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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES) CASE NO: CR-S-04-0119-KJD-LRL
)
Plaintiff)
)
V) DEFENDANT’S REPLY TO THE
) GOVERNMENT’S OPPOSITION
) TO DEFENDANT’S OBJECTION
) TO THE GOVERNMENT’S EXPERT
) WITNESS TESTIMONY
IRWIN SCHIFF, CYNTHIA NEUN)
And LAWRENCE N. COHEN,)
Defendants)

The following is my Reply to the government’s Response with respect to my objection to its having as an “expert” witness Internal Revenue Agent Clinton Lowder. As the following will show Mr. Lowder is *specifically* **barred by law** from giving testimony on income taxes. But even if he were not barred by law from giving such testimony, he would be barred by the government’s own representations as to his expertise from giving such testimony.

**THE GOVERNMENT HAS MISREPRESENTED
THE CHARACTER AND NATURE OF MR. LOWDER’S CLAIMED TESTIMONY**

The government makes no claim that Mr. Lowder is an expert in income tax law but is an expert in “tax computations” What is an expert in “tax computations”? And how can one be an “expert” on tax computations, unless one is an “expert” on the taxes one is “computing”? If one is not an “expert” on the taxes one is “computing,” than one could include in such a “computation” something that does not qualify as a tax at all. Obviously the government is contriving an expertise that does not exist. In its response the government states that “one need not be an expert in tax law to testify to the correct tax computations, and to help the jury understand the evidence.” Prior to that, the government quoted the Supreme Court case of *Daubert v. Merrell*

Dow Pharmaceuticals, Inc 509 U.S. 579 (1993) “in which the Supreme Court provided a standard to determine the admissibility of expert testimony.” As pointed out in the government’s Response, the Supreme Court stated that expert testimony “must assist the jury in understanding the evidence or determining a fact in issue.” And further the government stated that Mr. Lowder’s testimony will be based on “books and records seized at the search warrant of Freedom Books office...” as well as “bank records relating to each defendant, and other documents. These records are being utilized by Mr. Lowder as the basis for his summary computations. Further as additional draft computations and a report are prepared by Mr. Lowder, they will be provided to the defense. As stated above, the draft computations are subject to change based on the evidence admitted at trial.” Now admittedly, the amount of these deposits is a factual question, however since defendant has not, as yet, challenged the amount of these alleged deposits they are not, as yet, *a fact* “in issue.”¹ But, in any case, the amount of such bank deposits is a factual issue that, arguendo, could be helpful to the jury in drawing its own conclusions as to a “fact in issue” – if the amount of such deposits were relevant to any issue before the jury.² However the government seeks to go beyond that and use Mr. Lowder to testify on **legal conclusions** supposedly derived from this “fact,” disregarding whether or not it is “a fact in dispute.” The government states, in its Response, that Mr. Lowder “would testify that defendant Schiff had ‘significant income generated from his business Freedom Books during years 1997 through 2002’” However, whether a given amount of bank deposits constitutes “taxable income” within the meaning of 18 U.S.C 1, 61, 62, and 63 and within the meaning of “income” as defined in page 168 of Senate Report 1622 and page A18 of House Report 1337 (83rd Congress, 2nd Session) calls for a “legal conclusion,” not a factual conclusion. Therefore one would have to qualify as an expert in **tax law** to testify as to what constitutes “income” within the meaning of these statutes and Congressional Reports. There are over 100 pages in “Words and Phrases” devoted to the legal meaning of “income,” and the legal meaning of income is discussed at *great length* in a number of Supreme Court decisions. Is Mr. Lowder an “expert” on these decisions and how they impact on the legal meaning of “income”? If Mr. Lowder were to testify (that is if the Court disregards the law as shown below and allows him to testify) concerning the relationship of bank deposits to “income” – than I demand to be

¹ However as was noted in footnote #2 it was my claim that the bank records were illegally acquired, and I will shortly, if not contemporaneous, with this Reply, file a Motion to suppress all such illegally acquired bank records.

² However, since I am not being charged with money laundering, or check kiting, or any crime involving the alleged illegality of the bank deposits I made, I don’t see why the *amount* of these bank deposits can be related to any crime I am alleged to have committed.

allowed to voir dire him concerning his understanding of the legal meaning of “income” as reflected in the statutes and other documents as identified above.

Further on the government states that Mr. Lowder’s “testimony will assist the jury, and a demonstration of how defendant Schiff failed to properly report his tax liability may help the jury to determine willfulness, tax deficiencies, and falsity of statements, all of which are “fact [s] in issue.” However, whether or not I had a tax “liability” is a question of law not a question of fact. There are a number of statutes that have to be considered before it could be determined that I had a “tax liability” First of all we have to start off with whether or not I had “taxable income” within the meaning of those statutes and documents named above. Therefore he would have to show an expertise in this area before we needed to proceed any further. Then he would have to have an expertise on assessments as provided in such statutes as 26 U.S.C 6201 and 6203 and what impact they have on whether or not an income tax “liability” exists. He would also have to testify on what legal deductions and credits I might be entitled to and how they might impact on an alleged income tax “liability.” In addition he would also have to be an expert in the provisions contained in Chapter 65 of the Internal Revenue Code entitled, “Abatements, Credits and Refunds,” since obviously the provisions of this Chapter would have an impact on whether or not an income tax “liability” exists in any given year. In addition he would also have to be an expert on the provisions contained in Chapter 66 of the Internal Revenue Code entitled “Limitations on assessment and collection,” since obviously provisions in that Chapter would also have an impact on whether Schiff had an income tax “liability” in any given year. And the government claims that Mr. Lowder is going to testify about “tax deficiencies.” There are a number of statutes that are directly related to the legal meaning of a “tax deficiency,” on what basis “deficiencies” are legally determined, and how they are legally arrived at. These are all legal questions, not factual ones. One would have to be a tax expert to know the answers to these legal questions, and to understand the legal meaning of a “tax deficiency” and how and on what basis it is legally determined.

Therefore, for the government to claim that “Experts ‘interpret and analyze factual evidence. They do not testify about the law because the judge’s special legal knowledge is presumed to be sufficient, and it is the judge’s duty to inform the jury about the law that is relevant to their deliberations.’ Consistent with this standard, Revenue Agent Lowder will “interpret and analyze factual evidence,’ but will not improperly instruct the jury about the law as

Schiff suggests,” is a totally disingenuous claim on the part of the government. The government intends to have Agent Lowder testify to the jury on legal issues, under the pretense that he is only testifying on factual issues. If Agent Lowder testifies on what constitutes taxable “income” he is, obviously, “testifying about the law” and claiming that under the law, Schiff has taxable income. If Agent Lowder testifies that, Schiff has an income tax “liability,” he is obviously “testifying about the law,” since whether or not Schiff has an income tax “liability” in any given year is a legal issue involving dozens of statutes. How can one testify about whether or not an income tax “liability” exists without being an “expert” in all of these laws that impact on whether or not such a “liability” exists? Therefore, how can whether or not Schiff is “liable” for income taxes be anything other than a “legal” question? For the government to claim otherwise is totally disingenuous.

In addition, how can Agent Lowder testify about tax “deficiencies” without making legal representations concerning the law governing tax “deficiencies”? What constitutes a tax “deficiency” is strictly a matter of law. So how can one testify to a jury about tax “deficiencies” without being an expert on the various statutes that impact on whether or not a tax “deficiency” exists? If, as the government states, Agent Lowder will testify about a tax “deficiencies,” he will obviously be testifying on a legal issue and not a factual issue, and any other claim is obviously disingenuous. The government is seeking to put on a witness (who is barred by law from testifying on income taxes) so he can: **mislead** the jury as to the legal meaning of “income”: so he can **mislead** the jury with regard Schiff’s alleged legal “liability” with respect to income taxes; and so he can mislead the jury regarding the legal character of a tax “deficiency”; while pretending that he is testifying on “factual” issues, while knowing full well he would be testifying on “legal” issues.

Next the government states that Mr. Lowder will testify concerning the alleged “falsity of statements” presumably on the tax returns I filed. However there are no false statements on the tax returns I filed. However, my returns contain references to at least 10 Internal Revenue Code Sections, 10 Supreme Court decisions and at least 10 other references to regulations, lower court decisions, and Privacy Act Notice references. Therefore, before anyone could be capable of testifying as to the “falsity” of any of those legal references they would have to be an expert on those tax laws and on the Supreme Court cases I cite. Therefore before Mr. Lowder is permitted to testify as to the “falsity” of any statement I made in connection with

income taxes, I demand to be able to voir dire him concerning his “expertise” in tax law, before he is allowed to testify that any statements I might have made on any document attributed to me were “false.”

HOWEVER...

IRS AGENT LOWDER IS BARRED BY NO LESS THAN THREE STATUTES FROM TESTIFYING ON INCOME TAXES

In my objection to Mr. Lowder testifying I stated:

In addition the government has to provide proof that Mr. Lowder is authorized – more, than say, a clerk who works for the Department of the Interior, to make representations regarding income taxes – and the only way the government can do that is to produce (1) the Order from the Secretary of the Treasury to the Commissioner delegating him with the authority to enforce the payment of income taxes; and 2) a copy of the publication of that Order in the Federal Register. And unless the government produces those two documents, IRS agent Lowder can not establish that he has any more authority to testify about income tax calculations, than anyone sitting on the jury.

In its Response to this obvious legal requirement the government stated:

The Government need not, as defendant Schiff demands, produce either “the Order from the Secretary of the Treasury to the Commissioner delegating him with the authority to enforce the payment of income taxes” or “a copy of the publication of that Order in the Federal Register” Defendant’s Objection, Docket no. 154. Defendant Schiff cites no authority for such a requirement...”

Such a statement by the government is nonsense. The authority is contained in the statutes themselves. There is no provision in the Internal Revenue Code giving any authority to federal employees (whether IRS agents or not) to enforce the payment of income taxes. Indeed there is no mention of the IRS or the Commissioner anywhere in subtitle A. The IRS Commissioner was specifically given authority to enforce the payment of income taxes in the 1939 Code; however, Congress eliminated all such references and all such authority from the 1954 Code. Why? Obviously, it was the intent of Congress not to give any enforcement authority over income taxes to the IRS. All such enforcement authority was given **ONLY** to the Secretary of the Treasury. However, Section 7701(11) states:

The term “Secretary” means the Secretary of the Treasury or his delegate.

Section 7701(12) states (in pertinent part):

(A) In general. The term “or his delegate” –

- (i) when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in the context

Clearly, therefore the **law requires** that before any “officer, employee, or agency of the Treasury Department” can have any enforcement authority with respect to **any provision** of the Internal Revenue Code there must be a delegation order from the Secretary of Treasury – delegating to that agency (from which “redelegations” of authority can be made) the authority to enforce any provision of the Internal Revenue Code. However, Section 44 USC 1505 requires that “every document **or order** which proscribes a penalty has general applicability and **legal effect**” (Emphasis added) must be published in the Federal Register. So when the government states that “Defendant Schiff cites no authority for such a requirement... (That the government produce the Delegation Order at issue and a copy of its publication in the Federal Register), the authority that Schiff relies on **are the statutes themselves** – 26 U.S.C 7701 (11) & (12) and 44 USC 1505. What better “authorities” could there be? What authority can the government cite that authorizes it to **disregard** the clear provisions of **three statutes** - 26 U.S.C 7701 (11) & (12) and 44 USC 1505 – which **establish** the enforcement authority with respect to **ALL** the provisions of Internal Revenue Code?

However the clear provisions of 26 U.S.C 7701 (11) & (12) and 44 USC 1505 which specifically preclude IRS agent Lowder from testifying on any aspect or provision of the Internal Revenue Code (since he has no delegated authority to do so) is further **established and supported** by the provisions of Code Section 7608.

In establishing Code Section 7608 Congress clearly provided for two different categories of “internal revenue enforcement officers” and established **different** enforcement powers with respect to each class. Agents “by whatever term designated” all fall into to subsection (a) of section 7608; with the exception of “criminal investigators of the Intelligence Division of the Internal Revenue Service” who fall into subsection (b). Therefore, since Mr. Lowder is a Revenue Agent and not a criminal investigator of the Intelligence Division of the Internal Revenue Service, **Congress specifically placed him in subsection (a) of Section 7608**, and, stated that BY **LAW** he is only authorized to enforce are those taxes that fall into “subtitle E and other laws pertaining to liquor, tobacco, and firearms.” Congress **specifically provided** that – **BY LAW**- the *only* internal

revenue agents who *might* be authorized to enforce “laws relating to internal revenue **other than subtitle E**” were criminal investigators of the Intelligence Division of the IRS. ³ Therefore, since Revenue Agent Lowder **is not** a criminal investigator of the Intelligence Division of the IRS **he is BARRED BY LAW** from testifying about income taxes. What can be plainer than that?

It is obvious that the whole purpose of Mr. Lowder’s testimony would be to aid the government in **the enforcement** of the federal income tax, and Revenue Agent Lowder is barred - **BY LAW** – from engaging in *any such enforcement*. Therefore, it really doesn’t matter how much “education and experience with the Internal Revenue Service , Revenue Agent Lowder” might have which might “qualify (him) as an expert in tax computation,” he is **specifically barred** by the provisions of 7608(a) and (b) from testifying about *any tax other than those falling into subtitle E*. He is specifically precluded **by statute** from enforcing any federal tax “other than subtitle E” taxes.

Therefore, none of the cases cited by the government have any relevancy here. Those cases cited that didn’t involve income taxes, didn’t involve witnesses who were barred by statute from testifying on the subject they were testifying about. In those cases involving income taxes the relevancy of sections 26 U.S.C 7701 (11) & (12), 44 USC 1505 and IRC Sections 7608(a) and (b) were not raised with respect to the legality of the testimony involved. No court to my knowledge and no decision cited by the government have ever held that:

- 1) Despite the Secretary never having delegated to the IRS any authority to enforce the payment of income taxes as required by 26 U.S.C 7701 (11) & (12); and
- 2) Despite the fact that no such a Delegation Order has never been published in the Federal Register, as required by 44 USC 1505, and
- 3) Despite the fact that 26 USC 7608(a) and (b) specifically bar IRS Revenue Officers from enforcing any tax other than those that fall into subtitle E;

it is still legal for IRS revenue officers to help the government enforce the payment of income taxes by testifying as some kind of “expert” in connection with income taxes *even though* section 7608 bars them from doing so.

³ Provided they were *also* **specifically charged** by the Secretary “with the duty of enforcing any of the criminal provisions of the internal revenue laws....”

It is therefore clear from all of the above that the provisions of 26 U.S.C 7701 (11) & (12), 44 USC 1505 and IRC Sections 7608(a) and (b) bar IRS Revenue Agent Clinton Lowder from taking the stand and testifying on income taxes. This court will allow him to do so ***only by*** **VIOLATING THE LAW** as contained in such statutes as 26 U.S.C 7701 (11) & (12), 44 USC 1505 and IRC Sections 7608(a) and (b). And if it does so, it would only be a continuation of the same type of behavior that is criminalized in 18 USC 241 as covered in my motion filed on July 5, 2005 requesting a dismissal of all charges, since the indictment fails to charge an offense.

In addition, if this Court decides to **break** *all the laws as identified above*, and allow Revenue Agent Lowder to testify anyway along the lines outlined by the government, then I demand to be able to voir dire Revenue Agent Lowder on the numerous statutes, Supreme Court decisions, and Congressional Reports that would impact on the validity of any testimony he might give on: (1) the nature of what constitutes taxable “income”; (2) on what does and does not establish the legal basis of an income tax “liability”; (3) his understanding of the legal nature of a tax “deficiency,” and (4) his overall expertise on the subject of income taxes, that would allow him to testify as an “expert” that one or more statements I made on any document attributed to me which contain numerous references to: statutes, Supreme Court decisions, Congressional Reports and the Disclosure Statement contained in the 1040; are false.

ORAL ARGUMENT REQUESTED

Dated: July 15, 2005

Irwin Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this date hand delivered a copy of the foregoing Reply to the Government's Response to Defendant's Objection to the Government's Expert Summary Witness to:

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And that I have this day mailed a copy of this Motion by first class mail, to the following Attorney's of record.

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Date: July 15, 2005

Irwin Schiff