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December 29, 2004

BY OVERNIGHT MAIL

Hon. Chester J. Straub
U.S. Court of Appeals for the Second Circuit
1702 United States Courthouse
40 Foley Square
New York, New York 10007

RE: Schulz v. IRS
Docket No. 04-0196-cv

Dear Judge Straub:

This letter memorandum is submitted in reply to Defendant IRS's letter, dated December 20, 2004.

Plaintiff obtained a tape recording of the argument heard on December 13, 2004. Based on the recording, the court asked Defendant IRS to respond to the following two questions:

Q.1 "Whether, in the view of the IRS or any case law, the taxpayer is under some compunction at the initial moment of receiving the Summons or Subpoena, which might then create jurisdiction for a motion to quash, and if not, what is the policy of the IRS, either in regulations, case law or otherwise, as to what it is the IRS sees as occurring in the enforcement proceeding, that is to say, whether that proceeding is intended and seeks only an enforcement order, which if not complied with may thereafter lead to contempt, or whether that proceeding might in some way initially place the taxpayer in jeopardy of contempt or some other unforeseen circumstance."

Q.2 "What is the government's understanding of the law as presented by the Second Circuit, not by the District Courts within the Circuit, but by this Court, starting with Judge Friendly's opinion in *Colton* and as you see the cases developing thereafter."

Defendant IRS has replied to the first part of the court's first question by admitting that I was under some "compunction" (i.e., that I was "obligated" and "required" to comply) at the initial moment of receiving the Summons. However, the IRS then goes on to imply that the taxpayer's compunction does not directly create jurisdiction under 7604(a), or under any other principle of law or equity. Regarding a motion by the taxpayer to quash such a Summons, IRS contends that jurisdiction exists *only* following IRS's initiation of an enforcement action under 7604(b).

I disagree.

If the court has jurisdiction under 7604(a) to tell a taxpayer Summoned under 7602 to comply with the Summons, the court obviously has jurisdiction under 7604(a) to tell the IRS the taxpayer does not have to comply with the Summons. After all, that is the purpose of every trial under 7604 – to compel or not to compel. Therefore, the court has jurisdiction under 7604(a), whether the action was initiated by the taxpayer OR by the IRS. Taxpayers, as free individuals can do whatever they want to do as long as there is no law that says they can't. One of their Rights is to Petition for Redress – any issue, any branch. The IRS, on the other hand can only do what the law specifically authorizes it to do. Section 7604 authorizes the IRS to initiate an action to compel. 7604 does not prohibit a taxpayer from initiating an action to quash. Jurisdiction cannot be one sided, it cannot be the domain of the privileged IRS.

There is only one substantive difference between a district court action initiated by the taxpayer under 7604(a), in response to a 7602 Summons, and one initiated by the IRS under 7604(a), if the taxpayer failed to respond to the Summons. The difference is, if the IRS initiated the action, the IRS would (without a hearing) have the power, under 7604(b), to have the taxpayer arrested, incarcerated and held over indefinitely for a hearing and trial. Otherwise, there is no substantive difference. Either way, the taxpayer would be required to prove the IRS's purpose in issuing the Summons was not legitimate, and the IRS would be required to prove its purpose was not illegitimate.

Surely, if the IRS issues a formal 7602 Summons "obligating and requiring" the taxpayer to turn over his private and personal books and records, the IRS would obviously be prepared to argue in court the legitimacy of the Summons, whether the IRS is the defendant or the plaintiff before the Court.

It is not in the interest of the Rights, Freedoms and Liberties of the People to have the IRS, or any other unit of the government, willy-nilly requiring the People to turn over their private books and records without *bona fide* cause or, worse yet, as I have alleged in my motion to quash, for the purpose of chilling People's enthusiasm to assert their First Amendment Right to Petition the government for a Redress of Grievances.

Defendant IRS does not say the taxpayer is or is not under "some compunction at the initial moment of receiving the Summons." Instead, Defendant IRS responds to the Court's question by saying, "While the IRS certainly maintains that a taxpayer is required to comply with a properly served administrative summons, this obligation is not self-enforcing; (citations omitted). Thus, as indicated in oral argument, the IRS does not have the power to compel the taxpayer to obey an administrative summons without obtaining an order from the proper district court." (my emphasis).

By admitting that the taxpayer "is required to comply," the government admits that the taxpayer is under some compunction, for "to require" is commonly known to mean to demand or claim by right or authority -- that is, to insist on having. This gives rise to a

sharp feeling of uneasiness on the part of the average taxpayer – to some compunction to respond.

In addition, by admitting that the taxpayer has an "obligation" to comply with the Summons, the IRS admits the taxpayer is under some compunction to act, for "to be obligated" is commonly known to mean to be bound by a legally imposed duty.

However, in an apparent attempt to weaken the government's admission that the taxpayer is under some compunction to respond, which creates jurisdiction, the IRS goes on to say that the Summons is not "self-enforcing," and that the IRS does not have the power to enforce the Summons without obtaining an order from a district court. That may be, but IRS's lack of power to continue on with the second phase of its overall statutory enforcement action does not mean the taxpayer is without some compunction to respond. To the average taxpayer, and I would venture to say, to most attorneys, a Summons is an enforcement action. It is fair to say that the average taxpayer, including myself, develops a sharp feeling of uneasiness at the initial moment of receiving a 7602 Summons, that is to say, he immediately has some compunction to respond upon seeing the word "Summons" sprawled across the top of the page. That compunction is then reinforced as the summoned party reads the first eight words of the Summons itself ("You are hereby summoned and required to appear ….")(See A.161), and then as the summoned party goes on to read the second page of the Summons.

Nowhere does the Summons suggest that the Summons is without any teeth, that there are no adverse consequences should the summoned party fail to respond to it, that it is not a crime to fail to respond to it, that the summoned party could not be arrested and held "as for contempt" if he failed to respond to it, or that the summoned party could not be humiliated and embarrassed, or worse (imprisoned and financially sanctioned), by being sued by "the government" in federal court for failing to respond to the Summons, or that the taxpayer is without any legal obligation to act. In fact, the opposite is true. Reinforcing the taxpayer's compunction to respond, as if the words "You are hereby summoned and required …" are not enough, are the words found on the second page of the Summons titled, "Provisions of the Internal Revenue Code." (See A-162). Included are Sections 7604 and 7210. 7604 tells the taxpayer that if he was not immediately obedient and submissive to the IRS, by doing as directed by the Summons, he could be arrested for contempt and held over for trial. 7210 tells the taxpayer that he could be criminally convicted for neglecting to appear and otherwise obey the Summons, and could spend a year in prison and be fined $1,000 plus the costs of prosecution.

26 U.S.C. 7604 (b) states plainly and unambiguously that if the summoned party "neglects or refuses to obey such summons," the IRS has the power to immediately apply to a magistrate or judge of the district court for an order to have the summoned party arrested "as for contempt" and held over for a hearing or trial. (My emphasis). The provision of § 7604 (b) for an "attachment . . . as for a contempt" is applicable to persons who are summoned and who make default or refuse to comply. See *Reisman v Caplin*, 375 U.S. 440, 447-448.

Section 7210 is the penalty statute and it states plainly that the penalty for the crime of neglecting to appear and otherwise do as the 7602 Summons directs is imprisonment and financial sanctions.

There is only one meaning that can be drawn from the regulatory scheme consisting of the combination of 26 U.S.C. 7602, 7604(b) and 7210: any summoned party, at his own peril, had better plan to respond in some way to the receipt of the Summons; to refuse to respond could result in his immediate arrest and incarceration "as for contempt," because Congress has decreed in 7604 that showing disrespect for the authority of the IRS by neglecting to obey the Summons might be judged as an act of "contempt," punishable by attachment/arrest and incarceration for some indefinite period of time, pending the results of a trial, and <u>further punishable</u> according to Congress, under 7210, by imprisonment and financial penalties.

The Court asked, in Question #1 if the taxpayer is under some compunction <u>at the initial moment of receiving the Summons</u>. I believe it is important to summarize the record regarding the facts surrounding the "initial moment" of my receipt of the Summons on May 30, 2003. I do so in the paragraphs that follow.

From May of 1999 through April of 2003, I had been exercising my First Amendment Right to Petition the government for a Redress of Grievances relating to the direct, un-apportioned tax on labor, the Iraq Resolution, the USA Patriot Act and the Federal Reserve System. The only remedy being sought was answers to legitimate questions. (A.26-57).

On April 4, 2003, the IRS mailed to me a "6700" letter (A.152-155), which falsely characterized the legitimate Petition for Redress as a "promotion of an illegal tax shelter," and the People who were Petitioning as "investors." The letter requested a meeting with me. Included with the letter was an extensive list of personal documents, books and records that I was requested to make available at the meeting.

The meeting was held on May 30, 2003. However, instead of giving the IRS what it had requested, I responded to the IRS's April 4 letter by handing the IRS agent a letter dated May 30, 2003 (A. 156-160), which not only summarized the Petition for Redress process, it summarized fundamental Rights which I asserted were being interfered with by the IRS's demands of April 4, 2003.

As the record shows (A.55, par. 81), the IRS agent took one look at the letter and said, "I am not going to play the constitution game." The agent then handed me the 7602 Summons (A.161-167), with its more coercive and forceful "requirement" that I meet with the agent on June 25, 2003, to produce the listed document, books and records.

I immediately felt distress. I knew I could not obey the Summons, without giving up my Rights, any more than I could obey the "6700" letter. I knew there was nothing I could say at the June 25 meeting "required" by the Summons that I had not already said at the May 30 meeting "requested" by the "6700" letter. I knew the Summons would have even

more of a chilling effect than the "6700" letter had on the enthusiasm of People to continue exercising their First Amendment Right to Petition the government for Redress of Grievances. I was afraid. I knew I had to comply or respond in some way to the Summons or the IRS would have grounds for some additional, more coercive enforcement action(s). I felt I had to respond in some way to the Summons – that it was wrong, and dangerous, to ignore a summons from the government. At the same time I knew there wasn't anything else I could give the IRS that I had not already given them, without yielding my individual Rights, especially those guaranteed by the First Amendment.

While I had just a twinge of misgiving and fear upon the receipt of the Summons, I knew what my Rights were and that I would not give them up. I knew that I not only had the Right to pursue the four Petitions for Redress against the Executive and Legislative branches, but I also had the Right to Petition the Judiciary and the IRS for a Redress of Grievances relating to the IRS Summons, which Summons was allegedly issued for no reason other than to interfere with, if not to shut down completely, the four Petitions for Redress against the Executive and Legislative branches.

I noticed the district court had jurisdiction under 7604(a) to tell a taxpayer Summoned under the IRC to comply with the Summons. I determined that the court obviously also had jurisdiction under 7604(a), to tell the IRS the taxpayer does not have to comply with the Summons, <u>whether the action was initiated by the taxpayer OR by the IRS.</u>

I could find no law that said I was prohibited from Petitioning the Judiciary and the IRS to quash the Summons. Regardless, I knew my First Amendment Right to Petition the Court for a redress of a constitutional tort (in this case, an illegitimate Summons), trumped any statutory prohibition.

As an average citizen-taxpayer, the Summons was an order <u>with authority</u> to respond. Congress obviously meant for taxpayers to be responsive to IRS summonses, or there would be no need for the coercive sanctions authorized by Sections 7604 (b) and 7210 of the Internal Revenue Code. I responded.

On page two of his response, under "2", the IRS says that under 7604 (b), "the IRS can request an order from the court compelling testimony and/or production of relevant or material documents." In fact, by its plain language, 7604 authorizes much more than a mere summons enforcement action to compel the production of documents; it authorizes an action "as for contempt," with a conviction leading to imprisonment and financial penalties unless the summoned party responded to the Summons. In fact, the IRS fails to mention in its answer to the Court that while the government is "requesting an order from the court compelling testimony," the taxpayer may already have been arrested and incarcerated for contempt, pending the result of the government's "request for an order to compel."

The IRS argues, "Thus, the taxpayer is afforded an opportunity to present challenges to the IRS summons prior to being found in contempt by the district court…The Summons

issued to Schulz included IRS Form 2039, which sets forth relevant provisions of the Code, including the jurisdictional provisions of Section 7604. A.162." (page 2, par 2 and fn 1).

The IRS suggests that the person summoned is not in any jeopardy of adverse consequences for not complying with the summons until after the person summoned has had the opportunity to present challenges to the summons. Such is clearly not the case. The IRS utterly fails to mention the fact that in 7604(b), Congress explicitly says that even before any IRS initiated proceeding in district court gets underway, all district court magistrates and judges have the duty to hear every [*ex-parte*] application by the IRS for the arrest of any person summoned under 7602 who neglects to obey the summons, and that the court has the duty to issue an arrest warrant on the mere showing by the IRS that the person neglected to obey the summons, and that the court has the duty to proceed to a hearing, and the POWER to make an order, consistent with the law for punishment for contempt, "to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience." (my emphasis).

Without defining "usual case," Defendant IRS then alleges that "in the usual case [the IRS] seeks to have the information sought in the summons turned over to it." Regardless, the issue is not what the IRS "usually" does, the question is what power does the government have to enforce obedience to the requirements of the summons and whether the person summoned has some compunction and a Right to respond, thereby creating jurisdiction.

I turn now to the IRS's response to the Court's second question.

The IRS alleges that in *Colton*, the Court's presentation of the law was that the Court had jurisdiction for a challenge to a 7602 Summons because of the consequences of 7604(b) and 7210, but after *Reisman* the Court's presentation of the law, as in *Kulukundis*, is that the Court lacks such jurisdiction. The IRS argues that this purported change in the law in this Court is due to *Reisman* , which, the IRS says, "expressly prohibits such consequences without prior judicial review where a taxpayer wishes to interpose good faith challenges to an IRS summons."

In fact, in *Colton*, the government moved this Court to dismiss the taxpayers' appeal for lack of subject matter jurisdiction under the doctrine of sovereign immunity, for mootness, and lack of jurisdiction under 28 U.S.C. 1291 under the doctrine of finality. In denying the government's motion to dismiss the appeal in *Colton*, this Court, in dicta, discussed 7604 and 7210, saying, "These statutes appear to be much more drastic than the usual provisions as to subpoenas by administrative agencies" (*Colton* at 489). However, the Court denied the motion to dismiss the appeal on the ground that the doctrine of sovereign immunity did not apply, the issue was not moot and the decision by the district court was appealable under 28 U.S.C. 1291.

It is also important to note that in Colton, this Court went on to say, "As we read them, resort by the Government to the district court under § 7604(a), is permissive only; this is

in no way a condition to any other action." *Colton* at 489. Here, this court seems to be saying that if the government decides not to move the district court under 7604(a), the taxpayer can.

In *Colton*, without any reliance on the significance of 7604 or 7210, this Court reinforced the idea that the district court has jurisdiction to hear challenges by taxpayers to the legitimacy of 7602 Summons when it said, "Neither the Internal Revenue Code nor any other statute contains specific provision for a motion by a person receiving a summons under § 7602, to vacate or modify it. Petitioners have cited a number of instances where motions to that end have been entertained in this Circuit, apparently without objection from the Government, some of which have reached this Court (citations omitted)." *Colton*, at 489.

The IRS is correct in arguing that *Reisman* expressly prohibits the consequences of 7604(b) and 7210 without prior judicial review where a taxpayer wishes to interpose good faith challenges to an IRS summons. What the IRS fails to say in its letter to the Court, however, is that the taxpayer has two options available to him to "interpose good faith challenges to an IRS summons." The taxpayer can interpose his challenges in district court by initiating an action under 7604(a), or he can interpose his challenges in a meeting with the IRS under 7602.

As to jurisdiction, the U.S. Supreme Court has held, "There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. (cases omitted). We agree with that view…." *Reisman v Caplin*, 375 U.S. 440, 445.

Finally, in *Kulukundis*, this Court was hearing an appeal by Manuel E. and M. Michael Kulukundis, who, as corporate officers, had been personally assessed nearly $1,000,000 for failure to pay withholding taxes. The IRS had sued them in District Court to recover the money. While the case was pending in Court, the IRS issued 7602 summonses on them. The Defendants refused to respond to the Summonses. The IRS asked the District Court to order the defendants to comply. The District Court granted the order and the defendants appealed to this court. In its decision affirming the District Courts order, this court said, in effect, referring to the recent decision in *Reisman*, that the contempt and punitive provisions of § 7604(b) and § 7210 are applicable only to persons who "wholly made default or contumaciously refused to comply" with a 7602 Summons [such as the defendants], but not to a witness who "appears and interposes good faith challenges to the summons."

From this, it is fair to say that a taxpayer has some compunction at the initial moment of his receipt of the Summons, creating jurisdiction for a motion to quash, knowing that if he defaulted and did not respond he could be subject to the contempt and punitive provisions of 7604(b) and 7210.

Neither the U.S. Supreme Court, nor this Court has ever held that District Courts do not have jurisdiction to hear challenges to 7602 summonses on constitutional and other grounds, initiated by parties summoned and those affected by a disclosure. Under 26 U.S.C. 7605c, "No taxpayer shall be subjected to unnecessary examination or investigation…"

Indeed, regardless of the statutory constructions found within Title 26 regarding administrative Summons, no American citizen should be denied the Right to challenge such Summons as a plaintiff.

Based on the above, Plaintiff-Appellant respectfully requests that the order of the District Court be reversed or remanded, requiring the government defendants to appear and argue the legitimate purpose of its Summons.

Respectfully submitted,

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