

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

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REEFCO SERVICES, INC.,	:	
Plaintiff,	:	
	:	Case No. 3:14-cv-110
B&B MANUFACTURING, INC.,	:	
Intervenor,	:	
v.	:	
	:	
THE UNITED STATES VIRGIN ISLANDS,	:	
and THE VIRGIN ISLANDS BUREAU OF	:	
INTERNAL REVENUE	:	
	:	
Defendants.	:	
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MOTION FOR AN ORDER TO SHOW CAUSE

COMES NOW Intervenor, B&B MANUFACTURING, INC., (“B&B”) by and through undersigned counsel, pursuant to this Court’s inherent powers, moves the Court to issue a show cause order why the Defendants should not be held in contempt. In support thereof, the Movant states as follows:

FACTUAL BACKGROUND

On November 8th this Court held a hearing the Defendants “asserted that developing and implementing a procedure for the collection of excise taxes on locally manufactured items *was a difficult endeavor that would take a great deal of time.*” Doc. # 96 at p. 5 (emphasis added).

On November 15, 2018, this Court entered an order enjoining the Defendants “collecting excise taxes in a manner inconsistent with the Court’s holding in its September 28, 2018, Judgment; that is, the GVI *is enjoined from collecting excise taxes in a manner that violates Commerce Clause principles;* and it is further ORDERED that, to the extent it wishes to do so, the GVI *may advise the Court if and when it is prepared to collect excise taxes in a manner consistent with the Court’s September 28, 2018,*

Judgment and Memorandum Opinion, at which point the Court may reconsider the injunctive relief ordered herein.” Doc. # 93 at p. 3 (emphasis added).

On November 21, 2018, the Defendant issued a letter to on-island manufactures, including to the Intervenor, that informed them that the Defendants would be collecting the excise tax effective December 1, 2018. Doc. # 98-1.

On November 30, 2018, the Defendants moved the Court to lift its injunction. Stating that “Beginning December 1, 2018, the Government would like to start assessing excise taxes on locally manufactured goods. The excise taxes on locally manufactured goods will be due thirty days after the close of each month. Thus, the December tax return will be due and payable by January 30, 2019.” Doc. # 98 at p. 3.

APPLICABLE LAW

A plaintiff must prove three elements by clear and convincing evidence to establish that a party is liable for civil contempt: (1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order. The validity of the underlying order is not open to consideration. The resolution of ambiguities ought to favor the party charged with contempt.” *Berne Corp. v. Gov’t of Virgin Islands*, 2008 WL 4319973, at *2 (D.V.I. Sept. 11, 2008) (cleaned up).

DISCUSSION

One has to wonder why the Defendants represented at the November 8th hearing “that developing and implementing a procedure for the collection of excise taxes on locally manufactured items was a difficult endeavor that would take a great deal of time,” (Doc. # 96 at p. 5), but lo and behold by November 21st the BIR had developed and implemented a fix to the problem. This leads

to one of two mutually exclusive possibilities – (1) that the representations to the Court were false (a contention the undersigned does not believe) or (2) that the New Scheme has not fixed the problem (a more reasonable interpretation of the situation). But if the answer is the latter, then the Court should not lift the injunction that is currently in force and effect and hold the Defendants in contempt.

As to the three elements of civil contempt, all have been satisfied here; contempt is appropriate.

First, the Court's November 15th Order (Doc. # 93) was a valid court order, that cannot be relitigated here. *See Berne, supra* at *3, citing, *inter alia*, *United States v. Cutler*, 58 F.3d 825, 832 (2d Cir. 1995) (“[A] party may not challenge a district court's order by violating it. Instead, he must move to vacate or modify the order, or seek relief in this Court. If he fails to do either, ignores the order, and is held in contempt, he may not challenge the order unless it was transparently invalid or exceeded the district court's jurisdiction.”).

Second, the Defendants clearly had knowledge of the November 15th Order.

Third, the Defendants have disobeyed the order. The November 15th Order was clear in that the Defendants had to (a) advise the Court if and when it was ready to collect to USVI excise tax in a constitutionally compliant manner and (b) the Court would then consider lifting the injunction. *See* Doc. # 93. However, in clear contravention of this Court's valid order, on November 21st the BIR issued correspondence informing on-island manufactures of, for the very first time, the imposition of the USVI excise tax starting on December 1 and payable by at the end of January. Doc. # 98-1.

The timeline is clear, on November 21st the BIR informed the public in general, and the Intervenor in particular, of the New Scheme (including the December 1st effective date) *before* the Defendants filed their motion to lift the injunction (*see* Doc. # 98) on November 30th and *before* this Court has lifted the injunction. If this is not flouting of a valid Court order, then Intervenor is at a loss of what would be.

Moreover, as it currently stands, the Intervenor must (according to the BIR) pay the USVI exercise tax for the month of December by the end of the month. The BIR has not retracted/withdrawn its November 21st letter and the Intervenor reasonably expects the BIR to impose penalties and interest if the Intervenor does not pay. *See Berne, supra* at *9 (failing to pay taxes risks “severe legal consequences”).

To the best of the undersigned’s recollection, at the November 8th hearing the Court admonished counsel for the Defendants and expressed its hope that it would not have another *Berne* type contempt proceedings. Although the Court warned the Defendants, the Defendants have proceeded down the very same path that they travelled in the *Berne* case. To quote this Court’s *Berne* decision: “Here, as in *Halderman*, all the earmarks of contemptuous conduct appear to be present. There is a valid Order of this Court. The Defendants had knowledge of the Order. In spite of that knowledge, the Defendants elected to violate the Order.” *Berne, supra* at *7.

Applying *Berne* to the facts of this case, here, as in *Berne*, all the earmarks of contemptuous conduct appear to be present. There is a valid Order of this Court. The Defendants had knowledge of the Order. In spite of that knowledge, the Defendants elected to violate the Order. Thus, just

like *Berne* (even more so given the Court's warning on November 8th) this Court must hold the Defendants in contempt.

CONCLUSION

"The obligation to abide by the rule of law is not limited to the citizenry, however. That obligation is shared with the Government." *Berne, supra* at *9. The Defendants have flouted this Court's November 15th Order and has demonstrated, yet again, that it believes that the rule of law does not apply to it.

The Court, yet again, must show the Defendants that they are wrong.

WHEREFORE, the Intervenor prays that the Court hold the Defendants in contempt, order that the November 21st letter be rescinded, order that the USVI excise tax not be imposed until such time that the Court authorizes the Defendants to do so, order the Defendants to pay into the registry of the Court a per diem fine of \$10,000.00 find from a date to be set by the Court until the Defendants have complied with the terms of this Court's order(s), and pay the Intervenor's attorneys' fees and costs.

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Respectfully submitted,

/s/ Joseph A. DiRuzzo, III

Digitally signed by /s/ Joseph A. DiRuzzo, III
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Jan. 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing document was filed with the Court's ECF system and a NEF will be provided to the following:

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Jan. 11, 2018

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