

CONTROLLING LEGAL PRINCIPLES

*Free Exercise Clause Decision – The “Contemplation of Justice”
United States v. Bishop, 412 U.S. 346 (1973)*



Respondent was convicted of violating 26 U.S.C. § 7206(1), which makes it a felony when one "[w]illfully makes and subscribes any return . . . which he does not believe to be true and correct as to every material matter," after the District Court refused a lesser included offense jury charge under § 7207, which makes it a misdemeanor when one "willfully delivers or discloses" to the Internal Revenue Service any return or document "known by him to be fraudulent or to be false as to any material matter." The Court of Appeals reversed on the ground that "willfully," as used in § 7206, implied an evil motive and bad faith, but the same word, as used in § 7207, required only a showing of unreasonable, capricious, or careless disregard for the truth.

Held: The word "willfully" has the same meaning in §§ 7206(1) and 7207, connoting the voluntary, intentional violation of a known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser included offense instruction based on respondent's erroneous contention that the word "willfully" in the misdemeanor statute implied less *scienter* than the same word in the felony statute. Pp. 412 U. S. 350-361.

455 F.2d 612, reversed and remanded. ,

Chapter 75, subchapter A, of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 7201-7241, is concerned with tax crimes. Sections 7201-7207, inclusive, which in the aggregate relate to attempts to evade or defeat tax, to failures to act, and to fraud, all include the word "willfully" in their respective contexts. Specifically, § 7206 is a felony statute, and reads:

"§ 7206. Fraud and false statements."

"Any person who -- "

Thoughts, Words and Actions for Plaintiff's Quintessential Rights of the First Amendment:
Truths that manifest Life, Liberty & Pursuit of Happiness pursuant to the Free Exercise Clause

"(1) Declaration under penalties of perjury."

"Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . ."

"* * * *"

"shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 7207 is a misdemeanor statute, [Footnote 1] and reads:

"7207. Fraudulent returns, statements, or other documents. "

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"Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both."

This case presents the issue of the meaning of the critical word "willfully" as it is employed in these two successive statutes. Is its meaning the same in each, or is the willfulness specified by the misdemeanor statute, § 7207, of somewhat less degree than the felony willfulness specified by § 7206?

The Court of Appeals relied upon and followed, 455 F.2d at 614, a series of its own cases, [Footnote 3] particularly *Abdul v. United States*, 254 F.2d 292 (1958), enunciating the proposition that the word "willfully" has a meaning in tax felony statutes that is more stringent than its meaning in tax misdemeanor statutes. [Footnote 4] Our examination of these Ninth Circuit precedents in the light of this Court's decisions leads us to conclude that the Court of Appeals' opinion cannot be sustained by this asserted distinction between § 7206(1) and § 7207.

A. The Ninth Circuit rule appears to have been evolved from language in this Court's opinion in *Spies v. United States*, 317 U. S. 492 (1943). In *Spies*, the defendant requested an instruction to the effect that an affirmative act was necessary to constitute a willful attempt to evade or defeat a tax within the meaning of § 145(b) of the Revenue Act of 1936, 49 Stat. 1703. The trial court

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refused the request. The Second Circuit affirmed. This Court reversed. We were concerned in *Spies* with a felony statute, § 145(b), applying to on "who willfully attempts in any manner to evade or defeat any tax," and with a companion misdemeanor statute, § 145(a), applying to one who

"willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations."

These statutes were the predecessors of the current §§ 7201 and 7203, respectively, of the 1954 Code. In distinguishing between the two offenses, the Court said:

"The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock*, 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not, without the clearest manifestation of Congressional intent, assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer."

"Had § 145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally

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a failure to observe statutory duties to make timely returns, keep records, or supply information -- duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible, and perhaps an appropriate, construction of § 145(b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor, we think, argues strongly against such an interpretation."

317 U.S. at [317 U. S. 497-498](#).

In *Abdul*, the court considered an appeal by a taxpayer convicted of tax misdemeanors (§ 2707(b) of the 1939 Code and § 7203 of the 1954 Code) based on failure to file, but acquitted of tax felonies (§ 2707(c) of the 1939 Code and § 7202 of the 1954 Code) based on failure to account for and pay withholding taxes. The defense was inability to pay. The trial judge instructed the jury that the term "willful" in the misdemeanor counts meant, among other things, "capriciously or with a careless disregard whether one has the right so to act," whereas the same word in the felony counts meant

"with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct."

254 F.2d at 294. Relying on *Spies*, the Court of Appeals approved these instructions, and concluded that

"the word 'willful,' as used in the misdemeanor statute, means something less when applied to a failure to make a return than as applied to a felony non-payment of a tax. This being true, then the

words used in the instruction defining 'willful' as relates to a misdemeanor adequately and clearly point up that difference."

Ibid.

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It would be possible, of course, that the word "willfully" was intended by Congress to have a meaning in § 7206(1) different from its meaning in § 7207, and we turn now to that possibility.

We continue to recognize that context is important in the quest for the word's meaning. See *United States v. Murdock*, 290 U. S. 389, 290 U. S. 394-395 (1933). Here, as in *Spies*, the

"legislative history of the section[s] contains nothing helpful on the question here at issue, and we must find the answer from the [sections themselves] and [their] context in the revenue laws. [Footnote 6]"

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at 317 U. S. 495. We consider first, then, the sections themselves.

A. Respondent argues that both §§ 7206(1) and 7207 apply to a fraudulent "return," and cover the same ground if the word "willfully" has the same meaning in both sections. Since

"it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same derelictions it had just defined . . . as a misdemeanor,"

317 U.S. at 317 U. S. 497, respondent concludes that Congress must have intended to require a more willful violation for the felony than for the misdemeanor.

The critical difficulty for respondent is that the two sections have substantially different express terms. The most obvious difference is that § 7206(1) applies only if the document "contains or is verified by a written declaration that it is made under the penalties of perjury." No equivalent requirement is present in § 7207. Respondent recognizes this, but then relies on the presence of perjury declarations on all federal income tax returns, a fact that effectively equalizes the sections where a federal tax return is at issue. See 26 U.S.C. § 6065(a). [Footnote 7]

"However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute . . . , and not in the quality

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of willfulness which characterizes the wrongdoing."

United States v. Vitiello, 363 F.2d 240, 243 (CA3 1966). Thus, the word "willfully" may have a uniform meaning in the several statutes without rendering any one of them surplusage. We next turn to context.

The hierarchy of tax offenses set forth in §§ 7201-7207, inclusive, utilizes the mental state of the offender as a guide in establishing the penalty. Section 7201, relating to attempts to evade or defeat tax, has been described and recognized by the Court as the "climax of this variety of sanctions" and as the

"capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency."

The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," *Murdock*, 290 U.S. at 290 U. S. 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies*, 317 U.S. at 317 U. S. 498, or knowledge that the taxpayer "should have reported more income than he did." *Sansone*, 30 U.S. at 30 U. S. 353. See *James v. United States*, 366 U. S. 213, 366 U. S. 221 (1961); *McCarthy v. United States*, 394 U. S. 459, 394 U. S. 471 (1969).

This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said,

"It is not the purpose of the law to penalize *frank difference of opinion* or innocent errors made despite the

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exercise of reasonable care."

Spies, 317 U.S. at 317 U. S. 496. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. *James v. United States*, 366 U.S. at 366 U. S. 221-222. Cf. *Lambert v. California*, 355 U. S. 225 (1957). The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive

intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

[Footnote 1]

Title 18 U.S.C. § 1 defines felony and misdemeanor:

"§ 1. Offenses classified."

"Notwithstanding any Act of Congress to the contrary: "

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony."

"(2) Any other offense is a misdemeanor."

[Footnote 3]

United States v. Haseltine, 419 F.2d 579, 581 (1970) (§§ 7201 and 7203); *United States v. Fahey*, n 2, *supra*; *Eustis v. United States*, 409 F.2d 228 (1969) (§ 7203); *Edwards v. United States*, 375 F.2d 862 (1967) (§§ 7201, 7203, and 7206(2)); *Martin v. United States*, n 2, *supra*; *Abdul v. United States*, n 2, *supra*.

[Footnote 4]

One possible result of this distinction, of course, is that the Government's burden in a misdemeanor case could be less than in a felony case.

[Footnote 6]

See H.R.Rep. No. 1337, 83d Cong., 2d Sess., A425 (1954); S.Rep. No. 1622, 83d Cong., 2d Sess., 502-603 (1954). The predecessor to § 7206(1) was § 3809(a) of the 1939 Code. The antecedent to § 7207 was, as we have noted above, § 3616(a) of the 1939 Code. See *Sansone*, 380 U.S. at 380 U. S. 347.

[Footnote 7]

"§ 6065. Verification of returns."

"(a) Penalties of perjury."

"Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury."

See also Treas.Reg. § 1.6065-1 (1972).