No. 02-44

In the Supreme Court of the United States

COR-BON CUSTOM BULLET CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in an indictment for felony tax evasion under 26 U.S.C. 7201, the failure to allege specific acts constituting willful attempts to evade or defeat a tax may constitute harmless error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 287 F.3d 576. The bench opinion of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The opinion of the court of appeals was filed on April 25, 2002. The petition for a writ of certiorari was filed on July 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a manufacturer of firearm ammunition. Following a jury trial, petitioner was convicted on thirteen counts of tax evasion under 26 U.S.C. 7201, for evading the excise tax imposed by 26 U.S.C. 4181 on

taxable sales of ammunition by such manufacturers. Pet. App. 3a. Petitioner evaded this tax liability by reporting only part of its ammunition sales during each calendar quarter from 1991 through 1995. *Id.* at 2a.

1. a. Each count of the first superseding indictment tracked the applicable statutory language of Section 7201 in stating (Pet. App. 2a-3a):

> On or about [date] in the Eastern District of Michigan, Southern Division, Defendants PETER PI,[1] and COR-BON CUSTOM BULLET CO., willfully attempted to evade and defeat a tax imposed under this title or the payment thereof on ammunition sales that were due and owing from COR-BON CUSTOM BULLET CO. for the [quarter and calendar year in question] in violation of Title 26, United States Code, sections 4181 and 7201.

After the jury was impaneled, petitioner moved to dismiss this indictment on the ground that it did not allege an affirmative act of evasion.[2] *Id.* at 3a. Petitioner claimed that, although the text of Section 7201 states only two elements for the offense of tax evasion (a tax deficiency and willful evasion), a third element (that there be an affirmative act constituting the evasion or attempted evasion of tax) was added by this Court in *Spies* v. *United States*, 317 U.S. 492, 499 (1943). Arguing that the indictment in this case did not allege such specific affirmative acts of evasion, and thus

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[1] Peter Pi, the owner of Cor-Bon, was acquitted on all counts. Pet. App. 2a n.2.

[2] Petitioner's motion to dismiss the indictment was filed three months after the deadline provided by local rule (see Pet. App. 10a). It appears to have purposely been filed after the jury was empaneled, in an attempt to obtain a double jeopardy bar. Gov't CA Br. 3.

failed to allege all of the elements of the offense, petitioner asserted that the district court lacked subject matter jurisdiction over the case. Pet. App. 3a.

The United States argued that the decision in *Spies* did not add an additional element to the offense by construing the word "attempt" in the statute to imply an affirmative act of "commission" rather than merely one of omission. 317 U.S. at 499.[3] The district court agreed with the government that the indictment "contains the elements of the offense intended to be charged" and that, by alleging the statutory elements and the specific tax and tax periods at issue, the indictment "sufficiently apprises the defendant of what he must be prepared to meet." Pet. App. 10a. The court therefore denied petitioner's motion to dismiss on the merits. *Id.* at 10a-11a. The court further held that, because the motion to dismiss was untimely, it was therefore also denied on that "strictly procedural[]" ground. *Id.* at 10a.

b. Long before petitioner challenged the indictment in this case on the ground that it did not allege an affirmative act of evasion, petitioner was made aware that a disgruntled employee named Bambi Fischer "would be testifying that it filed false tax returns, destroyed sales invoices, and maintained a second, false set of records to conceal the true amount of its ammunition sales." Pet. App. 3a. During the trial, petitioner's counsel "cross-examined Fischer regarding her allegations and otherwise presented a robust defense." *Ibid.* And, at the conclusion of the evidence, "[b]oth sides

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[3] In *Spies*, the Court held that acts of omission—such as the mere failure to file a timely return or to pay a tax when due—are insufficient, by themselves, to constitute a willful attempt to evade tax or the payment thereof. 317 U.S. at 498-499.

argued [petitioner's] alleged affirmative acts to the jury." *Ibid.* After the jury found petitioner guilty of thirteen counts, the district court sentenced petitioner to three years' probation and ordered it to pay $200,000 in restitution, a fine of $240,000, and a special assessment of $2,600. *Ibid.*

2. The court of appeals affirmed. Pet. App. 1a-9a. The court noted that, although "*Spies* did not directly address the adequacy of felony tax indictments," "[c]ases now routinely state that, under the holding of *Spies*, an affirmative act of evasion is an element of an offense under § 7201." Pet. App. 6a. The court concluded, however, that it did not have to decide whether an indictment under this statute must allege such an affirmative act because the alleged deficiency in the indictment in the present case was harmless error, if error at all, and did not destroy the jurisdiction of the trial court. *Id.* at 7a.

The court noted that petitioner waited until "after the jury was impaneled" to challenge the indictment, and that petitioner "does not claim that it lost any of the protections intended to be furnished by the requirement that an indictment allege all of the elements of the offense charged." Pet. App. 3a, 7a. In particular, the court noted that petitioner did not claim that the failure of the indictment to allege an affirmative act "prevented it from preparing a defense or caused it surprise or prejudice." *Id.* at 7a. On review of the record as a whole, the court found that petitioner suffered no disadvantage in any manner from the alleged deficiency in the indictment. *Ibid.* The court found that the record instead establishes that petitioner "knew which specific affirmative acts it was accused of committing and pursued a vigorous defense to attempt to show that it had not committed them." *Ibid.* The court

emphasized, in this regard, that petitioner conducted a probing cross-examination of Bambi Fischer and also presented the testimony of two expert witnesses to refute the government's case. *Ibid.* The court concluded that petitioner failed to meet its burden of showing that it suffered any prejudice and that "any defect in the indictment was harmless error." *Id.* at 8a.

The court also rejected petitioner's argument that the failure of the indictment to allege an affirmative act of evasion deprived the district court of subject-matter jurisdiction. Pet. App. 8a. Instead, the court noted that the trial court has jurisdiction to determine the merits of a motion to dismiss an indictment and that the claimed failure of an indictment to allege each element of an offense "is subject to harmless error review." *Id.* at 9a (quoting *United States* v. *Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001)). Because the alleged defect in the indictment in this case was harmless, the court of appeals affirmed the judgment of the district court. Pet. App. 9a.

ARGUMENT

1. Under Section 7201 of the Internal Revenue Code, "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall" be guilty of a felony. 26 U.S.C. 7201. In *Spies* v. *United States*, 317 U.S. 492, 494 (1943), this Court disapproved of jury instructions that charged that the defendant could be convicted of felony tax evasion if he "willfully failed to file an income tax return" even if he did not take "affirmative steps to accomplish the prohibited purpose." The Court construed the word "attempt" in the statute to require the "commission" of an affirmative act, and held that a mere "omission" to file a timely return or pay a tax when due

would be insufficient, by itself, to constitute a willful attempt to evade tax or the payment thereof. *Id.* at 498-499. In a subsequent decision, the Court referred to the requirement of proof of "an affirmative act constituting an evasion or attempted evasion of the tax" as one of the elements of the offense of felony tax evasion. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965).

Petitioner asserts that the court of appeals held "that *if* an affirmative act of evasion *is* an element of an offense under 26 U.S.C. § 7201, it need not be alleged in the indictment" (Pet. 11). Petitioner therefore claims that the question presented in this case is whether "the Sixth Circuit erred in holding that if an affirmative act of evasion is an element of tax evasion under 26 U.S.C. § 7201, it is not an element which must be alleged in the indictment" (Pet. i). The question that petitioner seeks to frame for review, however, is manifestly not the question addressed and decided below.

The court of appeals agreed with petitioner that "an affirmative act constitutes an element of a § 7201 case." Pet. App. 7a. But, contrary to petitioner's assertion, the court did *not* hold that this "is not an element which must be alleged in the indictment" (Pet. i). Instead, the court expressly held that it "need not decide whether an indictment under § 7201 must allege an affirmative act" in this case "because the deficiency in the indictment here, if any, constituted harmless error." Pet. App. 7a. The cases on which petitioner relies that hold that the "affirmative act" requirement of the statute is an element of the criminal offense of tax evasion (Pet. 10) thus plainly do not conflict with the decision in this case.

2. Petitioner does not directly challenge the court's determination that the alleged deficiency in the indictment represents harmless error on the facts of this

case. Instead, petitioner argues that the requirement that an indictment allege each element of the offense "is jurisdictional" and that "omission of an element from an indictment deprives the court of subject matter jurisdiction." Pet. 16. That contention is in error for two separate reasons.

a. First, there is no finding in this case that the indictment failed to allege any required element of the offense of felony tax evasion. The decision in *Spies* does not purport to add a non-statutory, substantive element to this offense. It instead interprets the scope and meaning of the statutory elements of the offense and concludes that the means by which a defendant "willfully attempts in any manner to evade or defeat any tax" must be an act of "commission," rather than merely an omission. 317 U.S. at 499. The indictment in the present case not only specifically alleges the statutory elements of the offense, it also contains precise allegations of the specific time periods (quarters) involved and the nature of the alleged criminality—evading the ammunition excise tax. Pet. App. 2a-3a. The indictment thus possessed sufficient factual specificity to allow petitioner to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution. *Id.* at 7a. As the district court concisely explained, the indictment not only "contains the elements of the offense intended to be charged," it also "sufficiently apprises the defendant of what he must be prepared to meet, and it allows the defendant to invoke any kind of defense that they have." *Id.* at 10a.

b. The court of appeals correctly determined that it was, in any event, unnecessary to reach that question in this case because, even if an affirmative act of evasion is a separate substantive element of the offense that must be alleged in the indictment, the omission of such an

allegation in this case was harmless error. Pet. App. 7a-8a. Petitioner seeks to avoid harmless error analysis by asserting that the omission of an element from an indictment deprives the court of subject matter jurisdiction. This Court, however, has long "departed from [the] view that indictment defects are 'jurisdictional.'" *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). Omission of an element of an offense from an indictment does not constitute an automatic ground for reversal because only deficiencies that prejudice the "substantial rights" of the defendant warrant reversal of the conviction. Pet. App. 8a; see *United States* v. *Mojica-Baez*, 229 F.3d 292, 310-312 (1st Cir. 2000), cert. denied, 532 U.S. 1065 (2001). As the court of appeals concluded in this case, a challenge to an indictment is properly subject to harmless error review when, as here, it was made long after the deadline provided by local rule and was therefore "too late" (Pet. App. 10a). See *United States* v. *Yefsky*, 994 F.2d 885, 894 (1st Cir.1993).

On the record of this case, the courts below properly concluded that the alleged error in the indictment was harmless. As both courts found, petitioner was fully informed of the claims against it, "knew which specific affirmative acts it was accused of committing" and suffered no "surprise or prejudice." Pet. App. 7a. See *id.* at 10a. Those findings are firmly grounded in the specific facts of this case. As the court of appeals stated, petitioner was informed in advance of trial of the specific affirmative acts it was accused of committing—including the filing of false tax returns, the destruction of invoices, and the purposeful maintenance of a second, false set of books and records. *Id.* at 3a, 7a.[4]

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[4] As the court of appeals emphasized, petitioner's contention that it "did not learn what affirmative acts of evasion the govern-

These factual determinations, which are amply supported by the record and were concurred in by both courts below, do not warrant further review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2002

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ment was alleging until closing argument" (Pet. 15) is belied by the conduct of the trial, including the fact that petitioner retained and called two expert witnesses. Pet. App. 7a. Petitioner's fact-bound contentions do not, in any event, warrant further review.