Below is my Appeal to the 9th Circuit Court of Appeal, of District Court Judge Philip M. Pro's granting the government a summary judgment in connection with its $ 2 ½ million dollar civil lawsuit, seeking to reduce to judgment assessments for the years 1979-1985. As shown by my appeal, Judge Pro's Order is no more lawful than if he had ordered me to pay the government $2.5 million at the point of a gun. But that, in essence, is how "Justice" is actually dispensed in all U.S. federal courts when it comes to federal income taxes. How can it be otherwise, since there are no laws that require anyone to pay income taxes? When it comes to income taxes Federal judges act under color of law. Despite there pretentiousness and highfalutin language, when it comes to income taxes, federal judges are no different than Jessie James or John Dillinger, and, I suggest, this might be indicative of how they dispense "justice" in other areas.

I raise 11 issues in my appeal as to why Judge Pro's Order should be reversed. And it should be reversed on any one of those issues, while on four or five the issues (involving jurisdiction) the government's law suit should be thrown out altogether. One thing is absolutely certain: the $1 million in fraud and related interest penalties can not apply as a matter of law. So, if the 9th Circuit sustains Judge Pro's summary judgment you will know – for sure - that "law" in America is really a joke.

Along with this appeal I submitted about 235 pages of Exhibits. In the interest of brevity I removed the Index to cases and sources cited and some other extraneous material. Since I filed this brief pro se, I was allowed to file an "Informal Appeal." The government has until August 26, 2005 to file its Reply.

****

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

(LRL)

Plaintiff – Appellee

No. 05-15233
D.C. No CV – 01-0895-PMP

District of Nevada, Las Vegas

v.

IRWIN A. SCHIFF,

Defendant - Appellant

DEFENDANT/APPELLANT'S INFORMAL BRIEF

1. Jurisdiction

(a) Timeliness of Appeal

(i) Date of entry of judgment or order of district court: (1) On June 15, 2004 the District Court granted Plaintiff's motion for summary judgment, and instructed Plaintiff to submit a proposed form of order to reduce income tax assessments for the tax years 1979 - 1985 to judgment (Doc. 83, Excerpt , p. 96)[1] and also attached to this brief.

(2) On July 9, 2004 the District Court's Order was entered (Doc. 103) and the Judgment was entered on July 12, 2004 (Docs. 85 & 86, Excerpt pp. 103 & 106).

(ii) Date of service of any motion made after judgment (other than for fees and costs): (1) On July 8, 2004 I filed objections/ reconsideration to the District Court's Order of June 15, 2004 and request for " proposed order," (Doc. 84, Excerpt p. 99).

(2) On July 20, 2004 I filed a Rule 59 Motion to alter, amend or vacate the District Court's Final Judgment (Doc. 91, Excerpt p. 150).

(3) On September 3, 2004 I filed a motion to dismiss the government's lawsuit for lack of subject matter jurisdiction, since no law made me "liable" for the taxes at issue. (Doc. 102, Excerpt p. 173).

(4) On January 27, 2005 I filed a motion asking for "findings of fact and conclusions of law" with respect to the District Court's denial of my Rule 59 Motion, and my Motion to Dismiss for lack of subject matter jurisdiction (Doc.109 Excerpt p.205).

(5) On March 2, 2005 I renewed my motion for "findings of fact and conclusions of law." (Doc. 116 Excerpt p. 207).

(6) On March 9, 2005 I filed a motion asking the District Court to Reconsider its Order denying me "findings of fact and conclusions of law" with respect to its Denial of my Rule 59 Motion, and Motion to Dismiss for Lack of Subject Matter Jurisdiction. (Doc. 117 Excerpt p. 208).

(iii) Date of entry order deciding motion: (1) On August 16, 2004 the District Court denied my Motion for Reconsideration of its Final Order entered on July 12, 2004 (Doc. 98, Excerpt p. 163).

(2) On January 19, 2005 the District Court denied my motion to dismiss this suit for lack of subject matter jurisdiction (with respect to"liability") without giving any reasons. (Doc.107, Excerpt p. 203).

[1] "Doc." Refers to the District Court's Document Number.

3) On January 19, 2005 the District Court denied my Rule 59 Motion without giving any reasons (Doc. 108, Excerpt p. 204).

(4) On March 1, 2005 the District Court denied my Motions for " findings of fact and conclusions of law" in connection with my Rule 59 Motion & Motion to Dismiss on the issue of "liability." (Doc. 115, Excerpt p. 206).

(5) On April 11, 2005 the District Court denied my *Renewed* motion for "Findings of Fact and Conclusions of Law" and my Motion for Reconsideration of such denial (Doc. 118, Excerpt 216).

9 Tax C **(iv) Date notice of appeal or petition filed**: January 27, 2005.

2. What Are the Facts In This Case?

On or about August 2, 2001 the government filed a lawsuit seeking to reduce to judgment assessments for the years 1979-1985 in the amount of $2,276,244.00 (Doc. 1, Excerpt pp.12-16). Of this amount only $268,615.00 represented taxes, the rest was for penalties and interest.[2] On February, 2003, while I was engaged in discovery in this case, 15 IRS special agents conducted an illegal search and seizure of my business, Freedom Books, and carted away some 14,000 documents. On March 13, 2003 the government filed for a temporary restraining order (the order was granted), and later sought, and got, a preliminary injunction. Both orders threatened me with imprisonment if I failed to comply with disruptive, costly, and time consuming conditions imposed by these orders. On July 29, 2003 the government filed for summary judgment in this case.

This lawsuit involved six different taxable years going back approximately 20 years, and **three** separate sets of tax returns for the years 1980 -1985. One set (the last set filed)

[2] The government was attempting to extract from me an amount which the government knew exceeded, in multiples, what I grossed during this entire period, and when the government had already seized from me approximately $200,000 in taxes, interest and penalties during those years – yet still sought to tax this amount as "income." received. Therefore, to put the *true character* of the United States government *into perspective,* it should be noted that even the most *depraved medieval tyrant* never sought to exact more in tribute from a vanquished people than they possessed.

from which the **instant assessments** were made, I believed I could easily prove invalid to a jury, while proving to them that another set I had previously filed *were* my valid returns for those years, but had been expunged by the IRS to conceal the fact they had been processed.[3]

The Government's motion for summary judgment was supported by four Declarations containing numerous exhibits; "61 Undisputed Facts" of which, all but 8, I disputed.; 200 pages from my Deposition transcript; and a 30 – page, supporting Memorandum of Law.

It is obvious the government spent months compiling this material. It would have been simpler if we had just gone to trial. However, since the government knew it could never win a jury trial, it decided to overwhelm their pro se opponent with a plethora of legal paper work which they knew I had neither the time, knowledge, and research capability to deal with. Besides, a trial would have allowed me to cross-examine the IRS agents who provided the Declarations, which would have enabled me to prove that not only were their calculations false and fraudulent, but that they did not even have the authority to make them.

When the government raided my business and seized 14,000 documents, it took many documents I needed to defend against the motion for summary judgment. By removing entire filing cabinets and labeled file folders, the government was able to disrupt my filing system, making it difficult for me find the documents I needed to fight the summary judgment, complete discovery, and run my business.

I hoped to take one or more depositions, and also file motions to compel the government to answer the many admissions and interrogatories it refused to answer. [4]

[3] I was not "violated" by my assigned probation officer, but by a probation officer who had never met me in his life. At my "violation hearing," among other things, I was denied the assistance of counsel even though the law required it, especially if the terms of one's probation were changed. And Judge Peter Dorsey, who conducted the hearing (and who had contrived the alleged violation), knew that I was promoting a book that questioned his fitness to be a judge. Judge Dorsey deprived me of the counsel required by law and not only revoked my probation (only days away from completion), but stripped me of all of my "street time," and ordered me reincarcerated for another two years – which, legally, he could only do if I had been found guilty of committing a crime while on probation, which was not the case.

However, as a result of the government's disruptive, oppressive and diversionary tactics, I was never able to complete discovery. Further, I ran into medical problems requiring hospitalization and bed rest which also interfered with my ability to conduct this litigation. (Doc. 69, Excerpts p. 53) As a result of all this, I succumbed to a severe, bi-polar depression which caused me to lose 20 pounds in two weeks, interfered with my ability to sleep, eat, and, even made it difficult for me to get out of bed.

This led me to Dr. Luis C. Ortega, a local geriatric psychiatrist, who determined I suffered Bi-Polar mental illness, which resulted in my manic-depression, and was "delusional" with respect to my income tax beliefs. Because my depression rendered me incapable of continuing with this litigation, I sought assistance of counsel in Mr. William Cohan, a tax lawyer I have known for approximately 15 years. I informed him that I was awaiting a hospital bed to be treated for depression. I also told him I felt that Dr. Ortega believed that I was "delusional" in connection with my tax beliefs. Cohan told me he ***also*** believed I was "delusional" with respect to those beliefs.

Cohan believed that statements from Dr. Ortega, himself, and another psychologist confirming Dr. Ortega's diagnosis would raise a significant factual issue bearing on the validity of the fraud penalties, and that the 9th Circuit had recently ruled (apparently reversing its previous position) that such testimony was admissible in a tax trial. I explained to Cohan the many defenses I had already uncovered that should stop a summary judgment, such as: (1) the complaint sought a summary judgment with respect to unproven fraud penalties; (2) the statute of limitations barred the reduction to judgment of the taxes allegedly due for 1979; (3) the assessments were derived from coerced returns while my valid returns had been expunged;

[4] They couldn't answer them, without revealing that the government's entire lawsuit was a sham from beginning to end.

(4) no “notices and demands” were ever sent to me; and, (5) the government’s determination of my alleged “income” violated the intent of Congress as shown in Congressional Reports. Cohan assured me that he would raise these defenses, and felt that the factual circumstances surrounding the coerced returns raised an issue that should prevent a summary judgment; however, he felt that the “delusional” issue would itself be enough to prevent it.

However, despite my providing Mr. Cohan with the documents that proved all of the above, he raised few of these issues in “Defendant’s Opposition to the U. S. Motion for Summary Judgment” (Doc 73) which he prepared, and only a few were presented at Oral Argument on March 25, 2004, (Doc. 90). The District Court entered its final judgment on June 15, 2004. (Doc. 83 Excerpt pp 96- 98).

Legal Argument

To grant a motion for summary judgment, a court must determine that there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. *Id.* at 255. “At the summary judgment stage the Judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, supra at 249. However, in this case, I submit, the District Court resolved *every contested issue of fact* (which it did not otherwise ignore) and facts which the government **did not even contest** and all **legal issues** "in a light most favorable" to the Government, the party seeking the summary judgment.

Since the Court denied my motion challenging jurisdiction based on the issue of "liability," (which was also raised in my Rule 59 Motion) without giving any reason (Docs 107 & 108, Excerpt pp 203 & 204), I requested, for Appeal purposes, "Findings of Fact and Conclusions of Law" no less than *three times* (Docs 109, 116, 117 Excerpt pp. 205, 207, and 208); however, the Court denied all these requests. (Doc. 115 & 118 Excerpt pp. 206 & 216).

Defendant/Appellant presents the following issues to this Court

1) The government's lawsuit must be dismissed for lack of subject matter jurisdiction because the I.R.S. has no authority to enforce the payment of income taxes.

While I did not raise this jurisdictional issue at the District Court level, subject matter jurisdiction can be raised at any time even first time on appeal. *City of South Pasadena v. Mineta*, 284 F.3rd 1154 (Cal.2002); *In re Kieslich*, 243 B.R. 871 (D.Nev.1999), *Gushi Bros. Co v. Bank of Guam*, 28 F.3d 1535 (Cal. 1994); *De Saracho v. Custom Food*, 206 F.3rd 874; *Nor – Cal Plumbing, Inc* 185 F.3d 978 (Cal. 1999).

The Secretary of the Treasury is the only party given any authority in the Internal Revenue Code to assess and enforce the payment of internal revenue taxes. Section 26 U.S.C. 7701 (12) allows the Secretary to "delegate" such authority to "any officer, employee, or agency of the Treasury Department" which can then be "redelegated" to other parties. Section 1505 of Title 44 requires publication in the Federal Register of "every document" having "general applicability and *legal effect*." It is my claim that: (1) the Secretary of the Treasury has never delegated any of his authority to the Commissioner of Internal Revenue to enforce the payment of income taxes; and (2) no such delegation order was ever published in the Federal Register. Therefore, unless the government can produce these two documents (*which I claim do not exist*) the government's lawsuit must be dismissed for fraud – since it rests on fraudulent Declarations and statements of three IRS agents (and one from the

government's lawyer) who never had any legal, delegated authority to do what they claimed to have done in their Declarations. This automatically invalidates the government's complaint (Doc. 1), and its pleadings, since they are all based on Declarations, presumptions, and statements that the IRS is legally authorized to enforce the income tax, which is not true.

In my "Response Opposing Entry of Judgment" (Doc 89 Excerpt p. 137) I asked the court "to take judicial notice" that 26 U.S.C. 7608 "is broken down into subsection (a) and (b)," and that "Subsection (a) deals with the 'Enforcement of subtitle E and other laws pertaining to liquor, tobacco, and firearms." I pointed out that the only IRS agents who fell into subsection (b) were "criminal investigator(s) of the Intelligence Division" of the IRS "whom the Secretary charges with the duty of enforcing any of the criminal provisions of the internal revenue law…." Therefore, I pointed out, "Since Sandra Davaz is a Revenue Officer and not a 'criminal investigator of the Intelligence Division," she must fall into subsection (a)" which would only authorize her "to enforce the provisions of subtitle E, and not subtitle A"; therefore, she had "no authority to prepare 'Declarations' involving income taxes." Yet it was her Declaration that supported the "Entry of Judgment." I argued, "Her 'Declaration' is without legal force and effect." (*Id* at Excerpt 138) thus nullifying the District Court's "Entry of Judgment." (Doc. 89). I also attached as Exhibit K (Excerpt p. 146) a page from IRS Manual 1.16.4 which explains the nature of I.R.S. "Pocket Commissions," and the fact that Revenue Officers are only issued "non-enforcement" pocket commissions. It, therefore, shows that the hundreds of thousands of dollars taken from me as "payments by levy" and by "lien" encumbrances, as shown in her Declaration (Doc.85, Excerpt pp 112 - 115, 117 - 119, 121, 124, 125, 127,128, and 130 -133) **were all illegal.** Exhibits attached to Doc. 89 and included here as Excerpt pp. 144, 145, and 147 - 149 show that these notices of liens and notices of levy

[5] were all executed by I.R.S. Revenue Officers or others, none of who had "enforcement" authority. In addition, her statement in Excerpt p.107 that the income "Tax generally must be paid at the time the tax return is filed. 26 U.S.C. §6151" is also a false statement. Section 6151 only applies to taxes implemented by CFR 27 and not to taxes implemented by CFR 26; therefore, § 6151 has nothing to do with income taxes, as explained in Doc. 89 Excerpt p.138 and supported by Excerpt p. 142 . Sandra Davaz's Declaration is a fraud, and merely illustrates the illegal and unauthorized activities of the I.R.S. – which the government's inability to produce the two documents stated above will irrefutably substantiate.

Therefore, **all** of the Declarations, allegations, and statements in the government's pleadings rest on the *fraudulent* assumption that the IRS is authorized - by law – to enforce the payment of income taxes, which is not the case. Hence, the government's entire case must be dismissed for fraud, because: "Fraud destroys the validity of everything into which it enters," *Nudd v. Burrows,* 91 U.S 426*;* "Fraud vitiates everything," *Boyce v. Grundy*, 3 Pet. 210; "Fraud vitiates the most solemn contracts, documents and even judgments," *U.S. v. Throckmorton,* 98 U.S. 61. Neither the trial court nor the 9th Circuit can have subject matter jurisdiction to Order me to pay $2.6 million unless the government can produce for this Court the two documents named above. If the government cannot *now produce them*, than the District Court's Order would be no more legal than if Judge Pro merely ordered me to pay $2.6 million to the government at gunpoint.

(2) The district court lacked subject matter jurisdiction, because the income tax is not "directly traceable" to Congress' constitutional power to "lay and collect" taxes.

[5] However the I.R.S. further misleads and intimidates the public into believing that such "notices" constitute actual "liens" and "levies" that the public is required, by law, to honor; which is not the case. *See Schulz v I.R.S.*, Docket No. 04-0196-cv, decided 1/25/2005, (2nd Circuit) which held, at page 4: "IRS summonses apply no force to taxpayers, and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not comply with an IRS summons until that summons is backed by a federal court order." **And what applies to IRS summonses obviously *also* applies *to all* " notices" and communications from the IRS.**

As I pointed out in (Doc. 47 Excerpt pp. 17- 22) the Supreme Court in *United States v. Hill*, 123 U.S. 681,(1887) held "The term 'revenue law' when used in connection with the jurisdiction of the courts of the United States, means …a law which is *directly traceable* to the power granted to Congress by 8, Art. I of the Constitution, 'to lay and collect taxes duties, imposts, and excises.'" (Emphasis added)

As is more fully developed in Doc. 47, Congress derives its taxing power from three clauses in the Constitution, which also require that all direct taxes be apportioned, while indirect taxes (identified in Article 1, Section 8, Clause 1 as "duties, imposts and excises") must be imposed pursuant to the rule of *geographic uniformity*.

That Congress' taxing power is **still** limited by these clauses is verified in the Supreme Court's 1915 decision, *Brushaber v. Union Pacific RR*, 240 U.S.1. which held: (Excerpt p. 17)

> In the matter of taxation, the Constitution recognizes these two great classes of direct and indirect taxes and lays down two rules by which their imposition must be governed namely: The rule of apportionment as to direct taxes and the rule of uniformity as to duties, imposts and excises.

The *Brushaber* decision was decided **after** the 16th Amendment was passed, yet the *Brushaber* Court still held (Excerpt p.18) that there can not be a federal tax "lying intermediate between these two great classes and embraced by neither," and any such proposition…

> If acceded to, would cause *one provision* of the Constitution *to destroy another*: that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into *irreconcilable conflict* with the general requirement that all direct taxes be apportioned…This result …would *create radical and destructive changes* in our constitutional system and *multiply confusion*. (Emphasis added)

In line with this observation, and as is more fully explained in Excerpts pp. 20 & 21, the *Brushaber* Court repeatedly held – the 16th Amendment not withstanding – " that taxation on income was in its nature an **excise** entitled to be enforced as such…that taxes on such

income had been sustained as **excise taxes** in the past." (Emphasis added) This is further confirmed in the 1915 case of *Stanton v. Baltic Mining, 240 US 103 (1915)* which held, "The provisions of the 16th Amendment conferred *no new power* of taxation but simply prohibited (a tax on income) from being *taken out of the category of indirect taxation* to which it inherently belonged and being placed in the category of *direct taxation subject to apportionment* by a consideration of the sources from which the income was derived" (at page 112) (Emphasis added). I now ask this Honorable Court to take **formal, judicial notice** that the definitive *Brushaber* court ***specifically*** held (Excerpt p. 19) that the "whole purpose" of the 16th Amendment was not to "amend" the Constitution, but that its "whole purpose . . . was to relieve all income taxes when imposed from apportionment from a consideration of the sources whence the income was derived." (At page 17). All of the above is further confirmed by the definitive case of *Eisner v. Macomber* 252 US 189 (1920), which held: (Excerpt p. 21)

> The Sixteenth Amendment must be construed in connection with the taxing clauses in the original Constitution and the effect attributed to them *before the Amendment was adopted.* (At page 205, emphasis added)
>
> A proper regard for its genesis…require that the (16th) Amendment shall not be extended by loose construction…so as to repeal or modify…those provisions of the Constitution that require an apportionment…for direct taxes upon property, real and personal. **This limitation is not to be …disregarded by the courts.** (At age 206, Emphasis added)

What can be plainer than that?

Therefore, the 16th Amendment did not alter by *one wit* Congress' constitutional power to "lay and collect taxes." Since the income tax at issue is imposed *neither* as an apportioned direct tax *nor* as a uniform excise tax, its payment **cannot** be made compulsory - consistent with Congress' constitutional power to "lay and collect taxes," and any contrary claim would be arbitrary and capricious.

Congress eventually came to realize that the original income tax laws (written in 1913) did not reflect what later Supreme Court decisions held concerning the legal effect of the 16th Amendment. Congress also came to the realization that it could not, as a practical matter, impose and collect income taxes either as an *apportioned direct tax* nor as a *uniform excise tax* – in accordance with its legitimate, constitutional taxing powers as determined in the above Supreme Court decisions. Therefore, in order for the income tax statutes **not to be unconstitutional**, Congress removed all of the **mandatory** provisions that had formerly been included in the law since their 1913 adoption, and starting with the 1954 Code, the income tax "laws" became "constitutional," since without any mandatory provisions they now became based on *voluntary* "self-assessment" and "voluntary compliance." [6]

A number of changes were made in the law to accomplish this. To cite merely one such change: Congress removed from the 1954 Code the provision that income taxes shall be "levied, and collected, and paid…" that had appeared in Section 11 of the 1939 Code[7] and substituted the benign language of section 1 that merely "imposed" the tax, but the 1954 Code did not include any provision requiring that such an "imposed" tax had to be "paid," nor did it include a statute making anyone "liable" for such a tax - as Code Section 4402(c) does in connection with the federal wagering tax. The wagering tax is "imposed" in section 4402(a); however, section 4402(c) states: "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax …" showing that the mere imposition of a tax does not itself create a "liability" nor a requirement that the "imposed" tax has to be "paid."

[6] The classic oxymoron. If the income tax is "voluntary," then one doesn't have to "comply": if one has to "comply," the tax can't be "voluntary."

[7] This wording still appears in section 5821 in connection with the tax on firearms, a **real** tax, not based on "voluntary compliance."

In its Order (Doc. 62, Excerpts pp. 51 & 52) denying my Motion, the District Court disregarded all of the above decisions in favor of *In re Becraft,* 885 F. 2d 547 (Excerpt p.52) in which the 9th Circuit held, in direct conflict with all of the Supreme Court decisions cited above, that the 16th Amendment gave Congress a new taxing power (wrong), permitting it to impose an income tax as a direct tax (wrong), without apportionment (wrong).

It is the 9th Circuit's duty to uphold the Constitution and the "law of the land" and not prior decisions incorrectly decided. Even the Supreme Court reverses itself. The "law of the land" is the *Pollock, Brushaber, Eisner,* and *Stanton* decisions, and not *In re Becraft.*

. It is my claim (as supported by all of the Supreme Court decisions cited above) that since the income tax at issue is not imposed either as an apportioned direct tax nor as a uniform "duty, impost or excise," the tax is not "*directly traceable*" to any of Congress' power to "lay and collect taxes" and thus, pursuant to *United States v. Hill,* the District Court had no subject matter jurisdiction to compel me to pay $2.6 million in connection with such an unconstitutional "tax."[8] [9]

Therefore, since the District Court did not grant my motion in accordance with "the law of the land," it is the duty of the 9th Circuit do so, by: (1) reversing the District Court's Order on this issue; and (2) dismissing the government's law suit on this ground.

(3) Pursuant to 28 U.S.C. 1396 the District Court could not have subject matter jurisdiction since no statute makes defendant "liable" for income taxes.

As Defendant pointed out in (Doc. 102 Excerpts 173-178) 28 U.S.C. 1396 states: (Excerpt 173)

[8] Nor does any statute included in the IR Code require such payment.
[9] Since a "tax" "is an enforced exaction for the support of government," there is really no such thing as a "voluntary" tax. However, most taxes now collected by the U.S. government go to support individuals, not to "support government," in violation of this principle and Article 1, Section 8, Clause 1 of the U.S. Constitution.

> Any civil action for the collection of internal revenue taxes may be brought in the district where the **liability** for such tax accrues, in the district of the taxpayer's residence, or in the district where the return was filed. (Emphasis added)

It is clear from this statute that a "civil action for the collection of a federal tax" can NOT be "brought" in a federal district court **unless** there is a statute that imposes a "liability" for that tax. It was my claim that no such "liability" exists in the Internal Revenue Code – as covered extensively in Doc. 102. In its Opposing (2 ½ page) Response (Doc 105, Excerpts 198-200) the government: (1) makes no mention of § 1396; [10] (2) nor does it argue that § 1396 does not apply in the manner I claimed and (3) nor does the government identify any statute that makes me "liable" for income taxes. **What *more* could the government have done to lose the argument?**

The District Court gave no reasons for denying my motion. (Doc. 107, Excerpt 203). When I asked for "findings of fact and conclusions of law" (Docs. 109, 116, and 117, Excerpts pp. 205, 207, & 208-215) the Court stated (Doc pp.115 & 118, Excerpts pp. 206 & 216) that it had done so in its Order of June 14, 2004 (Excerpt p. 206). As shown in Doc. 117, Excerpt pp. 208- 215, I do not agree with the Court's conclusion.

Absolute proof that no law makes anyone "liable" for income taxes is the fact that no law requires the keeping of books and records with respect to income taxes, as, for example, Code sections 4102, 4403, 5124, 5415, and 5741, do in connection with federal: fuel, wagering, liquor, beer, and tobacco taxes to cite just five such examples. Obviously, if there were a law making people "liable" for income taxes, there would *also* be a law requiring people to keep books and records in connection with income taxes, so the government could verify that persons paid their correct income tax "liability." Therefore, if the government

[10] While ignoring the fundamental relevance of § 1396 to this issue, the government proceeded to cite five other Code sections that did not apply, prompting me to ask (Doc.106 Excerpt p. 202) *"If the Government could find these five code sections, why couldn't it find one providing for a 'liability' for income taxes?*"

wants to argue in its Reply, that there is a law that makes me "liable" for income taxes, it must *also* identify in its Reply *the law that requires me to keep books and records* with respect to income taxes - since without the latter, there could not be the former. [11]

I also raised the "liability' issue in my Rule 59 Motion. (Doc. 91, Excerpts pp. 156 & 157). In its Opposition (Doc.100 Excerpts 164 -172) the government does not even mention this issue at all, **let alone attempt to refute it**. Therefore in my Reply (Doc 103, Excerpts 179 & 180) I argued:

> ***The Government didn't address this issue at all!*** Therefore, it is clear from the Government's refusal to take issue with Defendant on this issue (let alone refute it) that the Government's entire lawsuit must be thrown out. Defendant should not have to proceed beyond this point to win this case, since how can this Court – legally – "reduce to judgment" taxes and penalties in connection with a "tax" for which neither the Government nor the Court can identify any statute making Defendant "liable"?

As Schiff pointed out in his Rule 59 Motion (Doc 91, Excerpt pp 156 & 157,)

> As shown on pages 14-17 of Defendant's 1979 Tax Court trial transcript (Exhibit I, of Defendant's Declaration), Tax Court Judge, Charles E, Clapp II, refused to identify the statute that made Defendant "liable" for the income taxes at issue, even though Defendant said to Judge Clapp, "If you will simply point out to me where in here (holding up the Internal Revenue…), I have an income liability, I will concede all of the amounts to the government, and we can dispense with any further hearing."[12]

And further Schiff points out:

> In refusing to allow Defendant to cross-examine IRS Agent Cingo on this issue, Judge Clapp stated, "**You've been asking that question of everybody you've met in the last 15 years**…and still waiting to find the honest man that will agree with you …Now you're asking me that question and now you're asking Mr. Cingo that question and **you're not going to get the answer**."[13]

---

[11] On page 19 of its Memorandum of Law in Support of its Motion for Summary Judgment (Doc. 52 Excerpt p. 24a.), the government claims § 6001 "requires" taxpayers to keep records with respect to income taxes. That claim is false. That *generic* section does not even *mention* income taxes, as the five statutes cited above mention the specific tax to which they apply. And all such record keeping references are contained **in the very Subtitle and Chapter** that imposes each tax. However, Section 6001 does not even appear *in the **same** Subtitle* devoted to income taxes, **let alone in the same Chapter**. Besides, Section § 6001 only applies to those taxes for which one can be "liable," so, obviously, § 6001 can have nothing to do with income taxes.

[12] These Transcript pages are included here as Excerpts pp. 71- 73.

[13] Shown here as Excerpt pp. 79 & 79(a)

And, pursuant to discovery (Doc 73, Schiff's Declaration Exhibit 5),[14] when I asked the government to admit that: "There is no statute …that specifically… makes defendant 'liable' for income taxes," the Government, refused to answer and claimed:

> The Admission was "argumentative, scandalous, indecent, and impertinent" and "calculated to annoy, embarrass, and oppress the United States in the eyes of the Court." Therefore, it is clear, that no Court or Department of Justice Attorney has ever identified for Defendant any statute that would make Defendant "liable" for the income taxes that this Court would make Defendant "liable" for, in its Court Order.

My Rule 59 Motion clearly put the government on notice, that its inability to identify a law that made me "liable" for the income taxes at issue – **would be fatal to its entire case.** And *despite* the government's **blatant failure** to do, the District still ruled I had to pay.

Therefore, based on the government's failure to identify any statute that makes me "liable" for income taxes, both in response to my Motion to Dismiss and my Rule 59 motion, the 9th Circuit is duty bound to: (1) reverse the District Court's order; and (2) dismiss the government's lawsuit for lack of subject matter jurisdiction as required by 28 U.S.C. 1396.

(4) The district court's final order rested on a *non-existent* "presumption"

The District Courts Final Order states (Excerpts pp. 96-98):

> Defendant Schiff has failed to raise any genuine issue of material fact to overcome the presumption of correctness afforded the tax assessments for the years 1980-1985. (Emphasis added)

However all the tax assessments for the years 1980-1985 are based on amounts shown on my alleged 1980-1985 tax returns, and nowhere in the annals of American jurisprudence has it ever been suggested that amounts shown on a taxpayer's return is "afforded" the

[14] Shown here as Excerpt pp 87, the government's answer to Admission No. 5.

"presumption of correctness." As I pointed out in my Reply to the government's Opposition to my Rule 35 Motion (Doc.103, Excerpt p. 189)

> In this litigation, the Government is not claiming that the taxes at issue were determined by the "Secretary," or the "Commissioner," or by any "Court" or that they reflect a "deficiency." What the Government is claiming is that the *amounts shown on Defendant's tax returns* for the years 1980-1985 (and upon which the instant assessments are based) ***are correct***. However, amounts shown on a taxpayer's tax return **carry no presumption that they are correct.**

Apparently the District Court was misled by such statements in the government's Memorandum of Law (Doc. 52, Excerpt p. 24) that: "An assessment for unpaid federal taxes, when properly certified, is presumptively correct evidence of a taxpayer's liability and satisfies the government's burden of proof so that the United States may rest its case." Apart from there being no such "presumption," how were the taxes shown on my 1980-1985 returns "properly certified"? Do those returns show any such "certification"? (My 1980 Return as shown as Exhibit I in Agent Netcoh's Declaration [Doc. No. 57], is included here as Excerpts 47-50 as representative of all such returns). In support of its *non-existent* "presumption," and *non-existent* "certification," the government cited cases (in its Opposition to Defendant's Rule 59 Motion, Doc. 100, Excerpt p. 170) where such a "presumption" was presumably recognized by the court. However, in every case the "presumption" only applied to "deficiencies" – and **not to amounts appearing on somebody's tax return, as is the case here.** I addressed the *false* "presumption" the government hoped to establish in my Reply in connection with my Rule 59 motion (Doc 103, Excerpt pp 186-116) from which some illustrative passages are included below. (From Excerpt pp. 186 - 189)

> The Government extended this claim further by stating on page 7, lines 17-19:
>
> > Once the **United States** has admitted some evidence of **unreported income,** the burden shifts to the taxpayer to prove by a preponderance of the evidence that the

amount is excessive. *Id*: *Edelson v. Commissioner*, 829 F2d 828, 831(9th Cir. 1987) (Emphasis added)

However, the Government has not alleged there is any "unreported income" in the instant case. The Government is claiming that Defendant merely owes all of the taxes as shown on the 1980-1985 coerced returns he submitted …in order to avoid being held to have violated the terms of his probation …

Further, …the Government's attorneys …altered the alleged holding in *Edelson* to make it fit their argument in this case. What the *Edelson* court actually said is:

> Once the **Commissioner** has introduced some evidence that a taxpayer received unreported income, the burden shifts to the taxpayer to prove by a preponderance of the evidence that the **deficiency determination** is arbitrary or excessive.

The *Edelson* Court *specifically* referred to the "Commissioner" as introducing the "unreported income" and not the all inclusive and indefinite "United States," which is the term that Government's lawyers substituted for "Commissioner" so as to make *Edelson* fit in with their presentation of this case…

In addition to *Edelson,* the Government cites two other Ninth Circuit decisions: *Palmer v. United States,* 116t F.3d 1309 (1997); and *United States v. Stonehill*, 702 F2d 1288(1983) as supporting its proposition that …The fraud sought to be perpetrated by the Government is that the amounts at issue in these cases were all determined by a Court or by the Secretary and deficiency notices sent out. In the instant case, the amounts at issue were not determined by any court or on the basis of deficiency notices, but reflect the amount of taxes reported on coerced returns **filed by the Defendant himself** …

In *Palmer*, supra, the Court stated, in pertinent parts, as follows:

> We must decide whether the Internal Revenue Service made proper **deficiency** determinations and assessments for unpaid taxes against non-cooperative taxpayers.

The other case cited by the Government, *Stonehill* involved the validity of a tax lien. The **court said in pertinent parts:**

> **The Commissioner computed tax deficiencies** (including interest and penalties) of $13,613,721.51 against Stonehill and $11,182,966.73 against Brooks.

Therefore, all of these cases, as the Government's lawyers had to know, involved the assessment of deficiencies, and the claim of unreported income.

Therefore, the whole "presumption of correctness" that the government *falsely* sought to establish in this case (and which it sold to the District Court) – only applied to "deficiencies" determined by the Commissioner, and not to amounts shown on a taxpayer's tax return.

While I have now totally discredited the "presumption" upon which the Court's Final Order is based, thus requiring a reversal of that Order **just on this ground alone**, I would still like to provide the Court with examples of how the government misrepresents facts as an indication of how it is litigating in bad faith. For example, the government states in its Opposition to my Rule 59 Motion (Doc. 100, Excerpt p. 167)

> "Moreover at Schiff's deposition…he unequivocally and repeatedly testified that he had no books and records of his financial activities during the years at issue and was completely unable to present any evidence that would refute the government's calculations of his tax liabilities (See United States memorandum of points and authorities in support of summary judgment, pp. 22-23)

However, transcript pages (Doc. 60 Addendum Excerpts pp 217, 218), show that I continually point out that I believe that "income" for tax purposes means corporate profit. When I ask Mr. Darmstadter, "If a corporation has a million dollars worth of income, but it doesn't have any profit, does it pay any income taxes?," Darmstadter avoids answering the question because he obviously knew that a truthful answer would concede my point. On pages 4 & 5 of Vol. II (Doc. 61, Excerpts 219, 220) I make clear that I report my income in accordance with H.R. No 1337 and S. Rep. No 1622. Further on I state: "I have never had any income …" and that I believe that income for tax purposes, based on those House and Senate Reports, means "corporate profit."

When Darmstadter suggests (Doc. 61 Excerpts pp. 221, 222) that I had no basis to refute the "IRS's determination as to (my) *gross receipts* or gross *earnings…,*" I answer: "I would challenge the IRS' determination that anything I received was taxable," and further, "I'll refute it in a different manner. I'll refute it. They cannot claim I had taxable income." Note - Darmstadter only questions me about my "receipts" and "earnings" - ***not about my "income,"*** so any claim by the government that I made representations at my deposition regarding my taxable "income" would be to deliberately falsify what I actually said.

In addition, even if there were a "presumption of correctness" I "overcame" it on a variety of grounds which the District Court refused to consider, thus again revealing its total bias in favor of the government. For one thing I, submitted an Affidavit (Doc. 74, Excerpts pp 90-95) showing that I had paid Howy Murzin no less than $72,505 during the period 1982-83, which was not considered in the 1982-83 assessments. In addition, the coerced returns said right on them (Excerpt p. 46), that I did not believe the figures on them, but that "my return originally filed for the year 1980 correctly and accurately reflected my taxable income for that year." And, of course, my illegally expunged "zero" returns correctly reflected the meaning of "income" given to it in those Congressional Reports (Doc. 73, Exhibit 3, included here as Excerpt pp. 82 & 83) while the returns at issue did not. Therefore, I even "overcame" the "presumption" that didn't exist. Therefore, the District Court's entire statement as quoted above was erroneous on every *conceivable* ground, and must be reversed just on this issue alone.

5) The fraud penalties imposed, did not apply in this case as a matter of law

Because § 6653 no longer applied to income taxes, I could not easily verify its provisions as they might have applied to income taxes in the years at issue. In addition, I was misled by relating the § 6653 fraud penalty to the type of fraud as discussed in Spies v. United States, 317 U.S. 492 (1943).[15] I was also misled by the manner in which the fraud penalty was presented in the government's Memorandum of Law (Doc. 52, Excerpts 23, 25-28). Its presentation is captioned **"Schiff's willfulness merits the civil fraud penalty,"** and states, "To establish liability for the Section 6653(b) civil fraud penalty, the government must demonstrate: (1) a knowing falsehood; (2) an intent to evade taxes; and (3) an underpayment of

[15] I believe if it weren't for my depression generated by all of the other litigation and pressures forced upon me by the government, I would have uncovered this deception far earlier in this litigation.

tax." The government goes on to describe actions that allegedly constitute these elements: "Schiff attempted to file improper "zero" tax returns… failed to maintain adequate records … refused to cooperate with the IRS." Apart from their being no law that required me to do any of these things, none of these "omissions" constituted "affirmative acts" of tax fraud, nor did they relate *in any way* to the fraud penalty established in § 6653. The government goes on: "Schiff is precisely the type of taxpayer upon whom a fraud penalty for failure to pay income taxes should be imposed….he has not voluntarily paid income tax since 1973 …he is certainly aware of his obligation to report and pay taxes…the Second Circuit affirmed ..fraud penalties …due to Schiff's repeated attempts to evade his obligation to pay income tax"; and on and on. On page 9 (Excerpt p. 23) the government states "the elements of criminal tax evasion under § 7201 and civil tax fraud under § 6653(b) are identical." **That statement is dead wrong**, as two, full time professional, Justice Department tax lawyers had to know. The government asserts a similar falsehood in its Opposition to my Rule 59 Motion (Doc. 100 Excerpt p. 168) when it states: "Civil fraud penalties (in this case) can be based upon a pattern of conduct by the taxpayer over the years." None of these claims by the government have anything to do with the fraud penalty provided for in § 6653 - which is based *solely* on the existence of a "deficiency." And if no deficiency exists, *no § 6653 fraud penalty can apply*. In this case, no deficiencies existed for any of the years 1980-1985. Therefore, no § 6653 fraud penalties could apply in my case for those years, as was fully explained in my "Supplement" to my Rule 59 Motion (Doc 95, Excerpts 158-160) as supported by my Affidavit (Doc. 97, Excerpts 225-226), as illustrated by the following brief excerpts from Excerpt p. 158:

> The fraud penalties at issue for the years 1980-1985 were allegedly imposed pursuant to the former provisions of Internal Revenue Section 6653. However, section 6653 based its fraud penalty, "on any underpayment (as defined in subsection (c) of tax required to be shown on a return…" And subsection (c) (1) defined an "underpayment"

as "a **deficiency** as defined (in section 6211(a) (1) (A))." Therefore, pursuant to Section 6653, no fraud penalty could legally be imposed pursuant to that statute **unless** a "deficiency" existed. However, no "deficiencies" existed for any of the years 1980-1985 that are at issue.

Proof that no "deficiencies" existed with respect to the tax years 1980-1985 is shown by the attachments on Sandra Davaz's Declaration. The *first entries* on the documentation for each of the tax years 1980-1985 are, "Return filed and Tax Assessed," and for each of those years, the taxes assessed are the amounts shown on the coerced returns at issue. There are no additional entries stating "Additional tax assessed by examination" (an entry which appears for the tax year 1979), which would have been shown if tax "deficiencies" for those years existed….[16]

Defendant pointed out, both in his Declaration (Paragraph 25)[17] and in his Motion for Reconsideration (Doc. 84, Excerpt p.102), that Revenue Agent, Gerald A. Dragon stated in his Declaration[18] that he prepared a deficiency "incorporating only 'the civil fraud penalties.'" Petitioner explained why no statute permitted a determination of a "deficiency" based solely on the imposition of fraud penalties…

Therefore, this Court is legally bound to alter, amend or vacate its Judgment entered on July 13, 2004 since it awarded the Government approximately $300,000 in fraud penalties (and more than that in contingent interest penalties) pursuant to a statue that did not provide for such fraud penalties being imposed on this Defendant.

I have now **conclusively proven** that the 1 million dollars in fraud and related interest penalties could not possibly apply in this case. In its Response the government claimed that I was relying on a "complex statutory definition of 'deficiency'" (Doc. 100, Excerpt p. 171) and sought refuge in *Iles v. Commissioner*, T.C. Memo 1998-337 (1998). However, as

[16] All of the documents attached to Sandra Davaz's Declaration include fraudulent entries for 1980-1985, in order to allow the IRS to illegally assess the fraud penalties at issue. Excerpts 111 117, 121, 124, 127, 130, and 132, each show TC 300 entries for each year. The TC 300 entries were allegedly entered as reflecting "additional tax assessed *by* ***examination***." The "additional taxes" are, in reality, the "deficiencies." However in each case, the TC 300 entry shows a "0.00" "deficiency," therefore no "additional tax" was assessed. But if no deficiencies existed why were the TC 300 entries made? And if the initial assessments were all based on the government's figures (which were "presumptively correct") why did each return have to be "examined" as claimed by those TC 300 entries? This was done so the IRS could illegally assess the fraud penalties. Since 6653 fraud penalties can only be assessed if a "deficiency" is found on an "examined" return, my master file had to show that my returns had been "examined" and "deficiencies" found, even though the government now claims that the amounts shown on them were not only "presumptively correct" but were "certified" as being correct. So why did my returns have to be "examined" when the amounts shown on them had already been assessed and "certified" as being correct?

[17] Schiff's Declaration Doc 73, Excerpts pp. 69, 70 – paragraph 25

[18] Dragon's Declaration, Doc 56, Excerpt . 45 , ¶ 30, states he imposed the 1980-82 fraud penalties due to Schiff 's criminal convictions, thus the fraud penalties had nothing to do with their being deficiencies for these years.

I pointed out in my Reply (Doc 103, Excerpt p. 183): (1) No deficiencies were ever "determined" by the Secretary in the instant case; nor (2) ruled upon by the Tax Court; (3) nor were "90 day deficiency notices" ever sent to me in connection with any of the years 1980-1985; and (4) I supplied the Court with an affidavit to that effect. (Doc. 97 Excerpts 225-226). So how does the existence of these four factors (which prove that no "deficiencies" existed for any of the years at issue) constitute a "complex statutory definition of 'deficiency'"?

As far as *Iles* is concerned, I pointed out (Doc 103, Excerpts 184) the following:

> However, the following excerpts from *Iles*. Show that this decision, not only does not support the Government's position, but it supports Defendant's position.
>
> > On April 14, 1988, after respondent issued the notices of **deficiency** and a joint **petition** was filed as to all 3 years, petitioners Robert E. Iles, ….and Monica M. Iles, filed joint tax returns for 1981 and 1982….. respondent recomputed [*7] the deficiencies for 1981 and 1982 by combining the adjustments to income determined in the separate notices of deficiency and using joint filing rates.
> >
> > **For purposes of the fraud addition to tax, the term "underpayment" means a "deficiency",** as defined in section 6211 … (Emphasis added throughout)
>
> So in *Iles*, (1) the IRS issued deficiency notices **which was not the case here**; (2) the Iles' filed petitions to Tax Court, **which was not the case here**; (3) the Tax Court *determined* the deficiency, **which was not the case here**; and (4) the deficiency determined by Tax Court was obviously *assessed* as a TC 300 determination, **which was not the case here**. In addition, the *Iles* Court clearly stated that the term "underpayment" for the purpose of a 6653 penalty "means a deficiency."

Therefore it is clear, that there cannot be any fraud penalties for any of the years 1980-1985, because no "deficiencies" existed for any of those years, including the years 1980 – 82 for which I was allegedly convicted of tax evasion. Therefore the District Court's claim as contained in its Final Order that "Schiff's criminal conviction on December 18, 1985 …collaterally estops Schiff from challenging the assessments for the years 1980-82" (does the Court mean the fraud penalties?) and that "the record adduced by Plaintiff United States is simply overwhelming in support of Plaintiff's entitlement to Judgment for tax liabilities for the years 1980 - 1985" is totally without merit. It is simply irrefutable that the $1 million in

§ 6653 fraud and related interest payments contained in the District Courts Final Order simply cannot apply in this case **as a matter of law** *on any basis* – and thus the District Court's Ruling that they do apply, must be reversed and expunged from the government's claim.

6. My taxable "income" for all the years at issue was erroneously determined.

As shown in my Rule 59 Motion (Doc. 91, Excerpt p. 155), "It is Defendant's contention that in determining Defendant's *taxable* 'income. for all the years at issue, the Government did so on the basis of 'income' Defendant allegedly received in the 'ordinary sense,' not on 'income' he received in the constitutional sense.'" I went into great detail in my Declaration (Excerpts pp 58 - 60) explaining why "income" in its "constitutional sense" means "corporate profit." I even included in my Declaration, as Exhibit 3, the relevant pages from those Congressional Reports. (Excerpts pp 82 & 83). As explained in these shortened excerpts from Excerpt 59:

> The "constitutional" meaning of "income" is derived from the holding in ***Brushaber v. Union Pacific RR***, 240 U.S. 1, 17 wherein the Court stated, "The whole purpose of the (16th) Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." So in order to be "relieved" from the constitutional requirement of "apportionment," "income," based on the 16th Amendment, cannot take into "consideration" the "sources" from which "the income is derived." Therefore, an "income tax," based on the 16th Amendment, must be imposed in a manner in which the "sources" that produced the "income" (such as commissions, dividends, wages, rents) are not specifically "considered" and are thus not directly taxed … **In taxing corporate "profit" (As in the Corporate Excise Tax Act of 1909) the "sources" are not "considered" and are thus not directly taxed. So the 16th Amendment "meaning of income" and the "constitutional meaning" of "income" are both synonymous with "corporate profit."**
>
> This is confirmed in the 1921 Supreme Court decision of ***Merchant's Loan & Trust Co v. Smietanka,*** 255 U.S. 509, 518, 519 (which has never been reversed or overruled) wherein the Supreme Court said "The word (income) must be given the same meaning in all of the Income Acts of Congress that was given to it in the Corporation Excise Tax Act (of 1909) and that what that meaning is has now become definitely settled by decisions of this court." (Emphasis added)

That "income" in the "constitutional sense" and as used in those Congressional Reports and in § 61" [19] is synonymous with corporate "profit" is **not even debatable,** since it is conclusively confirmed by the following Supreme Court decisions, which have never been overruled or reversed.

> As has been repeatedly remarked, the Corporation Tax Act of 1909 was not intended to be and is not in any proper sense an income tax law. **This court had decided in the *Pollock Case* that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the Constitution.** The act of 1909 avoided this difficulty by imposing not an income tax, *but an excise tax upon the conduct of business in a corporate* capacity, measuring, however, the amount of tax *by the income* of the corporation… (Citations omitted).
> *Stratton's Independence v. Howbert,* 231 U.S. 399, 414. (Emphasis added)

> Certainly the term "income" has no broader meaning in the 1913 Act than in that of 1909 (See *Stratton's Independence v. Howbert*, 231 U.S. 399, 416, 417), and for the present purpose we assume *there is no difference in it's meaning as used in the two acts.*
> *Southern Pacific v. Lowe*, 247 U.S. 330 (1918) (Emphasis added)

> It was not the purpose or effect of that (16th) Amendment to bring any new subject within the taxing power... But taxes on incomes from some sources has been held to be "direct taxes" within the meaning of the constitutional requirement as to apportionment…."Income" has been taken *to mean the same thing* as used in the Corporation Excise Tax Act of 1909, in the Sixteenth Amendment and in the *various revenue acts subsequently passed.* (Citations omitted)
> *Bowers v. Kerbaugh-Empire Co.,* 271 U.S. 170, 174 (1926) (Emphasis added)

> And before the 1921 Act this Court has indicated (see *Eisner v. Macomber*, 252 U.S. 189, 207), what it later held, that "income," as used in the revenue acts taxing income, adopted since the Sixteenth Amendment, has the *same meaning* that it had in the Act of 1909. *Merchant's Loan &Y Trust Co. v. Smientanka*, 255 U.S 509, 519; see *Southern Pacific Co. v. Lowe*, 247 U.S. 330, 335
> *Burnet v. Harmel*, 287 U.S.103, (1932)

[19] The Code itself does not define income. See *Conner v. U.S.*, 303 F. Supp.,1187, 1189; *U.S. v. Ballard*, 535 F.2d. 400,404. The reason it doesn't is because Congress has no authority to define it, since Congress cannot, "by legislation alone," amend the Constitution. (*Eisner v. Macomber* , 252 U.S. 189, 206) Thus "gross income," "net income" and "taxable income" are not defined in the Code, since all these definitions are dependant on the definition of "income," which the Code does not define.

> Whatever difficulty there may be about a precise and scientific definition of 'income" it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; *conveying rather the idea of gain or increase arising from corporate activities*. *Doyle v. Mitchell Bros.,* 247 U.S. 179, (1918)(Emphasis added)

The following quotation from *Eisner v. Macomber*, (1920) supra, is **DEFINITIVE** since it clearly shows that the Supreme Court held in *Pollock v. Farmer's Loan and Trust*, 158 U.S.601 at page 637, that "so far as (a tax on income) falls on the income of real estate and **personal property**" it is "a **direct tax within the meaning of the Constitution**" and therefore "unconstitutional and void … (if)… not apportioned." (Emphasis added) And, of course, wages represents "income" from "personal property": the sale of one's labor.[20] And, obviously, dividends and interest are "income" from personal property, the personal property being the invested capital generating the interest and dividends. That the 16th Amendment did not alter or overturn *Pollock* as stated above is confirmed in the very authoritative, 1920 Supreme Court decision of *Eisner v. Macomber*, supra, in which that Court held, in pertinent part, on page 205:

> In *Pollock v. Farmers' Loan & Trust*, it was held that taxes upon rents and profits of real estate and upon returns from investments or personal property were in effect direct taxes upon the property from which such income arose…and that Congress could not impose such taxes without apportioning them.

The *Eisner* Court repeatedly held that the 16th Amendment did not overturn *Pollock.* It held (at page 206) that the 16th Amendment "did not extend the taxing power to new subjects.. so as to repeal … those provisions of the Constitution that require an apportionment…for direct taxes upon property **real and <u>personal</u>**," and "This limitation…is not to be overridden by Congress or **disregarded by the courts."** (Emphasis added)

[20] In *Butcher's Union v. Crescent*, 111U.S.746 (1884), the Court held, "The property which every man has in his own labor, as it is the original foundation of all property, so it is the most sacred and inviolable."

So the *Eisner* decision, handed down 11 years *after the 16th Amendment was passed*, still held that taxes on income from real and **personal property** are unconstitutional **unless apportioned. Therefore the *Pollock* decision is still the law of the land!** - and all of the "income" at issue is "income" from personal property, Irwin Schiff's labor. **Therefore, in view of what is "the law of the land" the 9th Circuit is estopped from holding that the "income" I derived from my personal *property* is taxable, absent *apportionment.***

As I pointed out in my Reply (Doc. 103, Excerpt 108)

> Nowhere in its Response (Doc 100) did the Government **challenge or deny** Defendant's claim on this issue. The Government made **no mention of these reports in its Response** … Instead, the Government (stated): (Excerpt p.166)
>
> > The motion primarily consists of a rehash of Schiff's **own legal theories regarding the proper definition of the word "income"**….These arguments were not only rejected by this Court but have also previously been rejected by the numerous other courts that have considered them. These legal contentions have been found to be completely without merit and frivolous and do not merit reconsideration by this court.
>
> Defendant, of course, did not present his "own legal theories." He simply presented the reports, which speak for themselves and claimed that none of the "income" he allegedly received fell within their meaning – and the Government made no counter claim that it did….

Since the government did not ***deny*** that it ***did not*** determine my taxes for the years 1980-1985 **in accordance** with the **intent** of Congress as expressed in those Congressional Reports, the District Court, in accordance with Rule 8(d) of the Fed. Rule of Civ. P. was duty bound to grant my Rule 59 Motion just on this ground alone. Since the District Court did not do so (nor explain "why" in its Final Order Excerpt 64) the 9th Circuit is duty bound to reverse the Court's Orders of June 15, 2003 and January 19, 2005, just on this ground alone.

(7)The Statute of Limitations Barred Reducing the Tax Court's 1979 Determination to Judgment On At Least Two Grounds.

My Declaration noticed the District Court that the Tax Court's 1979 determination was time barred on at least two grounds. (Doc. 73, Excerpts pp. 62, 63) The government's own

records show that 1979 assessments were made on 05/20/1985 and 10/06/1986 or at least 6 years prior to the date claimed in the government's complaint (Excerpt 13 & 14) and in Sandra Davaz's Declaration (Doc 85 , Excerpt p. 111) which was 09/03/92. Since the government had 10 years from the date of the first assessment to reduce my alleged 1979 tax liabilities to judgment, the statute of limitations ended on 05/21/1995 or approximately 6 years prior to the government having instituted this lawsuit.

Secondly, I pointed out (Doc. 73, Excerpts pp. 62, 63)

> "In addition, the Tax Court's Order (as shown in Darmstadter's Exhibit 4) was never *completed* and *finalized* and is therefore without *any legal "force and effect."* IR Code section 6215 states that "the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid *upon notice and demand* from the Secretary." However no statutory "notice and demand" was ever sent to me in connection with the Tax Court's 1979 determination."

I will get into the government's failure to send out "notices and demands" further on, since this failure affects more than just the year 1979.

I ***again*** raised these two issues in my Memorandum in Support of my Motion for Reconsideration (Doc. 84, as follows, Excerpts p. 99)

> While the Court states in its Order that "Schiff's tax liabilities for the year 1979 have been fully litigated in the United States Tax Court and the doctrine of res judicata precludes re-litigation of the merits of that determination as to tax liability," my Declaration did not simply challenge the "merits of (Tax Court's) determination." What I claimed is that the Tax Court's determination can not be reduced to judgments on two grounds: 1) it was **time barred** by the statute of limitations 6 years before the Government instituted this lawsuit, and 2) its "determination" was never *finalized* by sending Defendant the statutory notice **and demand for payment** as is **specifically required** by 26 USC 6215, as covered in Paragraphs 11 and 15 of my Declaration, as follows:

Since, in its Final Order, the District Court did not comment on this issue, nor respond to its when I raised it ***again*** in my Motion for Reconsideration (as quoted above), and in my Response of July 14 (Doc. 89, Excerpts pp. 138, 139), and ***again*** in my Rule 59 Motion.

(Doc. 91 Excerpt pp 150, 151); however, the government did not address the issue in its Response. All the government would say is (Doc. 100, Excerpt p. 167) "*res judicata* and collateral… estoppel… precluded relitigation of Schiff's tax liabilities for the year 1979." However, as the government well knew, my claim on this issue had nothing to do with "re judicata" or "re-litigating …the merits" of that decision (That decision had no merits. [21]), but involved my claim that: (1) the statute of limitations and (2) the government's failure to send me a notice and demand for payment for 1979, barred reducing my alleged 1979 tax liabilities to judgment. I repeatedly raised both issues in numerous pleadings, which the government never challenged in any of its Responses. Fed. R. Civ. P. 8(d) provides that "Averments in a pleading…are admitted when not denied," and since the government never denied either claim, then pursuant to Rule 8(d) the District Court should have granted my motion that it "amend or vacate" its Order with respect my alleged 1979 income tax liability. Since the District Court did not do so, the 9th Circuit is duty bound to reverse the failure of the District Court to do so.

(8) My 1985 prosecution bars reducing 1980 – 1982 assessments to judgment

As I stated in my Declaration (Doc 73 Excerpt pp. 70(a), 70(b))

> In addition, 1) either the collection of all of the taxes at issue for the years 1980 –1982 were time barred as of the year 1996, or my convictions for tax evasion for these years were obviously *illegal* – on grounds that are comparable to convictions now being

[21] Transcript pages taken from Exhibit 1 of my Declaration (Doc. 73) show that Revenue Agent Cingo began his direct testimony by claiming he "examined" and "investigated" my 1979 tax return (Excerpt p. 75 & 76). However on cross – examination, he admits that in this case, he had no "return to examine," thereby establishing that his **entire** sworn, direct testimony rested on a fraudulent claim. (Excerpt pp. 77 & 78) . He also admits (Excerpt p. 78) that what he actually determined was my alleged "**total** tax liability" for 1979, and not simply a "deficiency." However, the Tax Court has **no authority** to determine anyone's **total** tax liability**,** which it did here in the guise of having determined a "deficiency." In excerpt pp. 81-82, Cingo admits that the only act of tax evasion I was accused of committing, as shown on the document imposing the fraud penalty, was "failure to file," which could not, on *any* basis, support the $22,100 fraud penalty at issue. But that did not make any difference, because in Excerpt p. 80 Judge Clapp admits that he "didn't care" if Agent Cingo determined the fraud penalty by "**shooting darts at a dart board**." Obviously, the Tax Court's entire 1979 decision **was a sham** from start to finish, and Judge Clapp fined me an ***additional* $25,000.00** for ***proving* it!**

> vacated on the basis of DNA evidence. The government admits in footnote 6 of its Memorandum [22] that the "existence of a deficiency" is an "essential element" to a "charge of tax evasion under I.R.C. 7201." Therefore, for the government to have legally prosecuted me for tax evasion in 1985 for the years 1980 –1982, a "deficiency" had to have existed in 1985 *for those years*. In order for a "deficiency" to have existed, a prior assessment would have had to be made, because a "deficiency" is clearly a supplemental assessment pursuant to 6204(b). Therefore, for a deficiency to have existed in 1985 a prior assessment for the years 1980-1982 would have to have been made, in order for it be corrected because it had been "ascertained" to be "imperfect or incomplete" pursuant to 6204(a). So if I was prosecuted legally in 1985 for the years 1980-82 an assessment at that time, for the years 1980-82 would had to have been made in order to have the "deficiency" which is an essential element in a 6201 prosecution. If no assessment had been made against me at that time, then no "deficiency" could have existed: ergo my 1985 prosecution and convictions for 7201 violations for the years 1980-82 were illegal.[23]

Throughout the government's Memorandum (Doc. 52 and other pleadings) the government continually makes reference to my 1985 conviction for tax evasion. Indeed, my alleged 1985 conviction is material to the District Court's Final Order in which that Court observes: " Moreover, Defendant Schiff's criminal conviction on December 18, 1985 …collaterally estops Schiff from challenging the assessments for the years 1980 - 82." **The government can't have it <u>both</u> ways.** If the government and the District Court claim that I am "estopped" from challenging my 1985 conviction, then both the government and the Court are ***equally estopped*** from claiming that my 1985 conviction was *anything* other than ***<u>LEGAL</u>***. However, as the government has already conceded, in order for my 1985 conviction **to have *been legal*** – a "Deficiency," pursuant to section 6204 had to have existed. However, before a "deficiency" pursuant to section 6204 could exist, it would have to have been "ascertained" that a prior § 6201 assessment was "imperfect or incomplete." Ergo, *initial* § 6201 assessments had to have existed in 1985 for the tax years 1980-1982, if my 1985, § 7201

[22] Doc 52, Excerpt p. 23 (footnote #6)

[23] See also Excerpt 143 which was taken from the IRS decoding manual "ADP and IDRS Information" and which was attached as Exhibit D to Defendant's Motion Opposing Entry of Judgment" Doc. 89. It shows that a "deficiency," TC 300 entry, cannot be made unless a prior TC 150 entry, showing that a prior assessment, had been made..

convictions for those years were legal. I raised this argument **over and over again:** in my Memorandum to Support Reconsideration (Doc. 84 Excerpt p. 101); ***again*** in my Reply to Plaintiff's Opposition for Reconsideration (Doc. 96, Excerpt p. 162); and ***again*** in my Reply to the Government's Opposition to Schiff's Rule 59 Motion (Doc 103, Excerpt pp. 181, 182), *and in none of its responses did the government ever deny or challenge my claims on this issue!* Therefore, based on Rule 8(d) of the Fed. R. of Civ. P., the District Court was duty bound to deem the government's failure to deny my claim on this issue, as having been admitted – and, accordingly, dismissed the government's claims for the years 1980-1982. However, despite the above, the District Court gave the government a summary judgment for those years. Therefore, this Honorable Appeals Court, is duty bound to dismiss the government's claim for the years 1980-1982, or, at the very least, reverse the summary judgment on these grounds.

(9) The government never sent me a "notice and demand" for payment

In Paragraph 7 of its complaint, the Government states, "Proper notice and demand for payment of the assessments set forth in Paragraph No. 5, above has been made on defendant Irwin A. Schiff." The Government repeats this claim in paragraph No. 8 as follows, "Despite notice and demand for payment…Irwin A. Schiff has neglected…to fully pay etc…etc…etc."

I raised this issue in my Declaration (Doc. 73 Excerpt pp. 62 & 63) supported by Interrogatories (Excerpts pp 89(b) & (c)) and Admissions (Excerpts 84 – 89). It is clear by the government's evasive and frivolous answers, that no statutory "notices and demands" for payment were ever sent to me, as I argued in these representative passages from Doc. 73.

> However no statutory "notice and demand" was ever sent to me in connection with the Tax Court's 1979 determination. Treasury Regulation 1995 (Schiff's Exhibit

6)[24] identifies the statutory notice and demand as being the IRS Form 17. Schiff's Exhibit 7,[25] is a copy of the IRS Form 17 that I received from the IRS on 05-28-78 in connection with some telephone taxes I owed. However, I was never sent a similar, statutory "notice and demand" with respect to the income taxes and penalties as contained in the Tax Court's determination. And I declare that Treasury Regulation 1995 has never been repealed, revoked or superseded, nor has any other Treasury Regulation or Decision been promulgated designating some other IRS document as being the "notice and demand" required by section 6215. In any case, the 9th Circuit in Benatar et al. v. U.S. 209 F. 2d 734 (1954) states "Form 17 was always issued after the time for payment had gone by." Schiff's Exhibit 5 (Admissions 180-181)[26] reveals the Government's refusal to deny that IRS Form 17 is the official, statutory "notice and demand" and that Treasury Decision 1995 was ever repealed or revoked while trying to avoid having to answer the legal significance of the Form 17. Nor did the government deny that no Form 17 was ever sent to me. It is clear that in order to avoid truthfully answering these admissions (and since they were not denied, they have to be deemed admitted) the government raised fictitious arguments as to why it refused to either admit or deny these admissions.

Therefore in Interrogatory 13 (Exhibit 8), I asked the Government to identify "the IRS Form number of the document that plaintiff claims were sent to defendant which constituted the 'proper' statutory 'notice and demand' for payment, as referred to in paragraphs 7 & 8 of its complaint …as required by IR Code Sections 6303, 6321, 6331, and 6215(a) …(and to) identify the Treasury Decision or Treasury Regulation that specifically identifies that document as being the 'proper' statutory Notice and Demand required by these statutes, as claimed by plaintiff." … The government's final response was that "the United States will produce a copy of the notice and demand if it is available to the attorneys for the United States." I never asked the "attorneys for the United States" to produce the actual document. All I asked them to do is *identify* the Form number of the document. .. How do they know what the "proper" notice and demand is, *if they can't even identify its form number?* And finally, the government never produced "a copy of the notice and demand." So, obviously, this claim in the government's complaint is false, which means the 1979 Ruling by the Tax Court is unenforceable, just on this ground alone.

In addition, the 4340 for 1979 as shown in Darmstadter's Exhibit 8 [27] does not show an entry that a notice and demand for payment was ever sent out. Thus, this is a significant and material contested fact. *I claim that no statutory notice and demand for payment was ever sent to me in connection with the taxes due for 1979 - or any other year for that matter.* And so far the government has not proven any differently.

[24] Excerpt p. 87(a) is a copy of Treasury Decision 1995
[25] Excerpt p 87(b) is a copy of IRS Form 17
[26] Excerpt pp 84-89 government Admissions
[27] Excerpt pp. 30 – 43 Documents from Darmstadter's Declaration

I also raised this issue in my: Motion for Reconsideration, (Doc. 84 Excerpt pp. 99 & 100); and **again** in my Opposition to Entering Order of Judgment (Doc. 89, Excerpts pp. 140 & 145;) and again in my Rule 59 Motion, (Doc 91, Excerpts pp 153 & 153(a)) , and ***again*** in my Reply to the government's Opposition to his Rule 59 Motion (Doc.103 pp 185, 185(a) & 186). In its Opposition, the government stated (Doc 100, Excerpt pp. 170, 171):

> "Schiff claims … that he has not received a notice and demand to pay the assessments… This is typical tax-protestor argument in which Schiff randomly alleges an IRS failure to complete some **procedural step**, which, he argues, invalidates the tax. The statute, 26 U.S.C. 6303, requires only that the notice be sent; it is not required to be received.

Here the government blatantly misrepresents both the substance of my argument and its importance. Failure to send out the required notice and demand for payment is hardly a failure to complete some "step" – indeed, the claim that this "step" was in fact "completed" occupied two paragraphs of the government's 12 paragraph complaint (Doc. 1).

In addition, my *repeated claim* was *not* that I never "received" such notices (as the government well knew), but that ***no such notices were ever sent out***. Indeed, I pointed this out to the Court in my Reply, as follows (using brief excerpts from Excerpt p. 185.)

> However, Defendant **never claimed** that he "did not **receive** a notice and demand to pay the assessments," what he repeatedly claimed in a number of pleadings he filed in this case is that the record shows that no such notices **were ever sent out**.
>
> At no time did Defendant ever state that his "claim" on this issue was that he never "**received** a notice and demand to pay the assessments" as the Government fraudulently claims. His claim, as he repeatedly stated throughout this litigation, is that the record shows that no such notices were ever sent to him…for any of the years 1980-1985
>
> Defendant again asks this Court to take *judicial notice* that there is no entry in any of the IRS documents (Exhibits B1-B5)[28] showing that "notices and demands" for payment of the taxes and penalties at issue were ever sent to Defendant for any of the years 1980-1985.
>
> In addition, the failure to send out such "notices and demands" for payment, is not some insignificant "procedural step" as the Government attempts to suggest …but such a

[28] Attached as Exhibits to Doc. 103; Excerpt pp. 192, 193, 194, 195, 196 and 197.

"failure" is a ***total bar to*** the Government's ability to collect any of the taxes and penalties at issue.

I also pointed out that Code sections 6671, 6303, 6215 all **require** the sending out of the statutory "notice and demand" for payment before a lien can apply and the enforced collection of a tax be undertaken, and I cited the 9th Circuit decision of Martinez v. United States, 669 F.2d 568 (1981), and 10 other court decisions as upholding this principle. Therefore, since there is **nothing** in the record indicating that notices and demands for payment were ever sent to me for any of the years at issue, as claimed in the government's complaint – this becomes a *contested issue of fact* that ***cannot* be resolved *in favor of the government*** as the District Court has done. Therefore the 9th Circuit is duty bound to reverse the District Court's Final Order just on this ground alone.

(10)The district court erred in not allowing a jury to decide the "delusional" issue.

As explained above, the $1 million dollar fraud and related interest penalties do not even apply in this case.[29] However if it did apply in the manner the Court and I had been initially misled by the government to believe – then, obviously, the Declaration submitted by Attorney William Cohan containing the reports of Dr. Luis C. Ortega and Ph.D. psychologist Cynthia Barry had a significant, factual bearing on the issue of "willfulness," and as such, the testimony of Cohan, Ortega and Barry was something a jury was entitled to consider in evaluating "willfulness" in connection with the civil fraud penalties at issue. The mere fact

[29] Since (as explained above) the "delusional" issue is now moot, I did not think it necessary to include this 51 page document (Included in Doc. # 73 "Schiff Opposition to Summary Judgment") or argue its relevance in this appeal. It is relevant, only because it reveals the total partiality and unconstitutional character of the District Court. In addition, the Court's bias is further revealed by its refusal to grant a stay pending the outcome of my criminal trial – now scheduled for August 29, 2005. On 3/24/2004 I was indicted on 16 counts involving 18 U.S.C 371, and 26 U.S.C 7206(2), and 7201. On 4/21/2004 I requested a stay (Doc 81) pending the outcome of that trial. It was denied and I feel ill equipped to argue that failure here. But as a result of the stay not being granted, I have been forced to spend weeks and weeks fighting this summary judgment (including this appeal) when I should have spent the time preparing my defense to those criminal charges, since I am proceeding pro per in that case too.

that the District Court could disregard Attorney Cohan's Declaration and the psychological reports it contained - especially in light of the 9th Circuit decision in *U.S. v. Morales,* 103 F. 3d 1031 - and still give the government a summary judgment to charges involving civil fraud for all of the years at issue (even in years in which I was never convicted of criminal fraud) clearly establishes that the District Court's Order was not based on either the law or the facts, but was based solely on the Court's own partisan prejudices, regardless of the law or the facts. Thus I was denied the type of judicial impartiality that both the law and "due process" require. Consequently I claim that the Court's Final Order was rendered in obvious violation of my rights under the "due process" clause of the United States Constitution.

Additional proof of this is the fact that I argued this issue in my Rule 59 Motion (Doc 91, Excerpt 10) and the government didn't even contest it in its Response (Doc. 100). Therefore, pursuant Fed. R. Civ P 8(d) the District Court should have granted my Rule 59 Motion just on this issue alone. Therefore, the District Court's action with respect to this issue constitutes another reason why the Court's Final Order must be reversed. .

11. The court erred in not allowing a jury to decide the validity of my coerced returns.

I have already produced for this Court enough information regarding the nature of the coerced returns from which the assessments for the years 1980-1985 were made. A full eight page explanation was included in my Declaration, (Doc. 73, paragraphs 48 -58)) which I will not bother to include in my Excerpts. However, since there was no mention of this issue in the District Court Final Order, I raised it in my Rule 59 Motion (Doc 91, Excerpt pp. 153(a), 154 and 155). In its Opposition (Doc. 100) the government **failed to address** this issue at all, prompting me to restate in my Reply what I had stated in his opening Memorandum in support of my Rule 59 motion. (Doc. Excerpt 191)

> It is unquestionable, based on such circumstances, an impartial jury should be the ones deciding whether returns filed under such circumstances can be factually regarded as the

returns that Defendant filed for 1980-85, or whether the "zero" returns Defendant had previously filed in accordance with Long, supra, congressional reports, and as approved by Defendant's assigned probation supervisor should be regarded as the returns he actually filed for those years at issue.

Since the District Court also **failed to address** this issue in either its Final Order or in rejecting (without comment) my Rule 59 Motion it is incumbent on this Court to reverse the District Court's Final Order on yet another ground.

CONCLUSION

It is hard to imagine how an Order of a District Court could be more violative of the Constitution, the law, and the facts as the one now before this Honorable Appeals Court. Based on the first three issues presented, the law requires that this Court dismiss the government's law suit - based on the lack of subject matter jurisdiction - on any one of the three issues presented.

However, even if these issues didn't exist, the Order at issue would still have to be reversed based on any one of the eight other issues as presented above. If this Court can sustain an Order requiring me to pay the government $2.6 million, a sum I can't possibly owe, and considering the basis upon which the government seeks to extract it - then the 9th Circuit will have acknowledged that law, constitutional rights, and "due process" in America are largely myths.

June 20, 2005

ORAL ARGUMENT REQUESTED

Respectfully submitted

_____

Irwin A. Schiff, pro per
440 E. Sahara Ave.
Las Vegas, Nevada 89104
Tel. 702-385-6920
Fax.702-385-6917

\