

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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NO. 97-3888SDRC

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UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

ELTON HOWARD SILKMAN,

Defendant and Appellant..

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

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THE HONORABLE RICHARD H. BATTEY  
UNITED STATES DISTRICT JUDGE

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APPELLEE'S BRIEF

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## **SUMMARY AND REQUEST FOR ORAL ARGUMENT**

Defendant Appellant Elton Howard Silkman (hereinafter Silkman) was charged with five counts of tax evasion in violation of 26 U.S.C. § 7201 in an indictment which charged that Silkman, a farmer-rancher, willfully attempted to evade and defeat the payment of income taxes for the years 1981 through 1985.

The jury convicted Silkman on all five counts of tax evasion. Silkman moved for judgement of acquittal. The District Court denied Silkman's motion, and Silkman appeals on the issues of refusal of the court to admit into evidence Silkman's business expenses and deductions for the years 1981 through 1985, failure of the court to admit into evidence exhibits regarding the tax assessments made by the Internal Revenue Service, and the denial of Silkman's motion for judgement of acquittal.

The United States respectfully requests the same amount of time given tot appellant for oral argument.

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## STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT INTO EVIDENCE DEFENDANT'S BUSINESS EXPENSES AND DEDUCTIONS FOR THE TAX YEARS 1981, 1982, 1983, 1984, AND 1985.

United States V. Dack, 747 F.2d 1172, 1174 (7<sup>th</sup> Cir. 1984)

United States v. Daniel, 956 F.2d 540, 542 (6<sup>th</sup> Cir. 1992)

United States v. Voorhies, 658 F.2d 710, 715 (9<sup>th</sup> Cir. 1981)

United States v. Richards, 723 F.2d 646, 648 (8<sup>th</sup> Cir. 1984)

- II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING DEFENDANTS MOTION FOR JUDGMENT OF ACQUITTAL.

United States v. Abodeely, 801 F.2d 1020, 1023 (8<sup>th</sup> Cir. 1986)

United States, v. Felak, 831 F.2d 794, 796 (8<sup>th</sup> Cir. 1987)

- III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT DEFENDANTS EXHIBITS REGARDING THE INTERNAL REVENUE SERVICE'S TAX ASSESSMENTS FOR THE TAX YEARS 1981, 1982, 1983, 1984, AND 1985.

Wade v. Haynes, 633 F.2d 778, 783 (8<sup>th</sup> Cir. 1981)

United States v. Wright, 799 F.2d 423, 425 (8<sup>th</sup> Cir. 1986)

- IV. APPELLANTS ISSUE IV IS COMBINED AND ARGUED WITH ISSUE III.

## STATEMENT OF THE CASE

A. The Nature of the Case, the Course of proceedings, and its Disposition in the Court below.

An indictment was filed against Elton Howard Silkman on November 11, 1996, charging him with five counts of tax evasion in violation of 26 U.S.C. § 7201.

A jury trial commenced on July 14, 1997 and concluded on July 17, 1997 with a verdict of guilty as charged. Silkman moved for a judgement of acquittal based on his contention that there was no evidence presented by the United States regarding his income for the tax years 1981 through 1985 upon which a tax could be calculated, which motion was denied by the court.

Silkman was sentenced to 27 months imprisonment on all five counts, to be served concurrently; ordered to become current on all delinquent tax returns within 60 days of release from incarceration; ordered to pay a total fine of \$50,000, a \$250 victim witness assessment, and costs of prosecution in the amount of \$5988.04; and placed on supervised release for a term of three years upon his release from prison.

Silkman filed a timely notice of appeal in this action.

B. Statement of the facts.

In 1973, Silkman, a farmer-rancher, purchased a 5,700+ acre ranch in northwest South Dakota with his wife as joint tenant. T 276, 277, 513 and Exhibit 24. He operated this ranch until 1991. T 574-575. Silkman's wife died in 1989 and in May of

1991, Silkman transferred the land to Exodus Trust. T 516, 281-282.

During the years 1981 through 1985, Silkman failed to file income tax returns. T 34, 36-38 and Exhibits 1-5. The Internal Revenue Service followed standard operating procedures in filing substitute tax returns for Silkman for those tax periods. T 39. Notification to Silkman of the tax deficiencies for these tax years was made by mailing to Silkman the tax assessments, which were dated March 6, 1991. T 39 and Exhibit 6.

The tax assessments were based upon the best available information to the Internal Revenue Services regarding Silkman, such as government payments, interest income, and any available information based on wages and expenses. T 35, 36, 38. By letter dated April 27, 1991, Silkman objected to the Internal Revenue Service's notice of deficiency. T 43. By subsequent correspondence from Silkman to the Internal Revenue Service dated May 9, 1991, Silkman stated:

Please be advised that I am not a 'taxpayer' as that term is defined withing section 7701, paragraph A, paragraph 14 of the IR code. Therefore, I have not submitted any type of tax return forms for those years in questions to the Internal Revenue Service for a deficiency to occur in. It is absurd for you to claim that you have the authority to file returns for me, create a deficiency within those returns, and then give me a notice of that deficiency.

T 46-47.

After receiving the Internal Revenue Service's assessments, Silkman went to significant lengths to liquidate all his

discernable farming proceeds to foreign bank accounts and into nominee multi-level marketing distributorships, as follows:

Land – Sold in April of 1991 by Silkman in the name of Exodus Trust. T 120-122, 126. Silkman then directed the real estate salesman to wire transfer the net proceeds of \$640,624.60 to Jersey England in favor of Avalon Funds. The money was wired on October 21, 1991. T 126-132, 158-160 and Exhibits 33 and 36.

Grazing Rights Certificate – These 200 cattle grazing units were owned solely and exclusively by Silkman. T 232 and Exhibit 9. They were sold by Silkman in August of 1991 for \$115,000. T 214-217, 224, 225 and Exhibits 15 and 16. The money was used to purchase a bank money order in the name of Exodus. T 395 and Exhibit 62. The bank money order in the amount of \$115,000 was wire transferred to Jersey, England on August 15, 1992. T 396, 397 and Exhibit 61.

Farm Machinery and Equipment – Silkman directed all his farm machinery and equipment to be sold at auction on October 19, 1991. T 241. The proceeds of the sale came to \$258,483.72. Silkman directed the auction company to write a check to Exodus Estates. T 243 and Exhibit 19. Silkman then took this check to a Bowman, North Dakota bank and directed that the money be wire transferred on November 1, 1991 to Vienna, Austria in the name of Phoenix Group. T 193-196 and Exhibit 23.

United States Department of Agriculture Patronage Checks – Silkman received Conservation Reserve Program (CRP) checks for enrolling some of his farm ground in this program. T 360. In

April of 1991, Silkman directed the CRP payments to be made to Exodus. T 363. The money received from this program, approximately \$75,000, was deposited in a Bowman, North Dakota bank. On February 14, 1992, the money was wire transferred to Austria as part of a \$150,000 transfer at the direction of Silkman. T 367, 369, 383, 400-406 and Exhibits 56, 57, 58 and 61.

Grain – On February 5, 1992, Scranton Equity Exchange purchased grain from Silkman and issued him checks for \$70,307.99. T 169 and Exhibit 50. The Reeder North Dakota Equity Exchange, on January 20, 1992, bought grain from Silkman and issued him a check for \$10, 623.71. T 347, 348 and Exhibit 51. These checks were made payable to Exodus at the direction of Silkman, were deposited in a Bowman, North Dakota bank, and became part of the \$150,000 wire transfer of February 14, 1992 to Austria. T 166, 347-348 and Exhibit 61.

Cattle – On October 2, 1991 and November 9, 1991, Silkman sold cattle to the Lemmon Livestock Auction in the name of Bar U Enterprises, totaling \$109,306.84. T 285, 286 and Exhibits 38 and 39. The proceeds of some of these cattle became part of the February 14, 1992 wire transfer of \$150,000 to Austria. Exhibit 61. The other cattle proceeds were used by Silkman to purchase multi-level distributorships held in trust names, or to receive cash back. T 299-302 and Exhibits 40-43.

## **SUMMARY OF THE ARGUMENT**

Silkman raises four issues on appeal in this case. The first argument is that the court erred in excluding Silkman's

business expenses and deductions for the tax years 1981 through 1985. It is the position of the United States that these exhibits were properly refused by the court.

Silkman's second issue pertains to the denial of his motion for judgment of acquittal in this action. Silkman failed to demonstrate that the United States had not presented evidence which would support a finding of guilt. The court therefore did not abuse its discretion in denying Silkman's motion.

Silkman's third and fourth issues are that the trial court abused its discretion in refusing evidence regarding the Internal Revenue Service's assessments made in this action. The position of the United States is that the court properly refused these exhibits.

## **ARGUMENT**

### **I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT INTO EVIDENCE DEFENDANT'S BUSINESS EXPENSES AND DEDUCTIONS FOR THE TAX YEARS 1981, 1982, 1983, 1984 AND 1985.**

#### **A. Standard of Review.**

"[Appellate courts] review the evidentiary rulings of a district court only for abuses of discretion, [citations omitted], and will reverse only when an improper evidentiary ruling affects the substantial rights of the defendant or when we believe that the error has had more than a slight influence on the verdict..." United States v. Ballew, 40 F.3d 936, 941 (8<sup>th</sup> Cir. 1994). See also, United States v. LeCompte, 108 F.3d

948 (8th Cir. 1997) ; United States v. Johnson, 56 F.3d 947 (8<sup>th</sup> Cir. 1995).

B. The Trial court Properly Refused the Business Record Exhibits.

Silkman argues that in the charged tax years, 1981 through 1985, he had no tax due and owing because his expenses exceeded any profits. Silkman cites 801 F.2d 1020, 1023 (8<sup>th</sup> Cir. 1986) in support of his assertion that the United States must prove a tax deficiency for any given year that is due and owing. In this case, the court permitted the United States to prove the tax deficiencies through the introduction of tax assessments. T 34-38 and Exhibits 1-5. The court did not permit Silkman to introduce documents regarding business expenses and deductions for these tax years. The court stated:

“...This will be the Court's ruling on this matter. Your client had an obligation to respond to the assessment. He had two rights, two ways in which he could contest the assessment in this case. He could exhaust his administrative remedies under the Internal Revenue Service Code, or he could challenge the assessment by a direct action. He did neither and he therefore, since he did not proceed civilly to resolve this matter but simply waited the occurring of subsequent events, that tax assessment becomes the tax liability until contested. This is not the forum for that purpose and therefore, the Court will exclude any testimony concerning the question of what was the tax liability based upon the defendant's income and expenses for those years.

Secondly, under the theory that has been advanced by the defendant in opening statements and by extensive cross-examination of the witnesses, it appears to the Court that the defendant's position is that he had no assets subject to income tax, no income. And if he had income, it was not sufficient to satisfy the filing

requirement. The time is long past to resolve that issue....

T 488-489.

Silkman was permitted to testify that he believed he owed no taxes for the years 1981 through 1985. T 541-544. The court gave the following cautionary instruction to the jury:

Ladies and gentlemen, the Court sometimes will accept evidence relative to the state of mind, but will not accept evidence for other reasons. The Court will not accept this evidence to establish that the defendant did not have to pay tax or had insufficient income for which to file a return. The tax assessment for that year establishes the tax liability. But in this case, there is an element of which is willfulness, willful violation of the tax law, so you may receive this evidence as you have received previous testimony for Mr. Silkman as to what he was thinking and the state of mind, but cannot conclude that the testimony is offered for the purpose of establishing the truth of the matter which he has asserted. You may proceed.

T 539-540.

Regarding the exclusion of the business records, the United States asserts that 26 U.S.C. § 7201 defines tax evasion to include the willful attempt to evade or defeat payment on taxes. See , United States, v. Dack, 747 F.2d 1172, 1174 (7<sup>th</sup> Cir. 1984).

In the instant case, Silkman was charged in the indictment with the willful attempt to evade or defeat payment of taxes. Accordingly, the analyses contained in Dack, supra., that the existence of a tax deficiency as an element of the offense is required, is particularly helpful as stated:

When, as here, the taxpayer fails to file a return, and the government can show a tax liability pursuant to the provisions of the tax code, then a tax deficiency

within the meaning of Section 7201 is deemed to arise by operation of law on the date the return is due.

at 1174.

In sum, tax assessment proceedings are civil in nature and are not normally a prerequisite to criminal liability. But when the crime charged is one of evading the payment of taxes that have been assessed in civil proceedings, the government must prove the existence of a valid tax assessment. Here, the indictment charged Dack with evading the government's ascertainment of tax when Dack failed to file a timely return. Accordingly, a valid tax assessment was not an element of the offense charged.

at 1175.

Although a tax deficiency must be established for a violation of Section 7201, the proof is not problematical in an evasion of payment case if the Internal Revenue Service has assessed the tax. The proof of the tax due and owing can consist of introducing the Internal Revenue Service's certificate of assessments and payments assessing the tax due and owing. It has been held that unless an assessment by the Service has been challenged as invalid by the taxpayer either administratively or judicially, a certificate of assessments and payments is *prima facie* correct and, therefore "adequate evidence" of the amount of the tax liability. United States v. Voorhies, 658 F.2d 710, 715 (9<sup>th</sup> Cir. 1981).

A clear example of the tax deficiency element required by Section 7201 is found in United States v. Daniel, 956 F.2d 540, 542 (6<sup>th</sup> Cir. 1992), Wherein it states:

Apparently, Daniel argues that he cannot be charged with attempting to evade payment of taxes because a tax deficiency did not exist. He argues that because there

has been no assessment and demand for taxes, there is no deficiency. However, when a taxpayer fails to file a federal income tax return and the government can show a tax liability pursuant to the tax code, a tax deficiency within the meaning of section 7201 arises by operation of law on the date that the return is due to be filed. United States v. Dack, 747 F.2d 1172, 1174 (7<sup>th</sup> Cir. 1984) (citing United States v. Voorhies, 658 F.2d 710, 714 (9<sup>th</sup> Cir. 1981)). See also United States v. Hogan, 861 F.2d 312, 315 (1<sup>st</sup> Cir. 1988). The law does not require an assessment or demand for payment before a tax deficiency arises. *Id.* Thus, when Daniel failed to file his federal income tax return, and the government determined his tax liability, a tax deficiency arose by operation of law, fulfilling the tax deficiency element of section 7201.

In the instant case, the government did not proceed to litigate the civil tax liability or deficiency.

The government proved the tax evasion of payment in this case by introducing evidence that Silkman placed assets beyond the government's reach by transferring assets abroad, placing assets in the names of others, or using cash transactions to conceal the existence of assets. See, United States v. Mal, 942 F.2d 682, 687 (9<sup>th</sup> Cir. 1991).

#### The Seventh Circuit

...addressed the issue of the requirement of a valid tax assessment saying “[w]hen, as here, the taxpayer fails to file a return, and the Government can show a tax liability pursuant to the provisions of the tax code, then a tax deficiency within the meaning of section 7201 is deemed to arise by operation of law on the date the return is due.” United States v. Dack, 797 F.2d at 1174 (footnote omitted) (citing United States v. Voorhies, 658 F.2d 710, 714 (9<sup>th</sup> Cir. 1981).

United States v. Hogan, 861 F.2d 312, 315 (1<sup>st</sup> Cir. 1988).

The Eighth Circuit Court of Appeals has adopted the reasoning contained in Voorhies – that a tax deficiency arises by

operation of law on the date the return is due. See, United States v. Richards, 723 F.2d 646, 648 (8<sup>th</sup> Cir. 1984).

Therefore, the court did not abuse its discretion in refusing the business records.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

A. Standard of Review.

The standard of review for granting a motion for judgement of acquittal is set out in United States v. Cunningham, 83 F.3d 218 (8<sup>th</sup> Cir. 1996). The evidence must be viewed in the light most favorable to the jury's verdict, giving the government the benefit of the reasonable inferences that may be drawn from the evidence. Id. at 222. The court will reverse a conviction for insufficient evidence and order the entry of a judgment of acquittal only if no construction of the evidence exists to support the jury's verdict. United States v. Darden, 70 F.3d 1507, 1517 (8<sup>th</sup> Cir. 1996). "The jury's verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable minded jury to find the defendant guilty beyond a reasonable doubt." United States v. White, 81 F.3d 80, 82 (8<sup>th</sup> Cir. 1996). "The evidence need not exclude every reasonable hypothesis except guilt; the essential elements of the crime may be proven by circumstantial, as well as direct evidence. United States v. Nabors, 762 F.2d 642, 653 (8<sup>th</sup> Cir. 1985).

B. No Abuse of Discretion in Denying the Motion for Judgement of Acquittal.

The court properly instructed the jury regarding the essential elements that the government was required to prove. T 671. These elements are consistent with the essential elements as outlined in United States v. Abodeely, 801 F.2d 1020, 1023 (8<sup>th</sup> Cir. 1986). See also, United States v. Felak, 831 F.2d 794, 796 (8<sup>th</sup> Cir. 1987).

Silkman asserts that the United States failed to prove that he had unreported income for the respective years and that this income was taxable. The United States contends that Silkman's argument is misplaced and that the court properly instructed the jury regarding the taxes due and owing:

The crimes; charged in Counts I to V of the indictment allege an attempt to evade the payments of taxes that have been assessed through the Internal Revenue Service process of issuing a tax assessment. Certificates of assessments were introduced in Exhibits I to 5, inclusive. The fact of a tax due and owing as established by such assessments in a criminal tax evasion such as this, it is necessary to prove that a tax on some substantial income was evaded. Once a proper tax assessment is made, that becomes evidence to the amount of tax liability owed. This evidence, however, is not conclusive as to the amount of the tax owed. You may accept or reject the evidence or give it such weight as you believe it is entitled.

To attempt to evade or defeat a tax involves two things.

1. An intent to evade or defeat the tax.

And second, some act *willfully* done in furtherance of such intent. So the word "attempt" contemplates that the defendant knew and understood that during the calendar years charged, he had federal income taxes due and owing the federal government for tax years 1981, '82, '83, '84 and 1985, which he was required by law to

report, but that he nevertheless attempted to evade or defeat all or a substantial portion of the tax during the indictment period. To evade and defeat a tax means to escape paying the tax by means other than lawful avoidance. Various schemes, subterfuges, and devices may be resorted to in an attempt to evade or defeat a tax. The ones alleged in the indictment are that of the concealing and attempting to conceal from the Internal Revenue Service the nature and extent of the assets and location thereof by placing funds and property in the names of nominees and placing funds beyond the reach of service of process.

T 671-672.

Silkman had no objection to this instruction. T 656.

In the case at bar, the jury heard from many witnesses regarding transfers by Silkman of his property into trusts and nominee accounts. These transfers are outlined in the Statement of Facts and are hereby adopted as Silkman's attempts to evade payment of taxes.

When viewed in a light most favorable to the government, the facts support the jury's finding that Silkman was the individual who avoided payment of the lawful taxes due and the court did not abuse its discretion by denying the motion for judgment of acquittal.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT DEFENDANT'S EXHIBITS REGARDING THE INTERNAL REVENUE SERVICE'S TAX ASSESSMENTS FOR THE TAX YEARS 1981, 1982, 1983, 1984, AND 1985.

A. Standard of Review.

The Court Of Appeals gives substantial deference to the district court's evidentiary rulings and will find error only if the district court clearly abused its discretion. United States v. Brown, 110 F.3d 605, 609 (8<sup>th</sup> Cir. 1997).

B. The Trial court Properly Refused Defendant's Exhibits as Irrelevant to the Tax Assessments.

In the instant case, Silkman sought to introduce Exhibit 106 (the Internal Revenue Service civil agent's work papers establishing taxable income for 1981-1985) and Exhibit 107 (Internal Revenue Service's assessment data). The court refused to admit these exhibits, and stated as to Exhibit 106:

See, that isn't is an – that is an attempt to purge the assessment, and I am not going to permit any evidence to purge that certificate of assessment. Your client had a right, had some rights that he slept on. He could have challenged all of these items of tax, but he didn't. Why he didn't, that's only up to him. But he slept on his rights civilly, and has been indicted for the evasion of those taxes that were assessed to which he offered no resistance.

T 491-492.

Silkman sought to introduce Exhibit 107 upon cross examination of the Service Center representative of the Internal Revenue Service. Silkman contends that this Internal Revenue Service assessment document failed to identify that Silkman himself had been assessed specific amounts as federal income taxes for the years 1981 through 1985. Therefore, Silkman argues, it rebuts the assessment documents admitted into evidence as Exhibits 1 through 5. The court refused to admit this exhibit. T 96. The exhibit itself does not identify Silkman.

Regarding both Exhibits 106 and 107, the district court has broad discretion in deciding whether to admit evidence at trial. Here, the United States objected on the basis of relevancy. Under Federal Rule of Evidence 403 the court can and should

exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confuses the issues, or is misleading to the jury. Wade v. Haynes, 633 F.2d 778, 783 (8<sup>th</sup> Cir. 1981). The Eighth Circuit Court of Appeals has stated, “We will reverse the district court only for a clear and prejudicial abuse of that discretion.” United States v. Wright, 799 F.2d 423, 425 (8<sup>th</sup> Cir. 1986). See also, United States v. Black Cloud, 101 F.3d 1258, 1261 (8<sup>th</sup> Cir. 1996).

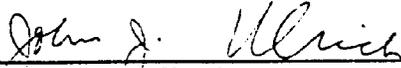
As stated, the court admitted the certificates of assessment (Exhibits 1-5) and any other evidence concerning the assessment was deemed irrelevant. In fact, Exhibit 106 would support the assessments and was cumulative, and Exhibit 107 did not pertain to Silkman and is clearly irrelevant. Therefore, the court did not abuse its discretion in denying the admission of the exhibits. The cases cited by Silkman in his brief concerning the admission of this evidence largely relate to civil tax proceedings and are not applicable to the criminal case at bar.

## **CONCLUSION**

For the reasons stated, the United States respectfully requests that the Court affirm Silkman’s conviction and sentence.

Respectfully submitted this 5 day of February, 1998.

KAREN E. SCHREIER  
United States Attorney



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#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing was made upon the defendant/appellant by mailing a true and correct copy thereof to his attorneys of record: Lowell H. Becraft, Jr., 209 Lincoln St., Huntsville, AL 35801; and to Ramon Roubideaux, 919 Main St. # 101, Rapid City, SD 57701, on the 5 day of February, 1998.



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**JOHN J. ULRICH**  
Assistant United States Attorney