

UNITED STATES TAX COURT

James M. Blaga and)
Vivian P. Blaga)
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Petitioners,)
)
v.) Docket No.19391-08L
)
Commissioner of Internal Revenue,)
)
Respondent)

RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND
MOTION FOR DENIAL OF RESPONDENT'S MOTION

COMES NOW petitioners in our own proper person and without representation to enter our RESPONSE to respondent's Motion for Summary Judgment upon all issues presented in this case. Petitioners pray that this Honorable Court deny respondent's Motion for Summary Judgment dated December 15, 2008, for the following reasons:

- 1.) The conditions precedent to the granting of respondent's motion set forth in Rule 121(b) are not met in the instant matter, in that there remains to be adjudicated genuine issues of material fact, and
- 2.) A decision cannot be rendered in favor of respondent as a matter of law.

IN SUPPORT THEREOF, petitioners respectfully state:

1. Respondent has alleged that the petitioners' returns in this case are frivolous and petitioners should thus be penalized under 26 U.S.C. §6702(a). Respondent however, has not submitted statements of fact supported by credible evidence that petitioners have even adopted a "position", on their returns much less that the alleged position was "frivolous". Respondent's allegation that petitioners have adopted a "position" assumes facts not in evidence and is an unsupported conclusion of law. Furthermore, respondent has not supported his allegation that petitioner's returns in this case are "frivolous" with any statements of fact or credible evidence in support thereof, even though respondent bears a statutory burden of proof pursuant to 26 U.S.C. §6703(a).

*26 USC §6703(a) Burden of proof
In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.*

2. Petitioners expressly rebut all presumptions of correctness afforded the actions of respondent Commissioner of Internal Revenue in this instant matter. In support of petitioner's rebuttal, petitioners cites as evidence our Forms 1040X for the years 2002 - 2004, and Forms 1040 for the year 2005, which have been entered into evidence by

respondent as Exhibits H, I, L, O, and Q of respondent's motion.

3. The entirety of respondents arguments contained in respondents motion, are based on subjective intent, i.e. respondents subjective evaluation of petitioners intent in filing their return. The statutory requirements of 26 U.S.C. §6702 clearly state "on its face..." and "which appears on the purported return..." The Courts have repeatedly struck down subjective intent as a basis for frivolous return determination and penalty, having declared that only information on the face of the return itself is to be considered as a basis for frivolous return determination and penalty:

"the honesty and genuineness of the filers attempt to satisfy the tax laws should be determined from the face of the form itself... The filer's subjective intent is irrelevant." See *Colson v. United States*, (8th Cir. 2000) 446 F.3d 836

"[the purpose of a return is] to get tax information in some form... that the physical task of handling and verifying returns may be readily accomplished." *United States v. Hatton*, (9th Cir. 2000) 220 F.3d 1057, 1060, and 1061

In paragraph numbered 66, respondent effectively admits that only the face of the return is to be considered, as respondent quotes statutory law, 26 of the U.S.C. §6702(a). And in paragraphs numbered 71 and 72, respondent consistently admits again to the same stating: "on the face

of the return" and "...which appears on the purported return (and/or amended returns)..." Courts have noted that the face of the return and the information (or lack thereof) determines whether a taxpayer is liable for a frivolous return penalty. See Yuen v. United States, 290 F. Supp 2d 1220, 1224 (D. Nev. 2003). Clearly, it is settled law that only information on the face of the return is to be considered in a frivolous determination under 26 U.S.C. Section 6702. This makes respondents Exhibits H or I, L, O, and Q (petitioners returns 1040X for 2002 - 1st and 2nd, 2003, 2004 and 1040 for 2005, respectively) the only Exhibits relevant to determining if petitioners should thus be penalized under 26 U.S.C. §6702(a) in the instant case.

4. Respondent's motion, paragraphs numbered 71 and 75, alleges that petitioners received or earned "wages". Petitioners expressly deny this allegation. Respondent's allegation assumes facts not in evidence and is an unsupported conclusion of law. Respondent is making what is essentially a Straw Man Argument, an informal fallacy based on misrepresentation of the testimony found on our returns. Petitioners returns, on their face, expressly rebuts under penalties of perjury that petitioners received "wages" as defined in 26 U.S.C. §3401 and §3121. Petitioners have the right to rebut erroneous information returns. The right of

rebuttal has been handed down by the following Supreme Court rulings:

"...a statute which imposes a tax upon an assumption of fact which the [presumed] taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." United States Supreme Court, Heiner v. Donnan 285 U.S. 312 (1932)

"...irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." United States Supreme Court, Vlandis v. Kline, 412 U.S. 441 (1973)
"A fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." United States Supreme Court, Armstrong v. Manzo, 380 U.S. 545 (1965)

Petitioners on the face of their amended returns for 2002, 2003, and 2004 have declared: we have received no statutory "wages" or any other denominated-gains from taxable activities resulting in a taxable income. Therefore the amounts withheld and/or paid in as estimated tax payments were to satisfy potential Federal tax liabilities, none of which came into existence and were paid in error. Our amended returns thus claim refund of overpayment.

Petitioners on the face of their return for 2005 have declared: we have received no statutory "wages". Our return made claims for refund of amounts withheld by the payer to satisfy potential 2005 Federal tax liabilities, none of which came into existence. Please note this finding by the 6th Circuit Court:

"A remittance that does not satisfy an asserted tax liability should not be treated as the 'payment' of a tax;" (emphasis added) Ameel v. United States, 426 F.2d 1270 (6th Cir. 1970)

Tax liabilities are "asserted" by the formal application of the rate of tax to the "income" shown on a filer's return, whether directly by the filer upon return itself, or through assessment by the Secretary of taxes "*as to which returns or lists are made under this title*" 26 U.S.C. §6201(a)(1).

5. Respondent alleges that it has assessed penalties against petitioners, but respondent has not submitted into evidence the relevant summary record(s) of assessment named in 26 CFR 301.6203-1 in support of its claims. Respondent's claims therefore assume facts not in evidence and are unsupported conclusions of law. Petitioners expressly rebut all presumption of correctness afforded respondent's claim that it has assessed penalties as taxes against petitioner in conformity with all provisions of law.

Petitioners submitted a written request to respondent for true and correct photocopies of the signed summary records of assessment named in 26 CFR 301.6203-1 on February 22, 2007. (Respondent's Exhibit II of respondent's motion.) Respondent has failed to provide petitioners with the documentation required by this treasury regulation and has thus violated a treasury regulation having the force of law.

"We find section 301.6203-1 of the Treasury Regulations reasonably adapted to carry out the intent of Congress as reflected in § 6203 of the Code. We

therefore adhere to our pronouncement United States v. Fisher, 5 Cir. 1965, 353 F.2d 396, 398-399, that: In the absence of any better test, we give effect to the generally recognized rule that Regulations issued by the Secretary of the Treasury, pursuant to statutory authority, and when necessary to make a statute effective, although not a statute, may have the force of law." Brafman v. United States, 384 F. 2d 863 (1967)

Respondent is now in default with respect to its legal obligation to provide petitioners with the signed summary record of assessment named in 26 CFR 301.6203-1.

Petitioners have notified respondent that he is in default. Petitioners' notice of default to respondent is attached hereto as Exhibit C, hereby incorporated by reference as if fully restated herein.

Respondent has submitted Forms 4340 in support of its claims that it has assessed penalties as taxes against petitioner in conformity with all provisions of law. However, a Form 4340 alone, without the signed summary record of assessment named in 26 CFR 301.6203-1 which it purports to support, is legally insufficient, and does not constitute credible evidence that a lawful assessment has been made. Form 4340 may serve as a supporting record of the signed summary record of assessment named in 26 CFR 301.6203-1, but it is clearly not the signed summary record of assessment named in the regulation, because Form 4340 it

does not bear the signature of an assessment officer. (The distinction between Form 4340 and the summary record of assessment named in 26 CFR 301.6203-1 is discussed in *Stallard v. United States of America*, 12 F.2d 489 (1994).) The regulation governing assessments, 26 CFR 301.6203-1, provides that:

The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment.... The date of the assessment is the date the summary record is signed by an assessment officer.

Because the respondent has failed to carry its burden of proof in supporting its claim that valid assessments have been made against petitioners, the validity of respondent's assessments is a material issue of fact that remains to be adjudicated, and this Court may not rule in favor of respondent as a matter of law. The respondent has unjustly prevented both the petitioners and this Court from ascertaining whether valid assessments have actually been made. The burden of proving that valid assessments have been made is upon the respondent, and respondent has failed to carry its burden of proof by providing the signed summary records of assessment named in 26 CFR 301.6203-1.

"The threshold issue of the validity of the assessment is crucial. We reverse on the ground that a valid

assessment against the transferor's estate was not made, because of an assessment officer's failure to sign the certificate of assessment." Brafman v. United States, 384 F. 2d. 863, 864-865 (1967)

Considering that the documentation respondent is obligated to produce under 26 CFR 301.6203-1 might very well invalidate the respondent's claims against petitioners, the Court's granting of respondent's motion, without requiring respondent's compliance with 26 C.F.R. 301.6203-1, would serve to reward the respondent for his lawless behavior.

6. Respondent's motion, paragraph numbered 4, alleges "petitioners' represent Michigan to be their state of legal residence". Petitioners object to respondent's allegation. Respondent's assumption assumes facts not in evidence and is an unsupported conclusion of law. Petitioners are natural born citizens of one of the several States as contemplated by Article IV Section 2 of the Constitution for the United States of America, as lawfully amended and are one of the People of the several States as contemplated by Article I, Section 2 of the Constitution. Petitioners have no other Citizenship other than that which are claimed herein and expressly rebut any presumption to the contrary. In support of petitioner's claims, petitioners attach hereto and incorporate by reference

herein, Exhibit A - Affidavit of James M. Blaga Concerning His Citizenship and Exhibit B - Affidavit of Vivian P. Blaga Concerning Her Citizenship.

7. Respondent's motion repeatedly and erroneously refers and/or alleges petitioners to be a "taxpayer". Petitioners MOVE to strike every allegation in respondent's motion that refers to petitioners as a "taxpayer". Respondent's allegation that petitioners are a "taxpayer" assumes facts not in evidence, and is an unsupported conclusion of law. The definition of a "taxpayer" is set forth at 26 U.S.C. §7701(a)(14):

26 USC § 7701. Definitions

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof-

(14) Taxpayer

The term "taxpayer" means any person subject to any internal revenue tax.

Respondent has failed to show why he is not obligated to receive petitioners' sworn declaration of annual income liable to be assessed under Section 93 of the Revenue Act of 1862. Neither has respondent met his burden of proof pursuant to 26 U.S.C. §6201(d) by producing reasonable and probative information concerning petitioners' earnings. Petitioners assert therefore, that because no income above the current individual exemption amount has been declared on the face of our returns nor demonstrated otherwise by respondent, we are not subject to any revenue tax.

Petitioners therefore expressly deny that we are a taxpayer" as defined in 26 U.S.C. §7701(a)(14).

Respondent's motion, paragraph numbered 69, respondent admits and we quote: "Under U.S.C. §6702, a civil penalty may be assessed against a 'taxpayer'..." Petitioners deny that we are a "taxpayer" for the 2002, 2003, 2004, and 2005 calendar years, which are the only years at issue in this instant matter. Petitioners MOVE, the application of frivolous penalty under section 6702 to our instant case is invalid. The internal revenue laws or statutes apply to 'taxpayers', not to 'non-taxpayers'.

8. Petitioners MOVE to strike every allegation, whether explicitly stated or implied, that petitioners had adopted a "frivolous" position, made a "frivolous" argument, cited a "frivolous" contention or have otherwise tarred with the "frivolous" mop. In every instance where the word "frivolous" occurs, there is no articulation of the alleged "frivolous" position, argument, or contention, nor does respondent explain why any alleged position or argument or contention is "contrary to established law and unsupported by a reasoned, colorable argument for change in the law". *Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986). Respondent's "frivolous" allegations assume facts not in evidence and, are therefore unsupported conclusions of law.

9. Petitioners MOVE to strike respondents' allegation in paragraph numbered 10, that "the petitioners recite their diatribe of incoherent and/or frivolous contentions..." Petitioners expressly object to this allegation. Respondent's allegation is an Ad hominem argument. Respondent, unable to carry his burden of proof set forth at 26 U.S.C. §6703(a), has resorted to a personal attack against the petitioners.

10. Pursuant to U.S.C. §6703, petitioners believe that respondent has not carried the burden of proof in this case. Respondent's allegations therefore are frivolous, assume facts not in evidence, and are an unsupported conclusion of law. Petitioners have demonstrated pursuant to Rule 121(b) that genuine issues of material fact remain to be adjudicated, and a decision cannot be rendered in favor of respondent as a matter of law.

WHEREFORE, as the foregoing reasons explain, petitioners OBJECT to respondent's motion for summary judgment and PRAYS that this Honorable Court deny respondent's motion with prejudice.

James M. Blaga,
Vivian P. Blaga
Petitioners

February 02, 2009
Date: _____

By: _____

By: _____

James M. & Vivian P. Blaga