UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CASE NO. 06-50164-01
VS	JUDGE: HICKS
TOMMY K. CRYER, *Defendant*	MAGISTRATE: HORNSBY

MEMORANDUM ON BEHALF OF DEFENDANT
IN REPLY TO
GOVERNMENT'S IN GLOBO RESPONSE TO DEFENDANTS MOTIONS

MAY IT PLEASE THE COURT:

ARGUMENT AND LAW

The Government's response to defendant's Second, Third and Fourth Motions to Dismiss, defendant's Motion in Limine and Motion to Compel Discovery present authorities that are either inapplicable to the issues presented or arguments that are unsupported by sound authorities, and, therefore, defendant submits this reply memorandum, addressing the government's objections categorically.

DEFENDANT'S SECOND MOTION TO DISMISS:

Defendant's Second Motion to Dismiss is, briefly stated, based on the fact that there is no statute fixing the rate of taxation of income for the years at issue, 2000 and 2001, and that there is no valid rule or regulation fixing the rate of taxation of income for those years.

The statute in question, 26 U.S.C. § 1, *by its own terms* specifically and clearly states that the tax tables previously set forth therein do not apply to the calendar years in question and directs the Secretary of the Treasury to complete the levy by specifying tax tables in accordance with instructions provided in the statute.[1] 26 U.S.C. § 1(f). However, defendant contends, *and the government does not dispute*, that the Secretary has not promulgated any rule or regulation fixing any tax rate as instructed and in the manner required by Congress in order for those specifications to be afforded the force of law. Thus, there are no statutory tax rates set in the statute, nor are there any rules or regulations entitled to legal effect fixing any tax rates for the years in question, 2000 and 2001.

[1] While a serious question could be posed regarding whether any regulation so promulgated would be invalid as being in violation of the nondelegation doctrine (*Field v. Clark*, 143 U.S. 649 (1892); *Mistretta v. United States*, 488 U.S. 361 (1989); *Touby v. United States*, 500 U.S. 160 (1991)), that issue is not presented in this case, since the Secretary never exercised that delegation.

Any tax must be "clearly and plainly laid" in law, not in fiat or by printing and distribution of instruction booklets or pamphlets. *Billings v. U.S.*, 232 U.S. 261, 34 S.Ct. 421 (1914); *United States v. Merriam*, 263 U.S. 179, 44 S.Ct. 69 (1923); *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53, 153 (1917); *Royal Caribbean Cruises v. United States*, 108 F.3d 290 (11th Cir. 1997); *Tandy Leather Company v. United States,* 347 F.2d 693 (5th Cir. 1965); and *B & M Company v. United States,* 452 F.2d 986 (5th Cir. 1971). The letter of the law does not include the law according to a letter. In this instance, where there is neither statute nor a valid regulation fixing the tax, then there can be no lawful tax liability, an essential element in the charges directed at defendant.

The government responds to the motion contending that the Administrative Procedures Act applies only to *agency rulings*, citing *Hotch v. United States*, 2212 F.2d 283 (9th Cir. 1954) (*sic*)[2] as authority for that contention. However, the issue in *Hotch* was not an agency ruling, but an agency *regulation*. While the decision did include the word "rulings", at no time and in no way did the Court in *Hotch* even consider, much less rule, that the APA was limited to "agency rulings", and to cite it as authority for such a proposition is at best erroneous.

[2] See 212 F.2d 280

The Court in *Hotch* was concerned with whether a *regulation* was entitled to be afforded the force of law. It opens its opinion with "Steven V. Hotch was convicted of fishing in violation of a *regulation* of the Department of the Interior. . ." Id at 281. Nowhere in that opinion is the scope of the APA considered, much less is it held to be restricted to "agency rulings." *Hotch* at 283-4:

> **"Under our system of law, no act is punishable as a crime unless it is specifically condemned by the common law or by a statutory enactment of the legislature. The Congress has here made it an unlawful offense against the United States to fish in "closed" waters** *[in the instant to evade taxes]*, **and has delegated the authority to determine which waters shall be closed to the Secretary of the Interior** *[in the instant the authority to fix the tax rates to the Secretary of the Treasury]* who, in turn, has subdelegated his authority. Since Congress could delegate its authority, it could also delegate the manner in which that authority is to be exercised. Therefore, **the Administrative Procedure Act and the Federal Register Act must be read as a part of every Congressional delegation of authority**, unless specifically excepted. **Those Acts require publication, irrespective of actual notice, as a prerequisite to the *issuance* of a regulation making certain acts criminal. If notice of a proposed rule is not published** in the Federal Register at least thirty days prior to its issuance, or if good cause is not found and published for the immediate issuance of a rule, **the rule cannot be legally issued; if the rule itself is not published, it follows that it has not been issued; and if a rule has not been issued, it has no force as law."**
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> (**bold** emphasis and *[bracketed material]* added, *italics* emphasis the court's)

The government's reliance upon *Hotch* as authority for its contention that the APA applies only to "agency rulings" is misplaced.

The government next contends that the APA does not apply to interpretive guidelines. The issue in this case, however, is far from being an "interpretive guideline." The specification of the amount of a tax is not interpretive, but is substantive. The test for the requirement of compliance with the APA's procedures for promulgation of a valid regulation or rule, one that can be afforded the force of law, is clearly set out in *Herron v. Heckler*, 576 F.Supp. 218 (N.D.Cal. 1983):

> Moreover, the claims manual provisions are 'rules' as the term generally has been construed by the courts: **they declare policies generally binding on the affected public; they provide specific standards to regulate future actions of the affected public; and they make a substantive impact on the rights and duties of persons** subject to their limitations," Id., at 230.
>
> "In sum, **the Secretary was required**, by the express terms of the APA and the 'substantial impact' principle, **to notify the public and to solicit comments before she promulgated** the claims manual limitations at issue here. **Her failure to comply with the notice and comment provisions of the APA renders the challenged limitations void and unenforceable.**" Id., at 232.[3]
>
> (emphasis added)

[3]. This is indeed the rule in several Circuits; see *Whaley v. Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981)(SSA claims manual has no legal force); *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003)(SSA manual, HALLEX, has no force and effect); *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 38 (3rd Cir. 1976)(manuals are not binding on agency); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3rd Cir. 1982)(VA manual); and *Burroughs v. Hill*, 741 F.2d 1525, 1529 (7th Cir. 1984)(HUD handbook).

What could possibly have a more substantive impact upon the rights and duties of persons than the adoption and imposition of rates of taxation?

Finally, the government contends that the absence of any statute or lawfully promulgated regulation imposing a specified tax is not applicable because defendant is not accused of violating a regulation. The government, in support of that contention, cites *United States v. Bowers*, 920 F.2d 220 (4th Cir. 1990), as a "similar" case. *Bowers* neither supports the government's distinction between statutory and regulatory violations nor does it bear any similarity to the case at bar. The APA objection raised in *Bowers* was that the government had not published and promulgated the tax *forms* and that the *forms* were therefore invalid.

The Court pointed out the error in that contention at p. 222:

> "The contents of the required return are described, in a general way, right in the statute. If a taxpayer had done his best to fashion and file a homemade return for want of notice of the IRS forms, and had paid the applicable tax, then 5 U.S.C. § 552 might protect him from being "adversely affected" by nonpublication of a form. However, the Bowers simply have evaded income taxes, and **their duty to pay those taxes is manifest on the face of the statutes, without any resort to IRS rules, forms, or regulations.**"
>
> (emphasis added)

and in doing so, it also pointed out the clear distinction between the situation in *Bowers* as opposed to the instant. Not only are forms not substantive, while tax

rates are clearly substantive rules, as previously established, unlike the situation in 1990 when *Bowers* was decided, the duty to pay taxes for the years 2000 and 2001 is not manifest on the face of the statute, and *can only be determined by resorting to IRS rules and regulations*, none of which have been published, held open for comment and objection and duly promulgated in accordance with the requirements of the APA.

Bowers did not hold, as it is represented by the government to the Court to have held, that the APA requirements for promulgation and publication of substantive rules only applied in cases where an accusation is based solely upon violation of a regulation, as opposed to a statute. In fact, a reference back to *Hotch, supra*, which involved the violation of a *statute* that prohibited "fishing in closed waters", and no valid regulation closing those waters having been properly published and issued, demonstrates the necessity of proper promulgation of a regulation entitled to the force of law as underlying the charge of the violation of the statute itself.

In this case, it is the government's burden to prove not only the facts it alleges, but the law upon which its accusation is based, as well. Defendant has clearly and upon sound statutory and jurisprudential authority challenged the

existence of any statute or duly promulgated regulation, entitled to enforcement with the full force of law, that imposes a lawful tax for the years in question.

None of the authorities relied upon by the government support any of the propositions for which they are cited and, in fact, if at all applicable are contrary to the government's propositions.

In contrast, the authorities set forth in defendant's Memorandum in Support of his second motion are all sound, clear and exactly applicable.

The government can defeat defendant's motion only by presenting the Court with the statute and duly published and promulgated regulation or rule specifying the tax rates applicable for the calendar years 2000 and 2001.[4] The government's silence and failure to do so can only be considered an admission by the government that no such statute and/or regulation exists, and, accordingly, it is respectfully submitted that defendant's second motion to dismiss is meritorious and should be granted.

DEFENDANT'S THIRD MOTION TO DISMISS:

Defendant's Third Motion to Dismiss is grounded on the established and indisputable fact that the trust that the government contends was used to conceal

income not only had no income for the two years at issue, but suffered losses, and that, therefore, the "affirmative act" alleged by the government did and could not have occurred.

The government's sole and solitary response is to declare consideration of the third motion to be inappropriate, without legal authority and without reference to the existence of any evidence of income concealed in the trust that would disclose a genuine issue of fact regarding the absence of any income at all on the part of the trust.

The government cites absolutely no law and no court authority in support of its position. With the sole exception of Witness Folder No. 8, which is the subject of the Rule to Compel Discovery filed herein, defendant has reviewed all evidence the government has and, unless the government withheld and failed to disclose evidence that it expects to educe in its case in chief, there is no contradictory evidence.

Defendant, in his original memorandum in support of his Third Motion to Dismiss, set forth ample and compelling authority for the propriety of consideration of such motions where "trial of the facts surrounding the commission

[4] In which case, of course, any such regulation would have to be scrutinized with regard to the nondelegation

of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60, 89 S.Ct. 1559 (1969); See also *U.S. v. Flores*, 404 F.3d 320 (5th Cir. 2005).

Knowing that there can be no genuine dispute regarding an essential element of the charge, it would be utterly pointless to subject the Court and its personnel, the parties, respective counsel and witnesses and the jurors, both prospective and selected, to the inconvenience and expense of a full-blown jury trial, which is certain to consume at least the better part of a week and the outcome of which could not be in question.

Accordingly, it is respectfully submitted that the government's opposition to the motion without authority and without establishing a genuine issue of fact other than that characteristic of a general denial actually confirms that there is and can be no disputing that there was no income "concealed" in the trust and that the legal authorities support the granting of Defendant's Third Motion to Dismiss, which should, therefore, be granted, dismissing both counts of the indictment with prejudice.

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doctrine. *Fields, Mistretta* and *Touby, supra.*

DEFENDANT'S FOURTH MOTION TO DISMISS:

The government opens its response to Defendant's Fourth Motion to Dismiss with a volley of name-calling, misstatement of law and a groundless declaration that the motion is without merit, to all of which defendant urgently excepts.

This is a serious proceeding, and while the government may not regard the threat posed to defendant's rights and liberty worthy of scholarly and authoritative discourse, the defendant is certainly entitled to expect a more professional and dignified response. Defendant is not a "tax protester", either in a generic sense or in the technical sense; and if he were a "tax protester", then so would be Chief Justice John Marshall, Chief Justices White and Taft and many more Supreme Court justices who have been quoted extensively in support of the genuine statutory and Constitutional issues raised by defendant in his Fourth Motion to Dismiss.

Defendant makes no claims on the basis of any protest of the lawful and authorized imposition of taxes or of the use of tax proceeds for military purposes (war protest) or for nuclear arms (anti-nuclear protest), nor are any of his actions, claims or defenses raised based upon any desire or intention on his part to protest anything other than to insist upon the application of the law as it is written and

subject to the limitations on the taxing authority of the federal government set forth in the Constitution. Not only is he entitled to do so, he is entitled to do so without derision and mischaracterization by the government. If not defendant, then the Constitution and the Supreme Court authorities cited in support are certainly entitled to more respect than that shown by the government in its response.

The issues raised in Defendant's Fourth Motion to Dismiss have not been ruled on, much less rejected and discredited. Anticipating an attempt by the government to claim they have been, defendant made a repeated effort to point out that each of the authorities he relied on his motion were not only Supreme Court pronouncements, but are still valid and controlling law. The conclusions those authorities mandate with respect to defendant's motions cannot be avoided by simply calling those reasoned and long-standing Constitutional principles "tax protester" claims.

The government contends that the language of the Sixteenth Amendment, "from whatever source derived," is indicative of Congress' intent to "exert in this field the full measure of the taxing power," citing *Commissioner v. Gleanshaw (sic)*[5] *Glass Co.*, 346 U.S. 426 (1955), a well-known Supreme Court case cited and

[5] Glenshaw Glass Co.

discussed at length in defendant's memorandum. However, the language of the Sixteenth Amendment cannot express Congress' intent because it is not a Congressional expression.

The language the Supreme Court is referring to in *Glenshaw* is the statutory language employed in 26 U.S.C. § 61, defining "gross income", and the fact that the Supreme Court has repeatedly concluded that Congress intended to extend the tax to the fullest extent of its authority to tax was acknowledged by defendant in memorandum.

The government's presumption, however, is that the extent of Congress' power to tax is without limits; that Congress having intended the tax to extend to the fullest extent of its taxing power, the issue of what may or may not be included is foreclosed. That presumption, as has been repeatedly demonstrated by defendant in his original memorandum, has been regularly and on numerous occasions rejected by the Supreme Court as patently and clearly erroneous. Indeed, the *Glenshaw* case, relied upon by the government in stating its claim to tax to the fullest extent, the Supreme Court recognized and considered some of those limitations.

Defendant's first and second grounds are not based upon any protest chant or mantra, nor on any claim of an unrecognized right, but on the law as it is written, not by defendant, but by the government. The validity and merit of the first, that there is no liability clearly imposed upon defendant by the law is apparent in the government's inability to produce for the Court one single statutory or even regulatory authority for classifying defendant as one who is made liable for the tax.

The second, that the income tax law and regulations promulgated thereunder fail to clearly and plainly include defendant's income within the scope of the tax is also one to which the government cannot respond with a statutory or regulatory authority to the contrary. The same conclusion, then, can be said of the second ground, in that the government is unable to produce for the Court any statutory or regulatory authority for the inclusion of defendant's revenues within the classification of taxable income.

The government makes a grossly erroneous claim that 26 U.S.C. § 61 defines "income." That section does not define income, it defines *gross income*, the subject of that section and definition having been suspiciously omitted by the government. In fact, the word income is found in both the term, gross *income*, and in the definition, "gross ***income*** means all ***income*** derived [from]. . .Compensation

for services, including fees, commissions, fringe benefits, and similar items. . ." Defining "income" as "income" provides us with no meaning for income.

The Supreme Court has dealt with the issue of the meaning of income on more than a few occasions. See *Stratton's Independence v. Howbert*, 231 U.S. 399, 34 S.Ct. 136 (1913); *Doyle v. Mitchell Brothers Co.*, 247 U.S. 179, 38 S.Ct. 467 (1918); *Towne v. Eisner*, 245 U.S. 418, 38 S.Ct. 158 (1918); *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189 (1920); and *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 75 S.Ct. 473 (1955). To think that the Supreme Court was unable to find a statutory definition of income in over forty years of exploration is, at best, erroneous reasoning.

Congress has never defined income.

The government compounds its erroneous reasoning that the Code defines income by citing cases it contends hold that defendant's revenues in the form of legal fees and the substantial losses incurred in the trust "fit this definition". In the original Memorandum in Support defendant attempted to alert the Court to the historic propensity of the government to cite inapplicable cases as authoritative in connection with the four Constitutional issues posed in defendant's motion. It was

hoped that by so doing the government may be more cautious about doing so. Old habits are hard to break.

The government cites *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Londale (sic)*[6] *v. Commissioner*, 661 F.2d 71 (5th Cir. 1981) and *Reading v. Commissioner*, 614 F.2d 159 (8th Cir. 1980). None of those cases support the proposition for which they are cited.

In *Kowalski*, the only issue before the court was whether a cash meal allowance paid to state troopers in addition to their salaries was income. The allowance, which was found to be accessions to wealth, or income under the *Glenshaw* definition, was paid whether the trooper spent any money on meals or not, the troopers were not required to make any accounting of meal expenses and it was paid without regard to whether the trooper was working or not working, and, as such, was not money that was personally earned by the troopers. Thus, that "income" was not at the expense of the troopers' human capital, their labor, skill, time and depletion of work life. Nor was the issue of the troopers' capital investment in obtaining their salaries and other compensation considered nor ruled

[6] Lonsdale

on by the Court. None of the issues raised in defendant's Fourth Motion to Dismiss were before the Court nor discussed by the Court.

In *Lonsdale*, a very brief ruling for which no judge was willing to accept credit, the court was presented with the argument that wages were a "sum zero" transaction, and exchange of equal values. The appellant, Lonsdale, represented himself and filed a *pro se* brief. It is obvious that he failed to fully inform the court of the law, however, because in its *per curiam* ruling it stated:

> The Constitution grants Congress power to tax "incomes, from whatever source derived. . . ." U.S. Const. amend. XVI. Exercising this power, Congress has defined income as including compensation for services. 26 U.S.C. § 61(a)(1). Broadly speaking, that definition covers all "accessions to wealth." *See Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 431, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955). This definition is clearly within the power to tax "incomes" granted by the sixteenth amendment. Id. at 72.

The appellant's failure to properly inform the court is unmistakable, since the court would never have attempted, knowingly, to completely disregard and rule in conflict with established Supreme Court declarations of Constitutional law. In the first place, the Sixteenth Amendment granted no taxing authority to the Congress. *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 36 S.Ct. 236 (1916); *Stanton v.*

Baltic Mining Co., 240 U.S. 103 (1916); *Peck & Co. v. Lowe*, 247 U.S. 165 (1918); *Eisner v. Macomber*, 252 U.S. 189 (1920).

The scope of "from whatever source derived" seems to have made a great impression on the court, but as we have been thoroughly schooled by the Supreme Court in *Brushaber, Baltic Mining, Peck* and *Eisner*, among others, the amendment does not enlarge the scope of the taxing powers and the phrase "from whatever source derived" serves only to remove the source from consideration in reclassifying a tax on income as a direct tax, requiring apportionment.

In addition, as we have already established, Congress has never defined income. The court erroneously cites, as does the government, § 61, which defines "*gross income*," not "*income*".

Finally, the court declares that the *Glenshaw* definition of income is "***all*** 'accessions to wealth'". That, however, is clearly not the case, since even Congress in the Code, and the Treasury department in its regulations, has admitted, repeatedly, that not all income can be taxed by the federal government and that income from some sources and activities cannot be included in gross income. Both have also admitted, in statute and regulation, that not all revenues and receipts are "income within the meaning of the Sixteenth Amendment." With all due respect to

the court in *Lonsdale*, this brief *per curiam* ruling is not entitled to weight and, certainly, is not entitled to be relied upon in conflict with and as opposed to the numerous Supreme Court opinions supporting defendant's motion. The lower courts cannot overturn established Supreme Court enunciations of fundamental Constitutional law.

The applicability of *Lonsdale* to this case is also lacking. Defendant does not contend that wages are a "sum-zero transaction". Defendant in memorandum cedes that it would be impossible to reasonably argue that every wage represents no more or no less than that which was given up to receive it. He does contend, and reasonably and logically so, that it is equally impossible to seriously and genuinely contend that every wage, salary or fee personally earned is received in exchange for nothing, which is the government's totally unrealistic and insupportable position.

Thus the issue in this case is not, as in *Lonsdale*, whether there is an equal exchange of wages and labor, but whether every wage, salary and fee is paid for nothing in return, whether every wage-, salary- and fee-earner contributes nothing to his employer or client in exchange. *Lonsdale* did not consider that issue and

cannot, therefore, misguided and ill-informed or not, be considered as authority in the instant.

In *Reading*, the issue was not wages, but deductions. The court refused to permit the appellant to deduct his living expenses as "recovery of investment" or as "cost of doing labor." *Reading* has absolutely no application to the instant.

The government also cites cases regarding claims that a citizen of Pennsylvania or of Indiana or a "free citizen" of the "Republic of Minnesota" is not a citizen of the United States, none of which have anything to do with defendant's motion. All those cases establish is that the government either has no authoritative argument to offer against defendant's Fourth Motion to Dismiss, and, in failing to produce any creditable argument has conceded the merits of the motion.

None of the cases cited by the government had before it, nor did any court in those cases rule on, any of the issues presented within the six grounds raised by defendant's Fourth Motion to Dismiss. The absence of any statutory imposition of liability upon defendant, the statutory and regulatory exclusion of defendant's revenues, the co-extensive jurisdictional limits of federal taxation authority, the Supreme Court's holdings that the Constitution forbids taxation of activities solely within the jurisdiction of the States, the Constitutional prohibition of taxation of a

fundamental right, i.e., the fundamental, God-given right to earn a living by engaging in any lawful occupation recognized by the Supreme Court in countless cases; and the Constitutional prohibition of taxing, without apportionment, that portion, however minute in the eyes of the government, of wages, salaries and fees personally earned that represents the wage earner's property, his human capital[7], the labor, effort, energy, and depletion and ultimate exhaustion of his life span and work life span, given in exchange for it.

All of the basic components of the six grounds for defendant's Fourth Motion to Dismiss are either based squarely upon exact statutory and regulatory authority or upon fundamental principles of Constitutional law supported by numerous Supreme Court cases.

Given the government's inability to produce any authorities contradicting the statutes, regulations and Supreme Court authorities cited in support of defendant's Fourth Motion to Dismiss, it should come as no surprise to note that the government is able only to conclude its argument with the motion in the same manner it opened, by resorting to name calling and mischaracterization.

[7] See *Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006)

Accordingly, the statutory and Constitutional authorities cited in support of defendant's Fourth Motion to Dismiss being valid, controlling and applicable, coupled with the government's inability to produce any applicable authority in opposition, it is submitted that defendant's motion is meritorious and that it should be granted, dismissing both counts of the indictment with prejudice.

MOTION TO COMPEL DISCOVERY:

Although it would seem unusual for intra-departmental legal advisory memoranda to occupy a witness folder, given the government's indication that it is willing to obey an order for an *in camera* review of the contents of Witness Folder No. 8 to determine whether it contains any discoverable material, defendant will be content with the Court's directing that the file be made available for such.

MOTION IN LIMINE:

While the government's concession that it does not intend to make an improper appeal the jury's pecuniary interests is appreciated, and would indicate the government's agreement to the granting of defendant's motion to the extent it is unopposed, its attempt to reserve the right to call the defendant names, such as "tax protester", is objected to in the strongest manner.

Again, the government's intention to base its claims on name calling and mischaracterization, rather than the facts and the law reappears. With all due respect this is not a political campaign, but a legal process that should confine its inquiry to the facts and to the law.

The IRS has defined "tax protester" as one who has refused to file income tax returns or to pay taxes because he objects to some policy or action of the government and, therefore, defendant cannot be categorized as a "tax protester". That definition does not include defendant, who is not refusing to file income tax returns for any reason other than to insist upon his right to rely upon the law as it is written and to insist that the IRS apply that law in a Constitutional manner. To call him a "tax protester" for insisting upon the rule of law is inappropriate and would plant a negative impression of defendant in the mind of the jury that is unwarranted and untrue.

In the common usage of the term, "protester" evokes images of one who is a malcontent, one who is obstructive, who is often irrational and even violent, and who seeks through his obstructive, irrational and violent behavior to impose a change in the law or policies of the government, none of which apply to defendant. The term carries a negative connotation that is not applicable to defendant. The

jury would, of course, wrongfully assign to defendant both the common usage, an irrational and potentially violent malcontent and obstructer, acting solely out of animosity toward some government policy or action and the term's obvious negative connotation.

Defendant's position relative to the claims of the government that he owes taxes is not defiance due to some objection to either the amount of the purported tax as excessive or the disposition of tax revenues. Obviously, defendant pays taxes every day to federal, state and local taxing authorities without protest and without objection. With respect to the federal income tax, however, he has raised issues, both with respect to the law as it is written and with respect to his rights that the Supreme Court has recognized are entitled to the government's protection. He seeks to enforce the law and the Constitution in keeping with his obligation as an attorney and officer of the Court, not to change or frustrate it. Hardly an anti-law animus generally associated with the term "protester".

Calling defendant a "tax protester" would associate defendant with a number of groups and organizations that have been actively opposing income taxes, seeking a change in the laws, and which have been publicly derided and ridiculed by the government through the media.

Defendant is not, nor has he ever been a member of any protest group on any issue, taxation or otherwise (Exhibit A) and it would be inappropriate, inaccurate and unjust to associate him in the minds of the jurors with groups to which he does not belong.

In *United States v. Bergman*, 813 F.2d 1027 (9th Cir. 1987), cited and relied upon by the government, Bergman had filed a doctored up return, attaching materials that were apparently generally associated with tax protesting groups and had objected to the tax on the basis of the 1st, 4th, 7th, 8th, 9th, 10th, 13th, 14th, and 16th Amendments, without any sound explanation for those objections. The court found that he was engaging in "tax protester activities" and that calling him a tax protester was not a mischaracterization. This case does not apply to defendant, whose issues with the IRS's misapplication of the tax laws are rooted in the law as it is written and the Constitution as it has been interpreted by the Supreme Court.

The government also cites *United States v. Turano*, 802 F.2d 10, as authority for its contention that it may call defendant names, including "tax protester", in opening arguments and during trial of the case. In *Turano*, the reference to "tax protester" was *after evidence of defendant's membership in and tax protest activities at meetings of a tax protest organization, including his attempts to induce*

others to stop filing returns, was adduced. The post-evidentiary comment was one that enjoyed a basis in evidence, not a general license to call the defendant inflammatory names prior to evidence and during the trial. Thus, *Turano* has been mis-cited as authority for such.

United States v. Carlson, 617 F.2d 518 (9th Cir. 1980), cited by the government, was a *bench trial*, not a jury trial, and has no application to the instant nor to this issue. The appeal was based solely on defendant's claim that the tax laws violated his 5th Amendment right against self-incrimination. Even in that case, however, the trial court's comment that defendant was a tax protester was in his findings, *after* the evidence.

Finally, the government relies on *United States v. Reed*, 670 F.3d (sic)[8] 622 (5th Cir. 1982). The reasoning of the government in citing that case in support of its position is a mystery, however, because the use of the term, *which did not appear until the appellate opinion*, was not an issue in the case. Reed's only reasons for his refusal to file returns were based upon religious and moral objections.

[8] 670 F.2d 622

The government is entitled to present any material, relevant and admissible *evidence* that is relevant and material to providing the jury with insight into defendant's state of mind, intentions and "willfulness", as an element of the charges, but name calling and assigning a state of mind of others, of groups to which defendant does not belong, is neither evidence nor relevant nor material.

Defendant, alone, has been accused in this case, and defendant's state of mind, motivations and intentions, alone, are the subject of the jury's quest. To categorize him as a "tax protester", associating him with a group, is assigning to him a state of mind, motivations and intentions of others, or, worse, those the jurors may associate with their perception of others, not evidence of defendant's state of mind.

None of the authorities cited by the government support its claim of a right to call defendant names in its opening statement and during the trial, nor afterwards in the absence of an evidentiary basis for such an association, and it is clear that doing so would be unjust and tend to prejudice the jury's perception of defendant.

Accordingly, it is respectfully submitted that Defendant's Motion in Limine should be granted, prohibiting the prosecution at trial from making statements or

arguments in the presence of the jury that, directly or indirectly, appeal to the jury's prejudice, emotion or pecuniary interests, to include calling defendant names, such as "tax protester", "tax resistor" or other prejudicial and inflammatory references as described more fully in defendant's Motion in Limine and memorandum submitted in support thereof.

CONCLUSION

With respect to the Defendant's Second Motion to Dismiss, the government has failed to produce any statute or valid rule or regulation fixing any tax rates for the years in question nor has it produced any applicable legal authorities to dispute those advanced by defendant, and, therefore, it is respectfully submitted that the defendant's motion to dismiss should be granted, dismissing both counts of the indictment with prejudice.

With respect to the Defendant's Third Motion to Dismiss, the government has failed to establish that a trial of this cause would serve any purpose nor that there is any genuine issue of fact that there was no income concealed in the trust as alleged as an "affirmative act" of evasion, an essential element of the offense charged, and, therefore, it is respectfully submitted that defendant's motion to dismiss should be granted, dismissing both counts of the indictment with prejudice.

With respect to the Defendant's Fourth Motion to Dismiss, the government is unable to refute any of the statutory and Supreme Court authorities advanced by defendant, relying solely on name calling, misstated definitions and cases that bear no application to the instant, and, therefore, the defendant's motion to dismiss should be granted, dismissing both counts of the indictment with prejudice.

With respect to the Defendant's Motion to Compel, the government has indicated that if ordered by the Court it would provide the folder at issue to the Court for *in camera* inspection, and, therefore, defendant requests that the Court order the production for *in camera* inspection and direct the disclosure of all material found by the Court to be discoverable to defendant.

With respect to the Defendant's Motion in Limine, the government has failed to demonstrate its right to call defendant inflammatory names in the presence of the jury, the authorities relied upon by the government for doing so either being inapplicable to the instant or failing to hold as represented to the Court, and, therefore, it is respectfully submitted that Defendant's Motion in Limine should be granted, prohibiting the prosecution at trial from making statements or arguments in the presence of the jury that, directly or indirectly, appeal to the jury's prejudice, emotion or pecuniary interests, to include calling defendant names, such as "tax

protester", "tax resistor" or other prejudicial and inflammatory references as described more fully in defendant's Motion in Limine and memorandum submitted in support thereof.

Respectfully submitted,

George E. Harp, Bar # 6567

610 Marshall St., Ste. 619
Shreveport, LA 71101
318 424-2003

Attorney for Tommy K. Cryer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Third Motion to Dismiss Indictment has this day been hand delivered to the offices of Earl Campbell, AUSA, U. S. Attorney's Office, 300 Fannin St., Suite 3201, Shreveport, Louisiana.

Shreveport, Louisiana, this 5th day of February, 2007.

George E. Hays
Of Counsel