UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

PETER HENDRICKSON,
Defendant.

Criminal No.08-CR-20585

Honorable Gerald E. Rosen,
Chief Judge

Michael C. Leibson (P-24092)
United States Attorneys Office
Attorney for Plaintiff
211 W. Fort St. #2001
Detroit, Michigan
Telephone: 313 226-9615

Ellen Dennis (P-24400)
Attorney for Defendant
101 S. Ann Arbor St., Ste. 203A
Saline, Michigan 48176
Telephone: 734 944-5819

Mark F. Daly, MA Bar No. 640581
United States Department of Justice, Tax Division
Attorney for Plaintiff
P.O. Box 972
Washington, D.C. 20530
Telephone: 202 616-1786

Lyle D. Russell, Jr. (P27039)
Russell & Stoychoff, P.C.
Attorney for Defendant
4468 W. Walton Blvd.
Waterford, MI 48329
Telephone: 248-618-0300

Motion to Dismiss Indictment

Defendant Peter Hendrickson moves this Court for dismissal of the Indictment against him, stating:

1. The Indictment fails to charge Peter Hendrickson as a "person" within the meaning of 26 USC 7206(1).

2. Even if the Indictment did allege that Mr. Hendrickson is a "person" within the meaning of the above statute, both the language of the statute and case law decided under it exclude Mr. Henderson from the class of "persons" subject to the duty imposed by that statute.

3. Defense attorney Lyle Russell has, in compliance with applicable court rules, sought concurrence in this motion with Assistant United States Attorney Michael Leibson on May 7, 2009. Concurrence was denied.

For reasons articulated in the accompanying Brief of Law, Defendant Peter Hendrickson respectfully requests that this dismiss the indictment against him.

Respectfully submitted,

/s/Ellen Dennis (P-24400)
Law Office of Ellen Dennis
Attorney for Defendant Hendrickson
101 S. Ann Arbor St., Ste. 203A
Saline, Michigan 48176
734 944-5819
l_den1947@yahoo.com

/s/Lyle D. Russell (P-27039)
Russell & Stoychoff, P.C.
Attorney for Defendant Hendrickson
4468 W. Walton Blvd.
Waterford, MI 48329
248-618-0300
Lylerussell@magnusoft.com

Dated: May 7, 2009

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Attorney for Plaintiff
P.O. Box 972
Washington, D.C. 20530
Telephone: 202 616-1786

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Russell & Stoychoff, P.C.
Attorney for Defendant
4468 W. Walton Blvd.
Waterford, MI 48329
Telephone: 248-618-0300

BRIEF OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT

The Indictment in this case charges that Defendant Peter Hendrickson violated 26 USC § 7206(1) by filing a false IRS form 1040 (4 counts) for calendar years 2000,2002,2003, and 2004. The Indictment also charges six additional counts of filing another false document, i.e., IRS form 4852. Mr. Hendrickson is charged with filing this document for calendar years 2000, 2002,2003,2004, 2005, and 2006. However, the Indictment fails to charge Mr. Hendrickson as a "person" within the meaning of 26 USC §7206. In addition to the failure of the Indictment to charge Mr. Hendrickson as a "person" within the meaning of 26 U.S.C. §7206, Mr. Hendrickson

is not a "person" within the meaning of the statute.

Therefore, for the reasons stated below, Mr. Hendrickson respectfully requests that this Court dismiss the Indictment against him.

I. ARGUMENT

A. DEFENDANT PETER HENDRICKSON IS NOT A "PERSON" WITHIN THE MEANING OF 26 U.S.C. §7206.

26 U.S.C. §7206(1) begins with this language:

> "§7206 Fraud and False Statements
> Any person who-
> (1) Declaration under penalties of perjury
> Willfully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter..."

§7206 is specifically limited in its application to a defined class of actors specified within Chapter 75, of which §7206 is a part:

> "§7343. Definition of term "person" -
> The term "*person*" as used in this chapter *includes* an officer or *employee* of a corporation, or a member or employee of a partnership, *who as such officer, employee, or member is under a duty to perform the act* in respect of which the violation occurs." (emphasis supplied)

The content of this definitional section makes it unambiguously clear that congress intended to limit the application of the title-wide definition of "person" found at 26 U.S.C. §7701(a)(1), which is otherwise unqualified, and pertains to "individuals" without limitations of any kind:

> "§7701. Definitions
> (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof-

> (1) Person
> The term "person" shall be construed to mean and include an individual, a trust, an estate, partnership, association, company or corporation."

In comparing the two sections, it is immediately apparent that the provision of §7343 can only exist for the purpose of limiting the definition of "person", as is evident from the text of the statute itself. Defendant Hendrickson does not fall within the definition of "person" contained in §7343.

Conversely, if the language of §7343 is considered as a supplement to the title-wide definition of "person", it would mean that the title-wide definition of "person" is not an all-inclusive term. In that event, a particular individual or class of individuals could not be subject to the provisions of Chapter 75 unless specifically enumerated or defined in §7343. Because Mr. Hendrickson is not thusly defined, he is not subject to the provisions of §7206.

1. Effect of the term "includes."

26 U.S.C. §7343 begins by stating: "The term 'person' as used in this Chapter *includes...*".

The terms "including" and "includes" are normally absolutely restrictive when used without modifier in a statutory definition. As Chief Justice John Marshall observed when presented with an argument to the contrary in a United States Supreme Court case in 1808:

> "[It] is argued that the word 'including' means 'moreover', or 'as well as'; but if this was the meaning of the legislature, it was a very embarrassing mode of expressing the idea." *United States v The Schooner Betsey and Charlotte,* U.S. 443, 446 (1808).

Marshall rejected the proposition that "including" was meant to be a term of expansion. A century later, the United States Supreme Court reiterated this concept:

> "The [State Supreme] Court also considered that the word 'including' was used as a word

of enlargement, the learned Court being of the opinion that such was its ordinary sense. With this we cannot concur." *Montello Salt Company v Utah,* 221 U.S. 452, 466 (1911).

The rule of construction for the term "includes" is slightly modified because of this additional content of §7701(c):

> "Includes and including: The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. §7701(c).

In other words, when used as part of the definition of another term, "includes" assists in the creation of a class to which that other term will apply.

In examining the convoluted terminology of the Income Tax Act, the United States Supreme Court noted the following:

> "[T] the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition. This view finds support in...the Act, which reads: 'Terms', 'includes,' and 'including', when used in a definition contained in this title, shall not be deemed to exclude other things otherwise within the meaning of the term defined'." *Helvering v Morgan's Inc.,* 293 U.S. 121, 125 fn. 1 (1934).

The United States Supreme Court reiterated this rule of construction in *Federal Land Bank v Bismarck Company,* 314 U.S. 95, 100, 62 S. Ct. 1 (1941) "We...point out that the term "including" is not one of all-embracing definitions, but connotes simply an illustrative application of the general principle."

In *Massachusetts v E.P.A.* 549 U.S. 497, (2007) the Supreme Court again repeats the "general principle" of the use of "including":

> "The word 'including' can indeed indicate that what follows will be an 'illustrative' sampling of the general category that precedes the word, " citing *Federal Land Bank of St. Paul v Bismarck Lumber Company*, 314 U.S. 95, 100 (1941); quoted with approval in a dissenting opinion on other grounds by Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, page 10 of

dissent.

The reference to the *Federal Land Bank* ruling is significant, as it therefore means that the Court is again reviewing and reiterating the *Helvering v Morgan, supra,* observation concerning the language of 26 U.S.C. §7701(c), which the *Federal Land Bank* ruling had cited, in turn. This reference clarifies that the use of "includes" or "including" means that the text that follows is an illustrative sample of a more general category being created by the provision of a custom definition, as affected by 26 U.S.C. §7701(c). This same rule applies to the term "includes" in 26 U.S.C. §7343.

It should be noted that the rule of construction for "includes" as explained in *Helvering, supra, Federal Land Bank, supra, and Massachusetts v E.P.A., supra,* does not nullify the principle that a defined term no longer has an unlimited meaning. If that were true, the definition would become inexplicable surplusage, a concept routinely rejected by the United States Supreme Court:

> "This Court's duty to give effect, where possible, to every word of a statute...makes the Court reluctant to treat statutory terms as surplus." *Duncan v Walker* 533 U.S. 167, 121 S. Ct. 2120 (2001).

This principle runs throughout the history of statutory interpretation by the United States Supreme Court, and has been consistently applied:

> "It is our duty to give effect, if possible, to every clause and word of a statute..." *Montclair v Ramsdell* 107 U.S. 147,152 S.Ct. 391 (1882).

The United States Department of Treasury has also included this interpretation in its regulatory language, currently 27 C.F.R. 26.11, and 27 C.F.R. 72.11 (also previously contained in 26 C.F.R. 170.59). The Department offers the following interpretive guidance:

> "Meaning of Terms: The terms 'includes' and 'including' do not exclude things not enumerated which are in the same general class."

It is apparent that the "class" is not determined by the central word being redefined by the statute, or the common meaning of that word. If that were the case, there would be no need for an illustrative sampling of the type referred to by the Supreme Court in *Federal Land Bank.* This concept is embodied in a number of decisions by the United States Supreme Court, including *Stenberg v Carhart,* 530 U.S. 914, 942 (2000): "When a statute includes an explicit definition, we must follow that definition, even it varies from that term's ordinary meaning." (concurring opinion of Justice Ginsberg).

In *Meese v Keene*, 481 U.S. 465,484-485 (1987), the Supreme Court stated that "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term."

The Supreme Court has also stated that "statutory definitions of terms used thereon prevail over colloquial meanings." *Western Union Telegraph Company v Lenroot,* 323 U.S. 490 (1945). Finally, there is this definition offered by the Sixth Edition of Black's Law Dictionary:

> " 'Inclusio unius est exclusio alterius', i.e., the inclusion of one is exclusion of another. The certain designation of one person is an absolute exclusion of all others...[T]his doctrine decrees that...an irrefutable inference must drawn that what is omitted or excluded was intended to be omitted or excluded."

The principle is self-evident: if "person" is left undefined by a statute, the term automatically embraces everybody. However, once it is defined, those "persons" not within that definition must obviously be excluded. If the reasoning utilized by the Supreme Court in *Helvering, Federal Land Bank of St. Paul, and Massachusetts v E.P.A.,* supra, is applied, the principle still remains that a defined term no longer has an unlimited meaning. If that was not the effect, the term defined would become mere surplusage. The language of §7343 would

become something other than an exclusive definition of "person" for purposes of Chapter 75. That, in turn, would violate one of the oldest principles of statutory interpretation established and honored by the United States Supreme Court: "...[To] give effect, where possible, to every word of a statute." *Duncan v Walker,* 533 U.S. 167, 121 S. Ct. 2120 (2001). And: "It is our duty to give effect, if possible, to every clause and word of a statute." *Montclair v Ramsdell,* 107 U.S. 147, 152, 2 S.Ct. 391 (1882). The language of §7343 must therefore be purposeful, i.e., to reduce or restrict the application of §7701(a)(1). If not, the more restrictive definition of §7343 would be mere surplus, or in the alternative would render the conflicting definitions hopelessly ambiguous.

The language of §7343 is thus to be viewed as intentional and purposeful. In other words, if the term "any person" found in §7206(1) literally means *any* person, then the definition of §7343 is redundant and pointless, and the principle of statutory interpretation reflected in the above decisions would be equally meaningless.

2. Legislative History.

The limiting effect of applying the test of §7206 to the individuals identified in §7343 has been present in various versions of Federal tax laws from the beginning. The Internal Revenue Code of 1939, 26 USC §1 et seq, contained this language:

> SEC. 145. PENALTIES
>
> (a) FAILURE TO FILE RETURNS, SUBMIT INFORMATION, OR PAY TAX.-
> Any person required under this chapter to pay any tax, or required by law or regulations made under authorities thereof to make a return, keep any records, or supply any information for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such tax...
>
> (b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX. -
> Any person required under this chapter to collect, account for, and pay over any

> tax imposed by this chapter, who willfully fails to collect or keep an account for and pay over such tax...
>
> (c) PERSON DEFINED. -
> The term "person" as used in this section includes an officer or an employee of a corporation or a member or an employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

The Revenue Act of 1942, enacted October 21, 1942, Chapter 619 of 56 Stat 798, contained language very similar to and the progenitor of the language contained in the section upon which the Indictment in this case is based:

> "SEC. 136. DECLARATION THAT RETURNS MADE UNDER PENALTIES FOR PERJURY IN LIEU OF OATH.
>
> (c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony..."

This "person" definition, as may be seen below, later became subparagraph (d) of Section 145, and is the same language upon which the Indictment in this case is based.

In 1949, Congress repealed the above Section 145(c) and enacted new Section 3809, which provided:

> "SEC. 3809. VERIFICATION OF RETURNS
> Penalties of Perjury.
> (a) Penalties. Any person who willfully makes and subscribes any return, statement, or other document which contains or is verified by a written declaration that is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony..."

Although Section 145(c) was repealed and replaced with the new language above, Section 145(d), defining "person", remained. The 1949 version became today's §7206(1) with no additional changes, restoring the definition of "person"to the version which remains in use

today. The language of any "individual" of subparagraph (c) to §145 in 1942 apparently applied in unlimited scope. Presumably, that language would have covered anyone acting in any capacity for any reason prohibited by that section of the tax code. The change, therefore, can only have been made for the purpose of restoring the restricted application of the provision.

Congress intended to limit the meaning of "person" used in Chapter 75, and thus in §7206(1). Congress would not have provided §7343 and its more specialized definition of "person" unless it intended the limit.

Shortly after the enactment of §3809, supra, and immediately preceding the re-categorization of that section into the current §7206(1) on which the instant Indictment is based, the Court of Appeals for the Ninth Circuit, in *Cohen v United States* 201 F. 2nd 386, 393 (9th Cir. 1953) stated that "We think the congressional intent in enacting §3809 was merely to simplify the task of both taxpayer and the Bureau of Internal Revenue by permitting a verified return to be substituted for a notarized return in certain situations."

Congress had noted the same intent in an earlier committee report, explaining changes in the act:

> "Section 4. Verification of Returns.
>
> This section gives the Commissioner authority to eliminate the oath in the case of corporate, fiduciary, partnership, estate, and gift tax returns, and other returns and statements..." *Sen Rep. No. 685,81st Cong, First Sess., Part II, Section 4, (1949).*

This more narrowly applied provision was reenacted as present day §7602(1), with its limited definition of "person" controlled by §7343. No argument to the contrary can alter the clearly expressed limitations of §7602(1). *Mobley v C.I.R.,* 532 F. 3d 491, 496 (6th Cir. 2008).

As it is presently constituted, the Indictment in this case does not contain the essential allegation that Defendant Hendrickson was within the defined class addressed in §7206(1). As such, the indictment fails and must be dismissed, an argument separately detailed in a pending

motion in this matter. But even if this Court construes the Indictment to be properly constituted in its current form, Mr. Hendrickson is not a "person" within the meaning of the charging statute, and for this reason the Indictment must be dismissed. Alternatively, as set forth below, ambiguities in the statutory term "person" require dismissal.

IV. RELIEF REQUESTED

For the reasons stated above, Defendant Peter Hendrickson respectfully requests that this Court dismiss the Indictment against him.

Respectfully submitted,

/s/Ellen Dennis (P-24400)
Law Office of Ellen Dennis
Attorney for Defendant Hendrickson
101 S. Ann Arbor St., Ste. 203A
Saline, Michigan 48176
734 944-5819
l_den1947@yahoo.com

/s/Lyle D. Russell (P-27039)
Russell & Stoychoff, P.C.
Attorney for Defendant Hendrickson
4468 W. Walton Blvd.
Waterford, MI 48329
248-618-0300
Lylerussell@magnusoft.com

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Russell & Stoychoff, P.C.
Attorney for Defendant
4468 W. Walton Blvd.
Waterford, MI 48329
Telephone: 248-618-0300

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2009, I electronically filed the Motion to Dismiss Indictment, Brief in Support of Motion to Dismiss Indictment and Index of Authorities on behalf of Defendant Peter Hendrickson with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Michael C. Leibson (P-24092)
United States Attorneys Office
Attorney for Plaintiff
211 W. Fort St. #2001
Detroit, Michigan
Telephone: 313 226-9615

Mark F. Daly, MA Bar No. 640581
United States Department of Justice, Tax Division
Attorney for Plaintiff
P.O. Box 972
Washington, D.C. 20530
Telephone: 202 616-1786

/s/ Lyle D. Russell
Lyle D. Russell, Jr. P27039
Attorney for Defendant Aubrey Terbrack
4468 W. Walton Blvd.
Waterford, MI 48329
248-618-0300
Email: lylerussell@magnusoft.com