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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATE OF AMERICA Plaintiff-Appellee, v. IRWIN A. SCHIFF Defendant-Apellant.	)	No. 05-15233 D.C. No. CV-01-00895-PMP Motion for Reconsideration

Irwin A. Schiff, Appellant, pro se, in this action, moves this Court to reconsider its decision of September 11, 2006 in which it sustained a summary judgment in favor of the Government. This action embraced a number of contested legal and factual issues all of which the District Court resolved in favor of the United States. That alone justified this appeal, yet this Court imposed a $6,000 sanction upon Appellant for taking this appeal.

In his appeal Appellant raised 11 issues, however, the Appeals Court addressed none of them - while seeming to address the fraud penalty, which it did not do. In addition, the Court stated on page 2:

> Schiff filed no return for 1979. For 1980-1985, Schiff filed returns reporting zero income and zero tax due, and requesting refunds for the amounts withheld by his employers from his wages. On each he also included a statement contending that his income was not taxable.

With the exception of the 1979 reference, all of the other statments in that paragraph are totally incorrect and have absolutely nothing to do with the tax returns at isssue in this appeal. As Schiff had already pointed out to the Court (in connection with its withdrawn Ruling of March 29, 2006) in his Notice of April 24, 2006, that the taxes at issue for 1980-85 were not based on "zero" returns, but were

based on returns reporting substantial income - and those returns are shown in the Government's "Excerpts of Record" at pages 97-120. As this court **was already notified,** the taxes reported on them were as follows: 1980, $36,413; 1981, $8,484; 1982, $142,497; 1983, $24,127; 1984, $5,567; and 1985, $7,327.00 No refund was was requested on any of the returns at issue. No return made any reference to wages, or claimed that the income reported on them "was not taxable." Therefore, it is clear that **ALL** of the Court's statements regarding the nature of the income tax returns at issue in this case were incorrect. Therefore, how could the Court's conclusions concerning the assessments and fraud penalties derived from them be accurate? In addition, how can this Court ethically impose sanctions on Appellant when it has totally misconstrued the tax returns he filed and which serve as the basis for this appeal? This consideration alone should persuade the court to rescind its $6,000 **sanction**.

Schiff also asserts that his 40 page Opening Brief, supported by 18 statutes, 16 Supreme Court and 11 lower court decisions; 4 constitutional clauses; 2 House and Senate Reports; 1 Treasury decision; and 224 pages of Excerpts of Record is inconsistent with the imposition of a $6,000 sanction.

Schiff would ask the Appeals Court to take notice of the fact that nowhere in the Government's 58-page Reply Brief did the Government contradict anything in Schiff's Opening Brief. In contrast, Schiff can point out numerous false claims contained in the Government's Reply, and since they undoubtedly influenced the Court's decision, some of them should be dealt with here.

For example. On page 1 the Government states: "Although Schiff contends that the District Court lacked jurisdiction because (in his view) the federal income tax is unconstitutional (e.g. Br.3)."

This claim is false. Not only does no such claim appear on page 3 of Schiff's Opening Brief, but Schiff has never taken this position. SChiff's claim that the District Court lacked jurisdiction has nothing to do with the alleged unconstitutionality of the income tax, but is based on three separate issues covered in Schiff's Opening Brief. In addition, Schiff states on page 16 of that Brief.

> Therefore, in order for the income tax statutes not to be unconstitutional, Congress removed all of the mandatory provisions that had formerly been included in the law since their 1913 adoption, and starting with the 1954 Code, the income tax "laws" became "constitutional."

Therefore, the Government's entire statement on this issue was false.

On page 39 the Government states: "Schiff's primary contention on appeal (Br 18-24) is that 'no law' makes him liable for the federal income tax because the Code restricts 'income' to 'corporate profit' and, since he had no corporate profit, he had no taxable income." This is another fabrication. Schiff claims he is not liable for income taxes because no law makes him "liable" for any such "tax," not because he has no taxable income. True, Schiff has no taxable income EITHER, but that is a separate issue. Secondly, Schiff has never said, "the Code restricts 'income' to 'corporate profit.'" SChiff claims that the Code restricts "income" to income received in the "constitutional sense," in accordance with Senate Report 1633 and House Report 1337 (Br., 82 & 83). So why didn't the Government mention those Reports in its Reply? In not doing so, the Government deliberately falsified this entire issue.

On page 27 of its REply Brief, the Government claims that Schiff "persistently" argues that he is not required to comply with federal tax laws..." But on pages 4 and 5 of his Opening Brief, Schiff refers to 16 tax statutes, which ones does SChiff claim he is not obligated to "comply with"?

On page 3, the Government states: "Schiff's primary argument on appeal is that 'no law' requires the payment of income taxes." The Government repeats this claim on page 25, as follows: "Schiff asserts in this appeal that 'no law' requires the payment of federal income taxes." Well, if that was Schiff's "primary argument," why didn't the Government simply cite the law that requires the payment of income taxes, and thereby **demolish** Schiff's "primary argument"?

The Government failed to do so, because no such statute exists.

Having thus established that the Government can only support its position by making false claims, Schiff will now turn to the specific issues raised in his appeal and will show how both the Government and the Court violated the law by failing to address them or by addressing them falsely.

(A) ISSUE NO. 1

As Schiff pointed out (Br.11): "The Secretary of the Treasury is the only party given any statutory authority to enforce the income tax." There is absolutely no mention of the IRS in the 1954 Code — with the exception of some benign references to the IRS in Subtitle F. However, the Secretary is authorized in Code section 7701(12) to delegate his enforcement authority to "any officer, employee, or agency of the Treasury DEpartment." Well, how is the Secretary supposed to do that? First, he must issue a delegation order, delegating his authority to some "officer, employee, or agency of the Treasury." Then he is required to notify the American public of this. How does the Secretary do that? By publishing his Delegation Order in the Federal Register. As Schiff pointed out in Br. 11, section 1505 of Title 44, requires that "every document" having "general applicability and legal effect" be published in the Federal Register. Obviously,

if the Secretary delegated his authority to enforce the income tax to the Commissioner (who could then re-delegate his authority to lower echelons of the IRS), the legal ramifications of this would be sweeping. It would subject virtually every American to the authority of individuals whom the law itself does not subject them too. Therefore, a delegation order having such a wide spread legal effect would obviously have to be published in the Federal Register. Accordingly, Schiff stated in his Opening Brief: "Unless the Government can produce these two documents (the Delegation Order and proof of its publication in the Federal Register) the Government's lawsuit would have to be dismissed for fraud - since it is entirely based on the declarations of four IRS employees (who, in the absense of these two documents) would have had no legal authority to do what they claimed to have done in their Declarations. And despite the Government being put on notice that failure to produce these two documents would be fatal to its case, it failed to produce the documents, even though it produced 154 pages of documents in its Excerpts of Record.

In addition, on pages 12-13 Schiff pointed out that all IRS agents other than criminal investigators of the Intelligence Division (to which none of the four IRS employees involved in this case belonged) fall into subsection 7608(a) of the Code, and that Code section only authorizes those agents that fall within it to enforce "subtitle E and other laws pertaining to liquor, tobacco, and firearms." This means that the declaration of Sandra Davaz that supported the "Entry of Judgment" was null and void, as were the declarations of Messieurs Wethje, Netcoh, and Dragon IRS employees who prepared declarations involving the income tax Schiff allegedly owed for the years 1980-1985 and how they determined the fraud penalties.

The Court of Appeals in its Ruling of 9/11/2006 fails to address the relevance of IR Code section 7608 and 7701(12) and 44 U.S.C 1505, nor

explain why Schiff's reliance on thme is misplaced. Nor does the 9th Circuit address the consequences of the Government's failure and inability to produce the documents that would establish that the four IRS employees as named above, had any authority to perform any functions involving income taxes.

Obviously the raising by Schiff of these three statutes, can hardly be said to "lack merit" since their judicial application would alone require the dismissal of the Government's lawsuit, a claim that the 9th Circuit in its Ruling does not deny.

(B) ISSUE NO.2

As pointed out by Schiff in his Opening Brief, the Supreme Court in U.S. v Hill, 123 US 681 held that before a federal court could acquire jurisdiction in a tax matter, the tax at issue had to be "directly traceable" to Congress' constitutional power to "lay and collect taxes." However, as Schiff further pointed out in his Opening Brief, the Constitution only authorizes Congress to impose two classes of taxes: direct taxes, which must be imposed pursuant to the rule of apportionment, and indirect taxes, which must be imposed pursuant to the rule of geographic uniformity. Schiff further pointed out, the 16th Amendment conferred on Congress "no new power of taxation" (Stanton v. Baltic Mining, 240 US 103 (1915)), and that Congress' power to lay and collect taxes was still limited to the powers it had "before the (16th) Amendment was adopted." (Eisner v. Macomber, 252 US 189 (1920)). This being the case, the district court (as Schiff argued to that court) could have no jurisdiction to enforce the payment of income taxes because the income tax is not imposed either as an apportioned direct tax or as a geographically uniform indirect tax, and, as such, it is not "directly traceable" to Congress' constitutional power to "lay and collect taxes."

Therefore, by raising this issue, it can hardly be said that

Schiff raised an issue that "lacked merit." On the contrary, the judicial application of these Supreme Court decisions (and the others cited and quoted in Schiff's Opening Brief) would **ALONE** require the dismissal of the Government's lawsuit, a claim that the 9th Circuit in its Ruling of 10/11/06 did not dispute.

(C) ISSUE NO.3

28 USC 1396 requires that before a district court can have jurisdiction to enforce the payment of a federal tax, there has to be a statute making persons "liable" for that tax. In its Reply Brief the Government did not take issue with Schiff's claim regarding the jurisdictional requirement contained in 28 USC 1396. (Nor did the district court take issue with Schiff's claim at the trial level) Therefore, in his Appeal Brief, Schiff put the Government on notice that unless it could identify in its reply the statute that made persons "liable" for income taxes, the 9th Circuit would have to dismiss the Government's lawsuit on the basis that the district court (which refused to address this issue) had no jurisdiction pursuant to the provisions of 28 USC 1396.

On pages vii and viii of its Reply Brief, the Government listed 18 statutes it would discuss in its Reply Brief. Why didn't it include a statute that made people "liable" for the income taxes at issue? - since, as pointed out by Schiff, the existence of such a statute was crucial to the very existence of its lawsuit? It didn't do so because no such statute exists. Therefore, how can this Court sustain a ruling of a lower court that orders Schiff to pay $2.6 million in connection with a "tax" the statutory "liability" for

which neither the Government nor any court involved in this case can identify? This, of course, is apart from the fact that for the same reason, the district court had no jurisdiction (pursuant to 28 USC 1396) to even entertain the Government's lawsuit.

Therefore, in raising this issue, it can hardly be said that Schiff raised an issue that "lacked merit." On the contrary, the judicial application of 28 USC 1396 would **ALONE** require the dismissal of the Government's lawsuit, a claim that the 9th Circuit did not dispute in its Ruling of 10/11/06.

(D) issue no 4

The District Court's Final Order rested on the erroneous assumption that assessments based on amounts reported on a taxpayer's return are entitled to a "presumption of correctness." Of course, since the 9th Circuit believes that the taxes at issue for the years 1980-85 are based on "zero" returns, it can have no idea were the assessments for the years 1980-85 came from. So the 9th Circuit is totally out of the loop on this issue. Suffice it to say, that the taxes at issue for the years 1980-85 were based on returns Schiff filed during the course of a probation violation hearing. Schiff did not believe the amounts of taxable income and taxes due as shown on those returns were correct (as he so stated on each return), but he reported such amounts in the hope that by doing so, he would not be held to have violated the terms of his probation - scheduled to terminate in a matter of weeks. The Government assessed the taxes Schiff reported on those coerced returns and Judge Dorsey still held that Schiff violated the terms of his probation, and stripped him of all the time he had served on probation, and sentenced him to another two years in jail.

At the district court level Schiff argued that the amounts

(1) Schiff had not violated the terms of his probation and was not violated by his own probation officer but by a probation officer that had never met or spoken to SChiff. No revocation hearing was ever held and no attorney was assigned to Schiff as required by law. The violation was a frame-up from start to finish.

shown on those returns were incorrect, for two reasons: (1) they did not report "income" in the "constitutional sense" (in conformity with House Report 1337 & Senate REport 1633) and they did not take in to consideration the $72,505 that Schiff paid to Howy Murzin who co-authored Schiff's 1982 best-seller "How Anyone Can Stop Paying Income Taxes." The District Court ignored both issues and, therefore, essentially resolved this issue in favor of the United States, in violation of the fundamental legal principle that before a court can award a summary judgment to a party, it must resolve all contested issues of fact in favor of the other party.

In addition, the Court's claim that the amount of taxes shown on Schiff's returns for the years 1980-85 are entitled to "a presumtion of correctness" is totally without merit. No court has ever ruled that assessments based on taxes shown on a taxpayer's return are entitled to a "presumption of correctness." If this were true, there would be no reason to have a Tax Court.

Obviously, therefore, this issue as raised by Schiff does not "lack merit," since the judicial application of the principle referred to above, would have to result in a reversal of the summary judgment given to the United States and this contested, factual issue placed in the hands of a jury.

(E) ISSUE NO. 5

The Court, after being informed by the Government that it had apparently considered the wrong fraud statute (26 U.S.C. 6662(a) instead of the former 26 U.S.C. 6653(b)), presumably corrected its error in its "Corrected" Memorandum of 10/11/06 by citing the former section 6653(b). However in doing so, the Court also cited 26 U.S. 6654 and 6673(a) as somehow being related to the fraud penalties at issue here. However section 6654 has to do with

an underpayment of an estimated tax, and section 6673(a) has to do with the imposition of sanctions for instituting an action in Tax Court "primarily for delay." Therefore neither of these statutes is remotely connected to the fraud penalties at issue here and should not have been included in the Court's Memorandum of 9/11/06.

In its Memorandum of 9/11/06, the Court states: "Because Schiff was convicted of criminal tax fraud for all pertinent years, he is estopped from denying liability for civil tax fraud for those same years. See 26 U.S.C. 7201." This statement by the Court is erroneous on a variety of grounds.

First of all, the pertinent years at issue are 1980-1985; however Schiff was allegedly convicted of criminal tax fraud for 1980-82, but not for the years 1983-85.(2) So how is Schiff "estopped from denying liability for civil tax fraud" for the years 1983-1985? Certainly the Government never proved that Schiff committed criminal tax fraud for the years 1983-85, and Schiff contests the fact that he committed tax fraud for those years. So here we have the trial court awarding a summary judgment to the Government in connection with a contested issue of fact regarding civil tax fraud which, by law, the Government is required to prove "by a preponderance of the evidence." And apparently the 9th Circuit is prepared to sustain such an obvious violation of law.

But civil fraud cannot exist here on **ANY BASIS.** As Schiff pointed out to the trial court (who refused to address this issue), and in his Openin/3Brief to this Court, the fraud penalty in section 6653 is based entirely upon an "underpayment" of tax. However an "underpayment" is further defined in that Code section as a "deficiency" as defined in section

(2) Schiff says "allegedly, because he was convicted of tax evasion only after Judge Peter Dorsey re-instructed a hung jury that it could convict Schiff of tax evasion even if the Government did not prove the affirmative act of evasion hewas charged with committing. See "Is Affirmative Misconduct Necessary For Tax Evasion," **The Journal of Taxation**, February, 1987.

6211(a)(1)(A.)" So, unless a "deficiency" exists, there cannot be a fraud penalty pursuant to 6653(b). And since there were no "deficiencies" with respect to Schiff for any of the years 1980-85, he cannot be guilty of fraud under section 6653(b) on **ANY BASIS.**(3)

In its Reply Brief, the Government did not challenge Schiff's claim as to why the fraud penalty of 6653(b) did not apply to him, and in reproducing portions of section 6653(b) in its Reply, theGovernment fraudulently omitted that portion of the statute that provided that fraud, under that statute, was based on the existence of a "deficiency."

When Schiff discovered that the fraud penalty at issue was based entirely on the existence of a deficiency, and had nothing to do with the elements of fraud as contained in the Government's pleadings, he called the two tax lawyers who were handling this case for the Government, since it was inconceivable to Schiff that they did not know that the fraud penalties imposed on him did not apply in his case.

When Schiff got both Mssrs Henry C. Darmstadter and G. Patrick Jennings on the phone, he said: "How could you seek to extract 1 million dollars from me knowing full well that I couldn't possibly owe this amount?" After a short pause, Mr. Darmstadter replied,

(3) While Schiff, in footnote 8 of his Opening Brief, refers to a number of pages in his "Excerpts of Record" that establish, from Government documents, that he had no tax "deficiency" for any of the years 1980-85, he realizes that, because of the Court's busy schedule, it might not have had the time to review those documents. Therefore Schiff has attached hereto, as Exhibit A, the document for the year 1982. I ask the Court to take judicial notice, that it shows an assessment of $142,497.00 from a "filed return," and the absense of any"deficiency." The TC 300 entry on the document shows a "zero" amount - a TC 300 being the Code number that signifies a "deficiency" entry. Also the fact that the document shows an assessment from an original return - a TC 150 being the Code number that signifies an entry from an original return - proves that the Court's claim in its Memorandum opinion, that "Schiff filed returns reporting zero income" was incorrect. If this were true, the $142,497 would have been recorded as a "deficiency," (with a TC 300 Code) and not as an original assessment, with a TC 150 Code. These Code entries are more extensively explaind in Schiff's " Excerpts of Record" p.143.

"We are only doing our job." I said, "That's what they said at Nuremberg." "No," he corrected me, "At Nuremberg, they said they were just following orders." I told him, "That's a distiction without a difference."

Therefore, if this Court were to sustain a one million dollar fraud penalty (including related interest charges), even though the law at issue does not provide for it, then the 9th Circuit will have established that law in the United Satates is, in many respects, no different from how "law" was enforced in Nazi Germany.

(F) ISSUE NO. 6

This issue involved Schiff's claim that none of his alleged "income" was received in the "constitutional sense" in accordance with House Report 1337 and Senate Report 1622 as shown in Schiff's "Excerpts of Record" pages 82 & 83. The income Schiff had originally reported on his "zero" return correctly reflected the amount of "income" Schiff received in the "constitutional sense"; however, Connecticut District Court Judge, Peter Dorsey got a Connecticut probation Officer (4) to violate Schiff for having filed returns that correctly reported Schiff's taxable income. As a result, Schiff was coerced into filing a second set of returns (in the hopes that by doing so he would not be found by Judge Dorsey of having violated his probation) which reflected what the Government claimed was Schiff's income for the years 1980-1985, and it was this income and the taxes derived from them that the Government assessed and which are the basis of the taxes at issue in this litigation for the years 1980-85.

However, the Government based the "income" it attributed to Schiff as income he received in the "ordinary sense," and not on "income"

(4) Schiff was then living in New York City, and had a New York probation supervisor who did not violate Schiff. The Connecticut probation Officer had never met with, or spoken to Schiff in his life.

he received in the "constitutional sense," as Congress mandated in those Congressional REports. Therefore, the Government incorrectly determined Schiff's taxable income for all the years at issue.

As was pointed out by Schiff in his Opening Brief, the Supreme Court held in Pollock v. Farmer's Loan and Trust Co., 158 U.S. 601,637 (This decision was not overturned by the 16th Amendment, and it has never been reversed or overturned, as Shepardizing this case will reveal), that taxes on "income" from real and personal property fall within the constitutional catagory of "direct taxes," and, therefore, can only be lawfully taxed pursuant to the rule of apportionment.

All of the "income" attributed to Schiff was derived from personal property, his labor. And therefore, Schiff's "income" cannot be made subject to a compulsary income tax, which has not been imposed on the basis of apportionment. Of course, this is why the laws themselves do not subject Schiff to any such tax, since no statute makes him "liable" for any such tax, or requires him "to pay" any such tax. Apart from the Pollock decision, Schiff cited and quoted from a number of other Supreme Court decisions all of which held that "income," under our revenue laws, means the same thing as "income" meant in the Corporation Excise Tax Act of 1909. And in that Act, "income" meant a corporate profit. Therefore none of Schiff's alleged "income" was taxable for any of the years at issue.

Therefore, in raising this issue, Schiff has not raised an issue that "lacks merit." The 9th Circuit can disregard Schiff's claim with respect to this issue only by disregarding the following Supreme Court decisions: Pollock v. Farmer's Loan and Trust, supra; Brushaber, v. Union Pacific RR, supra; Straton Independence v. Howbert, 231 US 399,414; Southern Pacific v. Lowe, 247 U.S. 330; Bowers v. Kerbaugh-Empire, Co. 271 U.S. 170, 174, Burnet v. Harmel, 287 US 103; Doyle v. Mitchell, 247 U.S. 179,; and Merchant's Loan & Trust v.

Smientanka, 255 U.S. 509, 519. Therefore, if this issue "lacks merit," so do the claims of the Supreme Court as contained in the above 8 decisions as well as the intent of Congress as expressed in those Congressional Reports also referred to above.

G ISSUE NO 7

In this issue, Schiff pointed out that the Tax Court's 1979 determination could not be reduced to judgment(pursuant to the Government's lawsuit) for two reasons: (1) the statute of limitations for doing so expired 6 years before the Government initiated its lawsuit; and (2) the IRS never completed the Tax Court's determination by sending Schiff a notice and demand for payment.

As pointed out by Schiff in his Opening Brief, Government records show that the first assessment made for 1979 was on 05/20/1985; therefore, the statute of limitation for reducing 1979 assessments to judgment expired on 05/20/1995 or some 6 years prior to the Government instituting this lawsuit. The Government in its Reply Brief sought to escape the consequences of this assessment by claiming (in its footnote 11) that this assessment was somehow "invalid." But the Government had already argued that entries on a form 4340 were "presumptively correct." In addition, as shown on page 111 of Schiff's "Excerpts of Record," the 5/2085 assessment is coded as a TC 150 assessment. The $44,199.99 tax due for 1979 is shown as being assessed as a "deficiency," and is coded as a TC 300 assessment. However, as shown on page 143 of Schiff "Excerpts of Record," the Government's decoding manual, "ADP and IDRS Information" shows that without a TC 150 assessment - which "establishes a tax module" - no subsequent assessments can be made.

So, if we eliminate as "invalid" the TC 150 assessment made on 05/20/1985, we also have to eliminate as "invalid" the subsequent TC 300 assessment of $44,199.99 made on 09/03/1992. In other words,

either both assessments are valid or both assessments are invalid. In either case, the Tax Court's determination, along with its penalty determinations, are rendered null and void for the purposes of this lawsuit.

In addition, as pointed out in Schiff's Opening BrieF (at page 32), section 6215 requires that "the entire amount redetermined as the deficiency . . .shall be paid upon notice and demand for payment." However, the IRS never sent Schiff a notice and demand for payment. This can easily be established from the Government's own records. Pages 111-115 of the Government's "Excerpts of Record" which record all of the assessment and collection activity with respect to 1979, includes no entry showing that a notice and demand for payment was ever sent to Schiff. (More on this issue will be found on pages 17-19 herein.

The trial Court ignored both of these issues. However, the first issue as discusssed above, irrefutably bars the Court from allowing Schiff's alleged 1979 income taxes from being reduced to judgement; while the second issue, involving a contested issue of fact, bars the Government from getting a summary judgment. If these two issues involving the Government's attempt to get a summary judgment involving taxes and penalties allegedly due for 1979 do not merit an appeal based on the facts herein presented, then Schiff has not the vaguest idea what kind of facts merit an appeal.

H. ISSUE NO.8

In this issue Schiff pointed out that his 1985,7201 prosecution and conviction automatically barred the Government from being able to reduce to judgment Schiff's income taxes for the years 1980-82. As the Supreme Court held in Sansone v. U.S., 380 U.S.345: "...the existence of a tax deficiency [is an] essential element" of a 7201

prosecution. However, in order for there to be deficiencies to support Schiff's 1985 prosecutions, there had to be assessments against him for those years to support those "essential" deficiencies. If there were no assessments (and no deficiencies) when Schiff was prosecuted in 1985, then his prosecution for the years 1980-82 **was obviously illegal.** Therefore, if the 9th Circuit wants to claim that Schiff was prosecuted legally in 1985, it cannot allow assessments that had to have existed at that time to be reduced to judgment some 18 years later.

In order to get around its dilemma, the Government had to make some outlandish claims. On page 49 of its Reply Brief it claims: "A deficiency exists prior to an assessment, " and, "A tax deficiency exists from the date a reurn is due." Both statements are totally false.

A deficiency is defined in Code section 6211 as: "The amount by which the tax imposed ...exceeds the excess of - (1) the sum shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayor thereon." Therefore, by law, there cannot be a deficiency unless the taxpayer files a return "and shows a tax thereon." In addition, Code section 6204 makes clear that a "deficiency assessment"is a "supplemental assessment" that is made "whenever it is ascertained that any (prior) assessment is imperfect or incomplete." Obviously, therefore,there cannot be a "deficiency" unless a prior assessment is "imperfect or incomplete." In addition, Treasury Reg. 601.103(b) makes clear that a deficiency can not exist until the taxpayer's return is "examined" and "adjustments" (the deficiency) "proposed" by the Commissioner. And finally the IRS' "ADP and IDRS Manual" (Schiff's Excerpts of Record p.143) shows that without the posting of an initial assessment, no deficiency can exist.

Therefore if the 9th Circuit were to sustain the trial court and allow assessments for the years 1980-82 to be reduced to judgment, then

the 9th Circuit will have determined that there were no assessments - and no deficiencies - to support Schiff's 1985 convictions. Therefore, the 9th Circuit would have determined, **sub silentio**, that Schiff was illegally convicted of tax evasion for the years 1980-82.(4) Therefore, based on this Court's determination of that fact, Schiff will file a Fed. Rules of Civil Procedure Rule 60(b) motion to set aside his 1985 convictions based upon such a 9th Circuit determination. All things considered, this can hardly be considered an issue that has "no merit."

I. ISSUE NO 9.

In its complaint, the Government twice alleged that it sent Schiff a "proper" notice and demand for payment for the years 1979-1985. However the Government submitted no evidence that it did so. As Schiff set out more fully in his Opening Brief, Schiff provided the court with:

(1) An IRS Form 17, which Treasury Decision 1995 identifies as being the statutory notice and demand for payment.

(2) An excerpt from the 9th Circuit decision Bentard et al v. U.S., 209 F.2d 734, which confirms that a Form 17 "was always issued after the time for payment had gone by."

(3) Excerpts from discovery material in which the Government: (a) refused to deny that a Form 17 is the official form used to make a "notice and demand" for payment; (b) refused to deny that a Form 17 was never sent to Schiff for any of the years at issue; (c) refused to supply Schiff with the IRS form number of the document the Government claimed constituted the required "notice and demand" it allegedly sent Schiff. (See Schiff's "Excerpts of Record" pp 88-89.) In any case, none of the 22 documents (Schiff's Excerpts of record pp 111-133) which

(4) Actually Schiff filed a pro se motion to dismiss his 1985 prosecution on these grounds, when his retained attorney, John Williams,Esq., declined to do so. But it was summarily denied by Connecticut District Judge Peter Dorsey as being "frivolous." And Mr. Williams failed to raise the issue on appeal.

purport to show all of the IRS assessment and collection activity for all the years at issue, do not contain one entry showing that a notice and demand for payment was ever sent to Schiff for any of the years at issue. So there is absolutely nothing in the record to support the Government's claims in its complaint that Schiff was sent "proper notice and demand for payment" for all the years at issue - and pursuant to 26 USC 6303, said notices have to be sent within 60 days of making the assessment.

Over the last10-15 years, the Government has seized hundreds of thousands of dollars of Schiff's property (and continues to do so to the present day) based on taxes Schiff allegedly owes for the years 1979-85, years for which no notice and demand for payment was ever sent to Schiff. Proving once again that in enforcing the income tax, the Government is unconcerned about the law. However, the law is clear. "The lackof proper notice and demand was fatal to the acquisition of the Government's lien against Coson." U.S. v. Coson, 286 F.2d 453(9th Cir. 1961); Without "a prior notice and demand for payment, the power to levy is inoperative." Shapiro v. Sec. of State, 499 F.2d 527 (D.C. Cir. 1974).

In its Reply Brief the Government failed to challenge any of Schiff's claims that established that the Government did not send him a notice and demand for payment for any of the years at issue as claimed in the Government's complaint. Therefore, this represents an obvious contested issue of fact, which, by law, had to be resolved by the trial court in favor of Schiff. Therefore,this one issue should have prevented the Government from getting a summary judgment. Therefore, if the rule of law is to play any part in this appeal, the 9th Circuit, at the very least, will reverse the summary judgment and allow a jury to decide the factual question presentedby this issue. In addition, it is clear that by raising this issue, Schiff did not

raise an issue that "lacked merit," since this issue alone, if properly decided, should reverse the summary judgment.

J. ISSUE NO. 10

This issue will not be presssed in this Motion for Reconsideration.

K. ISSUE NO 11.

At Schiff's recent criminal trial, the Government introduced two tax returns that Schiff filed for each of the years 1980-85: one being a "zero" return, and the other being the coerced return upon which the taxes for the years 1980-85 are based. When Schiff asked the Government witness who introduced the returns why the Government had two returns for each of those years, she could offer no explanation. However, none of the 4340s for the years 1980-85 as shown in the Government's "Ex. of Record' pp 31-62 show any entry "return filed" as is shown in the 4340 for the year 1979, see the Government's Excerpt of Rec. p. 17. So, why didn't Schiff's 4340s for the years 1980-85 show entries that returns had been filed for those years, especially when the IRS had two of them? The explanation for both phenomena is simple.

The IRS processed Schiff's "zero" returns in the same manner as it processed any return. Therefore, the statment in the Government's Reply Brief (pp 14-15) that "those (zero) returns were not considered valid returns and were not accepted for filing by the IRS," was false. They were accepted, and, as such, they satisfied SChiff's conditions of probation, as his probation officer agreed. (They were also valid returns pursuant to the 9th Circuit in U.S. v. Long, 618 Fd.2 74 and US v. Kimball, 896 F.2d 1218). Therefore Judge Dorsey's claim that Schiff's "zero" returns were not valid returns and were not accepted for filing by the IRS was a totally fictitious claim.(5) And the reason Schiff's 4340s do not show "returns filed" for those years is since

(5) Judge Dorsey was anxious to violate Schiff and get him back in prison, so Schiff couldn't promote his latest book which depicted Judge Dorsey in an unfavorable light.

the IRS had two original returns for each of those years, it didn'tknow which one to post as being Schiff's return for that year, so it posted neither.

Therefore, this issue involves Schif's claim that his valid returns for each of the years 1980-85 were his "zero" returns" and not the coerced returns which formed the basis of all of the assessments for the years 1980-85. Therefore, which set of returns constitute Schiff's actual returns for the years 1980-85 is a factual question to be decided by a jury weighing the evidence as presented by Schiff and the Government. Should the jury find for SChiff, that would, in effect, eliminate the Government's claim for all those years. Therefore, in appealing the trial court's incontrovertible error in resolving this fundamental factual issue in favor of the United States, the Appellant has hardly raised an issue that "lacks merit." This issue literally cries out for resolution before an impartial jury.

CONCLUSION

Schiff moved the 9th Circuit Court of Appeals to reconsider its Memorandum decision of 10/ 11/1906 in the hopes that in doing so, this Court would be ever mindful of its obligation to uphold the United States Constitution, and the laws derived from it, since that obligation requires that this Court dismiss the Government's lawsuit on a variety of grounds (or, at least reverse the summary judgment) and r/scind the totally unwarranted $6,000 sanction. Appellant urges this Honorable Court to reconsider its Order of 10/11/06 in that light.

Respectfully submitted,

Dated: October , 2006

Irwin Schiff, pro se

CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion to Reconsider was placed on our mail box for delivery to a U.S. Post Office to delivery to: Ms. Judith A. Hagl Esq U.S. Dept. of Justice, tax Division, Appellate Section, P.O. Box 502, Washington, D.C. 20044.

Irwin Schiff