states the tax may be credited against the individual income tax imposed under Subtitle A.

Under the statutory scheme, if an employee subsequently pays an individual income tax imposed under Subtitle A, then the employer is no longer responsible for whatever amounts were to be separately taxed under Chapter 24, although he is liable for the penalties and additions, if any, resulting from the failure to deduct and withhold. *See* 26 U.S.C. § 3402(d). The penalties and additions are set forth at 26 U.S.C. § 3509.

This careful crafting of the statutes by Congress deliberately avoids the risk of double taxation and gives force to the "credit" provisions afforded individuals against their separate liability for the individual income tax of Subtitle A. The tax laws are precise and highly technical. The use of care and precise definitions of law are necessary to avoid jury confusion and prejudice to Banister.

II. THE INDICTMENT SHOULD NOT MISLEAD THE JURY OR PREJUDICE BANISTER BY MISTATING THE STATUTE AND/OR DUPLICATING CHAGRES

From the foregoing examination of the different specific language used by Congress contained in Subtitle C, it becomes readily apparent that there are three types of taxes involved in

the indictment: 1) "income" taxes of the employees; 2) "excise" taxes of the employer; and 3) a tax to be credited against the Subtitle A income tax.

A. Indictment, Part II, Income Subject to Taxation

Paragraph 4 of the indictment gives a definition of gross income. The definition is superfluous to a conspiracy regarding employment taxes. The taxes covered by Chapters 21, 23 and 24 of Subtitle C do not require the definition of gross income to ascertain, compute, assess or collect them. All of these taxes are determined based upon the definition of wages found at 26 U.S.C. §§ 3121(a), 3306(b) or 3401(a). It is the definition of wages in these three sections that are relevant and material, not the definition of gross income.

Paragraph 5 of the indictment states that income is to be taxed to the party who earns it, advises taxation cannot be avoided by assignment, and that the tax consequences under the Internal Revenue Code depend upon the substance of the transaction, not the form. Like paragraph 4 above, this discourse of the law is superfluous to the conspiracy alleged.

Banister requests that both paragraphs 4 and 5, as well as the Part II designation, be struck from the indictment.

B. Indictment, Part III, Employment Taxes

The last sentence of Paragraph 6 of the indictment wrongly states:

> Employers are required to deduct, collect, account for and pay over to the United States Treasury the proper amount of income, Federal Insurance Contributions Act (FICA) (Social Security) and Medicare taxes.

Indictment, ¶ 6.

This is another attempt to include the title of a statute into the statute itself. The statute says nothing about "contributions" for social programs, nor does the statute require the tax paid to the Internal Revenue Service to be used for those programs. The government is not legally obligated to use Chapter 21 taxes to "contribute" to FICA, Social Security, Medicare or any other social welfare program. Neither the indictment itself, nor the government during its argument, should be allowed to misrepresent the clear language of the statute itself.

Banister requests this sentence in the indictment be stricken as being a technically wrong statement of the law. Although people regularly call these employment taxes "social security" or "Medicare" taxes because the proceeds of said taxes are supposedly spent for "old-age, survivors, disability insurance" and "hospital insurance," or because the taxes were imposed in a law merely entitled the "Federal Insurance Contributions Act," such language is not in the statute itself, where the taxes imposed are in fact income taxes and excise taxes with no statutory limitation for their use.

In that the indictment covers various types, not to mention classes[2], of taxes, it is imperative that there not be any confusion occasioned by the loose use of non-technical language. Banister is entitled to a clear and concise statement of the charges against him. The indictment, as will be shown *infra*, refers to Chapter 24 taxes as "income" taxes when Congress specifically chose not to call them "income" taxes when they wrote the statute. The inclusion of the term "income" used here will confuse the jury because the term "income" is also used with respect to Thompson's personal Subtitle A income taxes. As noted above, the two taxes are not the same. Similarly, calling entirely different classes and types of taxes either by the same name, i.e., "income taxes" or by the legally non-binding titles of the statutes, i.e., "FICA," "social security," and "Medicare" taxes can only serve to confuse the jury, the court, the jury instructions, the outcome of the trial, and the record on appeal.

The first sentence of Paragraph 7 of the indictment wrongly states:

> Employers are required to calculate the correct amount of income tax to withhold from the employees' pay based upon the amount of money earned, the exemptions claimed and the tax rate which is applicable.

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[2] Income taxes are direct that must be apportioned unless within the confines of the Sixteenth Amendment's exception to the apportionment requirement, and excise taxes are indirect taxes that must be uniform.

Indictment, ¶ 7.

Banister requests this sentence be struck as a wrong statement of the law. The indictment is no doubt making reference to 26 U.S.C. § 3402 taxes, but those taxes are not "income" taxes.

The second sentence of Paragraph 7 of the indictment wrongly states:

> In addition, employers must withhold FICA tax in the amount of 6.2% of wages and salary, and Medicare tax in the amount of 1.45% of wages and salary.

Indictment, ¶ 7.

Banister requests this sentence be struck as a wrong statement of the law. Congress used separate, distinct words in different places of the statutes. Technically, only Section 3402 taxes are "withheld." Section 3101(a) and (b) taxes are collected by "deducting" them, not by "deducting and withholding" them. Further, as shown above, these are technically a separate category of "income" taxes, not "FICA" or "Medicare" Taxes.

Paragraph 8 of the indictment wrongly states:

> In addition, there are FICA taxes of 6.2% of wages and salary and Medicare taxes of 1.45% of wages and salary imposed upon the employer. Accordingly, each fiscal quarter, an employer is required to file a U.S. Employers' Quarterly Tax return, Form 941, reporting to the U.S. Treasury the total amount of wages and salary paid, and paying to the Treasury the total amount of income taxes withheld from the employees' pay, plus both the employees' portion of FICA taxes and the employer's portion of FICA taxes, in the total amount of 12.4% of wages and salary, as well as employees' and employer's shares of Medicare taxes in the total amount of 2.90% of wages and salary.

Indictment, ¶ 8.

Banister requests this paragraph be struck as a wrong statement of the law. Congress imposed at 26 U.S.C. § 3111(a) and (b) excise taxes on the employer. While these taxes, again, may be spent for social security and Medicare, the tax is an excise tax on having employees. The tax is very different from the income tax on the employees imposed at 26 U.S.C. § 3101(a) and (b).

C. Indictment, Part IV, The Conspiracy

The first sentence of paragraph 9 of the indictment ends with the words "to wit: income, social security and Medicare taxes. Both paragraphs 9a and 9b also use the words "income, social security and Medicare." Banister requests these words be struck as they state a wrong statement of the law as discussed hereinabove.

D. Indictment, Part V, The Scheme to Defraud

Paragraph 10 of the indictment alleges two separate "schemes to defraud:"

The first alleged "scheme to defraud" was to remove the employees of Cencal from the taxpayer rolls. Several methods by which the scheme was to be carried out are alleged, such as no longer withholding, not filing Forms 941, and by not providing employees with forms W-2 or 1099. The last sentence of the first "scheme to defraud" alleges that as a result, dozens of required taxpayers either failed to file returns or filed returns but failed to report a substantial amount of their income.

The second alleged "scheme to defraud" was the preparation by Banister and the signing and filing by Thompson of alleged "false and fraudulent" Amended Individual Income Tax Returns, Forms 1040X.

Banister requests both "schemes to defraud" as well as the Part V designation be struck for several reasons:

First, none of the alleged conduct rises to the level of illegal conduct. *See United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993). While the alleged conduct may have made the government's job more difficult, the alleged conduct involved no deceit, craft or trickery or conduct that was dishonest. *Caldwell, supra* at p. 1059.

Second, the reference to forms 1099 is superfluous since the indictment nowhere alleges Cencal employees received anything but wages, and paragraph 11 of the indictment specifically states "[a]ll of the employees were hourly wage employees."

Third, the employees were absolutely free to file their income tax returns and pay the taxes due regardless of the alleged conduct of Banister and Thompson. That Thompson failed to file forms, failed to supply information or failed to pay a tax in no way prevents a worker from filing their tax returns and paying their taxes. Self-employed people do it all the time. And while Thompson's omissions may have made it harder for the employees to file and or pay, that does not equate to defrauding the IRS by deceit, craft, trickery, or dishonest means. This language, besides being superfluous, is inflammatory and prejudicial, and could give rise to an erroneous tax loss for purposes of sentencing, should that become necessary.

18 U.S.C. § 371 allows a conspiracy to be alleged in two disjunctive manners: (1) conspiracy to commit an "offense" against the United States, and (2) conspiracy to "defraud the government." As stated by the Sixth Circuit in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989):

> The statute is written in the disjunctive in order to criminalize two categories of conduct: conspiracy to commit offenses specifically defined elsewhere in the federal criminal code, and conspiracies to defraud the United States. The first category requires reference in the indictment to another criminal statute which defines the object of the conspiracy. The second category, the defraud clause, stands on its own without the need to refer to another statute which defines the crime.

Minarik, 875 F.2d at 1186-87.

> The courts have also consistently held that the two conspiracy clauses of section 371, taken together, create one offense, not two. *Braverman v. United States*, 317 U.S. 49, 52-53, 63 S.Ct. 99, 101-02, 87 L.Ed. 23 (1942); *May v. United States*, 175 F.2d 994, 1002 (D.C.Cir.), cert. denied sub nom. *Garsson v. United States*, 338 U.S. 830, 70 S.Ct. 58, 94 L.Ed. 505 (1949); *United States v. Manton*, 107 F.2d 834, 838 (2nd Cir. 1939), cert. denied, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed.

> 1012 (1940). . .These precedents, taken together, show that section 371 creates one crime that may be committed in one of two alternate ways.

Minarik, 875 F.2d at 1193.

"Thus, an individual whose alleged wrongful agreement is covered by the offense clause (because covered by a specific offense defined by Congress), as well as arguably by the broad defraud clause, cannot be convicted or punished for both." *Id*., at 1193-94; *see also United States v. Haga*, 821 F.2d 1036, 1043 (5th Cir. 1987) (the conspiracy count of the indictment had to charge a conspiracy "either to 'commit any offense' or to 'defraud the United States'; it cannot have charged both").

The second "scheme to defraud" section of the indictment is, in substance, an attempt to bootstrap a third object of the conspiracy, namely a conspiracy to file false and fraudulent Amended Income Tax Returns in violation of 26 U.S.C. §§ 7206(1) and (2). This object, disguised as a "scheme to defraud," is a specific offense conspiracy, the underlying counts of which are already charged in Counts Five, Six and Seven of the indictment. Such an allegation renders the indictment duplicitous and is highly prejudicial to Banister, as both types of conspiracy cannot be charged in a single count of the indictment[3].

In summary, the two "objects of the conspiracy" are set forth as paragraphs "a" and "b" to paragraph 9. Both objects charge a conspiracy under the defraud clause of 18 U.S.C. § 371. The so called "schemes to defraud" do not support defraud clause conspiracies. Therefore, they

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[3] If a defendant is convicted on a duplicitous indictment, it is possible that he was convicted without a unanimous jury verdict on any individual crime within the count, thus violating the defendant's Sixth Amendment right to know the charges against him. *See United States v. Murray*, 618 F.2d 892, 896 (2d Cir. 1980); *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975); *United States v. Pavlovski*, 574 F.2d 933 (7th Cir. 1978); *United States v. Orzechowski*, 547 F.2d 978, 986 (7th Cir. 1976); *United States v. Geberding*, 471 F.2d 55, 59 (8th Cir. 1973); *United States v. Aguilar*, 756 F.2d 1418, 1420 n. 2 (9th Cir. 1985); Levitt, Duplicity in Indictments Brought Under Section 371, Criminal Code of the United States, 6 Ill. L.Q. 135, 135-36, 144 (1923).

are wholly unnecessary, immaterial, irrelevant, prejudicial and renders Count I of the indictment duplicitous. Banister requests that Paragraph 10, as well as the Part V designation, be struck.

E. Indictment, Part VI, Manner and Means by Which the Conspiracy Was Carried Out

The allegations in Paragraph 11 are repetitive of the allegations in Paragraph 3. Banister requests Paragraph 11 be struck as surplusage.

Paragraph 12 alleges at one time all of the employees of Cencal had both "income" taxes (the mislabeled Chapter 24 taxes) "withheld" from their pay, along with their share of the "FICA" and "Medicare" taxes (the mislabeled Chapter 21 taxes.) For all the reasons set forth herein above regarding the true tax designation, the allegations are technically incorrect. Banister requests paragraph 12 be struck.

Paragraphs 13, 14, 15 and 16 under Part VI, "Manner and Means by Which the Conspiracy Was Carried Out", contain the same factual allegations of paragraphs 45, 46, 47, 48, 49, 54, 55, 56, 57, 58 and 59 under Part VII, Overt Acts. Since the allegations are the same, they are surplusage. Banister requests paragraphs 13, 14, 15 and 16 be struck from the indictment.

Paragraphs 17 and 18 allege as "manner and means by which the conspiracy was carried out" acts of omission of failing to file returns, failing to supply information and failing to pay. One does not commit a conspiracy by merely failing to disclose income. *United States v. Klein,* 247 F.2d 908. 916 (2nd Cir. 1957). By extenstion, one would not commit a conspiracy to defraud by not paying. The allegations are thus irrelevant and immaterial to a conspiracy to defraud. Banister requests paragraphs 17 and 18 be struck as surplusage.

Paragraphs 19 through 27 contain the same factual allegations of paragraphs 33 through 41 of the Overt Acts section of Count One. Since the allegations are the same, they are surplusage. Banister requests paragraphs 19 through 27 be struck as surplusage.

In Paragraph 20, the Government has asserted the word "huge" to describe a tax bill allegedly owed by Thompson. This adjective adds nothing but the prosecutors' subjective opinion as to the size of the bill. The word is clearly surplusage and potentially prejudicial. Banister requests that it be struck.

In paragraph 28 the indictment alleges a tax loss arising from the second object of the conspiracy in the amount of $83,454, and in paragraph 29 the indictment alleges a tax loss arising from Thompson's failure to deduct and withhold, a tax loss of $176,215. Paragraph 30 adds these two sums up. The allegation is surplusage and prejudices the jury by virtue of the fact that the amount is "huge" to quote from the government. Banister requests that it be struck.

WHEREFORE, Defendant Joseph Banister moves this Court for an order striking paragraphs 4, 5, 7, 8, 10-16, 19-27, 30, the last sentence of paragraph 6, the words "to wit: income, social security and Medicare taxes" from paragraph 9, the words "the income, social security and Medicare" from paragraphs 9a and 9b, and the word "huge" in paragraph 20 from the indictment.

Dated: May 19, 2005.

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