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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 DISMISS THE INDICTMENT FOR LACK OF SUFFICIENCY

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 for an order dismissing the indictment on the grounds that Counts One, Five, Six and Seven fail to state an offense, Count One fails to inform Banister of the crime charged with sufficient clarity to allow him to adequately defend against the charges, and is duplicitous. In support of said motion, Banister makes the following showing:

ARGUMENT:

The sufficiency of an indictment is measured by whether the indictment: (1) contains the necessary elements of the crime alleged; (2) informs the defendants of the crime charged with sufficient clarity to allow them to adequately defend against the charges; and (3) is stated with

sufficient clarity to bar subsequent prosecution for the same offense. *See United States v. Boone*, 951 F.2d 1526, 1542 (9th Cir. 1991). No liberal construction in favor of the indictment's validity attaches. *See United States v. Buckley*, 689 F.2d 893, 897 & n.4 (9th Cir. 1982). While the indictment's allegations are certainly presumed to be true, *see Buckley*, 689 F.2d at 897, the court looks only to the "four corners of the indictment . . . . [t]he indictment either states an offense or it doesn't." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002); *see also United States v. Welch*, 327 F.3d 1081, 1090 (10th Cir. 2003).

I. COUNTS FIVE, SIX AND SEVEN FAIL TO STATE AN OFFENSE

Counts Five, Six and Seven of the indictment each allege Joseph Banister willfully aided and assisted the filing of false amended income tax returns for taxpayers Walter A. Thompson and Denise Thompson in violation of 26 U.S.C. § 7206(2). The indictment alleges the returns were false and fraudulent as to a material matter in that it represented that adjusted gross income, taxable income, and taxes due and owing were zero. In bringing these causes of action to indictment, the government ignores a multitude of federal cases all of which hold that filing such forms constitute a protest, and not the filing of a return. While one can understand the government not wanting to deal with protests of this type, nonetheless, it cannot convert political "protest" filings into "fraudulent tax filings" in order to squelch the protest with imprisonment.

In the past thirty years, courts have had to deal with the issue of what happens when someone sends information on accounting forms, but the information shows they are actually protesting the requirements, and refuse to give the exact, and required, accounting information (like how much they were paid for their labor.) Is such a "protest" filing a "failure to report" or is it "fraudulent reporting?"

Due to critical First Amendment, Fifth Amendment and Fourteenth Amendment concerns

by the courts, as well as the administrative burdens, collection issues, and enforcement problems for tax agencies created by the decisions the courts make, the courts universally concur – someone whose filing shows they are refusing to provide the needed accounting information has "failed to report." They have not "filed" anything, but merely sent protest documents. Such protest documents do not trigger the fraudulent filing provisions of 7206, nor do they incur the benefit of a host of other filing statutes.

If a filing does not meet the reporting requirements, then it is not a "filing" for the purposes of the reporting statutes, including the statutes criminalizing fraudulent "reports," and is instead, criminally proscribed by the failure to report statutes. *See e.g.*, *Hess v. United States,* 785 F.Supp. 137, 138-39 (E.D.Wash.1991); *United States v Schiff*, 612 F2d 73 (2nd Cir. 1979); *United States v. Edelson,* 604 F.2d 232 (3d Cir.1979); *U. S. v. Smith*, 618 F.2d 280 (5th Cir. 1980); *United States v. Mosel*, 738 F.2d 157 (6th Cir. 1984); *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980); *United States v. Grabinski*, 558 F. Supp. 1324 (D. Minn. 1983), order aff'd, 727 F.2d 681 (8th Cir. 1984); *United States v. Farber,* 630 F.2d 569, 573 (8th Cir.1980); *United States v. Schmitz*, (9th Cir. 1976); *U. S. v. Rickman*, 638 F.2d 182 (10th Cir. 1980); *United States v. Brown,* 600 F.2d 248, 251 (10th Cir. 1979).

The Seventh Circuit explained the reasoning for this rule in a seminal case:

> The determination of what is an adequate return is a legal question and it was proper for the district court to decide that question… **It is important to harmonize the various tax crime laws.** The government apparently prefers to charge tax protestors with failure to file § 7203, a misdemeanor, rather than tax evasion s 7201, or making false returns § 7206, both felonies. A serious problem might be presented if the government took the position that any form with false information on it is not a return. That is not our situation. **It is not the false data which makes these returns defective, but the fact that there is no real attempt to comply with the requirement of filing a return. The government should not have to guess whether it should take the position that a form is not a return and charge the taxpayer with failure to file, or that the form is a return and charge him with filing a false return or tax evasion….it is our**

> **view that when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return**.

Moore, supra at p. 834-836 (emphasis added).

Were it otherwise, there would be major due process problems, as explained by a Nebraska state supreme court some time ago:

> It is difficult to understand how the State can charge that the filing of a false return is supported by the same facts that will support the charge of filing of no return, or, as the State contends, the filing of a false return is tantamount to failure to file a valid return. Count 2 is either repetitious of or inconsistent with count 1, and **the same set of facts can hardly support a guilty verdict as to both.**

State v. Forbes, 278 N.W.2d 615, 619 (Neb. 1979).

The federal courts have confronted the same fact pattern as presented here on multiple prior occasions, as one of the most common methods of protesting liability for the tax is to file such $0 returns with amounts listed for withholding and protest documents attached. The courts unanimously hold such filings were not "filings" within the meaning of the tax laws but were, instead, failures to file. *See e.g.*, *Hess,* 785 F.Supp. at p. 138-39; *Smith, supra*; *Mosel, supra*; *Moore, supra*; *Grabinski, supra*; *Farber, supra*; *Schmitz, supra*; *Rickman, supra*; *Brown, supra*; *Taylor v. United States*, 2001 WL 721850, *1 (D.D.C. 2001); T.C. Memo. 2004-251, 2004 WL 2475296 (U.S.Tax Ct. 2004).

Indeed, all courts, but one, that have considered just a $0 return agree that the mere filling of $0 in the income categories constitutes a failure to file, not a fraudulent filing. See *Mosel, supra*; *Moore, supra*; *Rickman, supra*; *Smith, supra*; *but see United States v Long*, 618 F2d 74 (9th Cir. 1980). The reasoning is simple – someone with $0 income has no obligation to report in the first place, so such a filing is clearly a protest filing, not a tax filing. This mirrors the statute's requirement of materiality – no tax agency is fooled by a $0 return, so there is no

possibility of misplaced reliance, the evil the fraudulent filing prohibition is intended to remedy. This objective materiality element is analogous to the tort law of fraudulent representation and the requirement of objective reliance – statements no one would reasonably rely upon cannot be actionable in fraud.

Even a court bound by the *Long* decision explained that placing $0 in all categories except the amount withheld category converts the filing into a non-report, non-return. While all $0 with nothing else could, theoretically, be a valid reporting, the inclusion of an amount in the withheld category makes it an evident protest document. As one court explained:

> With Long controlling, whether the 1983 return [with $0 in every category except the amount withheld section which listed $5322] qualifies as a return is a close question. One distinguishing feature is that in Long, the taxpayer completed all critical lines with "-0-" entries, including exemptions, income, tax, and tax withheld. Id. at 75. Here, on the other hand, the taxpayers did not short themselves. They had paid $5,322 in withholding and they wanted it back. The obvious question which leaps out at the reader of the subject return is "withholding from what?" Earned income is shown as "-0-." Interest income is also "-0-." There are no entries for dividends, capital gains, business income, or any other source of income from which taxes might have been withheld. The only logical conclusion which flows from these observations is that plaintiffs had some source of taxable income subject to withholding, but were not going to apprise IRS of what that source was or its amount. So viewed, the face of the return affirmatively shows that it contains insufficient "information from which tax liability could be calculated." Id. at 75.

Hess, 785 F. Supp. at 139.

Paragraph 2 of the indictment alleges that Banister is a Certified Public Accountant and at one time was a Special Agent with the Internal Revenue Service. Taking the allegations of an indictment in the light most favorable to the government, Thompson is a tax protester who wanted to protest whether he had taxable income. He consulted with Banister, a man presumed to know the law, for help with his Protest.

As stated by the great Justice Holmes, "[i]t is reasonable that a man who denies the

legality of a tax should have a clear and certain remedy." *Atchison, T. & S. F. R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). The government expressly acknowledges such. 26 U.S.C. § 6402 authorizes claims for refund to be made for the over payment of taxes. Section 6401(c) specifically provides that an amount paid as tax shall be considered an overpayment even if the claim is based on no tax liability. 26 U.S.C. § 7422 requires a claim for refund to be filed before the protest can be taken to court.

Prosecuting Banister for following the proscribed procedure to assist his client in filing a protest is a classic "bait-and-switch" remedy condemned as unconstitutional by the Supreme Court:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy for taxes collected in violation of federal law. Atchison, T. & S. F. R. Co. v. O'Connor, 223 U.S. 280, 285 (1912) (Holmes, J.). A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Reich v. Collins, 513 U.S. 106, 108 (1994).

The Federal Circuit recently explained the significance of the unanimous decision in *Reich* as follows:

> Armed with this confusion over the remedy available for challenges to the HMT [Harbor Maintenance Tax], Stone cites Reich v. Collins, 513 U.S. 106, 108 (1994), for the proposition that "due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." Reich, however, is best characterized as a "bait-and-switch" case. The Supreme Court in Reich stated that Georgia was not allowed to "hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists."

Reich v. Collins, 513 U.S. at 108.

Reich stands for the proposition that a state (or the federal government) may not restrict

access to postpayment relief when a taxpayer reasonably relies on the availability of such relief. *See Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 445 (1998) (per curiam) (requiring remedy for taxpayer who "reasonably relied on the apparent availability of a postpayment refund").

Reliance on a statute is no different than relying on the conduct of a government official in advising a person that he is not acting illegally if he takes certain actions. *See, e.g.*, *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109. To criminally prosecute Banister for assisting a client to file a protest, a right recognized by the United States Supreme Court, and authorized by statute, is entrapment by estoppel.

The case law cited to above and the facts alleged in the indictment show Banister prepared "protests" as opposed to "tax returns." Section 7206 deals exclusively with "tax returns." Documents that are not tax returns are not within the reach of Section 7206's proscribed conduct. Moreover, the filing of protests is expressly authorized by statute. Therefore, Counts Five, Six and Seven of the indictment fail to state an offense, and Banister's motion to dismiss these counts should be granted.

II. COUNT ONE OF THE INDICTMENT FAILS TO INFORM BANISTER OF THE CRIME CHARGED WITH SUFFICIENT CLARITY TO ALLOW HIM TO ADEQUATELY DEFEND AGAINST THE CHARGES

Paragraph 4 of the indictment provides an incomplete definition of gross income. The definition comes from 26 U.S.C. § 61 that is found in Subtitle A of the Internal Revenue Code. Subtitle A pertains to Income Taxes. Paragraph 6 of the indictment discusses the filing of a Form 941, an "Employers' Quarterly Tax Return", and mentions "income" taxes, "Federal Insurance Contribution Act (FICA)(Social Security)" and "Medicare" taxes. This paragraph would seem to embrace "employment" taxes contained in Subtitle C of the Internal Revenue

Code. Paragraph 7 alleges employers are required to calculate the correct amount of "income" taxes to withhold, and must also withhold "FICA" taxes and "Medicare" taxes. Paragraph 8 alleges there are "FICA" taxes and "Medicare" taxes imposed on an employer, and each quarter an employer is to prepare a Form 941 and to pay the "income" taxes withheld, together with the employers and employees portion of "FICA" taxes and "Medicare" taxes.

Paragraph 9 of the indictment alleges that Banister, Thompson and others conspired to defraud the United States by impeding, impairing, obstructing and defeating the lawful Government functions of the IRS in the ascertainment, computation, assessment and collection of the revenue, to wit: "income, social security and Medicare" taxes. According to paragraph 9, there were two objects of the conspiracy. The first object of the conspiracy regards the ascertainment, computation, assessment and collection of the "income, social security and Medicare taxes which were due and owing from the employees of CENCAL for the period July 1, 2000 through December 31, 2002." The second object of the conspiracy regards the ascertainment, computation, assessment and collection of the "income, social security and Medicare taxes which were due and owing from the owner and operator of CENCAL (a sole proprietorship according to paragraph 3 of the indictment), to wit, defendant Walter A. Thompson for the tax years ending December 31, 1996, 1997 and 1998."

Unfortunately, the indictment fails to provide statutory reference to the various taxes alleged in Count One. To fully comprehend the nature of Banister's inability to prepare a defense, a review of whom the various taxes are imposed on, and from whom those taxes are due and owing, is necessary.

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. In addition, Section 1401(a) and (b) imposes on the "self-employment income" of every individual a tax based on a percentage of the individual's "self-employment income." "Self-employment income" is defined at Section 1402(b).

26 U.S.C. § 6012 imposes a filing requirement on individuals if they have "gross income" over a certain amount, and 26 U.S.C. § 6151 provides that when a tax return is required to be filed, the amount of taxes, if any, shown on the return are to be paid when the return is filed, and in the absence of an assessment or notice and demand for their payment.

In Subtitle C there are several taxes imposed:

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 (as defined in Section 3121(a)) 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 (as defined in Section 3121(a)) in respect to their employment.

Although these taxes are 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 (as defined in Section 3121(a)) 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 (as defined in Section 3121(a)) he pays.

Chapter 22 Taxes

These are taxes involving employees working for employers who are "carriers." There is no indication in the indictment that Thompson is a "carrier."

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 (as defined in Section 3306(a)) 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 states the deducted and withheld taxes can be used as a credit against the tax imposed in Subtitle A.[1] This does not mean that an employer "withholds income tax."

When one applies these taxing provisions to the indictment, the confusion becomes obvious. Paragraph 11 of the indictment alleges that all of the employees of CENCAL were hourly wage employees. Hence, by definition, those "employees" have no "self-employment income," and the tax imposed at Sections 1401(a) and (b) are not applicable. Assuming that any particular employee has sufficient "gross income" to require the filing of a tax return, and sufficient "taxable income" to warrant a tax due and owing, each employee is required to pay the

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[1] The terms "Federal Insurance Contributions Act ("FICA")("social security") and "Medicare" do not appear in the language of the statutes. Instead they appear only in titles, subtitles and headings. Congress, at 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. This issue is more fully briefed in Banister's Motion to Strike Surplusage filed concurrently herewith.

tax "due and owing" at the time they file the income tax return. Thompson has no legal requirement to file those returns for his employees, and no obligation to pay the taxes "due and owing" as shown on those returns. Further, there is no statute that makes "social security" or "Medicare" taxes "due and owing from the employees of CENCAL."

It is indisputable that paragraph 9a identifies the object of the conspiracy to pertain to "taxes due and owing from the employees of CENCAL." If in fact the indictment meant to use the word "employee," then as a matter of law, the conspiracy would relate to the employees' Form 1040 individual income taxes. Yet paragraphs 6, 7, 8 – grouped together under the heading "Employment Taxes" – leave no doubt Count One attempts to incorporate Forms 941 and the non-payment of the taxes which would be shown due on those returns at the time set forth for their quarterly filings. Indeed, paragraph 29 states the United States was defrauded approximately $176,215, the amount of tax not deducted by Thompson and paid to the IRS. While these taxes would be "due and owing" from the employer of the employees of CENCAL, those taxes are not the taxes "due and owing" stated as the object of the conspiracy at paragraph 9a, i.e., "taxes due and owing from the employees of CENCAL."

In sum, the indictment fails to identify the taxes at issue by statute, and further fails to clearly give notice as to whether the taxes at issue are: (1) the income taxes imposed under Subtitle A due and owing from the employees of CENCAL; (2) the income taxes imposed on the employees under Subtitle C but allegedly due and owing from Thompson as the employer; (3) the excise tax imposed on the employer of the employees of CENCAL under Subtitle C and allegedly due and owing from Thompson; or (4) the tax to be deducted and withheld at Section 3402 from the wages of the CENCAL employees but allegedly due and owing from Thompson.

For all these reasons, the indictment lacks sufficient clarity to allow Banister to adequately defend against the charges, is fatally defective, and should be dismissed.

III. COUNT ONE FAILS TO STATE AN OFFENSE

Paragraph 10 of the indictment, under the heading "The Scheme to Defraud" describes the two objects of the conspiracy charged in paragraphs 9a and 9b. The first object of the conspiracy is described as a conspiracy to remove the employees of CENCAL from the taxpayer rolls, by:

1. Failing to withhold any income, FICA or Medicare taxes from their wages and salaries;

2. Failing to file Employers' Quarterly Tax Returns, Form 941;

3. Failing to provide the employees or the IRS with annual wage and/or other income statements, Forms W-2 or 1099.

While one may read these allegations and argue they clarify the object of the conspiracy at paragraph 9a, the allegations fail to rise to the level of conduct which can be punished under the "defraud clause" of 18 U.S.C. § 371.

Paragraph 10 also describes the second object of the conspiracy. It is described as a conspiracy to prepare, sign and file with the IRS Amended Individual Income tax returns, Forms 1040X, for the years 1996, 1997 and 1998, which returns were zero returns. So too, this conduct does not state a cause of action, and it also renders Count One of the Indictment duplicitous.

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 extremely broad scope of a "defraud clause" conspiracy, as announced in *Haas v. Henkel*, 216 U.S. 462, 30 S.Ct. 249, 54 L.Ed. 569 (1910) was refined in *Hammerschmidt v. United States*, 265 U.S. 182, 188-189, 44 S.Ct. 511 (1924). Here, the defendants had been charged with impeding the functions of the draft board by distributing handbills and flyers advocating non-compliance with the draft laws. In dismissing the indictment charging such a conspiracy, the Supreme Court held:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.

Hammerschmidt, supra at p. 188.

The court also held that even an open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it did not fall within the legal definition of a conspiracy to defraud the United States. *Hammerschmidt, supra* at p. 189; see also *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

Haga, supra, is a case involving a defendant indicted for an offense clause violation of §371, but convicted in a bench trial for a violation of the defraud clause. In reversing this conviction, the Court held:

> Hammerschmidt did not involve the participation of a federal official in a conspiracy for some fraudulent claim on the public fisc or for governmental benefits; the opinion instructs that -- at least absent such factors -- even concerted conduct encouraging violations of federal law is not of itself a conspiracy to defraud the government. Hammerschmidt also suggests that, even if a conspiracy to violate a specific federal law may be prosecuted under the "commit any offense" clause of section 371, a criminal prosecution under the "conspiracy to defraud" clause requires a showing of more than completely external interference with the working of a governmental program or disregard for federal laws.

Post-Hammerschmidt cases based on section 371 "conspiracy to defraud" indictments involving intangible governmental rights ordinarily have described clear interference and active contact with governmental agency functions. Analogously, section 371 "conspiracy to defraud" indictments typically include language indicating that the conspiracy defrauded the government by actively interfering with some specific function in some specified affirmative manner.

United States v. Klein, 247 F.2d 908 (2nd Cir. 1957) involved a conspiracy to defraud by impeding and obstructing the Treasury Department in the collection of income taxes. The court stated:

> Mere failure to disclose income would not be sufficient to show the crime charged of defrauding the United States under 18 U.S.C. § 371. The statute, however, not only includes the cheating of the Government out of property or money, but "also means to interfere with or obstruct one of its lawful government functions by deceit, craft, trickery, or at least by means that are dishonest."

Klein, supra at p. 916.

The court concluded there were 17 separate summary acts of concealment that showed such deceit, craft, trickery, or at least some means that was dishonest. The list included alteration of books, false entries in books, removal of bonds from New York to Canada, false statements in income tax returns, giving false answers to treasury agents and providing evasive affidavits. *Klein, supra* at p. 915.

The three items set forth in paragraph 10, identified as the manner in which the paragraph 9a conspiracy to defraud was carried out, contain no elements of deceit, craft, trickery, overreaching, or means that are dishonest. The three items are all acts of omission, not acts of commission. 26 U.S.C. § 7203 makes it a misdemeanor for any person required to file returns, supply information or pay a tax to willfully fail to do so. Yet one does not defraud the United States by not filing returns, *Klein, supra* at p. 916, and by extension, by not paying or supplying other information. The allegations simply do not support a conspiracy to defraud. Conspiracies to defraud require some affirmative conduct that obstructs or impedes the Internal Revenue Service. Paragraph 10 fails to allege any conduct that obstructed or impeded the IRS. No person at the IRS was prevented in any way from doing their job, and there are no facts plead showing an interference with the lawful functions of the IRS by trick, craft, deceit, overreaching, or other

dishonest means. There are no falsified books or records, no false statements made to any treasury agent, nor any other affirmative act of concealment alleged in the indictment. The IRS regularly ascertains, computes, assesses and collects taxes from those who don't file tax returns. To constitute a conspiracy to defraud, one of those functions has to be interfered with, or obstructed by, an act of deceit, craft, or trickery. Paragraph 10 makes clear the IRS was not defrauded as a matter of law. Thus no offense is stated.

Additionally:

> In a situation where the charging paragraph alleges the former [offense clause conspiracy] and yet the descriptive paragraph describe the latter [defraud clause conspiracy], the conviction must be reversed.

United States v. Allred, 867 F.2d 856, 866 (5th Cir. 1989).

Here the charging paragraph, paragraph 9a alleges a conspiracy to defraud, and the descriptive paragraph, paragraph 10, describes a willful failure to file returns, supply information or pay taxes by Thompson, and only by the most extended stretch, a conspiracy to violate 26 U.S.C. § 7203 – a specific offense conspiracy. The indictment must be dismissed.

The second object of the conspiracy, set forth in paragraph 9b, involves the filing of the same zero returns involved in counts Five, Six and Seven where Banister is charged with violating 26 U.S.C. § 7206(2). Paragraph 10 pertaining to the second object of the conspiracy describes a violation of 26 U.S.C. § 7206(2) by Banister and a violation of 26 U.S.C. § 7206(1) on the part of Thompson. To the extent this conduct describes a conspiracy, it describes a specific offense conspiracy to violate 26 U.S.C. § 7206. The indictment must be dismissed.

In addition, as discussed *supra*, the Forms 1040X mentioned in paragraph 10 were protest forms, not tax returns, and as a matter of law couldn't defraud anyone. Moreover, there is no allegation that any of the original Forms 1040 filed by Thompson were false or fraudulent. The

taxes on those forms have all been ascertained, computed, and assessed. Paragraph 20 of the indictment mentions at the time of the filing of the Form 1040X for 1988 there was an outstanding tax liability for that year. There is no mention as to other taxes being owed. Hence, we can conclude the taxes have been collected for two of the three years. There is no nexus between the filing of the protest documents and an obstruction or impeding of the IRS's ability to collect any unpaid taxes shown due on the original, perfectly lawful, Forms 1040 that were filed.

Paragraphs 11 through 30 under the "Manner and Means by Which the Conspiracy Was Carried Out," which for the most part merely duplicates many of the "Overt Acts" alleged at paragraphs 31 through 60, fail to allege any conduct done by deceit, craft or trickery, or at least by means that are dishonest.

WHEREFORE, and for all the reasons set forth hereinabove, Counts One, Five, Six and Seven fail to state an offense, Count One fails to inform Banister of the crime charged with sufficient clarity to allow him to adequately defend against the charges, and is duplicitous. Banister respectfully requests the indictment against him be dismissed.

Dated: May 19, 2005.

The Law Office of Robert G. Bernhoft, S.C.

By: /s/ Jeffrey A. Dickstein
Jeffrey A. Dickstein
Attorney for Defendant Joseph Banister