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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA)	Civil No. CV –S-01-0895-PMP LRL
)	
Plaintiff)	
v.)	MOTION FOR RECONSIDERATION
)	REGARDING FINDINGS OF FACT
)	AND CONCLUSIONS
IRWIN A. SCHIFF)	OF LAW
) Defendant.)	
_____)	

COMES NOW, Defendant Irwin Schiff, and requests that the Court reconsider its Order of March 1, 2005 denying Defendant findings of fact and conclusions of law with respect to his motions that the Court (1) dismiss this case for lack of subject matter jurisdiction, and (2) that it “Alter, Amend or Vacate” it’s Order of June 14, 2004 pursuant to Rule 59. in which the Court granted the government a summary judgment, for the following reasons:

- 1) On June 14, 2004, in a three page Order, the Court granted the government a summary judgment in this case.
- 2) On August 16, 2004 the Court denied defendant’s Motion for reconsideration.
- 3) On July 20, Defendant filed a Motion (which he supplemented on August 2, 2004) that the Court “Alter, Amend or Vacate” if Order of June 14, 2004 pursuant to Rule 59 on a variety of grounds that Defendant claims the Court did not consider in granting the government a summary judgment.
- 4) On August 13, 2004 the government filed its Opposition to Defendant’s Rule 59 Motion.
- 5) On September 3, 2004 defendant filed a Motion to Dismiss this action for lack of subject matter jurisdiction pursuant to 28 U.S.C 1396.
- 6) On September 3, 2004 Defendant filed a Reply to the Government’s Opposition to his

Rule 59 Motion to Dismiss.

- 7) On September 7, 2004 Defendant filed an Erratum to his Reply of September 3, 2004.
- 8) On September 16, 2004 the government filed its Opposition to Defendant's Motion to Dismiss for lack of subject matter jurisdiction.
- 9) On September 29th 2004 Defendant filed his Reply to the government's Opposition to his Motion to Dismiss for lack of subject matter jurisdiction.
- 10) On January 19, 2005 the Court summarily denied Defendant's: (1) Rule 59 Motion and his; (2) Motion to Dismiss for lack of subject matter jurisdiction without giving any reasons, either factual or legal, for denying these motions.
- 11) On January 27, 2005 Defendant moved the Court, pursuant to Rule 52, Fed. R. Civ. P., to provide Defendant with findings of fact and conclusions of law as to why it denied Defendant's: (1) Rule 59 Motion and (2) his Motion to Dismiss the government's lawsuit on the grounds that the Court lacked subject matter jurisdiction to entertain Plaintiff's lawsuit.
- 12) On March 2, 2005 Defendant renewed his Motion for findings of fact and conclusions of law with respect to these Motions.
- 13) In an Order filed on March 1, 2005 and (entered on March 4, 2005) the Court stated that

A review of the Court's file shows that the Court did make Findings of Fact and Conclusions of Law in the Order issued June 14, 2004. The subsequent Order of the Court simply denied reconsideration.

It was on that basis that the Court further stated that "Defendant's Motion for Findings of Fact and Conclusions of Law (#109) is denied."

I

LEGAL ARGUMENT

A

With Respect to the Court's Alleged Lack of Subject Matter Jurisdiction

A review of the filings in this case (as shown above) reveals that the Court *could not possibly* have considered the issues raised by the Defendant or the government's Opposition with respect to both of these motions. The Court denied Reconsideration of its June 14, 2004 Ruling on August 16, 2004. However, Defendant did not raise the issue of the Court's alleged lack of

subject matter jurisdiction until September 3, 2004 – or well after both of the above rulings were handed down, so no “findings of fact and conclusions of law” could have been issued by the Court in connection with this issue. Plaintiff based his claim of the court’s lack of subject matter jurisdiction on 28 U.S.C 1396 which makes jurisdiction in connection with “the collection of internal revenue taxes” dependent on their being a statutory “liability” for the tax at issue. Defendant claimed that since no statute made defendant “liable” for income taxes, section 1340 denied subject matter jurisdiction to the Court. It was the government’s claim that the Court had jurisdiction pursuant to Sections 28 USC 1340 and 1345 and 26 U.S.C 7401, 7402, and 7403. However, the government in Opposition: (1) did even mention 28 U.S.C. 1396, let alone refute defendant’s claim with respect to it; nor (2) did the government identify any statute that specifically made Defendant “liable” for income taxes as defendant believes is required by 28 U.S.C. 1396. Apart from mentioning the statutes as listed, the government claimed that Section 1 of the IR Code was “applicable” to the issue of jurisdiction, and somehow fulfilled the requirement with respect to establishing the statutory “liability” for the income taxes at issue.

Since the issue of “jurisdiction” **was not raised** by Defendant until he raised it in his Motion filed on September 3, 2004, the Court could not have addressed Defendant’s claim on this issue (nor the government’s Opposition, which was not filed until September 16, 2004) in its Rulings of June 14, 2004 and August 16, 2004, as claimed by the Court in its Order of March 1, 2005. Therefore, Defendant has no “findings of fact and conclusions of law” as to why this jurisdictional issue as raised by Defendant was denied by the Court, or why the Court deemed the government’s arguments to be more valid.

Since Defendant is appealing the Court’s granting of a summary judgment to the government to the 9th Circuit, Defendant has no basis for arguing in his appeal: (1) on what basis the Court might have erred in not granting Defendant’s motion to dismiss Plaintiff’s claim for lack of subject matter jurisdiction; and (2) how the Court might have erred in giving more legal weight to Plaintiff’s opposing arguments than it gave to Defendant’s arguments.

B

With Respect to Defendant’s Rule 59 Motion

Similarly, certain issues raised in Defendant’s Rule 59 Motion were never raised or addressed prior to the Court’s Ruling of June 14, 2004. Therefore, these issues could not have

been “considered or “reconsidered” in the Court’s rulings of June 14, 2004 or August 17, 2004. For one thing Defendant never raised the issue regarding the government’s fraudulent imposition of Section 6653 fraud penalties (it took Defendant considerable time to uncover this fraudulent imposition) until he raised it in his Reply brief which was not submitted to the Court until September 3, 2004. Therefore, this issue could not have been addressed by the Court in its Rulings of June 14 and August 16, 2004 as claimed by the Court in its Order of March 1, 2005. These patently unlawful fraud penalties (and related interest charges) alone accounted for approximately \$1 million of the \$2.4 million at issue. In Defendant’ Reply brief of September 3, 2004 Petitioner enumerated and argued how the following issues, which Defendant had raised in his opening brief, were responded to by the government in its brief in Opposition.

1) How Did the Government Respond to Defendant’s Claim That No Statute Made Him “Liable” For Income Taxes?

Defendant pointed out that the government refused to address this issue at all, *and this issue was not addressed in the Court’s Rulings of June 1 and August 16, 2004.*

(2) How Did the Government Respond to Defendant’s Claim That the Income Taxes At issue Were Not Determined In Accordance With the Intent of Congress?

With respect to this issue Defendant pointed out 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.’” as mandated by House Report 1337 and Senate Report 1622 (83rd Congress 2^d Session) . As Defendant pointed out in his Reply Brief, “Nowhere in its Response did the government challenge or deny Defendant’s claim on this issue,” and this issue was certainly not addressed in the Court’s Rulings of June 14 and August 16, 2004.

3) How did the Government Respond to Defendant’s Claim That the Statute of Limitations Barred Reducing the Tax Court’s 1979 Determination to Judgment?

In his Reply Brief, Defendant Schiff pointed out, that the 1979 Tax Court determination was: (1) barred by “the statute of limitations” and; (2) the “failure of the IRS to send Defendant a ‘notice and demand’ for payment,” with respect to that “determination”; and that “the Government did not challenge Defendant’s claims with respect to these issues on *any* bases.”

Defendant also pointed out, that since Defendant was prosecuted in 1985 for evading income taxes for the years 1980-1982 this meant that assessments for those years had to exist in 1985 (or Defendant's 1985 criminal prosecution was illegal, as admitted by the government) which meant that the statute of limitation with respect to reducing 1980-1982 tax assessments to judgment, terminated some seven years before the government instituted this lawsuit. And neither of these issues (which were obviously conceded by the government), were addressed by the Court in its Rulings of June 14, 2004 and August 16, 2004...

(4) How Did the Government Respond to Defendant's Claim That the Government is Barred From Getting a Summary Judgment In Connection with Unproven Civil Fraud Allegations For the Years 1983, 1984 and 1985?

It was the government's contention that Judge Peter Dorsey's determination that Defendant failed to file returns for the years 1983 -1985 at a (contrived) probation violation hearing proved "fraud" for these years, even though: : (1) Defendant had already filed returns for those years in accordance with House Report 1337 and Senate Report 1622 and other 9th Circuit decisions; (2) failure to file (even if true) cannot constitute the felony of tax evasion; (3) Petitioner was (illegally) denied counsel at those hearings; and (4) 6653 fraud penalties have to be based on "deficiencies," which did not exist for any of the years 1980-1985. Yet these issues were not addressed in the Court's Rulings of June 14 and August 16, 2004.¹

(5) How Did the Government Respond to Defendant's Claim that the Government Never Sent Defendant a "Notice and Demand" For Any Of the Years At Issue?

As pointed out in Defendant's Rule 59 Motion (and as Repeated in his Reply Brief,) the Government claimed in paragraphs 7 and 8 of its complaint that "Proper notice and demand for payment of the assessments set forth in Paragraph No. 5, above has been made on defendant Irwin A. Schiff." However, as pointed out by Defendant, the government could not: (1) produce any copy of any such "notice and demand," nor (2) identify the IRS Form number of any such "notice and demand" that was allegedly sent to defendant; and, (3) nor did any document produced by the government indicate that any such "notice and demand" for payment was ever

¹ The Court's statement in its Order of June 14, 2004 that "Defendant Schiff's criminal conviction estops Schiff from challenging the assessments for the years 1980-1982 " and that "the record adduced by Plaintiff United States

sent to Defendant.² Therefore, this issue constituted a *material* contested issue of fact which, if true, would render “null and void” the government’s entire \$2.3 million dollar claim. *Yet this fundamental and crucial contested issue of fact was not addressed in the Court’s Order of June 14, 2004.*

(6) What Was the Government’s Response to Defendant’s Claim that the Assessments at Issue Were Erroneous On a Variety of Grounds?

While the Court did address this issue in its Order of June 14, 2004 by stating that “Defendant Schiff failed to raise any genuine issue of material fact to overcome the presumption of correctness afforded the assessments for the years 1980-1985,” it did not address Defendant’s claim, as contained in his Rule 59 motion, that the income taxes as shown on Defendant’s returns for the years 1980-1985 were not entitled to any such “presumption of correctness.” Nor did the Court’s Order of June 14, 2004 take into account the \$72,000 Defendant paid to Howy Murzin for the years 1982-1983. The Court also did not address numerous other issues raised by Defendant in his Rule 59 motion in connection with this issue.³ However, since the court did make some reference that these assessments reflected Defendant’s correct “tax liabilities for the years 1980-1985,” Defendant, at least, has some basis for arguing the Court’s abuse of its discretion on this issue.

(7) How Did the Government Respond to Defendant’s Claim That “All of the Taxes For the Years 1980-1985 Are Based On Coerced Returns”?

As pointed out in his Reply brief, “Though Defendant devoted approximately two pages to this argument in his Rule 59 Motion, the Government made no mention of it in its Response.” By not contesting Defendant’s claim that all of the assessments at issue for the years 1980-1985 were based upon coerced (and therefore worthless) tax returns, the government obviously conceded Defendant’s claim on this issue.⁴ Yet there was no mention or resolution of this issue

is simply overwhelming in support of Plaintiff’s entitlement to Judgment for tax liabilities for the years 1980-1985” certainly does not address these issues, especially the **totally illegitimate** imposition of the 6653 fraud penalties.

² As pointed out by defendant, the government fraudulently sought to change the nature of this issue by stating that Defendant claimed he never “received” a notice and demand for payment, yet it was Defendant’s repeated claim that no such “notice and demand” was ever sent, and nothing in the record showed that any such document was ever sent to defendant.

³

⁴ Defendant stated that on the returns at issue that he was accepting the government’s figures so as “not be in violation of the conditions of my probation,” but that he believed that the amounts shown on his previously filed “zero” returns “correctly and accurately reflected my tax able income for that year.” :

in the Court's Order of June 14, 2004.

(8) How Did the Government Respond to Defendant's Claim That Defendant's Alleged "Delusional Disorder" Is An Issue for the Jury?

While in its Response, the Government did not mention or contest Defendant's claim on this issue, the Court did mention and considered it in its Order of June 14, 2004, so, at least, Defendant has a basis for challenging the Court's handling of this issue on appeal.

C

CONCLUSION

Therefore, with the exception of issues identified in 6 and 8 as shown above, Defendant has "no findings of fact or conclusions of law" that would enable him to argue why the Court's Order of June 14, 2004 was in error with respect to issues 1, 2, 3, 4, 5, and 7 – especially in connection with his Rule 59 motion. In addition, Defendant does not have any "finding of fact and conclusions of law" that would enable him to argue why the Court was in error in not granting Defendant's Motion to Dismiss for lack of subject matter jurisdiction in accordance with 28 U.S.C 1396.

Therefore, based on the above, Defendant respectfully requests that this Court, in accordance with Rule 52, Fed. R. Civ. P., provide him with "findings of fact and conclusions of law" as why the Court denied him relief with respect to the issues 1, 2, 3, 4, 5 and 7 as indicated above, and the basis upon which the Court did not dismiss this action for lack of subject matter jurisdiction in accordance with 28 U.S.C 1396 – so that he has some basis for arguing, in his appeal, why the Court was in error in not ruling in favor of Defendant on these issues.

Dated: March 9, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day hand delivered a copy of the foregoing to Henry C. Darmstadter and G. Patrick Jennings, Trial Attorneys, Tax Division, in care of Daniel G. Bogden, United States Attorney, District of Nevada, Lloyd D. George Federal Courthouse, 333 Las Vegas Blvd. South, Suit 5000, Las Vegas, Nevada.

Irwin A. Schiff