IRWIN A. SCHIFF
IN PRO PER
444 EAST SAHARA AVE
LAS VEGAS, NV 89104
PHONE: 702-385-6920
FAX: 702-385-6917

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA	) **Civil No. CV –S-01-0895-PMP LRL**
	)
Plaintiff	) **DEFENANT'S REPLY TO THE**
v.	.) **GOVERNMENT'S OPPOSITION**
	) **TO DEFENDANT'S MOTION TO**
IRWIN A. SCHIFF	) **DISMISS, SINCE DEFENDANT**
Defendant.	) **IS NOT 'LIABLE" FOR THE**
	) TAXES AT ISSUE

Since, in its Response, the Government could not identify any statute that makes Defendant "liable" for income taxes, basic common sense dictates that this Court can have no authority (jurisdiction) to compel Defendant to pay an alleged tax,[1] for which Justice Department lawyers can find no statute making Defendant "liable." However, since the Government's lawyers could not locate any such statute (since no such statute exists), they fabricated a response in which they sought to establish that Defendant was "liable" for income taxes even though they could not find a statute that said so. How did they seek to accomplish such a fraud? First, they would misrepresent the issue before the Court. On page 2 they state the "QUESTION PRESENTED," was, "Whether the Court has subject matter jurisdiction to adjudicate this suit to reduce federal income tax assessments to judgment." However they left out the crucial issue of "liability," which was the basis of Defendant's motion to dismiss. Why? Because if they correctly stated the "Question," the answer would be obvious even to those having no legal training whatsoever. The actual "Question" was, "Does this Court have the authority (i.e. the jurisdiction) to compel the payment of an alleged tax for which no statute makes Defendant 'liable'"? The answer is obvious: this Court can have no authority to compel Defendant to pay

[1] A tax has been defined as a "*Mandatory* exaction for the support of government." "A 'tax' is a ***statutory liability*** imposed upon all inhabitants of the state defined as taxable, so that they may contribute their just share to expenses of government." *People v. Chenango County*, 30 N.Y.S. 2d 785,791,792. (Emphases added) Therefore, if there is no statute making persons "liable" for an income tax, it is not a "mandatory exaction" and thus does not qualify as a "tax."

an alleged tax for which Congress passed no law making him "liable." As a matter of fact, if Defendant paid such a "tax," the Government would have been obliged – under the law- to refund any amount so paid.

Section 6401(c) entitled, "**Rule where no tax liability,**" states as follows.

> An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such payment was paid.

Since there is a double negative in the statute, the statute is practically impossible to understand unless the double negatives (which cancel themselves out) are omitted. Omitting the double negatives, we find the statute says: "An amount paid as tax shall be considered to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid." Therefore, under the law, if one pays a federal tax under the misconception that he is "liable" for the tax, the law provides that such a payment constitutes an "overpayment." Section 6402 (a) provides that such "overpayments" must be refunded to taxpayers. It provides, in relevant part, "In case of an overpayment. The Secretary…shall, subject to subsections (c), (d), and (e), ***refund*** any balance to such person." (Emphasis added.) Therefore, had Defendant paid any income taxes for the years at issue, the Secretary (actually the IRS illegally acting for the Secretary, since the Secretary has never delegated any such authority to the IRS) would have been obliged, under sections 6401 and 6402, to "refund" any such "overpayments" to Defendant.

Therefore, how can this Court, in light of Sections 6401 and 6402 – and overlooking all of the other statutes cited by Defendant – order the Defendant to pay a tax, which, by law, would have to be refunded to Defendant if he paid such taxes under the misconception that he was "liable" for them?

In order to overcome 28 U.S.C 1396 (as cited by Defendant) which clearly makes the issue of "liability" fundamental to a district court's jurisdiction with respect to any internal revenue tax, and which is supported by sections 26 U.S.C 6001 and 6011 both of which *also* make the issue of "liability" fundamental to the payment of any internal revenue tax, the Government raises a number of statutes, court decisions, and statements all of which are designed to overcome and obfuscate its fundamental inability to identify a law that makes Defendant "liable" for income taxes. Instead of citing such a statute (though numerous such statutes exist in connection with other federal taxes as shown in Defendant's instant

Memorandum of Law), the Government cites such irrelevant statutes as 28 U.S.C 1340 and 1345; 26 U.S.C. 7401, & 7402. Section 1340 does state that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue or revenue from imports or tonnage…" However, since no "Act of Congress" makes anyone "liable" for income taxes, section 1340 cannot apply to income taxes. Naturally, Congress can give federal courts jurisdiction to litigate the various Federal taxes for which an "Act of Congress" makes persons "liable," such as: wagering taxes, liquor taxes, tobacco taxes, and firearms taxes, just to name a few such taxes. However, could Congress give Federal courts jurisdiction to enforce the payment of an alleged tax for which no "Act of Congress" made anyone "liable"? Obviously, not, and obviously 28 U.S.C. 1340 only applies to such taxes for which an "Act of Congress" makes persons "liable." Therefore 28 U.S.C. 1340 cannot apply to income taxes.

Next the Government cites 28 U.S.C 1345 which states, in pertinent part: "Except as otherwise provided by Act of Congress, --district courts shall have original jurisdiction of all civil actions….expressly authorized to sue by Act of Congress." Well, "except as otherwise provided by Act of Congress," and Congress logically provided in Section 1396 that the "collection of internal revenue taxes" was dependant upon their being a "liability" for such taxes. Why would there be a law authorizing lawsuits in connection with an alleged tax for which no law made anyone "liable"? Therefore, Section 1345 does not confer on district courts jurisdiction to conduct lawsuits involving a tax for which no "Act of Congress" makes anyone "liable."

Next the Government cites 26 U.S.C. 7401 and 7402. However, 7401 does not apply to income taxes. Defendant has attached as Exhibit A an excerpt from the Parallel Table of Authorities. It shows that the implementing regulation for this statute is in C.F.R. 27, and that there are no implementing regulations for section 7401 in C.F.R. 26. Therefore, 26 USC 7401 can obviously only apply to those taxes (such as liquor, tobacco, and firearms) that are implemented in 27 CFR, which does not include income taxes, for which implementing regulations are contained in CFR 26 and not C.F.R. 27.[2] As far as 7402 is concerned, the

[2] The fact the earlier in this litigation, the Government's attorneys stated that they had received valid authorization from the Secretary and Attorney General to commence this lawsuit ***means that somebody is lying***. It is clear from the absence of any implementing regulation in C.F.R. 26 for 26 U.S.C. 7401, that the Government's attorneys ***could not have received any valid authority from the Secretary and Attorney General to commence this lawsuit.***

statute states that it gives district courts authority to enforce "internal revenue laws." However, if there is no statute making Defendant "liable" for income taxes, there is no "internal revenue law" for district courts to enforce. So much, therefore for 26 USC 7401 and 7402.

Next the Government cites 26 U.S.C. 7403. However 7403 provides that the Attorney General may "direct a civil action" in "any case where there has been a refusal or neglect to pay any tax or to discharge any ***liability*** in respect thereof…" Therefore, Section 7403 is itself dependant on a statute making persons "liable" for the tax at issue. Therefore, Section 7403 is of no help to the Government unless it can identify the statute that makes people "liable" for income taxes – which it is unable to do.

As Defendant stated in Footnote No. 2 in his Memorandum of law:

> If there is a statute making Defendant "liable" for income taxes, all Messer's Darmstadter and Jennings have to do in opposing this Motion is fill in the blank in the following sentence. "The Code section that makes persons 'liable' for income taxes is Code Section_____, and then merely quote from that section where the word 'liability' appears."

So, instead of merely citing such a section, the Government cites five (5) Code Sections none of which establish a "liability" for income taxes. *If the Government could find these five code sections, <u>why couldn't it find one providing for a "liability" for income taxes?</u>* As noted in Defendant's Memoranda of Law, the Internal Revenue Code specifically creates "liabilities" in connection with numerous Federal taxes, and Defendant provided this Court with examples of such provisions, as follows:

> For example, in connection with the federal wagering tax, section 4401(a) provides and states in relevant part:
>
> **Sec. 4401. Imposition of tax.**
> **(a) Wagers.**
> **(1) State authorized wagers.** There shall be <u>*imposed*</u> on any wager authorized under the law of the State… etc. etc. etc. (Emphasis added)
>
> However, subsection (c) is captioned **"Persons liable for tax"** and provides:
>
> Each person who is engaged in the business of accepting wagers <u>shall be liable</u> for and <u>*shall pay*</u> the tax under this subchapter. (Emphasis added)

Defendant overlooked this earlier, because all of the Government's actions against Defendant prevented him from focusing and completing discovery in connection with this action. Therefore, Defendant is putting this Court on judicial notice that the Government's attorney's could not have gotten legal authority to commence this lawsuit, since they were precluded from doing so by the absence of any implementing regulations in C.F.R. 26.

> Therefore, while subsection 4401(a) *imposes* the wagering tax, it is subsection (c) that says who is "liable" for, and who "shall pay the tax."
>
> Similarly, in connection with federal tobacco taxes, subsection 5701(a) *imposes* tobacco taxes, but it is subsections 5703 (a) and (b) that provide that,
>
> The manufacturer or importer of tobacco products and cigarette papers and tubes ***shall be liable*** for the taxes imposed thereon by Section 5701. and …
> Such taxes ***shall be paid*** on the basis of a return (Emphasis added).
>
> Therefore, while subsection 5701(a) imposes federal tobacco taxes, it is subsections 5703(a) and (b) which state who is *liable* for those taxes and who is required *to pay* them.
>
> Another example are subsections 5001(a)(1) and 5005(a) which deal with federal liquor taxes. While subsection 5001(a)(1) states that "There is hereby imposed on all distilled spirits…a tax," it is subsection 5005(a) that provides that it is the distillers and importers who " ***shall be liable*** for the tax imposed thereon by subsection 5001(a)(1)."
>
> So here again while subsection 5001(a) *imposes* federal liquor taxes it is subsection 5005(a) that states who are *liable* for those taxes.
>
> It is clear, therefore that if you are "liable" for some federal tax, there must be a statute that specifically says so. A further example is section 1461, which relates somewhat to income taxes since it involves withholding taxes. It states, in pertinent part, "Every person required to deduct and withhold any tax under this chapter is hereby *made liable* for such tax and is herby indemnified etc. etc. etc…" So even section 1461 specifically refers to a "liability" in connection with withholding taxes. While Section 1 of the Internal Revenue Code "imposes" an income tax, unlike all of the examples shown above, no Code section specifically makes anyone "liable" for income taxes "imposed" in section 1, by stating that "persons having income shall be *liable for* and shall pay income taxes," or words to that effect. ***And the United States will not be able to produce any such statute.***

And, sure enough, the United States was "not able to produce any such statute, " nor explain why a reference to an income tax liability did not appear anywhere in the Index of the Internal Revenue Code even though such references appear in connection with other Federal taxes.

Not finding any statute that established a "liability" for income taxes, the Government next turned to Court decisions - as if Federal judges have the authority to create tax liabilities which were never created by acts of Congress. The irrelevant cases cited by the Government are *United States v. Rodgers,* 461 U.S. 677 (1983); *United States v. Stonehill,* 702 F. 2d 1288 (9th Cir. 1983); and *United States v. Scherping,* 187 F.3d 796 (8th Cir. 1999). [3] The issue before this

[3] It is significant to note that the IRS does not consider itself bound by court decisions, other than Supreme Court decisions. In the 'Internal Revenue Manual" as posted on the Internet, (attached as Exhibit B) the IRS states at 4.10.7.2.1 "1. The Internal Revenue Code of 1986 is the primary source of Federal tax law." Next the Manual lists "Publication of Committee Reports" as being influential in determining Federal tax law. Next, the Manual notes,

Court, of course, is whether or not it can have subject matter jurisdiction in connection with an alleged tax for which no statute makes Defendant "liable." None of these three cases ***address such an issue***, nor where these courts briefed with the statutes and court decisions contained in Defendant's Memorandum of Law with respect to this issue. **Therefore, none of these three cases can be relevant to the issue before this Court.** However, in *United States v. Rogers et al* the Supreme Court focused on 26 U.S.C. 7403 and whether that statute "authorizes a federal district court, in a suit instituted by the Government, to decree a sale of certain properties to satisfy the tax indebtedness of delinquent taxpayers." In discussing section 7403 it noted, in relevant part (at pages 680-681):

> Section 7403 provides in full as follows: '(a) Filing- In any case where there has been a refusal or neglect to pay any tax, or to discharge ***any liability in respect thereof*** … The Attorney General at the request of the Secretary…may direct a civil action to be filed district court…to enforce the lien of the United States…with respect to ***such tax liability*** or to subject any property…to the payment of such ***tax liability***.
> (Emphasis added)

And further on the Supreme Court noted (at pages 681-682):

> As a general matter, the " lien of the United States" referred to in Section 7403(a) is that created by 26 U.S.C. Par. 6321, which provides:
> "If any person ***liable*** to pay any tax neglects or refuses to pay the same after demand, the amount….." (Emphasis added)

Therefore *United States v. Rogers* (and the case decided jointly with *Rogers, United States v. Ingram*) were based on the **assumption** and **belief** that there was a statute that made defendants "liable" for the income taxes at issue in those cases - and defendants did not challenge that assumption and belief, as the Defendant has done here. The (false) assumption that an income tax liability was created by an act of Congress is continually expressed in *United States v. Ingram.* For example:

> "Fourth, a court should consider the relative character and value of the **nonliable** and **liable** interest held in the property….

"The Service is bound by the regulations. The courts are not." Finally the Manual explains the "Importance of Court Decisions," and points out, "The Internal Revenue Service must follow Supreme Court decisions"; however the Manual explains that the Service is not bound by lower court decisions, which "are binding on the Service only for the particular taxpayer and the years litigated. Adverse decisions of lower courts do not require the Service to alter its position for other taxpayers." And finally the Manual states, that the Service can publish its "nonacquiescence" with "reference to an opinion of a circuit court of appeals, a nonacquiescence indicates that the service will not follow the holding on a nationwide basis." So, obviously, if lower court rulings are **not binding** on the IRS, they certainly are **not binding** on the public. And, of course, Congress never passed a law binding the public to court decisions.

(Page 711, Emphasis added)

> State law determines income attributable to wife as community property, but state law allowing wife to renounce community rights and obligations not effective as to ***liability*** for federal tax…. (Page 683, Emphasis added)

> In addition to its lien for individual debt of Donald Ingram, has a further lien of $283.33 plus interest, on the house, representing the ***joint liability*** of Donald and Joerene Ingram. Because Joerene Ingram is not a "third party" as to that ***joint liability***…On the other hand, it would certainly be to Mrs. Ingram's advantage to discharge her ***personal liability*** before the Government can proceed with its "sale"… (Page 712, Emphasis added)

Therefore, the existence of an income tax **liability** was fundamental in both cases; however, the actual existence of such a tax "liability" was never challenged by the defendants in these cases, nor was it ever statutorily proven by the Government. Therefore, this case as well as the two others cases cited by the Government can be of no help to the Government in opposing Defendant's motion.

A case closer on point is *United States v. Stone*, 59 F.R. D. 260 (1973). It starts off by mentioning that the "action is filed" pursuant to every section, mentioned by the Government in its Response, to wit:

> The complaint alleges that the action is filed pursuant to Sections 7401 and 7403 of the Internal Revenue Code of 1954, 26 U.S.C 7401 and 7408, by direction of the Attorney General of the United States and the authorization and request of the Chief Counsel of the Internal Revenue (IRS). Jurisdiction is based on 28 U.S.C 1340 and 1345 and 26 U.S.C. 7402.

However, the decision makes clear that the issue before the court concerns "the payment of (the defendant's) *assessed tax liability"* (at page 263, 3-5). If there were no "tax liability" there would not be a case before the court, regardless of Internal Revenue Code sections 7401, 7402, 7403, 7408, and 28 U.S.C. 1340 & 1345. The issue of defendant's alleged "tax liability" is continually referred to throughout this decision. Clearly, if the defendant had no tax "liability," there would be no case.

> The United States commenced a similar action against Stone in the Eastern District of Missouri seeking to subject certain of property …to …the satisfaction of the *same tax liabilities* involved herein. (Page 263, Emphasis added)

In seeking to establish "that 7403 actions are equitable in nature," the court cited some court decisions, and then went on to note:

> Most of these cases involved a refusal to grant the taxpayer's demand for a jury trial on the issue of his *tax liability* on the grounds that Sec. 7403 was equitable in nature (Emphasis added, page 265 [10])
>
> Since the Sec. 7403 action to subject a taxpayer's property to the payment of her *tax liability* is of equitable derivation." (Emphasis added, p 266 [11])
>
> While it is arguable that 6863(b)(3) precludes the sale of any seized property until after a Tax Court determination of the taxpayer's *liability*, the section in no manner purports to prevent initiation of efforts toward collection of an outstanding *tax liability*…the taxpayer can stay any form of collection by filing a bond in the amount of the alleged outstanding *tax liability* …prior interpretations of 7403 as a broad statute designed to secure payment of *tax liabilities*. The Court must consider the question of deferring a determination of the outstanding tax *liability* until the matter is resolved by the Tax Court. To prevent duplicative expenditures…and afford the taxpayer an adjudication of her tax liability before the Tax Court, this Court is of the opinion it should stay this action until the Tax Court's final determination of Stone's *tax liability*. (At page 267, Emphasis added)

In *United States v. Updike*, 281 U.S. 489, the Supreme Court stated:

> The aim in the one case, as in the other, is *to enforce a tax liability*. (At page 494)
>
> The clear intent of Sec. 278, as applied to the facts of the present case, was to designate the extent of time for the *enforcement of the tax liability*. (At page 495)
>
> An actual assessment having been made, it must be assumed that the government was in possession of the facts, which gave rise *to the liability* upon which the assessment was predicated. (Page 495)
>
> In any event, we think this is the fair interpretation of the clause and the one, which must be accepted, especially in view of the rule, which *requires taxing acts, including provisions of limitations embodied therein, to be construed liberally in favor of the taxpayer*. Bowers v. N.Y. & Albany Co., 273 U.S. 346, 349. (Emphasis added throughout)

Therefore, it is clear from the above, that ***ALL*** court actions involving all of the statutes and court decisions cited by the Government are all predicated on the assumption that there is a statute making individuals "liable" for income taxes – however, all such assumptions are erroneous since no such statute exists, as the Government's inability to identify any such statute proves. Of course, Defendant proved this in his initial Memorandum of Law by merely reproducing five Exhibits, which were excerpted from the Index of the Internal Revenue Code as, published by the Research Institute of America. These were the Index entries for "Liability for tax," "Books and Records" and the Index entries for alcohol, tobacco, and income taxes. These entries showed that while numerous federal taxes were listed in the Index entries for "Liability for tax" and "books and records" an income tax was not included in either list. These

Exhibits also showed that while "liability for" and "record" requirements were shown as applying to alcohol and tobacco taxes, no such provisions were shown as applying to income taxes. Therefore, it is clear, since there is no statute making Defendant "liable" for income taxes, this Court can have no jurisdiction to compel Defendant to pay a tax for which Congress passed no law making Defendant "liable." *Indeed 28 U.S.C. 1396 specifically precludes this Court from having any such jurisdiction, and in its Response, the Government did not contest Defendant's claim that 28 U.S.C. 1396 specifically precluded such jurisdiction.*

Since the Government could: (1) not find a statute that established an income tax liability, nor, (2) a court decision that held that district courts had jurisdiction in connection with "taxes" for which no statute made persons liable, the Justice Department lawyers were compelled to manufacture absurd claims in place of the statutes and court decisions they could not find. One such claim was: "Schiff's contention that there is no statute making him liable for any income taxes because the applicable statute only 'imposes' a tax is…. nonsensical and frivolous…."[4] Here the Government is trying to claim that the "applicable statute" that establishes an income tax "liability" is section 1 of the IR Code, which merely claims to "impose" a tax "on taxable income." However, neither Section 1 nor any other section of the Code makes anyone "liable" for the tax so imposed.[5] In addition, the Privacy Act Notice in a 1040 booklet (Exhibit F in Defendant's Memorandum) alone proves that this claim by the Government is fallacious. That Notice notifies the public that they "must file a return or statement for any tax your are ***liable*** for." It doesn't notify the public that they "Must file a return or statement for any tax ***imposed*** in the Internal Revenue Code." In addition, the Notice specifically directs the public to only three statutes which presumably establish the requirement to file and pay income taxes. Those Code sections are: sections 6001, 6011 and 6012. Obviously, if Section 1 were "applicable" to the payment of income taxes, it would have been mentioned in the Privacy Act Notice along with sections 6001, 6011, and 6012. The fact that it was not mentioned, is proof that section 1 has nothing to do with establishing an income tax "liability" or the payment of income taxes.

[4] "Frivolous" is a term that DOJ tax attorneys use when they can't refute an argument, which is quite often.
[5] In addition, section 1, "imposes" the tax on "taxable income" not **on individuals** . And since House Report 1337 and Senate Report 1622 (33rd Congress, 2nd Session, Exhibit B) decreed that "income" as used in the Code (as in Code sections 1 and 61) means "income" used in its "constitutional sense," section 1 does not impose the income tax on "income" used in its "ordinary sense," which is the "sense" in which the Government imputes "income," as it has done throughout this litigation. So, section 1 is of no help to the Government on a variety of grounds.

In addition, the very wording of Sections 6001 and 6011 – ***Code section to which the public is specifically directed to in the 1040 Booklet*** - make clear that: (1) the imposition of a tax and (2) who is made liable for the tax, constitute two separate provisions which are provided for by law. Section 6001 states "Every person *liable* for any tax *imposed* by this title…." Thus it is clear from the wording of the statue that *not all* persons are "liable" for the taxes "imposed" in the Code. If both terms meant the same thing, the statute could read. "Every person subject to a tax imposed in this title, shall…keep such records…make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe." However, how would the public know who was made subject to the tax "imposed"? In addition, Section 6011 would make no sense at all. It states: "When required by regulations proscribed by the Secretary, any person *made liable* for any tax *imposed* by this title …shall make such a return or statement according to the forms and regulations by the Secretary" If the imposition of a tax automatically made one "liable," what purpose would the words "made liable" in that statute serve? The fraud sought to be perpetrated by the Government can easily be seen from the fact that wagering, tobacco, alcohol, and firearms taxes are all "imposed" in the Code. Does that mean that the Defendant is "liable" for all these taxes because they are "imposed"? Obviously there has to be statutes making specific persons "liable" for these taxes, notwithstanding the fact that they are all "imposed."

In addition, Exhibit C is 26 CFR 602.101 as it formerly appeared. It shows the OMB numbers assigned to the collection of information in connection with IRS regulations. Regulation 1.1-1 is entitled "Income tax on individuals" and it implements Section 1 of the Code. Notice, however, that the OMB control number assigned to that Section is number 1545-0067. This is the control number that is also assigned to IRS Form number 2555 (Exhibit D) which is the form for reporting "Foreign Earned Income." The OMB number assigned to the 1040, "Income Tax Return" is 1545-0074 (Exhibit F). However that OMB control number for an IRS 1040 does not even appear until Regulation 1-31-2(a), or well beyond the regulations that implement the "imposing" of income taxes. This certainly proves that Section 1 cannot make anyone "liable" for income taxes: the Government does not even claim that Section 1 *even applies* to the reporting of "income" for tax purposes. Thus, the Government's attempt to pass

off Section 1 as providing the statutory basis for making person's "liable" for income taxes is revealed as a total fraud.[6]

As Defendant has previously noted, Exhibit A, in Defendant's Memorandum of Law lists some 30 statutes, which create a tax "liability, " however an income tax "liability" is not shown as being among them. In addition, Exhibits B-1 and B-2 (Index entries for alcohol and tobacco taxes) specifically show entries for "liability" with respect to these taxes, while Exhibit D, the entry for income taxes, shows no such entry. In addition, as shown above, Section 4401, which deals with the federal wagering tax, both imposes the tax but then states who are "liable" for the tax so imposed. The same provisions are contained in sections 5701 and 5703, which deal with tobacco taxes, and sections 5001 and 5005, which deal with liquor taxes.

In addition, the fraudulent attempt by the Government to pass off Section 1 of the Internal Revenue Code as creating the statutory "liability" for income taxes is also refuted by the following Court decisions which were cited in Defendant's Memorandum

> Moreover, even the collection of taxes should be extracted only from persons upon whom a tax ***liability*** is imposed ***by some statute***.
> (*Botta v. Scanlon* 288 F.2d 504, 506 [2nd Cir 1961]Emphasis added)
>
> Liability for taxation must ***clearly appear*** from statute imposing tax.
> (*Higley v. Commissioner,* 69 F2d 160 Emphasis added)
>
> The Government is correct when it states that the statute imposes the tax upon "articles sold at retail". ... **Liability for the payment of the tax must be placed on a person**.
>
> In this case we have a much narrower **question -- the question of whether or not the Commissioner may make an assessment for unpaid taxes upon those who are not *made liable for the tax by the taxing statute***.
> (*Fine v. United States,* 206 F. Supp. 520 [D. Colorado 1962] Emphasis added)

Additional cases which establish this point are: *Bente v. Bugbee* 137 A. 552, 553, 103 N. J. Law 608, in which the court held:

> A tax is a legal imposition exclusively of statutory origin (37 Cyc.724, 725), and, naturally, liability to taxation must be read in the statue, ***or it does not exist.***
> (Emphasis added)

[6] Defendant does not doubt that DOJ lawyers have successfully used this fraudulent argument thousands of times against a hapless public, who simply would not have known any better – including the lawyers who represented them.

And in *State v. Chicago & N.W.R. Co*., 112 N.W. 515, 520; 132 Wis. 345, quoting and adopting the definition in *State v. Certain Lands in Redwood County*, 42 N.W. 473, 40 Minn. 512, the court held:

> That a tax is *a liability created by statute* we think admits of no doubt, either upon principle or authority. (Emphasis added)

Therefore, the "liability" with respect to a tax must "clearly appear" in some statute "***or it does not exist.***"

The Government additionally claimed that not only was "Schiff's contention that there is no statute making him liable for any in come taxes…nonsensical and frivolous," but also that it has "been rejected by this court and other courts in actions in which Schiff was a party. (See cases in support of United States' motion for summary judgment.)." That statement is also false. This Court has never ruled that it has jurisdiction with respect to a tax for which no statute makes anyone liable – and Defendant doubts that this Court would lend its name to any such absurd ruling. Also, no other Court in actions "in which Schiff was a party" has ever handed down such an absurd ruling – which is why the Government did not quote from any such ruling.[7] Defendant has indeed raised this very issue as a bar to jurisdiction in *U.S. v. Schiff*, et al, CR –S-04-0119-KJD (LRL); however, the Government has yet to answer (though the motion was filed on April 1, 2004), and the court has yet to rule on it.

As far as the Ninth Circuit upholding an injunction which "barred Schiff and his associates from promoting and selling Schiff's frivolous tax schemes and books" is concerned, (Footnote 1 in the Government's response), Defendant's attorney did not argue the merits of Schiff's books to the Ninth Circuit. He stated he would be sanctioned and lose credibility with the court if he did so. He, therefore, could only argue that regardless of what Defendant's book contained, it was protected by the 1st Amendment.[8] At the preliminary hearing which generated the injunction (which can be heard in its entirety on Defendant's web site), the Government (1) put on no witnesses of its own (2) refused to cross-examine Schiff or materially cross-examine his witnesses, and (3) refused to point out to Schiff where in his book Schiff promoted tax evasion and violations of law. The Government has raised this irrelevant, injunction issue in its

[7] Defendant has never raised this issue in any case, in which he was a party; in any case he never briefed any court as extensively and as thoroughly on this issue as he has done here.

[8] Defendant has filed a petition to the Ninth Circuit asking for a rehearing *en banc*. In addition, Defendant will address the significance, implications, and validity of that injunction in his next book.

Response in lieu of pointing out where in the Internal Revenue Code Defendant was "made liable" for income taxes.

Therefore, it is clear, that for Defendant to be "liable" for the payment of income tax, and for this Court to have jurisdiction to compel such payment there has to be a statute ***specifically*** making Defendant "liable" for an income tax. As Defendant pointed out in his original Memorandum of Law, that is exactly what 26 U.S.C. 6001 and 6011 both say. Section 6001 states in relevant part:

> Every person ***liable*** for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe… (Emphasis added)

Section 6011 states in relevant part:

> When required by regulations prescribed by the Secretary any person ***made liable*** for any tax imposed by this title…shall make a return or statement according to the forms and regulations proscribed by the Secretary …

Obviously, Defendant can only be "made liable" by some statute, as confirmed by all of the court decisions quoted above. However, there is no statute that "makes" Defendant "liable" for income taxes – and the Government in its Response could not identify any such statute. Therefore, this Court cannot assume that such a statute exists.

In addition to the ***unambiquous,*** statutory provisions of being "liable" and being "made liable" as contained in sections 6001 and 6011, Defendant's Memoranda called attention to the fact that the statutory requirement of "liability" was also an integral part of such statutes as: 26 U.S.C 6303, 6321, and 6331. This Court is not at liberty to disregard all of the references to "liability" that appear in all of these statutes. ***Taxing statutes must be strictly construed, and any doubt resolved in favor of the taxpayer***. Hassett v. Welch, 303 U.S. 303, 314, 58 S.Ct. 559, 82 L.Ed. 858; Miller v. Standard Nut Margarine Co., 284 U.S. 498, 508, 52 S.Ct. 260, 76 L.Ed. 422; Davenport v. Ralph N. Peters & Co., 386 F.2d 199 (4th Cir. 1967); Bookwalter v. Mayer, 345 F.2d 476 (8th Cir. 1965); Luben Ind., Inc. v. United States, 707 F.2d 1037 (9th Cir. 1983); Renick's Estate v. United States, 687 F.2d 371, 231 Ct. Cl. 457 (1982); Mobil Petroleum Co., Inc. v. Blaz, 416 F. Supp. 98 (D.C. Guam 1975). It is likewise the established rule not to extend their provisions by implications beyond the clear import of the language used. United States v. Merriam, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547, Gould v. Gould, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211.

Nothing can be clearer than numerous laws, as quoted above, require a statute ***specifically*** making Defendant "liable" for income taxes before this Court can compel Defendant to pay $2.6 million to the Government in income taxes, penalties and interest and this Court is not at liberty to ignore and disregard this simple fact. As stated by John Marshall in ***Osborn et al v. The Bank of U.S., 6 L.Ed 204***

> Judicial power, as contradistinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised *in discerning the course prescribed by law*; and, when that is discerned, *it is the duty of the court to follow it.* Judicial power is never exercised for the purpose of giving the effect to the will of the judge, always for the purpose of giving effect *to the will of the legislature;* or, in other words, the ***will of the law.*** (emphasis added)[9]

Obviously, "the will of the law" is that there has to be a statute ***specifically*** making Defendant "liable" for income taxes, before this Court can have jurisdiction to require Defendant to pay $2.6 million in connection with such an alleged tax.

Obviously, the income tax is being collected "in the guise of a tax." That this can occur was noted by the Supreme Court in *Miller v. Nut Margarine Co.,* 284 U.S. 498, 509, wherein the Supreme Court observed:

> And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the *illegality of an exaction* *in the guise of a tax* there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector (Citations omitted)

Clearly, therefore, the income tax is *similarly* being collected "in the guise of a tax."

Therefore, since there is no statute in the Internal Revenue Code that makes Defendant "liable" for income taxes, this Court can have no authority (i.e. jurisdiction) to issue an Order compelling Defendant to pay an alleged tax for which no statute makes him liable. Such an order would make a mockery of the rule of law as allegedly practiced in America as well as making a mockery of the protections allegedly afforded to the public by the United States Constitution.

---

[9] Article 1, Section 1 of the United States Constitution provides that "***All*** legislative Powers shall be vested in Congress," Thus the expression "case law" implying that judges can make law, independent of Congress to which the public must conform certainly finds no support in the Constitution, as John Marshall obviously understood.

WHEREFORE, since 28 U.S.C. 1396 provides that district courts can have no jurisdiction in the collection of internal revenue taxes for which Congress has not enacted a statute making persons "liable," this Court can have no jurisdiction to compel Defendant to pay $2.6 million in income taxes, penalties and interest in connection with an alleged tax for which no statute makes him liable. Therefore, this Court must vacate its Order of June 13, 2004 since that Order was manifestly illegal and void as a matter of law.

Dated: September 29, 2004

_____

Irwin A. Schiff, pro per

CERTIFICATE OF SERVICE

I certify that I have this day hand delivered a copy of the foregoing to Henry C. Darmstadter and G. Patrick Jennings, Trial Attorneys, Tax Division, in care of Danial G. Bogden, United States Attorney, District of Nevada, Lloyd D. George Federal Courthouse, 333 Las Vegas Blvd. South, Suit 5000, Las Vegas, Nevada.

_____

Irwin A. Schiff