

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,

§

§

Plaintiff

§

§

v.

§

No. 1:13-CR-133-SS

§

GREGORY P. BOYD,

§

§

Defendant

§

**GOVERNMENT’S REPLY TO DEFENDANT’S RESPONSE TO
GOVERNMENT’S NOTICE OF INTENT TO OFFER EVIDENCE
PURSUANT TO RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE**

The government replies to the Defendant’s November 13, 2013 Response to Government’s Notice of Intent to Offer Evidence Pursuant to Rule 404(b) [doc. 74] (“the Response”), and would respectfully show the Court the following.¹

On November 4, 2013, the government filed its Notice of Intent to Offer Evidence Pursuant to Rule 404(b) [doc. 52] (“the Notice”), stating that the government intended to offer at trial evidence of, among other things:

- Defendant’s failure to file income tax returns timely and pay income tax timely or at all;
- IRS tax liens and levies to collect unpaid income taxes from the Defendant;
- Payment plans undertaken by the Defendant to pay overdue taxes; and
- Bankruptcies filed by the Defendant.

¹ The government’s attorney regrets not filing this Reply earlier, in order to allow time for the Court and defense counsel to read it in advance of the hearing set for November 15. The government’s attorney will provide courtesy copies by electronic mail and at the hearing.

(Notice [doc. 52] at 1-2.) In the Response, the Defendant argued none of that evidence should be admitted. (*See* Response [doc. 74] at 2-5.)

The government respectfully disagrees. The evidence to which the Defendant has objected is admissible under Rule 404(b) to prove the Defendant's "motive ... intent ... knowledge ... and absence of mistake." Fed. R. Evid. 404(b)(2). Therefore, the evidence is part of the government's proof of willfulness. Also, the defense intends to rebut the government's evidence of willfulness by showing that the Defendant believed his income tax returns were truthful, based on his good-faith misunderstanding of the law. The evidence to which the Defendant has objected will rebut any defense of good faith.

IRS records show the Defendant's history of failing to comply with his income tax obligations, particularly in years when he was not subject to withholding of income tax from his wages. In those years, which include the years to which the Indictment relates, the Defendant repeatedly failed to file returns on time or pay income tax on time; the IRS used liens and levies in an attempt to collect income tax from the Defendant; and the Defendant paid overdue taxes, penalties and interest under installment plans and bankruptcy proceedings.

That evidence, in combination with evidence about the Defendant's cash flow during years in the Indictment, will demonstrate that the Defendant had a financial motive for filing the false tax returns to which the Indictment pertains, and made a conscious choice not to comply with the tax laws except in years where withholding of income tax essentially forced him to comply. Evidence of IRS collection efforts such as liens and levies will also demonstrate the Defendant's knowledge that his income tax obligations were legally enforceable. Therefore, the evidence proves the Defendant's "motive ... intent ... knowledge ... and absence of mistake." Fed. R. Evid. 404(b)(2).

In criminal tax cases, the Fifth Circuit has upheld the admission of evidence showing past tax violations to prove intent and rebut claims of mistake and good faith. Some of the evidence considered by the Fifth Circuit included uncharged conduct and conduct that was remote in time from the charged offenses.

In *United States v. Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994), the defendant was convicted of attempting to evade federal excise taxes, and on appeal he argued that the district court had erred by admitting evidence of his prior state court convictions for failing to pay state excise taxes. *See id.* at 1024, 1028. The Fifth Circuit affirmed, holding that the prior convictions were “relevant to the element of willfulness and tend to negate Wisenbaker's assertion that he had a good-faith belief that he was not obligated to pay the taxes.” *Id.* at 1028.

In *United States v. Miller*, 520 F.3d 504 (5th Cir. 2008), a jury convicted the defendant of tax evasion, and on appeal he contended that the district court erred by admitting evidence that he had “opened a bank account under a false name and with fraudulent identification.” *Id.* at 511-12. The Fifth Circuit affirmed, reasoning in part that a “large part of Miller’s defense turned on his mental state, that he lacked an unlawful intent,” and the fact that he “was caught attempting to hide money under false pretenses” was “probative of his intent.” *See id.* at 512.

In an unpublished decision in *United States v. Watson*, 433 Fed. Appx. 284, 2011 WL 2899614 (5th Cir. 2011), the defendant, a tax return preparer, was convicted of assisting in the preparation of false tax returns. *Id.* at 285. He argued at trial that he did not intentionally prepare false returns, because he relied on the information his customers provided to him. *Id.* at 287. The district court admitted evidence that the defendant falsified his own tax returns by misrepresenting his marital status, and on appeal he argued that that ruling was error. *See id.* The Fifth Circuit affirmed, noting that the defendant “listed erroneous information he logically

Certificate of Service

On November 14, 2013, I caused the foregoing to be filed, and served on the Defendant's counsel of record, via the Court's Electronic Case File system.

/s Alan M. Buie
ALAN M. BUIE
Assistant United States Attorney