IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 18-CR-28-RM

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRAIG R. WALCOTT,

Defendant.

GOVERNMENT'S RESPONSE IN OPPOSITION TO PRE-TRIAL MOTIONS TO DISMISS THE INDICTMENT FILED PERSONALLY BY THE DEFENDANT

The United States of America, by Richard E. Zuckerman, Principal Deputy Assistant Attorney General, Department of Justice, Tax Division, and through Trial Attorneys Andrew J. Kameros and Lee Langston, hereby respectfully opposes the defendant's several motions to dismiss the indictment or a particular count in the indictment for various reasons.

INTRODUCTION

The defendant Craig Walcott was indicted by a federal grand jury on January 24, 2018, on charges of tax evasion and failing to file individual income tax returns. (Doc. No. 1). Although Walcott was not arraigned on these charges until March 9, 2018, he began filing substantive motions seeking dismissal of the indictment on February 9, 2018. With the Court's permission, Walcott has continued to personally file substantive motions even after attorney Peter Bornstein was appointed by the Court to represent Walcott on April 9, 2018. To date, defendant has filed eight pleadings that in some form request dismissal of a portion or all of the indictment.

Taken together, the pleadings seek dismissal of the indictment for three reasons: 1) the Court lacks subject matter jurisdiction over the case, 2) revenue received by him is not taxable as a matter of law, and 3) appointed counsel is ineffective. Walcott also seeks dismissal of Count One of the indictment claiming that his taxes for the years at issue were not assessed. For the following reasons, Walcott's motions to dismiss the indictment and Count One of the indictment should be denied.

ARGUMENT

1. <u>The Court Has Subject Matter Jurisdiction Over This Case</u>

On February 9, 2018, Walcott filed a "motion to determine subject matter jurisdiction of the Court." (Doc. No. 14). On February 14, 2018, the Court denied this motion concluding that "[t]he Court [] has jurisdiction over this matter." (Doc. No. 16). Despite the Court's unequivocal ruling, on February 26, 2018, Walcott filed a "motion to dismiss for lack of jurisdiction." (Doc. No. 21). The government's response characterized Walcott's motion as a request for reconsideration of the Court's earlier ruling, and requested that the motion be denied. (Doc. No. 22). To date, the Court has not ruled on this motion.

On March 6, 2018, Walcott filed a "supplement" to his motion to dismiss for lack of subject-matter jurisdiction. (Doc. No. 23). Because this pleading did not raise any new grounds for Walcott's claim that the Court lacks subject-matter jurisdiction over this matter, the government did not file a response.

On May 18, 2018, Walcott filed a "Mandatory Judicial Notice and 2nd Offer of Proof" in which he asserted, without authority, that the Department of Justice lacks jurisdiction over the offenses charged in the indictment. Walcott has been indicted for violation of the laws of the United States (26 U.S.C. 7201 and 7203) and the Act to

Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870), specifically grants the Attorney General and the United States Attorneys the authority to prosecute of all federal crimes, and represent the United States in all court actions. The Department of Justice clearly has the authority to represent the United States in this matter, and this Court unquestionably has subject matter jurisdiction in this case. Walcott's motions to dismiss based on the Court's and the Department of Justice's lack of jurisdiction over this matter should, therefore, be denied.

2. **Walcott Was Required To File Tax Returns And Pay Assessed Taxes And Penalties**

In several of his pleadings (Doc. Nos. 34, 53 and 63), Walcott argues that the money he received during the years at issue was not taxable income and that he had no obligation to file tax returns or pay any income tax. Walcott's frivolous argument is directly contradicted by statutes, regulations and settled law.

Section 1 of the Internal Revenue Code imposes a tax on the "taxable income" of all individuals who, like Walcott, are citizens or residents of the United States. *See* Treas. Reg. (26 C.F.R.) § 1.1-1(a)(1). I.R.C. Section 63 defines "taxable income" as gross income less allowable deductions. I.R.C. Section 61(a), in turn, defines "gross income" as "all income from whatever source derived," including "[c]ompensation for services." I.R.C. Section 61(a)(1).

The Supreme Court has recognized that Congress intended, through I.R.C. Section 61(a) and its statutory precursors, to exert "the full measure of its taxing power," *Helivering v Clifford,* 309 U.S. 331, 334 (1940), and to bring within the definition of income any "accession to wealth." *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426, 431 (1955).

Taxpayers are required to file returns and keep records according to the requirements of the Secretary of the Treasury or his delegate. I.R.C. §§ 6001, 6011(a); Treas. Reg. §§ 1.6001-1(b), 1.6011-1(a). I.R.C. 6012(a) provides in pertinent part that "[r]eturns with respect to income taxes . . . shall be made" by [e]very individual having folr the taxable year gross income which equals or exceeds the exemption amount," with certain exceptions not applicable here. I.R.C. § 6012(a). The terms "exemption amount" is defined in I.R.C. 151 (d) and, during the years at issue, was between $3,800 and $3,950. I.R.C. §§ 151(d), 6012(a)(1)(D)(ii). Returns must generally be filed by April 15 of the year following the close of the taxable year. I.R.C. § 6072(a); *see also* Treas. Reg. § 1.6012-1 (prescribing the form of the return). The evidence presented at trial will demonstrate that Walcott earned sufficient income for each of the years 2012, 2013 and 2014 to require him to file a federal income tax return.

The Internal Revenue Code authorizes the IRS to make inquiries, determinations and assessments of all taxes imposed thereunder and to collect such taxes. See I.R.C. §6201, 6301. Included in this grant of authority is the authority to determine tax deficiencies. I.R.C. §§ 6211(a), 6212(a).

When the IRS determines a deficiency, it generally must send, as it did here, a statutory notice of deficiency by certified or registered mail to the taxpayer at his last known address before it assesses or collects the tax. I.R.C. §§ 6212(a), (b). The IRS's deficiency determination is presumed to be correct, and the taxpayer bears the burden of showing otherwise. *See, e.g., Zell v. Comm'r*, 763 F.2d 1139, 1141 (10th Cir. 1985); *Kikalos v.* Commissioner, 434 F.3d 977, 982 (7th Cir. 2006); *Reynolds v. Commissioner,* 296 F.3d 607, 612 (7th Cir. 2002). The evidence will demonstrate that Walcott did not pursue any of the acceptable methods available to challenge the IRS's assessment of

taxes for the years 2005, 2006 and 2007. The Internal Revenue Code also authorizes the imposition of penalties or additions to tax, as was done here, if a taxpayer does not comply with his statutory obligations. I.R.C. § 7491(c).

Because the IRS properly assessed income taxes on the income earned by Walcott for the years 2005, 2006 and 2007, and Walcott clearly earned sufficient income for the years 2012, 2013 and 2014 to require him to file a tax return, his motion to dismiss on the grounds that he did not earn income and was not required to file tax returns should be denied.

3 . **Defendant Has Not Demonstrated Ineffectiveness Of His Attorney and Ineffectiveness Of Counsel Is Not Grounds For Dismissal Of The Indictment**

In several of his pleadings Walcott requests that the indictment be dismissed on the grounds that his appointed counsel is ineffective. Walcott bases his claim of ineffective assistant of counsel on assertions that his attorney "refuses to place onto the record in Defendant's defense volumes of evidence that essential elements of the crimes alleged can never be met," and "lacks knowledge of the operation of 26 USC."

Walcott's complaints about his attorney do not demonstrate a problem with Mr. Bornstein's representation that would entitle him to any relief at this stage of the proceeding. Although indigents in criminal cases have a fundamental right to have counsel appointed to represent them, *Gideon v. Wainwright,* 372 U.S. 335 (1963), there is no corollary right to have any special rapport or even confidence in court-appointed counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983). Nor is there an absolute right to appointed counsel of one's choice. *United States v. Collins*, 920 F.2d 619, 625 n.8 (10th Cir. 1990); *United States v. Nichols,* 841 F.2d 1485 (10th Cir. 1988); *Davis v. Stamler*, 650 F.2d 447, 479-80 (3d Cir. 1981).

Although it is not clear whether Walcott is seeking appointment of substitute counsel at this point, a criminal defendant does not have a right "to demand a different appointed lawyer except for good cause shown." *Thomas v. Wainwright,* 767 F.2d 738, 742 (11th Cir. 1985). Good cause in this context means a fundamental problem such as a conflict of interest or complete breakdown in communication which could lead to an unjust verdict. *United States v. Porter*, 405 F.3d 1136, 1140 (10th Cir. 2005); United *States v. Young*, 482 F.2d 993, 995 (5th Cir. 1973). Even serious disagreements between a defendant and appointed counsel regarding case strategy and trial tactics do not rise to the level of "a total lack of communications preventing an adequate defense." *United States v. Jennings,* 83 F.3d 145, 148 (6th Cir. 1996). The constitutional right to counsel is satisfied when the lawyer chooses a professionally competent strategy that secures for the defendant a fair and adversarial trial. *Holman v. Gilmore,* 126 F.3d 876, 881-884 (7th Cir. 1997).

Walcott does not claim that Mr. Bornstein is operating under a conflict of interest or that there has been a complete breakdown in communication between them. Walcott's complaint is simply that Mr. Bornstein has not agreed to pursue Walcott's preferred strategy in defending against the pending charges. Such a complaint does not support an ineffective assistance of counsel claim. Simply put, a defendant does not have a constitutional right to demand that counsel present arguments which counsel has professionally decided not to present. *Tapia v. Tansy*, 926 F.2d 1554, 1564 (10th Cir. 1991)(*citing Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)).

There are simply no grounds presented by Walcott that would support a determination that Mr. Bornstein is not providing competent and effective representation and Walcott's disagreements with Mr. Bornstein's defense strategy do not warrant

appointment of substitute counsel. Moreover, Walcott provides no support for his contention that a claim of ineffective assistance of counsel can be the basis for dismissal of an indictment pre-trial. This is because there are no cases in which a pre-trial determination that appointed counsel is ineffective has resulted in the dismissal of charges. If Walcott could demonstrate that Mr. Bornstein is ineffective, which he cannot, he would only be entitled to substitute counsel, not dismissal of the indictment. If Mr. Walcott is displeased with Mr. Bornstein's representation simply because of strategy disagreements his recourse is to represent himself. *See United States v. Garey*, 540 F.3d 1253, 1264 (11th Cir. 2008).

4. **The IRS Assessed The Defendant For Taxes Due For The Years 2005, 2006 and 2007, Although A Formal Assessment Is Not Required**

Walcott argues that Count One of the Indictment, charging him with the evasion of the payment of his 2005, 2006 and 2007 income taxes, should be dismissed because the taxes due for those years were not properly assessed.

The indictment alleges that on April 8, 2010, the IRS sent Walcott a Notice of Deficiency informing him that he owed additional tax and penalties in the amounts of $232,203 for 2005, $128,760 for 2006 and $97,606 for 2007. The Notice of Deficiency, will be offered as evidence during the government's case-in-chief. 26 U.S.C. 6213 provides that assessment becomes final 90 days from the mailing of the Notice of Deficiency unless the taxpayer files a petition with the Tax Court to challenge the assessment during that period. Here, the evidence will demonstrate that Walcott did not petition the Tax Court in response to this Notice of Deficiency – in fact he sent it back to the IRS with the statement "refused for cause" written across each page – such that the assessment became final on July 7, 2010. Official IRS certificates of

assessment for these years, which are prima facie evidence of a tax deficiency, will be offered during the government's case-in-chief. *See United States v. Silkman*, 220 F.3d 935, 937 (8th Cir. 2000); *United States v. Voorhies,* 658 F.2d 710, 715 (9th Cir. 1981).

Although the evidence will clearly demonstrate the existence of a valid assessment of Walcott's 2005, 2006 and 2007 taxes, it is clear that proof of a final assessment is unnecessary because a tax deficiency arises by operation of law on the date the return is due. *Voorhies*, 658 F.2d at 714; *United States v. Northwestern Mutual Insurance Co.,* 315 F.2d 723, 725-26 (9th Cir. 1963)(a tax is due and owing on the date the return must be filed, even if ascertainment of the amount requires reference to a subsequent IRS redetermination; the statutory deficiency notice "merely reminds the taxpayer of his duty to pay a tax debt already due and does not create a liability."); *United States v. Dack*, 747 F.2d 1172, 1174 (7th Cir. 1984) (IRS not compelled to make a formal assessment, because any deficiency is deemed to arise by operation of law on the date a return should have been filed.) Because Walcott's tax deficiencies for the years 2005, 2006 and 2007 both arose by operation of law and were validly assessed, his motion to dismiss Count One of the indictment should be denied.

CONCLUSION

For the above reasons, the Government respectfully requests that the Court deny the defendant's motion to dismiss Count One of the indictment and motions to dismiss the indictment.

Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

By: *s/ Andrew J. Kameros*

Andrew J. Kameros
Lee Langston
Trial Attorneys
Tax Division
Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Department of Justice, Tax Division, and that a copy of the foregoing Government's Response in Opposition to Pre-Trial Motions to Dismiss the Indictment Filed Personally by the Defendant was filed using the CM/ECF system and caused to be served via United States mail, to the following on this 3rd day of August, 2018.

Peter R. Bornstein, Esq.
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/s/ Andrew J. Kameros
Andrew J. Kameros
Trial Attorney