UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, 16-CR-72-RJA-MJR

-against-

IAN TARBELL,

Defendant.

DEFENDANT'S OPPOSITION TO THE GOVERNMENTS MOTION IN LIMINE

Defendant Ian Tarbell, by and through his attorney Michael Rhodes-Devey, as and for his opposition to the Motion in Limine of the United States, states as follows:

On March 25, 2016 Defendant Ian Tarbell was charged by Complaint filed with this Court with a violation of 18 USC §2341. On June 21, 2016, an Indictment was filed with this Court charging Defendant Tarbell with Trafficking in Contraband Cigarettes and Attempting to Evade Cigarette Taxes in violation of 18 USC §2342(a) and 2344(a) and 26 USC 5701(b)(1) and 5762(a)(3).

The First Count of the Indictment charges Defendant, as follows:

> On or about February 18, 2016, in the Western District of New York, the defendant, Ian Tarbell, did knowingly ship, transport, receive, and possess contraband cigarettes, as that term is defined in Title 18, United States Code Section234l(2), that is, a quantity in excess of 10,000 cigarettes which bore no evidence of the payment of applicable State cigarette taxes in the State of New York.

The Second Count of the Indictment charges defendant, as follows:

> On or about February 18, 2016, in the Western District of New York, the defendant, Ian Tarbell, with intent to defraud the United States, did refuse to pay the federal taxes imposed on cigarettes manufactured in the United States pursuant to Title 26, United States Code, Section 5701(b)(1), and did attempt to evade and defeat said

taxes and the payment thereof.

I. THE DEFENDANT SHOULD BE ALLOWED TO INTRODUCE EVIDENCE THAT THE STATE OF NEW YORK DOES NOT COLLECT CIGARETTE TAXES FROM SALES BETWEEN INDIAN NATIONS OR UPON ON INDIAN TERRITORY

The Government incorrectly argues that a Violation of 18 USC Section 2342(a) has but a single element; the possession of unstamped cigarettes.

"When a criminal statute introduces the elements of a crime with the word "knowingly," we apply that word to each element of the crime unless special context or background calls for a different reading." United States v Nguyen, 758 F3d 1024, 1027-1028 (8th Cir 2014).

The four elements of a CCTA violation are that a party (1) knowingly 'ship, transport, receive, possess, sell, distribute or purchase' (2) more than 10,000 cigarettes (3) that do not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps." Golden Feather, 2009 U.S. Dist. LEXIS 76306, 2009 WL 2612345, at *26; see also Milhelm I, 550 F. Supp. 2d at 345-46.

City of NY v Milhelm Attea & Bros., 2012 US Dist LEXIS 116533, at *56 (EDNY Aug. 17, 2012, No. 06-CV-3620 (CBA))

In addition, federal criminal tax law violations have had an expanded meaning appended to "willingly".

> The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. (Citations omitted) Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. (Citations omitted)
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> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the

common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In United States v. Murdock, 290 U.S. 389, 78 L. Ed. 381, 54 S. Ct. 223 (1933), the Court recognized that:

> "Congress not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." Id., at 396.

The Court held that the defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief. In Murdock, the Court interpreted the term "willfully" as used in the criminal tax statutes generally to mean "an act done with a bad purpose," id., at 394, or with "an evil motive," id., at 395.

Subsequent decisions have refined this proposition. In United States v. Bishop, 412 U.S. 346, 36 L. Ed. 2d 941, 93 S. Ct. 2008 (1973), we described the term "willfully" as connoting "a voluntary, intentional violation of a known legal duty," id., at 360, and did so with specific reference to the "bad faith or evil intent" language employed in Murdock. Still later, United States v. Pomponio, 429 U.S. 10, 50 L. Ed. 2d 12, 97 S. Ct. 22 (1976) (per curiam), addressed a situation in which several defendants had been charged with willfully filing false tax returns. The jury was given an instruction on willfulness similar to the standard set forth in Bishop. In addition, it was instructed that "'good motive alone is never a defense where the act done or omitted is a crime.'" Id., at 11. The defendants were convicted but the Court of Appeals reversed, concluding that the latter instruction was improper because the statute required a finding of bad purpose or evil motive. Ibid.

Cheek v United States, 498 US 192, 199-201 (1991)

> An individual's good-faith belief that he or she has no duty under the tax laws to pay taxes, however, provides a defense to a criminal tax prosecution by negating proof that the defendant acted willfully. Cheek v. United States, 498 U.S. 192, 202-04, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). This is true even if the defendant's claimed good-faith belief is objectively unreasonable. Id. at 203, 111 S.Ct. 604.

State v. Souza, 119 Haw. 60, 68 (Haw. Ct. App. 2008)

> While a good faith belief is not a defense in the assessment or collection of that tax, its is a

defense to a criminal prosecution for the criminal charges.

Thus, in order to obtain a conviction on these charges, the Government must establish, beyond a reasonable doubt, that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.

Cheek v United States, supra at 201.

Thus, the Defendant's state of mind and intent are critical to and required for a conviction on the CCTA charges.

However, Defendant is also charged with a violation of 26 USC § 5762. That statute requires proof of an intent to defraud. Prosecution under the federal tax provisions make a necessity of the element of intent to defraud, i.e. that the defendant was aware of the obligations to pay the tax.

The question of the Defendants knowledge of and belief of any obligation to pay these taxes are critical central issues to the entire matter.

II THE STATE OF NEW YORK'S NON-ENFORCEMENT OF COLLECTION OF CIGARETTE TAXES ON INDIAN TERRITORY ARE LIKEWISE CENTRAL TO THE MATTER.

As noted above, the Courts require a more specific intent when "by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." United States v. Murdock, 290 U.S. 389, 396 (1933).

It is respectfully submitted that a New York State taxing law that is not enforced cannot form the basis for a criminal conviction absent evidence of a mens rea showing knowledge and intent to avoid those taxes. A state tax law that is not enforced can easily give rise to a common perception

that one is not required to remit such taxes. Such a law cannot be applied on someone who is engaging in what to the State of New York is an tolerated, if not accepted course of conduct, allowing him to believe it is legal conduct.

Indeed, the State of New York brought charges against the Defendant, at the request of the Federal Government in this case and then dropped the charges when the Federal Government was prepared to undertake this prosecution.

The Government relies upon the case of United States v. Kaid, 241 Fed. Appx. 747 (2d Cir. 2007) for the proposition that it is no defense that the State does not collect the cigarette taxes from Indians. However, in that matter it was not an Indian or an Indian owned company which was asserting the defense. The defendants were non-natives, and had no opportunity to claim to be the beneficiaries of the non-enforcement.

Defendant stands before the Court as an American Indian, a member of the Saint Regis Mohawk Tribe who resides on that territory.

As the Government is well aware, the cigarettes in question were bound for cigarette dealers on the sovereign territory of the Seneca Nation. This was a nation to nation business transactions amongst Native Americans. The very type that the State is declining to collect taxes from.

Likewise, United States v. Morrison. 686 F.3d 94, 105-106 (2d Cir. 2012) stands for the proposition that the New York State Tax scheme as it apples to Indians and Indian Nations is legal and enforceable. It does not address the fact that for over 7 years, the State has taken no steps to implement or enforce the tax collection scheme upon Indian Territories in New York.

WHEREFORE, Defendant Ian Tarbell prays for the Order of this Court denying the Government's motion in limine in the above entitled matter and for such other and further relief as to the Court may seem just and proper.

Dated: February 22, 2017

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