

David M Gute

Certified Mail no.

August 7, 2009

Maureen Green
Operations Mgr., Exam SC Suppor
Internal Revenue Service
Ogden, UT 84201-0030

Your Notice Dated: July 22, 2009
LTR 3175C
Year at issue: 2004
Reply Reference: 0469004352

Dear Ms Green,

Your letter stated, "*We have determined that the arguments you raised are frivolous and have no basis in law*" after clarifying that you were replying to my correspondence dated Mar. 04, 2009.

In the first place, I have no record of any correspondence sent to you dated March 4, 2009. The closest to that date is my letter of February 25, 2009, but your response makes no specific reference to anything in that letter by which I can relate the two. Your persistent reluctance and/or inability to address specific issues raised in any of my letters makes this process of conflict resolution essentially of no effect. Is this, perhaps, by design?

It is my 1040X filing for tax year 2004 that the IRS finally (after many months of delay and evasion) decided to label 'frivolous' in a LTR 3176C dated October 01, 2008. Although I provided a clear explanation for the 1040X in a letter dated October 22, 2008, (a copy of which is enclosed to refresh your memory) *and* specifically requested an explanation for how you made the 'frivolous' determination, you **completely ignored** that correspondence and proceeded to issue me CP15 on February 16, 2009. So it is to that initial charge of 'frivolity' in regard to my 1040X that I will address this response, since that issue has yet to be properly resolved.

Again I ask, **What is the basis of this determination?** My 1040X for 2004 was a properly sworn affidavit. Are the persons making the determination of 'frivolity' possessed of direct personal knowledge of the nature of receipts reported? Obviously not, which is why the law specifies that any liability for a tax ***must be based upon a taxpayer's self-assessment.***

Since I **do** have personal knowledge, I profoundly disagree with your conclusion since I have studied the law with respect to this matter and double-checked the subject return against every known or published definition (both state and federal) of “frivolous” and every active list of “frivolous arguments,” and found none of my previously filed documents tainted by even one of them. I agree that frivolous arguments ought not to be accepted, but I relied upon no such arguments. While your “determination” is conveniently boiled down to one vague word, an adequate rebuttal requires some actual effort, even though the *burden of proof* is clearly upon you, or your direct supervisor(s) **whose name(s) I hereby request**. The mere word of an employee does not make hearsay into a fact.

I do not understand what could possibly be “frivolous” about the return filed. Perhaps you find it inconvenient to consider the corrections I was forced to make when my payers issued legally incorrect 1099s. **Am I required to accept their errors?** Since incorporating the defective 1099s would likely yield a higher tax, I can see why a self-serving and overzealous collection agency would prefer that citizens not challenge false documents overstating “income.” However, it was necessary that I make the correction for the purposes of the “return” because I fully understand that the payers did not consider the legal import of reporting payments on a form (1099) not intended for their use. Further, I can only submit evidence under oath that I personally know to be true. I cannot be required (forced to confess) to incorporate anyone else’s testimony in lieu of my own especially when I know it to be false.

“Anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority, even though the agent himself may be unaware of the limitations upon his authority.” Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947).

Americans have a duty to hold their public servants accountable to the *Rule of Law* and to the limitations on their delegated authority. Consequently, I hereby exercise my right to accurately ascertain whether you, Ms. Green, are authorized in law to actually make the determination of “frivolity.” **Please establish your qualifications for doing so.**

And as regards the imposition of a penalty charge, **I demand the name of the agent responsible for sending me the CP15 Notice (dated February 16, 2009) as previously requested (letter dated February 25, 2009).** I highly suspect that this agent is not qualified, and in fact may be committing *fraud* (Gov. Code §6203(a)) or *extortion under color of office*¹ (Penal Code §518) by mailing² an unsupported “*determination*” to me, which would explain why he/she failed to sign it.

¹ **The Hobbs Act** defines “extortion” as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 USC §1951(b)(2).

² Mail Fraud - 18 USC §1341.

The Internal Revenue Service is an *administrative agency* responsible for accounting and collection of public revenue. It is not a judge and jury, and therefore may be criminally overstepping its authority to declare a disfavored (although legally correct) submittal to be “frivolous” and to subsequently impose penalties.³

I am constitutionally protected from deprivation of “*life, liberty, or property, without due process of law,*” that you, as agent, have sworn an oath to protect. At the very least I am entitled to “*administrative due process.*”

“...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.” Heiner v. Donnan 285 US 312 (1932)

In respect of my “*due process*” rights, **you have a *duty to disclose* with specificity what exactly it is that you find to be “frivolous” in the documents filed, then sign your true name to that determination.** So that I may correct any errors, **cite the precise law that presumably I misapplied or misunderstood that resulted in the “frivolous” elements you purportedly found and are personally authorized to judge.**

“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.” (cites omitted) Gould v. Gould, 245 US 151 (1971).

If you fail to identify the statutorily defined elements you presume exist to reach the “frivolous” conclusion you propose, then you will have failed to *state a claim upon which relief can be granted.* **With no legal claim on my property, you must refund, as the law provides.** Actually, I cannot find in the code any section that imposes a liability⁴ directly on the *people*. As in all tax law, any doubt flows against those seeking to impose the tax.

“*Keep in mind the well settled rule that the citizen is exempt from taxation unless the same is imposed in clear and unequivocal language, and that where the construction of a law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid.*” Spreckles Sugar Refining Co. v. McClain, 192 US 397 (1904).

The federal law is mathematically consistent that only “wages” as defined at IRC §3401(a) and §3121(a) or “income” from a “trade or business” are returnable as earnings

³ **Unauthorized Practice of Law.** Most jurisdictions include the following as the **practice of law**: “*Preparing any claims, demands, or pleadings of any kind, or any written documents containing legal arguments, conclusions, or interpretations of law, for filing in any court or administrative tribunal.*”

⁴ “*The taxpayer must be liable for the tax. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.*” Bothke v. Terry, 713 F.2d 1405, 1414 (1983).

from labor under federal law. There is no doubt that unprivileged pay-for-labor, not “wages” or “income” as either term is custom defined or identifiably utilized in the code, is exempt from reporting.⁵ For the government agent to threaten penalties for not so swearing and submitting written testimony known by the agent to be false is a criminal offense.

“Where a state official receives money for a tax paid under duress with notice of its illegality, he has no right to it and the name of the state does not protect him from suit.” Atchison, T. & S. F. R. Co. v. O'Connor, 223 U.S. 280,

Your **Atchison Notice** is hereby given. My “return” was based upon the law contained in the Constitution, the actual enacted statutes, the pertinent codes, the promulgated regulations, and relevant rulings from the Supreme Court, not upon commonly held misunderstandings of the statutory structure of the federal tax system. The “return” was not based solely upon instruction booklets that do not have the force of law, nor upon regulations, statutes and code sections taken entirely out of context. I believe that the law means precisely what it says. I can read the law. I find the relevant sections and study them in context. Then I apply the law to the facts of my situation, which yields the receipts that are exempt and the receipts that are taxable, submissions of third parties to the contrary notwithstanding. If that is a *frivolous* position, then perhaps you should just ignore all the limitations on your authority and simply send me a bill for the taxes you prefer me to pay so that the reverse master-slave relationship you expect me to submit to will be clear for all to see. TAKE NOTICE: “Reliance upon the decisions of the Supreme Court is NEVER frivolous.”

“...if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer...” Hassett v. Welch., 303 US 303, 314, (1938)

Speaking of “doubt,” you would have to agree, would you not, that (1) not all earnings qualify as “income” subject to reporting, that (2) it is possible for “information returns” to be wrong, and (3) the written specifications of the law provide that only receipts qualifying as “wages,” as defined at IRC §3401(a) and §3121(a), or payments made in connection with a “trade or business” are to be listed on relevant “information returns?” Because these terms are defined in the code,⁶ I am constrained by the *rules of statutory construction* that the commonly held definition does not apply.⁷

I corrected rebuttable presumptions and “*bad payer data*” from the company-supplied “*information returns*” that violated the clear and specific directions found at IRC

⁵ “Decided cases have made the distinction between wages and income and have refused to equate the two.” Central Illinois Publishing Service v. U.S., 435 US 21 (1978).

⁶ “Words of art” have the specific definition given to them in the IRC. Words defined in the code using the term “include” cannot be presumed to have their ordinary meaning plus the special definition given, rather the custom definition exclusively.

⁷ “It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.” Meese v. Keene, 481 US 465 (1987).

§6041(a)⁸ by use of the federal form⁹ created for that purpose. I then used the corrected data to prepare the federal and state “returns” and *self-assessments*. The documents containing the current self-assessments were properly and timely sworn¹⁰ and filed.

Accordingly, the “*valid return*” that you are “demanding” is already in your hands as filed in December, 2006. Unless you identify the instance of frivolity you suspect and disclose the legal basis for demanding that I submit a different federal return at variance with the 1040X, I can only resubmit that already corrected return. I will presume that you really are not knowingly suggesting that I issue a new federal return swearing that the taxable receipts are something other than the accurate self-assessment already reported on the corrected federal return.¹¹ Since no provision of law authorizes such a thing, I will temporarily pretend that you are not attempting to threaten, coerce, or deceive me into committing a crime¹² simply because you prefer the outcome of an alternative scenario. In like manner, I will also pretend that you are not attempting to manipulate my testimony through fear or obfuscation of the language of the law to my injury.

“Consonant alike with ordinary notions of fair-play and settled rules of law; and a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” Connally et al v. General Construction company, 269 U.S. 385, 391 (1926)

Certainly, the IRS is not so bold as to command that allegations of third parties falsely stating that the receipts were connected with a “*trade or business*” or a *taxable activity* cannot be opposed. It goes without saying that “*information returns*” can be wrong. Thus, it also goes without saying that it would be improper (perjurious) for a filer to include any assertions made on the payer’s “*information return*” unless they were fully in keeping with the filer's own knowledge and belief; and it would be profoundly improper for any government to design, or seek to enforce, especially through threats and duress, a

⁸ Section 6041(a) is the IRC section that requires “All persons engaged in a trade or business and making payment in the course of such trade or business to another person, of... gains, profits, and income... of \$600 or more in any taxable year” to “render a true and accurate return to the Secretary”... and is to include “the amount of such gains, profits, and income and the name and address of the recipient of such payment.”

⁹ Form 1099-MISC, Corrected.

¹⁰ Axiom of Law: *Jurato creditur in judicio*, he who swears an oath is to be believed in judicial proceedings.

¹¹ **Subornation of Perjury.** The offense of procuring another to take such a false oath as would constitute perjury in the principal. 18 USC §1622.

¹² **Witness Tampering.** The *Federal Victim and Witness Protection Act* prohibits retaliation or threats of retaliation against witnesses after they testify. 18 USC §1512 et seq. **Depravation of Rights under color of law:** makes it a crime for any public official to violate a law related to his office, or to exert an authority he does not expressly have, or fail to perform a duty he is required to perform, 18 USC §242.

statutory structure under which a filer's testimony is somehow required to incorporate or endorse such assertions.¹³

I now direct your attention to the definition of "frivolous" or what passes as a definition from the penalty statutes incorporating the term. "Frivolous" is a statutory term with a very explicit and restricted meaning. It is found, as you have repeatedly referenced, in the Internal Revenue Code, §6702:

IRC Sec. 6702. - Frivolous income tax return

(a) Civil penalty. If -

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to -

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of \$5000.

From this code section it is quite reasonable to conclude that the rightness or wrongness of the actual declaration of "taxable income" on the federal return is not an element of the "offense." What is apparently at issue is the IRS's refusal to take official notice of those declarations, preferring to switch the issue to the content of the "return." This would be an attempt to defeat the statutory structure in which the overall revenue law operates, in consistency with which structure the legal definition of "frivolous" is confined to purely mechanical aspects of the filer's presentation of testimony.

The determination of whether a return is "frivolous" extends solely to the question of whether the return constitutes a valid, cognizable affidavit under the normal and logical standards by which such documents are judged-- that is, neither contradicting itself, nor lacking some information upon which something appearing upon the affidavit itself purports to be based.

"[A return is 'frivolous' if it] does not contain information on which the substantial correctness of the self-assessment may be judged;

or, Contains information that on its face indicates that the self-assessment is substantially incorrect". (From the federal version of the statute)

Nothing more is within the scope of the question. So that I may correct any errors, if you still think the return is "frivolous" **which of the two elements do you contend is applicable to the instant "return?"**

¹³ **Official Misconduct, Abuse of Process.** Penal Code §918, Grand Jury (access). Also: Public officials conspiring to do things that act in violation of law and perpetuate ongoing schemes, in the furtherance of an ongoing criminal conspiracy. RICO 18 USC §1961 et seq.

Is the IRS attempting to suggest that by declining to incorporate someone else's testimony into my affidavit (that of the "information return" creator), whose testimony better serves the government's revenue interests, means the instant return "*does not contain information on which the substantial correctness of the self-assessment may be judged?*" To simply observe the true nature of this suggestion is to defeat it. No law can compel me to testify as to the knowledge and belief of someone else, nor can any law invalidate anyone's testimony for failing to do so, and by my reading, the revenue laws make no attempt to be an exception to these most fundamental of legal principles. This "frivolous" statute allows a challenge as to whether the return's refund-owed figure is supported by the information in the filing, not whether that figure is what someone else imagines it should be.

"Provided, that any party, in his or her own behalf, or as guardian or trustee, as aforesaid, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the commissioner of Internal Revenue, that he or she was not possessed of an income of six hundred dollars, liable to be assessed according to the provisions of this act or... has been assessed elsewhere... and shall thereupon be exempt from an income duty; or, if the list or return of any party shall have been increased by the assistant assessor, in manner as aforesaid, he or she may be permitted to declare, as aforesaid, the amount of his or her annual income, or the amount held in trust, as aforesaid, liable to be assessed, as aforesaid, and the same so declared shall be received as the sum upon which duties are to be assessed and collected." — Section 93 Revenue Act of 1862. As can be seen at IRC §6201 (the most recent albeit highly diluted rendering of Section 93), assessment is the application of the rate of tax to a *previously established taxable figure*.¹⁴ Assessment determines the amount of tax, not the amount being taxed.

There are statutory restrictions upon whom penalties¹⁵ can be assigned. A cursory glance is all that is required to confirm that I do *not* qualify as one against whom a penalty for an alleged "frivolous" return can be assessed. Furthermore, the notice referred to the Treasury Secretary's list of "frivolous" arguments as *public notice*. That list is found in *Notice 2007-30*. It consists of forty (40) arguments or claims that are considered legally baseless. I could go through each and every one of them and state my opinion of each. My opinion doesn't really matter, however, because the only relevant issue is whether I relied on or incorporated any such positions in the instant submittal. For clarification, from my reading of the law, I agree that all the forty positions are without merit and substantially frivolous. In lieu of asserting tedious responses to each, I hereby affirm that the instant "return" was neither based upon nor related to any of the arguments referred to above, as if fully set forth herein. (I previously made this point in my initial response letter of October 22, 2008, attached).

¹⁴ Assess: (1) to determine the rate or amount of (as a tax). (2) to impose (as a tax) according to an established rate. Merriam-Webster's Dictionary of Law, 1996.

¹⁵ 26 USC §6671(b) Rules for application of assessable penalties [including "frivolous" return]: (b) *Person defined- The term "person", as used in this subchapter, 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.*

Generally, “frivolous” is relevantly defined as: “A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.”¹⁶ The “return” form (1040X) did not offer space for presentation of “rational arguments.” This letter contains a considerable amount of rational argument and law in support of my claim, which points to the illegitimacy of your “determination.” And, these relevant citations, directives from your own Taxpayer Advocate, Supreme Court rulings, and citations of law used to prove the correctness of my claim are hereby offered even though the burden of proof is entirely upon you.

As is my/our right to “*due process*,” **I hereby raise my rights and place them as a bar to prevent the violation of same or injury to my family.** Should you intend to use the “frivolous” claim as a pretext to claiming that no “valid” return was ever filed, and you subsequently intend to impose penalties (regardless of the limitation on your authority to do so) then this is my offer to receive your arguments, to correct my misconceptions (if any), and allow you to discharge your *burden* on the record:

TAKE NOTICE: I request and demand any and all due process to which I am entitled or which is in any way appropriate and/or available to me under any provision or practice of common, statutory, and/or administrative law or protocol-- including, but not limited to, that to which your notice refers; and incorporate by reference into this request and demand all relevant information included on or in that notice, a copy of which is attached. Be advised that it is my intention to audio-record any and all proceedings herein related. I declare that I make no admissions as to my status, the legitimacy of your implicit or explicit assertions, or the fitness of any particular legal or administrative protocol by responding to your notice or by requesting and demanding the due process referenced above. Prior to any due process hearing, whether formal or informal, I expect and require meaningful clarification as to the nature of-- and reason for-- the alleged “frivolous” determination, the process by which any and all relevant determinations reflected in and by your notice were arrived at, and anything else pertinent to the matter.

You, as issuer of the notice, are obliged to determine-- and are responsible for asserting-- the propriety or applicability of both the initial procedure, and any which follow. If an invitation to participate in a hearing results, it would be because you, the notice-issuer, decided that such a procedure applies. I am making no endorsement, which could compromise an effective challenge to the underlying allegations. Should the matter proceed to a hearing, the statutory structure of the *civil penalties* referenced in connection

¹⁶ Black’s Law Dictionary, 6th Edition (1991)

with allegations of *failure to file* and *filing a frivolous return*, explicitly requires the notice-issuing agency to bear the *burden of proof* therein.¹⁷

The income tax laws are intolerably complex, which is why a detailed letter is needed to answer your simplistic, unfounded, unsupported, and unsworn allegation of frivolity. Take no inference from the length or assertiveness of this reply; it was made necessary to fully answer your presumptions given the huge body of law treating the subject. I caution you not to react irrationally, that anyone who disagrees with the IRS or goes to so much trouble would have to be “frivolous.” The size and the format of this rebuttal are irrelevant to the character of the facts and the law presented. That I am passionate in protecting my rights and the Rule of Law, you should have no doubt. In order to prevent further IRS *abuse of discretion*, in the face of overwhelming doubt, it is necessary to remind you that “*official policy*” is not law.¹⁸ You and I are constrained by the actual written law, the *corpus juris*, nothing further.

Accordingly and for all the reasons given, **it is incumbent for you to supply me with the specific element of the subject “return” that you deemed to be “frivolous,” and the provision in law, applicable to me, that makes it “frivolous.”** I cannot correct the document if you do not disclose precisely what is wrong. If you cannot comply, then I grant you thirty (30) days to honor my claim for the return of my \$4195.00 plus interest. If you determine that a hearing is appropriate, then **I will expect the pre-hearing meaningful clarification previously referenced** and positive identification at hearing of each IRS participant. *Registered pseudonyms* and/or initials only are not allowed. Participants may be sworn, since your agent will be presenting testimony on the record in carrying your *burden*.

All rights reserved.

Respectfully,

David M. Gute

Sui Juris

Enc: Copy of your July 22, 2009 LTR 3175C
Copy of my letter to the IRS dated October 22, 2008

Cc: Undisclosed recipients, held 30 days.

¹⁷ 26 CFR § 7491(a)(1) If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the **burden of proof** with respect to such issue.

¹⁸ “*Policy never becomes law no matter how well used or well accepted. Policy never gains legal authority by usage.*” Hall v. State.

P.S. Insofar as I am as undesirous of continuing to entertain your unsubstantiated allegations of frivolity as you are of receiving what you *claim* to be 'frivolous correspondence' from me, please take notice that any future correspondence from you regarding Tax Year 2004 that is neither a thoughtful, legal, and comprehensive response to *all* of my inquiries (highlighted in red for your convenience), or preferably a check in the amount of \$4195.00 plus the interest that has accrued, will be treated *as if never received*.

Your repetitive yammering that "the arguments you raised are frivolous and have no basis in law" without providing lawful evidence of that assertion does not make it so no matter how often repeated -- just as your repetitive claim that I owe the IRS \$5000 in penalty fines does not make it so without a lawful basis: "*The taxpayer must be liable for the tax. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability.*" *Bothke v. Terry*, 713 F.2d 1405, 1414 (1983).