UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DONALD A. GRAY, Defendant.	Case No. 1:07-cv-42 HONORABLE PAUL MALONEY Magistrate Judge Carmody

Opinion and Order
Granting the Plaintiff's Motion for Summary Judgment
and Issuing a Permanent Injunction

In January 2007, the United States of America ("the government") instituted this action claiming that defendant Donald A. Gray ("Gray") had been fraudulently preparing federal income-tax returns ("returns") since 2004, and seeking preliminary and permanent injunctive relief against Gray offering any type of federal tax-preparation service or assistance. Specifically, the government alleged that Gray prepared returns falsely stating that the taxpayer received no taxable income, which he accomplished by filing Internal Revenue Service ("IRS") Form 4852 and Form 1099-MISC. Gray has acknowledged in this court that he prepared returns based on the following premises: (1) the Internal Revenue Code fails to define "income" and (2) income is not taxable by the federal government unless it is received directly from the federal government. According to the government, Gray then sought a refund for all federal income tax, FICA (Social Security) tax, and Medicare tax that had been withheld from the taxpayer's wages, as if all three types of tax were

federal income tax that had been levied on non-taxable income.

In February 2007, Gray moved to dismiss the complaint, contending that this court lacked subject-matter jurisdiction and that the government failed to state a claim on which relief could be granted. Specifically, Gray contended that this court's jurisdiction is limited to matters occurring on land owned by the federal government, and that the federal government lacked Article III standing because Article III, Section 2 of the U.S. Constitution uses the term "United States" rather than the term "United States of America," which is the full name of the plaintiff here. Also in February 2007, the government applied for a temporary restraining order ("TRO") and a preliminary injunction pursuant to 26 U.S.C. §§ 7407 and 7408.

In March 2007, after receiving briefs and hearing oral argument, Chief Judge Robert Holmes Bell denied Gray's motion to dismiss and granted the government's application for preliminary injunctive relief. Namely, Chief Judge Bell preliminarily enjoined Gray from preparing returns for others, from counseling others about the preparation of their returns, and from otherwise interfering with the administration of the federal tax laws.

The case was reassigned to this Judge in August 2007. On Monday, October 22, 2007, the government moved for summary judgment; the government's certificate of service states that it mailed a copy of the motion to Gray by regular (first-class) U.S. mail on that same date. Under W.D. MICH. L.CIV.R. 7.2©, Gray had thirty days after being served with the motion to file an opposition brief. For Gray's sake, the court assumes *arguendo* that he did not receive the government's motion until Thursday, November 1, 2007 (ten days after it was filed). Using that assumption, the thirty-day period began to run on Friday, November 2, 2007, *see* FED. R. CIV. P. 6(a)(1), and ended on Saturday, December 1, 2007, and Gray had until midnight on Monday,

December 3, 2007 to file an opposition brief, *see* FED. R. CIV. P. 6(a)(3). Gray has neither filed an opposition brief nor sought an extension of time in which to do so; accordingly, the court will consider the government's motion without waiting longer for opposition from Gray.

For essentially the reasons stated by Chief Judge Bell in his preliminary-injunction opinion, the court will grant the government's motion for summary judgment.

DISCUSSION

The traditional equitable requirements for injunctive relief need not be satisfied when the Internal Revenue Code specifically and expressly authorizes such relief, as 28 U.S.C. § 7407 does here. *See US v. Gleason*, 432 F.3d 678, 682 (6th Cir. 2005) (citing *US v. Estate Preservation Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000)).[1]. *See, e.g., US v. Conces*, No. 1:05-cv-739, 2006 WL 1402198

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[1] *Cf. US v. City & Cty. of San Francisco*, 310 U.S. 16 (1940):

> [T]he statutory requirement that Hetch-Hetchy [hydroelectric] power be publicly distributed . . . [is] an exercise of the complete power which Congress has over particular public property entrusted to it.
>
> [T]he City denies the government's right – upon a balancing of equities – to relief by injunction even if the present disposition of Hetch-Hetchy power be in violation of the Act. * * *
>
> However . . . we are satisfied that this case does not call for a balancing of equities or for invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued. * * * Congress provided . . . [that] it is made the duty of the Attorney General of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act. Pursuant to this legislative mandate, the present suit was instituted . . . . The equitable doctrines relied no do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use – in violation of that policy – of property granted by the United States . . . is both appropriate and necessary.

Id. at 30 (n. 25 omitted) and 31 (n. 26 omitted).

(W.D. Mich. Apr. 24, 2006) (Quist, J.) (citing *Gleason*, issuing permanent injunctive relief under 26 U.S.C. § 7408, and expressly declining to consider traditional equitable criteria for injunctive relief) and *US v. Schulz*, No. 1:07-cv-352, 2007 WL 2286410, *2 (N.D.N.Y. Aug. 9, 2007) (McAvoy, Senior J.) (same).

Title 26 U.S.C. § 7407(b) provides that *if the court finds*

(1) *that an income-tax return preparer has –*

(A) *engaged in any conduct subject to penalty under section 6694 or 6695*, or subject to any criminal penalty provided by this title,

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer,

© guaranteed the payment of any tax refund or the allowance of any tax credit, or

(D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct.

Emphasis added.

As Chief Judge Bell found when issuing the preliminary injunction, the court again finds that Gray violated 26 U.S.C. § 6694(a) by understating taxpayer liability based on a position that he knew or should have known had no realistic possibility of being sustained on its merits. Specifically, Gray filed returns stating that his customers had no income, on the ground that wages are not taxable income, when the federal courts – including our Circuit in published decisions – have emphatically and repeatedly rejected such an argument, and he has not identified any federal court

that has held to the contrary. *See Perkins v. CIR*, 746 F.2d 1187, 1188 (6th Cir. 1984) (calling such arguments "totally without merit" and upholding a sanction on appellant for a "patently frivolous" appeal as to the definition of "income"); *Sawukaytis v. CIR*, 102 F. App'x 29, 34 (6th Cir. 2004) (holding that "wages are not income" argument is frivolous, and upholding the imposition of sanctions under 26 U.S.C. § 6673).[2]

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[2] *Accord US v. Gardell*, No. 93-1916, 23 F.3d 395, 1994 WL 170797, *2 n.1 (**1st Cir.** May 6, 1994) ("Similarly frivolous is Gardell's contention that the taxing of wages is unconstitutional.") (citing, *inter alia*, *Wilcox v. CIR*, 848 F.2d 1007, 1008 (9th Cir. 1988) (contention that wages are not income for tax purposes is frivolous));

Allamby v. US, 207 F. App'x 7, 9 (**2d Cir.** 2006) ("There is similarly no question that wages are taxable income.") (citing *Ficalora v. CIR*, 751 F.2d 85, 88 (2d Cir. 1984) (citing 26 U.S.C. § 61(a)(1)));

Powers v. CIR, – F. App'x –, –, 2007 WL 4385491, *2 (**3d Cir.** Dec. 17, 2007) ("Powers' 2002 tax return, which contains all zeroes and disputes the government's power to tax wages and other forms of 'income,' is entirely frivolous.") (citing *Bradley v. US*, 817 F.2d 1400, 1402-04 (9th Cir. 1987));

Mills v. CIR, No. 86-1035, 799 F.2d 751, 1986 WL 17399, *1 (**4th Cir.** Sept. 2, 1986) (argument that wages are not income has been so frequently rejected that raising it warrants sanctions) (citations omitted);

Burnett v. CIR, 227 F. App'x 342, 345 n.5 (**5th Cir.** 2007) ("[T]he claim that wages and investment income are somehow exempt from federal taxation is a tired one, and has been repeatedly rejected.") (internal quotation marks and brackets omitted) (citing, *inter alia*, *Lonsdale v. CIR*, 661 F.2d 71, 72 (5th Cir. 1981) (labeling such claims "stale" and "meritless" and "long settled"));

US v. Raymond, 223 F.3d 804, 808 n.2 (**7th Cir.** 2000) (affirming issuance of injunction that directed defendant, *inter alia*, not to "incit[e] other individuals and entities to understate their federal tax liabilities, avoid the filing of federal tax returns, or avoid paying federal taxes based upon (a) the false representation that wages, salaries, or other compensation for labor or services are exempt from federal income taxation, or (b) any other such *frivolous* claim . . . .");

US v. Gerads, 999 F.2d 1255, 1256-57 (**8th Cir.** 1993) (affirming summary judgment for government in action to recover back taxes, and imposing monetary sanctions for appeal that rested on "frivolous" arguments that wages are not income, federal income tax is unconstitutional direct tax, payment of federal income tax is voluntary, and protestors were citizens of the "Free Republic

The preliminary-injunction opinion states that Gray acknowledged, at a March 2007 hearing, that the IRS has rejected the argument that wages are not income, and that he knew his customers had received IRS letters that rejected such returns as frivolous. *See* Mar. 19, 2007 Op. at 5. Gray has never contested this statement by the Chief Judge, and the court adheres to that statement. Because Gray knew or should have known that his argument that private-sector wages are not federally taxable income had no realistic possibility of being sustained on the merits, he engaged in conduct subject to penalty under 26 U.S.C. § 6694(a). Gray thereby became eligible, under 26 U.S.C. § 7407(b)(1)(A), to be enjoined from preparing or counseling the preparation of federal income-tax returns whose representations relied on the notion that private-sector wages are not federally taxable income (what Gray's favored sourcebook referred to as "cracking the code" returns), or on the patently false notion that the FICA and Medicare taxes withheld from his clients' wages (which are withheld under 26 U.S.C. § 3101) were instead federal income taxes (which are separately calculated and are withheld under 26 U.S.C. § 3402).

Moreover, under circumstances like those here, the court need not confine the injunction to

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of Minnesota" and hence not subject to federal taxation);

Abell v. Sothen, 214 F. App'x 743, 754 (**10th Cir.** 2007) ("[T]he following arguments . . . are completely lacking in legal merit and patently frivolous: * * * (5) wages are not income . . . (8) the term 'income' as used in the tax statutes is unconstitutionally vague and indefinite' . . . .").

US v. Spitzer, 245 F. App'x 908 (**11th Cir.** 2007) (affirming grant of summary judgment to government in an action to recover an erroneously issued federal income-tax refund, and imposing FED. R. APP. P. 38 sanctions for frivolous appeal due to appellant's argument that money received from employment were "non-taxable private-sector earnings");

Mathes v. CIR, 788 F.2d 33 (**D.C. Cir.** 1986) (holding that Tax Court did not abuse discretion in dismissing petition of taxpayer who excluded $60,000 of wages from his gross income on the ground, *inter alia*, that the wages were not taxable income; requiring appellant to pay attorney fees and double costs for filing frivolous appeal).

the prohibition of the misconduct, but may, in its discretion, issue a broader injunction:

> If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, *the court may enjoin such person from acting as an income tax return preparer.*

26 U.S.C. § 7407(b) (emphasis added). In other words, the statute's authorization of broader injunctive relief is triggered by the court's finding that a preparer has continually or repeatedly engaged in conduct prohibited by *any one* of the subparagraphs from § 7407(b)(1)(A) through (D); the government need not prove that the preparer repeatedly violated engaged in conduct described by more than one of those provisions. Section 7407(b)(1)(B) refers to "misrepresent[ing] his eligibility to practice before the Internal Revenue Service, or otherwise misrepresent[ing] his experience or education as a tax return preparer . . . ." As Chief Judge Bell found in the preliminary-injunction opinion, *se* March 19, 2007 Op. at 6, this court again finds that Gray has repeatedly and continually engaged in the conduct described by this subparagraph; namely, Gray allowed a website to identify him as a CPA when he was no longer licensed as such, and although he acknowledged at other times that he was not licensed a CPA, he continued to hold himself out as a CPA based on his membership in a professional organization. *See* Declaration of Shauna Henline, Senior Technical coordinator for the Internal Revenue Service's Frivolous Return Program, dated January 24, 2007 ("Henline Dec."), ¶¶ 16 and 18 and Exs. 1 and 3.

This alone suffices to justify the imposition of the broader injunctive relief sought by the government, rather than merely an injunction against repeating this or other specific violations of the Internal Revenue Code. *See, e.g.*, *US v. Sonibare*, No. Civ-06-497, 2006 WL 662450 (D. Minn. Mar. 10, 2006) (stating, "[I]t is undisputed Sonibare falsely stated that he is a CPA. The evidence

also establishes that Sonibare [also like Gray] continually and repeatedly failed to sign returns he has prepared.") (issuing TRO enjoining not only future violations of specific I.R.C. sections but also "any conduct that interferes with the proper administration and enforcement of the internal revenue laws"); *US v. Hunn*, Civ. No. 06-1458, 2006 WL 2663783, *6 (D. Ariz. Aug. 18, 2006) ("*Hunn's continual and repeated* violations of I.R.C. §§ 6694 and 6695, his *misrepresentation that he is an attorney*, and his fraudulent and deceptive conduct *fall within I.R.C. § 7407(b)(1)*(A), *(B)*, and (D) *and thus are subject to injunction under I.R.C. § 7407*.") (emphasis added); *US v. Ferrand*, No. 05-0069, 2006 WL 598212, *3 and *7 (W.D. La. Feb. 7, 2006) (among other things, "Ferrand misrepresented his alleged prior employment with the IRS to customers and therefore engaged in conduct described in § 7407(b)(1)(B). *** The continuous and repetitive nature of the Defendant's fraudulent conduct is evident from the thousands of income tax returns they prepared in 2000 and 2001. *** Therefore, it is recommended that the government's motion for summary judgment be granted and that the Defendants . . . be permanently enjoined from acting as income tax return preparers in any capacity."), *R&R adopted*, 2006 WL 1401924 (W.D. La. Apr. 11, 2006).

ORDER

Accordingly, **the plaintiff United States of America's motion for summary judgment [document #18] is GRANTED.**

Defendant Donald A. Gray is hereby PERMANENTLY ENJOINED from preparing

federal income-tax returns for others, from counseling others about the preparation of their federal income-tax returns, from holding himself out to be a Certified Public Accountant until and unless he is duly licensed as such, and from otherwise interfering with the administration and enforcement of the federal internal revenue laws.[3] This order shall be effective upon Defendant Gray's receipt of this Order and the accompanying Opinion.

It is further ordered that the plaintiff shall have a copy of this order and the accompanying opinion personally served on defendant Gray.

This is a final and appealable order.

IT IS SO ORDERED THIS 29th day of February, 2008.

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

[3] *Cf.*, invoking 26 U.S.C. §§ 7407-08 and issuing similar broad, permanent injunctions against federal income tax-return preparers: *US v. Pugh*, No. 1:07-cv-2456, 2007 WL 3539435, * (E.D.N.Y. Nov. 14, 2007); *US v. Harris*, Civ. No. H-06-2115, 2007 WL 614207 (S.D. Tex. Feb. 26, 2007).