Appellate No. **07-1156**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee.

v.

JOHN BAPTIST KOTMAIR, JR.,
and SAVE-A-PATRIOT FELLOWSHIP,
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

SAVE-A-PATRIOT FELLOWSHIP'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear this action under 28 U.S.C. §§1340 and 1345, and 26 U.S.C. §§7402(a) and 7408. It granted summary judgment for plaintiff on November 29, 2007, disposing of all claims and entering a permanent injunction order against defendant. Defendant timely filed for appeal upon the court's denials of its post-judgment motions. This court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. Whether the district court exceeded its subject matter jurisdiction by enjoining a political membership organization from speech and activities which lie outside the scope of 26 U.S.C. §§7402(a) and 7408.

II. Whether the court should have granted summary judgment to defendant, when the government failed to demonstrate the essential elements for violations of the statutes invoked.

III. Whether permanent injunction issued on summary judgment is proper when a complaint broadly alleging "tax fraud schemes" fails to aver fraud or mistake with sufficient particularity per the requirements of FRCP 9(b).

IV. Whether permanent injunction order can be issued on summary judgment

motion despite disputed issues of material fact, and when court issues order based on inadmissible evidence or findings contradicted by the record.

V. Whether the court's permanent injunction order disregards FRCP 65(d), in failing to provide adequate notice of the actual enjoined speech and actions, thereby exposing Defendants to potential inadvertent contempt citations for lawful actions.

VI. Whether the court erred in finding that the political speech of members of a political association can be enjoined under the commercial speech doctrine.

VII. Whether an order that defendant members of a political association turn over their membership list impermissibly chills the members' First Amendment rights to free speech and association.

STATEMENT OF THE CASE

This case arises from the government's insistence that a political association's speech, where that speech voices opinions about the operation of the Internal Revenue Code that are contrary to those held by the IRS, can be enjoined under statutes which forbid abusive tax shelters and aiding and abetting understatements of liability.

The United States (the government) sought a permanent injunction under 26 U.S.C. §§7408 and 7402(a)[1] against defendants John Baptist Kotmair, Jr. d/b/a Save-A-Patriot Fellowship and National Workers Rights Committee (Kotmair), and Save-A-Patriot Fellowship, an unincorporated association (SAPF). The government alleged that SAPF's speech was violative of 26 U.S.C. §§6700 and 6701 and obstructed the IRS from performing its duties, and that members' assistance to each other provided financial incentives to violate the internal revenue laws.

Kotmair and SAPF denied the allegations, and filed separate motions for summary judgment. The government filed a cross-motion for summary judgment. In the course of the summary judgment proceedings, SAPF raised disputed issues of material fact and numerous objections over procedural errors prejudicial to SAPF. (Dockets 54, 64). The district court granted summary

judgment to the United States, and issued a permanent injunction order on November 29, 2006. (App. 473)

Defendants timely filed joint motions for a trial, for modification of the permanent injunction order, and for a stay pending the resolution of those motions. (Dockets 71, 72, 73). The district court granted the stay on December 19, 2006. (Docket 74).

On February 7, 2007, the district court denied the post-judgment motions, and lifted its stay of the injunction order. Upon defendants' joint motion, the district court stayed its order pending appeal on February 22, 2007. (Docket 83). Notice of appeal was timely filed on February 16, 2007, and this appeal follows.

STATEMENT OF THE FACTS

Appellant Save-A-Patriot Fellowship (SAPF) has been an unincorporated association domiciled in the State of Maryland for over 23 years. See *Save-A-Patriot Fellowship v. U. S.*, 962 F.Supp 695 (1996). (App. 517). Appellant Kotmair is fiduciary of SAPF. (App. 55). Since its founding in early 1984, citizens from all fifty states have joined the Fellowship in order to more effectively advocate their political views, especially with regard to the tax laws

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1 All section numbers, unless otherwise noted refer to the Internal Revenue

of the United States, and to assist each other in exercising their constitutional and due process rights. SAPF is interested in confining the IRS and other government personnel within the written law. (App. 55). The Fellowship's program agreement states: "The SAP Fellowship is a national organization of American patriots who have joined together to resist the illegal actions of the IRS and other government agencies who knowingly or unknowingly deceive the public." (App. 46). A not-for-profit organization, SAPF's operating costs are met through membership dues, donations, sales of its educational materials, and fees for services to members. (App. 55, 46). SAPF publishes opinions on the government, constitution and various laws of the United States, including the tax laws (the Internal Revenue Code, Title 26). (App. 122). The opinions expressed relate to the construction and operation of numerous sections of the internal revenue law (and analysis of court opinions relating to it), but especially those which pertain in some manner to income and wage taxes. One of SAPF's opinions, based on its investigation into Title 26, is that citizens are nowhere within the code made liable to file or pay Subtitle A (income) tax on income from domestic sources, but *are* made liable to file and pay income tax on foreign entities. (App. 122). Based on this or their own research, *some* SAPF members determine that they are not persons required to file. SAPF refuses to

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Code, Title 26 of the United States Code.

advise any particular person whether they have a filing requirement. (App. 88, 472).

Because SAPF members express opinions on the tax laws that are contrary to those advocated by the IRS (App. 54) the Fellowship has frequently been the target of government attention and harassment. In 1993, the IRS raided SAPF, and confiscated SAPF funds. SAPF sued for a return of the funds, and the district court ruled in favor of SAPF. (App. 517). In the course of the 1996 proceedings in the district court, Judge Garbis stated on the record that while the government might disagree with the political and legal opinions held by Kotmair, no one could doubt that he was sincere in those opinions. (App. 52.)

Activities of SAPF relevant to this appeal

It is SAPF's consistent view that its political speech and activities related thereto are protected by the First Amendment. (App. 55, App. 54). SAPF engages in four activities relevant to this appeal: (1) publishing material expressing its political views, (2) assisting members with communicating their views to government agencies and third parties, (3) assisting members with communicating their views and obtaining due process, as appropriate, with respect to the IRS, and (4) assisting members who have been harmed by the IRS.

(1) Publications and media

The first activity relevant to this appeal arises from SAPF's desire to educate the public to its findings and opinions on constitutional issues and the tax laws. (App. 86) To that end, it publishes a website, *www.save-a-patriot.org*; video and audio presentations such as *Just the Facts*, a 12-hour video lecture; a newsletter, *Reasonable Action*; and books such as *Piercing the Illusion* and its own *Member Handbook*. (App. 98-99). The *Member Handbook* is not available except to members. (App. 46). Statements which are published on the website about the construction of the internal revenue laws include statements such as:

- "The 'income tax' under subtitle A is an 'indirect' tax in the form of an 'excise,' imposed on certain 'activities' or 'occupations' and a liability for tax must arise from statute."
- "The only statute under subtitle A (income tax) making anyone liable is section 1461 which applies to withholding agents who are required to withhold only from foregoing entitities like nonresident aliens and foreign corporations." (App. 122).

SAPF believes that the statements it makes about the law are true, factual statements about the law, and that the Fellowship must strictly adhere to the law. (App. 123, 88).

With respect to publications, one page of *Piercing the Illusion*, six pages of *www.save-a-patriot.org*, several *Reasonable Action* newsletters dating from

1990 to 1999, and a version of the *Member Handbook* are in the record. (Docket 43). No videos or audiotapes have been included in the record.

(2) Assistance with respect to agencies and third parties

The second activity relevant here arises out of SAPF members' desire to notify government agencies, employers, and other third parties of their opinions and stand on the tax laws, and to that end, SAPF offers two documents — a "statement of citizenship" (SOC) and "affidavit of revocation and rescission" (ARR) — and writes to employers and other third parties as appropriate. (App. 82, 90, 92). In the past, SAPF also offered to assist with suits before OCAHO,[2] but this activity ended approximately nine years ago. (App. 338). Members of SAPF join as "associate" or "full" members. Full members are offered this assistance. (App. 86).

The "statement of citizenship" (SOC) is an statement affirming that a person is a citizen of the United States. (App. 207, 238). It is presented to an employer pursuant to the regulation in 26 C.F.R. §1.1441-5 (1999) entitled "Claiming to be not subject to withholding" (App. 370) and IRS publication 515 (1990) (App. 371). SAPF tells members that the regulation and IRS publication explain the use of the statement of citizenship. The "affidavit of

2 The Office of the Chief Administrative Hearing Officer (OCAHO), which oversees provisions of the Immigration Reform and Control Act of 1986 (IRCA) and the Immigration Act of 1990.

revocation and rescission" (ARR) is presented by some SAPF members to the Secretary of the Treasury as a declaration of their views. (App. 236). The affiant states he was constructively defrauded by the government and media into signing previous tax forms and applying for a social security number (Form SS-5). Therefore, he "rescinds" and "cancels" all such forms submitted by him, including his signature thereon. The affidavit sets forth facts relied upon to declare: "I am not now, *nor was I ever* subject to, personally liable for, or personally required to pay any income/excise tax" and "I *hereby declare* that I am not … a person liable for an Internal Revenue tax." [emphasis added] (App. 463). SAPF describes this as "quit[ting]" the social security entitlement program in its Member Handbook. (App. 90). SAPF tells members that if they make this declaration, but sign and file income tax forms later, or reapply for social security benefits later, they will invalidate the affidavit (*i.e.*, their actions will contradict their own declaration). (App. 90, 470).

(3) Assistance with respect to the IRS or courts

The third activity arises out of SAPF members' desire to see the written law (as they understand it) followed by IRS employees, and to avail themselves of all legal remedies under the IRC and its regulations (App. 83), and to that end, SAPF prepares letters in response to IRS inquiries and notices, citing the laws and regulations it believes are being violated by IRS actions. (App. 146 et

seq.) SAPF also offers to assist, if a situation warrants, in preparing briefs for members or members' attorneys to use in IRS-related civil cases with respect to due process rights. (App. 235).

When the IRS sends notices such as requests for tax returns, proposed assessments, notices of deficiencies, etc., to a full member, and the member requests assistance in responding, SAPF prepares correspondence on their behalf. (App 85). In responding to IRS-initiated notices, SAPF requests the remedies prescribed by the statutes, regulations or IRS publications, presents citations of law, regulations, and court cases to support its view, and challenges, where appropriate, the position and lawfulness of IRS employees' actions. Kotmair represents members who give him power of attorney before the IRS. (App. 149).

The IRS collected 846 SAPF letters over a year and a half of investgation. (App. 68). In deposition, Agent Metcalfe, the IRS investigator on this case, testified that the letters sent by SAPF are disregarded by the IRS. (App. 31).

In 1990, the IRS assigned Kotmair a CAF (representative) number (App. 322), and it appears to SAPF that the CAF number is still in the computer system. (App. 231). The remaining facts and argument relating to this number and representative status are raised in Appellant Kotmair's opening appellate

brief, and are included herein by reference thereto.

(4) Membership agreements

The fourth activity arises from SAPF members' concerns that IRS employees will ignore their correspondence and collect the taxes that the IRS claims are due, or will charge them criminally for their political stand. (App. 83). To that end, SAPF members pledge to reimburse one another for tax sums collected by the IRS, or to help with legal defense costs in the event of a criminal charge.[3] (App. 364)

SAPF members' opinions on the written law lead them to believe that government officials often misapply the internal revenue laws to citizens. (App. 83). By joining, members agree to contribute to other members who have lost property through the illegal actions of the IRS, and to contribute to a member or her beneficiary if she is illegally incarcerated. This is known as the Membership Assistance Program (MAP).[4] (App. 46, App. 84). Members may at their option also agree to contribute to other members' legal defense in criminal tax proceedings by joining the Patriot Defense Fellowship. (App. 382). While SAPF notifies all members of another members' claim, members contribute directly to each other, and so SAPF makes no promises that members will receive any certain amount. (App. 364, 48.)

[3] None of such reimbursement reduces amounts collected by the IRS.

SAPF describes this agreement as providing assurance that a member can count on, so that fear of the unknown becomes less of a factor in the fight for his rights. This is voluntary charity for the times when it matters that "the kids have clothes, or food, or schoolbooks, or that the family has a car to get to and from work." (App. 84).

The instant case: Government's view and summary judgment motion

According to the government, the political speech and related activities of SAPF are not protected under the First Amendment (App. 58); the government characterized the activities in question as organizing and selling "tax-fraud schemes designed to assist customers in evading their federal tax liabilities." In its motion for summary judgment, the government further specified that the "tax-fraud" scheme in question was called the "861 argument" or the "U.S. Sources" scheme, which it described as "statutory-construction argument" which concludes that the "foreign-source income rules from §861 somehow sharply limit the scope of §61 … to conclude that the domestic-source income of U.S. citizens is not taxable."[5] (App. 60).

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[4] Also referred to as the "Victory Express" by plaintiff-appellee United States.
[5] The government quotes from United States v. Bell, 414 F. 3d 474 (3rd Cir., 2005), at p. 475.

The government claimed that SAPF violates §6700[6] by making "false statements about the federal income tax laws and the tax advantages of their schemes" (App 10, ¶ 25), and that SAPF falsely states that its documents "will prevent the member's employer from withholding federal taxes from the member's wages."[7] (App 10, ¶ 21).

The government claimed in its complaint that SAPF violates §6701[8] by preparing court filings and letters to the IRS that would result in "understatements of the customers' tax liabilities" (App. 10, ¶¶ 36-37) if the IRS or the courts relied on them.

With respect to these claims and SAPF's activities in the government's summary judgment motion:

(1) Publications and media

The government admitted that some of the statements it initially claimed

[6] Section 6700 penalizes any person who, in connection with the organization or sale of a plan or arrangement, makes or furnishes a statement the person knows (or has reason to know) is false or fraudulent with regard to the securing of a tax benefit by reason of holding an interest in or participating in that plan or arrangement.

[7] In the government's complaint, these were erroneously identified as documents made under NWRC (National Workers Rights Committee), which is a letterhead used by SAPF.

[8] Section 6701 penalizes any person who aids or assists in the preparation of any portion of a document that person knows (or has reason to believe) will be used in connection with any material matter arising under the internal revenue laws, and which they also know would result in an understatement of liability of tax with respect to another person.

were false were not attributable to SAPF. (App. 10, ¶ 25, statements 5-6, App. 63.) The court acknowledged this fact. (App. 483). The remaining statements complained of are all statements, taken out of context, that SAPF makes about the operation of the tax laws, *inter alia*: "The tax on wages has absolutely nothing to do with the tax on income …"; "The 'income tax' .. is an 'indirect' tax in the form of an 'excise' imposed on certain 'activities' or 'occupations' …"; "Taxable income … is limited to certain income that has been 'earned' while living and working in certain 'foreign' countries or territories." (App. 10, ¶¶ 25, statements 1-4 and 7-8, App. 362.)

(2) Assistance with respect to agencies and third parties

In its summary judgment motion, the government did not include any law or evidentiary support for the proposition that SAPF violates §6700 by falsely stating that SAPF affidavits "will prevent the member's employer from withholding federal taxes from the member's wages." The government submitted that SAPF "advises customers that a lack of response [from the government to the ARR affidavit] is 'conclusive proof' that … they are no longer obligated to file returns." (App. 61). The government cited pages from several *Reasonable Action* newsletters, none of which contained such statements. (App. 126-133).

(3) Assistance with respect to the IRS or courts

In its summary judgment motion, the government did not include any law or evidence to support its allegation that SAPF violated §6701 by preparing court filings and letters to the IRS. Instead, the government acknowledged that SAPF letters to the IRS are *not* violative of §6701. (App. 66).

(4) Membership assistance programs

The government alleged that the MAP and PDF agreements provide financial incentives for SAPF members to violate federal tax laws (App 10, ¶ 11-13). In its motion for summary judgment, it did not provide any evidence or reasoning to support this theory.

Claims of interference and obstruction

The government also requested a permanent injunction under §7402(a), claiming that SAPF interferes with the enforcement of the internal revenue laws by promoting tax-fraud plans "they falsely advise customers will permit the customers legally to stop paying federal tax and filing federal tax returns," by sending letters to the IRS, by preparing court filings to obstruct collection, and by encouraging others, through financial incentives, to violate the internal revenue laws. (App. 10, ¶¶ 41-44.) This interference was claimed to cause irreparable harm to the IRS "because it impedes discovery and collection of unreported and unpaid taxes." (App. 10, ¶ 44).

Expanded allegations and inadmissable evidence

Within its summary judgment motion, the government also raised new allegations outside of those raised in the complaint, and supported them with inadmissible affidavits and evidence. (App. 323). The new allegations relevant to this appeal were that SAPF assists members to file returns indicating zero income (App. 376), that SAPF advises members not to file tax returns (App. 58), that the ARR is claimed by SAPF to remove the obligation to file tax returns or discontinue paying taxes (App. 61, 64), and that SAPF falsely advises that Kotmair can represent individuals before the IRS.[9] (App. 62, 65). SAPF objected to all of these untimely raised allegations and details, and notified the court that the basis for these allegations involved disputed issues of material fact. (App. 325, 472).

District court's grant of summary judgment

While the permanent injunction order commands SAPF generally not to violate §§6700 and 6701, the district court also enjoined the activities of SAPF as outlined *supra*. The injunction commands and the legal conclusions provided in support thereof are as follows:

(1) Publications and media

The district court enjoined SAPF from selling or distributing any of its publications (App. 473, ¶1-k), reasoning that the publications were not protected by the First Amendment because "much of the speech … is commercial speech, and commercial speech, if fraudulent, can be enjoined." (App. 496). The district court reasoned that it had authority under §7402(a) to order SAPF to remove speech regarding "tax-fraud promotional materials," "false commercial speech regarding the internal revenue laws," and "speech likely to aid or abet others in violating the internal revenue laws" from the website, but did not identify the particular statements or sections that should be removed. (App. 473, ¶4).

(2) Assistance with respect to agencies and third parties

The court enjoined SAPF from "instructing, advising or assisting anyone to stop the withholding of federal employment taxes from wages" (App. 473, ¶1-i). The court provided no reasons for this command.

The court reasoned that SAPF violates §6700 by selling the ARR, because, according to the court, SAPF claims that an individual using it "is no longer obligated to file income tax returns or to have taxes or Social Security contributions withheld from his or her earnings." App. 479. The order therefore enjoins SAPF from "organizing or selling any document purporting to enable

[9] This issue is raised in Kotmair's opening appellate brief, and SAPF

the customer to discontinue payment of the federal tax." (App. 473, ¶ 1-l).

(3) Assistance with respect to the IRS or courts

The court also enjoined SAPF from "preparing or assisting in preparation of court filings related to the assessment or collection of income taxes on behalf of any other person." (App 473, ¶1-f). The court provided no reason for this command, asserting only that "SAPF offers to prepare and file customized pleadings for its members advancing the U.S.-Sources argument." (App. 480).

The court also enjoined SAPF from "preparing or assisting in the preparation of correspondence to the IRS on behalf of any person." The court reasoned that SAPF correspondence is violative of §6701 by drawing the legal conclusion that "the statute penalizes the understatement of liability, and SAPF assists its customers in making those understatements." The court reasoned that within the meaning of §6701, "understatement of liability" is accomplished whether a person files a return indicating zero income or does not file a return at all. (App. 493). The court also found SAPF's letters enjoinable under §7402(a) because they cause the government "irreparable harm in the form of expenditures of time and money to respond." (App. 495).

The district court further enjoined SAPF from "representing or assisting

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incorporates herein by reference thereto.

any other person before the IRS in connection with any matter," but gave no reason. (App. 473, ¶1-e).

(4) Membership assistance programs

The district court enjoined SAPF from assisting others through MAP and PDF(App. 473, ¶1-j), but provided no reason. With regard to MAP, the court noted that the *Member Handbook* explains that the program "reimburses" losses suffered by members as set forth *supra*, then cited a hypothetical scenario in the *Member Handbook* — that if the membership were 100,000, reimbursement under MAP might be compared to winning the lottery and "some members may even wish for multiple sentences." (App. 481).

Findings of the court related to §6700.

The court reasoned that SAPF's "falsehoods about the tax laws" were penalizable under §6700 because they were used to encourage individuals to join SAPF. (App. 490). The court also found that SAPF misrepresents "Kotmair's authority to represent others before the IRS."

While acknowledging that SAPF states that *all* U.S. citizens are not liable for the income tax on their domestic income — not SAPF members alone — the court found that SAPF implicitly represents that only members can take advantage of this "[tax] benefit." The court drew this implication from partial statements in the *Member Handbook* concerning SAPF's ability to request the

proper remedies available under the law and regulations. (App. 490, 94).

Injunction commands unrelated to SAPF activities

The district court ordered SAPF to stop "[a]dvising anyone they are not required to file federal tax returns or pay federal taxes" (App. 473 ¶1-h), "[O]bstructing or advising anyone to obstruct … IRS proceedings" (App. 473, ¶1-g), and "[E]ngaging in similar conduct that substantially interferes with the administration and enforcement of the internal revenue laws" (App. 473, ¶1-m). The court made no finding, however, that SAPF engages in any of these activities.

The court also ordered SAPF to notify all members and purchasers of SAPF's "tax plans, arrangements, materials and services" of the order (App. 473, ¶2), to produce to the government a list of SAPF members and "purchasers" (App. 473, ¶3), and to display the injunction order on the SAPF website (App. 473, ¶5). The court reasoned that this was warranted because the IRS is irreparably harmed by "lost revenue from SAPF customers who either fail to file returns or file returns understating their tax liability," and so an injunction order under the authority of §7402(a) can extend to "alleviate some of the harm caused by Defendants' conduct and to mitigate further harm." (App. 498).

SUMMARY OF ARGUMENT

I. The government brought this injunction suit under the provisions of four jurisdictional statutes: §§6700, 6701, 7408 and 7402(a). However, the subject matter jurisdiction of those statutes do not extend to an injunction of "false commercial speech" generally, nor to the other activities the Court enjoined.

II. The government failed to make the necessary showing of an essential element of each of the penalty statutes invoked. This lack of essential elements required granting summary judgment in favor of Defendants, and the Court erred in granting it Plaintiff instead.

III. The Court erred in granting summary judgment to Plaintiff on all issues of fraud because the complaint did not particularize the allegations of fraud as required by FRCP 9(b).

IV. There were many issues of fact that SAPF deemed immaterial, not supported by evidence in the record, or supported only by evidence improperly introduced: insofar as the Court relied upon those alleged facts in rendering its decision, it did so improperly; and insofar as these facts are genuinely contested, the case was not ripe for summary judgment in favor of the government.

V. The Court erred in writing the injunction order in terms that are too broad and vague to give Defendants adequate notice of the activities and speech prohibited.

VI. SAPF's opinions on the operations of government, and on the operation of the federal tax laws, as expressed in its books, videotapes, audiotapes and newsletters, are protected political speech, and cannot be restricted simply by mischaracterizing it as false commercial speech.

VII. SAPF's members, like all citizens, not only have the right to freely speak and associate, but also have a right to privacy in their associations, which can not legitimately be violated merely because of the possibility that unnamed others in such association may have violated the law.

STANDARD OF REVIEW

This court reviews decisions granting summary judgment *de novo*. See *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003). "[T]o the extent there are issues of law in dispute, those questions will also be reviewed *de novo*. See *Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 512* (4th Cir.2002)," *ibid.*, at 282.

ARGUMENT

I. Jurisdiction always emanates directly and immediately from the law; it is a power which nobody on whom the law has not conferred it can exercise. See Jurisdiction, 50 CJS p. 1090 ("Subject-matter jurisdiction is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign."). Indeed, "'[t]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.' Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884)." *Insurance Corp. of Ireland, Ltd. et al. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The statutes invoked by the government establish the limit to subject matter jurisdiction for the purposes of breadth and scope, hence the validity of the permanent injunction order.

The subject matter jurisdiction for this suit was established under two statutes, IRC §§7408 and 7402(a). Section 7408 authorizes injunctions to prevent recurrence of violations of §§6700 and 6701, while §7402(a) authorizes injunctions to issue "for the enforcement of the internal revenue laws." Unless

the activities being enjoined fall within the scope of one or the other of these two statutes, then subject matter jurisdiction to enjoin them cannot exist. Even if it were found that one or even several of SAPF's activities fall within the scope of these sections, an injunction can issue only against those activities. The existence of subject matter jurisdiction for those activities does not extend the jurisdiction to include other activities not within the scope of one or the other statute.

To begin, the court below dismissed SAPF's argument that their website, publications, video and audio recordings, *etc.* are protected First Amendment speech, with the following:

> *"Because much of the speech, however, relates to the sale of SAPF products and services, it is commercial speech and it is well established that commercial speech, if fraudulent, can be enjoined.* Schiff, *379 F.3d at 630;* Estate Preservation, *202 F.3d at 1106. Because Defendants' representations about the tax laws and the efficacy of their products is clearly fraudulent, that speech can be enjoined without running afoul of the First Amendment."* (App. 496)

As will be discussed *infra*, the district court made this determination even though very little of said speech was ever introduced into evidence. Nevertheless, although courts have held that fraudulent commercial speech can be enjoined, it still cannot be enjoined under either of the two statutes relied upon for jurisdiction here, with the exception of a particular narrow class of false commercial speech described in §6700, which will be discussed *infra*. The

Internal Revenue Code contains no other law prohibiting false commercial speech generally that can be enforced under the provision of §7402(a), so the Court below had no subject matter jurisdiction with respect to any such commercial speech — false, fraudulent, or otherwise. Therefore, it erred in enjoining the speech of Defendants on that ground.

The Court also erred in concluding that subject matter jurisdiction existed under §7402(a), when that section specifically authorizes action only "as may be necessary or appropriate for the enforcement of the internal revenue laws." The court based its conclusion on the fact that "[t]his section has been employed 'to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute.'" (App. 494), quoting from *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984).) In that case, the 11th Circuit overturned a well-reasoned decision of the U.S. District Court of Georgia, which held that some "underlying Code section must directly create some duty on the part of the defendant sought to be enjoined" under §7402(a). *United States v. Ernst & Whinney*, 549 F.Supp. 1303, 1311 (D.C. Ga. 1982). However, the 11th Circuit, as has the court below in the present case, rejected the reasoning of the district court out of hand, based solely on cases that defendants had shown never raised the issue. (App. 332-336).

Further, *arguendo*, even if injunctions were allowed to enforce unspecified internal revenue laws, no evidence has been introduced that defendants have ever prevented or hindered any IRS agent, officer, or other employee from performing his administrative or enforcement duties, whether with regard to examinations, collections, or any other proceeding before the IRS. The finding of interference stems from the idea that a person interferes merely by not helping the IRS. (App. 67, FN 60.)[10] The government simply alleged that SAPF "delay[ed] examination and collection," but introduced no evidence that any such delay has ever occurred.[11]

SAPF showed in its opposition to the government's summary judgment motion (App. 330-332), that if not for this erroneous idea that one can impede the administration of the tax laws simply by challenging the administrative actions of the IRS through the remedies provided by Congress[12], the government would have had no argument at all for interference. If availing oneself of such Congressional remedies is subject to injunction, then Congress' efforts to protect the public thereby are in vain.

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10 The natural result of such a construction is that merely not responding to IRS letters or notices could equally be deemed interference.

11 The only evidence introduced concerning interference is IRS Agent Metcalfe's admission in his deposition that letters sent by Defendants don't actually impede the IRS.

Despite the lack of evidence of actual interference with the performance of any person's duty to administer the tax laws, the court improperly found that "Defendants are … interfering with the administration of [tax] laws." (App. 495-496). Even so, the only statute by which subject matter jurisdiction could arise with respect to impeding tax administration is §7212, which prohibits only such impediment as is done "corruptly or by force or threats of force," and which was never cited by the government.

Likewise, no statute has been cited to invoke subject matter jurisdiction with respect to "preparing or assisting in the preparation of court pleadings." The Court acknowledged that bankruptcy pleadings and Freedom of Information Act requests were outside the scope of injunctive relief available under §7402(a) or 7408, yet erred in enjoining pleadings to other courts, which are equally outside the scope of the Internal Revenue Code. Even though the injunction is limited to such filings as are "related to the assessment or collection of income taxes," this still does not bring them within the subject matter jurisdiction of the cited statutes.

II. FRCP Rule 56(c) states, in relevant part:

> 56(c) Motion and Proceedings Thereon.
> The judgment sought shall be rendered forthwith if the pleadings,

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12 For example, sending a "written protest" to proposed assessments, as explained in IRS' Publication 5, or requesting a collection due process hearing, as provided in §§6320 and 6330

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The element of the moving party being entitled to judgment as a matter of law has been clarified by the Supreme Court, wherein they stated:

> "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) [Emphasis added]

In the present suit, the government has failed to make a sufficient showing of all necessary elements of the penalty statutes it cites to invoke jurisdiction for the injunction it seeks.

Sections 6700 and 6701, for which an injunction under §7408 may be granted, are penalty statutes, and as such, are to be strictly construed against the government.

> "The law is settled that 'penal statutes are to be construed strictly,' *Federal Communications Commission v. American Broadcasting Co.,* 347 U.S. 284, 296, and that one 'is not to be subject to a penalty unless the words of the statute plainly impose it,' *Keppel v. Tiffin Savings Bank,* 197 U.S. 356, 362." *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 91 (1959). (internal citations omitted)

§6700 - Promoting abusive tax shelters, etc.

As discussed briefly *supra*, there is only one narrow class of false

commercial speech which falls within the subject matter jurisdiction of §6700, and that is only such advertising as consists of making false statements "with respect to … the securing of any [] tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement." [Emphasis added] See §6700(a)(2)(A). This is acknowledged as an essential element of the penalty enacted by this section, not only by the court (App. 489), but also by Congress, as SAPF demonstrated from the TEFRA committee reports dealing with it. (App. 32 et seq.) The bottom line is that this element was specifically included in the language used by Congress in enacting §6700, and the scope of the law cannot now be construed so as to render that explicit condition a nullity.

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word.'" *Petition of Public National Bank*, 278 U.S. 101, 104 (1928).

This essential element of the offense is non-existent here. Even so, the court below dismisses SAPF's argument concerning the necessity for the existence of this element established by §6700(a)(2)(A) with the statement: "Courts have universally rejected Defendants' narrow reading of §6700 and have found tax schemes very similar to Defendants' to fall within the reach of that statute." (App. 487). None of the cases cited to support that decision addressed the issue of the existence of the element of the alleged tax benefit being a result of participation (§6700(a)(2)(A)). Instead, all of the cited

authority dealt only with whether the plans fell within the scope of the "other plans or arrangements" element delineated in §6700(a)(1)(A)(iii).

The court's statement that "Defendants provide no authority to the contrary" is contradicted by the excerpts taken from the Congressional committee reports (App. 23-26, App. 32 et seq.), one of which the court cites — Senate Report No. 97-494. Those committee reports show that the legislators clearly intended the penalty to be restricted to situations where false claims of tax benefits were used to promote participation in a tax shelter. In fact, they show the element of participation was deemed to be necessary to prevent the penalty from being "overbroad." (App. 37).

SAPF provided no contrary authority to the cases cited by the court because those decisions have no bearing on the issue SAPF raised. At the same time, SAPF could cite no case law to support its argument because it appears that no court has yet addressed it; neither did the court below provide any authority which directly addressed the issue — that is, whether §6700 can be violated when the statements claimed to be false are not with respect to tax benefits resulting from participation in the shelter, as intended by Congress' inclusion of §6700(a)(2)(A).

This issue is one of first impression, as far as SAPF can determine. While there have been decisions which recognize in passing this necessary element of

participation, none have been directly on point in deciding that a violation of §6700 cannot exist without it. As SAPF has raised from the beginning of this suit, none of the statements complained of (nor even those later identified by the court below) deal with tax benefits resulting from participation in Save-A-Patriot Fellowship. SAPF has never stated that any tax benefit accrues as a result of becoming a member thereof, and the government has not been able, throughout the course of this suit, to identify any such statements.

Neither has the court, which ultimately relied on its finding that:

> "While Defendants may argue that the tax benefits it promotes are potentially available to any American citizen, implicit in SAPF's sale of its forms, letters, and 'paralegal' services is the representation that only those that follow SAPF's plan will be able to reap those benefits." [Emphasis added] (App. 489.)

It is plain that implicit representation does not equal a false statement. The court then went on to specifically identify the following statements presumably deemed to constitute the necessary element of §6700(a)(2)(A), yet none of them result from membership in SAPF:

> "To encourage individuals to join its 'Fellowship,' and make use of its products and services, SAPF represented, *inter alia*: that taxable income is limited to "income that has been 'earned' while living and working in certain 'foreign' countries or in the U.S. possessions and territories;' that there is no requirement for most Americans to file tax returns or have taxes withheld from their wages; and that one can 'quit' the Social Security program." (App. 489).

The court clearly erred in finding that these statements could be the basis for the penalty administered under §6700. In the absence of any actual statements that tax benefits accrue to anyone as a result of participation in SAPF, no penalty violation of §6700 can exist, regardless of whether or not SAPF can be deemed to fall within the scope of "any other plan or arrangement."

Thus, the court erred in finding that SAPF violated §6700, because the essential element to invoke the penalty under §6700(a)(2)(A) was not found to exist. That being so, the court should have granted summary judgment in favor of SAPF on this issue. *Celotex Corp., id*.

§6701 - Penalties for aiding and abetting understatement of tax liability

A similar situation exists with respect to §6701, which, like §6700, is a penalty statute, and as such, is to be strictly construed against the government.

In the case of a §6701 violation, the essential elements of the penalty, as laid out by the court below, are that: "(1) the defendant prepares, assists in, procures, or advises the preparation of any portion of a return, affidavit, claim, or other document; (2) the defendant knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws; [and] (3) the defendant knows that such portion (if so used) would result in an understatement of the liability for tax of another

person." (App. 492) [emphasis added]. In the present case, the necessary element of an understatement of tax liability is absent. SAPF argued that in order for an understatement of liability to exist, some statement of liability must have been made in the first place.

A review of the other penalty statutes which deal with understatements shows a consistent treatment of such understatements as only those made on returns or claims for refunds (also typically made on returns). Section 6694(a) penalizes tax return preparers for "understatement of liability with respect to any return or claim for refund" due to unrealistic positions, while §6694(e) defines "understatement of liability" to mean "any understatement of the net amount payable with respect to any tax imposed by subtitle A or any overstatement of the net amount creditable or refundable with respect to any such tax." Thus, according to this penalty,[13] an understatement of liability means a statement of an *amount* of tax.

Another penalty related to understatement is §6662, which penalizes underpayments of tax resulting from a "substantial understatement of income tax." Section 6662(d)(2) defines "understatement" as the "excess of (i) the amount of the tax required to be shown on the return for the taxable year, over (ii) the amount of the tax imposed which is shown on the return." (emphasis

added) Once again, an understatement is defined not only as a statement of an amount of tax, but one that is made on a return. Likewise, the penalty imposed by §6662A for understatements with respect to reportable transactions specifically requires that such statements be "shown on the taxpayer's return of tax." (Add. 11) These latter two penalties are further clarified by §6664(b), which specifically limits them to "cases where a return of tax is filed." (Add. 14).

The language of these penalties reveals the underlying statutory scheme throughout the Internal Revenue Code when dealing with understatements — that is, statements of amounts of tax actually shown on returns which are less than the amounts that should have been shown. There is nothing in the language of §6701 to indicate a departure from that context. Nevertheless, the Court below made a finding that a person can understate his tax liability by not filing a return at all.

> "Whether Defendants' customers achieve this result by filing a return indicating zero income and zero liability, or simply refuse to file a return, the result is the same - their tax liability is understated. To argue otherwise is mere sophistry." (App. 493).

In *Acker*, *supra*, the Supreme Court found it necessary to construe the provisions of a similar penalty imposed for filing a "substantial underestimate"

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13 Located in Part I of Subchapter B of Chapter 68, along with §§6700 and 6701.

of tax, in a case where no declaration of estimated tax was filed. That court concluded that a failure to file a declaration of tax is not the same as a declaration that the tax is zero.

> "Viewing s 294(d)(2) in the light of this rule, we fail to find any expressed or necessarily implied provision or language that purports to authorize the treatment of a taxpayer's failure to file a declaration of estimated tax as, or the equivalent of, a declaration estimating his tax to be zero. This section contains no words or language to that effect, and its implications look the other way. By twice mentioning, and predicating its application upon, 'the estimated tax' the section seems necessarily to contemplate, and to apply only to, cases in which a declaration of 'the estimated tax' has been made and filed." *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 91-92 (1959) (emphasis added)

For these reasons, the Court below erred in finding that an understatement of liability could result from failing to file a tax return. Without some sort of statement of liability made, there can be no understatement of liability. Without the element of an understatement of liability, there can be no penalty violation of §6701.

Even if it were possible for an understatement of liability to be accomplished by failing to file a return, the IRS correspondence prepared by SAPF on behalf of its members still could not result in such an understatement, and is therefore not enjoinable under §6701. SAPF correspondence is written in response to various notices and form letters sent by the IRS to SAPF members, ranging from inquiries about the lack of filed returns for specified years to

notices of IRS' intention to begin seizing property. (App. 134). The responses to these notices attempt to invoke the legal and administrative remedies established by Congress and by the Secretary of the Treasury. (App. 146-191). Notably, the sending of all of these notices, as well as the corresponding responses, occur after the point in time a return is not received by the IRS. Since it is impossible for an effect to precede its cause, a failure to file a return cannot possibly be the result of correspondence sent after that failure has already occurred. Thus, the court erred in finding that the correspondence prepared by SAPF on behalf of its members violates §6701, even under its erroneous conclusion that an understatement of liability can be made by failing to file a return.

Either way, an essential element to invoke the penalty under §6701 is missing, and therefore, it was error for the court not to grant summary judgment for SAPF with respect to alleged violations of such section. *Celotex Corp.*, *id.*

§7402(a) and irreparable harm.

With respect to §7402(a), the court acknowledges that the traditional elements of injunctions apply, and cites "continuing irreparable injury to the United States" as one of those necessary elements. (App. 495). The court went on to identify the alleged harm as being "the expenditures of time and money to respond to Defendants' frivolous filings as well as the lost revenue from SAPF

customers who either fail to file returns or file returns understating their tax liability." However, the government's only attempt to introduce any evidence to support any claim of harm was a chart for which no evidentiary foundation had been laid. (App. 228). No authentication was provided for this exhibit — that is, the person or persons who created this chart was not identified. Without authentication, this exhibit can not properly be the basis of any factual finding.[14] Even so, the chart shows absolutely no connection to defendant SAPF. It purports to be an estimate of expenditures associated with frivolous filings, but the chart does not show that the listed expenditures are caused in any way by SAPF. In other words, there is nothing that connects any specific action of SAPF to any particular expense. As for the alleged lost revenue, absolutely no evidence was introduced to establish any such harm. It was error for the court to find that such harm existed without any supporting evidence. Because of the lack of any evidentiary basis for a finding of the essential element of harm, it was error not to grant summary judgment in favor of Defendants. [15] *Celotex Corp., id.*

Findings of fraud

The Court found as fact that SAPF acted fraudulently. Yet, no evidence

14 Federal Rules of Evidence, Rule 901(a).

has been introduced into the record to establish the necessary element of an intent to deceive that would support a finding of fraud. In 1996, Judge Garbis stated in court that no one could deny Kotmair's sincerity. (App. 50). As Judge Garbis found, the positions espoused by SAPF members represent their sincerely held beliefs with respect to the meaning, applicability and operation of the tax laws. Statements in connection with such beliefs are protected by the Free Speech clause. Even if those beliefs are ultimately deemed false by others, they cannot be fraudulent in the absence of the essential element — an intent to deceive. There being no evidence of fraud — nor even particularized allegations of it, as required by Rule 9(b) — introduced into the record, all findings of fraud are without evidentiary basis. Lacking any evidence of an intent to deceive, an essential element of fraud, it was error for the district court not to grant summary judgment in favor of SAPF on all issues related to fraud.

III. With respect to pleadings, FRCP Rule 9(b) provides as follows:

> "(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . ."

This rule requires the pleader to state who, what, where, when and how. *U. S. ex rel Costner v U. S.* 317 F.3d 883 (8th Cir. 2003). Rule 9(b)'s

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15 It is further noted that in granting Defendants' two separate motions for stay, the Court even acknowledged that the harm to Defendants from the issuance of the injunction outweighs the harm to the government in delaying it.

requirement of particularity is satisfied if the complaint sets forth precisely the statement made, the time, place and person responsible for each statement, the content of the statement and its affect on the government and what the defendant gained from the fraud. *Official Publications, Inc. v. Kable News Co.*, Inc. 775 F.Supp 631 (1991).

The government broadly alleged "tax-fraud schemes"[16] numerous times in its complaint. SAPF argued in its summary judgment motions (Docket 38, 54) that the complaint contained no specific *facts* as required by FRCP Rule 9(b). See *Flynn v. Merrick*, 881 F.2d 446 (7th Cir., 1989) ("mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times the accusations are repeated.").

However, the Court decided SAPF's objections to this deficiency were merely "quibbling criticisms of the Complaint," and that to particularize the allegations would place a heavy burden on the government "far beyond … the stringent standards of Rule 9." (App. 484). Yet, the purpose of the requirement is to allow the defendant reasonable opportunity to answer the complaint and frame a response. See *Tribune Co. v. Pureigliotti* 869 F.Supp 1076 (1994),

[16] For instance, ¶ 5 of complaint: "SAPF, an unincorporated association, … organizes and sells tax-fraud schemes designed to assist customers in evading their federal tax liabilities and interfering with the administration of the internal

Pittiglio v. Michigan Nat. Corp. 906 F.Supp. 1145 (1995) (purpose of rule is to provide defendants with notice adequate to prepare proper responsive pleadings). Thus, the lack of particularity deprived SAPF of a reasonable opportunity to prepare a defense to the claims.[17]

The Rule requiring heightened pleading standard for allegations of fraud is threefold: (1) to inform defendants of the nature of the alleged wrong so that defendant might mount an adequate defense, (2) to eliminate conclusory complaints filed as a pretext for using discovery to uncover heretofore unknown wrongs, and (3) to protect defendants from spurious fraud charges that might be particularly damaging to reputation. *Levine v. Prudential Bache Properties, Inc.* 855 F.Supp. 924 (1994). SAPF was severely prejudiced by this deficiency in the pleadings, and further hampered by the government's repeated objections and refusals to particularize the false statements and alleged fraud, all of which tend to show that the government did not have the necessary particulars in the first instance, and that the complaint was filed as a pretext for using discovery to uncover heretofore unknown wrongs.

For these reasons, the court erred in refusing to hold the government to the requirements of Rule 9(b).

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revenue laws.

[17] The "how" of the alleged schemes, that is, an actual theory as to the working of the plan, has never been set forth within the government's documents.

IV. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc*., *supra* at p. 248-49; *Matsushita Elec. Indus. Co*., *supra* at p. 587. Portions of this court's permanent injunction order appear to be contingent upon factual conclusions not supported by any evidence in the record; or based on affidavits and evidence improperly made part of the record, or based on facts which are disputed. Consequently, this matter was not ripe for granting summary judgment to the government.

Moreover, facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986); *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 521 (4th Cir. 2003). The court below erred in that it failed to view the facts offered by the government and all inferences and ambiguities therefrom in the light most favorable to SAPF. Even when SAPF presented affidavits substantially controverting the facts alleged by the government, the court failed to order the case to trial or make all inferences in favor of the nonmovants.

(1) Publications and media

As noted *supra*, the court found that "much" of Defendant's newsletters, books, videos, and website constituted commercial speech, and so was

enjoinable, if fraudulent. (App. 496). Since only a fraction of the material SAPF makes available was ever introduced, the evidence to support this finding is lacking. The district court also reasoned that it had authority under §7402(a) to order SAPF to remove speech such as "tax-fraud promotional materials," "false commercial speech," and "speech likely to aid or abet others in violating the internal revenue laws" from the website. As also noted *supra*, with respect to fraud generally, the record actually contradicts any intent to deceive. There being no evidentiary basis to support these findings, then, they should be overturned or the case remanded and heard so that the remaining materials can be entered into evidence, the particular statements the court deems wrong specified, and the intent to deceive can be shown.

(2) Assistance with respect to agencies and third parties

The court reasoned that SAPF violates §6700 by selling the ARR, because, according to the court, SAPF claims that an individual using it "is no longer obligated to file income tax returns or to have taxes or Social Security contributions withheld from his or her earnings." (App. 479.) This finding, as to what SAPF claims about the ARR, is a disputed issue. As such, the court did not cite anything SAPF has published to support this finding. Rather, the court merely cited *another* case, *U.S. v. Raymond*, 228 F.3d 804 (7th Cir., 2000), where defendants were enjoined because they sold "forms and instructions to

guide individuals through the process of "withdrawing" from the jurisdiction of the federal government's taxing authorities … so that the individual would, under the defendants' view … no longer be required to pay federal taxes." (App. 487). Because what SAPF claims about the SOC and ARR are in dispute, this issue was not ripe for summary judgment, and should be remanded for trial.

(3) Assistance with respect to the IRS or courts

As noted *supra*, the government did not submit any law or evidence that SAPF violated §6701 by preparing court filings and letters to the IRS. Instead, the government acknowledged that SAPF letters to the IRS are *not* violative of §6701. (App. 66.) In light of this admission, and the fact that the government did not raise these issues in its motion, the court erred in granting summary judgment on these issues. There being no foundation for the related injunction commands (App 437, ¶ 1-e, 1-f), they should be vacated.

The court also found SAPF's letters enjoinable under §7402(a) because they cause the government "irreparable harm in the form of expenditures of time and money to respond." App. 495. As noted *supra*, this finding appears to be based on inadmissible evidence, and SAPF had no opportunity to challenge this evidence. Therefore, this issue was not ripe for summary judgment, and at minimum, the issue should be remanded for trial.

(4) Membership assistance programs

As noted supra, the government made only conclusory statements that SAPF's member assistance programs provide financial incentives to violate federal tax laws. Since the government did not address the issue in its motion, the district court erred in granting summary judgment on this issue, and the related injunction should be vacated.

Injunction commands unrelated to SAPF activities

Without making any specific finding, the Court enjoined SAPF from "[a]dvising anyone they are not required to file federal tax returns or pay federal taxes" (App. ¶ 1-h). This order is contradicted by the record, in that it is the strict policy of SAPF never to advise any person with respect to whether they are required to file. See *supra*. This order is without foundation, and should be vacated.

Relative to "obstruction" and "interfering," the court enjoined SAPF (App. 473, ¶ 1-g, 1-m) without any proper evidence, and this order should be vacated.

SAPF objected to these issues, both in its motions to strike and motion for new trial. The Court erred in denying those motions and granting summary judgment for Plaintiff. (App. 328-329, App. 472).

V. FRCP Rule 65(d) states, in part: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be

specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; …" [emphasis added]

The Supreme Court has said that "[b]asic fairness requires that persons enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473 (1974), at 476.

The injunction order is drawn in overbroad and vague terms, and so fails to give fair and precisely drawn notice of what it prohibits. Further, as discussed *supra*, the injunctive relief enlarges upon the pleadings, the evidence, and the actual findings of the court.

As this court has previously found in *Save-A-Patriot Fellowship v. U.S.*, 962 F.Supp 695 (1996), Kotmair sincerely believes that none of his actions are violative of federal laws. Because SAPF engages in acts and speech which have historically been protected by the Bill of Rights, but which are abhorred by certain government officials, defendants are left in the untenable situation of having to guess, *inter alia*, what constitutes political speech and what constitutes commercial speech, afraid to be erroneously held on contempt charges for violations of what the court deems implicit prohibitions, or else forfeiting their most fundamental rights to err on the side of caution.

The lack of specificity in the order dovetails with the issue of subject matter jurisdiction. Many of the activities that the court below appears to enjoin are outside the scope of the authority given in §§7408 and 7402(a).

Section 7408 states that a person can be enjoined for any "action … subject to penalty under section 6700, 6701 …" (Add. 31). Since the penalty under §6700 is imposed only when a false statement has been made with respect to the tax benefits of participation in a tax shelter, it follows that the false statement is that which can be enjoined. Rather than enjoining all speech, the court is limited, under §7408, to enjoining the precise statements which have been held to be false with respect to tax benefits said to be derived from participation in the shelter. These specific statements have not been identified by the court in its injunction order. Rather, the injunction order reiterates the statute, and further enjoins "promoting, marketing, organizing, selling, or receiving payment for any plan or arrangement." (App. 473, ¶1-c.) Section 6700 does not penalize these things *per se*, it only penalizes statements made in the context of those activities. Thus, the order fails to inform SAPF of the precise statements it has made which it must now stop making.

Likewise, the penalty in §6701 is imposed on each document that has been prepared in which results in "understatement of a liability," but the specific documents in question have not been identified by the court. Rather,

the injunction order reiterates the statute and further enjoins all correspondence to the IRS generally. In addition, the court enjoins "organizing or selling any document purporting to enable the customer to discontinue payment of federal tax," but these documents appear to be outside the scope of the penalty proscribed by §6701. Thus, the order fails to inform SAPF of the precise documents it has made which it must now stop making.

Furthermore, the injunction order of this court did not state with nearly the degree of specificity that the other courts did in the aforementioned *U.S. v. Bell*, *U.S. v. Schiff,* and *U.S. v. Estate Preservation Services*; three cases that this court stated it relied upon for its injunction order. The orders of those cases were more precise as to which acts were forbidden, and which speech was not protected by the First Amendment; in contradistinction to the injunction order of this court.

This issue is further argued in SAPF's motion for modification of this order and motion for stay pending appeal, incorporated herein by reference thereto. (Docket 72). If the other relief prayed for herein is not granted, then this court should remand this case for modification of its order, so as to particularize that which is enjoined, for the permanent injunction order does not satisfy these requirements of Rule 65(d).

VI. The district court found that statements on SAPF's website and in its other

publications constitute speech:

> "relate[d] to the sale of SAPF products and services, it is commercial speech and it is well established that commercial speech, if fraudulent, can be enjoined…. Because Defendants' representations about the tax laws and the efficacy of their products is clearly fraudulent, that speech can be enjoined without running afoul of the First Amendment." [Emphasis added]

The court cited three cases as authority to enjoin SAPF's speech: *United States v. Estate Preservation Services*, 202 F.3d 1093 (9th Cir. 2000), *United States v. Schiff*, 379 F.3d 621(9th Cir. 2004) and *United States v. Bell*, 414 F.3d 474 (3rd Cir. 2005).

Besides the first impression aspects discussed *supra*, upon which the district court did not rule, appellant SAPF is at a disadvantage here, because there is no "bright line rule" with respect to what speech constitutes "commercial speech" for the purposes of invoking the penalties of IRC §§6700 and 6701, and what speech constitutes political speech, fully protected by the First Amendment. Even worse, it appears that a small body of new case law dealing with "commercial speech" in the context of IRC §§6700, 6701, 7208 and 7204 is in conflict with the larger and older body of case law — including numerous Supreme Court cases — narrowly defining the limitations of the commercial speech doctrine. Our lower courts are now parting from the time-tested free speech doctrine long recognized, opening the door to all kinds of encroachment upon political speech, notwithstanding the fact that the Supreme

Court has consistently recognized that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Court has also recognized that the high value of free speech can often lead those in power to seek to suppress it. Free speech and expression therefore have special significance with respect to government because "[it] is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression" and acknowledged "[t]he door barring federal and state intrusions into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.'" *Id*. 777, n. 11. While keeping our treasury solvent is important, it cannot be done at the expense of our fundamental right of political speech.

"False commercial speech" defined by precedent case law

There is a serious legal question involved where SAPF's members' right to think as they will, and speak as they think, is curtailed. The court erred in following the recent tendency of the lower courts to expand the "false commercial speech" exception to the right of free speech, originally carved out by the Supreme Court's to allow regulation of false advertising.

Black's Law Dictionary (6th ed.) defines "commercial speech doctrine":

> "Commercial speech doctrine. Speech that was categorized as "commercial" in nature (i.e. speech that advertised a product or

> service for profit or for business purposes) was formerly not afforded First Amendment freedom of speech protection, and as such, could be freely regulated by statutes and ordinances. *Valentine v. Chrestensen,* 316 U.S. 52, 62. This doctrine, however, has been essentially abrogated. *Pittsburg Press Co. v. Pittsburg Comm. On Human Rights,* 413 U.S. 376; *Bigelow v. Virginia*, 421 UY.S. 809; *Virginia State Brd. of Pharmacy v. Virginia Citizen Council*, 425 U.S. 748."

When the Supreme Court first distinguished "commercial speech," they essentially equated it with "commercial advertising."[18] However, once the concept of *advertisement* is removed from this narrow exception, all speech eventually becomes fair game for restriction, contrary to the intent of the First Amendment. "Defendants' representations about the tax laws" (App. 496) could not possibly constitute "commercial speech." Clearly, any such representation about the tax laws is purely *political*, not *commercial* speech.

In the present suit, the district court enjoined SAPF from distributing all videotapes, audiotapes and books — none of which were found to contain *any* commercial advertising (let alone false advertising) — by lumping it all together as "commercial speech," as if it applies to any kind of speech ultimately offered for sale. This construction completely subverts the meaning

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18 See *Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942): "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in

given to the term by the Supreme Court. That court recognized in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 761 (1976) that:

> "Speech likewise is protected even though it is carried in a form that is 'sold' for profit, (citations omitted) and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co. v. Sullivan, supra; NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 335-336, 9 L.Ed.2d 405, 415-416 (1963)."

Indeed, commercial speech is expression that does no more than propose a commercial transaction. See *Cincinnati v. Discovery Network*, 507 U.S. 410, 423 (1998); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). The speech found in SAPF books, videotapes, etc. is not advertisement, but purely political speech — fully protected by the First Amendment.

Political speech is not transformed into commercial speech merely because it is sold. Speech must be delivered by some method: a speaker with a microphone, an audio recording, book, newspaper, etc. That people pay for the medium does not make the speech "commercial speech." Therefore, banning speech because compensation is received for the means by which it is disseminated, runs afoul of the protections of the First Amendment.

Membership organizations of all types — the National Rifle Association,

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these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."

the NAACP, and PTAs, *inter alia* — raise operating funds by selling things, yet this does not turn their advocacy into commercial speech. It is hard to imagine how any such group could fund their operations except by donations or sales of some sort.

SAPF's political speech, in the form of its books, videotapes, audiotapes and newsletters, cannot be legitimately restricted under the pretense that it is commercial speech. By whatever medium disseminated, it comes under the ambit of the First Amendment.

Free speech generally

The Supreme Court recognizes the threat to First Amendment rights from the use of vague language in restrictions of speech or actions, because the only way a person can positively avoid penalty is "by restricting their conduct to that which is unquestionably safe" and by "steer[ing] far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. … Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citations omitted). Indeed, "These freedoms are delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927), puts the freedom of speech into proper perspective:

> "Those who won our independence … believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Political Speech enjoys the full protection of the First Amendment

Like the membership organizations mentioned above, Save-A-Patriot Fellowship is a *bona fide* political advocacy organization. SAPF must rely on both sales and donations to fund its advocacy and educational activities. The fact that, like them, SAPF sells books, publications and services does not render its activities "commercial speech."

Moreover, the constitutional protection does not turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). Thus, SAPF's speech, even if their

opinions might be deemed wrong, still enjoys the full protection of the First Amendment, just like that of any citizen — or collection of citizens.

VII. Ordering SAPF to turn over its membership list would, at the very least, permanently and irreparably damage the existence of the Fellowship. The courts have long recognized that ordering political organizations to turn over membership lists constitutes irreparable injury to the members' rights. Similarly, the right of SAPF members to freely associate with others, invoke remedies at law, and to freely communicate their opinions on matters of prime importance to all citizens—federal taxes being one such matter—is irreparably damaged by turning over its membership list.

In *National Association for Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 459 (1958), the Supreme Court recognized the damage to a membership association likely to result from the production of its list, and the right of the organization to complain on behalf of those members:

> "The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members."

The harm resulting from that chilling effect, once begun, can never be repaired. People will forever afterwards be more leery of associating with SAPF, for fear that such association will expose them to increased government

scrutiny and harassment.

Of course, SAPF is concerned about the harm inflicted upon its members that would result from turning over its membership list. But the harm here goes well beyond our interests. If SAPF members are dispossessed of the right to freely associate and engage in political speech without being red-flagged (or worse) by government officials, any political organization will be at risk. This is particularly true where the organization espouses unpopular political sentiments.

This same form of injury was addressed by the Supreme Court in *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960):

> "Freedoms such as these [freedom of speech and a free press, the right of peaceable assembly, and the freedom of association for the purpose of advancing ideas and airing grievances] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Grosjean v. American Press Co.*, 297 U.S. 233. (other citations omitted) '[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute (an) effective * * * restraint on freedom of association. * * * This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.' *N.A.A.C.P. v State of Alabama*, 357 U.S. at page 462, 78 S.Ct. at page 1171." (Emphasis added)

Any prior restraint, or other infringement of the rights to political association and free speech is injurious to SAPF, its members, and the public

generally. Taken together, these injuries are quite substantial.

The district court cited the reason for its demand that SAPF provide the government with a list of its members as "this information is needed because of the possibility that many do not file tax returns." However, a mere "possibility" that some do not file is not reason enough to abrogate the rights to free speech, association, and due process of all SAPF members. In the Internal Revenue Code, Congress has invested the government with all the powers it deemed necessary to accomplish its duty of discovering, assessing, and collecting tax liabilities, even in cases where required returns have not been filed. Said powers are wholly adequate to those purposes, and can be exercised in the precise manner intended by Congress, even without access to the names of SAPF members.

"Injunctive relief is historically designed to deter, not to punish." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). Yet, in the present case, the government wants to punish not only SAPF collectively, by infringing their right to freely associate and speak, but also SAPF members individually, by subjecting them to increased scrutiny of their financial affairs, not because the government has information that they have violated any law, but merely because they have chosen to associate with the Save-A-Patriot Fellowship.

Eleven years ago in *Save-A-Patriot Fellowship v. U. S.*, 962 F.Supp 695,

698-699 (1996), the Maryland District Court recognized the First Amendment implications of revealing the identities of SAPF's members, when, during the hearing of that case, the following exchange took place:

> THE COURT: Mr. Harp [the attorney representing SAPF], I don't want to be treading on first amendment rights, so I expect you are going to object if I ask this question the wrong way.
>
> Is there a membership list? I am certainly not entitled to ask, and I don't want to ask who the members are. Is there some way of telling who is a member?
>
> MR. HARP: Your Honor, with all due respect to the Court, I would object to that.
>
> THE COURT: I would rather sustain the objection. Is there some question Mr. Harp that we can ask so I can get an idea of whether there is a membership as compared to some kind of feeling that anybody who agrees with us is a member and they know in there hearts there is a member [sic]. Could you ask the question that is proper please.
>
> MR. HARP: Your Honor, I suppose that there could be a question asked about the membership agreement.
>
> THE COURT: Why don't you ask the question. I don't want to ask the question and be accused of trying to tread on the first amendment.
>
> *Save-A-Patriot Fellowship v. U. S.*, *supra*, transcript of hearing of September 20, 1996 (App. 507) [Emphasis added]

Nevertheless, the Court below ignored those First Amendment implications and ordered the list to be provided to the government. It should also be noted that SAPF associate members do not even have access to the services full members do, such as assistance with preparing letters to the IRS; these members join primarily to support the political outreach mission. Yet the government demands their confidential information anyway. If not to

investigate them, then to what purpose?

SAPF members will suffer irreparable harm as the result of increased scrutiny (real or perceived) by the government, in the form of tax audits, inquiries of friends, family members, employers, etc. by IRS officials, with the likely result of unwarranted stigmatization, etc. Likewise, prospective members — even prospective Associate members — will fear joining SAPF lest their identity be revealed to the government as an unapproved political dissident. This is the exact kind of "chilling effect" on free speech that the U. S. Supreme Court has condemned repeatedly and consistently over the years; and those who support unpopular speech are no exception: case law protects even such politically disfavored groups as the Communist Party (*e.g.*, *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961)).

For these reasons, it was error for the Court below to order SAPF to turn over a list of its members' personal information.

CONCLUSION

The permanent injunction order issued by the district court should be vacated, or the judgment of the lower court should be reversed and the case remanded for trial and strict application of the penalty statutes and correct constitutional standards.

STATEMENT OF ORAL ARGUMENT

Appellant requests oral argument. This appeal raises important questions regarding the jurisdictional scope of penalty statutes used to issue an injunction which operates as prior restraint on a membership association's freedom of speech. The district court seriously misconstrued the relevant statutes to extend its jurisdiction to otherwise constitutionally protected activities.

Respectfully submitted this 30th day of April, 2007.

GEORGE E. HARP

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for defendant-appellant SAPF certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App P. 32(a)(7)(B)(i) and contains 13,320 words (using Microsoft Word for Windows, 14 pt. Times New Roman), excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

GEORGE E. HARP

CERTIFICATE OF SERVICE

The undersigned counsel certifies that foregoing brief and appendix was sent to counsel for the Appellee, Carol A. Barthell, Attorney, Appellate Section, U.S. Department of Justice, Post Office Box 502, Washington, DC, 20044; and to Defendant/Appellant John B. Kotmair, Jr., Post Office Box 91, Westminster, MD 21158, by first class U.S. Mail with sufficient postage affixed on the 30th day of April, 2007.

GEORGE E. HARP

Appellate No. **07-1156**

ADDENDUM TO
SAVE-A-PATRIOT FELLOWSHIP'S OPENING BRIEF

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26 U.S.C.A. § 6020

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 61--INFORMATION AND RETURNS
SUBCHAPTER A--RETURNS AND RECORDS
PART II--TAX RETURNS OR STATEMENTS
SUBPART D--MISCELLANEOUS PROVISIONS

§ 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.

(2) Status of returns.--Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

Current through P.L. 110-19 approved 04-23-07

END OF DOCUMENT

26 U.S.C.A. § 6651

Effective: December 31, 1999

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 68--ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES
SUBCHAPTER A--ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS
PART I--GENERAL PROVISIONS

§ 6651. Failure to file tax return or to pay tax

(a) Addition to the tax.--In case of failure--

(1) to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2) to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3) to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b)) within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent

for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

In the case of a failure to file a return of tax imposed by chapter 1 within 60 days of the date prescribed for filing of such return (determined with regard to any extensions of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under paragraph (1) shall not be less than the lesser of $100 or 100 percent of the amount required to be shown as tax on such return.

(b) Penalty imposed on net amount due.--For purposes of--

(1) subsection (a)(1), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return,

(2) subsection (a)(2), the amount of tax shown on the return shall, for purposes of computing the addition for any month, be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed on the return, and

(3) subsection (a)(3), the amount of tax stated in the notice and demand shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the beginning of such month.

(c) Limitations and special rule.--

(1) Additions under more than one paragraph.--With respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month (or fraction thereof) to which an addition to tax applies under both paragraphs (1) and (2). In any case described in the last sentence of subsection (a), the amount of the addition under paragraph (1) of subsection (a) shall not be reduced under the preceding sentence below the amount provided in such last sentence.

(2) Amount of tax shown more than amount required to be shown.--If the amount required to be shown as tax on a return is less than the amount shown as tax on such return, subsections (a)(2) and (b)(2) shall be applied by substituting such lower amount.

(d) Increase in penalty for failure to pay tax in certain cases.--

(1) In general.--In the case of each month (or fraction thereof) beginning after the day described in paragraph (2) of this subsection, paragraphs (2) and (3) of subsection (a) shall be applied by substituting "1 percent" for "0.5 percent" each place it appears.

(2) Description.--For purposes of paragraph (1), the day described in this paragraph is the

earlier of--

(A) the day 10 days after the date on which notice is given under section 6331(d), or

(B) the day on which notice and demand for immediate payment is given under the last sentence of section 6331(a).

(e) Exception for estimated tax.--This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655.

(f) Increase in penalty for fraudulent failure to file.--If any failure to file any return is fraudulent, paragraph (1) of subsection (a) shall be applied--

(1) by substituting "15 percent" for "5 percent" each place it appears, and

(2) by substituting "75 percent" for "25 percent".

(g) Treatment of returns prepared by Secretary under section 6020(b).--In the case of any return made by the Secretary under section 6020(b)--

(1) such return shall be disregarded for purposes of determining the amount of the addition under paragraph (1) of subsection (a), but

(2) such return shall be treated as the return filed by the taxpayer for purposes of determining the amount of the addition under paragraphs (2) and (3) of subsection (a).

(h) Limitation on penalty on individual's failure to pay for months during period of installment agreement.--In the case of an individual who files a return of tax on or before the due date for the return (including extensions), paragraphs (2) and (3) of subsection (a) shall each be applied by substituting "0.25" for "0.5" each place it appears for purposes of determining the addition to tax for any month during which an installment agreement under section 6159 is in effect for the payment of such tax.

26 U.S.C.A. § 6662

Effective: August 17, 2006

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 68--ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES
SUBCHAPTER A--ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS
PART II--ACCURACY-RELATED AND FRAUD PENALTIES

§ 6662. Imposition of accuracy-related penalty on underpayments

(a) Imposition of penalty.--If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies.--This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following:

(1) Negligence or disregard of rules or regulations.

(2) Any substantial understatement of income tax.

(3) Any substantial valuation misstatement under chapter 1.

(4) Any substantial overstatement of pension liabilities.

(5) Any substantial estate or gift tax valuation understatement.

This section shall not apply to any portion of an underpayment on which a penalty is imposed under section 6663. Except as provided in paragraph (1) or (2)(B) of section 6662A(e), this section shall not apply to the portion of any underpayment which is attributable to a reportable transaction understatement on which a penalty is imposed under section 6662A.

(c) Negligence.--For purposes of this section, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless, or intentional disregard.

(d) Substantial understatement of income tax.--

(1) Substantial understatement.--

(A) In general.--For purposes of this section, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of--

(i) 10 percent of the tax required to be shown on the return for the taxable year, or

(ii) $5,000.

(B) Special rule for corporations.--In the case of a corporation other than an S corporation or a personal holding company (as defined in section 542), there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the lesser of--

(i) 10 percent of the tax required to be shown on the return for the taxable year (or, if greater, $10,000), or

(ii) $10,000,000.

(2) Understatement.--

(A) In general.--For purposes of paragraph (1), the term "understatement" means the excess of--

(i) the amount of the tax required to be shown on the return for the taxable year, over

(ii) the amount of the tax imposed which is shown on the return, reduced by any rebate (within the meaning of section 6211(b)(2)).

The excess under the preceding sentence shall be determined without regard to items to which section 6662A applies.

(B) Reduction for understatement due to position of taxpayer or disclosed item.--The amount of the understatement under subparagraph (A) shall be reduced by that portion of the understatement which is attributable to--

(i) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or

(ii) any item if--

(I) the relevant facts affecting the item's tax treatment are adequately disclosed in the

return or in a statement attached to the return, and

(II) there is a reasonable basis for the tax treatment of such item by the taxpayer.

For purposes of clause (ii)(II), in no event shall a corporation be treated as having a reasonable basis for its tax treatment of an item attributable to a multiple-party financing transaction if such treatment does not clearly reflect the income of the corporation.

(C) Reduction not to apply to tax shelters.--

(i) In general.--Subparagraph (B) shall not apply to any item attributable to a tax shelter.

(ii) Tax shelter.--For purposes of clause (i), the term "tax shelter" means--

(I) a partnership or other entity,

(II) any investment plan or arrangement, or

(III) any other plan or arrangement,

if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.

[(D) Repealed. Pub.L. 108-357, Title VIII, § 819(b)(2), Oct. 22, 2004, 118 Stat. 1585]

(3) Secretarial list.--The Secretary may prescribe a list of positions which the Secretary believes do not meet 1 or more of the standards specified in paragraph (2)(B)(i), section 6664(d)(2), and section 6694(a)(1). Such list (and any revisions thereof) shall be published in the Federal Register or the Internal Revenue Bulletin.

(e) Substantial valuation misstatement under chapter 1.--

(1) In general.--For purposes of this section, there is a substantial valuation misstatement under chapter 1 if--

(A) the value of any property (or the adjusted basis of any property) claimed on any return of tax imposed by chapter 1 is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be), or

(B)(i) the price for any property or services (or for the use of property) claimed on any such return in connection with any transaction between persons described in section 482 is 200 percent or more (or 50 percent or less) of the amount determined under section 482 to be the correct amount of such price, or

(ii) the net section 482 transfer price adjustment for the taxable year exceeds the lesser of

$5,000,000 or 10 percent of the taxpayer's gross receipts.

(2) Limitation.--No penalty shall be imposed by reason of subsection (b)(3) unless the portion of the underpayment for the taxable year attributable to substantial valuation misstatements under chapter 1 exceeds $5,000 ($10,000 in the case of a corporation other than an S corporation or a personal holding company (as defined in section 542)).

(3) Net section 482 transfer price adjustment.--For purposes of this subsection--

(A) In general.--The term "net section 482 transfer price adjustment" means, with respect to any taxable year, the net increase in taxable income for the taxable year (determined without regard to any amount carried to such taxable year from another taxable year) resulting from adjustments under section 482 in the price for any property or services (or for the use of property).

(B) Certain adjustments excluded in determining threshold.--For purposes of determining whether the threshold requirements of paragraph (1)(B)(ii) are met, the following shall be excluded:

(i) Any portion of the net increase in taxable income referred to in subparagraph (A) which is attributable to any redetermination of a price if--

(I) it is established that the taxpayer determined such price in accordance with a specific pricing method set forth in the regulations prescribed under section 482 and that the taxpayer's use of such method was reasonable,

(II) the taxpayer has documentation (which was in existence as of the time of filing the return) which sets forth the determination of such price in accordance with such a method and which establishes that the use of such method was reasonable, and

(III) the taxpayer provides such documentation to the Secretary within 30 days of a request for such documentation.

(ii) Any portion of the net increase in taxable income referred to in subparagraph (A) which is attributable to a redetermination of price where such price was not determined in accordance with such a specific pricing method if--

(I) the taxpayer establishes that none of such pricing methods was likely to result in a price that would clearly reflect income, the taxpayer used another pricing method to determine such price, and such other pricing method was likely to result in a price that would clearly reflect income,

(II) the taxpayer has documentation (which was in existence as of the time of filing the return) which sets forth the determination of such price in accordance with such other method and which establishes that the requirements of subclause (I) were satisfied, and

(III) the taxpayer provides such documentation to the Secretary within 30 days of request for such documentation.

(iii) Any portion of such net increase which is attributable to any transaction solely between foreign corporations unless, in the case of any such corporations, the treatment of such transaction affects the determination of income from sources within the United States or taxable income effectively connected with the conduct of a trade or business within the United States.

(C) Special rule.--If the regular tax (as defined in section 55(c)) imposed by chapter 1 on the taxpayer is determined by reference to an amount other than taxable income, such amount shall be treated as the taxable income of such taxpayer for purposes of this paragraph.

(D) Coordination with reasonable cause exception.--For purposes of section 6664(c) the taxpayer shall not be treated as having reasonable cause for any portion of an underpayment attributable to a net section 482 transfer price adjustment unless such taxpayer meets the requirements of clause (i), (ii), or (iii) of subparagraph (B) with respect to such portion.

(f) Substantial overstatement of pension liabilities.--

(1) In general.--For purposes of this section, there is a substantial overstatement of pension liabilities if the actuarial determination of the liabilities taken into account for purposes of computing the deduction under paragraph (1) or (2) of section 404(a) is 200 percent or more of the amount determined to be the correct amount of such liabilities.

(2) Limitation.--No penalty shall be imposed by reason of subsection (b)(4) unless the portion of the underpayment for the taxable year attributable to substantial overstatements of pension liabilities exceeds $1,000.

(g) Substantial estate or gift tax valuation understatement.--

(1) In general.--For purposes of this section, there is a substantial estate or gift tax valuation understatement if the value of any property claimed on any return of tax imposed by subtitle B is 65 percent or less of the amount determined to be the correct amount of such valuation.

(2) Limitation.--No penalty shall be imposed by reason of subsection (b)(5) unless the portion of the underpayment attributable to substantial estate or gift tax valuation understatements for the taxable period (or, in the case of the tax imposed by chapter 11, with respect to the estate of the decedent) exceeds $5,000.

(h) Increase in penalty in case of gross valuation misstatements.--

(1) In general.--To the extent that a portion of the underpayment to which this section applies is attributable to one or more gross valuation misstatements, subsection (a) shall be applied

with respect to such portion by substituting "40 percent" for "20 percent".

(2) Gross valuation misstatements.--The term "gross valuation misstatements" means--

(A) any substantial valuation misstatement under chapter 1 as determined under subsection (e) by substituting--

(i) in paragraph (1)(A), "200 percent" for "150 percent",

(ii) in paragraph (1)(B)(i)--

(I) "400 percent" for "200 percent", and

(II) "25 percent" for "50 percent", and

(iii) in paragraph (1)(B)(ii)--

(I) "$20,000,000" for "$5,000,000", and

(II) "20 percent" for "10 percent".

(B) any substantial overstatement of pension liabilities as determined under subsection (f) by substituting "400 percent" for "200 percent", and

(C) any substantial estate or gift tax valuation understatement as determined under subsection (g) by substituting "40 percent" for "65 percent".

Current through P.L. 110-19 approved 04-23-07

END OF DOCUMENT

26 U.S.C.A. § 6662A

Effective: [See Notes]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 68--ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES
SUBCHAPTER A--ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS
PART II--ACCURACY-RELATED AND FRAUD PENALTIES

§ 6662A. Imposition of accuracy-related penalty on understatements with respect to reportable transactions

(a) Imposition of penalty.--If a taxpayer has a reportable transaction understatement for any taxable year, there shall be added to the tax an amount equal to 20 percent of the amount of such understatement.

(b) Reportable transaction understatement.--For purposes of this section--

(1) In general.--The term "reportable transaction understatement" means the sum of--

(A) the product of--

(i) the amount of the increase (if any) in taxable income which results from a difference between the proper tax treatment of an item to which this section applies and the taxpayer's treatment of such item (as shown on the taxpayer's return of tax), and

(ii) the highest rate of tax imposed by section 1 (section 11 in the case of a taxpayer which is a corporation), and

(B) the amount of the decrease (if any) in the aggregate amount of credits determined under subtitle A which results from a difference between the taxpayer's treatment of an item to which this section applies (as shown on the taxpayer's return of tax) and the proper tax treatment of such item.

For purposes of subparagraph (A), any reduction of the excess of deductions allowed for the taxable year over gross income for such year, and any reduction in the amount of capital

losses which would (without regard to section 1211) be allowed for such year, shall be treated as an increase in taxable income.

(2) Items to which section applies.--This section shall apply to any item which is attributable to--

(A) any listed transaction, and

(B) any reportable transaction (other than a listed transaction) if a significant purpose of such transaction is the avoidance or evasion of Federal income tax.

(c) Higher penalty for nondisclosed listed and other avoidance transactions.-- Subsection (a) shall be applied by substituting "30 percent" for "20 percent" with respect to the portion of any reportable transaction understatement with respect to which the requirement of section 6664(d)(2)(A) is not met.

(d) Definitions of reportable and listed transactions.--For purposes of this section, the terms "reportable transaction" and "listed transaction" have the respective meanings given to such terms by section 6707A(c).

(e) Special rules.--

(1) Coordination with penalties, etc., on other understatements.--In the case of an understatement (as defined in section 6662(d)(2))--

(A) the amount of such understatement (determined without regard to this paragraph) shall be increased by the aggregate amount of reportable transaction understatements for purposes of determining whether such understatement is a substantial understatement under section 6662(d)(1), and

(B) the addition to tax under section 6662(a) shall apply only to the excess of the amount of the substantial understatement (if any) after the application of subparagraph (A) over the aggregate amount of reportable transaction understatements.

(2) Coordination with other penalties.--

(A) Coordination with fraud penalty.--This section shall not apply to any portion of an understatement on which a penalty is imposed under section 6663.

(B) Coordination with gross valuation misstatement penalty.--This section shall not apply to any portion of an understatement on which a penalty is imposed under section 6662 if the rate of the penalty is determined under section 6662(h).

(3) Special rule for amended returns.--Except as provided in regulations, in no event shall any tax treatment included with an amendment or supplement to a return of tax be taken into

account in determining the amount of any reportable transaction understatement if the amendment or supplement is filed after the earlier of the date the taxpayer is first contacted by the Secretary regarding the examination of the return or such other date as is specified by the Secretary.

Current through P.L. 110-19 approved 04-23-07

END OF DOCUMENT

26 U.S.C.A. § 6664

Effective: August 17, 2006

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 68--ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES
SUBCHAPTER A--ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS
PART II--ACCURACY-RELATED AND FRAUD PENALTIES

§ 6664. Definitions and special rules

(a) Underpayment.--For purposes of this part, the term "underpayment" means the amount by which any tax imposed by this title exceeds the excess of--

(1) the sum of--

(A) the amount shown as the tax by the taxpayer on his return, plus

(B) amounts not so shown previously assessed (or collected without assessment), over

(2) the amount of rebates made.

For purposes of paragraph (2), the term "rebate" means so much of an abatement, credit, refund, or other repayment, as was made on the ground that the tax imposed was less than the excess of the amount specified in paragraph (1) over the rebates previously made.

(b) Penalties applicable only where return filed.--The penalties provided in this part shall apply only in cases where a return of tax is filed (other than a return prepared by the Secretary under the authority of section 6020(b)).

(c) Reasonable cause exception for underpayments.--

(1) In general.--No penalty shall be imposed under section 6662 or 6663 with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

(2) Special rule for certain valuation overstatements.--In the case of any underpayment

attributable to a substantial or gross valuation overstatement under chapter 1 with respect to charitable deduction property, paragraph (1) shall not apply. The preceding sentence shall not apply to a substantial valuation overstatement under chapter 1 if--

(A) the claimed value of the property was based on a qualified appraisal made by a qualified appraiser, and

(B) in addition to obtaining such appraisal, the taxpayer made a good faith investigation of the value of the contributed property.

(3) Definitions.--For purposes of this subsection--

(A) Charitable deduction property.--The term "charitable deduction property" means any property contributed by the taxpayer in a contribution for which a deduction was claimed under section 170. For purposes of paragraph (2), such term shall not include any securities for which (as of the date of the contribution) market quotations are readily available on an established securities market.

(B) Qualified appraisal.--The term "qualified appraisal" has the meaning given such term by section 170(f)(11)(E)(i).

(C) Qualified appraiser.--The term "qualified appraiser" has the meaning given such term by section 170(f)(11)(E)(ii).

(d) Reasonable cause exception for reportable transaction understatements.--

(1) In general.--No penalty shall be imposed under section 6662A with respect to any portion of a reportable transaction understatement if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

(2) Special rules.--Paragraph (1) shall not apply to any reportable transaction understatement unless--

(A) the relevant facts affecting the tax treatment of the item are adequately disclosed in accordance with the regulations prescribed under section 6011,

(B) there is or was substantial authority for such treatment, and

(C) the taxpayer reasonably believed that such treatment was more likely than not the proper treatment.

A taxpayer failing to adequately disclose in accordance with section 6011 shall be treated as meeting the requirements of subparagraph (A) if the penalty for such failure was rescinded under section 6707A(d).

(3) Rules relating to reasonable belief.--For purposes of paragraph (2)(C)--

(A) In general.--A taxpayer shall be treated as having a reasonable belief with respect to the tax treatment of an item only if such belief--

(i) is based on the facts and law that exist at the time the return of tax which includes such tax treatment is filed, and

(ii) relates solely to the taxpayer's chances of success on the merits of such treatment and does not take into account the possibility that a return will not be audited, such treatment will not be raised on audit, or such treatment will be resolved through settlement if it is raised.

(B) Certain opinions may not be relied upon.--

(i) In general.--An opinion of a tax advisor may not be relied upon to establish the reasonable belief of a taxpayer if--

(I) the tax advisor is described in clause (ii), or

(II) the opinion is described in clause (iii).

(ii) Disqualified tax advisors.--A tax advisor is described in this clause if the tax advisor--

(I) is a material advisor (within the meaning of section 6111(b)(1)) and participates in the organization, management, promotion, or sale of the transaction or is related (within the meaning of section 267(b) or 707(b)(1)) to any person who so participates,

(II) is compensated directly or indirectly by a material advisor with respect to the transaction,

(III) has a fee arrangement with respect to the transaction which is contingent on all or part of the intended tax benefits from the transaction being sustained, or

(IV) as determined under regulations prescribed by the Secretary, has a disqualifying financial interest with respect to the transaction.

(iii) Disqualified opinions.--For purposes of clause (i), an opinion is disqualified if the opinion--

(I) is based on unreasonable factual or legal assumptions (including assumptions as to future events),

(II) unreasonably relies on representations, statements, findings, or agreements of the taxpayer or any other person,

(III) does not identify and consider all relevant facts, or

(IV) fails to meet any other requirement as the Secretary may prescribe.

Current through P.L. 110-19 approved 04-23-07

END OF DOCUMENT

26 U.S.C.A. § 6694

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 68--ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES
SUBCHAPTER B--ASSESSABLE PENALTIES
PART I--GENERAL PROVISIONS.

§ 6694. Understatement of taxpayer's liability by income tax return preparer

(a) Understatements due to unrealistic positions.--If--

(1) any part of any understatement of liability with respect to any return or claim for refund is due to a position for which there was not a realistic possibility of being sustained on its merits,

(2) any person who is an income tax return preparer with respect to such return or claim knew (or reasonably should have known) of such position, and

(3) such position was not disclosed as provided in section 6662(d)(2)(B)(ii) or was frivolous,

such person shall pay a penalty of $250 with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith.

(b) Willful or reckless conduct.--If any part of any understatement of liability with respect to any return or claim for refund is due--

(1) to a willful attempt in any manner to understate the liability for tax by a person who is an income tax return preparer with respect to such return or claim, or

(2) to any reckless or intentional disregard of rules or regulations by any such person,

such person shall pay a penalty of $1,000 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

(c) Extension of period of collection where preparer pays 15 percent of penalty.--

(1) In general.--If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is an income tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Preparer must bring suit in district court to determine his liability for penalty.--If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the income tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) Suspension of running of period of limitations on collection.--The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(d) Abatement of penalty where taxpayer's liability not understated.--If at any time there is a final administrative determination or a final judicial decision that there was no understatement of liability in the case of any return or claim for refund with respect to which a penalty under subsection (a) or (b) has been assessed, such assessment shall be abated, and if any portion of such penalty has been paid the amount so paid shall be refunded to the person who made such payment as an overpayment of tax without regard to any period of limitations which, but for this subsection, would apply to the making of such refund.

(e) Understatement of liability defined.--For purposes of this section, the term "understatement of liability" means any understatement of the net amount payable with respect to any tax imposed by subtitle A or any overstatement of the net amount creditable or refundable with respect to any such tax. Except as otherwise provided in subsection (d), the determination of whether or not there is an understatement of liability shall be made without regard to any administrative or judicial action involving the taxpayer.

(f) Cross reference.--

For definition of income tax return preparer, see section 7701(a)(36).

Current through P.L. 110-19 approved 04-23-07

26 U.S.C.A. § 6694

END OF DOCUMENT

Effective: October 23, 2004

Title 26. Internal Revenue Code
Subtitle F. Procedure and Administration
Chapter 68. Additions to the Tax, Additional Amounts, and Assessable Penalties

§ 6700. Promoting abusive tax shelters, etc.

(a) Imposition of penalty.--Any person who--

(1)(A) organizes (or assists in the organization of)--

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)--

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated. Notwithstanding the first sentence, if an activity with respect to which a

penalty imposed under this subsection involves a statement described in paragraph (2)(A), the amount of the penalty shall be equal to 50 percent of the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed.

(b) Rules relating to penalty for gross valuation overstatements.--

(1) Gross valuation overstatement defined.--For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or services if--

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related to the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) Authority to waive.--The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties.--The penalty imposed by this section shall be in addition to any other penalty provided by law.

CREDIT(S)

(Added Pub.L. 97-248, Title III, § 320(a), Sept. 3, 1982, 96 Stat. 611, and amended Pub.L. 98-369, Div. A, Title I, § 143(a), July 18, 1984, 98 Stat. 682; Pub.L. 101-239, Title VII, § 7734(a), Dec. 19, 1989, 103 Stat. 2403; Pub.L. 108-357, Title VIII, § 818(a), Oct. 22, 2004, 118 Stat. 1584.)

Current through P.L. 110-19 approved 04-23-07

END OF DOCUMENT

26 U.S.C.A. § 6701

Effective: [See Text Amendments]

United States Code Annotated
Title 26. Internal Revenue Code
Subtitle F. Procedure and Administration
Chapter 68. Additions to the Tax, Additional Amounts, and Assessable Penalties
Assessable Penalties
Part I. General Provisions

§ 6701. Penalties for aiding and abetting understatement of tax liability

(a) Imposition of penalty.--Any person--

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty.--

(1) In general.--Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) Corporations.--If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) Only 1 penalty per person per period.--If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) Activities of subordinates.--

(1) In general.--For purposes of subsection (a), the term "procures" includes--

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) Subordinate.--For purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) Taxpayer not required to have knowledge.--Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim, or other document.

(e) Certain actions not treated as aid or assistance.--For purposes of subsection (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) Penalty in addition to other penalties.--

(1) In general.--Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) Coordination with return preparer penalties.--No penalty shall be assessed under subsection (a) or (b) of section 6694 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) Coordination with section 6700.--No penalty shall be assessed under section 6700 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

CREDIT(S)

(Added Pub.L. 97-248, Title III, § 324(a), Sept. 3, 1982, 96 Stat. 615, and amended Pub.L. 101-239, Title VII, § 7735(a), (b), Dec. 19, 1989, 103 Stat. 2403.)

26 U.S.C.A. § 7203

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 75--CRIMES, OTHER OFFENSES, AND FORFEITURES
SUBCHAPTER A--CRIMES
PART I--GENERAL PROVISIONS

§ 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

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END OF DOCUMENT

26 U.S.C.A. § 7206

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 75--CRIMES, OTHER OFFENSES, AND FORFEITURES
SUBCHAPTER A--CRIMES
PART I--GENERAL PROVISIONS

§ 7206. Fraud and false statements

Any person who--

(1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.--Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.--Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.--In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property.--Conceals from any officer or employee of the United States

any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.--Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

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END OF DOCUMENT

26 U.S.C.A. § 7212

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 75--CRIMES, OTHER OFFENSES, AND FORFEITURES
SUBCHAPTER A--CRIMES
PART I--GENERAL PROVISIONS

§ 7212. Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference.--Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

(b) Forcible rescue of seized property.--Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

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END OF DOCUMENT

26 U.S.C.A. § 7402

Effective: [See Text Amendments]

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 76--JUDICIAL PROCEEDINGS
SUBCHAPTER A--CIVIL ACTIONS BY THE UNITED STATES

§ 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments.--The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) To enforce summons.--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

(c) For damages to United States officers or employees.--Any officer or employee of the United States acting under authority of this title, or any person acting under or by authority of any such officer or employee, receiving any injury to his person or property in the discharge of his duty shall be entitled to maintain an action for damages therefor, in the district court of the United States, in the district wherein the party doing the injury may reside or shall be found.

[(d) Repealed. Pub.L. 92-310, Title II, § 230(d), June 6, 1972, 86 Stat. 209]

(e) To quiet title.--The United States district courts shall have jurisdiction of any action brought by the United States to quiet title to property if the title claimed by the United States to such property was derived from enforcement of a lien under this title.

(f) General jurisdiction.--

26 U.S.C.A. § 7402

For general jurisdiction of the district courts of the United States in civil actions involving internal revenue, see section 1340 of title 28 of the United States Code.

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END OF DOCUMENT

26 U.S.C.A. § 7408

Effective: October 23, 2004

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE F--PROCEDURE AND ADMINISTRATION
CHAPTER 76--JUDICIAL PROCEEDINGS
SUBCHAPTER A--CIVIL ACTIONS BY THE UNITED STATES

§ 7408. Actions to enjoin specified conduct related to tax shelters and reportable transactions

(a) Authority to seek injunction.--A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree.--In any action under subsection (a), if the court finds--

(1) that the person has engaged in any specified conduct, and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) Specified conduct.--For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is--

(1) subject to penalty under section 6700, 6701, 6707, or 6708, or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

(d) Citizens and residents outside the United States.--If any citizen or resident of the United States does not reside in, and does not have his principal place of business in, any United States

judicial district, such citizen or resident shall be treated for purposes of this section as residing in the District of Columbia.

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END OF DOCUMENT