UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No.: 1:04 CV 1432
	)	
Plaintiff	)	
	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
	)	
MICHAEL A. ALLAMBY,	)	
	)	
Defendant	)	ORDER

Now pending before the court is Plaintiff United States of America's ("United States" or "Plaintiff") Motion for Summary Judgment (ECF No. 27) against Defendant Michael Allamby ("Allamby" or "Defendant"). Plaintiff filed its Motion on May 31, 2005. To date, Defendant has not responded on the

merits.[1] After reviewing Plaintiff's brief, the applicable case law, and the relevant documents on the record, the court grants the motion for summary judgment.

I. FACTS[2]

Defendant Allamby, a resident of East Cleveland, Ohio, began preparing federal income tax returns for customers in 1975. In 1994, Allamby began interpreting the Internal Revenue Service's ("IRS") instructions to Form 1040A (the U.S. Individual Income Tax Return) as requiring individuals to report only their "income from" wages, salaries, and tips on their tax returns. (Allamby Dep. 32-37.) Allamby believes this amount is zero rather than the amount of wages, salaries, and tips actually received by individuals, because one does not receive "income from" wages unless one invests their wages to earn income on them. (Def. Letter to the Court 7-9.) For example, Allamby believes that if an individual earns $83,000 in wages in a year, and the individual's W-2 form reports $83,000 in wages, the individual should report zero income on his tax return if he follows the instructions, because $83,000 was not income earned from wages. (Allamby Dep. 80-81.) Allamby's interpretation results in many of Allamby's customers reporting no income, despite their having earned wages. (*See* Allamby Dep. 37, Dep. Ex. 6, 30.)

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[1] Defendant filed a Motion to Strike the Plaintiff's Motion for Summary Judgment, ECF No. 28, on June 24, 2005. The basis for the motion to strike was a contention that the Plaintiff's motion was unsigned and out of rule. The motion to strike did not address the merits of Plaintiff's summary judgment motion. The court denied the motion to strike, since the Plaintiff had filed and signed electronically. ECF No. 30. Defendant then filed a Response to Denial of Motion to Strike and Other Matters, ECF No. 31. This filing repeated similar meritless arguments, and also did not address the merits of the summary judgment motion. At no point did Defendant seek any extension to respond to the summary judgment motion.

[2] Many of these facts are reprinted from the court's prior Order granting a preliminary injunction.

Allamby does not dispute that this is his interpretation, nor does he dispute having prepared tax returns for many of his customers based on this interpretation. Allamby contends that no one has been able to show him the law by which Congress executed its power to impose income taxes under the Sixteenth Amendment to the United States Constitution. (*See* Allamby Dep. 62.)

Despite having received warnings from the IRS and other government officials that the Internal Revenue Code classifies wages and salaries as gross income subject to taxation, Allamby continued to prepare tax returns reporting zero total income for individuals who earned wages or salaries until enjoined by this court's previous Order. (*Id.* at 86-88.) Allamby admits that if he were to prepare returns today, he would prepare them in the same manner, "according to the instructions." (Allamby Dep. 42-44.)

Allamby estimates that he has prepared an average of 50 to 60 tax returns each year since 1994. (*Id.* at 24.) Accompanying many of these returns is an identical letter written by Allamby to the IRS, stating that:

> I have been unable to find the law that Congress was required to make in order to carry into execution the power vested in it by the Constitution of the United States to lay and collect taxes on incomes. We agreed to ask you to inform us as to the whereabouts of the law, and, if possible, send us a copy of the law . . . Without the enactment and existence of such a law I file returns according to IRS instructions.

(Allamby Dep. Ex. 7.) Past clients have invited Allamby to speak to groups of people about his interpretation of the tax code, and he has spoken to about sixteen groups in various cities, including Cleveland, Detroit, New York, Philadelphia, Portland, and Seattle. (Allamby Dep. 53-54, 59-60.)

Allamby has also published a book entitled, "To the Best of My Knowledge and Belief" which

expresses his view that individuals may lawfully report zero total income on their income tax returns despite having earned wages or salaries reported on Form W-2. In the book, Allamby writes:

> The wage earner has never been nor can ever be subject to income taxes. . . [Y]ou as a wage earner are not obligated or liable for income taxes on your wages. April 15th should be just another day to you. As a wage earner you have not created an income tax obligation which is due by that date.

(Pl. Prelim. Inj. Ex. 26 at 21.) The book advises individuals who use the Allamby approach and are audited to say the following to IRS agents: "Let me make one thing perfectly clear to you. I earn wages. I don't derive income from my wages. So stop your game and let's end this audit." (*Id. at* 131.) The last page of the book contains a mail order offer for readers to purchase an audiotape called "The Audit Tape," on which Allamby explains what individuals should expect at an audit, and how they should respond. (Allamby Dep. 112-13.) Allamby sold the book and from time to time gave it away at his speaking presentations. (*Id.* at 98-103.)

On July 27, 2004, the United States filed the instant case against Allamby pursuant to 26 U.S.C. §§ 7407, 7408 and 7402(a), seeking permanent injunctive relief barring Allamby from preparing any tax returns. The United States moved for a preliminary injunction, and this court issued a preliminary injunction on November 4, 2004 (ECF No. 17.) On May 31, 2005, the United States moved for summary judgment and a permanent injunction.

II. LAW AND ANALYSIS

A. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

> with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id*. at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id*.

B. Permanent Injunction Under 26 U.S.C. § 7407

The United States seeks a permanent statutory injunction to prevent Allamby from preparing any tax returns, pursuant to 26 U.S.C. § 7407. Under this statute, the court may issue injunctive relief if the court finds that an income tax return preparer has (1) "engaged in any conduct subject to penalty under section 6694 or 6695"[3] or "engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws" and (2) "injunctive relief is appropriate to prevent the recurrence of such conduct." 26 U.S.C. § 7407(b). The court has the further authority to enjoin a person from acting as an income tax preparer:

> 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.

Id. at § 7407(b)(2).

The government has presented uncontroverted evidence that the Defendant prepares tax returns based on the incorrect interpretation that wages are not taxable income, and that this practice results in the under-reporting of income and tax owed. Defendant admitted these facts at his deposition. Courts have repeatedly held that such an interpretation is without merit and frivolous. *E.g.*, *Sisemore v. United States*, 797 F.2d 268, 270-71 (6th Cir. 1986); *Perkins v. Comm'r of Internal Revenue*, 746 F.2d 1187, 1188-89 (6th Cir. 1984); *Thacker v. United States*, 2000 U.S. App. LEXIS 15721, *4 (6th Cir. 2000). Therefore, Defendant's activities interfere with the administration of the internal revenue laws and are unrealistic positions under 26 U.S.C. § 7407(b)(1)(B) and (D). Additionally, Defendant has indicated,

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[3] 26 U.S.C. § 6694 prohibits "understatements due to unrealistic positions" and "reckless or intentional disregard of rules."

despite receiving countless warnings and notifications of the proper interpretation of the tax instructions, that were he to prepare returns today, he would continue to prepare them under his (incorrect and illegal) interpretation of the law. The court thus concludes that an injunction is necessary to prevent further interference. Finally, the United States has shown evidence that Defendant regularly and repeatedly engaged in such conduct. Allamby filed 50 to 60 returns a year for the last ten years. This evidence is sufficient to grant a permanent injunction preventing Defendant from acting as a income tax preparer.

C. Permanent Injunction Under 26 U.S.C. § 7408

The United States also seeks a permanent statutory injunction to prevent Allamby from promoting, either at speaking engagements or by distributing his book, his positions on tax preparation, pursuant to 26 U.S.C. § 7408. Under the statute, the court may enjoin a person "from engaging in such conduct or in any other activity subject to penalty under this title" if the court finds "(1) that the person has engaged in any specific conduct, and (2) that injunctive relief is appropriate to prevent recurrence of such conduct." 26 U.S.C. § 7408(b). Specified conduct includes violation of 26 U.S.C. §§ 6700, 6701, 6707, or 6708. *Id.*

26 U.S.C. § 6701 is violated by (1) aiding or assisting "the preparation or presentation of any portion of a return;" (2) "know[ing] (or ha[ving] reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws;" and (3) "know[ing] that such portion . . . would result in an understatement of the liability for tax of another person." 26 U.S.C. § 6701(a). In this case, Allamby assisted in preparing tax returns he knew would be submitted to the IRS, and knew, based on warnings from IRS officials and others, that this practice would understate the tax

liability of his customers. Defendant is and has been violating 26 U.S.C. § 6701(a). He stated a desire to continue to do so in the future. Therefore, an injunction is proper under 26 U.S.C. § 7408.

26 U.S.C. § 6700 proscribes the promotion of abusive tax shelters, and is violated by any person who: (1) organizes a partnership, plan or arrangement; (2) makes a statement with respect to the excludability of any income; (3) that the person knows is false or fraudulent as to any material matter. 26 U.S.C. § 6700(a). In this case, Allamby organized an arrangement through which he would prepare tax returns. Under this arrangement, Allamby would file taxes that excluded all income. At numerous meetings around the country, as well as in his book, Allamby told potential clients about his theory of tax preparation and how they wouldn't owe any taxes if they followed his interpretation. Allamby knew these statements were false. IRS officials had informed him that his position was frivolous and improper. Numerous courts have rejected Allamby's interpretation. *E.g., Sisemore*, 797 F.2d at 270-71. Allamby's actions were with respect to a material matter, since reporting zero income results in no taxes due and owing. Defendant states that he would continue this past practice if he were filing returns today. Accordingly, an injunction is proper under 26 U.S.C. § 7408.

D. Scope of Injunction: First Amendment Limitations

Despite the statutory eligibility for an injunction, the court has concerns about the First Amendment repercussions of enjoining Allamby's behavior in as broad a fashion as the United States seeks. The government seeks to enjoin Allamby "from promoting, either at speaking engagements or by distributing his book, the frivolous tax positions and return-preparation methods described in" Allamby's book. (Pl. Mot. for Summ. J. 6-7, ECF No. 27-3.) Rather than discussing or addressing potential First Amendment issues in any detail in its briefing, the United States drops a footnote on the final page of its brief and cites

three non-Sixth Circuit appellate cases dealing with the First Amendment issue. Nonetheless, the court will evaluate these cases and the applicable case law in crafting the appropriate scope of the injunction.

Injunctive relief of the type sought by the United States is a prior restraint on expression, and "'any prior restraint on expression carries a 'heavy presumption' against its constitutional validity.'" *United States v. Kaun*, 827 F.3d 1144, 1150 (7th Cir. 1987) (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). However, prior restraints are not necessarily unconstitutional; it depends on the type of speech at issue. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Two pertinent types of speech that may be restricted by prior constraint are: (1) commercial speech that is fraudulent or promotes an illegal activity, *Central Hudson Gas & Electric v. Public Serv. Comm'n*, 477 U.S. 557, 563-64 (1980); and (2) speech that incites imminent lawlessness, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

1. Commercial Speech

Under *Central Hudson*, the government has the power to regulate false, misleading, fraudulent, or deceptive commercial speech. *See Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 367 (2002). *Central Hudson* describes commercial speech as "advertising pure and simple" or "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561-62. In evaluating whether speech is commercial, courts consider whether "(1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech." *United States v. Bell*, 2005 U.S. App. LEXIS 13979, *10 (3d Cir. July 5, 2005). Numerous appellate courts have held that the sale of books or tapes that promote fraudulent tax schemes such as Allamby's are commercial speech. *Bell*, 2005 U.S. App. LEXIS 13979 at *10-*17; *United States v.*

Schiff, 379 F.3d 621, 626-29 (9th Cir. 2004); *Kaun*, 827 F.3d at 1152; *United States v. White*, 769 F.2d 511, 516 (8th Cir. 1985). In *Schiff*, the Ninth Circuit held that a book explaining how to avoid income taxes was commercial speech, because the book was used to help sell other products sold by the author. 379 F.3d at 627-29. In the instant case, Allamby's book advertises an audiotape that can assist individuals with the IRS and is sold by mail. Further, Allamby admitted that he prepared tax returns, for which he charged a fee, for some of the individuals who purchased his book. (Allamby Dep. 102-103, 106.) Thus, the court concludes that the book is commercial speech and its sale and distribution can be enjoined.

2. Inciting Imminent and Lawless Behavior

Under *Brandenburg*, the government may exercise prior restraint against speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Courts evaluating the constitutionality of speech restrictions on fraudulent tax schemes have been hesitant to rest their rulings entirely on *Brandenburg*. *See Bell*, 2005 U.S. App. LEXIS at *21-*23 (upholding injunction because enjoined speech aids and abets criminal activity and is fraudulent commercial speech, explicitly avoiding *Brandenburg*); *Schiff*, 379 F.3d at 629 ("Because we can uphold the injunction as an appropriate restriction on fraudulent commercial speech, we do not need to address the alternate [basis] cited by the district court to support the injunction, inciting imminent lawless behavior.")

Despite this, both the *Bell* and *Kaun* courts narrowly construed previously issued injunctions to ensure compliance with *Brandenburg*'s imminence requirements. In *Bell*, the district court enjoined Bell from "organizing, promoting, marketing, or selling (or assisting therein) the tax shelter, plan, or arrangement . . . or any other abusive tax shelter, plan, or arrangement that incites taxpayers to attempt to violate the

internal revenue laws." 2005 U.S. App. LEXIS 13979 at *6. The appellate court construed this paragraph "to mean that Bell may only be found in contempt for violating the order where the evidence demonstrates that he advertised, marketed, or sold false tax advice, or aided and abetted others, directly or indirectly, to violate tax laws." *Id.* at *24. In *Kaun*, the district court enjoined Kaun from "'organizing, selling, or assisting in the organization of an entity or otherwise promoting any plan or arrangement' based on various false and fraudulent claims about income taxation." 827 F.2d at 1150. The appellate court recognized that if read broadly, the injunction could infringe Kaun's right to freedom of association. *Id.* at 1151. The court thus interpreted the order narrowly and held that the injunction would be violated if "Kaun actually persuaded others, directly or indirectly, to violate the tax laws, or if the evidence shows that Kaun's words and actions were directed toward such persuasion in a situation where the unlawful conduct was imminently likely to occur." *Id.* at 1151-52. In the instant case, the court will not completely bar Allamby from public speaking engagements. However, Allamby is barred from aiding, abetting, or attempting to persuade others, directly or indirectly, to violate the tax laws,[4] in such a situation where unlawful conduct is likely to occur.

E. Injunction under 26 U.S.C. § 7402(a)

26 U.S.C. § 7402(a) grants broad discretion to federal courts to issue injunctions necessary to enforce internal revenue laws. The United States seeks to extend a requirement contained in the preliminary injunction Order that Defendant must provide a signed document to persons seeking his assistance in preparing taxes. The court agrees, and Defendant shall provide a copy of the attached

[4] Allamby should note that, as should have been made clear by this Order and these court proceedings, his interpretation of the tax code is unlawful and a violation of the tax laws.

"Notice to Customers of Michael A. Allamby" to anyone who seeks his assistance in preparing taxes. The United States shall be permitted to conduct discovery to monitor Allamby's compliance with the permanent injunction.

III. CONCLUSION

The United States has presented evidence that the Defendant has repeatedly engaged in fraudulent and deceptive conduct that substantially interferes with the administration of the internal revenue laws. Moreover, the court finds that injunctive relief is appropriate to prevent the recurrence of such conduct. The court further finds that a permanent injunction is necessary and appropriate in this instance to enforce the internal revenue laws. Therefore, the court orders that:

1. Pursuant to I.R.C. §§ 7402(a), 7407, and 7408, the Defendant, Michael Allamby, and his representatives, agents, servants, employees, attorneys, and any persons in active concert or participation with him, are permanently enjoined from directly or indirectly:

    a. Preparing any federal tax returns, forms, or claims for refunds for others;

    b. Representing others before the IRS in any way, including attending meetings at IRS offices on behalf of others or submitting documents to the IRS on behalf of others;

    c. Engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws; or

    d. Aiding, abetting, or attempting to persuade others, directly or indirectly, to violate the tax laws, in such a situation where unlawful conduct is likely to occur.

2. In the event that any current, potential, or former customers approach Defendant for assistance in preparing their tax returns, Defendant shall immediately provide a signed copy of the attached "Notice to Customers of Michael Allamby" to such customers.

3. The United States is permitted to conduct discovery to monitor the Defendant's compliance with this Order.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

July 29, 2005

NOTICE TO CUSTOMERS OF MICHAEL A. ALLAMBY

I regret to inform you that the United States District Court for the Northern District of Ohio has permanently enjoined me from preparing or assisting in the preparation of tax returns. I am prohibited by court order from assisting anyone with their tax returns, accompanying anyone to the Internal Revenue Service offices, or submitting documents to the Internal Revenue Service.

The Court has found that I have been preparing frivolous federal tax returns that do not report wages and salaries as income. If I prepared a tax return for you that did not correctly report your tax liability, you may be subject to civil or criminal tax penalties, or both. You may wish to contact a licensed attorney or certified public accountant to determine whether any tax returns that I prepared for you were improper and what you should do to correct any false or inaccurate returns. Thank you for your understanding and cooperation.

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MICHAEL A. ALLAMBY