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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR-10-00757-1-PHX-ROS
Plaintiff,)	ORDER
vs.)	
James R. Parker,)	
Defendant.)	

Pending before the Court are objections to jury instructions. (Doc. 145, at 58-106).
This order resolves those objections.

A. Government’s Requested Instructions to which Defendant Objects

1. “On or About”

The Government requests an instruction regarding its duty to prove offenses were committed on dates reasonably near the dates alleged in the Indictment. Defendant objects to the “on or about” instruction because the violations are covered by the statute of limitations, the charges in the Indictment are exact dates, and this instruction is therefore unnecessary. However, the Indictment also uses phrases such as “As early as” and “Between” when referencing time periods. The objection is overruled.

2. Instruction §5.1- Aiding and Abetting

The Government requests an instruction on aiding and abetting. Defendant objects on the basis this instruction is not applicable to this case because there are no aiding and

1 abetting charges. However, the Indictment charges 18 U.S.C. § 2. (Doc. 1). Therefore, the
2 instruction is applicable. The Government argues “[t]he instruction may become relevant
3 depending on whether defendant attempts to blame others.” (Doc. 145, at 61). The objection
4 is overruled.

5 **3. Tax Evasion - Statute**

6 The Government requests an instruction quoting 26 U.S.C. § 7201, altered by
7 substituting “of an offense” for “of a felony.” Defendant objects that this alteration. The
8 Government states it seeks modification “in the interest of justice,” but does not object to
9 using the statutory language. The parties shall use the statutory language. The objection is
10 overruled as moot.

11 **4. Existence of a Tax Deficiency**

12 The Government requests an instruction on the existence of a tax deficiency.
13 Defendant objects because Defendant is on trial for a criminal violation, not a civil
14 assessment of a tax deficiency. The Government argues the proposed instruction is proper
15 because an element of tax evasion is a tax deficiency. See, e.g., Ninth Circuit Manual of
16 Model Criminal Jury Instructions (2010 revision) 9.37. Defendant owed more federal
17 income tax than he paid in the relevant years.

18 The Government’s proposed instruction has three paragraphs. The first paragraph
19 states, “A tax due and owing may be ascertained in three ways: by the taxpayer reporting the
20 amount of tax due and owing; by the IRS examining the taxpayer and assessing the tax; or
21 if the taxpayer fails to file a return, and the government can prove a tax deficiency, the
22 deficiency arises on the date the return was due.” (Doc. 145, at 63). The Government cites
23 three cases as authority for its proposed instruction. None of the authorities set forth three
24 ways to ascertain a tax due. What is more, tax deficiency is defined by the Ninth Circuit as,
25 “A tax deficiency occurs when a defendant owes more federal income tax for the applicable
26 tax year than was declared due on the defendant’s income tax return.” *United States v.*
27 *Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007). As such, Defendant’s objection will be
28 sustained as to the first paragraph, and the Ninth Circuit’s definition of tax deficiency will

1 be used in its place.

2 The second paragraph states “a certificate of assessment and payment is ‘adequate
3 evidence’ of tax liability.” (Doc. 145, at 63). The “adequate evidence” language is taken
4 from *U.S. v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981). Voorhies was convicted of willful
5 evasion of tax payments. On appeal, he argued there was insufficient evidence to establish
6 tax liability on which his conviction was based. “The certificates of assessment against
7 Voorhies . . . were introduced into evidence at trial.” *Id.* The Ninth Circuit observed “[a]
8 valid assessment is one method of establishing tax liability” *Id.* “In the absence of an
9 administrative- or judicial-level contention by the taxpayer that these assessments were
10 invalid, the certificates of assessment were prima facie correct and therefore adequate
11 evidence of the amount of Voorhies’ tax liability.” *Id.* It is as yet unclear whether the
12 evidence will show Defendant made administrative- or judicial-level objections to the
13 validity of the assessments. Further, *Voorhies* states the assessments are “prima facie”
14 correct not “adequate evidence” which is a retrospective appellate review of the evidence.
15 *Id.* at 715. Paragraph two will not be given in the form requested.

16 The third paragraph states, “The government need not prove the specific amount of
17 tax due for each year alleged in the Indictment. It makes no difference if the actual tax
18 deficiency is more or less than the amount charged as unreported in the Indictment. The
19 government need only show that the defendant willfully attempted to evade any tax during
20 the years in question.” (Doc. 145, at 63). The first sentence accurately states the law, and
21 closely tracks a model instruction from the Third Circuit. *See* Model Criminal Jury
22 Instructions for the Third Circuit, 6.26.7201-1 (2008 ed.). The second sentence appears to
23 be repetitive of the first sentence, and will not be given. The last sentence accurately sets
24 forth the Government’s burden and will be given..

25 Therefore, the objection is overruled in part and sustained in part.

26 **5. Affirmative Act - Defined**

27 The Government requests an instruction explaining an affirmative act in the context
28 of evading taxes, when such an act may be inferred, and providing examples of affirmative

1 acts of tax evasion. Defendant objects because the instruction is redundant, argumentative,
2 and would require further explanation. The Government states it must prove an affirmative
3 act, and cites model instruction 9.37. The first paragraph is to-the-point and accurately states
4 the law. The second and third paragraphs contain selective examples of inferences and
5 “[o]ther examples.” As such, the second and third paragraphs unnecessarily create the
6 possibility of jury confusion, and would require further explanation. The first paragraph will
7 be allowed, and the second and third paragraphs will not be allowed. The objection is
8 overruled in part and sustained in part.

9 **6. Substance Over Form**

10 The Government requests an instruction consisting of two paragraphs about alter ego,
11 what the law “[g]enerally” will recognize as a trust, and a discussion of tax consequences
12 “flow[ing] from the substance rather than the form of a transaction.” Defendant objects this
13 is argumentative and not supported by the case law. The Government argues the instruction
14 states the law about the validity of trusts for income tax purposes. The Court will reserve
15 ruling on this objection until all the evidence is admitted.

16 **7. Income Defined**

17 The Government requests an instruction defining income. Defendant objects because
18 the instruction alters the statute on which it relies. 26 U.S.C. § 61. The Government has not
19 adequately explained why the alteration and commentary is needed. The objection is
20 sustained. The Court will provide definitions from the statute defining income, 26 U.S.C. §
21 61-63.

22 **8-9, 11-19, 21-22. Willfully and Good Faith**

23 The parties have submitted numerous alternative instructions on good faith and
24 “willfully.” In order to present the instructions in an organized manner and reduce repetition,
25 the Court will give model instruction 9.42 (which is proposed by the Government in
26 instruction 9), and deny the remaining proposed instructions regarding “willfully” and good
27 faith. (Doc. 145, at 70).

28 Specifically as to requested instruction 9, the Government’s instruction tracks the

1 model instruction 9.42 and the bracketed portion will be included. Defendant's objection
2 states he "wants to include [a] third paragraph. *See* page 81." (Doc. 145, at 70). However,
3 page 81 does not contain a third paragraph for this instruction.

4 This ruling is preliminary and a final decision will await admission of all evidence.
5 This ruling acknowledges that a Defendant is entitled to an instruction on his theory of his
6 defense, "provided it is supported by law and has some foundation in the evidence." *Kayser*,
7 488 F.3d at 1071.¹

8 **10. §5.6 Knowingly—Defined**

9 The Government requests an instruction defining "knowingly." The Government uses
10 the model instruction. Defendant objects to a bracketed portion of the model instruction that
11 states, "the government is not required to prove that the defendant knew his acts or omissions
12 were unlawful." Defendant argues the bracketed portion is improper because the
13 Government is required to prove willfulness. The Government agrees to removing the
14 second sentence. In light of the parties' agreement, Defendant's objection is overruled as
15 moot.

16 **B. Defendant's Requested Instructions to which Government Objects**

17 **20. Criminal v. Civil Tax Trial**

18 Defendant requests an instruction on the "significant difference between a civil tax
19 trial and a criminal tax trial." The Government objects because the out-of-Circuit case relied
20 upon by Defendant is distinguishable and does not support the instruction. The Court agrees.
21 Defendant has not pointed to a regulatory violation cited throughout the indictment so as to
22 necessitate this instruction to avoid jury confusion. The Government's objection is sustained.

23 **23. Nominee Instruction**

24 Defendant requests an instruction defining "nominee." The Government objects that
25 Defendant's proposed definition is limited. Defendant makes no objection to the

26
27 ¹ Thus, instructions 8, 11-19, and 21-22 are denied at this time. Throughout this order,
28 the instruction numbers refer to the disputed proposed instructions numbered 1-31. (Doc.
145, 58-106).

1 Government's proposed instruction from Black's Law Dictionary. (Doc. 145, at 91-92).
2 Therefore, the parties shall use the Government's proposed instruction from Black's Law
3 Dictionary. The objection is overruled as moot.

4 **24 - 29. Ethical Rules**

5 Defendant requests instructions reciting six Arizona Rules of Professional Conduct
6 regarding conflicts of interest, confidentiality and communication. (Doc. 145, at 93-104).
7 The Government objects because the requested instructions are irrelevant. Defendant argues
8 the Court has excluded his late-disclosed ethics expert and ruled the ethical issues may be
9 resolved by instructing the jury on the Arizona Rules of Professional Conduct. At the May
10 16, 2012 final pretrial conference, the Court stated, "First of all, if it's ethics, then ethics are
11 almost a matter of law. So my question is whether or not the jury would need it anyway.
12 The jury could be told or be given the . . . ethical rules [T]he question as to whether or
13 not they would be helpful to the jury. No lawyer can testify to what the law is, and that
14 includes what ethics are." (Doc. 143, at 27). The transcript does not support Defendant's
15 argument that the Court ruled ethical rules are admissible, let alone proper jury instructions.
16 Without more, Defendant has failed to demonstrate relevance. The Government's objection
17 is sustained.

18 **30. Character of Defendant**

19 Defendant requests a former model instruction on the character of the defendant. The
20 Government objects on the grounds the Ninth Circuit no longer recommends this instruction
21 because "the trial judge need not give an instruction on the character of the defendant when
22 such evidence is admitted under Fed. R. Evid. 404(a)(1) because it adds nothing to the
23 general instructions regarding the consideration and weighing of evidence." Fed. R. Evid.
24 404(a)(1) advisory committee's note. Defendant concedes the Court may decline this
25 instruction if the jury is otherwise properly instructed. (Doc. 145, at 105). The
26 Government's objection is sustained.

27 **31. Trusts**


28 Defendant requests an instruction from Black's Law Dictionary 9th Edition defining

1 trusts. The Government objects because additional instructions regarding trusts may confuse
2 the jury and unnecessarily complicate the case. The Court will reserve ruling on this
3 objection until all the evidence is admitted

4 **IT IS ORDERED** the objections to jury instructions (**Doc. 145**) are sustained in part
5 and overruled in part as set forth in this order.

6 DATED this 29th day of May, 2012.

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Roslyn O. Silver
Chief United States District Judge