James Leslie Reading, *Pro Se*
Clare Louise Reading, *Pro Se*
2425 East Fox Street
Mesa, Arizona 85213
(480) 964-0199

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AUG 29 2012
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES LESLIE READING, CLARE L. READING, FOX GROUP TRUST, MIDFIRST BANK, CHASE, FINANCIAL LEGAL SERVICES, and STATE OF ARIZONA,

Defendants.

Civil Number: 2:11-CV-00698-FJM

MOTION FOR LEAVE OF COURT TO FILE SURREPLY

(Oral Argument Requested)

Defendants, James Leslie Reading and Clare Louise Reading, hereby file with this honorable Court this request for permission to file a Surreply in response to Respondent United States (Plaintiff, Plaintiff's attorney) reply [Doc. No. 83, hereinafter "Reply"] to Defendants' Response to [Doc. No. 52] to the Untied States' Motion for Summary Judgment.

1) Plaintiff's attorney filed its Reply to Defendants' Response [Doc. No. 90] on 8/24/2012. Plaintiff's Reply brings in new material, introduces new factual and legal arguments, makes mistakes which need to be corrected, makes assertions which need to be rebutted, takes a position that must be contested, and makes misstatements that need to be countered and/or denied.

2) Just a few examples of the new material introduced by Plaintiff include the new errors, omissions, and false or unsupported statements that follow:

a) Defendants, being parties to the contract that created the Fox Group Trust rebut the statement by the Plaintiff's attorney that the Fox Group Trust did not file a response to the Plaintiff's Motion for Summary Judgment, when the truth of the matter is that the Court refused to allow it.

b) In the Reply at I. A., lines 11 and 12, the Plaintiff's attorney misrepresents the companies as "insurance companies".

c) At lines 25 – 27, the Plaintiff's attorney misrepresents the law in an attempt to mislead the Court because no evidence or testimony has been produced to show that the inferior courts have the power to overturn holdings of the U.S. supreme Court

d) At page 3, lines 1 – 14 Plaintiff's attorney misleads the Court with lower, inferior court rulings *that have no bearing on the landmark declarations made the by highest Court in the land.*

e) Plaintiff bases their claims of 'valid assessments" on mere "presumption" and also relies on "probably" where no actual proof exists, relying on cases that have nothing to do with the instant matter and inserting new cases supporting weak presumption when Defendants show the reality of truth.

f) At page 4, line 10 – 12, Plaintiff agrees that there are facts in dispute regarding 1993, 1994 and 1995 which must be determined by a jury.

g) Plaintiff has the nerve to admit to this honorable Court that it does not know what the "correct" figures are, but that if the Court will grant their Motion for Summary Judgment, bypassing *Defendants' fundamental, Constitutional right for a jury to decide these facts, that <u>then</u> they will* come up with the "correct" numbers! It is the duty of the Court to disallow such a miscarriage of justice. These facts are most assuredly in dispute and must be presented to a jury.

h) Revenue Agent Marriaga has committed perjury for the second time and must be examined in the presence of a jury.

Summary Judgment is not proper and if granted would deprive Defendants of their Constitutionally guaranteed right to due process.

It is the duty of this honorable Court to uphold justice which calls for facts, evidence and actual statutes, not "presumption". Without a Surreply, Defendants will be denied due process. Defendants will file their Surreply forthwith, or in conjunction with the filing of the instant motion.

RESPECTFULLY SUBMITTED this 29th day of ~~September~~ August, 2012.

JAMES

~~Jamie~~ Leslie Reading *Pro Se*
2425 East Fox Street
Mesa, Arizona 85213
(480) 964-0199

Clare Louise Reading
2425 East Fox Street
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(480) 964-0199

Jurat

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct, 28 USC § 1746(1).

Reserving ALL Natural God-given unalienable birthrights, waiving none,

/s/ Clare Louise Reading
Clare Louise Reading

/s/ James Leslie Reading
James Leslie Reading

Arizona State)
) ss
Maricopa County)

Clare Louise Reading and James Leslie Reading appeared before me, a Notary, subscribed and sworn under oath this 29th day of August, 2012.

Notary Public My Commission expires: 8-10-2015

seal

Jason Cupnyk
Notary Public
Maricopa County, Arizona
My Comm. Expires 8-10-15

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing, **MOTION FOR LEAVE OF COURT TO FILE SURREPLY,** with attachments, has been made this 29th day of ~~September~~ August, 2012, by depositing a copy thereof in the United States Mail in a postage prepaid envelope addressed to:

ANN BIRMINGHAM SCHEEL
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Clare Louise Reading

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. JAMES LESLIE READING, CLARE L. READING, FOX GROUP TRUST, MIDFIRST BANK, CHASE, FINANCIAL LEGAL SERVICES, and STATE OF ARIZONA, Defendants.	Civil Number: 2:11-CV-00698-FJM **DEFENDANTS' SURREPLY TO PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** **(Oral Argument Requested)**

Defendants, James Leslie Reading and Clare Louise Reading, hereby file with this honorable Court this Surreply in response to Respondent United States (hereinafter Plaintiff, Plaintiff's attorney) reply [Doc. No. 83, hereinafter "Reply"] to Defendants' Response to [Doc. No. 52] to the Untied States' Motion for Summary Judgment.

1) Plaintiff filed its Reply to Defendants' Response [Doc. No. 90] on 8/24/2012. Plaintiff's Reply brings in new material, introduces new factual and legal arguments, makes mistakes which need to be corrected, makes assertions which need to be rebutted, takes a position that must be contested, and makes misstatements that need to be countered and/or denied.

2) The new material introduced by Plaintiff, the new errors, omissions, and false or unsupported statements are as follows:

a) Defendants, being parties to the contract that created the Fox Group Trust for the benefit of their nephew, rebut the statement by the Plaintiff's attorney that the Fox Group Trust did not file a response to the Plaintiff's Motion for Summary Judgment, when the truth of the matter is that the Court refused to allow it. The Arizona Revised Statutes have been ignored with the Court refusing to allow the Trustee of the Fox Group Trust to enter a Notice of Appearance and demanded that the Trustee find attorney representation. The Fox Group Trust does not have the money to hire an attorney. Defendants' Constitutional protection in Article I, Section 10 that "No state shall impair the right to contract" has been violated, and Defendants have been damaged.

b) In the Reply at I. A., lines 11 and 12, the Plaintiff's attorney misrepresents Pilot Catastrophe (and all Pilot companies by reference) and Colonial Claims Corporation as "insurance companies" which they most definitely are not and they are also not federal government instrumentalities. Furthermore, the Readings are not U.S. persons, as described by the Secretary of the Treasury in Treasury Decision 8734:

> "Under chapter 61 of the Code, many types of payments, such as interest, dividends, royalties, broker proceeds, etc. (reportable payments) must be reported on a Form 1099 if paid to U.S. persons. In addition, section 3406 requires the same U.S. payees to furnish a taxpayer identification number (TIN) to the payor, generally on a Form W-9…" and "Reporting to the IRS may be required under sections 6011 and 1461 or under the reporting provisions of chapter 61 of the Code, such as 6041, 6041A, 6042, 6044, 6045, 6049, 6050A, or 6050N, (the 1099 reporting provisions)."

c) At lines 25 – 27, the Plaintiff's attorney misrepresents the law in an attempt to mislead the Court because no evidence or testimony has been produced to show that the inferior courts have the power to overturn holdings of the U.S. supreme Court, which all judges and all government attorneys and all government employees must adhere to and swear and subscribe in their Oath of Office that they pledge to do so. The Plaintiff has never produced any statute requiring that Defendants must pay a tax on compensation for their labor, although defendants have requested a copy or citation of such for over 20 years! The U.S. supreme Court has declared several times that a man's labor is his property and is his fundamental right, which is not taxable by the U.S.

government: *Evans v. Gore*, 253 U.S. 245: "... whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the 16th Amendment became effective, it was true at the time of Eisner v. Macomber supra, it was true under Section 22(a) of the Internal Revenue Code of 1938, and it is likewise true under section 61(a) of the I.R.S. Code of 1954. **If there is not gain, there is not income** ... **Congress has taxed income not compensation**," (Bold emphasis added). The Plaintiff's attorney has the gall to say that these decisions and statutes promulgated by Congress cited by Defendants are "frivolous"! These and other U.S. supreme Court decisions, never overturned and still controlling, can be seen in Defendants' Response at Exhibit U attached herein.

At page 3, lines 1 – 14 in the Reply, the Plaintiff's attorney misleads the Court with lower, inferior court rulings that have no bearing on the landmark declarations made the by highest Court in the land, that all judges, all attorneys and all government employees for the IRS have sworn and subscribed in their Oaths of Office as a condition of employment. Decisions by inferior courts carry no weight against the U.S. supreme Court, nor do Treasury regulations.

Plaintiff continues to rely on *United Sates v. Chila*, 871 F.2d 1015, 1017 (11th Cir. 1989), an action under 26 § § 7401 and 7403, which have no relation to the instant matter and *Geiselman v. United States*, 961 F.2d 1, 5-6 (1st Cir. 1992) bolsters Plaintiff's reliance on mere presumption, when Defendants have actual facts in truth – facts which need to be presented to a jury. [*See*: Government Exhibits 2, 3, 4 and 5 at Doc. 40-1 Pages 23 – 40 attached herein.]

d) At I. B., on page 4 at line 6 and footnote 2, Defendants never received "Notice and Demand for Payment" and specifically not on the proper Form 17, a copy of the Treasury Decision that has never been superseded is in Defendants' response at Exhibit CC displaying a photocopy of the Secretary's Treasury Decision regarding Form 17, which Plaintiff never issued, as required by 26 USC § 6303. A jury should be allowed to scrutinize the Treasury Decision and make a factual determination as to whether it is the proper form to be used.

e) At page 4, line 10 – 12, Plaintiff agrees that there are facts in dispute regarding 1993, 1994 and 1995 which must be determined by a jury.

f) Defendant James Leslie Reading did receive a "Notice of Deficiency" in the mail regarding 2008; however, as shown in Defendants' Response in Affidavit L with accompanying Exhibits, the "Notice of Deficiency" has no basis in law nor did the IRS did follow their own procedures in the execution of the "Notice", as outlined in their Internal Revenue Manual. These items of fact must be presented to a jury.

g) On page 4 at lines 13 – 16, Plaintiff ignores the facts pointed out by Defendants in their Response in Affidavit L and accompanying Exhibits, that the penalties were not assessed as a tax, as required, but, rather, as "user fees". Defendants require the examination in the presence of a jury of the IRS employees who made the determination to issue "user fees" as well as to receive an explanation of what is being used for which the fees are being charged.

h) On page 4 at lines 19 – 22, Defendant Clare L. Reading showed a copy of a "Notice of Deficiency" stamped "Defaulted" that was obtained via Freedom of Information Act (FOIA) request and not received via U.S. Mail.

i) On page 5 of the Reply at line 2, Defendant Clare L. Reading testified under penalty of perjury in Defendants' Response that she has never refused receipt of certified mail. Plaintiff states that the copy of the envelope "probably" contained the notice of deficiency. This is unacceptable and to uphold justice, the Court must dismiss the Plaintiff's unsubstantiated claim.

j) On page 5 at lines 3 – 12, Defendants showed in their Response how the IRS fabricated evidence and altered their own in-house document, substitution for Postal Form 3788, and then had it "certified" by "disclosure officers" on the East Coast, who had no knowledge and have no authority for this type of certification. Defendants also showed how easy it was to overlay the

IRS "certified mail receipt" with one of their own at Exhibit MM, facts which should be judged by a jury.

The Plaintiff's attorney is trying to get this Court to hand down serious life-altering rulings on flimsy paperwork and their alteration of documents to try to prove their claim and it is the duty of this honorable Court to refuse to allow such a miscarriage of justice.

k) At I. C. on page 6 at lines 11 – page and 7 lines 1 – 4, Plaintiff's attorney has twisted the meaning of the Defendants' statements in their Response which was not to agree that any of the compensation for labor received by Defendant James Leslie Reading is "taxable income" as specified in 26 USC § 1.1-1, but to show that *even if* Defendant James Leslie Reading *had* received "taxable income", the IRS did not even properly follow their own procedures, as outlined in their Internal Revenue Manual. Defendant James Leslie Reading has never received "taxable income", he has only received "compensation for labor", a fundamental right, not taxable by the federal government. There is no statute promulgated by Congress that Plaintiff can produce that declares otherwise. As pointed out in Defendant's Response, "compensation" means to be made whole; it is not "income", which is a "profit" or a "gain". [*See* Defendants' Exhibit U attached herein.]

l) On page 6 at lines 12 – 25 and page 7 through line 4, there was no "tax picture" to "piece together" because the "compensation for labor" received by James Leslie Reading is not "income" and is not taxable by the federal government. Plaintiff admits that they were attempting to collect more tax than allowed by law, first, by trying to collect "compensation for labor" as "income" and second by charging both James and Clare with the total amount. Now that the IRS has been caught, they are amendable to making corrections! What about the forcible "collection actions" carried out even by armed agents based on the figures Plaintiff now admits are wrong? Until the IRS can produce the statute promulgated by Congress to prove that the federal government *can*

tax a fundamental right, the IRS must concede that there is no "taxable income" to consider. This honorable Court must Order that all wrongfully seized property be returned at interest.

The Plaintiff has the nerve to admit to this honorable Court that it does not know what the "correct" figures are, but that if the Court will grant their Motion for Summary Judgment, bypassing Defendants' fundamental, Constitutional right for a jury to decide these facts, that *then* they will come up with the "correct" numbers! It is the duty of the Court to disallow such a miscarriage of justice. These facts are most assuredly in dispute and must be presented to a jury.

m) On page 7 at lines 19 -25 and page 8 through line 2, Plaintiff's attorney states that Defendants are "relying on notes of someone at the IRS other than Revenue Agent Marriaga, who made the adjustments in question". The plaintiff's attorney is trying to pull the wool over the eyes of this honorable Court. Agent Marriaga did not come on the scene until days after this instant case was filed with this Court. Defendants rely on the 1099 reports sent to the IRS in 1993 and 1994, by Robert Adelmann, Certified Financial Planner, who conducted these stock trades and showed in that paperwork *20 years ago* that he had caused a total net loss of $2,171.00 for Defendants in 1993. The IRS refused to share the basis of their claims with Defendants and by Freedom of Information Act (FOIA) request Defendants discovered the deliberate errors of the IRS File Examiner in 2000, taking only 7 of 65 trades and counting each one as a brand new $18,000.00 investment! As Defendants asked previously, if they had really earned $100,039.00 in Capital Gain from Stock Sales in one year, *why* on Earth would they have gotten out?!

When Defendants shared the information they received from Robert Adelmann's son, Russell, the IRS now pretends that they knew nothing of the original 1099s. To top it off, on page 22 of the IRS Integrated Collection System [ICS] History Log as long ago as December 16, 2009, Debra Vahe wrote that she calculated the same loss of $2,171.00 that we told her! Not only that, she deceitfully pursued with instigating this suit and then kept that evidence away from the eyes of the Court by omitting those pages from her Declaration. The Declaration of Debra Vahe was made

under penalty of perjury and Defendants would like to know why she should not be fined or jailed for committing this crime.

Defendants also showed in their Response that the IRS own files show that they labeled Defendants as "illegal tax protestors" merely for requesting a copy of the statute and regulation requiring them to file and pay a tax on their labor receipts! Why couldn't the IRS simply send the requested statute or liability, along with its regulation, to Defendants when requested? Could it be because it does not exist? In a nation founded on the Rule of Law, this honorable Court must let the jury determine this fact and not allow such a miscarriage of justice based on a "law" no one can find.

n) Plaintiff alters not only their own documents, but changes the words in Defendants' statements on page 8 at lines 3 -8. Defendants never said that they each should have reported $11,948 in capital gains for 1994 but instead proved that this was a number invented by the first IRS File Examiner and deliberately and erroneously charged to both Clare and James. This is because in 1994, Defendants also suffered a total net loss in their stock investment. Once again, the IRS ignored the original 1099s sent to them *20 years ago* in 1993 and 1994 by Robert Adelmann. The Capital Gain must be reduced to "$0" because there was a total net loss. Agent Marriaga's figures are not based on any facts and her Declaration was also filed with this Court under penalty of perjury. She was wrong in her first Declaration and is wrong again in her second. Now that she has committed perjury a second time, Defendants wonder why she should also be fined or incarcerated for this committing this crime. These are facts that should be determined by a jury.

o) Also, all of page 8 shows that when the IRS got caught with their hand in the cookie jar regarding the Defendants' total net loss in their stock investments that they now want to charge a capital Gain of $4,140.53, each – when each suffered a *total net loss* (lines 6 and 7). Tthey continue by insisting that the Merrill Lynch sale includes the basis, the tax on which had already been paid by Clare's grandfather. The Capital Gain from that transaction was far below any

threshold to have any "gross income" or "taxable income". When the IRS was supplied with the information about the basis of that transaction, they chose to ignore it. These are facts that must be presented to a jury to preserve Defendants' right to due process.

p) Plaintiff wants this honorable Court to accept their "presumptive proof of valid assessments" but says in the same breath that Defendants have no admissible evidence for their argument that they are entitled to a total net loss of $83.94 for their 1994 stock investment, when it is printed in black-and-white on the 1099 sent to the IRS in 1994. Let's please let the jury decide whose evidence is credible in these facts that are in dispute.

q) Regarding Plaintiff's reply at II, the income tax returns filed by Defendants show their testimony under penalty of perjury that the figures on their returns are correct, as there was no "income", no "gross income" and no "taxable income" received by Defendants.

r) On page 9 at lines 5 – 9 the IRS has refused to state what, exactly, was "frivolous" about the returns filed by the Defendants – only merely asserting that they were. Defendants have demanded repeatedly that the IRS specifically state from the Secretary of the Treasury's "frivolous list" which statement applies to the returns that they filed so any necessary corrections could be made – but the IRS refuses to answer.

s) In their Response, Defendants showed, using the IRS Internal Revenue Manual, that the penalties that have been issued by the IRS against them are, in fact, "user fees". [*See*: g) above]. This is completely outside the parameters of the statute commanding that penalties be issued as a "tax".

t) The statements of the Plaintiff on page 9 at lines 10 – 16 are outrageous. The Plaintiff has never provided evidence from the Secretary's list of "Frivolous Tax Arguments" or shown that Defendants met all the conditions necessary in 26 USC § 6702. without any demonstration, the

Plaintiff merely made the assertion that by their citation of this statute, a frivolous return had been filed.

Once again, Plaintiff bases their claims on mere presumption and a phantom law no one can find. The Plaintiff's attorney states that "the compensation that Mr. Reading received is not taxable" is an improper argument; however, without a statute proving that the compensation that Mr. Reading received *is* taxable, any penalties are a moot point.

u) At III on page 9 lines 23 – 27 and pages 10 and 11 through line 11, the Plaintiff is confusing this honorable Court as to the relationship to its changing the receipts received for "compensation for labor" into "taxable income" and the creation of the Fox Group Trust for Defendants' heir.

Defendants want to know how this honorable Court can make any determination regarding the Fox Group Trust when it has never seen any of the Trust documents.

In conclusion, Summary Judgment is not proper and if granted to the Plaintiff, facts in dispute will not have been determined by a jury and this honorable Court would have committed clear error by denying Defendants their right to due process.

Defendants request that this honorable Court proceed to trial to let the jury decide the matters in this instant case and in the preservation of justice and the Rule of Law.

RESPECTFULLY SUBMITTED this 29th day of ~~September~~ August, 2012.

JAMES

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(480) 964-0199

Clare Louise Reading *Pro Se*
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(480) 964-0199

Jurat

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct, 28 USC § 1746(1).

Reserving ALL Natural God-given unalienable birthrights, waiving none,

/s/ Clare Louise Reading
Clare Louise Reading

/s/ James Leslie Reading
James Leslie Reading

Arizona State)
) ss
Maricopa County)

Clare Louise Reading and James Leslie Reading appeared before me, a Notary, subscribed and sworn under oath this 29th day of August, 2012.

Notary Public My Commission expires: 8-10-2015

seal

Jason Cupryk
Notary Public
Maricopa County, Arizona
My Comm. Expires 8-10-15

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing, **DEFENDANTS' SURREPLY TO PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,** with attachments, has been made this 29th day of ~~September~~ August, 2012, by depositing a copy thereof in the United States Mail in a postage prepaid envelope addressed to:

ANN BIRMINGHAM SCHEEL
United States Attorney
District of Arizona
40 North Central Avenue Ste 1200
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Clare Louise Reading

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EXHIBIT U

WHAT THE COURTS SAY ABOUT INCOME

1. "**Income**" is not defined in Title 26, making it hard to calculate Gross Income without understanding what "income" is.

U.S. v. Ballard, 400 F2d 404 (1976):
"The general term **'income' is not defined in the Internal Revenue Code**." (Bold emphasis)

2. Congress may not define "income" because it is used within the Constitution.

Eisner v. Macomber, 252 U.S. 189 (1920), 40 S. Ct. at 193:
"It becomes essential to distinguish between what is and what is not 'income' . . . **Congress may not, by any definition it may adopt, conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone, that power can be lawfully exercised.**" (Bold emphasis)

Goodrich v. Edwards, 255 U.S. 527, 535 (1921):
" ... the definition of 'income' approved by this Court is: **"The gain derived from capital, from labor, or from both combined,' provided it be understood to include profits gained through sale or conversion of capital assets.'** ... It is thus very plain that **the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived there from by the vendor** ..." (Bold and underline emphasis)

Regal Drug Co v. Wardell, 260 US 386 (1922):
"**Congress may not, under the taxing power, assert a power not delegated to it by the Constitution.**" (Bold emphasis)

Helvering v. Edison Brothers' Stores, 8 Cir. 133 F2d 575 17 (1943):
"The Treasury **cannot by interpretive regulations, make income of that which is not income** within the meaning of the revenue acts of Congress, **nor can Congress, without apportionment, tax as income that which is not income within the meaning of the 16th Amendment**." (Bold emphasis)

3. See what the Supreme Court have to say about the Sixteenth Amendment, and how the Court has defined Income as "profit or gain" not salary or compensation for labor.

Evans V. Gore, 253 U.S. 245 (1920):
"The 16th Amendment **does not justify the taxation** of **persons or things previously immune**. It was intended only to remove all occasions for any apportionment of income taxes among the states. **It does not authorize a tax on a salary**" (Bold emphasis)

Staples v. U.S., 21 F.Supp. AT 737 (1937):
"Income within the meaning of the Sixteenth Amendment and the Revenue Act, means 'gain'... and in such connection 'gain' means profit...proceeding from property, severed from capital, however invested or employed, and coming in, received, or drawn by the taxpayer, for his separate use, benefit and disposal.." (Bold emphasis)

EXHIBIT ____

Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 173, 174 (1926):
"The Sixteenth Amendment ... **It was not the purpose or effect of that amendment to bring any new subject within the taxing power. Congress already had power to tax all incomes ... 'Income' has been taken to mean the same thing as used in the Corporation Excise Tax Act of 1909 (36 Stat. 112), in the Sixteenth Amendment, and in the various revenue acts subsequently passed** ... **income may be defined as gain derived from** capital, from labor, or from both combined, including profit gained through sale or conversion of capital ... And **that definition has been adhered to and applied repeatedly** ..."

Helvering v. Edison Brothers' Stores, 8 Cir. 133 F2d 575 17 (1943):
"The Treasury cannot by interpretive regulations, make income of that which is not income within the meaning of the revenue acts of Congress**, nor can Congress, without apportionment, tax as income that which is not income within the meaning of the 16th Amendment.**" (Bold emphasis)

Merchants' Loan & Trust Co. v. Smietanka, 255 U.S. 509, 517-519 (1921):
"**The Corporation Excise Tax Act of August 5, 1909** (36 Stat. 11, 112), was not an income tax law, but a definition of the word 'income' was so necessary in its administration that in an early case it was formulated as 'A ***gain derived from capital***, *from labor, or from both combined*' ... **This definition, frequently approved by this court**, received an addition, in its latest income tax decision ... so that it **now reads:**

'Income may be defined as a gain derived from capital, from labor, or from both combined, **provided it be understood to include profit gained through sale or conversion of capital assets** ... The use made of **this definition of 'income'** in the decision of cases arising **under the Corporation Excise Tax Act of August 5, 1909, and under the Income Tax Acts**, is, we think, decisive of the case before us ... **'there would seem to be no room to doubt that the word must be given the same meaning in all of the Income Tax Acts of Congress that was given to it in the Corporation Excise Tax Act, and that what that meaning is has now become definitely settled by decisions of this Court ... the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution**.'"

McCutchin v. Commissioner of IRS, 159 F2d 472 5th Cir. (1947):
"**The 16th Amendment does not authorize laying of an income tax upon one person for the income derived solely from another.**" (Bold emphasis)

Conner v. U.S., 303 F.Supp. 1187 (1969):
"... whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the 16th Amendment became effective, it was true at the time of Eisner v. Macomber Supra, it was true under Section 22(a) of the Internal Revenue Code of 1938, and it is likewise true under Section 61(a) of the I.R.S. Code of 1954. **If there is not gain, there is not income ... Congress has taxed income not compensation**." (Bold emphasis)

EXHIBIT ____

4. The Supreme Court goes on to tell us that "Income or Profit" does not include compensation for our labor. The exchange of labor for pay of equal value has never been income.

Commercial League Assoc. v. The People, 90 Ill. 166 (1878):
"The object of the statute, no doubt, was to prevent the corporation from making dividends of profits among the members, as do corporations organized for pecuniary profit; and while the statute might subserve a useful purpose if construed in this manner, we fail to perceive any benefit which would result if a member of the association, who happened to fill an office, should be deprived of receiving compensation for his labor as an officer. . **Compensation for labor cannot be regarded as profit within the meaning of the law.** The word 'profit' as ordinarily used, means the gain made upon business or investment - **a different thing altogether from mere compensation for labor**." (Bold emphasis)

Stratton's Independence v. Howbert, 231 US 309 (1913):
"**Income ... may be defined as the gain derived from capital or from labor or from both combined.**" (Bold emphasis)

Edwards v. Keith, 231 F 110, 113 (1916):
"... **one does not derive income by rendering services and charging for them**." (Bold emphasis)

Evans v. Gore, 253 U.S. 245 (1920):
"The 16th Amendment does not justify the taxation of persons or things previously immune. It was intended only to remove all occasions for any apportionment of income taxes among the states. **It does not authorize a tax on a salary**" (Bold emphasis)

Staples v. United States, 21 F.Supp 737 at 739 (1937):
"Income means gains/profit from property severed from capitol, however invested or employed. **Income is not a wage or compensation for any type of labor**" (Bold emphasis)

Lauderdale Cemetery Assoc. v. Mathews, 345 PA 239, 47 A. 2d 277, 280 (1946):
"... **reasonable compensation for labor or services rendered is not profit.**" (Bold emphasis)

McCutchin v. Commissioner of IRS, 159 F2d 472 5th Cir. (1947):
"**The 16th Amendment does not authorize laying of an income tax upon one person for the income derived solely from another.**" (Bold emphasis)

So. Pacific v. Lowe, 238 F. Supp. 736, 247 US 330 (1918):
"'**income' as used in the statute should be given a meaning so as not to include everything that comes in. The true function of the words 'gains' and 'profits' is to limit the meaning of the word 'income'**. (Bold emphasis)

EXHIBIT ____

Oliver v. Halstead, 86 S.E. Rep 2nd 85e9 (1955):
"There is a clear distinction between `profit' and 'wages', or a compensation for labor. **Compensation for labor (wages) cannot be regarded as profit within the meaning of the law**. The word `profit', as ordinarily used, means the **gain made upon any business or investment- - - a different thing altogether from the mere compensation for labor**."

Penn Mutual Indemnity Co. v. Commissioner, 32 Tax Court page 681 (1959):
"The rule of Eisner v. Macomber has been reaffirmed on so many occasions that citation of the cases to this effect would be unnecessarily burdensome. To depart from the rule at this late date would ignore the sound principles upon which that case was decided and would throw into confusion the fundamental income tax structure and law as it has developed in the almost half century which has elapsed since adoption of the 16th amendment. **That there cannot be 'income' without a 'gain' accords with the common understanding of the term, a test of construction which is particularly appropriate in our system of self-assessed Federal income tax ...** Moreover, **that which is not income in fact manifestly cannot be made such by the legislative expedient of calling it income ...."**

Commissioner of IRS v. Duberstein, 80 S. Ct. 1190 (1960):
"**Property acquired by gift is excluded from gross income.**" (Bold emphasis)

Tennessee Supreme Court in Jack Cole v. Commissioner MacFarland, 337 SW2d 453 (1960):
"**The right to receive income or earnings is a right belonging to every person, and realization and receipt of income is therefore not a "privilege that can be taxed**."

Conner v. U.S., 303 F.Supp. 1187 (1969):
"... whatever may constitute income, therefore, must have the essential feature of gain to the recipient. This was true when the 16th Amendment became effective, it was true at the time of Eisner v. Macomber Supra, it was true under Section 22(a) of the Internal Revenue Code of 1938, and it is likewise true under Section 61(a) of the I.R.S. Code of 1954. **If there is not gain, there is not income ... Congress has taxed income not compensation**." (Bold emphasis)

5. The Courts state that "income" is not everything that comes in as the IRS claims, and does not include what you were paid for your labor.

Lucas v. Earl, 281 U.S. 111 (1930):
"**The claim that salaries, wages, and compensation for personal services are to be taxed as an entirety** and therefore must be returned by the individual who has performed the services which produce the **gain is without support, either in the language of the Act or in the decisions of the courts construing it...** It is to be noted that, by the language of the Act, **it is not salaries, wages, or compensation for personal services that are to be included in gains, profits, and income derived from** salaries, wages, or compensation for personal services." (Bold emphasis)

EXHIBIT ____

So. Pacific v. Lowe, 238 F. Supp. 736, 247 US 330 (1918):
"'income' as used in the statute should be given a meaning so as not to include everything that comes in. The true function of the words 'gains' and 'profits' is to limit the meaning of the word 'income'. (Bold emphasis)

6. The Courts have adjudicated that our right to work is protected and cannot be taxed. They say that congress can tax any privilege it wants, but not a common or basic right.

Coppage v. State of Kansas, 236 US 1, 23-24 (1915):
"The court held it unconstitutional, saying: 'The right to follow any lawful vocation and to make contracts is as completely within the protection of the Constitution as the right to hold property free from unwarranted seizure, or the liberty to go when and where one will. One of the ways of obtaining property is by contract. **The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the Constitution**. Every citizen is protected in his right to work where and for whom he will. He may select not only his employer, but also his associates." (Bold emphasis)

Sims v. Ahrens, 271 SW 720 31 (1925):
"An income tax is neither a property tax nor a tax on occupations of common right, but is an EXCISE tax...The legislature may declare as 'privileged' and tax as such for state revenue, those pursuits not matters of common right, **but it has no power to declare as a 'privilege' and tax for revenue purposes, occupations that are of common right."** (Bold emphasis)

Oregon Supreme Court in Redfield v. Fisher, 292 P. 813, at 819 (1930):
"The individual, unlike the corporation, cannot be taxed for the mere privilege of existing. The corporation is an artificial entity which owes its existence and charter powers to the state; **but the individuals' rights to live and own property are natural rights for the enjoyment of which an excise cannot be imposed."** (Bold emphasis)

Jerome H. Sheip Co. v. Amos, 100 Fla. 863, 130 So. 699, 705 (1930):
"A man is free to lay hand upon his own property. **To acquire and possess property is a right, not a privilege ... The right to acquire and possess property cannot alone be made the subject of an excise** .... (Bold emphasis)

U.S. Supreme Court in *Magnano Co. v. Hamilton*, 292 US 40 (1934):
"***The power to tax the exercise of a [right] ... is the power to control or suppress its enjoyment.***"
(Bold emphasis)

U.S. Supreme Court in *Murdock v. Pennsylvania*, 319 US 105, at 113 (1943):
"A state may not ... impose a charge for the enjoyment of a right granted by the Federal Constitution." (Bold emphasis)

Jack Cole Company v. Alfred T. MacFarland, Commissioner, 206 Tenn, 694, 337 S.W.2d 453 Supreme Court of Tennessee (1960):
"Since the right to receive income or earnings is a right belonging to every person, this right cannot be taxed as privilege." (Bold emphasis)

EXHIBIT ____

Wilby v. State, 93 Miss. 767, 772-73, 47 So. 465, 466-67 (1908):
"It certainly was not the intention of the legislature to levy a tax upon honest toil and labor."

. . .

"[l]iberty, in its broad sense, must consist of the right to follow any of the ordinary callings of life without being trammelled . . . The right to follow any of the common occupations of life is an inalienable right. . . . It was formulated as such under the phrase `pursuit of happiness' in the [D]eclaration of [I]ndependence . . . This right is a large ingredient in the civil liberty of the citizen." (Bold emphasis)

Butcher's Union v. Crescent City, 111 US 746 (1884):
"The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. ... to hinder his employing this strength and dexterity in what manner he thinks proper without injury to his neighbor, is a plain violation of this most sacred property." (Bold emphasis)

7. The Courts tell us that Income Tax is an EXCISE Tax. This means it is a tax on the exercise of some federally privileged or taxable activity.

Sims v. Ahrens, 271 SW 720 31 (1925):
"An income tax is neither a property tax <u>nor a tax on occupations of common right</u>, but is an excise tax ...The legislature may declare as 'privileged' and tax as such for state revenue, those pursuits not matters of common right, but it has no power to declare as a 'privilege' and tax for revenue purposes, occupations that are of common right." (Bold emphasis)

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White Packing Co. v. Robertson, 89 F 2d 775, 779 the 4th Circuit Court (1937):
"The tax is, of course an excise tax, as are all taxes on income . . ." (Bold emphasis)

8. The Courts have protected the rights of all Americans from becoming crimes including any penalty fall upon them for the exercise thereof.

Miller v. U.S., 230 F 489 (1956):
"The claim and exercise of a Constitutional right cannot be converted into a crime." (Bold emphasis)

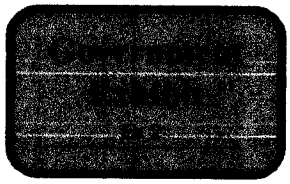
U.S. Supreme Court in *Hurtado v. California*, 110 US 516 (1884):
"The state cannot diminish the rights of the people." (Bold emphasis)

EXHIBIT ____

Sherar v. Cullen, 481 F2d 946 (1973):
*"... **there can be no sanction or penalty imposed upon one because of his exercise of constitutional rights**."* (Bold emphasis)

Duffy, Charles M. (TAX)

From: CryerLaw@aol.com
Sent: Thursday, March 08, 2012 4:26 AM
To: Duffy, Charles M. (TAX)
Subject: Reading



Charles,

I've devoted most of the evening to thinking about the Reading situation, looking for a mutual solution to the time squeeze. Both of us need at least another 30 days, a compromise I think he'll probably let us have.

But the big problem I have is that I can find no way to avoid having to file a motion to compel on the interrogatories. I cannot use objections as support for my MSJ. The motion to dismiss the suit to set aside the transfer to the trust is based on the Texas statute of limitations on that action and can be filed separately, but I have to have responses in order to complete and file the obvious MSJ on the merits of the suits to reduce assessments to judgment. The only way out of that short of malpractice would be to reach some compromise with you on which ones are too essential for me to forego answers on and which are not.

I can't brief the issues here, but to put it in a nutshell, in order to prove your lien interest or your right to seize and sell you have to prove that you have a valid assessment and that within 60 days of that assessment notice of assessment and demand for payment was mailed to defendants at their last known address. 6303, 6321, 6331. That makes them relevant and material. If you don't have those, and I have not found them among the material you provided, then I need an answer admitting that you don't.

In order to prove you have a valid assessment that is entitled to be reduced to judgment you have to prove the essential elements behind the assessment. Those can be identified in 6212, 6211 and 6020(b) and are too numerous for me to list here and still catch my plane in a little bit. Those sections clearly make the interrogatories I've filed not only relevant and material, but essential for the Readings' defense.

So I'm asking you to reconsider your objections and to provide answers to at least the most important of the interrogatories. I've gone back through them with both the spirit of compromise and my duty to client to diligently defend in mind and would suggest to you that if I can get complete and thorough answers to the following interrogatories I would be willing to forego answers to the rest:

First Set: Interrogatory Nos. 2, 3, 4

Second Set: Interrogatory No. 2

If all of the NOD's and 6020 returns issued are in the materials you provided, then I can dispense with the rest and, ***if your answers to the above provide enough detail on name, grade and official title at the time of issuance of those issuing and filing 6020 returns and NOD's*** I ***may*** be able to dispense with the necessity of depositions of the issuing agents. Those are a lot of fun, but I'm willing to give up some of my fun in order to get this case handled.

Insofar as getting an extra 30 days, I believe he would do that, but not without a showing of due diligence. Point out that this case covers an extensive period and is paper intensive and that defendants commenced discovery as soon as counsel's case load permitted (well over two months ago) and, in fact, the complainant has provided over 2,600 pages of documentation in response. I'd point out that the sixty days originally requested is needed, but counsel have agreed to cooperate and expedite the remaining discovery needs in order to get discovery completed within the additional thirty days in this request and that thirty days would still allow sufficient time for consideration of dispositive motions. I'd be glad to authorize your representing that to be a joint filing. I think that's the way to go.

Please let me know about getting answers to those four interrogatories today, since I'm going to have to move promptly to avoid his saying I haven't been diligent. I'll have my cell phone on me and can receive and respond to emails from Florida. 318 564-9044.

Tom

U.S. Department of Justice

Tax Division

Please reply to: Civil Trial Section, Western Region
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Facsimile No. (202) 307-0054
Trial Attorney: Charles M. Duffy
Attorney's Direct Line: (202) 307-6406

JAD:RRW:CMDuffy
5-8-12648
CMN 2010101335

March 9, 2012

[redacted]

E-MAIL and FEDERAL EXPRESS

Tommy K. Cryer
Attorney at Law
7330 Fern Avenue, Suite 1102
Shreveport, LA 71105

Re: *United States of America v. James and Clare Reading et al.*,
Case No. CV 11-00698-PHX-FJM (USDC Arizona)

Dear Mr Cryer:

Enclosed please the **UNITED STATES' NOTICE OF TAKING DEPOSITIONS AND REQUESTS FOR PRODUCTION OF DOCUMENTS and RULE 26(a)(3) DISCLOSURES.** Pursuant to the enclosed, I would like to take your clients' depositions and obtain documents from them on April 10th and 11th in Phoenix. However, in our telephone conversation of March 7, 2012 you mentioned that you might have a conflict on those dates. If it better suits your schedule, we could do the referenced depositions on 2 days during the March 27th-March 30th time period in Phoenix as long as you produce the requested documents before the depositions. Please let me know by March 14, 2012 so that I can plan accordingly. Please note that I cannot do the depositions during the week of April 2nd because I have longstanding vacation plans and I am scheduled to be in Las Vegas, Nevada on another case on March 22nd and March 23rd.

You also mentioned in the referenced telephone conversation that you may want to take the depositions of IRS employees in this matter. Please note that to the extent it is not otherwise objectionable, such testimony would have to comply with applicable federal regulations, such as Treasury Regulation § 301.9000-1.

I am also in receipt of the e-mail that you sent yesterday. I do not agree with many of your characterizations and statements such as, for example, your statement that the Texas statute of limitations applies in this case. However, I would like to try to resolve any discovery disputes without the Court's intervention and I agree it would be helpful if we had an additional 30 days to do discovery in this case. But I am hesitant to ask the Court for the additional 30 days since it recently denied the joint motion filed by all of the parties in this case that requested a 60 day extension of the discovery period. Perhaps early next week, after you review this letter, we can discuss asking for the additional 30 days.

In the e-mail that you sent yesterday, you also asked me to "reconsider [my] objections and provide answers" to requests numbers 2, 3 and 4 in your first set of Interrogatories and

request number 2 in your second set of Interrogatories. As a preliminary matter, the objections raised by the United States to the referenced requests are proper. Also, you appear to be ignoring the fact that, in addition to the objections, the Government provided answers to the requests by referring to specific documents that were produced to you. For example, in response to your request number 2 (first set of Interrogatories) which relates to notices of deficiency, I directed you to copies of the notices of deficiency in the documents that I produced and also explained that the notice of deficiency procedures are not applicable to the assessments at issue in the complaint that were made under 26 U.S.C. § 6702.

For example, in response to your request number 4 (first set of Interrogatories) I provided you with copies of many of the relevant returns filed by your clients, which was responsive to the request. Please note in this regard that our production of copies of returns filed by your clients was onerous in that such returns are likely already in their possession.

For example, regarding your request number 2 (second set of Interrogatories), you asked, *inter alia*, for evidence that notices and demand under 26 U.S.C. § 6303 were issued and sent. In response, I directed you to the copies of the Certificates of Assessments and Payments, which set forth that such notices were sent. *See e.g.*, the Statutory Notice of Balance Due entries on the Certificates. Regarding that point also, the notices and demand are not relevant in the instant judicial collection action in any event. *See e.g., United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir. 1989).

In sum, it would be very helpful if you would first consider the documents referenced in the responses to determine if there are, in fact, legitimate discovery disputes regarding the Interrogatories. Also, much of the information in your discovery requests relating to the identifying information of IRS employees is irrelevant since this court proceeding is *de novo* in nature.

Please note that I called you yesterday on your cell phone to discuss these issues and left a voice mail message for you.

Also, please note that enclosed are an additional 78 pages of documents. These documents were not requested by you in your discovery requests but they might be relevant to the issues in this case.

I will not be in the office on March 12th and 13th but can respond to emails on those days and also can call you to discuss the above matters if you would like.

Sincerely yours,

CHARLES M. DUFFY
Trial Attorney
Civil Trial Section, Western Region

Duffy, Charles M. (TAX)

From: CryerLaw@aol.com
Sent: Saturday, March 10, 2012 5:38 AM
To: Duffy, Charles M. (TAX)
Subject: Re: U.S. v. Reading et al., Case No. 11-698 (D. Ariz)

Charles,

I'm sorry I missed your call yesterday. I spent the first half of the day in the air or rushing to make a very close connection in Atlanta. Cell phones have to be turned off so the terrorists can't get calls through to the passengers. By the time I got through baggage claim and rental I barely made it to a meeting with associated counsel who was on a tight departure schedule. As soon as I finished that meeting I got your message, but was scheduled to meet with my client to go through a few thousand pages of discovery in a criminal case. Although this is his time he was gracious enough to agree to my calling you back yesterday, but I missed you and had to leave a message on your voice mail.

I did not intend for any part of my email to be offensive, but if it did I apologize for the offense. My message was intended to resolve the problems and get to the root of the issues in this case so it can be heard, both with respect to pretrial motions and on the merits at trial. After all, that's our job. I also did not intend to initiate a debate, since I do not like to argue cases unless and until there is someone to rule on it. But I do believe that sometimes some open discussion can result in agreements that are, often, better for both parties than what a ruling would provide.

So some quick points.

6303 Notices and Demands

Chila has no application to this case. It's been some time since I've read it, but if I remember correctly *Chila* was a 7401 action to reduce a 6672 "responsible party" penalty to judgment. Since no lien recognition or enforcement was sought in *Chila*, 6303 was not a factor. This action is filed as a 7401 and 7403 action, seeking to foreclose federal tax liens against property and, as such, requires a showing of a lien interest in the property.

There is ample authority for the absolute necessity for timely compliance with 6303's requirement of notice and demand before any lien interest exists, much less attaches to the property. The same authority and 6303 require that notice and demand be sent to the tp's last known address within sixty days of the assessment. Transcripts prove nothing and directing me to a transcript that does not say that a 6303 notice and demand was sent proves less. The best evidence of the notice and demand is a copy of it which would set forth the date and the address to which it was sent, establishing that the notice was timely and complied with the requirements of 6303. Those notices and demand are, then, relevant and material. If you do not have them, then I need an answer saying so because their absence is equally relevant and material.

Fraudulent transfer act time limitations.

You got me. I admit that the Texas statute has no bearing on this case and I also admit that I'm at that age when I get the occasional brain fart. But the AZ act imposes a five year limitation and the transfer complained of occurred over five years prior to filing your complaint. But this has nothing to do with our discovery problem.

NOD issuer

You are suing to have assessments reduced to judgment and in order to do so must prove that you have valid assessments in which case you enjoy the benefit of certain presumptions. But in order to have a valid assessment you must (I know, 6702 penalty assessments excluded) have proof that a valid NOD was issued in accordance with law (numerous citations omitted). In order for the NOD to be valid it must be made, signed and sent by the Secretary (or his delegate). Thus, knowing who issued the NOD and sent it to the tp and his grade and job title at the time is relevant because that information permits us to determine whether that person was a delegate of the Secretary with authority to make, sign and send an NOD.

The copies of NOD's you produced do not provide that information, particularly when the common practice is to sign someone else's name to the document, hence the italicized clarification of the interrogatory.

Means of Mailing NOD

In order for a NOD to be valid and support the validity of a purported assessment it must have been sent to the tp's last known address by certified or registered mail (again, numerous citations omitted). That makes evidence of means of transmission relevant and material. The Post Office issues its Form 3800 and the IRS maintains its internal record of registered and certified mailings on its own form, 3877. Thus, those records are important in determining whether a NOD was or was not sent by registered or certified mail. None of the NOD's produced reflect the means of mailing and although a couple of them have a partial blank 3800 visible neither the NOD nor the blank form provides any showing that either is related to the other, much less that the NOD was sent by means required by 6212.

6020(b) Filer

In order to have a valid NOD there must first be a deficiency to notice (6211) and in order to have a deficiency a return to compare to the determined tax due and owing is necessary (6211). 6020(b) authorizes only the Secretary or his delegate to make and file a 6020(b) return. It is, therefore, relevant and material to know the name, and grade and title of the person making and filing a 6020 return in order to determine whether he is a duly authorized delegate of the Secretary for that purpose.

Depositions of Agents

I'm hoping that by getting responses to those interrogatories dealing with the identity, grade and job title as of the actions taken we can forego depositions. But with respect to Touhy regs you might want to take a look at *Exxon Shipping Co. v. US Dept. of Interior*, 34 F3d 774 (9th Cir. 1994).

Your Depositions of the Readings

I am tied up in final preparations for a trial on the April dates you've suggested but I've emailed my secretary and the Readings to check on availability of the March dates. I may have to participate, however, by phone. As soon as I have responses on those dates I will let you know what I found out. I cannot think of any conflict but I do not keep my own calendar and I'm given scheduling information on a need to know basis.

Thirty Day Deal

I'm confident that we can get the thirty with another joint motion, but, again, we need to point out that we have not been idle and that even with the thirty days we are having to and will continue to work hand in glove to resolve all discovery needs.

Charles, I'm bending over backwards trying to avoid motions, but I can't resolve these issues unilaterally. I have to have some cooperation on your part, too. I've clearly demonstrated that the information sought by those selected interrogatories, 2, 3, 4 and 2, are relevant, material and necessary for the presentation of the Readings' defense. It is not that onerous to say this agent, name, grade and job title signed that NOD or return and this etc. Nor is it onerous to say "We do (or do not) have records of certified or registered mailings of the NOD's" or "We do (or do not) have copies of 6303 notices and demands and here they are".

For the last two days I have been totally consumed with the tasks at hand in this criminal case in Ft. Myers. For the next two days I will be equally consumed with sifting through ten years of correspondence and disputes regarding a tax court case in Naples and won't be returning to Shreveport until late Sunday evening. So I will not be able to prepare and file motion to compel before Monday. Think about this and let's get it handled ourselves.

Tom

In a message dated 3/9/2012 1:33:50 P.M. Pacific Standard Time, Charles.M.Duffy@usdoj.gov writes:

> **Mr. Cryer, please see the attached documents re the above case. Thanks, Charles.**
>
> <<Letter.pdf>>
>
> <<NoticeofDepsProd.pdf>>
>
> <<Rule26(3).pdf>>

Charles M. Duffy

Trial Attorney,

U.S. Department of Justice

Tax Division

Washington D.C.

(202) 307-6406

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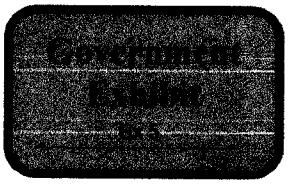
CryerLaw@aol.com

March 14, 2012



VIA E-MAIL, FAX TO (202) 307-0054 AND MAIL

Mr. Charles M. Duffy
Attorney at Law
P. O. Box 683
Ben Franklin Station
Washington, D.C. 20044

Re: Resolution of discovery issues
U. S. v. Reading et al., No. CV 11-00698-PHX-FJM
USDC, District of Arizona

Dear Charles:

This is the fourth and final attempt on my part to persuade you to at least respond to the few selected interrogatories and requests for production to which you have made a blanket, stonewall objection based on relevance. The Court has clearly indicated it has no desire to have to deal with our discovery issues and I have no desire to file a motion to compel unless it is absolutely necessary. But this is my last and final attempt to resolve this matter.

I have repeatedly demonstrated and described the obvious relevance of the information and documentation sought, but you have, essentially, asked me to lay my hand down. Although a refusal to respond to every interrogatory and every request for production would be generally construed as bad faith stonewalling, your demeanor and tone seem sincere and in fairness to you I must presume that you are genuinely unaware of the significance of that information and documentation and its necessity to prove your claims against the Readings and

others. I believe, and certainly hope, you are acting in good faith and on that basis I am providing the following partial baring of my case in hopes of resolving this dispute without the Court's intervention.

In an effort to resolve our disagreement I have offered to reduce my discovery scope to four subjects:

1. Interrogatory 2 and request for production 1 calling for you to identify and produce copies of all § 6212 Notices of Deficiency for the subject tax years and to identify the person making and issuing the same by name, address, phone number, employee identification number, grade and job title as of the time of issuance of the same;

2. Interrogatory 3 and request for production 2 calling for you to identify and produce evidence of the NOD's referred to in the foregoing having been mailed by certified or registered mail to the Readings' last known address, including, but not by way of limitation, Postal Service Form 3800 (certificate of mailing) and IRS internal Form 3877 (register of certified and registered mailings);

3. Interrogatory 4 and request for production 3 seeking identification and production of any and all returns, including § 6020(b) returns for the subject years and to identify the person making and filing the same by name, address, phone number, employee identification number, grade and job title as of the time of issuance of the same; and

4. Interrogatory 2 and request for production 1 (second set, which followed the first by one day to correct an oversight) seeking identification and production of any and all notices of assessment and demand for payment pursuant to § 6303 with respect to all assessments.

Let's start with the 6303 notices and work our way upstream.

Timely § 6303 Notices essential to existence of lien

You are claiming and seeking enforcement of a lien interest in property formerly belonging to the Readings. In order to perfect a lien, much less establish a lien interest in a particular property, an assessment is not enough. See § 6321, which provides that a lien arises only after failure to pay following notice and demand. That notice and demand is described in § 6303 which requires that it

must be sent 1) within sixty (60) days after assessment and 2) to the citizen's last known address. Those two elements, along with a ***valid assessment***, are essential to your proof of your case. See *U.S. v. Berman*, 825 F.2d 1053 (6th Cir. 1987); *Bauer v. Foley*, 408 F.2d 1331, 1333 (2nd Cir. 1969).

Accordingly, the relevance and materiality of whether the IRS perfected the lien and can prove that it did so could not be any greater, since the proof of such a notice would, necessarily, consist of copies of the notices and testimony of the person(s) who created and sent those notices that they were sent as addressed on the date shown. If you have no such notices of assessment and demands for payment, I am entitled to know that no such evidence exists.

You have referred me to transcripts, but those transcripts do not indicate that any notice of assessment and demand for payment pursuant to § 6303 were sent. Entries of unknown origin in a transcript, like Walter Mitty's diary, prove nothing, since they are mere entries of what may or may not have happened. Evidence in other cases has revealed that the IRS's computer system is programmed to make an entry of a "notice of balance due" automatically when an assessment is entered, but § 6303 requires more than a "notice of balance due" and an automatic entry does not constitute evidence that a notice of assessment and demand for payment ever existed, much less that it was sent properly addressed.

Thus, the information and documentation sought by Item 4 above, namely Interrogatory 2, request for production 1 (second set) is relevant and material and I am entitled to see that evidence or, if it does not exist, to a response acknowledging that you have no such evidence.

Requirements for existence of a valid assessment

Your client is seeking to have assessments reduced to judgment in this case, which, in and of itself, requires that there be valid assessments to be reduced to judgment. A valid assessment is also essential to the perfection of a lien interest, recognition and enforcement of which is also sought.

Although you have referred to a set of 4340 certificates as "proof" of assessments, there are several problems with that position. First, those certificates are rank hearsay and meet none of the exceptions to the hearsay rule. They are not business records kept in the course of business, so cannot be tendered as such in good faith.

Second, they merely claim that there is an entry in the IRS computer system saying a certain amount was assessed, but do not speak to, hearsay or no hearsay, personal knowledge or no personal knowledge, the necessary elements for the existence of a valid lien, i.e., a valid return which was determined to be deficient (§ 6211), followed by a valid Notice of Deficiency (§ 6212) properly addressed to the taxpayers's last known address and sent via registered or certified mail.

Third, the best evidence of the assessment is the assessment itself. The law requires that in order to be an assessment the purported assessment must contain essential information and must be signed and dated by an *Assessment Officer* who has been appointed and duly authorized by both the *District Director* and the Director of the Service Center. Since there have been no District Directors (and therefore, any Assessment Officers possible) since 1999, I have good reason to question whether your client has such an instrument and, if not, then its evidence of an assessment is lacking. Programming a computer to accept an entry of an event that has not occurred or persuading an employee to certify that the computer was so duped does not constitute proof of a valid assessment.

Finally, those 4340 "certificates" are, admittedly, prepared and created for "use in litigation", which is an euphemism for "fabricated evidence", something that would no doubt have serious consequences to anyone less formidable than the IRS who might decide to "make up" its own batch of evidence to submit to the Court.

In order to provide notice of assessment and demand for payment in accordance with § 6303 there must be an assessment of which to provide notice and in order to have a valid assessment, entitled to judicial recognition your client must prove that a valid assessment exists. It is obvious that without an assessment no tax is due and without an assessment there can be no § 6303 notice of assessment and demand for its payment. *Crompton & Knowles Loom Works v. White*, 65 F2d 132 (1st Cir. 1933) (collector has no authority to collect unassessed interest); *Radinsky v. United States*, 622 FSupp 412 (D Colo, 1985) (collector cannot collect an unassessed tax).

In *United States v. Camejo*, 666 F.Supp 1542, 1545 (S.D.Fla. 1987), the court stated:

> "When the government seeks the aid of the Courts in enforcing an assessment, it opens the assessment to judicial scrutiny in all respects... Thus, in an action instituted by the Government to enforce

> its tax liens under [section] 7403, the merits of the claim are clearly open to challenge. *United States v. O'Connor,* 291 F.2d 520 (2nd Cir. 1961); *Quinn v. Hook,* 231 F. Supp. 718 (E.D.Penn. 1964)."

See also See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 1855, 18 How. 272, 283-285, 15 L.Ed. 372.

So what is required for there to be a valid assessment? In order for the Secretary to assess it is absolutely essential that he notify the citizen that he is claiming a deficiency is outstanding and provide the citizen with an opportunity to dispute that claim. Notice is the foundation for due process because without notice there can be no opportunity to be heard nor a meaningful hearing and adjudication made.

But in order to determine that a deficiency exists it is essential that a return exists. § 6211 defines a deficiency as the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the amount shown on the taxpayer's return. We know that although the Readings submitted returns for some of the years at issue, none of those returns were accepted and processed by the service. We also know that both the Code, § 6020(b), and IRS procedures in such cases ***require*** the Secretary ***or his delegate*** (See § 6020(b) and § 7701(a)(11)(B)) to prepare and file a return for the taxpayer and that once that is done the internally created return serves as the taxpayer's return "for all purposes".

But § 6020(b) does not permit the filing of returns on behalf of taxpayers without first making a determination that the taxpayer was required to file but failed to do so or, if he did file, he falsely or fraudulently stated his liability, nor does it permit the Secretary to enter numbers and figures willy-nilly:

> **26 U.S.C. § 6020. Returns prepared for or executed by Secretary**
>
> (a) Preparation of return by Secretary — If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.
>
> (b) Execution of return by **Secretary**

> (1) Authority of **Secretary** to execute return — If any person fails to make any **return required** by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, **the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise**.
>
> (emphasis added)

Thus if a taxpayer who is required to file fails to do so then the Secretary is required ("***shall*** make such return") to do so after gathering sufficient information. Since the service rejected the Readings' returns and refused to process them, the statutorily mandated 6020(b) return becomes an essential component in determining whether there is a deficiency. That makes the 6020(b) return relevant and material with respect to the issue of whether a valid assessment has been made in this case.

Equally relevant is whether the person who made and filed the return was properly authorized to do so, since only the "Secretary or his delegate" is authorized to make such a return. I am, therefore, entitled to know who made the 6020(b) returns and his grade and job title. I have the Delegation Orders relative to § 6020(b), but without proper responses to the interrogatories I have no way of determining whether the return maker is among those to whom that authority has been duly delegated. The validity of those returns also hinges on whether they were in compliance with § 6020's requirement that they be made "from his own knowledge and from such information as he can obtain through testimony or otherwise", hence production of those returns is equally relevant, material and subject to discovery.

Accordingly, I think I have demonstrated that the § 6020(b) returns sought are relevant and material, that identification of the maker(s) of those returns in order to determine whether he/they are duly authorized delegates of the Secretary are proper subjects of discovery and I am entitled to responses and productions sought by Interrogatory 4 and request for production 3.

The statutory requirement for the essential notice of the Secretary's claim that there is a deficiency in this instance is set forth in 26 U.S.C. § 6212, which provides in pertinent part:

26 U.S.C. § 6212. Notice of deficiency

(a) In general — If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to **send notice of such deficiency** to the taxpayer **by certified mail or registered mail**. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency

(1) Income and gift taxes and certain excise taxes — In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his **last known address**, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. (emphasis added)

In conjunction with § 6212 we also have, in pertinent part, § 6213(a):

26 .S.C. § 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment — Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. . . .

Due to the 90-day time period for filing a petition with Tax Court the Notice of Deficiency is often referred to as the "90-day letter". There can be no valid assessment, and, accordingly, no required § 6303 notice of assessment and demand, and, therefore, no lien in existence unless the Secretary or his delegate 1) mails a proper Notice of Deficiency to the citizen, 2) by certified mail or registered mail, and 3) to his last known address.

The absolute necessity for a properly mailed Notice of Deficiency pursuant to § 6212(a) as well as a notice and demand pursuant to § 6303 is well recognized by the courts. In *United States v. Ball*, 326 F.2d 898, (4th Cir. 1964) the court stated at 900-901:

> "In the usual case, § 6212(a) of the Code, 26 U.S.C.A. § 6212(a), requires the Government, as a first step, to send a notice of deficiency to the taxpayer, by registered mail.[fn2] Thereafter, the Government may make an assessment of unpaid tax (26 U.S.C.A. § 6201), provided that the assessment is made within the period of time after the notice of deficiency prescribed by 26 U.S.C.A. § 6213. Once the assessment has been made, § 6303(a) of the Code, 26 U.S.C.A. § 6303(a), requires notice and demand for payment of the tax as a condition precedent to the taking of additional steps to enforce its collection and payment.
>
> "Thus, in the usual case the Code contemplates the giving of two notices by the Government, first, the notice required by § 6212(a) of a deficiency, and the notice required by § 6303(a) of assessment and demand for payment. The notice of deficiency is specified to be by registered mail (26 U.S.C.A. § 6212(a)), while no such restriction is applicable to the notice of assessment and demand for payment (26 U.S.C.A. § 6303(a)).
>
> " . . .
>
> " . . . **The validity of the tax lien to serve as a basis for the judgment granted here depends upon whether the notice requirements of § 6212(a) were met, because 26 U.S.C.A. §§ 6321 and 6322, which create tax liens, require, *inter alia*, a valid assessment.**" (Emphasis added)

See also *Steiner v. Nelson*, 259 F2d 853 (7th Cir. 1958), and *Enochs v. Muse*, 270 F2d 528 (5th Cir. 1959): Assessment void if no 90 day letter sent; *Heinemann Chemical Co. v. Heiner*, 92 F2d 344 (3rd Cir. 1937): 90 day letter is mandatory; *Wiley v. United States*, 20 F3d 222 (6th Cir. 1994); *Robinson v. United States*, 920 F.2d 1157, 1158 (3rd Cir. 1990) (the notice of deficiency is a pivotal feature of the Code's assessment procedures, because it serves as a prerequisite to a valid assessment by the IRS); *Holif v. Commissioner*, 872 F.2d 50, 53 (3rd Cir. 1989)

(same); *Goldston v. United States*, 97-1 U.S.T.C. ¶50,148 (D.Kansas 1995) ("If an assessment is void, the IRS is prohibited from proceeding administratively..."); *Luhring v. Glotzbach*, 304 F.2d 560 (4th Cir. 1962); *Schreck v. United States*, 301 F.Supp. 1265, 1268 (D. Maryland 1969) ("Reduced to essentials, section 6213(a) makes injunctive relief available against the assessment, levy or collection of a tax when the IRS does not send to the taxpayer a deficiency notice as required by the tax laws."). Section 6213(a) of the Internal Revenue Code is clear that "no assessment of a deficiency ... and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer...."). See also *Laing v. United States*, 423 U.S. 161, 184 n. 27 (1975) (Section 7421(a) does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination.)

Thus evidence regarding how and to whom and where any purported NOD was addressed and the manner of mailing are clearly relevant and material with respect to the essential notice required for the existence of a valid assessment, and, accordingly, I am entitled to a full and complete response to Interrogatory 3 and request for production 2 described hereinabove. If you have no such evidence, then I am also entitled to your acknowledgement that such evidence does not exist.

Without repeating all of the above, you will surely note that § 6212 authorizes the Secretary alone to make and send a Notice of Deficiency. By virtue of § 7701(a)(11)(B), that means "the Secretary or his delegate". I have the Delegation Orders relative to § 6212, but without proper responses to the interrogatories I have no way of determining whether the maker and issuer of the Notice of Deficiency is among those to whom that authority has been duly delegated. Knowing whether the person(s) who made and sent those NOD's in this case were duly authorized to act in the stead of the Secretary insofar as § 6212 is concerned is, then, equally relevant to determine whether the NOD's are valid or, if not, unable to form the basis for a valid assessment, an essential element to both your claim for reduction of assessments to judgment and to the recognition and enforcement of a purported lien interest.

Accordingly, I believe I have established that I am entitled to responses and productions called for by Interrogatory 2 and request for production 1.

Due to the fact that, depending on what those responses reveal there may be a necessity for either depositions or requests for admission and that we are within

thirty days of the discovery deadline in the Judge's scheduling order, I would request that you provide your response to this final appeal no later than tomorrow, March 15, 2012. If I delay in acting any longer I am concerned that the Court may be entitled to contend that I have moved less than diligently in pursuit of discovery needs.

With kindest regards, I remain

Yours very truly,

Tommy K. Cryer