UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITEDSTATES OF AMERICA, Plaintiff, v. JAMES DOMINIC YYY, Defendant.	))))))))))	CRIMINAL ACTION NO. 3:05-CR-00202-REP-1

MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL AND MEMORANDUM OF LAW IN SUPPORT THEREOF

I. INTRODUCTION

Pursuant to Fed. R. Crim. P. 29(c), Defendant, James Dominic YYY, hereby moves this Court to enter a Judgment of Acquittal on all counts in the superseding indictment. As set forth below, because, even considering the evidence in the light most favorable to the government, no reasonable juror could conclude the government proved all of the elements of the various counts beyond a reasonable doubt, a Judgment of Acquittal is appropriate under Fed. R. Crim. P. 29(c).

In the alternative, Mr. YYY requests the Court order a new trial pursuant to Fed. R. Crim. P. 33. The granting of a new trial is appropriate under Fed. R. Crim. P. 33 for any reason mandated by the "interests of justice." United States v. Scroggins, 379 F.3d 233, 253-54 (5th Cir. 2004).

II. DISCUSSION

A. Counts 1-3

It is axiomatic that, in order to establish Mr. YYY's guilt on Counts 1-3, the government was obligated to prove, beyond a reasonable doubt, that Mr. YYY willfully evaded a "substantial

income tax." In order to establish the "substantial income tax" element at trial, the government relied primarily upon the testimony of former IRS auditor John Gordon. See 1/24/06 Tr. at 54-55. Mr. Gordon testified that he conducted an audit in order to determine the taxes owed by Mr. YYY for the tax years 1995-1997 and determined that Mr. YYY owed $321,659 for 1995, $395,906 for 1996, and $119,233 for 1997. *Id.* at 88. Significantly, however, Mr. Gordon's audit was based only upon the deposits into accounts allegedly controlled by Mr. YYY. *Id.* at 79 ("I used the total of those deposits to be their income."). Moreover, Mr. Gordon's audit did not credit Mr. YYY with most deductions for 1995 and it did not credit him with any deductions for 1996 and 1997, although Mr. Gordon was confident that such deductions existed. *Id.* at 78 ("I disallowed all the deductions because there was no support for those deductions."); 79 ("I'm pretty confident there probably would have been deductions."); 81. Indeed, Mr. Gordon conceded on cross-examination that the figures he presented to the jury did "not accurately reflect[] the tax that [the YYYs] would owe on that...." *Id.* at 92.

For purposes of this motion, it is imperative to determine what Mr. Gordon did not do in arriving at the 'tax owed' figures he presented to the jury. First, despite the fact that Mr. Gordon subpoenaed bank records, he limited his subpoena to those records relating to deposits even though he could have requested records related to withdrawals in order to determine deductions to taxable income. *Id.* at 101. Second, he did not review Alpha & Omega's Quickbooks files or any other documents seized from the YYY's home. *Id.* at 102. The seizure took place on May 29, 2003 – almost three years prior to Mr. Gordon's testimony. As part of the seizure, the government seized: numerous bank records and canceled checks, business receipts, financial records as well as Alpha & Omega's Quickbooks file. See Attachment A (Inventory Listing of All Items Seized at Search Warrant Site).

In reviewing tax evasion cases using the bank deposits method of prosecution, the United States Court of Appeals for the Fourth Circuit, in *United States v. Ayers*, 673 F.2d 728 (4th Cir. 1982), relied upon the Fifth Circuit's explanation of that method as contained in *United States v. Boulet*, 577 F.2d 1165 (5th Cir. 1978).

> Under this method, all deposits to the taxpayer's bank and similar accounts in a single year are added together to determine the gross deposits. An effort is made to identify amounts deposited that are nontaxable, such as gifts, transfers of money between accounts, repayment of loans and cash that the taxpayer had in his possession prior to that year that was deposited in a bank during that year. This process is called "purification." It results in a figure called net taxable bank deposits.

Id. at 1167. In connection with this method, it "is part of the government's duty to negate the possibility that bank deposits or cash expenditures in the year under investigation originated from non-taxable sources." *Id.* at 1168.

The "leads doctrine," developed by the United States Supreme Court in *Holland v.United States*, 348 U.S. 121, 136-37 (1954), is an integral part of the government's responsibilities when attempting to prove a tax evasion case. *See, e.g., United States v. Hall*, 650 F.2d 994, 999-1000 (9th Cir. 1981); *United States v. Slutsky*, 487 F.2d 832, 843 n.14 (2d Cir. 1973). Under the "leads doctrine," in order to meet its burden of proof, the government must track down "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." *Holland*, 348 U.S. at 135-36. This includes an obligation to give a defendant credit for deductions which the government can "calculate without [the defendant's] assistance." *Slutsky*, 487 F.2d at 842. The government's "investigation must establish a guarantee of essential accuracy in the circumstantial proof at trial as an element of the government's burden of proving guilt beyond a reasonable doubt. . . ." *Id.* at 840.

Indeed, the Supreme Court in *Holland* noted that there are many problems with the bank deposits method of proof in a tax evasion case that "might result in a serious injustice" and a shifting of the burden of proof. *Holland*, 348 U.S. at 135, 138. Nevertheless, it held that the government should not be denied this method of proof provided that it complies with the "leads doctrine." *Id.* As noted by the Court, by requiring faithful application to this doctrine, "[t]he practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads." *Id.* at 139. If the government fails to follow the "leads doctrine," however, a trial court should not send the government's case to a jury because it is insufficient. *Id.* at 136.

Instructive is *United States v. Lenamond*, 553 F.Supp. 852 (N.D. Tex. 1982). In that case, the defendant has been convicted by a jury for tax evasion after the government used a "bank deposits-cash expenditures" method of proof. *Id.* at 853. Nevertheless, the government's investigation failed to follow leads concerning inventory which would have produced deductions to any income. *Id.* at 855-860. In granting a judgment of acquittal following the jury's verdict, the Court noted that "[t]his is the very type of case contemplated by *Holland*" and found that "the *Holland* protections have been violated." *Id.* at 862, 855. First, it noted that the government was obligated to show that it conducted "a full and adequate investigation in a bank deposits case" in order for the verdict to survive a motion for a judgment of acquittal. *Id.* at 860, citing, *Boulet*, 577 F.2d at 1168. Second, it noted that "[t]he government's duty to investigate and to follow leads does apply to omitted or understated deductions...." *Id.* at 855 (collecting case citations).

In this case, the government itself conceded that it did not conduct "a full and adequate investigation." Indeed, as noted above, Mr. Gordon admitted that the figures he presented to the

jury did "not accurately reflect[] the tax that [the YYYs] would owe...." See 1/24/06 Tr. at. Likewise, it appears Mr. Gordon made no effort whatsoever to "negate the possibility that bank deposits...in the year[s] under investigation originated from non-taxable sources."[1] More importantly, the government, in this case, cannot plausibly argue that it adhered to the "leads doctrine" required by the Supreme Court in Holland. This is certainly not a case where the defense is arguing that the government must "bay down rabbit tracks" or conduct a "bacteriophobic search for error."[2] Instead, it is a case where Mr. Gordon could have easily obtained records by subpoena and could have easily reviewed many of Mr. YYY's financial records and quickbooks files that had been seized by the government almost three years prior in order to allow the jury to accurately assess whether there truly was a "substantial tax" owing. In this case, as in *Lenamond*, the *Holland* protections were egregiously violated.[3]

In sum, given the government's admitted failure to conduct a "full and adequate investigation" into the taxes, if any, truly owed by Mr. YYY as well as its failure to adhere to the "leads doctrine" as announced in *Holland*, Mr. YYY respectfully submits that the Court should not have allowed this case to go to the jury. *Holland*, 348 U.S. at 147; *Lenamond*, 553 F.Supp. at 863 ("Since the investigation was not adequate, this case should not have been submitted to the jury."). In any event, like the defendant in *Lenamond*, Mr. YYY is entitled to a judgment of acquittal on the tax counts (i.e. Counts 1-3).

B. Count 4

Count 4 of the superseding indictment charges Mr. YYY with mail fraud in violation of 18 U.S.C. § 1341. Specifically, it alleges that, on or about June 11, 2002, in the Eastern District of Virginia, Mr. YYY sent documents by United Parcel Service in furtherance of a scheme to

defraud. The recipient of the documents is alleged to have been Countrywide Home Loans, Inc. in Plano, Texas ("Countrywide").

The government's only witness to the mail fraud count at trial was Kyle Mays, who is a loan officer with Countrywide. See 1/25/06 Tr. at 246. Mr. Mays testified that he sent the YYYs a loan application through "either UPS or Fed Ex" along with a return envelope. *Id.* at 252 (emphasis added). There was no testimony as to whether the return envelope was "postage prepaid." Mr Mays further testified that the loan application was returned but he had no knowledge as to how it was returned. *Id.* at 258-61.

Mr. YYY pointed out at trial that there was no proof that the YYYs did not personally deliver the loan application to Countrywide despite the fact that they were living in Virginia at the time. *Id.* at 355-359, 372-73. The government contended that this was "unlikely" and that a reasonable jury could conclude that it was sent by overnight carrier." *Id.* at 359-362. Nevertheless, there are much more fundamental flaws in the government's proof regarding Count 4.

First, although the government undertook to prove that the loan application was sent to Countrywide using United Parcel Service, its own witness stated that it could have been sent through "either UPS or Fed Ex" using the return envelope from the same company. *Id.* at 252 (emphasis added).

Second, while Mr. Mays testified that it was Countrywide's habit to provide a return envelope for the loan application, there was no evidence whatsoever that the YYYs used that method to return the application. Indeed, while Mr. YYY concedes that it was implausible that it was returned by hand delivery, it is definitely reasonable that, because of the location of the UPS or Fed Ex facility or because of the costs of these companies (recall that there was no testimony

that postage was provided on the return envelope), the YYYs chose to return the loan application by United States mail. While, properly charged, this in and of itself might be an offense, the only allegations contained in the indictment is that the YYYs used a "commercial interstate carrier."

Third, the burden of proof is on the government to show venue. *See, e.g., United States v. Burns*, 990 F.2d 1426, 1436 (4th Cir. 1993). At the time the loan application was returned to Countrywide, the evidence at trial was that Mr. YYY was traveling extensively for business. Moreover, the YYYs lived relatively close to the Western District of Virginia. In sum, it is reasonable, if not likely, to conclude that Mr. YYY mailed the loan application or deposited it with UPS or Fed Ex or, for that matter, the United States Postal Service, during his travels. In short, there was absolutely no evidence offered by the government to establish that the application was mailed from the Eastern District of Virginia.

Fourth, there was no proof offered that "UPS or Fed Ex" is a "commercial interstate carrier." While the government might claim this to be common knowledge, elements of a crime cannot be presumed to be common knowledge – especially in a country where forty percent of citizens cannot name the vice president of the United States.[4] Indeed, one might presume that citizens have a common knowledge that large banks are federally insured, yet the government is not excused from proving that when FDIC insurance is an element of a criminal offense.[5]

In sum, given the numerous flaws with the government's proof on Count 4, no reasonable juror could conclude that the evidence established Mr. YYY's guilt beyond all reasonable doubt, and, therefore, a Judgment of Acquittal should be entered on Count 4 as well.

III. CONCLUSION

For the foregoing reasons, Mr. YYY respectfully requests the Court enter a Judgment of Acquittal on Counts 1-4 of the superseding indictment and to conditionally grant him a new trial pursuant to Fed. R. Crim. P. 33(a). *See* Fed. R. Crim. P. 29(d)(1). In the event this Court was to deny Mr. YYY's Motion for Judgment of Acquittal, Mr. YYY respectfully requests this Court grant him a new trial pursuant to Fed. R. Crim. P. 33(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on March ___, 2006, I caused the foregoing document to be served by first class mail, postage prepaid, on:

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