

# **THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS**

**February 16, 2012**

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# **THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS**

**February 16, 2012**

This document describes and responds to some of the more common frivolous arguments made by individuals and groups who oppose compliance with the federal tax laws. The first section groups these arguments under five general categories, with variations within each category. Each contention is briefly explained, followed by a discussion of the legal authority that rejects the contention. The second section responds to some of the more common frivolous arguments made in collection due process cases brought pursuant to sections 6320 or 6330. These arguments are grouped under ten general categories and contain a brief description of each contention followed by a discussion of the correct legal authority. A final section explains the penalties that the courts may impose on those who pursue tax cases on frivolous grounds. The court opinions cited as relevant legal authority illustrate how these arguments are treated by the IRS and the courts. Note that courts often decline “to refute [frivolous] arguments with somber reasoning and copious citation of precedent” for a variety of reasons. Wnuck v. Commissioner, 136 T.C. 498 (2011) (quoting Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984)). This document, including the relevant legal authorities cited, is not intended to provide an exhaustive list of frivolous tax arguments.

## **I. FRIVOLOUS TAX ARGUMENTS IN GENERAL**

### **A. The Voluntary Nature of the Federal Income Tax System**

#### **1. Contention: The filing of a tax return is voluntary.**

Some taxpayers assert that they are not required to file federal tax returns because the filing of a tax return is voluntary. Proponents of this contention point to the fact that the IRS itself tells taxpayers in the Form 1040 instruction book that the tax system is voluntary. Additionally, these taxpayers frequently quote Flora v. United States, 362 U.S. 145, 176 (1960), for the proposition that “[o]ur system of taxation is based upon voluntary assessment and payment, not upon distraint.”

**The Law:** The word “voluntary,” as used in Flora and in IRS publications, refers to our system of allowing taxpayers initially to determine the correct amount of tax and complete the appropriate returns, rather than have the government determine tax for them from the outset. The requirement to file an income tax return is not voluntary and is clearly set forth in sections 6011(a), 6012(a), et seq., and 6072(a) of the Internal Revenue Code. See also Treas. Reg. § 1.6011-1(a).

Any taxpayer who has received more than a statutorily determined amount of gross income is obligated to file a return. Failure to file a tax return

could subject the non-complying individual to criminal penalties, including fines and imprisonment, as well as civil penalties. “[A]lthough Treasury regulations establish voluntary compliance as the general method of income tax collection, Congress gave the Secretary of the Treasury the power to enforce the income tax laws through involuntary collection . . . . The IRS’ efforts to obtain compliance with the tax laws are entirely proper.” United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986). The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2007-20, 2007-1 C.B. 863.

### **Relevant Case Law:**

Helvering v. Mitchell, 303 U.S. 391, 399 (1938) – the Supreme Court stated that “[i]n assessing income taxes, the Government relies primarily upon the disclosure by the taxpayer of the relevant facts . . . in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes [either criminal or civil] sanctions.”

United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993), cert. denied, 510 U.S. 1193 (1994) – the court held that “[a]ny assertion that the payment of income taxes is voluntary is without merit.”

United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986) – the court upheld a conviction for willfully failing to file a return, stating that the premise “that the tax system is somehow ‘voluntary’ . . . is incorrect.”

United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983) – the court upheld conviction and fines imposed for willfully failing to file tax returns, stating that the claim that filing a tax return is voluntary “was rejected in

Woods v. Commissioner, 91 T.C. 88, 90 (1988) – the court rejected the claim that reporting income taxes is strictly voluntary, referring to it as a “‘tax protester’ type” argument, and found Woods liable for the penalty for failure to file a return.

### **Other Cases:**

United States v. Drefke, 707 F.2d 978, 981 (8th Cir. 1983), cert. denied, Jameson v. United States, 464 U.S. 642 (1983); United States v. Schulz, 529 F.Supp.2d 341 (N.D.N.Y. 2007), aff’d, 517 F.3d 606 (2d Cir. 2008), cert. denied, 555 U.S. 946 (2008); Johnson v. Commissioner, T.C. Memo. 1999-312, 78 T.C.M. (CCH) 468, 471 (1999), aff’d, 242 F.3d 382 (9th Cir. 2000).

## 2. Contention: Payment of federal income tax is voluntary.

In a similar vein, some argue that they are not required to pay federal taxes because the payment of federal taxes is voluntary. Proponents of this position argue that our system of taxation is based upon voluntary assessment and payment. They frequently claim that there is no provision in the Internal Revenue Code or any other federal statute that requires them to pay or makes them liable for income taxes, and they demand that the IRS show them the law that imposes tax on their income. They argue that until the IRS can prove to these taxpayers' satisfaction, which is effectively impossible because they never will be satisfied, the existence and applicability of the income tax laws, they will not report or pay income taxes. These individuals or groups reflexively dismiss any attempt by the IRS to identify the laws, thereby continuing the cycle. The IRS discussed this frivolous position at length and warned taxpayers of the consequences of asserting it. [Rev. Rul. 2007-20](#), 2007-1 C.B. 863.

**The Law:** The requirement to pay taxes is not voluntary and is clearly set forth in section 1 of the Internal Revenue Code, which imposes a tax on the taxable income of individuals, estates, and trusts as determined by the tables set forth in that section. (Section 11 imposes a tax on the taxable income of corporations.)

Furthermore, the obligation to pay tax is described in section 6151, which requires taxpayers to submit payment with their tax returns. Failure to pay taxes could subject the non-complying individual to criminal penalties, including fines and imprisonment, as well as civil penalties.

In discussing section 6151, the United States Court of Appeals for the Eight Circuit stated that "when a tax return is required to be filed, the person so required 'shall' pay such taxes to the internal revenue officer with whom the return is filed at the fixed time and place. The sections of the Internal Revenue Code imposed a duty on Drefke to file tax returns and pay the appropriate rate of income tax, a duty which he chose to ignore." [United States v. Drefke](#), 707 F.2d 978, 981 (8th Cir. 1983), cert. denied, [Jameson v. United States](#), 464 U.S. 642 (1983).

There have been no civil cases where the IRS's lack of response to a taxpayer's inquiry has relieved the taxpayer of the duty to pay tax due under the law. Courts have in rare instances waived civil penalties because they have found that a taxpayer relied on an IRS misstatement or wrongful misleading silence with respect to a factual matter. Such an estoppel argument does not, however, apply to a legal matter such as whether there is legal authority to collect taxes. See, e.g., McKay v. Commissioner, 102 T.C. 465 (1994), rev'd as to other issues, 84 F.3d 433 (5th Cir. 1996).

**Relevant Case Law:**

United States v. Schiff, 379 F.3d 621 (9th Cir. 2004), cert. denied, 546 U.S. 812 (2005); see also <http://www.usdoj.gov/tax/txdv04551.htm>. – the court affirmed a federal district court’s preliminary injunction barring Irwin Schiff, Cynthia Neun, and Lawrence N. Cohen from selling a tax scheme that fraudulently claimed that payment of federal income tax is voluntary. In subsequent criminal trials, these three individuals were convicted of violating several criminal laws relating to their scheme. See 2005 TNT 206-18. Schiff received a sentence of more than 12 years in prison and was ordered to pay more than \$4.2 million in restitution to the IRS; Neun received a sentence of nearly 6 years and was ordered to pay \$1.1 million in restitution to the IRS; and Cohen received a sentence of nearly 3 years and was ordered to pay \$480,000 in restitution to the IRS. See [http://www.usdoj.gov/opa/pr/2006/February/06\\_tax\\_098.html](http://www.usdoj.gov/opa/pr/2006/February/06_tax_098.html).

Adams v. Commissioner, 170 F.3d 173, 181-82 (3d Cir. 1999), cert. denied, 528 U.S. 1117 (2000) – the court affirmed the imposition of penalties for failure to file tax returns and pay tax, as Adams’ religious beliefs—payment of taxes to fund the military is against the will of God—did not constitute reasonable cause for failing to pay taxes.

United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993), cert. denied, 510 U.S. 1193 (1994) – the court stated that the “[taxpayers] claim that payment of federal income tax is voluntary clearly lacks substance” and imposed sanctions in the amount of \$1,500 “for bringing this frivolous appeal based on discredited, tax-protester arguments.”

Wilcox v. Commissioner, 848 F.2d 1007, 1008 (9th Cir. 1988) – the court rejected Wilcox’s argument that payment of taxes is voluntary for American citizens and imposed a \$1,500 penalty against Wilcox for raising frivolous claims.

United States v. Bressler, 772 F.2d 287, 291 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986) – the court upheld Bressler’s conviction for tax evasion, noting that “[he] has refused to file income tax returns and pay the amounts due not because he misunderstands the law, but because he disagrees with it . . . . [O]ne who refuses to file income tax returns and pay the tax owing is subject to prosecution, even though the tax protester believes the laws requiring the filing of income tax returns and the payment of income tax are unconstitutional.”

United States v. Schulz, 529 F.Supp.2d 341 (N.D.N.Y. 2007), aff'd, 517 F.3d 606 (2d Cir. 2008), cert. denied, 555 U.S. 946 (2008) – the court permanently barred Robert Schulz and his organizations, We the People Congress and We the People Foundation, from promoting a tax scheme that helped employers and employees improperly stop tax withholding from wages on the false premise that federal income taxation is voluntary.

Packard v. United States, 7 F.Supp.2d 143, 145 (D. Conn. 1998), aff'd, 198 F.3d 234 (2d Cir. 1999) – the court dismissed Packard’s refund suit for recovery of penalties for failure to pay income tax and failure to pay estimated taxes where the taxpayer contested the obligation to pay taxes on religious grounds, noting that “the ability of the Government to function could be impaired if persons could refuse to pay taxes because they disagreed with the Government’s use of tax revenues.”

#### **Other Cases:**

Schiff v. United States, 919 F.2d 830, 833 (2d Cir. 1990), cert. denied, 501 U.S. 1238 (1991); United States v. Sieloff, 2009 WL 1850197, 104 A.F.T.R.2d (RIA) 2009-5067 (M.D. Fla. Jun. 25, 2009); United States v. Scott, 2009 WL 1439187, 103 A.F.T.R.2d (RIA) 2009-2336 (D.D.C. May 20, 2009); Horowitz v. Commissioner, T.C. Memo. 2006-91, 91 T.C.M. (CCH) 1120; Bonaccorso v. Commissioner, T.C. Memo. 2005-278, 90 T.C.M. (CCH) 554 (2005).

### **3. Contention: Taxpayers can reduce their federal income tax liability by filing a “zero return.”**

Some taxpayers attempt to reduce their federal income tax liability by filing a tax return that reports no income and no tax liability (a “zero return”) even though they have taxable income. Many of these taxpayers also request a refund of any taxes withheld by an employer. These individuals typically attach to the zero return a “corrected” Form W-2, or another information return that reports income and income tax withholding, and rely on one or more of the frivolous arguments discussed throughout this outline to support their position.

**The Law:** A taxpayer that has taxable income cannot legally avoid income tax by filing a zero return. Section 61 provides that gross income includes all income from whatever source derived, including compensation for services. Courts have repeatedly penalized taxpayers for making the frivolous argument that the filing of a zero return can allow a taxpayer to avoid income tax liability or permit a refund of tax withheld by an employer. Courts have also imposed the frivolous return and failure to file penalties because such forms do not evidence an honest and reasonable attempt to satisfy the tax laws or contain sufficient data to calculate the tax liability, which are necessary elements of a valid tax return. See Beard v. Commissioner, 82 T.C. 766, 777-79, aff'd 793 F.2d 139 (6th Cir. 1986). The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2004-34, 2004-1 C.B. 619. Furthermore, the inclusion of the phrase “nunc pro tunc,” or other legal phrase, does not have any legal effect and does not serve to validate a zero return. See Rev. Rul. 2006-17, 2006-1 C.B. 748.



**Relevant Case Law:**

Kelly v. United States, 789 F.2d 94, 97 (1st Cir. 1986) – the court found that the taxpayer’s failure to report any income from wages, the “unexplained designation of his Form W-2 as ‘Incorrect’, and his attempt to deduct as a cost of labor expense on Schedule C an amount almost identical to the amount of wages on Form W-2” established his position (that compensation for his labor was not “wages” or taxable income) was both incorrect and frivolous.

Sisemore v. United States, 797 F.2d 268, 270-71 (6th Cir. 1986) – the court upheld the assessment of a frivolous return penalty on taxpayers because “their amended return [showing no income] on its face clearly showed that their assessment of their taxes was substantially incorrect and that their position on the matter [that their wages were zero because received in equal exchange for their labor] was frivolous.”

Olson v. United States, 760 F.2d 1003, 1005 (9th Cir. 1985) – the circuit court held that the district court properly found the taxpayer was liable for a penalty for filing a frivolous tax return because he listed his wages as zero and attempted “to escape tax by deducting his wages as ‘cost of labor’ and by claiming that he had obtained no privilege from a governmental agency.”

Davis v. United States Government, 742 F.2d 171, 172 (5th Cir. 1984) – the court held as clearly frivolous the taxpayers’ reasons for reporting no wages and no gross income (“rejected . . . time and time again”), while having received over \$60,000 in earnings or other compensation as demonstrated by the Forms W-2 attached to their Form 1040.

United States v. Ballard, 101 A.F.T.R.2d (RIA) 1241, 2008 WL 918278 (N.D. Tex. Feb. 12, 2008) – the court permanently enjoined a tax return preparer from engaging in further tax return preparation or tax advice because he prepared federal income tax returns for customers that falsely showed nothing but zeroes.

Bonaccorso v. Commissioner, T.C. Memo. 2005-278, 90 T.C.M. (CCH) 554 (2005) – the taxpayer filed zero returns based on the argument that he found no Code section that made him liable for any income tax. The court held that the taxpayer’s argument was frivolous citing to section 1 (imposes an income tax), section 63 (defines taxable income as gross income minus deductions), and section 61 (defines gross income). The court also imposed a \$10,000 sanction against the taxpayer under section 6673 for making frivolous arguments.

United States v. Conces, 507 F.3d 1028 (6th Cir. 2007), cert. denied, 553 U.S. 1042 (2008); United States v. Schiff, 379 F.3d 621 (9th Cir. 2004); Schultz v. United States, 2005 WL 1155203, at \*3, 95 A.F.T.R.2d (RIA)

2005-1977 (W.D. Mich. Mar. 23, 2005); Little v. United States, 2005 WL 2989696, at \*4, 96 A.F.T.R.2d (RIA) 2005-7086 (M.D.N.C. Nov. 7, 2005), aff'd, 178 F. App'x 230 (4th Cir. 2006); United States v. Hill, 2005 WL 3536118, 97 A.F.T.R.2d (RIA) 548 (D. Ariz. Dec. 22, 2005), aff'd, United States v. Romero-Hill, 197 F. App'x 613 (9th Cir. 2006); Yuen v. United States, 290 F.Supp.2d 1220, 1224 (D. Nev. 2003); Gillett v. United States, 233 F.Supp. 2d 874, 881 (W.D. Mich. 2002); Oman v. Commissioner, T.C. Memo. 2010-276, 100 T.C.M. (CCH) 548 (2010); Blaga v. Commissioner, T.C. Memo. 2010-170, 100 T.C.M. (CCH) 91 (2010); Lindberg v. Commissioner, T.C. Memo. 2010-67, 99 T.C.M. (CCH) 1273 (2010); Halcott v. Commissioner, T.C. Memo. 2004-214, 88 T.C.M. (CCH) 286 (2004); Hill v. Commissioner, T.C. Memo. 2003-144, 85 T.C.M. (CCH) 1328, 1331 (2003); Rayner v. Commissioner, T.C. Memo. 2002-30, 83 T.C.M. (CCH) 1161 (2002), aff'd, 70 F. App'x 739 (5th Cir. 2003), cert. denied, 540 U.S. 1139 (2004).

#### **4. Contention: The IRS must prepare federal tax returns for a person who fails to file.**

Proponents of this argument contend that section 6020(b) obligates the IRS to prepare and sign under penalties of perjury a federal tax return for a person who does not file a return. Thus, those who subscribe to this contention claim that they are not required to file a return for themselves.

**The Law:** Section 6020(b) merely provides the IRS with a mechanism for determining the tax liability of a taxpayer who has failed to file a return. Section 6020(b) does not require the IRS to prepare or sign under penalties of perjury tax returns for persons who do not file, and it does not excuse the taxpayer from civil penalties or criminal liability for failure to file.

#### **Relevant Case Law:**

United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir. 1993), cert. denied, 510 U.S. 1112 (1994) – the court held the district court did not err when it instructed the jury that defendant's belief that Section 6020 permitted the Secretary of the Treasury to prepare a tax return for a person did not negate "in any way" the obligation to file a tax return.

In re Bergstrom, 949 F.2d 341, 343 (10th Cir. 1991) – the court recognized that "[c]ourts have held that 26 U.S.C. § 6020(b) provides the IRS with some recourse if a taxpayer fails to file a return as required under 26 U.S.C. § 6012, but that it does not excuse a taxpayer from the filing requirement."

Schiff v. United States, 919 F.2d 830, 832 (2d Cir. 1990), cert. denied, 501 U.S. 1238 (1991) – the court rejected the taxpayer's argument that the IRS must prepare a substitute return pursuant to section 6020(b) prior to

assessing deficient taxes, stating “[t]here is no requirement that the IRS complete a substitute return.”

Moore v. Commissioner, 722 F.2d 193, 196 (5th Cir. 1984) – the court stated that “section [6020(b)] provides the Secretary with some recourse should a taxpayer fail to fulfill his statutory obligation to file a return, and does not supplant the taxpayer’s original obligation to file established by 26 U.S.C. § 6012.”

Stewart v. Commissioner, T.C. Memo. 2005-212, 90 T.C.M. (CCH) 269 (2005) – the court found that the IRS need not prepare a substitute return in order to determine a deficiency where the taxpayer has not filed a return for the year at issue.

#### **Other Cases:**

United States v. Barnett, 945 F.2d 1296, 1300 (5th Cir. 1991), cert. denied, 503 U.S. 941 (1992); United States v. Lacy, 658 F.2d 396, 397 (5th Cir. 1981).

#### **5. Contention: Compliance with an administrative summons issued by the IRS is voluntary.**

Some summoned parties may assert that they are not required to respond to or comply with an administrative summons issued by the IRS. Proponents of this position argue that a summons thus can be ignored. The Second Circuit’s opinion in Schulz v. IRS, 413 F.3d 297 (2d Cir. 2005) (“Schulz II”) is often inappropriately cited to support this proposition.

**The Law:** A summons is an administrative device with which the IRS can summon persons to appear, testify, and produce documents. The IRS is statutorily authorized to inquire about any person who may be liable to pay any internal revenue tax, and to summons a witness to testify or to produce books, papers, records, or other data that may be relevant or material to an investigation. I.R.C. § 7602; United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984); United States v. Powell, 379 U.S. 48 (1964). Sections 7402(b) and 7604(a) of the Internal Revenue Code grant jurisdiction to district courts to enforce a summons, and section 7604(b) governs the general enforcement of summonses by the IRS.

Section 7604(b) allows courts to issue attachments, consistent with the law of contempt, to ensure attendance at an enforcement hearing “[i]f the taxpayer has contumaciously refused to comply with the administrative summons and the [IRS] fears he may flee the jurisdiction.” Powell, 379 U.S. at 58 n.18; see also Reisman v. Caplin, 375 U.S. 440, 448-49 (1964) (noting that section 7604(b) actions are in the nature of contempt proceedings against persons who “wholly made default or contumaciously refused to comply,” with an administrative summons issued by the IRS).

Under section 7604(b), the courts may also impose contempt sanctions for disobedience of an IRS summons.

Failure to comply with an IRS administrative summons also could subject the non-complying individual to criminal penalties, including fines and imprisonment. I.R.C. § 7210. While the Second Circuit held in Schulz II that, for due process reasons, the government must first seek judicial review and enforcement of the underlying summons and to provide an intervening opportunity to comply with a court order of enforcement prior to seeking sanctions for noncompliance, the court's opinion did not foreclose the availability of prosecution under section 7210.

### **Relevant Case Law:**

Schulz v. IRS, 413 F.3d 297 (2d Cir. 2005) ("Schulz II") – the court, upholding its prior per curiam opinion, reported at Schulz v. IRS, 395 F.3d 463 (2d Cir. 2005) ("Schulz I"), held that, based upon constitutional due process concerns, an indictment under I.R.C. § 7210 shall not lie and contempt sanctions under I.R.C. § 7604(b) shall not be levied based on disobedience of an IRS summons until that summons has been enforced by a federal court order and the summoned party, after having been given a reasonable opportunity to comply with the court's order, has refused. The court noted that "[n]either this opinion nor Schulz I prohibits the issuance of pre-hearing attachments consistent with due process and the law of contempts." Schulz II, 413 F.3d at 304.

United States v. Becker, 58-1 U.S.T.C. ¶ 9403 (S.D.N.Y. 1958), aff'd, 259 F.2d 869 (2d Cir. 1958) (per curiam), cert. denied, 258 U.S. 929 (1959) – in a case in which the defendant failed to produce certain books and records specified in an IRS summons, claiming that the books and records had been destroyed by fire, the court found that based upon the evidence (including the fact that some of the specified books were subsequently produced in compliance with a grand jury subpoena), Becker willfully and knowingly neglected to produce information called for by a summons in violation of section 7210.

## **B. The Meaning of Income: Taxable Income and Gross Income**

### **1. Contention: Wages, tips, and other compensation received for personal services are not income.**

This argument asserts that wages, tips, and other compensation received for personal services are not income, because there is allegedly no taxable gain when a person "exchanges" labor for money. Under this theory, wages are not taxable income because people have basis in their labor equal to the fair market value of the wages they receive; thus, there is no gain to be taxed. A variation of this argument misconstrues section

1341, which deals with computations of tax where a taxpayer restores a substantial amount held under claim of right, to somehow allow a deduction claim for personal services rendered.

Another similar argument asserts that wages are not subject to taxation where individuals have obtained funds in exchange for their time. Under this theory, wages are not taxable because the Code does not specifically tax these so-called “time reimbursement transactions.” Some individuals or groups argue that the Sixteenth Amendment to the United States Constitution did not authorize a tax on wages and salaries, but only on gain or profit.

**The Law:** For federal income tax purposes, “gross income” means all income from whatever source derived and includes compensation for services. I.R.C. § 61. Any income, from whatever source, is presumed to be income under section 61, unless the taxpayer can establish that it is specifically exempted or excluded. See Reese v. United States, 24 F.3d 228, 231 (Fed. Cir. 1994) (stating that “an abiding principle of federal tax law is that, absent an enumerated exception, gross income means all income from whatever source derived.”). The IRS advised taxpayers that wages and other compensation received in exchange for personal services are taxable income and warned of the consequences of making frivolous arguments to the contrary. Rev. Rul. 2007-19, 2007-1 C.B. 843.

Section 1341 and the court opinions interpreting it require taxpayers to return funds previously reported as income before they can claim a deduction under claim of right. To have the right to a deduction, the taxpayer should appear to have an unrestricted right to the income in question. See Dominion Resources, Inc. v. United States, 219 F.3d 359 (4th Cir. 2000). The IRS warned taxpayers of the consequences of making the frivolous 1341 deduction when there has been no repayment by the taxpayer of an amount previously reported as income. Rev. Rul. 2004-29, 2004-1 C.B. 627.

The Sixteenth Amendment provides that Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration. U.S. Const. amend. XVI. Furthermore, the Supreme Court upheld the constitutionality of the income tax laws enacted subsequent to ratification of the Sixteenth Amendment. Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916). Since that time, the courts have consistently upheld the constitutionality of the federal income tax. For a further discussion of the constitutionality of the federal income tax laws, see section I.D. of this outline.

All compensation for personal services, no matter what the form of payment, must be included in gross income. This includes salary or

wages paid in cash, as well as the value of property and other economic benefits received because of services performed, or to be performed in the future. Furthermore, criminal and civil penalties have been imposed against individuals who rely upon this frivolous argument.

Though a handful of taxpayers who were criminally charged with violations of the internal revenue laws avoided conviction, taxpayers should not mistake these few cases for an indication that frivolous positions that lead to criminal acquittals are legitimate or that the outcome of other cases will protect a taxpayer from sanctions resulting from noncompliance. While a few defendants have prevailed, the vast majority are convicted. Furthermore, even though a taxpayer may be acquitted of criminal charges of noncompliance with Federal tax laws, the IRS may pursue any underlying tax liability and is not barred from determining civil penalties. See Helvering v. Mitchell, 303 U.S. 391 (1938); Price v. Commissioner, T.C. Memo. 1996-204.

#### **Relevant Case Law:**

Cheek v. United States, 498 U.S. 192 (1991) – the Supreme Court reversed and remanded Cheek’s conviction of willfully failing to file federal income tax returns and willfully attempting to evade income taxes solely on the basis of erroneous jury instructions. The Court noted, however, that Cheek’s argument that he should be acquitted because he believed in good faith that the income tax law is unconstitutional “is unsound, not because Cheek’s constitutional arguments are not objectively reasonable or frivolous, which they surely are, but because the [law regarding willfulness in criminal cases] does not support such a position.” Id. On remand, Cheek was convicted on all counts and sentenced to jail for a year and a day. Cheek v. United States, 3 F.3d 1057 (7th Cir. 1993), cert. denied, 510 U.S. 1112 (1994).

Commissioner v. Kowalski, 434 U.S. 77 (1977) – the Supreme Court found that payments are considered income where the payments are undeniably accessions to wealth, clearly realized, and over which a taxpayer has complete dominion.

Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-30 (1955) – referring to the statute’s words “income derived from any source whatever,” the Supreme Court stated, “this language was used by Congress to exert in this field ‘the full measure of its taxing power.’ . . . And the Court has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax all gains except those specifically exempted.”

United States v. Sloan, 939 F.2d 499, 500 (7th Cir. 1991), cert. denied, 502 U.S. 1060 (1992) – in rejecting the taxpayer’s argument that the

revenue laws of the United States do not impose a tax on income, the court recognized the “Internal Revenue Code imposes a tax on all income.”

United States v. Connor, 898 F.2d 942, 943-44 (3d Cir. 1990), cert. denied, 497 U.S. 1029 (1990) – the court stated that “[e]very court which has ever considered the issue has unequivocally rejected the argument that wages are not income.”

Stelly v. Commissioner, 761 F.2d 1113, 1115-16 (5th Cir. 1985), cert. denied, 474 U.S. 851 (1985) – the court imposed double costs and attorney’s fees on the taxpayers for bringing a frivolous appeal and rejected the taxpayers’ argument that taxing wage and salary income is a violation of the constitution because compensation for labor is an exchange rather than gain.

United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1983) – the court upheld conviction and fines imposed for willfully failing to file tax returns, stating that the taxpayer’s contention that wages and salaries are not income within the meaning of the Sixteenth Amendment is “totally lacking in merit.”

Lonsdale v. Commissioner, 661 F.2d 71, 72 (5th Cir. 1981) – the court rejected as “meritless” the taxpayer’s contention that the “exchange of services for money is a zero-sum transaction . . . .”

United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981) – the court affirmed Romero’s conviction for willfully failing to file tax returns stating that “Romero’s proclaimed belief that he was not a ‘person’ and that the wages he earned as a carpenter were not ‘income’ is fatuous as well as obviously incorrect.”

Callahan v. Commissioner, 334 F. App’x 754 (7th Cir. 2009) – the court rejected the petitioner’s argument that only “the gain from wages” (not the wages themselves) is taxable and characterized the argument as “beyond frivolous.”

Sumter v. United States, 61 Fed. Cl. 517, 523 (2004) – the court found the taxpayer’s “claim of right” argument “devoid of any merit” and that section 1341 only applies to situations in which the claimant is compelled to return the taxed item because of a mistaken presumption that the right held was unrestricted and, thus, the item was previously reported, erroneously, as taxable income. Section 1341 was inapplicable to Ms. Sumter, because she had a continuing, unrestricted claim of right to her salary income and had not been compelled to repay that income in a later tax year.

Carskadon v. Commissioner, T.C. Memo. 2003-237, 86 T.C.M. (CCH) 234, 236 (2003)– the court rejected the taxpayer’s frivolous argument that

“wages are not taxable because the Code, which states what is taxable, does not specifically state that ‘time reimbursement transactions,’ a term of art coined by [taxpayers], are taxable.” The court imposed a \$2,000 penalty against the taxpayers for raising “only frivolous arguments which can be characterized as tax protester rhetoric.”

### **Other Cases:**

United States v. Becker, 965 F.2d 383, 389 (7th Cir. 1992), cert. denied, 507 U.S. 971 (1993); United States v. White, 769 F. 2d 511 (8th Cir. 1985); Abdo v. United States, 234 F.Supp.2d 553 (M.D.N.C. 2002), aff’d, 63 F. App’x 163 (4th Cir. 2003), cert. denied, 540 U.S. 1120 (2004); McCoy v. United States, 88 A.F.T.R.2d (RIA) 7116, 2001, U.S. Dist. LEXIS 18986 (N.D. Tex. Nov. 16, 2001); Abrams v. Commissioner, 82 T.C. 403, 413 (1984); Reading v. Commissioner, 70 T.C. 730 (1978), aff’d, 614 F.2d 159 (8th Cir. 1980); Bigley v. Commissioner, T.C. Memo. 2010-29, 99 T.C.M. (CCH) 1125 (2010); Pugh v. Commissioner, T.C. Memo. 2009-138, 97 T.C.M. (CCH) 1791 (2009); Wheelis v. Commissioner, T.C. Memo. 2002-102, 83 T.C.M. (CCH) 1543-45 (2002), aff’d, 63 F. App’x 375 (9th Cir. 2003); Cullinane v. Commissioner, T.C. Memo. 1999-2, 77 T.C.M. (CCH) 1192, 1193 (1999).

## **2. Contention: Only foreign-source income is taxable.**

Some individuals and groups maintain that there is no federal statute imposing a tax on income derived from sources within the United States by citizens or residents of the United States. They argue instead that federal income taxes are excise taxes imposed only on nonresident aliens and foreign corporations for the privilege of receiving income from sources within the United States. The premise for this argument is a misreading of sections 861, et seq., and 911, et seq., as well as the regulations under those sections. These frivolous assertions are contrary to well-established legal precedent.

**The Law:** As stated above, for federal income tax purposes, “gross income” means all income from whatever source derived and includes compensation for services. I.R.C. § 61. Further, Treas. Reg. § 1.1-1(b) provides, “[i]n general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States.” Sections 861 and 911 define the sources of income (U.S. versus non-U.S. source income) for such purposes as the prevention of double taxation of income that is subject to tax by more than one country. These sections neither specify whether income is taxable nor determine or define gross income.



The IRS warned taxpayers of the consequences of making these frivolous arguments. Rev. Rul. 2004-28, 2004-1 C.B. 624 (discussing section 911); Rev. Rul. 2004-30, 2004-1 C.B. 622 (discussing section 861).

### **Relevant Case Law:**

United States v. Ambort, 405 F.3d 1109 (10th Cir. 2005) – the court affirmed the conviction and 108-month sentence of Ernest G. Ambort for willfully aiding and assisting in the preparation of false income tax returns, specifically the seminars he conducted during which he falsely instructed the attendees that they could claim to be nonresident aliens with no domestic-source income, regardless of place of birth, so that they were exempt from most federal income taxes

Great-West Life Assur. Co. v. United States, 678 F.2d 180, 183 (Ct. Cl. 1982) – the court stated that “[t]he determination of where income is derived or ‘sourced’ is generally of no moment to either United States citizens or United States corporations, for such persons are subject to tax under I.R.C. § 1 and I.R.C. § 11, respectively, on their worldwide income.”

Takaba v. Commissioner, 119 T.C. 285, 295 (2002) – the court rejected the taxpayer’s argument that income received from sources within the United States is not taxable income, stating that “[t]he 861 argument is contrary to established law and, for that reason, frivolous.” The court imposed sanctions against the taxpayer in the amount of \$15,000, as well as sanctions against the taxpayer’s attorney in the amount of \$10,500, for making such groundless arguments.

Corcoran v. Commissioner, T.C. Memo. 2002-18, 83 T.C.M. (CCH) 1108, 1110 (2002), aff’d, 54 F. App’x 254 (9th Cir. 2002), cert. denied, 538 U.S. 1036 (2003) – the court rejected the taxpayers’ argument that their income was not from any of the sources in Treas. Reg. § 1.861-8(f), stating that the “source rules [of sections 861 through 865] do not exclude from U.S. taxation income earned by U.S. citizens from sources within the United States.” The court further required the taxpayers to pay a \$2,000 penalty under section 6673(a)(1) because “they . . . wasted limited judicial and administrative resources.”

Williams v. Commissioner, 114 T.C. 136, 138 (2000) – the court rejected the taxpayer’s argument that his income was not from any of the sources listed in Treas. Reg. § 1.861-8(a), characterizing it as “reminiscent of tax-protester rhetoric that has been universally rejected by this and other courts.”

### **Other Cases:**

Hillecke v. United States, 2009 WL 2015009, 2009-2 U.S.T.C. ¶ 50,481 (D. Or. Jun. 30, 2009); United States v. Thompson, 2009 WL 1531571,

103 A.F.T.R.2d (RIA) 2009-2421 (E.D. Cal. May 28, 2009); Rodriguez v. Commissioner, T.C. Memo. 2009-92, 97 T.C.M. (CCH) 1482 (2009); Madge v. Commissioner, T.C. Memo. 2000-370, 80 T.C.M. (CCH) 804 (2000), aff'd, 23 F. App'x 604 (8th Cir. 2001), cert. denied, 537 U.S. 825 (2002); Aiello v. Commissioner, T.C. Memo. 1995-40, 69 T.C.M. (CCH) 1765 (1995); Solomon v. Commissioner, T.C. Memo. 1993-509, 66 T.C.M. (CCH) 1201, 1202 (1993), aff'd, 42 F.3d 1391 (7th Cir. 1994).

### **3. Contention: Federal Reserve Notes are not income.**

Proponents of this contention assert that Federal Reserve Notes currently used in the United States are not valid currency and cannot be taxed because Federal Reserve Notes are not gold or silver and may not be exchanged for gold or silver. This argument misinterprets Article I, Section 10 of the United States Constitution. The courts have rejected this argument on numerous occasions.

**The Law:** Congress is empowered “[t]o coin Money, regulate the value thereof, and of foreign coin, and fix the Standard of weights and measures.” U.S. Const. Art. I, § 8, cl. 5. Article I, Section 10 of the Constitution prohibits the states from declaring as legal tender anything other than gold or silver, but does not limit Congress’ power to declare the form of legal tender. See 31 U.S.C. § 5103; 12 U.S.C. § 411. . In an opinion affirming a conviction for willfully failing to file a return and rejecting the argument that Federal Reserve Notes are not subject to taxation, the court stated that “Congress has declared federal reserve notes legal tender . . . and federal reserve notes are taxable dollars.” United States v. Rifen, 577 F.2d 1111, 1112 (8th Cir. 1978).

#### **Relevant Case Law:**

Sanders v. Freeman, 221 F.3d 846, 855 (6th Cir. 2000), cert. denied, 531 U.S. 1014 (2000) – finding that the defendant’s argument “that imposing sales tax on the sale of legal-tender silver and gold coins unconstitutionally interferes with Congress’s exclusive power to coin money is simply untenable,” the court recognized that “most, if not all, of the courts that have considered this issue have held that imposing sales tax on the purchase of gold and silver coins and bullion for cash does not infringe on Congress’s constitutional power to coin and regulate currency.”

United States v. Condo, 741 F.2d 238, 239 (9th Cir. 1984), cert. denied, 469 U.S. 1164 (1985) – the court upheld the taxpayer’s criminal conviction, rejecting as “frivolous” the argument that Federal Reserve Notes are not valid currency, cannot be taxed, and are merely “debts.”

Jones v. Commissioner, 688 F.2d 17 (6th Cir. 1982) – the court found the taxpayer’s claim that his wages were paid in “depreciated bank notes” as

clearly without merit and affirmed the Tax Court's imposition of an addition to tax for negligence or intentional disregard of rules and regulations.

United States v. Rickman, 638 F.2d 182, 184 (10th Cir. 1980) – the court affirmed the conviction for willfully failing to file a return and rejected the taxpayer's argument that "the Federal Reserve Notes in which he was paid were not lawful money within the meaning of Art. 1, § 8, United States Constitution."

United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973), cert. denied, 414 U.S. 1064 (1973) – the court rejected as "clearly frivolous" the assertion "that the only 'Legal Tender Dollars' are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed" and affirmed Daly's conviction for willfully failing to file a return.

#### **Other Cases:**

United States v. Davenport, 824 F.2d 1511, 1521 (7th Cir. 1987).

#### **4. Contention: Military retirement pay does not constitute income.**

Eligible retired United States military personnel may receive military retirement pay (MRP) from the agency responsible for disbursing these payments, the Defense Finance and Accounting Service (DFAS). Some individuals attempt to claim MRP does not constitute income for federal income tax purposes.

**The Law:** The Tax Code defines gross income as "all income from whatever source derived, including . . . pensions." I.R.C. § 61(a)(11). Military retirement pay is pension income within the meaning of section 61. Wheeler v. Commissioner, 127 T.C. 200, 205 n.11 (2006), aff'd 521 F.3d 1289 (10th Cir. 2008); see also Eatinger v. Commissioner, T.C. Memo. 1990-310.

#### **Relevant Case Law:**

Wheeler v. Commissioner, T.C. Memo. 2010-188 – after ruling multiple filings from taxpayer were frivolous and warning taxpayer to stop making such arguments, Tax Court imposed a \$25,000 penalty under section 6673(a)(1) because taxpayer continued to make the argument that his military retirement pay was not income and that he did not need to file federal income tax returns.

Mathews v. Commissioner, T.C. Memo. 2010-226 – Tax Court held that a military veteran's retirement pay was includable in gross income, that he was subject to additions to tax for failure to file and pay taxes, and imposed a \$500 penalty for "frivolous" arguments intended to delay the proceedings under section 6673(a)(1). Taxpayer had argued that his

military retirement pay, including an amount garnished by the state for child support, was not income.

### **C. The Meaning of Certain Terms Used in the Internal Revenue Code**

#### **1. Contention: Taxpayer is not a “citizen” of the United States, thus not subject to the federal income tax laws.**

Some individuals argue that they have rejected citizenship in the United States in favor of state citizenship; therefore, they are relieved of their federal income tax obligations. A variation of this argument is that a person is a free born citizen of a particular state and thus was never a citizen of the United States. The underlying theme of these arguments is the same: the person is not a United States citizen and is not subject to federal tax laws because only United States citizens are subject to these laws.

**The Law:** The Fourteenth Amendment to the United States Constitution defines the basis for United States citizenship, stating that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The Fourteenth Amendment therefore establishes simultaneous state and federal citizenship. Claims that individuals are not citizens of the United States but are solely citizens of a sovereign state and not subject to federal taxation have been uniformly rejected by the courts. The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2007-22, 2007-1 C.B. 866.

#### **Relevant Case Law:**

United States v. Bowden, 402 F. App'x 967 (5th Cir. 2010) – in denying an appeal of a sentence for tax evasion, the court rejected the taxpayer’s argument that he was a sovereign and not subject to the laws of the United States.

United States v. Drachenberg, 623 F.3d 122 (2d Cir. 2010) – the court affirmed the conviction of Drachenberg for tax evasion and conspiracy to defraud the United States and rejected his argument that the federal courts lacked jurisdiction because he was not a citizen of the United States.

United States v. Hilgeford, 7 F.3d 1340, 1342 (7th Cir. 1993) – the court rejected “shop worn” argument that defendant is a citizen of the “Indiana State Republic” and therefore an alien beyond the jurisdictional reach of the federal courts.

United States v. Gerads, 999 F.2d 1255, 1256 (8th Cir. 1993), cert. denied, 510 U.S. 1193 (1994) – the court rejected the Gerads’ contention

that they were “not citizens of the United States, but rather ‘Free Citizens of the Republic of Minnesota’ and, consequently, not subject to taxation” and imposed sanctions “for bringing this frivolous appeal based on discredited, tax-protester arguments.”

United States v. Sloan, 939 F.2d 499, 500 (7th Cir. 1991), cert. denied, 502 U.S. 1060, reh’g denied, 503 U.S. 953 (1992) – the court affirmed a tax evasion conviction and rejected Sloan’s argument that the federal tax laws did not apply to him because he was a “freeborn, natural individual, a citizen of the State of Indiana, and a ‘master’ – not ‘servant’ – of his government.”

United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987), cert. denied, 485 U.S. 1022 (1988) – the court found Ward’s contention that he was not an “individual” located within the jurisdiction of the United States to be “utterly without merit” and affirmed his conviction for tax evasion.

Kay v. Commissioner, T.C. Memo. 2010-59 – the court imposed a \$500 penalty under section 6673(a) for raising frivolous arguments in the proceeding, including that the petitioner “was not born a [U.S.] taxpayer” and that the United States may not tax him because “the United States is a corporation” to which he holds no “allegiance.”

#### **Other Cases:**

United States v. Sileven, 985 F.2d 962 (8th Cir. 1993); O’Driscoll v. IRS, 1991 U.S. Dist. LEXIS 9829, at \*5-6 (E.D. Pa. Jul. 16, 1991); McLaurine v. Commissioner, T.C. Memo. 2010-236, 100 T.C.M. (CCH) 364 (2010); Callahan v. Commissioner, T.C. Memo. 2010-201, 100 T.C.M. (CCH) 225 (2010); Rice v. Commissioner, T.C. Memo. 2009-169, 98 T.C.M. (CCH) 40 (2009); Knittel v. Commissioner, T.C. Memo. 2009-149, 97 T.C.M. (CCH) 1837 (2009); Bland-Barclay v. Commissioner, T.C. Memo. 2002-20, 83 T.C.M. (CCH) 1119, 1121 (2002); Marsh v. Commissioner, T.C. Memo 2000-11, 79 T.C.M. (CCH) 1327 (2000), aff’d, 23 F. App’x 874 (9th 2002), cert. denied, 537 U.S. 1029 (2002); Solomon v. Commissioner, T.C. Memo. 1993-509, 66 T.C.M. (CCH) 1201, 1202-03 (1993), aff’d 42 F.3d 1391 (7th Cir. 1994).

## **2. Contention: The “United States” consists only of the District of Columbia, federal territories, and federal enclaves.**

Some individuals and groups argue that the United States consists only of the District of Columbia, federal territories (e.g., Puerto Rico, Guam, etc.), and federal enclaves (e.g., American Indian reservations, military bases, etc.) and does not include the “sovereign” states. According to this argument, if a taxpayer does not live within the “United States,” as so defined, he is not subject to the federal tax laws.

**The Law:** The Internal Revenue Code imposes a federal income tax upon all United States citizens and residents, not just those who reside in the District of Columbia, federal territories, and federal enclaves. The United States Supreme Court has “recognized that the sixteenth amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation, not just in federal enclaves.” United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990) (citing Brushaber v. Union Pac. R.R., 240 U.S. 1, 12-19 (1916)), cert. denied, 500 U.S. 920 (1991). This frivolous contention has been uniformly rejected by the courts, and the IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2006-18, 2006-1 C.B. 743.

**Relevant Case Law:**

United States v. Cooper, 170 F.3d 691, 691 (7th Cir. 1999) – the court sanctioned defendant for filing a frivolous appeal wherein he argued, in pertinent part, that only residents of Washington, D.C. and other federal enclaves are subject to the federal tax laws because they alone are citizens of the United States.

United States v. Mundt, 29 F.3d 233, 237 (6th Cir. 1994) – the court rejected the "patently frivolous" argument that defendant was not a resident of any "federal zone" and therefore not subject to federal income tax laws.

In re Becraft, 885 F.2d 547, 549-50 (9th Cir. 1989) – the court imposed monetary damages on Becraft, an attorney, based on his advocacy of frivolous claims, such as that federal laws apply only to United States territories and the District of Columbia, which the court found had “no semblance of merit.”

United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987), cert. denied, 485 U.S. 1022 (1988) – the court rejected as a “twisted conclusion” the contention “that the United States has jurisdiction over only Washington, D.C., the federal enclaves within the states, and the territories and possessions of the United States,” and affirmed a conviction for tax evasion.

Wnuck v. Commissioner, 136 T.C. 498 (2011) – the court described in detail why this argument (based on a misreading of an employment tax provision that includes Puerto Rico, the Virgin Islands, Guam, and American Samoa within the term “United States”) is frivolous and imposed a \$5,000 penalty under section 6673 for maintaining this and other frivolous arguments.

**Other Cases:**

Holmes v. Commissioner, T.C. Memo. 2010-42, 99 T.C.M. (CCH) 1165 (2010); Barcroft v. Commissioner, T.C. Memo. 1997-5, 73 T.C.M. (CCH) 1666, 1667 (1997).

### **3. Contention: Taxpayer is not a “person” as defined by the Internal Revenue Code, thus is not subject to the federal income tax laws.**

Some individuals and groups maintain that they are not a “person” as defined by the Internal Revenue Code, and thus not subject to the federal income tax laws. This argument is based on a tortured misreading of the Code.

**The Law:** The Internal Revenue Code clearly defines “person” and sets forth which persons are subject to federal taxes. Section 7701(a)(14) defines “taxpayer” as any person subject to any internal revenue tax and section 7701(a)(1) defines “person” to include an individual, trust, estate, partnership, or corporation. Arguments that an individual is not a “person” within the meaning of the Internal Revenue Code have been uniformly rejected. A similar argument with respect to the term “individual” has also been rejected. The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2007-22, 2007-1 C.B. 866.

#### **Relevant Case Law:**

United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986), cert. denied, 480 U.S. 907 (1987) – the court affirmed Karlin’s conviction for failure to file income tax returns and rejected his contention that he was “not a ‘person’ within meaning of 26 U.S.C. § 7203” as “frivolous and requir[ing] no discussion.”

United States v. Studley, 783 F.2d 934, 937 n.3 (9th Cir. 1986) – in affirming a conviction for failure to file income tax returns, the court rejected the taxpayer’s contention that she was not subject to federal tax laws because she was “an absolute, freeborn, and natural individual” and noted that “this argument has been consistently and thoroughly rejected by every branch of the government for decades.”

Biermann v. Commissioner, 769 F.2d 707, 708 (11th Cir. 1985), reh’g denied, 775 F.2d 304 (11th Cir. 1985) – the court said the claim that Biermann was not “a person liable for taxes” was “patently frivolous” and, given the Tax Court’s warning to Biermann that his positions would never be sustained in any court, awarded the government double costs, plus attorney’s fees.

Smith v. Commissioner, T.C. Memo. 2000-290, 80 T.C.M. (CCH) 377, 378-89 (2000) – the court described the argument that Smith “is not a ‘person liable’ for tax” as frivolous, sustained failure to file penalties, and imposed a penalty for maintaining “frivolous and groundless positions.”

**Other Cases:**

McCoy v. Internal Revenue Service, 2001 U.S. Dist. LEXIS 15113, at \*21, 22, 88 A.F.T.R.2d (RIA) 5909 (D. Col. Aug. 7, 2001); United States v. Rhodes, 921 F. Supp. 261, 264 (M.D. Pa. 1996).

**4. Contention: The only “employees” subject to federal income tax are employees of the federal government.**

This contention asserts that the federal government can tax only employees of the federal government; therefore, employees in the private sector are immune from federal income tax liability. This argument is based on a misinterpretation of section 3401, which imposes responsibilities to withhold tax from “wages.” That section establishes the general rule that “wages” include all remuneration for services performed by an employee for his employer. Section 3401(c) goes on to state that the term “employee” includes “an officer, employee, or elected official of the United States, a State, or any political subdivision thereof . . . .”

**The Law:** Section 3401(c) defines “employee” and states that the term “includes an officer, employee or elected official of the United States . . . .” This language does not address how other employees’ wages are subject to withholding or taxation. Section 7701(c) states that the use of the word “includes” “shall not be deemed to exclude other things otherwise within the meaning of the term defined.” Thus, the word “includes” as used in the definition of “employee” is a term of enlargement, not of limitation. It clearly makes federal employees and officials a part of the definition of “employee,” which generally includes private citizens. The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2006-18, 2006-1 C.B. 743.

**Relevant Case Law:**

Montero v. Commissioner, 354 F. App’x 173 (5th Cir. 2009) – the court affirmed a \$20,000 section 6673(a) penalty against the petitioner for advancing frivolous arguments that he is not an employee earning wages as defined by sections 3121 and 3401.

Sullivan v. United States, 788 F.2d 813, 815 (1st Cir. 1986) – the court imposed sanctions on the taxpayer for bringing a frivolous appeal and rejected his attempt to recover a civil penalty for filing a frivolous return, stating “to the extent [he] argues that he received no ‘wages’ . . . because he was not an ‘employee’ within the meaning of 26 U.S.C. § 3401(c), that contention is meritless. . . . The statute does not purport to limit withholding to the persons listed therein.”

United States v. Latham, 754 F.2d 747, 750 (7th Cir. 1985) – calling the instructions the taxpayer wanted given to the jury “inane,” the court said,



“[the] instruction which indicated that under 26 U.S.C. § 3401(c) the category of ‘employee’ does not include privately employed wage earners is a preposterous reading of the statute. It is obvious within the context of [the law] the word ‘includes’ is a term of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others.”

United States v. Hendrickson, 100 A.F.T.R.2d (RIA) 2007-5395, 2007 WL 2385071 (E.D. Mich. May 2, 2007) – the court permanently barred Peter and Doreen Hendrickson, who filed tax returns on which they falsely report their income as zero, from filing tax returns and forms based on frivolous claims in Hendrickson’s book, “Cracking the Code,” that only federal, state, or local government workers are liable for federal income tax or subject to the withholding of federal taxes.

#### **Other Cases:**

Peth v. Breitzmann, 611 F. Supp. 50, 53 (E.D. Wis. 1985); Pabon v. Commissioner, T.C. Memo. 1994-476, 68 T.C.M. (CCH) 813, 816 (1994).

### **D. Constitutional Amendment Claims**

#### **1. Contention: Taxpayers can refuse to pay income taxes on religious or moral grounds by invoking the First Amendment.**

Some individuals or groups claim that taxpayers may refuse to pay federal income taxes based on their religious or moral beliefs or an objection to the use of taxes to fund certain government programs. These persons mistakenly invoke the First Amendment in support of this frivolous position.

**The Law:** The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The First Amendment, however, does not provide a right to refuse to pay income taxes on religious or moral grounds or because taxes are used to fund government programs opposed by the taxpayer. The First Amendment does not protect commercial speech or speech that aids or incites taxpayers to unlawfully refuse to pay federal income taxes, including speech that promotes abusive tax avoidance schemes.

#### **Relevant Case Law:**

United States v. Lee, 455 U.S. 252, 260 (1982) – the Supreme Court held that the broad public interest in maintaining a sound tax system is of such importance that religious beliefs in conflict with the payment of taxes

provide no basis for refusing to pay, and stated that “[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”

Jenkins v. Commissioner, 483 F.3d 90, 92 (2d Cir. 2007), cert. denied, 552 U.S. 821 (2007) – upholding the imposition of a \$5,000 frivolous return penalty against the taxpayer, the court held that the collection of tax revenues for expenditures that offended the religious beliefs of individual taxpayers did not violate the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act of 1993, or the Ninth Amendment.

United States v. Indianapolis Baptist Temple, 224 F.3d 627, 629-31 (7th Cir. 2000), cert. denied, 531 U.S. 1112 (2001) – the court rejected defendant’s Free Exercise challenge to the federal employment tax as those laws were not restricted to the defendant or other religion-related employers generally, and there was no indication that they were enacted for the purpose of burdening religious practices.

Adams v. Commissioner, 170 F.3d 173, 175-82 (3d Cir. 1999) – the court affirmed adjudged tax deficiencies and penalties for failure to file tax returns and pay tax, holding that the Religious Freedom Restoration Act did not require that the federal income tax accommodate Adams’ religious beliefs that payment of taxes to fund the military is against the will of God, and that her beliefs were not constitute reasonable cause for purposes of the penalties.

United States v. Ramsey, 992 F.2d 831, 833 (8th Cir. 1993) – the court rejected Ramsey’s argument that filing federal income tax returns and paying federal income taxes violates his pacifist religious beliefs and stated that Ramsey “has no First Amendment right to avoid federal income taxes on religious grounds.”

Wall v. United States, 756 F.2d 52 (8th Cir. 1985) – the court upheld the imposition of a \$500 frivolous return penalty against Wall for taking a “war tax deduction” on his federal income tax return based on his religious convictions and stated the “necessities of revenue collection through a sound tax system raise governmental interests sufficiently compelling to outweigh the free exercise rights of those who find the tax objectionable on bona fide religious grounds.”

United States v. Peister, 631 F.2d 658, 665 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981) – the court rejected Peister’s argument that he was exempt from income tax based on his vow of poverty after he became the minister of a church he formed and found his First Amendment right to freedom of religion was not violated.

## **2. Contention: Federal income taxes constitute a “taking” of property without due process of law, violating the Fifth Amendment.**

Some individuals or groups assert that the collection of federal income taxes constitutes a “taking” of property without due process of law, in violation of the Fifth Amendment. Thus, any attempt by the IRS to collect federal income taxes owed by a taxpayer is unconstitutional.

**The Law:** The Fifth Amendment to the United States Constitution provides that a person shall not be “deprived of life, liberty, or property, without due process of law . . . .” The United States Supreme Court stated that “it is . . . well settled that [the Fifth Amendment] is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power, and taking the same power away on the other by limitations of the due process clause.” Brushaber v. Union Pacific R.R., 240 U.S. 1, 24 (1916). Further, the Supreme Court has upheld the constitutionality of the summary administrative procedures contained in the Internal Revenue Code against due process challenges, on the basis that a post-collection remedy (e.g., a tax refund suit) exists and is sufficient to satisfy the requirements of constitutional due process. Phillips v. Commissioner, 283 U.S. 589, 595-97 (1931).

The Internal Revenue Code provides methods to ensure due process to taxpayers: (1) the “refund method,” set forth in section 7422(e) and 28 U.S.C. §§ 1341 and 1346(a), where a taxpayer must pay the full amount of the tax and then sue in a federal district court or in the United States Court of Federal Claims for a refund; and (2) the “deficiency method,” set forth in section 6213(a), where a taxpayer may, without paying the contested tax, petition the United States Tax Court to redetermine a tax deficiency asserted by the IRS. Courts have found that both methods provide constitutional due process.

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to pursue a claim on these grounds. Rev. Rul. 2005-19, 2005-1 C.B. 819.

For a discussion of frivolous tax arguments made in collection due process cases arising under sections 6320 and 6330, see Section II of this outline.

### **Relevant Case Law:**

Flora v. United States, 362 U.S. 145, 175 (1960) – the Supreme Court held that a taxpayer must pay the full tax assessment before being able to file a refund suit in district court, noting that a person has the right to appeal an assessment to the Tax Court “without paying a cent.”

Schiff v. United States, 919 F.2d 830 (2d Cir. 1990), cert. denied, 501 U.S. 1238 (1991) – the court rejected a due process claim where the taxpayer chose not to avail himself of the opportunity to appeal a deficiency notice to the Tax Court.

### **3. Contention: Taxpayers do not have to file returns or provide financial information because of the protection against self-incrimination found in the Fifth Amendment.**

Some individuals or groups claim that taxpayers may refuse to file federal income tax returns, or may submit tax returns on which they refuse to provide any financial information, because they believe that their Fifth Amendment privilege against self-incrimination will be violated.

**The Law:** There is no constitutional right to refuse to file an income tax return on the ground that it violates the Fifth Amendment privilege against self-incrimination. As the Supreme Court has stated, a taxpayer cannot “draw a conjurer’s circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.” United States v. Sullivan, 274 U.S. 259, 264 (1927). The failure to comply with the filing and reporting requirements of the federal tax laws will not be excused based upon blanket assertions of the constitutional privilege against compelled self-incrimination under the Fifth Amendment.

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to pursue a claim on these grounds. Rev. Rul. 2005-19, 2005-1 C.B. 819.

#### **Relevant Case Law:**

Sochia v. Commissioner, 23 F.3d 941 (5th Cir. 1994), cert. denied, 513 U.S. 1153 (1995) – the court affirmed tax assessments and penalties for failure to file returns, failure to pay taxes, and filing a frivolous return and imposed sanctions for pursuing a frivolous case because the taxpayers claimed a Fifth Amendment privilege on each line calling for financial information, rather than provide any information on their tax return about income and expenses.

United States v. Neff, 615 F.2d 1235, 1241 (9th Cir. 1980), cert. denied, 447 U.S. 925 (1980) – the court affirmed a failure to file conviction, noting that the taxpayer “did not show that his response to the tax form questions would have been self-incriminating. He cannot, therefore, prevail on his Fifth Amendment claim.”

United States v. Schiff, 612 F.2d 73, 83 (2d Cir. 1979) – the court said that “the Fifth Amendment privilege does not immunize all witnesses from testifying. Only those who assert as to each particular question that the

answer to that question would tend to incriminate them are protected . . . . [T]he questions in the income tax return are neutral on their face . . . [h]ence privilege may not be claimed against all disclosure on an income tax return.”

United States v. Brown, 600 F.2d 248, 252 (10th Cir. 1979), cert. denied, 444 U.S. 917 (1979) – the court held Brown made “an illegal effort to stretch the Fifth Amendment to include a taxpayer who wishes to avoid filing a return.”

United States v. Daly, 481 F.2d 28, 30 (8th Cir. 1973), cert. denied, 414 U.S. 1064 (1973) – the court affirmed a failure to file conviction, rejecting the taxpayer’s Fifth Amendment claim because of his “error in . . . his blanket refusal to answer any questions on the returns relating to his income or expenses.”

#### **4. Contention: Compelled compliance with the federal income tax laws is a form of servitude in violation of the Thirteenth Amendment.**

This argument asserts that the compelled compliance with federal tax laws is a form of servitude in violation of the Thirteenth Amendment.

**The Law:** The Thirteenth Amendment to the United States Constitution prohibits slavery within the United States, as well as the imposition of involuntary servitude, except as punishment for a crime of which a person shall have been duly convicted. “If the requirements of the tax laws were to be classed as servitude, they would not be the kind of involuntary servitude referred to in the Thirteenth Amendment.” Porth v. Brodrick, 214 F.2d 925, 926 (10th Cir. 1954) (per curiam). Courts have consistently found arguments that taxation constitutes a form of involuntary servitude to be frivolous.

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to pursue a claim on these grounds. Rev. Rul. 2005-19, 2005-1 C.B. 819.

#### **Relevant Case Law:**

United States v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983), cert. denied, Jameson v. United States, 464 U.S. 942 (1983) – the court affirmed the taxpayer’s failure to file conviction and rejected his claim that the Thirteenth Amendment prohibited his imprisonment because that amendment “is inapplicable where involuntary servitude is imposed as punishment for a crime.”

Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979), cert. denied, 446 U.S. 967 (1980) – the court rejected the taxpayer’s claim that the Internal

Revenue Code results in involuntary servitude in violation of the Thirteenth Amendment.

Kasey v. Commissioner, 457 F.2d 369 (9th Cir. 1972), cert. denied, 400 U.S. 864 (1972) – the court rejected as without merit the argument that the requirements to keep records and to prepare and file tax returns violated the taxpayers’ Fifth Amendment privilege against self-incrimination and amount to involuntary servitude prohibited by the Thirteenth Amendment.

Porth v. Brodrick, 214 F.2d 925, 926 (10th Cir. 1954) – the court described the taxpayer’s Thirteenth and Sixteenth Amendment claims as “clearly unsubstantial and without merit,” as well as “far-fetched and frivolous.”

Wilbert v. IRS (In re Wilbert), 262 B.R. 571, 578 (Bankr. N.D. Ga. 2001) – the court rejected the taxpayer’s argument that taxation is a form of involuntary servitude prohibited by the Thirteenth Amendment.

**5. Contention: The federal income tax laws are unconstitutional because the Sixteenth Amendment to the United States Constitution was not properly ratified.**

This argument is based on the premise that all federal income tax laws are unconstitutional because the Sixteenth Amendment was not officially ratified or because the State of Ohio was not properly a state at the time of ratification. Proponents mistakenly believe that the courts have refused to address this issue.

**The Law:** The Sixteenth Amendment provides that Congress shall have the power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration. The Sixteenth Amendment was ratified by forty states, including Ohio (which became a state in 1803; see Bowman v. United States, 920 F. Supp. 623 n.1 (E.D. Pa. 1995) (discussing the 1953 joint Congressional resolution that confirmed Ohio’s status as a state retroactive to 1803), and issued by proclamation in 1913. Shortly thereafter, two other states also ratified the Amendment. Under Article V of the Constitution, only three-fourths of the states are needed to ratify an Amendment. There were enough states ratifying the Sixteenth Amendment even without Ohio to complete the number needed for ratification. Furthermore, the United States Supreme Court upheld the constitutionality of the income tax laws enacted subsequent to ratification of the Sixteenth Amendment. Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916). Since that time, the courts have consistently upheld the constitutionality of the federal income tax.

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to pursue a claim on these grounds. Rev. Rul. 2005-19, 2005-1 C.B. 819.

**Relevant Case Law:**

Sochia v. Commissioner, 23 F.3d 941, 944 (5th Cir. 1994), reh'g denied, 35 F.3d 568 (5th Cir. 1994), cert. denied, 513 U.S. 1153 (1995) – the court held that defendant's appeals which challenged Sixteenth Amendment income tax legislation were frivolous and warranted sanctions.

Miller v. United States, 868 F.2d 236, 241 (7th Cir. 1989) (per curiam) – the court imposed sanctions on the taxpayer for advancing a “patently frivolous” position and stated, “We find it hard to understand why the long and unbroken line of cases upholding the constitutionality of the sixteenth amendment generally, Brushaber v. Union Pacific Railroad Company . . . and those specifically rejecting the argument advanced in The Law That Never Was, have not persuaded Miller and his compatriots to seek a more effective forum for airing their attack on the federal income tax structure.”

United States v. Stahl, 792 F.2d 1438, 1441 (9th Cir. 1986), cert. denied, 479 U.S. 1036 (1987) – the court stated that “the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the Constitution is conclusive upon the courts” and the court upheld Stahl's conviction for failure to file returns and for making a false statement.

United States v. Foster, 789 F.2d 457 (7th Cir. 1986), cert. denied, 479 U.S. 883 (1986) – the court affirmed the taxpayer's conviction for tax evasion, failing to file a return, and filing a false W-4 statement and rejected his claim that the Sixteenth Amendment was never properly ratified.

Knoblauch v. Commissioner, 749 F.2d 200, 201 (5th Cir. 1984), cert. denied, 474 U.S. 830 (1986) – the court rejected as “totally without merit” the contention that the Sixteenth Amendment was not constitutionally adopted and imposed monetary sanctions against Knoblauch based on the frivolousness of his appeal.

**Other Cases:**

United States v. Benson, 2008 WL 267055 (N.D. Ill. Jan. 10, 2008), aff'd in part, rev'd in part, 561 F.3d 718 (7th Cir. 2009), cert. denied, 130 S. Ct. 759 (2009); United States v. Schulz, 529 F.Supp.2d 341 (N.D.N.Y. 2007), aff'd 517 F.3d 606 (2nd Cir. 2008), cert. denied, 555 U.S. 946 (2008); Stearman v. Commissioner, T.C. Memo. 2005-39, 89 T.C.M. (CCH) 823 (2005), aff'd, 436 F.3d 533 (5th Cir. 2006), cert. denied, 547 U.S. 1207 (2006).

**6. Contention: The Sixteenth Amendment does not authorize a direct non-apportioned federal income tax on United States citizens.**

Some individuals or groups assert that the Sixteenth Amendment does not authorize a direct non-apportioned income tax and thus, U.S. citizens and residents are not subject to federal income tax laws.

**The Law:** The constitutionality of the Sixteenth Amendment has invariably been upheld when challenged. And numerous courts have both implicitly and explicitly recognized that the Sixteenth Amendment authorizes a non-apportioned direct income tax on United States citizens and that the federal tax laws as applied are valid.

**Relevant Case Law:**

United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990) (relying on Brushaber v. Union Pac. R.R., 240 U.S. 1, 12-19 (1916)), cert. denied, 500 U.S. 950 (1991) – the court found defendant’s argument that the Sixteenth Amendment does not authorize a direct, non-apportioned tax on United States citizens to be “devoid of any arguable basis in law.”

In re Becraft, 885 F.2d 547, 548-49 (9th Cir. 1989) – the court affirmed a failure to file conviction and rejected the taxpayer’s frivolous position that the Sixteenth Amendment does not authorize a direct non-apportioned income tax.

Lovell v. United States, 755 F.2d 517, 518-20 (7th Cir. 1984) – the court rejected the argument that the Constitution prohibits imposition of a direct tax without apportionment, upheld assessment of the frivolous return penalty, and imposed sanctions for pursuing “frivolous arguments in bad faith” on top of the lower court’s award of attorneys’ fees to the government.

Maxwell v. Internal Revenue Service, 103 A.F.T.R.2d (RIA) 2009-1571, 2009 WL 920533 (M.D. Tenn. Apr. 1, 2009) – the court found that the taxpayer’s arguments to have been “routinely rejected,” principally that there is no law that imposes an income tax nor is there a non-apportioned direct tax that could be imposed on him as a supposed non-citizen.

**Other Cases:**

Broughton v. United States, 632 F.2d 706 (8th Cir. 1980), cert. denied, 450 U.S. 930 (1981); United States v. Hockensmith, 2009 WL 1883521, 104 A.F.T.R.2d 2009-5133 (M.D. Pa. June 30, 2009); Stearman v. Commissioner, T.C. Memo. 2005-39, 89 T.C.M. (CCH) 823 (2005), aff’d, 436 F.3d 533 (5th Cir. 2006), cert. denied, 547 U.S. 1207 (2006).



## **E. Fictional Legal Bases**

### **1. Contention: The Internal Revenue Service is not an agency of the United States.**

Some argue that the IRS is not an agency of the United States but rather a private corporation, because it was not created by positive law (i.e., an act of Congress) and that, therefore, the IRS does not have the authority to enforce the Internal Revenue Code.

**The Law:** There is a host of constitutional and statutory authority establishing that the IRS is an agency of the United States. Indeed, the United States Supreme Court has stated “that the Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the Treasury under § 7801(a) of the 1954 Code for the administration and enforcement of the internal revenue laws.” Donaldson v. United States, 400 U.S. 517, 534 (1971).

Pursuant to section 7801, the Secretary of the Treasury has full authority to administer and enforce the internal revenue laws and has the power to create an agency to enforce such laws. Based upon this legislative grant, the IRS was created. Thus, the IRS is a body established by “positive law” because it was created through a congressionally mandated power. Moreover, section 7803(a) explicitly provides that there shall be a Commissioner of Internal Revenue who shall administer and supervise the execution and application of the internal revenue laws.

#### **Relevant Case Law:**

United States v. Fern, 696 F.2d 1269, 1273 (11th Cir. 1983) – the court declared “[c]learly, the Internal Revenue Service is a ‘department or agency’ of the United States.”

Salman v. Dept. of Treasury, 899 F.Supp. 471, 472 (D. Nev. 1995) – the court described Salman’s contention that the IRS is not a government agency of the United States as wholly frivolous and dismissed his claim with prejudice.

Young v. IRS, 596 F.Supp. 141, 147 (N.D. Ind. 1984) – the court granted summary judgment in favor of the government, rejecting Young’s claim that the IRS is a private corporation, rather than a government agency.

**2. Contention: Taxpayers are not required to file a federal income tax return, because the instructions and regulations associated with the Form 1040 do not display an OMB control number as required by the Paperwork Reduction Act.**

Some individuals and groups claim that taxpayers are not required to file tax returns because of the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501, *et seq.* ("PRA"). The PRA was enacted to limit federal agencies' information requests that burden the public. The "public protection" provision of the PRA provides that no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved does not display a current control number assigned by the Office of Management and Budget [OMB] Director. 44 U.S.C. § 3512. Advocates of this contention claim that they cannot be penalized for failing to file Form 1040, because the instructions and regulations associated with the Form 1040 do not display any OMB control number.

**The Law:** The courts have uniformly rejected this argument on multiple grounds. Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and because the Form 1040 does have a control number, there is no PRA violation. Other courts have held that Congress created the duty to file returns in section 6012(a) and "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." United States v. Neff, 954 F.2d 698, 699 (11th Cir. 1992). The IRS warned taxpayers of the consequences of making this frivolous argument. Rev. Rul. 2006-21, 2006-1 C.B. 745.

**Relevant Case Law:**

Dodge v. Commissioner, 317 F. App'x 581 (8th Cir. 2009) – the court treated the taxpayer's argument that the Form 1040 does not comply with the PRA as frivolous.

Wolcott v. Commissioner, 103 A.F.T.R.2d 2009-1300 (6th Cir. 2008) – the court rejected the taxpayer's argument that Form 1040 does not comply with the PRA and imposed sanctions of \$4,000 under 12 U.S.C. § 1912 for bringing a frivolous appeal.

United States v. Patridge, 507 F.3d 1092 (7th Cir. 2007), *cert. denied*, 552 U.S. 1280 (2008), *reh'g denied*, 553 U.S. 1062 (2008) – in upholding the taxpayer's conviction for tax evasion, the court addressed and rejected the taxpayer's contention that the PRA foreclosed his conviction.

Salberg v. United States, 969 F.2d 379 (7th Cir. 1992) – rejecting the taxpayer's claims under the PRA, the court affirmed his conviction for tax evasion and failing to file a return.

United States v. Holden, 963 F.2d 1114 (8th Cir. 1992), cert. denied, 506 U.S. 958 (1992) – the court affirmed the taxpayer’s conviction for failing to file a return and rejected his contention that he should have been acquitted because tax instruction booklets fail to comply with the PRA.

United States v. Hicks, 947 F.2d 1356, 1359 (9th Cir. 1991) – the court affirmed the taxpayer’s conviction for failing to file a return, finding that the requirement to provide information is required by law, not by the IRS. “This is a legislative command, not an administrative request. The PRA was not meant to provide criminals with an all-purpose escape hatch.”

Lonsdale v. United States, 919 F.2d 1440, 1445 (10th Cir. 1990) – the court held that the PRA does not apply to summonses and collection notices.

United States v. Wunder, 919 F.2d 34 (6th Cir. 1990) – the court rejected the taxpayer’s claim of a PRA violation and affirmed his conviction for failing to file a return.

#### **Other Cases:**

Saxon v. United States, T.C. Memo. 2006-52, 91 T.C.M. (CCH) 914 (2006).

### **3. Contention: African Americans can claim a special tax credit as reparations for slavery and other oppressive treatment.**

Proponents of this contention assert that African Americans can claim a so-called “Black Tax Credit” on their federal income tax returns as reparations for slavery and other oppressive treatment suffered by African Americans. A similar frivolous argument has been made that Native Americans are entitled to a credit on their federal income tax returns as a form of reparations for past oppressive treatment.

**The Law:** There is no provision in the Internal Revenue Code which allows taxpayers to claim a “Black Tax Credit” or a credit for Native American reparations. It is a well settled principle of law that deductions and credits are a matter of legislative grace. See *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934). Unless specifically provided for in the Internal Revenue Code, no deduction or credit may be allowed.

The IRS warned taxpayers of the consequences of claiming refunds or other tax benefits based on frivolous reparations tax credits. Rev. Rul. 2004-33, 2004-1 C.B. 628. Also, with respect to a somewhat similar argument, the IRS warned taxpayers about the frivolous nature of claiming an exemption for Native Americans from federal income tax liability based

upon an unspecified “Native American Treaty.” Rev. Rul. 2006-20, 2006-1 C.B. 746.

Persons who claim refunds based on the slavery reparation tax credit or assist others in doing so are subject to prosecution for violation of federal tax laws. Furthermore, the United States has a cause of action for injunctive relief against a party suspected of violating the tax laws. Sections 7407 and 7408 provide for injunctive relief against income tax preparers and promoters of abusive tax shelters, respectively, in these types of cases.

#### **Relevant Case Law:**

United States v. Bridges, 86 A.F.T.R.2d (RIA) 2000-5280 (4th Cir. 2000) – the court upheld the taxpayer’s conviction of aiding and assisting the preparation of false tax returns, on which he claimed a non-existent “Black Tax Credit.”

United States v. Foster, 2002 U.S. Dist. LEXIS 3092, 2002-1 U.S.T.C. (CCH) ¶ 50,263 (E.D. Va. 2002), aff’d, 51 F. App’x 915 (4th Cir. 2002) – the court held that the United States clearly established its right to recover an erroneously paid refund in the amount of \$500,000, plus interest, where the claim for refund was based on the slavery reparation tax credit.

Taylor v. United States, 57 Fed. Cl. 264, 266 (2003) – the court upheld IRS’s denial of the taxpayer’s refund claim, which was based on “being reduced to a second class citizen, but billed first class citizenship taxes for over 60 years,” and held that the Internal Revenue Code does not contain a provision allowing slavery reparation claims.

George v. Commissioner, T.C. Memo. 2006-121 – the court rejected the taxpayer’s frivolous argument that he is an “Indian not paying taxes,” finding that Native Americans are subject to the same federal income tax laws as are other United States citizens, unless there is an exemption created by treaty or statute.

Wilkins v. Commissioner, 120 T.C. 109 (2003) – the court found that the Internal Revenue Code does not provide a tax deduction, credit, or other allowance for slavery reparations.

#### **Other Cases:**

United States v. Haugabook, 2002 U.S. Dist. LEXIS 25314 (M.D. Ga. Dec. 9, 2002); United States v. Mims, 2002 U.S. Dist. LEXIS 25291 (S.D. Ga. Oct. 3, 2002); United States v. Foster, 2002 U.S. Dist. LEXIS 3092 (E.D. Va. Jan. 16, 2002), aff’d, 51 F. App’x 915 (4th Cir. 2002); Gunton v. Commissioner, T.C. Memo. 2006-122, 91 T.C.M. (CCH) 1261 (2006).

**4. Contention: Taxpayers are entitled to a refund of the Social Security taxes paid over their lifetime.**

Proponents of this contention encourage individuals to file claims for refund of the Social Security taxes paid during their lifetime on the basis that the claimants have sought to waive all rights to their Social Security benefits. Additionally, some advise taxpayers to claim a charitable contribution deduction as a result of their “gift” of these benefits or of the Social Security taxes to the United States.

**The Law:** There is no provision in the Internal Revenue Code, or any other provision of law, which allows for a refund of Social Security taxes paid on the grounds asserted above. A person may not claim a charitable contribution deduction based upon the purported waiver of future Social Security benefits. Crouch v. Commissioner, T.C. Memo. 1990-309, 59 T.C.M. (CCH) 938 (1990).

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to pursue a claim on these grounds. Rev. Rul. 2005-17, 2005-1 C.B. 823.

**5. Contention: An “untaxing” package or trust provides a way of legally and permanently avoiding the obligation to file federal income tax returns and pay federal income taxes.**

Advocates of this idea believe that an “untaxing” package or trust provides a way of legally and permanently “untaxing” oneself so that a person would no longer be required to file federal income tax returns and pay federal income taxes. Promoters who sell such tax evasion plans and supposedly teach individuals how to remove themselves from the federal tax system rely on many of the above-described frivolous arguments, such as the claim that payment of federal income taxes is voluntary, that there is no requirement for a person to file federal income tax returns, and that there are legal ways not to pay federal income taxes.

**The Law:** The underlying claims for these “untaxing” packages are frivolous, as specified above. Furthermore, the IRS warned that taxpayers may not eliminate their federal income tax liability by attributing income to a trust and claiming expense deductions related to that trust. Rev. Rul. 2006-19, 2006-1 C.B. 749.

Promoters of these “untaxing” schemes as well as willful taxpayers have been subjected to criminal penalties for their actions. Taxpayers who have purchased and followed these “untaxing” plans have also been subjected to civil penalties for failure to timely file a federal income tax return and failure to pay federal income taxes. And those who promote, advise on, or assist with these schemes can be enjoined from further

carrying out this conduct or may be denied the ability to practice before the IRS.

**Relevant Case Law:**

United States v. Bell, 414 F.3d 474 (3d Cir. 2005) – the court affirmed a permanent injunction against Bell, who sold customers access to materials instructing them on how to use a phony “U.S. Sources rationale” to file income tax returns reporting zero income.

United States v. Andra, 218 F.3d 1106 (9th Cir. 2000) – in affirming the conviction of a promoter of an untaxing scheme for tax evasion and conspiracy, the court found that it was proper to include the tax liabilities of persons Andra recruited into a tax fraud conspiracy when calculating the effect of his actions for sentencing.

United States v. Raymond, 228 F.3d 804, 812 (7th Cir. 2000), cert. denied, 533 U.S. 902 (2001) – the court affirmed a permanent injunction against taxpayers who promoted a “De-Taxing America Program” forbidding them from engaging in certain activities that incited others to violate tax laws. The court said, “[W]e conclude that the statements the appellants made in the Just Say No advertisement were representations concerning the tax benefits of purchasing and following the De-Taxing America Program that the appellants reasonably should have known were false.”

United States v. Clark, 139 F.3d 485 (5th Cir. 1998), cert. denied, 525 U.S. 899 (1998) – the court upheld convictions of defendants involved with The Pilot Connection Society for conspiracy to defraud the United States and aiding and abetting the filing of fraudulent Forms W-4.

United States v. Scott, 37 F.3d 1564 (10th Cir. 1994), cert. denied, Skinner v. United States, 513 U.S. 1100 (1995) – the court concluded the defendants were the promoters of a multi-tiered trust package marketed to purchasers as a device to eliminate tax liability without losing control over their assets or income.

United States v. Meek, 998 F.2d 776 (10th Cir. 1993) – the court upheld Meek’s conviction of willfully failing to file an income tax return and willfully attempting to evade taxes because his “trust” had been formed through his membership in an organization (a “warehouse bank”) that provided its members the opportunity to warehouse their funds until directed to disburse them.

United States v. Kaun, 827 F.2d 1144 (7th Cir. 1987) – the court affirmed the district court’s injunction prohibiting the taxpayer from inciting others to submit tax returns based on false income tax theories.

United States v. Krall, 835 F.2d 711 (8th Cir. 1987) – the court held that the trusts used by the defendant were shams, in which he exercised the same dominion and control over the corpus and income of the trusts as he had before the trusts were executed.

Lizalek v. United States, T.C. Memo. 2009-122, 97 T.C.M. (CCH) 1639 (2009) – the court held that a trust, which the taxpayer claimed was created when the Social Security Administration issued a Social Security card to the taxpayer, did not exist and that the taxpayer earned the wages and other income includable in gross income.

#### **Other Cases:**

United States v. Binge, 2004 WL 2600770, 94 A.F.T.R. 2d 2004-6502 (N.D. Ohio Sep. 27, 2004); King v. Commissioner, T.C. Memo. 1995-524, 70 T.C.M. (CCH) 1152 (1995); Robinson v. Commissioner, T.C. Memo. 1995-102, 69 T.C.M. (CCH) 2061, 2062 (1995) (citing Hanson v. Commissioner, 696 F.2d 1232, 1234 (9th Cir. 1983)).

#### **6. Contention: A “corporation sole” can be established and used for the purpose of avoiding federal income taxes.**

Advocates of this idea believe they can reduce their federal tax liability by taking the position that the taxpayer’s income belongs to a “corporation sole” (these have also been referred to as “ministerial trusts”), an entity created for the purpose of avoiding taxes. A valid corporation sole is a corporate form that enables religious leaders to hold property and conduct business for the religious entity. Participants in this scheme apply for incorporation under the pretext of being an official of a church or other religious organization. Participants contend that their income is exempt from taxation because the income allegedly belongs to the corporation sole, which is claimed to be a tax exempt organization described in section 501(c)(3).

**The Law:** A valid corporation sole enables a bona fide religious leader, such as a bishop or other authorized religious official, to incorporate under state law, in his capacity as a religious official. See, e.g., Berry v. Society of Saint Pius X, 69 Cal. App. 4th 354 (1999). A corporation sole may own property and enter into contracts as a natural person, but only for the purposes of the religious entity and not for the individual office holder’s personal benefit. A legitimate corporation sole is designed to ensure continuity of ownership of property dedicated to the benefit of a legitimate religious organization.

A taxpayer cannot avoid income tax or other financial responsibilities by purporting to be a religious leader and forming a corporation sole for tax avoidance purposes. The claims that such a corporation sole is described in section 501(c)(3) and that assignment of income and transfer of assets

to such an entity will exempt an individual from income tax are meritless. Courts have repeatedly rejected similar arguments as frivolous, imposed penalties for making such arguments, and upheld criminal tax evasion convictions against those making or promoting the use of such arguments.

The IRS discussed this frivolous argument in more detail and warned taxpayers of the consequences of attempting to use this scheme. Rev. Rul. 2004-27, 2004-1 C.B. 625.

### **Relevant Case Law:**

United States v. Heineman, 801 F.2d 86 (2d Cir. 1986), cert. denied, 479 U.S. 1094 (1987) – the court upheld the conviction and three year prison sentence imposed against the defendants for promoting use of purported church entities to avoid taxes.

United States v. Adu, 770 F.2d 1511 (9th Cir. 1985), cert. denied, 475 U.S. 1030 (1986) – the court upheld the defendant’s conviction for aiding and assisting in the preparation and presentation of false income tax returns with respect to false charitable deductions to purported church entities.

United States v. Gardner, 101 A.F.T.R.2d (RIA) 2008-2016, 2008 WL 906696 (D. Ariz. Mar. 21, 2008), aff’d, 108 A.F.T.R.2d (RIA) 2011-6961, 2011 WL 5149150 (9th Cir. Nov. 1, 2011) – the court permanently enjoined the Gardners from promoting a tax fraud scheme involving a “corporation sole” program that they had sold to over 300 people.

Svedahl v. Commissioner, 89 T.C. 245 (1987) – the court sanctioned the taxpayer under section 6673 in the amount of \$5,000 for using contributions to purported church entities to shield income and pay personal expenses.

### **7. Contention: Taxpayers who did not purchase and use fuel for an off-highway business can claim the fuels tax credit.**

Proponents of this idea assert that taxpayers can claim the section 6421 fuels tax credit without regard to whether they qualify for the credit through the purchase and use of gasoline for an off-highway business. In addition, certain purveyors of fraudulent tax schemes have claimed on behalf of clients (usually on IRS Form 4136, Credit for Federal Tax Paid on Fuels) the tax credit under section 6427 for nontaxable uses of fuel when the taxpayers clearly are not entitled to the credit based on the facts, such as the taxpayers’ occupation and income level, type of motor vehicle and how it is used, and the volume of fuel claimed.

**The Law:** These claims are frivolous. Section 6421(a) allows a tax credit for gasoline purchased and used in an off-highway business. Similarly,



section 6427 provides a tax credit to certain purchasers of undyed diesel fuel used in an off-highway business. The diesel fuel credit is allowable both for off-highway business use or any use other than in a registered diesel-powered highway vehicle (e.g., in a private home for personal heating purposes). The circumstances in which the credits are available are specific and limited. The principal requirement is that the fuel be used in an off-highway business. Off-highway business use is the use of fuel in a trade or business or in an income-producing activity other than as a fuel in a vehicle registered for use on public highways. IRS Publication 225 (2008), Farmer's Tax Guide, gives as examples of the off-highway business use of fuels: (1) use in stationary machines like generators, compressors, power saws, and similar equipment; (2) use in forklifts, bulldozers, and earthmovers; and (3) use in cleaning. Also, Publication 510 (2008), Excise Taxes, explains that, with some exceptions, a highway vehicle is one "designed to carry a load over a public highway," including federal, state, county, and city roads and streets. Passenger cars, motorcycles, buses, highway trucks, tractor trailers, etc., generally are highway vehicles. The fuels tax credits, however, are being claimed without regard to these requirements and often in absurdly huge amounts that cannot possibly be for the quantity of fuel expended for off-highway purposes. Notice 2010-33, 2010-1 C.B. 609, lists such positions as frivolous.

United States v. Kasten, No. 4:08-cv-2740 (S.D. Tex. Nov. 13, 2008) – the court permanently enjoined Kasten and any person in active concert with him from acting as a federal tax return preparer and from preparing or filing federal tax returns for taxpayers. Kasten prepared tax returns claiming false fuels tax credits.

United States v. Totou, No. 3:07-cv-391 (W.D.N.C. May 14, 2008) – the court permanently enjoined a tax return preparer from preparing or filing federal tax returns. Totou claimed fraudulent fuels tax credits on customers' returns.

**8. Contention: A Form 1099-OID can be used as a debt payment option or the form or a purported financial instrument may be used to obtain money from the Treasury.**

Advocates of this contention encourage individuals to use a Form 1099-OID, Original Issue Discount, or a bogus financial instrument such as a bonded promissory note as what purports to be a debt payment method for credit cards or mortgage debt. This scheme has evolved somewhat from an earlier frivolous position under which a secret bank account (sometimes referred to as a "straw man" account) was supposedly created at the Treasury Department for each U.S. citizen that individuals could use to pay tax and non-tax debts and claim withholding credits. Those who put forth this theory often argue that the proper way to redeem or draw on

the account is to use some form of made-up financial instrument. This has frequently involved what looks like a check drawn on the United States Treasury or other similar paper instruments, e.g., bonded promissory notes.

More recently, this redemption theory asserts that persons can draw on the secret or “straw man” Treasury account by sending a Form 1099-OID to a creditor and the creditor can present the form to the Treasury Department and receive full payment of the debt. The proponents appear to assert that the Form 1099-OID permits them to access their secret Treasury Account for an amount equal to the face amount of the Form 1099-OID in the form of a tax refund.

Proponents of this theory appear to additionally argue that they have sold or transferred their debt or obligation to the person to whom they issued the Form 1099-OID in a transaction subject to sections 1271 through 1275 and that the debt or obligation is transferred with a discount of the full face amount. The issuer of the Form 1099-OID then treats the face amount of the Form 1099-OID as “other income” on the individual’s return. The “other income” amount, however, is not included in the taxable income line.

Persons asserting this theory often significantly overstate withholding and claim an excessive refund in an amount close or identical to the inflated withholding.

**The Law:** As the instructions to the Form 1099-OID indicate, the purpose of the form is to report the original issue discount of holders of OID obligations, like certificates of deposit, time deposits, bonds, debentures, bonus saving plans, and Treasury inflation-indexed securities, having a term of more than one year. OID is simply the excess of the stated redemption of the deposit, bond, or other financial obligation at maturity over its issue price. Under section 1272, OID is taxable as interest over the life of the obligation and must be included in the holder’s gross income each taxable year that the obligation is held. Certain obligations are excepted, including United States savings bonds and short-term (less than one year) and tax-exempt obligations.

The Form 1099-OID is in no way a financial instrument. It is not a legitimate method of payment of any public or private debt, and it is not a means to withdraw or redeem money from the Treasury. Furthermore, the Treasury Department does not maintain depository accounts against which an individual can draw a check, draft, or any other financial instrument. United States v. Anderson, 353 F.3d 490, 500 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004). The notion of secret accounts assigned to each citizen is pure fantasy.

In addition to potential civil and criminal tax penalties for misuse of the Form 1099-OID, persons who fraudulently use false or fictitious instruments may be guilty of federal criminal offenses, such as under sections 287 and 514(a) of title 18.

The IRS has warned taxpayers of the consequences of making such frivolous arguments. [Rev. Rul. 2005-21](#), 2005-1 C.B. 822 (discussing the “straw man” theory); [Rev. Rul. 2004-31](#), 2004-1 C.B. 617 (discussing the commercial redemption theory).

### **Relevant Case Law:**

[United States v. Heath](#), 525 F.3d 451 (6th Cir. 2008) - the court convicted the defendant of presenting a fictitious financial instrument under 18 U.S.C. § 514(a) for sending to the IRS a so-called “Registered Bill of Exchange” that appeared to be a certified check but for which there was no actual account.

[United States v. Anderson](#), 353 F.3d 490, 500 (6th Cir. 2003), [cert. denied](#), 541 U.S. 1068 (2004) – the court upheld criminal convictions relating to a conspiracy involving the creation and offering of almost 200 fictitious sight drafts purporting to be drawn on the United States Treasury with an aggregate face value of more than \$550 million.

[United States v. Cunningham](#), No. 10cv1377-IEG(RBB), 2011 WL 11445 (S.D. Cal. Jan. 3, 2011) – the court held the taxpayer in contempt for refusing to comply with a court order to provide documents and testimony summoned by the IRS pursuant to an investigation regarding his participation in a Form 1099 OID scheme.

[Ernle v. Commissioner](#), T.C. Memo. 2010-237 – the court held petitioner liable for fraud based on various filings, including phony Forms 1099-OID and imposed a penalty of \$4,000 under section 6673(a).

### **Other Cases:**

[Miller v. Commissioner](#), 2009 WL 4060274, 2010-1 U.S.T.C. ¶ 50,175 (M.D. Tenn. Nov. 23, 2009); [United States v. Guan](#), 2009 WL 4609654, 104 A.F.T.R. 2d 2009-7471 (C.D. Cal. Nov. 18, 2009); [United States v. Oehler](#), 2003 WL 1824967 (D. Minn. Apr. 2, 2003), [aff'd](#), 116 F. App'x 43 (8th Cir. 2004).

## **II. FRIVOLOUS ARGUMENTS IN COLLECTION DUE PROCESS CASES**

Under sections 6320 (pertaining to liens) and 6330 (pertaining to levies), the IRS must provide taxpayers notice and an opportunity for an administrative appeals hearing upon the filing of a notice of federal tax lien (section 6320) and prior to levy (section 6330). Taxpayers have the right to seek judicial review of the IRS's

determination in these proceedings. I.R.C. § 6330(d). These reviews can extend to the merits of the underlying tax liability, if the taxpayer has not previously received the opportunity for review of the merits, e.g., did not receive a notice of deficiency. I.R.C. § 6330(c)(2)(B). A face-to-face administrative hearing concerning a taxpayer's underlying liability will not be granted if the hearing request raises solely frivolous arguments. Treas. Reg. §§ 301.6320-1(d)(2) Q&A D8 and 301.6330-1(d)(2) Q&A D8. The Tax Court will impose sanctions pursuant to section 6673 against taxpayers who seek judicial relief based upon frivolous or groundless positions.

On December 6, 2006, Congress passed the Tax Relief and Health Care Act of 2006 (TRHCA), Pub. L. No. 109-432, 120 Stat. 2922 (2006). Section 407 of TRHCA revised sections 6320 and 6330. The TRHCA amended section 6330 by adding new subsection (g) to provide that the IRS may disregard any portion of a section 6320 or 6330 hearing request that is based upon a position identified as frivolous by the IRS in a published list or that reflects a desire to delay or impede tax administration. Such portion shall not be subject to any further administrative or judicial review. If the entire hearing request meets one or both of these criteria, the hearing request will be denied. The TRHCA also amended section 6702 to allow imposition of a \$5,000 penalty for specified frivolous submissions, including frivolous section 6320 or 6330 hearing requests, where any portion of the submission meets one or both of these criteria. See section III below. These amendments are effective for hearing requests made after March 15, 2007, the release date of Notice 2007-30, 2007-1 C.B. 883, which listed frivolous positions (most recently updated by Notice 2010-33, 2010-1 C.B. 609). Accordingly, in cases where the TRHCA amendments are applicable, a taxpayer raising only frivolous issues may not only be ineligible for a face-to-face hearing but may be denied any section 6320 or 6330 hearing.

This section discusses some of the more common frivolous tax arguments raised in collection due process cases.

#### **A. Invalidity of the Assessment**

- 1. Contention: A tax assessment is invalid because the taxpayer did not get a copy of the Form 23C, the Form 23C was not personally signed by the Secretary of the Treasury, or a form other than Form 23C is not a valid record of assessment.**

**The Law:** Tax assessments are formally recorded on a record of assessment. I.R.C. § 6203. The assessment is made by an assessment officer signing the summary record of assessment. Treas. Reg. § 301.6203-1. The summary record of assessment must "provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." Id. The date of the assessment is the date the summary record is signed. Id.

There is no requirement in the statute or regulation that the assessment be recorded on a specific form, that the Secretary of the Treasury personally sign it, or that the taxpayer be provided with a copy of the record of assessment before the IRS takes collection action.

The IRS has refuted the frivolous argument that before the IRS may collect overdue taxes, the IRS must provide taxpayers with a summary record of assessment made on a Form 23-C, Assessment Certificate – Summary Record of Assessments, or on another particular form. Rev. Rul. 2007-21, 2007-1 C.B. 865.

**Relevant Case Law:**

March v. IRS, 335 F.3d 1186, 1188 (10th Cir. 2003), cert. denied, 541 U.S. 1031 (2004) – the court held that the computer-generated certificate of assessment and payment form utilized by the IRS to make assessment against the taxpayers satisfied the regulatory requirements because the computer-generated form contained the same information as the non-computer-generated form previously used and was signed by the assessment officer.

Roberts v. Commissioner, 118 T.C. 365 (2002), aff'd, 329 F.3d 1224 (11th Cir. 2004) – the court held that there was nothing in the law to show that the use of the Revenue Accounting Control System (RACS) report was not in compliance with the statute and regulation.

Nestor v. Commissioner, 118 T.C. 162 (2002) – the court held that the petitioner was not entitled to production of Form 23C at his collection due process hearing and it was not an abuse of discretion for the Appeals Officer to use Form 4340, Certificate of Assessments and Payments to verify the assessment, for purposes of section 6330(c)(1).

Powell v. Commissioner, T.C. Memo. 2009-174, 98 T.C.M. (CCH) 56 (2009) – the court awarded a \$25,000 section 6673 penalty against the petitioner for asserting, among other frivolous arguments, that respondent was obligated to produce a Form 23C even though petitioner received notices of deficiency.

Williams v. Commissioner, T.C. Memo. 2005-94, 89 T.C.M. (CCH) 114 (2005) – in this collection due process case, the court held that it was not an abuse of discretion for the appeals officer to provide copies of the transcripts of account (so-called MFTRA-X transcripts) to the taxpayer in lieu of the copies of the assessment documents that the taxpayer had requested.

**Other Cases:**

Roberts v. Commissioner, 118 T.C. 365 (2002), aff'd, 329 F.3d 1224 (11th Cir. 2004); Nestor v. Commissioner, 118 T.C. 162 (2002); Chang v. Commissioner, T.C. Memo. 2007-100, 93 T.C.M. (CCH) 1143 (2007); Perez v. Commissioner, T.C. Memo. 2002-274, 84 T.C.M. (CCH) 501 (2002).

**2. Contention: A tax assessment is invalid because the assessment was made from a substitute for return prepared pursuant to section 6020(b), which is not a valid return.**

**The Law:** Section 6020(b)(1) provides that “[i]f any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.” Section 6020(b)(2) further provides that any return prepared pursuant to section 6020(b)(1) shall be prima facie good and sufficient for all legal purposes. See also Treas. Reg. § 301.6020-1.

**Relevant Case Law:**

Douglas v. United States, 324 F. App'x 320, 321 (5th Cir. 2009) – the court rejected the taxpayer’s claim that “the IRS committed a fraud” by completing a section 6020(b) return and held that the IRS properly issued notices of levy.

Nicklaus v. Commissioner, T.C. Memo. 2005-156, 89 T.C.M. (CCH) 1499 (2005), aff'd, 202 F. App'x 171 (9th Cir. 2006) - the court held that the IRS may prepare substitute returns for taxpayers who fail to do so themselves under section 6020(b).

**Other Cases:**

United States v. Updegrave, 1997 WL 297074, 97-1 U.S.T.C. ¶ 50,465 (E.D. Pa. May 28, 1997); Holland v. Louisiana Sec’y of Revenue & Taxation, 97-1 U.S.T.C. ¶ 50,403 (W.D. La. Feb. 7, 1997).

**B. Invalidity of the Statutory Notice of Deficiency**

**1. Contention: A statutory notice of deficiency is invalid because it was not signed by the Secretary of the Treasury or by someone with delegated authority.**

**The Law:** Section 6212(a) provides the authority for the Secretary to send notices of deficiency to taxpayers. Section 7701(a)(11)(B) defines “Secretary” to include the Secretary of the Treasury or his delegate. Section 7701(a)(12)(A)(i) defines the term “delegate,” as used with respect

to the Secretary of the Treasury, to mean any officer, employee, or agency of the Treasury Department duly authorized by the Secretary directly, or indirectly by redelegation of authority, to perform a certain function. There is no statutory requirement that, to be valid, a notice of deficiency must be signed by the Secretary of the Treasury or his delegate.

**Relevant Case Law:**

Selgas v. Commissioner, 475 F.3d 697, 699-700 (5th Cir. 2007) (citations omitted), cert. denied, 552 U.S. 824 – the court held that a signature is not required on a notice of deficiency to render the notice of deficiency valid. The court stated, “Like our sister circuits, we conclude that a notice of deficiency is valid as long as it informs a taxpayer that the IRS has determined that a deficiency exists and specifies the amount of the deficiency . . . [and] [t]he existence of a signature or the identity of any IRS official who provides one, is superfluous.”

Urban v. Commissioner, 964 F.2d 888, 889 (9th Cir. 1992) – the court held that the Internal Revenue Code does not require a notice of deficiency to be signed.

Tavano v. Commissioner, T.C. Memo. 1991-237, 61 T.C.M. (CCH) 2743, aff'd, 986 F.2d 1389 (11th Cir. 1993) – the court rejected petitioner’s argument that the notice of deficiency was invalid because it was unsigned.

**Other Cases:**

Nestor v. Commissioner, 118 T.C. 162 (2002); Green v. Commissioner, T.C. Memo. 2007-262, 94 T.C.M. (CCH) 249 (2007); Reynolds v. Commissioner, T.C. Memo. 2006-192, 92 T.C.M. (CCH) 260 (2006); Ball v. Commissioner, T.C. Memo. 2006-141, 92 T.C.M. (CCH) 7 (2006); Wheeler v. Commissioner, T.C. Memo. 2006-109, 91 T.C.M. (CCH) 1194 (2006), aff'd, 528 F.3d 773 (10th Cir. 2008).

**2. Contention: A statutory notice of deficiency is invalid because the taxpayer did not file an income tax return.**

**The Law:** Section 6211(a) defines “deficiency” as the amount by which the tax imposed by subtitle A or B – (including income, estate, and gift taxes), or chapter 41, 42, 43, 44 (excise taxes) exceeds the excess of the sum of the amount shown as the tax by the taxpayer upon his return (if return made and amount shown thereon) plus any amounts previously assessed (or collected without assessment) as a deficiency, over the amount of rebates, as defined in section 6211(b)(2), made. In accordance with this definition, a taxpayer’s failure to report tax on a return does not prevent the IRS from determining a deficiency in his federal income tax and issuing a notice of deficiency, pursuant to section 6212(a).

**Relevant Case Law:**

Brennan v. Commissioner, T.C. Memo. 2009-77, 97 T.C.M. (CCH) 1379 (2009) – the court upheld the deficiencies determined by respondent when the taxpayer made only frivolous arguments, including that the “respondent lacked the authority to issue a notice of deficiency and that no statute required him to pay income tax.”

Johnston v. Commissioner, T.C. Memo. 2004-107, 87 T.C.M. (CCH) 1256 (2004) – the court stated that “[p]etitioner’s contention that the Commissioner cannot determine a deficiency for a year for which a taxpayer did not file a return is frivolous.” The court further emphasized that the “petitioner’s contention that failure to file a return shields the nonfiler from income tax liability is also frivolous.” Due to the petitioner’s frivolous arguments, the court imposed a penalty under section 6673.

Robinson v. Commissioner, T.C. Memo. 2002-316, 84 T.C.M. (CCH) 694 (2002), aff’d, 73 F. App’x 624 (4th Cir. 2003) – the court found the petitioner liable for the section 6673(a) penalty in this case where petitioner argued, among other frivolous arguments, that the IRS was not authorized to determine a deficiency for a taxpayer who has not filed a return.

**C. Invalidity of Notice of Federal Tax Lien**

- 1. Contention: A notice of federal tax lien is invalid because it is unsigned or not signed by the Secretary of the Treasury, or because IRS employees lack the delegated authority to file a notice of federal tax lien.**

**The Law:** The form and content of the notice of federal tax lien is controlled by federal law. Section 6323(f)(3) provides that the form and content of the notice of federal tax lien shall be prescribed by the Secretary and shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien. Treas. Reg. § 301.6323(f)-1(d) further provides that the notice of federal tax lien must be filed on a Form 668, Notice of Federal Tax Lien Under Internal Revenue Laws, and must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose. There is no statutory or regulatory requirement that, to be valid, a notice of federal tax lien must be signed by anyone or, if it is signed, that it must be signed by the Secretary of the Treasury.

Section 6323(a) provides that “[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic’s lien holder, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.”



Section 7701(a)(11)(B) defines “Secretary” to include the Secretary of the Treasury or his delegate. Section 7701(a)(12)(A)(i) defines the term “delegate,” as used with respect to the Secretary of the Treasury, to mean any officer, employee, or agency of the Treasury Department duly authorized by the Secretary directly, or indirectly by redelegation of authority, to perform a certain function. Treasury Order 150-10 delegates to the Commissioner the Secretary’s authority to enforce and administer the internal revenue laws. Delegation Order 5-4, Rev. 1 delegates to IRS personnel the Commissioner’s authority with respect to notices of federal tax lien.

#### **Relevant Case Law:**

Uveges v. United States, 2002-2 U.S.T.C. ¶ 50,740 (D. Nev. 2002) – the court noted that with respect to section 6323, among other Code sections, which use the term “Secretary,” “Secretary” refers to the Secretary of the Treasury and any delegates.

Hult v. Commissioner, T.C. Memo. 2007-302, 94 T.C.M. (CCH) 359 (2007) – the court dismissed petitioner’s argument that the notice of federal tax lien was invalid because it was not signed as it is not necessary for a notice of federal tax lien to be signed.

Fairchild v. Internal Revenue Service, 450 F. Supp. 2d 654, 659 (M.D. La. 2006) – the court rejected the argument that IRS employees lacked the authority to file notices of federal tax lien.

#### **Other Cases:**

In re Kroll, 1994 WL 650127, 74 A.F.T.R. 2d 94-6161 (W.D. Mich. Aug. 11, 1994); Thompson v. Commissioner, T.C. Memo. 2004-204, 88 T.C.M. (CCH) 219 (2004).

#### **2. Contention: The form or content of a notice of federal tax lien is controlled by or subject to a state or local law, and a notice of federal tax lien that does not comply in form or content with a state or local law is invalid.**

**The Law:** The form and content of the notice of federal tax lien is controlled by federal law. Section 6323(f)(3) provides that the form and content of the notice of federal tax lien shall be prescribed by the Secretary and shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien. Treas. Reg. § 301.6323(f)-1(d) further provides that the notice of federal tax lien must be filed on a Form 668, Notice of Federal Tax Lien Under Internal Revenue Laws, and must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose.

**Relevant Case Law:**

United States v. Union Cent. Life Ins. Co., 368 U.S. 291, 294 (1961) – the Supreme Court held that the form used for filing a federal tax lien does not have to comply with an additional state law requirement that it describe the property affected, although the lien did have to be filed in a designated state office.

Tolotti v. Commissioner, T.C. Memo. 2002-86, 83 T.C.M. (CCH) 1436 (2002), aff'd, 70 F. App'x 971 (9th Cir. 2003) - in upholding the validity of a notice of federal tax lien filed even though the lien was not certified pursuant to a Nevada statute, the court noted that it is “well-settled” that the form and content of the notice of federal tax lien is controlled by federal, not state, law.

**D. Invalidity of Collection Due Process Notice**

1. **Contention: A collection due process notice (e.g., Letter 1058, LT-11 or Letter 3172) is invalid because it is not signed by the Secretary or his delegate.**

**The Law:** Section 6320(a)(1) provides that the Secretary shall notify a taxpayer in writing of the filing of a notice of federal tax lien, pursuant to section 6323, advising the taxpayer of the right to request a collection due process hearing. Section 6330(a)(1) provides that no levy may be made on any property or rights to property of any person unless the Secretary has notified such person of his or her right to a collection due process hearing before levy. There is no requirement for a signature on the collection due process notice in the statute or regulations.

**Relevant Case Law:**

Oropeza v. Commissioner, T.C. Memo. 2008-94, 95 T.C.M. (CCH) 1367 (2008) – the court reaffirmed that there is “no statutory requirement” that the Final Notice of Intent to Levy and Notice of Your Right to a Hearing be signed.

Craig v. Commissioner, 119 T.C. 252 (2002) – the court held that for purposes of section 6330(a), either the Secretary or his delegate (e.g., the Commissioner) may issue a final notice of intent to levy. In this case, the authority to levy was delegated to the Automated Collection Branch Chiefs pursuant to a delegation order.

**Other Cases:**

Thompson v. Commissioner, T.C. Memo. 2004-204, 88 T.C.M. (CCH) 219 (2004); Hodgson v. Commissioner, T.C. Memo. 2003-122, 85 T.C.M. (CCH) 1232 (2003).

**2. Contention: A collection due process notice is invalid because no certificate of assessment is attached.**

**The Law:** Sections 6320(a)(3) and 6330(a)(3) list the information required to be included with the collection due process notice, such as the amount of unpaid tax, the right of the person to request a collection due process hearing, administrative appeals available, and the provisions of the Internal Revenue Code and procedures pertaining to the notice of federal tax lien or levy. See also Treas. Reg. §§ 301.6320-1(a)(2), Q&A A10 and 301.6330-1(a)(3), Q&A A6. There is no requirement in the statute or regulations that a certificate of assessment be attached to the collection due process notice.

**E. Verification Given as Required by I.R.C. § 6330(c)(1)**

**1. Contention: Verification requires the production of certain documents.**

**The Law:** Pursuant to sections 6320(c) and 6330(c)(1), at a collection due process hearing, the appeals officer is required to obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met. Treas. Reg. §§ 301.6320-1(e)(1) and 301.6330-1(e)(1) direct Appeals to obtain verification from the IRS office collecting the tax. Neither the statutes nor the regulations require the appeals officer to rely upon a particular document (e.g., the summary record of assessment) to satisfy the verification requirement. Sections 6320(c) and 6330(c)(1) also do not require the appeals officer to give the taxpayer a copy of the verification upon which the appeals officer relied. See also Treas. Reg. §§ 301.6320-1(e)(1) and 301.6330-1(e)(1). There is no requirement in the statute or regulations that the taxpayer be provided with any documents as a part of the verification process. As a matter of practice, however, the taxpayer will be provided with a transcript of account such as a Form 4340 or MFTRA-X computer transcript. Transcripts such as the Form 4340 or MFTRA-X, which identify the taxpayer, the character of the liability assessed, the taxable period and the amount of the assessment, are sufficient to show the validity of an assessment, absent a showing of irregularity.

**Relevant Case Law:**

Standifird v. Commissioner, T.C. Memo. 2002-245, 84 T.C.M. (CCH) 371 (2002), aff'd, 72 F. App'x 729 (9th Cir. 2003) – the court held that a MFTRA-X transcript “is a valid verification that the requirements of any applicable law or administrative procedure have been met.”

Schroeder v. Commissioner, T.C. Memo. 2002-190, 84 T.C.M. (CCH) 141 (2002) – the court held that the TXMODA transcript is sufficient for the verification requirement.

Craig v. Commissioner, 119 T.C. 252 (2002) – the court held that section 6330(c)(1) does not require the appeals officer to rely upon a particular document, such as the summary record of assessment, to satisfy the verification requirement of section 6330(c)(1) or mandate that the appeals officer actually provide the taxpayer with a copy of the verification upon which the appeals officer relied.

#### **Other Cases:**

Nestor v. Commissioner, 118 T.C. 162 (2002); Davis v. Commissioner, 115 T.C. 35 (2000); Wagner v. Commissioner, T.C. Memo. 2002-180, 84 T.C.M. (CCH) 96 (2002).

### **F. Invalidity of Statutory Notice and Demand**

#### **1. Contention: No notice and demand, as required by I.R.C. § 6303, was ever received by taxpayer.**

**The Law:** Section 6303(a) provides that the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. This notice is to be left at the dwelling or usual place of business of such person, or shall be mailed to such person's last known address. See also Treas. Reg. § 301.6303-1(a) (establishing that failure to give notice within 60 days does not invalidate notice). Nothing in the statute or regulation requires the IRS to establish receipt of the notice and demand, as long as it is mailed to the taxpayer's last known address.

At a collection due process hearing, an appeals officer may rely upon a computer transcript to verify that notice and demand for payment has been sent to a taxpayer in accordance with section 6303. For example, the entry in a Form 4340 showing "notice of balance due" is a section 6303 notice and demand.

#### **Relevant Case Law:**

United States v. Chila, 871 F.2d 1015, 1018-19 (11th Cir. 1989), cert. denied, 493 U.S. 975 (1985) – the court held in a case in which the taxpayer denied receiving notice under section 6303 that, even though notice was not required under section 6303 prior to judicial collection, proper notice was given as established by the Form 4340.

Williams v. Commissioner, T.C. Memo. 2008-173, 96 T.C.M. (CCH) 25 (2008) – the court rejected petitioner’s argument that he is entitled to see proof that the Notice and Demand Letter was received, and asserted Forms 4340 sufficiently showed that the IRS issued notices of balance due (which constitute notice and demand for payment under section 6303(a)) on the same day that the IRS assessed petitioner’s tax.

**Other Cases:**

United States v. Lisle, 92-1 U.S.T.C. ¶ 50,286 (N.D. Cal. 1992) (citing Thomas v. United States, 755 F.2d 728, 730 (9th Cir. 1985)), aff’d, 5 F.3d 542 (9th Cir. 1993); Craig v. Commissioner, 119 T.C. 252, 262-63 (2002); Reynolds v. Commissioner, T.C. Memo. 2006-192, 92 T.C.M. (CCH) 260 (2006).

**2. Contention: A notice and demand is invalid because it is not signed, it is not on the correct form (such as Form 17), or because no certificate of assessment is attached.**

**The Law:** Section 6303(a) provides that the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. This notice is to be left at the dwelling or usual place of business of such person, or shall be mailed to such person’s last known address. See also Treas. Reg. § 301.6303-1(a) (failure to give notice within 60 days does not invalidate notice). Notice and demand is sufficient for purposes of section 6303 as long as it states the amount due and makes demand for payment. There is no requirement in the statute or regulation that the notice and demand be made on a specific form, have a signature, or include any specific attachments.

**Relevant Case Law:**

Flathers v. Commissioner, T.C. Memo. 2003-60, 85 T.C.M. (CCH) 969 (2003) – the court rejected as frivolous and/or groundless petitioner’s argument that she did not receive proper notice and demand under section 6303(a) because, according to petitioner, the IRS must use Form 17 in issuing such notice and demand.

Craig v. Commissioner, 119 T.C. 252, 262-63 (2002) – the court held that notices received by the petitioner, such as notices of intent to levy and notices of deficiency, were sufficient to meet the requirements of section 6303(a) and the form on which notice of assessment and demand for payment is made was irrelevant, as long as it provided the taxpayer with the information specified in section 6303(a).

Keene v. Commissioner, T.C. Memo. 2002-277, 84 T.C.M. (CCH) 514 (2002) – the court rejected petitioner’s argument as frivolous and groundless that a notice and demand for payment was not in accord with a Treasury decision issued in 1914 that required a Form 17 be used for such purpose.

## **G. Tax Court Authority**

### **1. Contention: The Tax Court does not have the authority to decide legal issues.**

**The Law:** The United States Tax Court is a federal court of record established by Congress under Article I of the United States Constitution. Congress created the Tax Court to provide a judicial forum in which affected persons could dispute tax deficiencies prior to payment of the disputed amount. The jurisdiction of the Tax Court includes the authority to hear tax disputes concerning notices of deficiency, notices of transferee liability, certain types of declaratory judgment, readjustment and adjustment of partnership items, review of the failure to abate interest, administrative costs, worker classification, relief from joint and severable liability on a joint return, and review of collection due process actions.

Section 7441 provides that “[t]here is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.” Section 7442 provides the “[t]he Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by Chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.” See also I.R.C. §§ 7443-7448.

### **Relevant Case Law:**

Freytag v. Commissioner, 501 U.S. 868 (1991) – contrary to the petitioners’ challenge, the Supreme Court held that section 7443A(b)(4) authorized the Chief Judge of the Tax Court to assign petitioners’ cases to a special trial judge and concluded that the special trial judge’s appointment did not violate the Appointments Clause of the Constitution.

Knighen v. Commissioner, 705 F.2d 777 (5th Cir. 1983), cert. denied, 464 U.S. 897 (1983) – the court held frivolous the contention that, as a court created under Article I of the Constitution, the Tax Court could not hear any cases that could be heard by Article III courts.

Martin v. Commissioner, 358 F.2d 63 (7th Cir. 1966), cert. denied, 385 U.S. 920 (1966) – the court ruled that petitioners’ contention that the Tax

Court is without a valid constitutional existence lacked substance and merit.

**Other Cases:**

Burns, Stix Friedman & Co. v. Commissioner, 57 T.C. 392 (1971).

**H. Challenges to the Authority of IRS Employees**

**1. Contention: Revenue Officers are not authorized to seize property in satisfaction of unpaid taxes.**

**The Law:** Section 6331(a) provides that “[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax ... by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.” Section 6331(b) provides that the term “levy” includes the power of distraint and seizure by any means. In any case in which the Secretary may levy upon property or property rights, he may also seize and sell such property or property rights. I.R.C. § 6331(b).

Section 7701(a)(11)(B) defines “Secretary” to include the Secretary of the Treasury or his delegate. Section 7701(a)(12)(A)(i) defines the term “delegate,” as used with respect to the Secretary of the Treasury, to mean any officer, employee, or agency of the Treasury Department duly authorized by the Secretary directly, or indirectly by redelegation of authority, to perform a certain function. Treasury Order 150-10 delegates to the Commissioner the Secretary’s authority to enforce and administer the internal revenue laws. See also Treas. Reg. § 301.6331-1(a)(1) (district director is authorized to levy); see, e.g., Delegation Order 5-3 (formerly D.O. 191 Rev. 3) (redelegation of authority with respect to levies to revenue officers and other IRS employees).

**Relevant Case Law:**

Gibbs v. Commissioner, 673 F. Supp. 1088, 1092 (N.D. Ala. 1987), aff’d, 846 F.2d 754 (11th Cir. 1988) – the court held that revenue officers “are specifically delegated and charged with the responsibility for collection of taxes. “

Craig v. Commissioner; 119 T.C. 252 (2002) – the court found that the authority to levy on petitioner’s property was delegated to Automated Collection Branch Chiefs pursuant to delegation order.

**2. Contention: IRS employees lack credentials. For example, they have no pocket commission or the wrong color identification badge.**

**The Law:** The authority of IRS employees is derived from Internal Code provisions, Treasury Regulations, and other redelegations of authority (such as delegation orders). See the previous discussion on the authority of revenue officers to seize property. The authority of IRS employees is not contingent upon such criteria as possession of a pocket commission or a specific type of identification badge.

**Relevant Case Law:**

Oropeza v. Commissioner, T.C. Memo. 2008-94, 95 T.C.M. (CCH) 1367 (2008) – the court ordered the taxpayer to pay a fine of \$10,000 for arguing only frivolous and groundless arguments, including the argument that he never received the pocket commissions of the IRS agents, which is one of the “patently spurious” issues the taxpayer raised.

Gunselman v. Commissioner, T.C. Memo. 2003-11, 85 T.C.M. (CCH) 756 (2003) – the court held that an Appeals Officer at a collection due process hearing does not have to produce enforcement pocket commission for himself or for the IRS employee who signed the notice of lien filing.

**I. Use of Unauthorized Representatives**

**1. Contention: Taxpayers are entitled to be represented at hearings, such as collection due process hearings, and in court, by persons without valid powers of attorney.**

**The Law:** Section 330 of Title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department and, after notice and an opportunity for a proceeding, to suspend or disbar from practice before the Treasury Department those representatives who are incompetent, disreputable, or who violate regulations prescribed under section 330. Pursuant to section 330, the Secretary, in Circular No. 230 (31 CFR part 10), published regulations that authorize the Office of Professional Responsibility to act on matters related to practitioner conduct and discipline, including disciplinary proceedings and sanctions. The regulations were most recently amended on June 3, 2011 (T.D. 9527, 76 FR 32300, 2011-27 I.R.B. 1). Pursuant to Circular No. 230, only attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and registered tax return preparers are considered practitioners. Circular No. 230, § 10.3. Practice as a registered tax return preparer (or as an unenrolled preparer) is limited to preparing and signing tax returns, claims for refund, and other documents submitted to the IRS and to



representing a taxpayer during an examination if the preparer signed the tax return or claim for refund for the taxable year or period under examination. Id. at § 10.3(f)(2)-(3). A registered tax return preparer or unenrolled preparer, however, may not represent a taxpayer before Appeals Officers (including in a CDP hearing), revenue officers, the Office of Chief Counsel, or similar IRS employees. Id. at § 10.3(f)(3). In limited circumstances, an immediate family member may also represent a taxpayer before the IRS. Id. at § 10.7(c)(1). Attorneys and non-attorneys are entitled to practice before the United States Tax Court only upon application and admission to practice, pursuant to Tax Court Rule of Practice and Procedure 200.

**Relevant Case Law:**

Young v. Commissioner, T.C. Memo. 2003-6, 85 T.C.M. (CCH) 739 (2003) – the court held that a third party was not entitled to represent taxpayer in a collection due process hearing because he was not a practitioner listed in Circular No. 230 (attorney, CPA, etc.).

**J. No Authorization Under I.R.C. § 7401 to Bring Action**

- 1. Contention: The Secretary has not authorized an action for the collection of taxes and penalties or the Attorney General has not directed an action be commenced for the collection of taxes and penalties.**

**The Law:** Section 7401 provides that “[n]o civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.” Treas. Reg. § 301.7401-1(a) further provides that such action must be authorized by the Commissioner (or the Director, Alcohol, Tobacco and Firearms Division, with respect to subtitle E of the Code), or Chief Counsel for the IRS or his delegate, and such action must be commenced by the Attorney General or his delegate.

The Attorney General is the head of the Department of Justice, appointed by the President. 28 U.S.C. § 503. The Attorney General may from time to time make such provisions as he or she deems appropriate delegating authority to any other officer, employee, or agency of the Department of Justice. 28 U.S.C. § 510. See 28 U.S.C. §§ 501-530D.

**Relevant Case Law:**

Perez v. United States, 2001-2 U.S.T.C. ¶ 50,735 (W.D. Tex. 2001) – the court held that section 7401 does not require production of a certified copy of a document in which the Attorney General or a United States Attorney

authorized the cause of action against the plaintiff. The court held that the United States demonstrated compliance with section 7401 by producing a letter from the Office of Chief Counsel to a United States Attorney and a declaration from the counsel of record for the United States.

United States v. Bodwell, 96-2 U.S.T.C. ¶ 50,592 (E.D. Cal. 1996) – the court noted that the defendant’s argument that this suit was not authorized because section 7401 is rooted in the Federal Regulations concerning the Bureau of Alcohol, Tobacco and Firearms has been “flatly rejected” by the Ninth Circuit.

**Other Cases:**

United States v. Nuttall, 713 F. Supp. 132 (D. Del. 1989), aff’d, 893 F.2d 1332 (3d Cir. 1989).

**III. PENALTIES FOR PURSUING FRIVOLOUS TAX ARGUMENTS**

Those who act on frivolous positions risk a variety of civil and criminal penalties. Those who adopt these positions may face harsher consequences than those who merely promote them. “Like moths to a flame, some people find themselves irresistibly drawn to the tax protester movement’s illusory claim that there is no legal requirement to pay federal income tax. And, like moths, these people sometimes get burned.” United States v. Sloan, 939 F.2d 499, 499-500 (7th Cir. 1991).

Taxpayers filing returns with frivolous positions may be subject to the accuracy-related penalty under section 6662 (twenty percent of the underpayment attributable to negligence or disregard of rules or regulations) or the civil fraud penalty under section 6663 (seventy-five percent of the underpayment attributable to fraud) or the erroneous claim for refund penalty under section 6676 (twenty percent of the excessive amount). Additionally, late filed returns setting forth frivolous positions may be subject to an addition to tax under section 6651(f) for fraudulent failure to timely file an income tax return (triple the amount of the standard failure to file addition to tax under section 6651(a)(1)). See Mason v. Commissioner, T.C. Memo. 2004-247, 88 T.C.M. (CCH) 398 (2004) (stating that frivolous arguments “may be indicative of fraud if made in conjunction with affirmative acts designed to evade paying federal income tax”).

The Tax Relief Health Care Act of 2006 amended section 6702 to allow imposition of a \$5,000 penalty for frivolous tax returns and for specified frivolous submissions other than returns, if the purported returns or specified submissions are either based upon a position identified as frivolous by the IRS in a published list or reflect a desire to delay or impede tax administration. Pub. L. No. 109-432, § 407(a), 120 Stat. 2922 (2006). The term specified submission means: a request for a hearing under section 6320 (relating to notice and opportunity for hearing on filing of a notice of lien), a request for hearing under section 6330

(relating to notice and opportunity for hearing before levy), an application under section 6159 (relating to agreements for payment of tax liability in installments), an application under section 7122 (relating to compromises), or an application under section 7811 (relating to taxpayer assistance orders). This amendment is effective for frivolous returns or specified frivolous submissions made after March 15, 2007, the release date of Notice 2007-30, 2007-1 C.B. 883, which identified the list of frivolous positions (last updated by Notice 2010-33, 2010-1 C.B. 609)

Section 6673(a) allows the Tax Court to impose a penalty of up to \$25,000 when it appears that:

- a taxpayer instituted or maintained a proceeding primarily for delay,
- a taxpayer's position in such proceeding is frivolous or groundless, or
- a taxpayer unreasonably failed to pursue administrative remedies.

"The purpose of § 6673 . . . is to induce litigants to conform their *behavior* to the governing rules regardless of their subjective beliefs. Groundless litigation diverts the time and energies of judges from more serious claims; it imposes needless costs on other litigants. Once the legal system has resolved a claim, judges and lawyers must move on to other things. They cannot endlessly rehear stale arguments . . . . [T]here is no constitutional right to bring frivolous suits . . . . People who wish to express displeasure with taxes must choose other forums, and there are many available." Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986) (emphasis in original).

A tax return preparer, as defined by section 7701(a)(36), who prepares any return or claim of refund with respect to which any part of an understatement of liability is due to an unreasonable position, including any frivolous position discussed in this outline, and who knew or reasonably should have known of the position may be required to pay a penalty equal to the greater of \$1,000 or 50 percent of the income derived by the tax return preparer with respect to the preparation of the return or claim for refund. I.R.C. § 6694(a). The minimum penalty amount increases to \$5,000 for willful or reckless conduct of the tax return preparer. I.R.C. § 6694(b). The IRS may impose a penalty of \$1,000 for aiding or assisting in the preparation or presentation of any portion of a return with knowledge that it will result in an understatement of tax liability. I.R.C. § 6701(a).

Taxpayers who rely on frivolous arguments may also face criminal prosecution. These taxpayers may be convicted of a felony for attempting to evade or defeat tax. I.R.C. § 7201. Section 7201 provides as a penalty a fine of up to \$100,000 (\$500,000 in the case of a corporation) and imprisonment for up to 5 years. Similarly, taxpayers may be convicted of a felony for willfully making and signing under penalties of perjury any return, statement, or other document that the person does not believe to be true and correct. I.R.C. § 7206(1). The penalty for violating section 7206 is a fine of up to \$100,000 (\$500,000 in the case of a

corporation) and imprisonment for up to 3 years. Any individual found guilty of either offense may be subject to an increased fine of up to \$250,000. 18 U.S.C. § 3571(b)(3).

Persons who promote frivolous arguments and those who assist taxpayers in claiming tax benefits based on frivolous arguments may be prosecuted for a criminal felony for which the penalty is up to \$100,000 (\$500,000 in the case of a corporation) and imprisonment for up to 3 years for assisting with or advising about the preparation or presentation of a false return or other document under the internal revenue laws. I.R.C. § 7206(2). Any individual found guilty of a felony under section 7206 may be subject to an increased fine of up to \$250,000. 18 U.S.C. § 3571(b)(3).

### **Relevant Case Law:**

Deyo v. United States, 296 F. App'x 157, 158 (2d Cir. 2008) – the court held that the IRS complied with any applicable personal approval requirement of section 6751 and upheld the assessment of penalties against a married couple for filing frivolous income tax returns, on which the taxpayers claimed zero adjusted gross income based on the frivolous position that they did not receive any income from sources listed in the regulations under section 861.

Szopa v. United States, 460 F.3d 884, 887 (7th Cir. 2006) – the court found that a frivolous tax appeal warrants a presumptive sanction of \$4,000, but imposed an \$8,000 sanction against the taxpayer for repeatedly filing frivolous appeals.

Gass v. United States, 4 F. App'x 565 (10th Cir. 2001) – the court imposed an \$8,000 penalty for contending that taxes on income from real property are unconstitutional.

Brashier v. Commissioner, 12 F. App'x 698 (10th Cir. 2001) – the court imposed \$1,000 penalties on taxpayers who argued that filing sworn income tax returns violated their Fifth Amendment privilege against self-incrimination, after the Tax Court had warned them that their argument – rejected consistently for more than seventy years – was frivolous.

Baskin v. United States, 738 F.2d 975 (8th Cir. 1984) – the court found that the IRS's assessment of a frivolous return penalty without a judicial hearing was not a denial of due process because there was an adequate opportunity for a later judicial determination of legal rights.

Jones v. Commissioner, 688 F.2d 17 (6th Cir. 1982) – the court found the taxpayer's claim that his wages were paid in "depreciated bank notes" as clearly without merit and affirmed the Tax Court's imposition of an addition to tax for negligence or intentional disregard of rules and regulations.

United States v. Rempel, 87 A.F.T.R.2d (RIA) 1810 (D. Ark. 2001) – the court warned the taxpayers of sanctions and stated: “It is apparent to the court from some of the papers filed by the Rempels that they have at least had access to some of the publications of tax protester organizations.” The court went on to say, “The publications of these organizations have a bad habit of giving lots of advice without explaining the consequences which can flow from the assertion of totally discredited legal positions and/or meritless factual positions.”

Rowe v. United States, 583 F. Supp. 1516, 1520 (D. Del. 1984), aff’d, 749 F.2d 27 (3d Cir. 1984) – the court upheld the viability of section 6702 penalties against various objections, including that it was unconstitutionally vague because it does not define a “frivolous” return. “Frivolous is commonly understood to mean having no basis in law or fact,” the court stated.

#### **Other Cases:**

Holker v. United States, 737 F.2d 751, 752-53 (8th Cir. 1984); McAfee v. United States, 2001-1 U.S.T.C. (CCH) ¶ 50,433 (N.D. Ga. 2001).

#### **Sanctions Imposed Generally in Tax Court Cases:**

Thomason v. Commissioner, 401 F. App’x 921 (5th Cir. 2010) – the court affirmed the Tax Court’s imposition of a \$2,000 penalty against petitioner under section 6673 because petitioner made numerous frivolous arguments, including that the section 6020(b) substitute tax return prepared by the IRS was invalid and that United States citizens are exempt from paying income tax on income earned in the United States.

Tinnerman v. Commissioner, T.C. Memo. 2010-150 – the court imposed a \$25,000 penalty under section 6673 in a CDP case for delaying the proceedings by making “stale and recycled” frivolous arguments.

Precourt v. Commissioner, T.C. Memo. 2010-24 – against a background of eleven separate actions in which the taxpayer advanced frivolous arguments in both Tax Court and district court, as well as previous sanctions against the taxpayer of over \$22,000, the Tax Court dismissed the taxpayer’s case and imposed the maximum penalty of \$25,000 for failing to appear for court proceedings and for failing to comply with court orders. In addition to petitioner’s dilatory conduct, his petition was plagued with frivolous constitutional and other claims.

McCammom v. Commissioner, T.C. Memo. 2008-114, 95 T.C.M. (CCH) 1421 (2008) – the court imposed a \$25,000 sanction against a taxpayer who argued that she “did not have any income ‘in a constitutional sense,’” despite almost \$200,000 paid to the taxpayer in her medical practice and despite being previously warned by the court against instituting meritless proceedings.

Stearman v. Commissioner, T.C. Memo. 2005-39, 89 T.C.M. (CCH) 823 (2005), aff'd, 436 F.3d 533 (5th Cir. 2006) – the court imposed sanctions totaling \$25,000 against the taxpayer for advancing arguments characteristic of tax-protester rhetoric that has been universally rejected by the courts, including arguments regarding the Sixteenth Amendment. In affirming the Tax Court’s holding, the Fifth Circuit granted the government’s request for further sanctions of \$6,000 against the taxpayer for maintaining frivolous arguments on appeal, and the Fifth Circuit imposed an additional \$6,000 sanctions on its own, for total additional sanctions of \$12,000.

Haines v. Commissioner, T.C. Memo. 2000-126, 79 T.C.M. (CCH) 1844, 1846 (2000) – stating that “[p]etitioner knew or should have known that his position was groundless and frivolous, yet he persisted in maintaining this proceeding primarily to impede the proper workings of our judicial system and to delay the payment of his Federal income tax liabilities,” the court imposed a \$25,000 penalty.

#### **Other Cases:**

Rodriguez v. Commissioner, T.C. Memo. 2009-92, 97 T.C.M. (CCH) 1482 (2009); Rhodes v. Commissioner, T.C. Memo. 2008-225, 96 T.C.M. (CCH) 215 (2008); Hanloh v. Commissioner, T.C. Memo. 2006-194, 92 T.C.M. (CCH) 266 (2006).

#### **Sanctions Imposed in Collection Due Process Cases:**

Oropeza v. Commissioner, 402 F. App’x 221 (9th Cir. 2010) – the court affirmed the imposition of a \$10,000 penalty on the taxpayer for raising frivolous and groundless arguments related to collection due process t

Goff v. Commissioner, 135 T.C. 231 (2010) – the court held that the IRS may proceed with collection of taxpayer’s unpaid taxes and penalties because the bonded promissory note she presented to the IRS did not constitute payment of her liabilities. The court also held that her position was groundless and her arguments in support of the position were frivolous, and it imposed a \$15,000 penalty against her under section 6673.

Pierson v. Commissioner, 115 T.C. 576, 581 (2000) – the court considered imposing sanctions against the taxpayer, but decided against doing so, stating, “we regard this case as fair warning to those taxpayers who, in the future, institute or maintain a lien or levy action primarily for delay or whose position in such a proceeding is frivolous or groundless.”

#### **Other Cases:**

Burke v. Commissioner, 124 T.C. 189 (2005); Roberts v. Commissioner, 118 T.C. 365 (2002), aff'd, 329 F.3d 1224 (11th Cir. 2003); Battle v. Commissioner,

T.C. Memo. 2009-171, 98 T.C.M. (CCH) 45 (2009); Oropeza v. Commissioner, T.C. Memo. 2008-94, 95 T.C.M. (CCH) 1367 (2008), aff'd, 402 F. App'x 221 (9th Cir. 2010); Hassell v. Commissioner, T.C. Memo. 2006-196, 92 T.C.M. (CCH) 273 (2006).

### **Sanctions Imposed Against Taxpayer's Counsel:**

United States v. Jones, No. 4:09-cv-00547-EJL, 2011 WL 2680742 (D. Idaho Jul. 7, 2011) – the court permanently enjoined a tax return preparer from preparing tax returns for others and promoting frivolous tax schemes as a result of her repeated use of the Form 1099-OID scheme on behalf of her clients.

Abdo v. United States, 234 F. Supp. 2d 553 (M.D.N.C. 2002), aff'd, 63 F. App'x 163 (4th Cir. 2003) – the court found that a tax return preparer who prepared returns based on the arguments that wages are not taxable because labor is exchanged for wages and that wages are exempt from income tax as a result of withheld FICA tax should be permanently enjoined from acting as an income tax return preparer and from other related activities.

Powell v. Commissioner, T.C. Memo. 2009-174, 98 T.C.M. (CCH) 56 (2009) – the court imposed sanctions against the taxpayer in the amount of \$25,000 and against the taxpayer's attorney in the amount of \$4,725 for making frivolous arguments and delaying the proceedings.

Wetzel v. Commissioner, T.C. Memo. 2005-211, 90 T.C.M. (CCH) 266 (2005) – the court imposed a \$15,000 penalty against Wetzel, a professional tax return preparer, for making frivolous arguments because he knew or should have known the arguments were frivolous.

Takaba v. Commissioner, 119 T.C. 285, 295 (2002) – the court rejected the argument that income received from sources within the United States is not taxable income, stating that “[t]he 861 argument is contrary to established law and, for that reason, frivolous” and imposed sanctions of \$10,500 against the taxpayer's attorney, as well as sanctions of \$15,000 against the taxpayer, for making such groundless arguments.

Nis Family Trust v. Commissioner, 115 T.C. 523, 545-46 (2000) – concluding that the petitioners chose “to pursue a strategy of noncooperation and delay, undertaken behind a smokescreen of frivolous tax-protester arguments,” the court imposed a \$25,000 penalty against them, and also imposed sanctions of more than \$10,600 against their attorney for arguing frivolous positions in bad faith.

Edwards v. Commissioner, T.C. Memo. 2002-169, 84 T.C.M. (CCH) 24, 42 (2002), aff'd, 119 F. App'x 293 (D.C. Cir. 2005) – the court found that sanctions were appropriate against both the taxpayer and the taxpayer's attorney for making groundless arguments and stated that “[a]n attorney cannot advance

frivolous arguments to this Court with impunity, even if those arguments were initially developed by the client.” In a supplemental opinion, the court imposed sanctions against the taxpayer in the amount of \$24,000 and against the taxpayer’s attorney in the amount of \$13,050. Edwards v. Commissioner, T.C. Memo. 2003-149, 85 T.C.M. (CCH) 1357.