

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

v.

WALTER ANDERSON,

Defendant.

Criminal No. 05-66 (PLF)

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION TO DISMISS COUNT ONE (IN PART)
FOR FAILURE TO STATE AN OFFENSE
(Anderson Pretrial Motion No. 6)**

Mr. Anderson has been charged in Count One with a violation of the so-called “omnibus clause” of 26 U.S.C. § 7212(a), an amorphous provision that criminalizes “corrupt[] . . . endeavors to obstruct or impede the due administration of” the federal tax laws. Through this charge, the government attempts to sweep in conduct that allegedly occurred over a 15-year period. Much of this conduct mirrors the conduct alleged in the federal tax evasion counts, but covers a longer time period or simply provides additional color and context.

The government, however, seeks to avoid potential limitations on its proof under the tax evasion counts by pursuing the Count One charge. But in so doing, the government ignores the effect of *United States v. Aguilar*, 515 U.S. 593 (1995), on the reach of the omnibus clause. *See, cf., id.* at 599-600 (interpreting an analogous obstruction of justice statute, 18 U.S.C. § 1503, to require the existence of a judicial proceeding, defendant’s awareness of that proceeding, and defendant’s knowledge that the natural and probable effect of his conduct would be to obstruct the proceeding’s administration (*i.e.*, a sufficient “nexus” between conduct and proceeding)). Indeed, in light of *Aguilar*, a charge under the omnibus clause should be dismissed

unless the government has alleged that the defendant was aware -- at the time of his conduct -- of a pending IRS investigation, audit, or other enforcement proceeding and that the requisite “nexus” between conduct and proceeding exists. Because the only such allegations here relate to an IRS audit that began in April 1998 and concluded in September 1998, all other conduct alleged in Count One should be stricken.

BACKGROUND

I. THE “OMNIBUS CLAUSE” OF 26 U.S.C. § 7212(a)

Section 7212(a) of the Internal Revenue Code contains two clauses. The first provides for criminal liability when an individual “corruptly by force or threats of force . . . endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title[.]” 26 U.S.C. § 7212(a). The second, more general clause of this section, commonly referred to as the “omnibus clause,” provides for criminal liability when an individual “in any other way corruptly . . . endeavors to obstruct or impede the due administration of” the internal revenue laws. *Id.*¹

¹ The legislative history of Section 7212(a), particularly with respect to the omnibus clause, is inconclusive. The Senate Report indicates, for example, that “[Section 7212(a)] provides for the punishment of threats or threatening acts against agents of the [IRS], or any other officer or employee of the United States . . . on account of the performance by such agents or officers or employees of their official duties,” and that “[t]his section will also punish the corrupt solicitation of an internal revenue employee.” Sen. Rep. No. 83-1622, at 5254 (1954) (adopted by Congress). Because the Senate Report does not speak specifically to the omnibus clause, some courts have discounted its relevance. *See, e.g., United States v. Mitchell*, 985 F.2d 1275, 1279 (4th Cir. 1993) (“We do not find the history particularly enlightening or dispositive as to Congress’s understanding of the precise scope of the omnibus provision.”). Nonetheless, the legislative history also has been construed to reveal Congress’s intent to limit the reach the statute. *See, e.g., United States v. Popkin*, 943 F.2d 1535, 1543 (11th Cir. 1991) (“The legislative history reveals that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code.”) (Roney, J., dissenting); Robert S. Fink and Caroline Rule, *The Growing Epidemic of Section 7212(a) Prosecutions - Is Congress the Only Cure?*, 88 J. Tax’n 356, 356 (June 1998), available at 1998 WL 475900 (“Congress enacted Section 7212(a) [only] to punish (continued...)”).

Initially, the Department of Justice applied the omnibus clause in only limited circumstances and to a narrow range of conduct. For example, in at least one early prosecution, DOJ took the position that the omnibus clause applies only to acts or threats of physical violence against particular IRS employees. *See United States v. Henderson*, 386 F. Supp. 1048, 1055 (S.D.N.Y. 1974); *see also id.* at 1056 (“The government . . . stresses that thus far all prosecutions [under the omnibus clause] have involved the use of force, violence or threats . . .”). Thereafter, the government signaled a more expansive interpretation of the clause, *see United States v. Williams*, 644 F.2d 696, 700 n.12 (8th Cir. 1981) (government characterizing its position in *Henderson* as “timid”), but one still subject to important limitations. Indeed, in 1989, DOJ issued Tax Division Directive No. 77, which still serves today as the Department’s official policy statement with respect to the omnibus clause.

This Directive explains that the “overall purpose” of the omnibus clause “is to penalize conduct aimed directly at IRS personnel in the performance of their duties, and at the general IRS administration of the federal tax *enforcement* program, but not to penalize tax evasion as such.” Tax Division Directive No. 77 (emphasis added) (attached as Exhibit A); *see also id.* (“The omnibus clause should not be used when other more specific charges are available and adequately reflect the gravamen of the offense.”); *Popkin*, 943 F.2d at 1543 (“This is not a statute designed to sweep within its reach any and all efforts to evade taxation. Other more specific statutes are designed for that purpose.”) (Roney, J., dissenting). Section 7212(a) “should

acts or threats of physical force against IRS employees . . . [and] to prohibit soliciting . . . IRS personnel in an effort to impede or obstruct a tax audit or investigation Section 7212(a) was not . . . intended to duplicate more specific statutes that penalize tax evasion or the filing of false statements with the IRS.”).

be reserved [typically] for conduct . . . *designed to impede or obstruct an audit or criminal tax investigation[.]*” Directive No. 77 (emphasis added).

Notwithstanding the limits suggested by the Directive, DOJ has used the omnibus clause aggressively in recent years. The Department, for example, now considers a Section 7212(a) charge in “virtually every case[.]” *Justice Official Says Section 7212(a) Will Be Used More Often in Fraud Cases*, BNA Daily Tax Report, Dec. 3, 1993 (attached as Exhibit B). In DOJ’s view, “[t]he good thing about 7212 is you can get a wide range of evidence in,” *id.*, thereby freeing the government from the burdens of Rule 404(b) and the elements of more appropriate criminal offenses. The government, seemingly undeterred by its own official policy statement, now takes aim at Mr. Anderson.²

II. COUNT ONE OF THE INDICTMENT

Much of Count One overlaps with the allegations in Counts Two through Six of the indictment. In certain instances, the government uses the obstruction count to extend the time period for the very same conduct that gives rise to the tax evasion counts. And in other instances, the government uses the obstruction count, not to extend the time period, but simply to add color and context for the conduct alleged in the later counts. The following side-by-side comparison is revealing:

OBSTRUCTION COUNT	TAX EVASION COUNTS
¶ 23: Anderson “transferred his personal holdings in MAT, Telco and Esprit to G&A and Iceberg. Anderson . . . filed[] false . . . Returns and failed to file Form[] 926 . . . with the IRS.”	¶ 39(e): Anderson “fail[ed] to file the required Form 926 . . . disclosing that he transferred 220,000 shares in Esprit to G&A[.]”

² Because of the apparent conflict between the Department’s official policy guidance, on the one hand, and its application of the omnibus clause, on the other, we have made a request for agency records wherein DOJ officials acknowledge that the omnibus clause is subject to certain limits. That motion (Doc. #109) has been fully briefed; argument is scheduled for June 16, 2006.

<p>¶ 24: Anderson “filed[] false . . . Returns for [1992 through 1999] that falsely failed to include the net profits of G&A and Iceberg as income[.]”</p>	<p>¶¶ 38(a), 39(a), 41(a), 43(a), 45(a): Anderson “fil[ed] and caus[ed] to be filed a false and fraudulent . . . Return, wherein he . . . failed to report . . . [\$X of] Subpart F investment-type income from G&A[.]”</p>
<p>¶ 27: Anderson “filed[] false . . . Returns for [1994 through 1999] that falsely omitted the Schedule B information relating to foreign bank accounts, and Anderson failed to file Forms TD-F with the United States Department of the Treasury, disclosing his interest and control in any of these foreign bank accounts.”</p>	<p>¶¶ 38(b)-(c), 39(b)-(c), 41(b)-(c), 43(b)-(c), 45(b)-(c): Anderson “fail[ed] to notify the IRS . . . on a Schedule B of the . . . Return of his signature authority and control of . . . accounts at Barclays Bank [and] fail[ed] to file the required Form TD-F . . . with the Department of the Treasury to report his control of . . . accounts at Barclays Bank[.]”</p>
<p>¶ 28: Anderson “directed Esprit to deposit into the ANDERSON 1 account a total of \$250,000 earned by him. . . . Anderson filed false . . . Returns that omitted this income.”</p>	<p>¶¶ 38(a)(ii), 39(a)(ii): Anderson “failed to report . . . [\$X of bonus] income from Esprit[.]”</p>
<p>¶ 29: “When he was being audited by the IRS . . . Anderson represented to accountant R.M. that the 1995 deductions he had claimed were for unreimbursed legal fees incurred in litigation. He failed to disclose to accountant R.M. that most of these legal fees had been reimbursed to Anderson in 1997. Anderson made these false and misleading representations well knowing that R.M. would repeat them to the IRS during his representation of Anderson in the audit.”</p>	<p>¶ 38(e): Anderson “ma[de] and caus[ed] to be made a false and fraudulent statement to the IRS during the audit relating to the unreimbursed business deductions he claimed on his 1995 Schedule A[.]”</p>
<p>¶ 30: Anderson “filed a 1997 . . . Return that falsely omitted . . . reimbursed legal expenses . . . as income. Anderson failed to pay that portion of taxes due and owing to the IRS on that reimbursement.”</p>	<p>¶ 41(a)(iv): Anderson “failed to report [on his 1997 tax return] \$232,106 in proceeds from a lawsuit, the substantial portion of which represented reimbursement for legal expenses previously deducted on his 1995 . . . Return.”</p>
<p>¶ 35: “From in or about 1993, Anderson filed or caused to be filed false and misleading forms with government agencies . . . insofar as he denied the ownership of G&A and Iceberg and misstated facts relating to the funding of G&A and Iceberg.”</p>	<p>¶¶ 38(d)(iii), 39(f)(iii), 41(d)(iii), 43(d)(iii), 45(d)(iii): Anderson “ma[de] or caus[ed] to be made false and fraudulent statements regarding the ownership and control of G&A and Iceberg[.]”</p>

The remainder of Count One focuses on conduct that one would otherwise expect to see presented to the Court in a Rule 404(b) motion or in additional counts charging other, more specific provisions of the federal tax code.³ The government alleges, for example, that:

- “Anderson did not timely file his 1987, 1988, 1989, 1990, 1991, 1992, and 1993 . . . Returns . . .” (Indictment ¶ 21);
- “From . . . September 14, 1994, through . . . April 15, 2000, Anderson falsely represented to the IRS that he was a resident of the State of Florida when, in fact, Anderson did not reside there” (*id.* ¶ 36);
- “From . . . August 3, 1998, through . . . June 22, 2001, Anderson caused to be filed United States Corporate Income Tax Returns for TWCD for the tax years 1997 through 2000, which returns contained false and inconsistent statements relating to the ownership of TWCD” (*id.* ¶ 33);
- “From . . . October 19, 2000, through . . . October 15, 2001, Anderson caused to be filed United States Partnership Income Tax Returns for Red Tulip for the tax years 1999 and 2000, which returns contained false and inconsistent statements relating to the ownership of Red Tulip” (*id.* ¶ 34).

Taken as a whole, it becomes plain that the government has leveraged the obstruction count here to “get a wide range of evidence in,” BNA Daily Tax Report, Dec. 3, 1993, *supra* -- evidence that might otherwise not have been admissible under Rule 404(b) or, alternatively, sufficient to support a different charge under the tax laws. Moreover, throughout the obstruction count, the government fails explicitly to allege that, at the time he committed much of the conduct at issue, Mr. Anderson was aware of a pending IRS investigation, audit, or other enforcement proceeding, or that he intended to obstruct the administration of any such proceeding. To the contrary, other than with respect to certain conduct alleged in connection

³ In fact, the government already has included certain conduct alleged in Count One in its Rule 404(b) notice, but with an expanded timeframe. *Compare, e.g.*, Indictment ¶ 21 (“Anderson did not timely file his [1987-1993] . . . Returns”) with Gov’t Notice at 9 (“[D]efendant . . . failed to timely file . . . returns for tax years 1978, 1980, 1981, [and 1984-1994] . . .”) (Doc. #106).

with an IRS audit that took place from April to September 1998 (*see* Indictment ¶ 29), the government does not plead a nexus between conduct, on the one hand, and a pending proceeding, on the other, as the Supreme Court required in *Aguilar*, and as we discuss further, below.

ARGUMENT

The Supreme Court, in 1995, sharply constrained the “very broad language of the catchall provision” in 18 U.S.C. § 1503, which is one of the general obstruction of justice statutes in the criminal code.⁴ *United States v. Aguilar*, 515 U.S. 593, 599 (1995). The Court in *Aguilar* concluded that “if defendant lacks knowledge that his actions are likely to affect [a] judicial proceeding, he lacks the requisite intent to obstruct.” *Id.* at 599; *see also United States v. Schwarz*, 283 F.3d 76, 109 (2d Cir. 2002) (“The thrust of the Court’s opinion in *Aguilar* is that § 1503 requires a specific intent to obstruct a federal judicial or grand jury proceeding.”). Accordingly, “the government must show . . . that there was a pending judicial proceeding, that the defendant was aware of that proceeding, and that the defendant corruptly intended to impede the administration of that judicial proceeding.” *United States v. Fassnacht*, 332 F.3d 440, 447 (7th Cir. 2003).⁵

⁴ The statute provides in relevant part: “Whoever . . . corruptly or by threats of force or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be punished as provided in subsection (b).” 18 U.S.C. § 1503.

⁵ The “intent” requirement will be satisfied provided the government alleges a sufficient “nexus” between the conduct and the proceeding. *Aguilar*, 515 U.S. at 599 (“[T]he act must have a relationship in time, causation, or logic with the judicial proceedings.”). In other words, “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.” *Id.* (citations and internal quotation marks omitted); *see also In Re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1998) (noting that Section 1503 is satisfied “whenever a person, with the ‘intent to influence judicial or grand jury proceedings,’ takes actions having the ‘natural and probable effect’ of doing so”) (quoting *Aguilar*, 515 U.S. at 600).

The omnibus clause has been analogized repeatedly to 18 U.S.C. § 1503. *See, e.g., United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998) (interpreting Section 7212(a) by “looking to the analogous obstruction of justice statute”).⁶ Indeed, the government has drawn this precise analogy in at least one prior prosecution. *See, e.g., Williams*, 644 F.2d at 700 (“[T]he Government more pointedly invites us to construe section 7212 *in pari materia* with the principal obstruction of justice statutes,” including 18 U.S.C. § 1503).

Accordingly, the limiting principles of *Aguilar* apply with compelling force to the omnibus clause. Indeed, that clause, which refers to the due administration of *a particular Title* in the criminal code, is even narrower on its face than the obstruction statute, which refers to the “due administration of *justice*.” *See Kassouf*, 144 F.3d at 956 (“The language ‘due administration of justice’ could have been . . . construed even more broadly than the language in § 7212(a).”). Thus, the constrained interpretation given by the Supreme Court to the even-broader language of Section 1503 is particularly significant. *See id.* at 956-57 (“The administration of justice could conceivably have been interpreted to encompass a wide array of activities including filing of false police reports, interfering with police investigations, or

⁶ *See also, e.g., United States v. Dykstra*, 991 F.2d 450, 454 (8th Cir. 1993) (“In interpreting § 7212(a), courts have often resorted to the obstruction of justice provision of Title 18.”); *Mitchell*, 985 F.2d at 1278 (noting that Section 7212(a) should be interpreted in the “same . . . fashion” as Section 1503); *Popkin*, 943 F.2d at 1539-40 (relying on Section 1503 to interpret Section 7212(a)); *United States v. Reeves*, 752 F.2d 995, 997-99 (5th Cir. 1985) (considering Section 1503 when interpreting the meaning of “corrupt intent” within Section 7212(a)); *United States v. Martin*, 747 F.2d 1404, 1409 (11th Cir. 1984) (finding that “[c]aselaw under the general obstruction of justice statute . . . aids in the construction of [Section 7212(a)]” because the two statutes contain similar language); *Williams*, 644 F.2d at 699 n.11 (“The language and structure of [section 7212] track part of certain federal obstruction of justice statutes,” including 18 U.S.C. § 1503); BNA Daily Tax Report, Dec. 3, 1993, *supra* (DOJ official stating that the omnibus clause of section 7212(a) “is the obstruction statute for the Tax Code”); Ian M. Comisky, *et al.*, Tax Fraud & Evasion, § 2.06 (2006) (“The language and structure of [26 U.S.C.] § 7212(a) track certain obstruction-of-justice statutes contained in the criminal code,” such as 18 U.S.C. § 1503).

destroying evidence before a formal proceeding was underway. The Supreme Court, however, soundly rejected such a broad pronouncement”).

This Court should thus have no hesitation applying *Aguilar* here. *See generally Aguilar*, 515 U.S. at 600 (federal courts “traditionally exercise[s] restraint in assessing the reach of a federal criminal statute . . . [in part] out of concern that a fair warning should be given to the world[,] in language that the common world will understand, of what the law intends to do if a certain line is passed”) (citations and internal quotation marks omitted). Indeed, the Sixth Circuit already has applied *Aguilar* to limit the reach of the omnibus clause, and the Ninth Circuit appears poised to do the same. *See Kassouf*, 144 F.3d at 955-58, *cited with approval in United States v. McBride*, 362 F.3d 360, 372 (6th Cir. 2004); *United States v. Metteer*, 118 Fed. Appx. 135, 135-36 & n.3 (9th Cir. 2004) (applying the principles of *Aguilar* in Section 7212(a) context) (unpublished). *But see United States v. Bowman*, 173 F.3d 595 (6th Cir. 1999) (suggesting, *in a decision pre-dating McBride*, that *Kassouf* should be limited to its facts).⁷

Moreover, Mr. Anderson is accused of conduct that is similar to the conduct at issue in *Kassouf*. There, the defendant was accused of failing to maintain proper records, and “ma[king] it more difficult to discover and trace his activities by transferring funds between bank accounts . . . and affirmatively misle[ading] the IRS by filing tax returns which failed to disclose the transactions, the bank accounts and other assets, and the interest earned on those accounts.” *Kassouf*, 144 F.3d at 953. The court found that such behavior could only be considered “obstructive” in the most “speculative” sense. *Id.* at 957. Accordingly, in order to guard against prosecutions for such conduct, the *Kassouf* court applied *Aguilar* and concluded that liability for

⁷ The application of *Aguilar* to a prosecution under the omnibus clause appears to present an issue of first impression in the District of Columbia Circuit.

a violation of the omnibus clause requires the defendant to be aware of an IRS proceeding, such as a “subpoena[], audit[] or criminal tax investigation[].” *Id.* at 957 n.2.⁸

Here, other than with respect to conduct in connection with the 1998 audit, the government has failed adequately to plead, in connection with the other conduct set forth in Count One, (1) an IRS investigation, audit, or other enforcement proceeding, (2) Mr. Anderson’s awareness of any such proceeding, and (3) his intent to obstruct the administration of any such proceeding. There simply are no allegations of a “nexus” between the additional conduct described in Count One and a particular IRS investigation, audit, or other enforcement proceeding. *Aguilar*, 515 U.S. at 599. And, without such allegations, much of Count One fails to state an offense.⁹

⁸ The court in *Kassouf* properly distinguished a number of earlier appellate court decisions that did not impose a requirement of a pending IRS investigation or proceeding in an omnibus-clause prosecution. *See* 144 F.3d at 955-56 (distinguishing *United States v. Hanson*, 2 F.3d 942 (9th Cir. 1993), *Mitchell*, 985 F.2d 1275, *United States v. Kuball*, 976 F.2d 529 (9th Cir. 1992), *Popkin*, 943 F.2d 1535, and *Williams*, 644 F.2d 696). *All of those cases pre-dated Aguilar.* Moreover, they generally involved deliberate attempts to *trigger* an IRS investigation, a situation clearly different from *Kassouf* or the facts at issue here.

⁹ The government does make certain vague references in Count One to “repeated contacts by the IRS,” and to various “efforts” by the IRS to (1) “audit, assess and collect the taxes owed for 1987 through 1993,” (2) “locate [Anderson’s] income and assets,” and (3) “monitor his financial transactions.” (Indictment ¶¶ 22-23.) But such references, standing alone, are not sufficient to state an offense under the omnibus clause. Indeed, the remaining paragraphs in Count One, which detail Mr. Anderson’s alleged conduct, do not allege sufficient facts to satisfy the intent requirement of *Aguilar* -- *i.e.*, there are no allegations that the conduct at issue in those paragraphs bears a relationship in “time, causation, or logic” with a particular IRS investigation, audit, or other enforcement proceeding. 515 U.S. at 599.

CONCLUSION

For the reasons set forth above, all paragraphs in Count One of the indictment that fail to allege a sufficient “nexus” to an actual IRS investigation, audit, or other enforcement proceeding must be dismissed.¹⁰

Respectfully submitted,

/s/

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¹⁰ These paragraphs are delineated in the proposed Order accompanying this motion.