

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
TESSA DAVID ROSE	:	NO. 05-101-02

**MEMORANDUM**

**Baylson, J.**

**March 8, 2006**

Pending before the Court is the Defendant's Motion for Judgment of Acquittal.

A jury found the Defendant guilty of five counts of failure to file income tax returns in violation of 28 U.S.C. § 7203. The Defendant has filed a Rule 29(a) Motion alleging that the evidence was insufficient because the Government failed to prove the element of willfulness as required under the leading case of Cheek v. United States, 498 U.S. 192 (1991). The Court reserved judgment on Defendant's Rule 29(a) Motion at the conclusion of the Government's evidence. After oral argument on February 15, 2006, and in considering the briefs of the parties, the Court will deny Defendant's Motion for Judgment of Acquittal.

Defendant's counsel has appropriately cited a number of cases holding that the Court must find that the Government has introduced sufficient evidence at trial to show that the Defendant's conduct was willful. The government does not dispute this legal proposition.

As background to this case, the Defendant's husband, Larken Rose was indicted with her, and after a severance which the Court ordered sua sponte, Mr. Rose was tried before a jury and also convicted of all five counts. The evidence at both trials showed that Mr. Rose was, without

any question, the dominant actor between Mr. Rose and Mrs. Rose in the interaction with the Internal Revenue Service (“IRS”). He took the lead in all communications and meetings with the IRS that occurred. Defendant relies heavily on these facts as showing that she did, in fact, merely rely on her husband, and that she should not suffer a guilty verdict because of his conduct.

Although the Defendant’s argument could, in theory, be valid, the Court concludes that there is more than sufficient evidence in the record to support the verdict of guilty against the Defendant.

The Court will briefly summarize these evidentiary points, and finds that they were sufficient, under the instructions that the Court gave to the jury, which the defense does not dispute as proper and adequate, to allow the jury to find the Defendant guilty:

- 1) Defendant had knowingly signed and filed tax returns prior to 1997, the first year alleged in the indictment.
- 2) Defendant signed letters to the IRS and the Defendant attended meetings with the IRS in which IRS representatives told both Defendant and her husband that the law required them to file income tax returns. Defendant argues that the IRS is not necessarily authoritative on these matters and although the Court would agree with that general statement, the IRS certainly put the Defendant on notice that the arguments that she and her husband were making, that their income was not subject to taxation and that they did not have to file tax returns, was not accepted. Although there is some evidence in the record that at some points IRS representatives vacillated in their discussions with the Defendants, there is evidence where IRS representatives, either verbally or in letters that the Defendants received, made it known explicitly to Defendants that the IRS disagreed with the Defendants’ position.
- 3) There was also evidence confirming the law, that Defendant could have paid the tax

and filed suit for a refund, but failed to do so. Given the discussions which the Defendant had with the IRS, the jury was entitled to find that her knowledge of the IRS position, coupled with her failure to take advantage of a judicial remedy to test her argument, was also evidence of willfulness.

4) There is evidence of Defendant's hostility towards the IRS as shown by the testimony of Carl Jenkins, to whom the Defendant had written an e-mail dated June 12, 2002, in which she said "we hope we'll simultaneously make us rich and collapse the IRS." Ex. 19-36.

5) There is evidence that the Defendant declined to pay taxes so that she could have an early pay-off of the mortgage which she and her husband have on their home, and thus the jury could have found the Defendant's conduct, that she did not have to pay taxes or file tax returns, was motivated by her financial self interest, rather than by a sincere belief that she did not have to file tax returns. Ex. 19-35.

6) The government introduced testimony by Malcolm Smith, CPA, who had rendered accounting services to Defendant's father's estate, and was available to Defendant, and could have rendered professional advice about her position about taxes; however, she never consulted him. See Ex. 25-1.

7) The Defendant also made disparaging remarks about the IRS on a check which she had written paying certain taxes. Ex. 19-4.

Defense counsel minimizes the above evidence, but the Court finds it was sufficient to sustain the verdict.

Defendant's reply discusses the above evidence, but fails to recognize the important principle that, in view of the jury's verdict, the Court must view the evidence in the light most

favorable to the government. Defendant does not cite any cases specifically supporting her argument, but attempts to refute the cases relied on by the government. However, these cases do not provide any authority to grant Defendant's motion. In United States v. Mahney, 949 F.2d 1397 (6<sup>th</sup> Cir. 1991), the defendant was convicted of filing false individual tax returns. Mahney correctly holds that evidence of willfulness may be inferred from the facts and circumstances. The facts in Mahney are very different, but the legal principles established in that case do not help this Defendant.

Next, the Defendant attempts to refute the government's reliance on U.S. v. Fingado, 934 F.2d 1163 (10<sup>th</sup> Cir. 1991), which was a failure to file tax returns, as is the present one. The court upheld the trial judge's decision to allow evidence that the defendant had failed to file tax returns in the years prior to those for which he was charged. In Fingado, the defendant had filed income tax returns for some years, and then stopped filing. The court held this was evidence of willfulness. The court also relied on evidence of notices from the IRS relating to potential tax liability as relevant on willfulness, and evidence of a substantial income, both of which are also present in this case. The parties also discussed United States v. Trano, 802 F.2d 10 (1st Cir. 1986); however, this case does not specifically discuss the sufficiency of the evidence, but rather reviews the jury instructions and prosecutor's statements, which are not at issue in this case.

The Defendant's attempt to narrowly circumscribe the import of the Supreme Court's opinion in Cheek must be rejected. Although that case squarely holds that the government must prove willfulness, it does not delineate any specific type of evidence which must be introduced to warrant a finding of willfulness, nor does it restrict the government's evidence to any specific categories.

The Court concludes that the evidence against Defendant, as reviewed above in summary fashion, was sufficient and that the Defendant's post-trial Motion for Acquittal must be denied.

An appropriate Order follows.

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**ORDER**

AND NOW, this 8<sup>th</sup> day of March, 2006, it is hereby ORDERED that the Defendant's Motion for Acquittal under F. R. Crim. P. 29(a) is DENIED.

BY THE COURT:

s/Michael M. Baylson

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Michael M. Baylson, U.S.D.J.