

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION
OF THE WESTERN DISTRICT OF MISSOURI AT KANSAS CITY

UNITED STATES, Plaintiff,

-against-

JOHN LAZIA, Defendant.

No. 12287.

MEMORANDUM IN SUPPORT OF MOTION FOR BILL OF PARTICULARS.

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NATURE OF MOTION:

This is a motion for a Bill of Particulars asking that the United States District Attorney be required and directed to make and file a Bill of Particulars of the items set forth in the motion for the same filed herein.

THE INDICTMENT:

The indictment charges the defendant with having violated the Revenue Act of 1928, in three Counts by first, knowingly and wilfully attempting to defeat and evade a tax, to wit, \$6,074.24, upon his net income for the calendar year 1929; of wilfully failing to make a return of his gross income had and derived during the calendar year 1930, during which year the Defendants gross income was in excess of \$5,000, to wit, \$98,121.56; of wilfully and knowingly attempting to evade and defeat a tax of, to wit, \$15,627.17 upon

his net income for the calendar year 1930.

The indictment further alleges in an obvious effort to anticipate and forestall Defendant's constitutional guarantees and the decisions of the Courts that the charge set forth in Count I to wit, the wilfull attempt to evade the tax of \$6,074.24 upon the taxable income of the Defendant for the year 1929, is computed upon a gross income of \$58,795.20 made up as follows:

| | |
|-------------------|-----------|
| Interest received | \$ 726.31 |
| Rents received | 3,000.00 |
| Other income | 55,068.89 |

after deducting from said gross income the deductions and credits allowed by law, namely, \$710.35 by way of interest paid, the marital exemption in the sum of \$3500, and a credit of \$1.88.

Likewise, under Count II the same effort is made by setting forth that Defendant's gross income for the calendar year 1930 was in excess of \$5,000, to wit, \$98,121.56.

Under Count III, as under Count I, the indictment alleges that the defendant wilfully attempted to evade a tax, to wit, \$15,627.17 upon his net income for the calendar year of 1930, that said alleged tax owing was computed on the basis of the gross income of \$98,121.56 made up as follows:

| | |
|-------------------|-----------|
| Interest received | \$ 261.10 |
| Rents received | 7,500.00 |
| Dividends | 2,160.00 |
| Other income | 88,200.46 |

after deducting from said gross income the deductions and credits allowed by law, namely, \$305.56 by way of interest paid, the marital exemption in the sum of \$3500, and a credit of \$5.63.

Under the 5th Amendment to the Constitution of the United States and the decisions of the Courts construing Defendant's rights thereunder, the Defendant is entitled to be informed of the acts upon which the alleged crime is founded "with such accuracy, precision and definiteness that the accused may prepare to meet the charge with all available and procurable evidence".

The indictment does not meet these requirements. The allegations thereunder are

mere generalizations.

The statement of the gross income under each Count and their alleged itemized make-up proves no more informative than if the gross income were set out and nothing more.

Defendant is entitled to be informed with precision, accuracy and definiteness so that his rights may not be prejudiced herein, of the following:

(a) Every item and transaction going to make up the gross incomes set forth hereunder.

(b) The date or dates upon which the gross incomes were received, and the date or dates and transactions going to make up the gross incomes hereunder, namely, rents received and other income.

(c) The person, persons, firms or corporations, the alleged items were derived from, and the exact and individual amounts thereof, if the whole is made up of more than one item.

(d) In the pursuit of what vocation, profession, trade or calling the defendant derived them.

(e) The facts upon which the government claims the defendant was the real party in interest, and the owner thereof in the receipt of the aforesaid items, or whether in fact, it claims he did receive them.

(f) And upon all of the claims or facts, the aforesaid designated items, and or their constituent parts, are denominated as income.

POINT I.

THE INDICTMENT BEING SO GENERAL IN LANGUAGE AND VAGUE IN IMPORT AS NOT TO APPRISE THE DEFENDANT OF THE FACTS OF THE CRIMES ALLEGED OR TO ENABLE HIM TO PREPARE FOR TRIAL, A BILL OF PARTICULARS SHOULD BE GRANTED.

It is impracticable, if not impossible, to prepare for trial without a Bill of Particulars specifying the specific acts alleged to constitute the crime upon which the government relies to prove its indictment. It will not do, and it is not sufficient directly or in effect, that the indictment shall charge the offense in the same generic terms as in the definition of the offense "but it must state the species it must descend to particulars"

(1 Arch. Cr. Pr. and Pl. 291, cited in U. S. v. Cruikshank 92 U. S. at page 593)

"A crime is made up of acts and intent and these must be set forth in the indictment, with reasonable particularity of time, place and circumstance" (U. S. v. Cruikshank 92 U. S. at page 593).

It is clearly plain that where the indictment is go general in its terms and without import as to facts and circumstances, that without a Bill of Particulars specifying them, the trial would be protracted beyond sufferable bounds, and would permit the consideration of evidence prejudicial to the defendant beyond recall, even though it was later stricken out and the jury instructed to disregard it. The Grand Jury should know before it indicts, the criminal acts it charges against a citizen, be prepared to specify them, and immediately go to trial on them. This is the only theory of prosecution that is in keeping with the orderly administration of Justice. The government can suffer no harm by specifying as to time, place, circumstance and item of amount. It does inflict irreparable injury upon the defendant by neglecting to do so.

The principles and reasoning set out above are so well recognized and academic in Federal Jurisprudence as to be accepted as a formula in deciding these matters and are epitomized as follows:

- (1) The defendant has the right to be informed of the charge against him by indictment, i.e., informed definitely and specifically because the Constitution affords him that right (5th Amendment) and the Constitution does not define an indictment but the common law does and the language of the Constitution cannot be understood without reference to the common law. (I-Kent's Comments, 336; Kemper vs. U.S., 195 U.S., 100-126).
- (2) The right to be thus informed is valueless unless the acts alleged to be criminal are stated with such accuracy, precision and definiteness that the accused may prepare to meet the charge with all available and procurable evidence.
- (3) The accused has the right to be charged with crime with such precision and accuracy that in a further prosecution on an indictment involving the same acts and transactions he may plead a former judgment of acquittal or conviction in bar of prosecution upon the subsequent indictment.
- (4) What the defendant knows the facts to be is not important. What the prosecution

claims the facts to be is supremely so. U. S. vs. Cruikshank, 92 U.S., 542-557-558
Cochran vs. U.S., 286 U.S., 256-290 U.S. vs. Green, 136 Fed, Rep, 618-658.

In U. S. v. Adams Express Co., 119 Fed. 240, the defendant and its stockholders were indicted for "carrying on the business of a retail liquor dealer without having paid the special tax as required by law". On motion of defendant, the government was required to file a bill of particulars. At page 241, the court said:

"An indictment often is in such general terms, and yet sufficient in law, as to largely fail to apprise the defendant of what he must meet on the trial. And the office of a bill of particulars is to advise the court, but more particularly the defendant, of what facts, more or less in detail, he will be required to meet".

Also see Cochran vs U.S. 41 Fed. (2nd) at p.198.

In U. S. v. Eastman, et al, 252 Fed. 232, the defendant and others were indicated in the District Court for the Southern District of New York for conspiracy, in violation of the Espionage Act of June 15, 1917, c. 30, 40, 40 Stat. 217, charged with impeding, hindering and retarding enlistment service and causing subordination in military service. At page 232, Learned Hand, D. J., said:

"The first count alleges a conspiracy in which the contemplated means is not specific, except as regards the publication of the magazine. The defendants will be entitled by bill of particulars, if they wish it, to a statement of the 'public speeches' and 'private solicitations' which are alleged, and to those parts of each member of the magazine relied upon as constituting a part of the conspiracy. They will be also entitled to particulars of the other means, if any, contemplated by the defendants to impede, hinder, or retard the enlistment service".

The defendants at this time do not demur to the indictment. The fact that an indictment is not demurrable, having complied with the terms of the statute, but still is so general as not to apprise the defendants with the facts which they will be required to meet on the trial and to enable them to prepare for trial, has consistently been held by the courts to be a ground for a bill of particulars.

The indictment practically sets forth the words of the statute without giving any other particulars other than mere figures which standing alone are without significance.

In U. S. v. Colwell, et al, 243 Fed. the defendant and others were indicted for combining and engaging in a monopoly in restraint of interstate trade and commerce. The court in its opinion said at page 732:

"Of course, I realize and recognize the authority of United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588. It is essential in a case like this to descend to particulars, and not to rely simply on the words of the statute in pleading. United States v. Hess, 124 U. S. 483, 8 Sup. ct. 571, 31 L. Ed. 516".

While the court in that case denied the demurrer to the indictment, still the court was positive in its language in stating that a bill of particulars should be granted setting forth the particulars of the indictment.

Also it was held in Wishart vs. U. S. 29 Fed. (2nd) at page 106, by Van Valkenburgh, J., that:

"It is well established that an 'indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly alleged'. United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588; Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419; Fontana v. United States (C.C.A. 8) 262 F. 283; Martin v. United States (C.C.A. 8) 168 F. 198; Anderson v. United States (C.C.A. 8) 260 F. 557; Brenner v. United States (C.C.A. 2) 287 F. 636; Hilt v. United States (C.C.A. 5) 279 F. 421; Myers v. United States (C.C.A. 8) 15 F. (2d) 977; Brown v. United States (C.C.A. 5) 21 F. (2d) 827; United States v. Behrman, 258 U. S. 280, 42 S. Ct. 303, 66 L. Ed. 619".

It is apparent from a reading of the authorities that the courts have granted bills of particulars in cases, as in the instant case, where the allegations of the indictment are so general as not to apprise the defendant of the facts which he will be required to meet.

POINT II.

THE PRINCIPLES SET FORTH UNDER POINT I. ARE APPLIED IN U. S. V. SINGER 58 FED. (2nd) 74. A CASE DIRECTLY IN POINT AS TO THE REQUIREMENTS OF AN INDICTMENT INVOLVING A SIMILAR CRIME WITH REFERENCE TO THE

ACCURACY. PRECISENESS AND DEFINITENESS OF ITS PLEADING.

In the Singer Case *supra* the defendant was indicted and charged with receiving a net income of \$400,338.90 on which he should have paid an income tax of \$92,018.49, but instead filed a return showing no net income. The indictment in this case was set forth with even greater particularity than in the instant case, in that in at least two of the items going to make up the alleged gross income, certain amounts were specified to be profits from sales of real estate and income from partnership.

Upon being refused, save in one meager detail, a specification of the facts and circumstances, names, amounts, etc. upon which the alleged gross income was founded, by requesting the District Attorney out of court for the information, the defendant duly filed his motion for a bill of particulars and argued the same, which was denied. The defendant was accordingly tried and convicted, and upon appeal to the Circuit court of Appeals for the Third Circuit, the Judgment was reversed and a new trial awarded, and the Court said in its opinion with particular reference to the District Court's refusal to grant the motion for a bill of particulars, that:

"At the argument of the motion, counsel for defendant insisted, that he was in absolute need of a bill of particulars in order to prepare his defense. He desired particularly to know what was meant by 'Income from partnership \$165,570.26' and 'other income \$240,635.19'. If these items were true net income, as charged, constituting a part of the \$400,338.90, he did not understand them, and could not properly prepare his defense. If, on the other hand, they were not net income, but aggregate gross partnership receipts and bank deposits, and the government knew this and refused to disclose it, the pleading was bad, and the false figures could have been stricken from the indictment. A bill of particulars would have enabled the defendant on the one hand to prepare his defense, or, on the other, to attack the indictment. The refusal to furnish a bill of particulars left him in a dilemma, and was prejudicial.

"The closing statements of one of the real estate title companies with which the defendant dealt and the bank records were put in evidence over objection, and a government witness was asked if from these records he could state what the defendant's income for 1926 was. He said he could, and, over objection, was permitted to state that it was over \$400,000. And yet, through the information brought out during

cross-examination, and the facts which the court required the government to give to the defendant, which several times necessitated the cessation of the trial for hours, nearly \$300,000 was eliminated from the \$400,338.90 which the government charged, and the witness said, was the defendant's net income, on which he should have paid the tax of \$92,018.49. These charges, this testimony, and the great number of irrelevant figures could not but prove harmful to the defendant and prejudice the jury against him. All this could and would have been avoided by a proper bill of particulars which would have shown the falsity of the allegations and enabled the defendant to eliminate untrue and prejudicial charges from the indictment and irrelevant and harmful evidence from the jury. The entire item of alleged 'other income' of \$240,635.69, except about \$10,000 was eliminated in the course of the trial from the indictment as income on which a tax had to be paid.

"The net income of \$400,338.90 was made up in part by 'Income from partnership \$163,570.26'. This, it was discovered on the trial, was one-half of the gross receipts of the Chelsea Beverage Company for 1926. In his reply to the request for a bill of particulars, the government said that 'the partnership referred to is the Chelsea Beverage Company'. But whether it was the gross receipts, one-half of them, or net income for the whole or part of the company computed on some unknown basis or method, the defendant did not know.

"After counsel was informed that it related to the Chelsea Beverage Company, he went to Trenton, and in conference with the court and Assistant United States Attorney asked permission to inspect the books of the company which had been taken by the government. This request was apparently granted, but later on counsel was notified that 'upon mature deliberation I do not see why the Government should permit Mr. Singer or his attorney to inspect the books'. The government said that 'he could tell from his own records whether or not this income had been received'. The difficulty was that he did not know just what this item included, and his own records, the books, were in the possession of the government and he could not remember, after the lapse of five years, so many transactions and tell anything about his true income. There was no reason to charge his memory with these facts until the indictment was found, and any offer of the books before that time was of no help to him in his preparation for trial.

"It is evident that, since the defendant was refused a bill of particulars, showing what constituted these large items of alleged net income, and was refused permission to inspect the books of the Chelsea Beverage Company, he could not properly prepare his defense, and was not in a position to keep from the jury the great mass of prejudicial evidence which was admitted in this case. While much of this evidence was stricken out, yet the harmful effects could not be stricken from the jury's minds.

"When it appears that the indictment does not inform the defendant with sufficient particularity of the charges against which he will have to defend at the trial, he is entitled to a bill of particulars, if seasonal application is made therefor. The defendant may demand this as a matter of right, even though the indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced bad on motion to quash or demurrer, where the charge is couched in such language that the defendant is liable to be surprised and unprepared. (Cases omitted)

"The indictment in this case did not inform the defendant with such particularity of what he had to meet at the trial as to enable him to prepare his defense without surprise and embarrassment. A reading of the record shows this conclusion to be inescapable. The frequent interruptions of the trial to enable the government to give the defendant the information which would have been contained in a bill of particulars show that he was surprised, could not properly prepare his defense, and that his motion for a bill of particulars should have been allowed. For example, the defendant did not know what was meant by the item, 'other income \$240,635.19'. It could have meant other income from any source what- ever. When the government replied to the defendant's letter stating that it was 'unidentifiable income obtained by an examination of his bank deposit, together with such other records as the books disclose', it did not give him any real information as to what this income was—what deposit, what records, and what books were not disclosed. The government could not state what constituted the 'other income', without showing the falsity and untenable character of the charge. This item was not set forth with such definiteness and particularity as to enable the defendant to plead it in bar to another prosecution for the same crime."

POINT III

THE GOVERNMENT HAS AVAILED ITSELF OF THE PROTECTION THAT THIS

DEFENDANT HERE URGES AS HIS LEGAL RIGHT.

The Government has declared it reasonable, when called upon for a refund of taxes paid by a taxpayer, to require him to set out with definiteness and particularity the facts upon which he claims the money was erroneously paid to the Government.

Pursuant to the authority vested in the Commissioner of Internal Revenue he has promulgated certain departmental regulations, which, among others, provide:

"Claims by taxpayers for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843, All Facts relied upon in support of the claim should be clearly set forth in detail, under oath."

This regulation has been the subject of numerous decisions in the federal courts, the Government in every instance claiming that a broad allegation of an overstatement of income was insufficient to apprise it of the facts upon which the taxpayer relied as a basis for his refund, even though it designated the date and amount thereof.

This regulation has the force of law and can only be waived by expressed stipulation.

Tucker v. Alexander, 78 U. S. 288;

Ramsay v. United States, 55 Fed (2d), 333;

Monarch Mills v. Jones, 56 Fed. (26.), 180;

Sneed, Collector, v. Elmore, 59 Fed. (2d) 312; Moore v. Rose, 61 Fed. (2d), 605;

National Bank of Seattle v. United States, 39 Fed. (2d), 434;

Meinrath Brok. Co. v. Crooks, 28 Fed. (2d) 991 (Eighth Cir.);

Feather Riv. Lbr. Co. v. United States, 66 Ct. of Claims 67
(certiorari denied, 49 S. Ct. 257).

The Constitution clothes this defendant with a more potent protection than the safeguard which this court found to exist in the regulation designed to protect taxes lawfully due to the United States. We respectfully submit that it cannot be successfully urged that the liberty of a citizen is to be held in lower estimate by the courts than the protection of the funds of the Government.

The defendant, an individual citizen, charged with the crime of tax evasion, is seeking no more than that which is accorded the Government under existing law. He is merely seeking the facts upon which the Government predicates its charge so that like the Government, he may be able to investigate the Charges against him, properly prepare

his defense, insure himself against surprise at the trial and assemble the witnesses, the benefit of whose testimony might otherwise be denied him.

CONCLUSION

THE MOTION SHOULD BE GRANTED.

Of Counsel FRANK P. WALSH JEROME WALSH

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