

DOJ

RECEIVED U.S. ATTORNEY'S
OCT 8 8 30 AM '04
LAS VEGAS, NV
FILED
ENTERED
RECEIVED
SERVED ON
CLERK OF DISTRICT COURT
DISTRICT OF NEVADA
2004 OCT -7 P 2:51
BY _____ DEPUTY

1 DANIEL G. BOGDEN
United States Attorney
2 MELISSA SCHRAIBMAN
LARRY WSZALEK
3 Trial Attorneys
U.S. Department of Justice
4 Tax Division
DANIEL R. SCHIESS
5 Assistant United States Attorney
333 Las Vegas Boulevard South, Suite 5000
6 Las Vegas, NV 89101
Telephone: (702) 388-6336
7

8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
10

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 vs.)

14 IRWIN SCHIFF,)
CYNTHIA NEUN,)
15 and LAWRENCE N. COHEN,)

16 Defendants.)
17

CR-S-04-0119-KJD-LRL

UNITED STATES' CONSOLIDATED
MEMORANDUM IN OPPOSITION TO
DEFENDANT SCHIFF'S MOTIONS
TO DISMISS (DOCKET #13, #14, #15,
& #16)

18 COMES NOW the United States of America, through DANIEL G. BOGDEN, United
19 States Attorney, by MELISSA SCHRAIBMAN and LARRY WSZALEK, Trial Attorneys, United
20 States Department of Justice, Tax Division, and DANIEL R. SCHIESS, Assistant United States
21 Attorney, and submits this consolidated Memorandum of Law in opposition to the defendant Irwin
22 Schiff's Motion to Dismiss all Counts Involving Income Taxes, Since this Court Has No Jurisdiction
23 With Respect to an Alleged Tax That is Not "Traceable" to Congress' Power to Tax (Docket #13);
24 Motion to Dismiss All Counts Involving Income Taxes Since No Statute Makes Defendants or Anyone
25 Else "Liable" for Income Taxes (Docket #14); Motion to Dismiss All Counts in the Indictment Related
26 to Income Taxes, Since All Such Counts Were Secured by Fraud (Docket #15); and Motion to Dismiss

1 All Counts Alleging Violations of 26 U.S.C. Since Federal Courts Were Given No Jurisdiction to
2 Prosecute Alleged Criminal Violations of Title 26 (Docket #16).

3 DEFENDANT SCHIFF'S ARGUMENTS

4 In all of the four motions listed above, defendant Schiff essentially challenges the
5 jurisdiction of this Court and the existence, validity, and applicability of federal tax laws. In his
6 Motion to Dismiss All Counts Involving Income Taxes (Docket #13), defendant Irwin Schiff argues
7 that this Court has no subject matter jurisdiction over the criminal case against him because the
8 Constitution does not grant Congress the power to impose the federal income tax. In his Motion to
9 Dismiss All Counts Involving Income Taxes (Docket #14), defendant Schiff again argues that this
10 Court has no subject matter jurisdiction, this time because no statute makes him or anyone else "liable"
11 for income taxes. In his Motion to Dismiss All Counts in the Indictment (Docket #15), defendant
12 Schiff argues that the charges should be dismissed because the government fraudulently secured the
13 indictment by not informing the grand jury that income is only corporate profit. In his Motion to
14 Dismiss All Counts Alleging Violations of 26 U.S.C. (Docket #16), defendant Schiff argues that
15 Congress did not give federal courts jurisdiction over violations of Title 26 of the United States Code.

16 All of defendant Schiff's arguments are frivolous, and they completely ignore the plain
17 language of the Constitution, federal income tax statutes, case law, and the holdings in various federal
18 cases to which he has been a party. His motions should be dismissed.

19 THE CONSTITUTION AUTHORIZES INCOME TAXES

20 The plain language of the Constitution authorizes Congress to impose income taxes.
21 As stated in Article I, Section 8, clause 1: "The Congress shall have Power To lay and collect Taxes,
22 Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general
23 Welfare of the United States..." The Constitution originally required that direct taxes be apportioned
24 among the states in accordance with their respective populations. U.S. Const., Article I, Section 2,
25 clause 3 & Section 9, clause 4. However, the Constitution was amended in 1913 to remove any
26 requirement of apportionment for income taxes, regardless of the source of the income: "The Congress

1 shall have power to lay and collect taxes on incomes, from whatever source derived, without
2 apportionment among the several states, and without regard to any census or enumeration.” U.S.
3 Const., Amend. XVI.. Therefore, since the passage of the Sixteenth Amendment, it is immaterial as
4 to whether an income tax is considered to be a direct or indirect tax; Congress has the power to impose
5 a tax on income from any source without apportionment.

6 One of the cases cited (and summarily rejected) by defendant Schiff in his
7 Memorandum in support of his Motion to Dismiss (Docket #13, pg. 7) sums up the long-standing state
8 of the law regarding the constitutionality of federal income tax laws:

9 For over 75 years, the Supreme Court and the lower federal courts
10 have both implicitly and explicitly recognized the Sixteenth
11 Amendment’s authorization of a non-apportioned direct tax on United
12 States citizens residing in the United States and thus the validity of the
13 federal income tax laws as applied to such citizens.

14 In re Becraft, 885 F.2d 547, 548 (9th Cir. 1989).

15 The Supreme Court has repeatedly held that the federal income tax is constitutional.
16 In Brushaber v. Union Pacific Railroad Company, the Supreme Court extensively analyzed and upheld
17 the constitutionality of the federal income tax. 240 U.S. 1 (1916). In Tyee Realty Co. v. Anderson,
18 the Supreme Court held that the Brushaber decision “considered and adversely disposed of”
19 contentions that federal income tax statutes exceed the power of taxation included in the Sixteenth
20 Amendment. 240 U.S. 115, 117 (1916). Ten years later, in Bowers v. Kerbaugh-Empire Co., the
21 Supreme Court reiterated the constitutional basis for Congress’ power to impose taxes on income. 271
22 U.S. 170, 173-74 (1926).

23 As noted by In re Becraft, the lower federal courts have also long held the federal income tax
24 to be valid and constitutional. In United States v. Sibla, the *pro se* defendant filed pleadings contesting
25 the validity of the federal income tax. The trial judge “thoroughly admonished Sibla that similar
26 challenges to the federal tax laws had been routinely rejected by the courts and that Sibla would be ‘in
great trouble in connection with the defense of this case,’ if he relied on that argument.” United States

1 v. Sibra, 624 F.2d 864, 866 (9th Cir. 1980). The Ninth Circuit found that the “district court correctly
2 characterized Sibra’s defense as legally frivolous.” Id. at 869. Other circuits have also found the
3 argument against the constitutionality of the federal income tax to be frivolous and absurd. See, i.e.,
4 Lovell v. United States, 755 F.2d 517 (7th Cir. 1984) (upholding sanctions imposed on taxpayers who
5 put forth “patently frivolous” arguments that the Constitution prohibits imposition of direct tax without
6 apportionment and wages are not taxable income); Parker v. Commissioner, 724 F.2d 469, 471-72 (5th
7 Cir. 1984) (“At this late date, it seems incredible that we would again be required to hold that the
8 Constitution, as amended, empowers the Congress to levy an income tax against any source of income,
9 without the need to apportion the tax equally among the states, or to classify it as an excise tax
10 applicable to specific categories of activities.”)

11 **FEDERAL STATUTES IMPOSE INCOME TAXES**

12 The United States Code imposes a legal obligation to file federal tax returns and pay federal
13 taxes. “The statutes themselves require the payment of tax and the filing of a return.” United States
14 v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990). Defendant Schiff, an unmarried man, need read no
15 further than section 1 of Title 26 of the United States Code to find where a tax is imposed upon his
16 taxable income:

17 There is hereby imposed on the taxable income of every individual (other than a
18 surviving spouse as defined in Section 2(a) or the head of a household as defined in
19 Section 2(b)) who is not a married individual (as defined in section 7703) a tax
determined in accordance with the following table: (table omitted)

20 26 U.S.C. §1(c).

21 “Taxable income” is defined as gross income minus allowable deductions. 26 U.S.C. §63. Gross
22 income is “all income from whatever source derived,” including, but not limited to, compensation for
23 services, gross income derived from business, gains derived from dealings in property, interest, and
24 rents. 26 U.S.C. §61. An individual with gross income above certain minimum threshold amounts
25 (as set forth in 26 U.S.C. §6012(a)(1)(A)) must file a federal income tax return. 26 U.S.C. §6012.

1 There are criminal penalties, including potential jail time, for willfully failing to file a required tax
2 return or pay the tax due. 26 U.S.C. §7203.

3 The cases defendant Schiff cites in his Motion to Dismiss (Docket #14), Botta v. Scanlon and
4 Higley v. Commissioner, do not support his contention that no individual is liable for income taxes.
5 Both of these cases deal with circumstances where the taxing authority tried to collect the imposed tax
6 from someone other than the person or entity upon which the tax was imposed. In Botta, the Thru-
7 County Plumbing and Heating Co. owed the Internal Revenue Service employment taxes at the time
8 it filed for bankruptcy. Botta v. Scanlon, 288 F.2d 504, 505 (2nd Cir. 1961). As the company could
9 not pay the taxes, the Internal Revenue Service wanted to collect from a responsible individual of the
10 company. Id. at 506. Because the Internal Revenue Service was trying to collect the tax from someone
11 other than the imposed taxpayer (Thru-County), it needed a statute to impose such a liability. In Botta,
12 that statute was I.R.C. Section 6671. Id.

13 Similarly, in Higley the Internal Revenue Service attempted to collect an estate tax from a
14 beneficiary. Higley v. Commissioner, 69 F.2d 160, 161 (8th Cir. 1934). When the court said that
15 “liability for taxation must clearly appear,” as cited by defendant Schiff on Page 1 of his supporting
16 Memorandum (Docket #14), it was discussing the ambiguity of the term “beneficiary” as used in the
17 statute at issue in that case.¹ Id. at 162. Again, this is a case illustrating the need for explicit liability
18 in order to collect a tax from a taxpayer other than the one upon which the tax due was imposed.

19 Defendant Schiff has submitted supplemental authority (Docket #53) to his Motion to Dismiss
20 (Docket #14), citing several additional irrelevant cases. First, defendant Schiff cites White v. Hopkins,
21 a case where a corporation’s shareholder was forced, by use of duress, to pay the corporation’s tax
22 liability. White v. Hopkins, 51 F.2d 159, 161 (5th Cir. 1931). Next, Mr. Schiff cites Fine v. United
23 States, a case involving an excise tax imposed upon the sale of goods at retail. Fine v. United States,
24

25 ¹ The sentence in Higley ends at the word “appear.” Higley, 69 F.2d at
26 162. It does not continue to say “from statute imposing tax,” as Mr. Schiff
quotes. (Defendant’s Memorandum, Page 1).

1 206 F. Supp. 520 (D.Colo. 1962). Finally, defendant Schiff cites Drake v. United States and U.S. v.
2 Calamaro, two cases in which taxes were imposed upon wagers (Defendant's Submission, Pages 4-6).
3 Drake v. United States, 355 F. Supp. 710 (E.D.Mo. 1973); U.S. v. Calamaro, 354 U.S. 351 (1957).

4 All of these cases, like the ones cited originally, analyzed whether one taxpayer could be
5 required to pay the taxes either imposed upon another taxpayer or in a situation where more than one
6 taxpayer could have been held liable for the taxes. The tax at issue here is the federal income tax,
7 which is imposed upon defendant Schiff personally. The United States is not seeking to collect any
8 taxes from defendant Schiff that were imposed upon any other individual or entity. Therefore, the
9 cited cases are irrelevant to defendant Schiff's argument that no one is liable for federal income taxes.

10 **INCOME IS NOT LIMITED TO CORPORATE PROFIT**

11 Defendant Schiff argues in two of his Motions to Dismiss (Docket #13 and Docket #15) that
12 the constitutional sense of the term "income" only includes corporate profit. This is untrue; gross
13 income means all income from whatever source derived including compensation for services, gross
14 income derived from business, gains derived from dealings in property, interest, and rents. 26 U.S.C.
15 § 61(a); see also Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Brushaber v. Union
16 Pacific Railroad, 240 U.S. 1, 12 (1916); Funk v. Commissioner, 687 F.2d 264, 265 (8th Cir.1982)
17 (wages received for services are taxable as income). Arguments that income is limited to corporate
18 profit have been held to be frivolous. See United States v. Letscher, 83 F. Supp. 2d 367, 383
19 (S.D.N.Y. 1999); Ghalardi Income Tax Educ. Found. v. Commissioner, T.C. Memo. 1998-460;
20 Hathaway v. Commissioner, T.C. Memo. 2004-15.

21 **THIS COURT HAS JURISDICTION**

22 Despite defendant Schiff's frivolous arguments to the contrary, this court has jurisdiction over
23 tax offenses committed in the District of Nevada, including those alleged in the instant case. Section
24 3231 of Title 18 of the United States Code gives United States District Courts original jurisdiction over
25 "all offenses against the laws of the United States," and the Internal Revenue Code defines offenses
26

1 against the laws of the United States. 18 U.S.C. §3231; See United States v. Przybyla, 737 F.2d 828,
2 829 (9th Cir. 1984). “Efforts to argue that federal jurisdiction does not encompass prosecutions for
3 federal tax evasion have been rejected as either ‘silly’ or ‘frivolous’ by a myriad of courts throughout
4 the nation.” United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990) (citations omitted).

5 **DEFENDANT SCHIFF’S ANTI-TAX ARGUMENTS**
6 **HAVE REPEATEDLY LOST IN COURT**

7 Defendant Schiff has been making frivolous anti-tax arguments, including those alleged in his
8 motion, in the federal courts for over twenty years. Courts have repeatedly rejected his arguments and
9 even imposed monetary sanctions on Mr. Schiff for raising them. In a 1984 appeal from a Tax Court
10 ruling, Mr. Schiff argued that the tax on wages was unconstitutional and that the Commissioner of
11 Internal Revenue was not authorized to assess a tax deficiency if a tax return was not filed. The
12 Second Circuit said, “We see no need to elucidate our reasons for dismissing these arguments. Suffice
13 it to say that each is wholly lacking in merit, is without any logical basis, and has been rejected
14 countless times by this Court and others.” Schiff v. Commissioner, 751 F.2d 116, 117 (2nd Cir. 1984).
15 The Court went on: “[Mr. Schiff’s] understanding of our federal tax system is such that he must have
16 known his claims would be rejected by this Court. Indeed, the tax court told him in no uncertain terms
17 that his arguments were frivolous and that he was “engaged in a ‘folly’ which [would] be costly to
18 him.” Id. It was indeed costly; the Second Circuit imposed double costs and \$2,500 in damages for
19 his frivolous arguments.

20 Unfortunately, defendant Schiff was not deterred by the sanctions, nor by his criminal
21 convictions for tax offenses in 1981 and again in 1985, nor by the time he spent in federal prison as
22 a result of his tax offenses. In 1990, Mr. Schiff appealed his tax refund suit to the Second Circuit, who
23 noted, “Schiff is no stranger to this court. This is another in a series of cases involving Schiff’s refusal
24 to pay income taxes.” Schiff v. United States, 919 F.2d 830, 831 (2nd Cir. 1990), cert. denied, 501
25 U.S. 1238 (1991). Again, the Court found all of Mr. Schiff’s claims to be “completely lacking in
26 merit” and “frivolous,” adding, “Schiff’s background makes it inconceivable that he was unaware of

1 his obligation to file returns and pay taxes.” Id. at 834. In 1992, Mr. Schiff argued that he had no
2 income within the meaning of the Internal Revenue Code and the Constitution did not authorize
3 income taxes, which the Tax Court characterized as “stale and long discredited tax protester arguments
4 that have been proffered to and rejected by this and other courts countless times.” Schiff v.
5 Commissioner, T.C. Memo. 1992-183. The Tax Court imposed a \$25,000 fine against Mr. Schiff for
6 his “frivolous and groundless” positions.

7 Even though defendant Schiff has repeatedly been made personally aware of the legal
8 obligation to file tax returns and pay federal income taxes, Schiff has continued to conduct seminars,
9 author books, and host radio shows that promote the filing of zero-income tax returns based on his
10 frivolous anti-tax theories. As a result of these activities, in 2003 the government sought and obtained
11 a preliminary injunction in the District of Nevada against defendants Schiff, Neun, and Cohen to
12 prevent them from promoting an abusive tax scheme. Judge Lloyd George granted the injunction,
13 finding that “Schiff’s scheme is anything but legal.” United States v. Schiff et al., 269 F. Supp.2d
14 1262, 1280 (D. Nev. 2003), aff’d, 379 F.3d 621 (9th Cir. 2004). The injunction specifically prohibited
15 the defendants from:

16 [a]dvertising, marketing, or promoting any false, misleading or deceptive tax position
17 in any media for the purpose of advising or encouraging taxpayers to unlawfully evade
18 the assessment or payment of federal income taxes, including the positions that ... (3)
19 there is no law requiring anyone to pay income tax; (4) there is no income tax, only a
profits tax.

20 Id. at 1285. The Ninth Circuit recently affirmed the preliminary injunction, finding that “the
21 defendants have been selling products that help their customers to engage in illegal activity.” United
22 States v. Schiff et al., 379 F.3d 621, 631 (9th Cir. 2004).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

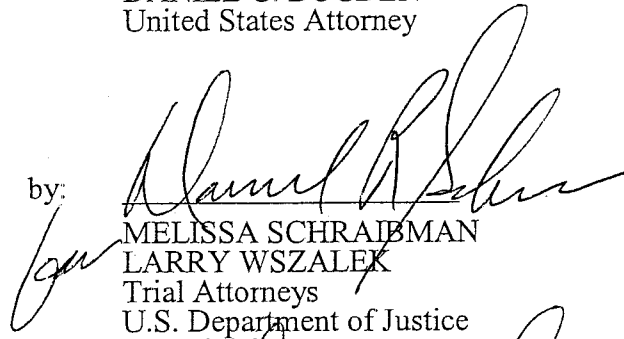
CONCLUSION

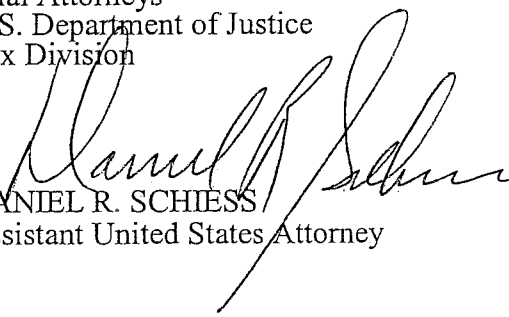
Defendant Schiff continues to assert his frivolous, time-worn arguments against the legality of the income tax. His arguments directly contradict the Constitution, federal statutes, and established case law. His motions to dismiss should be denied.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

by:


MELISSA SCHRAIBMAN
LARRY WSZALEK
Trial Attorneys
U.S. Department of Justice
Tax Division


DANIEL R. SCHIESS
Assistant United States Attorney