

CTJ (Hand-carried)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA

v.

RICHARD MICHAEL SIMKANIN

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CRIMINAL NO. 4:03-CR-188-A

**GOVERNMENT'S BRIEF RELATING TO
SUFFICIENCY OF INDICTMENT**

I. Elements: 26 U.S.C. § 7202 (Counts 1-12)

To establish a violation of section 7202, the following elements must be proven beyond a reasonable doubt:

1. That the defendant had a duty to collect, and/or to truthfully account for, and/or pay over taxes;
2. That the defendant failed to collect, and/or to truthfully account for, and/or pay over taxes;
3. That the defendant's failure was willful.

The Supreme Court of the United States clearly set forth the elements of tax offenses in Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 610, 112 L. Ed. 2d 617 (1991). Although Cheek involved violations of 26 U.S.C. 7201 and 7203, the requisite intent element for the "willful" violation of a tax law is the same for violations of either 26 U.S.C. §§ 7201, 7202 (Counts 1-12) or 7203.

This so-called element of “statutory willfulness” was crafted to protect the average citizen from prosecution for innocent mistakes made due to the complexity of the tax laws. United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L.Ed.2d 12. Thus, statutory willfulness is defined as the “voluntary, intentional violation of a known legal duty”. United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12, and Cheek, Id. at 605.

Cheek, Id. at 610, clearly defined the government’s burden in proving a defendant guilty in a tax case as follows:

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove:

1. That the law imposed a duty on the defendant;
2. That the defendant knew of this duty; and
3. That the defendant voluntarily and intentionally violated that duty.

This willfulness standard was also recently cited in two recent circuit court decisions. United States v. Mathes, 151 F.3d 251, 255 (5th Cir.) and United States v. Evangelista, 122 F.3d 112, 122 (2nd Cir. 1997).

II. Elements: 18 U.S.C. § 287 (Counts 13-27)

To establish a violation of section 7202, the following elements must be proved beyond a reasonable doubt:

1. That the defendant presented a false or fraudulent claim against the United States;
2. That the claim was presented to an agency of the United States; and
3. That the defendant knew that the claim was false or fraudulent.

These elements are clearly set forth in United States v. Upton, 91 F.3d 677 (5th Cir. 1996) and United States v. Burns, 162 F.3d 840, 850 (5th Cir. 1998). It is

also probably wise to include a fourth element of materiality due to the language in the recent cases of Neder v. United States, 119 S.Ct. 1827, 1841 (1999) and United States v. Foster, 229 F.3d 1196, 1196 n.2 (5th Cir. 2000).

III. Sufficiency of Indictment Language

Rule 7(c)(1) of the Federal Rules of Criminal Procedure require that the indictment be a “plain, concise, and definite written statement of the essential facts constituting the offense charged.” See United States v. Crow, 164 F.3d 229, 235 (5th Cir. 1999), In Crow, the trial court’s denial of a motion to dismiss the indictment was upheld because the indictment was sufficiently detailed and clearly presented the charges.

A. Counts 1-12 [26 U.S.C. §7202]

In these counts, the government clearly alleged that the defendant, for each of Counts 1-12, **willfully** failed to collect, truthfully account for, and pay over, to the Internal Revenue Service certain named taxes then due and owing to the United States. (emphasis added)

During the July 10, 2003 detention hearing, the Court pointed out that the language of the indictment does not include language specifically alleging that the defendant was the responsible party who had a legal duty to collect, truthfully account for, and pay over these taxes. However, these Counts **do** charge that the defendant **willfully** failed to collect these taxes. In Cheek, *supra*, the Supreme Court affirmed that the government’s burden of proving “statutory willfulness” necessarily includes a showing that the defendant had a legal duty to collect these taxes.

B. Counts 13-27 [18 U.S.C. §287]

In these counts, the government clearly alleged that the defendant, for each of Counts 13-27, knowingly presented to an agency of the United States a false or fraudulent claim against the United States, and that the defendant knew that the claim was false or fraudulent.

At the July 10, 2003 detention hearing, the Court inquired whether a defendant can be convicted for making a false claim if he were making the claim on behalf of a third party (ie. his employees). The government was unable to find any case law that stated that a defendant cannot be convicted of 18 U.S.C. §287 (making a false claim) if the defendant was presenting the false claim on behalf of a third party. It would appear that at least part of the rationale for criminalizing the presenting of false claims is to deter conduct that would cause a waste of government time and loss of government funds in connection with the processing and payment of false claims. The loss of government resources caused by the filing of false claims would be just as significant whether the defendant is filed the false claim for his personal benefit or for the benefit of some third party.

IV. Legality of Continued Detention if Indictment Legally Defective

At the July 10, 2003 detention hearing, the Court inquired about the legality of any continued detention of the defendant if the allegations of the indictment were legally defective. The government was unable to find any cases that seemed relevant to this point. In any event, for the reasons stated above, the government considers the allegations in the indictment to be legally sufficient.

V. Indictment is Legally Sufficient

The instant indictment is legally sufficient and in full compliance with the requirements set forth in Rule 7(c)(1) of the Federal Rules of Criminal Procedure. Both the essential elements and facts of all offenses are set forth in a clear and concise manner.

Respectfully submitted,

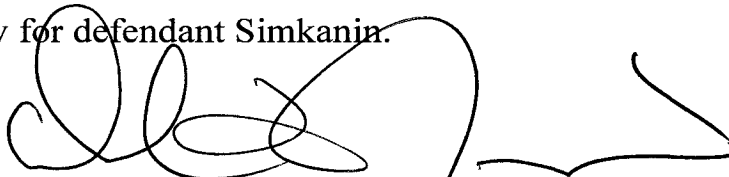
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CERTIFICATE OF SERVICE

This is to certify that on this the 14th day of July, 2003, a true and correct copy of the foregoing Government's Brief Relating to the Sufficiency of Indictment was served via facsimile on Arch McColl, III, 1601 Elm Street, Suite 2000, Dallas, Texas 75201-4761, attorney for defendant Simkanin.



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