

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA)
)
 v.)
) Crim. No. 06-00071-SJM
 EDWARD LEWIS BROWN and)
 ELAINE ALICE BROWN,)
)
 Defendants.)

GOVERNMENT'S OBJECTION TO DEFENDANTS' NOTICE OF MOTION AND
AND MOTION TO DISMISS JUDICIAL AND ADMINISTRATIVE NOTICE

The government hereby objects to the defendants' "Notice of Motion and Motion to Dismiss Judicial and Administrative Notice" (Doc. No. 75). In support of its opposition, the government states as follows:

1. The defendants maintain that the indictment handed down by the grand jury was incurably defective on the alleged ground that it does not adequately apprise the defendants of the nature and the cause of charges against them.
2. The indictment charges the defendants with two conspiracies and a variety of substantive tax and money-laundering related offenses. ¹

¹ With respect to the first conspiracy count (Count 1), the indictment alleges that the defendants conspired with each other "to defraud the United States for the purpose of impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service ... in the ascertainment, computation, assessment, and collection of revenue: to wit, federal income taxes and income taxes." The indictment alleges twenty-seven specific overt acts that the defendants committed in furtherance of that conspiracy. In the next five counts (Counts Two through Seven), the indictment alleges that defendant Elaine Brown "willfully" evaded personal federal income taxes for each of the tax years 1999 through 2003, "by failing to make an income tax return ... as required by law ..., to pay [income taxes to] the Internal Revenue Service and by concealing

3. An indictment is sufficient if it: (i) contains all elements of the offense charged; (ii) fairly informs the defendant of the charge against which he must defend; and (iii) is particular enough to allow the defendant to plead acquittal or conviction in bar of future prosecutions for the same offense, United States v. Bailey, 444 U.S. 394, 414 (1980)
4. The indictment sets forth all of the elements of the charged offenses - conspiracy, tax evasion and structuring - in the corresponding counts. The indictment also describes the facts and conduct constituting the offenses charged, including with respect to the each of the substantive tax counts, the approximate amount of income on which taxes were evaded for or not collected during the charged tax year and the resulting tax and due and owing. Likewise, the substantive structuring counts set forth the approximate dates of the transactions that constitute the alleged structuring and the approximate amounts of the allegedly

and attempting to conceal ... her true and correct income." Each of those counts of income tax evasion allege the approximate amount income on which defendant Elaine Brown evaded taxes and the approximate amount of tax due and owing. The following eight counts (Counts Eight through Fourteen) allege that defendant Elaine Brown failed to collect from employees of her dental practice withholding for federal income taxes and employee portions of Federal Insurance Contribution Act (FICA) Tax payments during each of the eight quarters from January 2002 through December 2003. Each of those counts alleges the approximate amount of total taxable wages and the approximate amount of withholding and FICA contributions defendant Elaine Brown failed to collect. The remaining three counts consist of one count alleging that the defendants conspired to structure financial transactions (Count Fifteen) and two counts alleging that defendant Elaine Brown alone (Count Sixteen) or with defendant Edward Brown (Count Seventeen) committed substantive violations of the structuring laws.

structured funds. Finally the two conspiracy counts also allege all of the elements of conspiracy and numerous overt acts in furtherance of the conspiracies.

5. In short, the indictment alleges all of the elements of the charged offenses and contains sufficient factual specificity to put the defendants on fair notice of the charges against which they must defend. That same specificity in pleading the alleged offenses protects the defendants from being placed in danger of double jeopardy as a result of a future prosecution. Accordingly, the indictment is sufficient.
6. The defendants also contend that the tax evasion charges do not constitute a criminal offense because 26 U.S.C. §7201 is, according to them, only a penalty statute and imposes no tax. Section 7201, however, encompasses attempts to evade "any tax imposed by the title" and Title 26 imposes taxes in other provisions. It is well-established that a failure to file a federal income tax return, together with a deficiency, an affirmative act calculated to conceal or mislead and willfulness constitutes tax evasion. See United States v. Spies, 317 U.S. 492, 499 (1943). The tax evasion charges in the indictment therefore allege real criminal offenses.
7. Finally, the defendants suggest that the indictment fails to allege any offense because the federal income tax runs afoul of the Taxing Clause of the Constitution, which generally

prescribes any unapportioned direct federal taxes. See U.S. Constitution, Article I, Section 9, Clause 4. This argument is without merit because it ignores the plain language of the 16th Amendment, which gave Congress the "power to lay and collect taxes on incomes, from whatever source derived, without apportionment." The defendants' shop worn constitutional argument also has been rejected as without merit by every single Court that has considered it. See, e.g., United States v. Swan, 2006 WL 1846112 (1st Cir. 2006).

For the reasons set forth above, the government respectfully requests that the defendants' motion be denied in its entirety.

Date: December 14, 2006

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, William E. Morse, hereby certify that a copy of the foregoing was served this date by sending a copy by regular U.S. mail to Elaine Alice Brown and Edward Lewis Brown, each at 401 Center of Town Road, Plainfield, New Hampshire 03781.

Dated: December 15, 2006

/s/ William E. Morse