No. 05-4756-ag

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DANIEL TAYLOR JENKINS,
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

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v.

COMMISSIONER OF INTERNAL REVENUE,

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ON APPEAL FROM THE DECISION OF THE
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BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

The Tax Court's order and decision was entered by Judge James S. Halpern on March 3, 2005, and is not reported officially or unofficially.

JURISDICTIONAL STATEMENT

On October 23, 2003, the Internal Revenue Service (IRS) Office of Appeals mailed a Notice of Determination Concerning Collection

Action(s) under Section 6320 and/or 6330 of the Internal Revenue Code of 1986 (26 U.S.C.) (I.R.C.) to Daniel Taylor Jenkins (taxpayer), determining that it was appropriate to collect his unpaid federal income tax liability for 2001 by levy. (A. 18-21.)1/ Taxpayer had 30 days within which to file a petition in the Tax Court contesting the notice of determination. I.R.C. § 6330(d)(1). His petition seeking review of the notice (Doc. 1) was postmarked November 20, 2003, and was therefore timely under I.R.C. § 7502(a), even though it was received by the Tax Court on November 25, 2003. The Tax Court had jurisdiction over the petition under I.R.C. § 6330(d)(1)(A).

The Commissioner filed a motion for summary judgment and to impose sanctions under I.R.C. § 6673 on the grounds that the petition was filed primarily for the purpose of delay or that taxpayer's position in the petition was frivolous and groundless. (A. 9-14.) On March 3, 2005, the Tax Court (Judge James S. Halpern) granted the motion for

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1/ "A." references are to the documents in the separately bound Appendix filed by Appellant. "Doc." references are to the documents in the original record, as numbered by the Clerk of the Tax Court.

summary judgment and entered a decision that the Commissioner could proceed with the collection action as determined in the notice of determination. (A. 43-48.) The Tax Court also granted the Commissioner's motion for sanctions, and imposed a penalty in the amount of $5,000. (A. 47-48.) The Tax Court's decision disposed of all claims of all parties and was therefore final and appealable.

On March 31, 2005, taxpayer filed a motion to vacate or revise the Tax Court decision, which was denied by imprint stamp on June 1, 2005. (A. 49-78, 80.) This motion stayed the time for appeal because it was filed within 30 days of the decision. Fed. R. App. P. 13(a)(2); Tax Court Rule 162. On August 24, 2005, within 90 days after disposition of the motion to vacate or revise, taxpayer filed a timely notice of appeal to this Court. (A. 81.) *See* I.R.C. § 7483; Fed. R. App. P. 13(a)(1). This Court has jurisdiction under I.R.C. § 7482(a)(1).

STATEMENT OF THE ISSUES

1. Whether the Tax Court correctly granted summary judgment upholding the IRS's proposed collection action, where taxpayer's arguments were without merit, and where there were no facts in dispute.

2. Whether the Tax Court properly imposed sanctions for raising frivolous or groundless arguments where the arguments advanced by taxpayer had no basis in law, and he had been so informed when he raised them in prior Tax Court litigation.

STATEMENT OF THE CASE

Taxpayer brought this case to contest the Commissioner's determination that a proposed levy action could proceed to collect the unpaid balance of his 2001 federal income tax liability. The Tax Court granted summary judgment for the Commissioner, and imposed a penalty for raising frivolous or groundless arguments. Taxpayer now appeals.

STATEMENT OF THE FACTS

Taxpayer filed a timely federal income tax return for 2001, on which he reported a tax due of $4,118.58. With his return, he submitted a payment for $1,842.58. (A. 20.) There were no credits or payments made from any other source towards his 2001 tax liability. (A. 20) Taxpayer attached a letter to his return indicating that the balance due was being held in escrow pending the opportunity to direct his tax payment to non-military government expenditures. (A. 20)

The Commissioner issued notices requesting taxpayer to pay the balance due for 2001. (A. 20) On May 16, 2003, the Commissioner issued to taxpayer a Final Notice of Intent to Levy and Notice of Your Right to a Hearing. (A. 20, 22-23.) Taxpayer filed a request for a Collection Due Process (CDP) hearing. (A. 24-25.) On October 8, 2003, a telephone conference was held between taxpayer and an IRS settlement officer. (A. 16.) During the course of the CDP hearing, taxpayer expressed his desire to direct the remainder of his tax payment to non-military government expenditures, and he

acknowledged that this would require a legislative remedy. (A. 20-21) Taxpayer also asked a question regarding calculation of the amount exempted from attachment by a notice of levy, and he accepted the settlement officer's explanation of this matter. (A. 21) On October 23, 2003, the IRS issued to taxpayer a notice of determination in which it determined that the proposed levy could proceed. (A. 18-21.) Taxpayer filed a timely petition for review in the Tax Court. (Doc. 1.)

The Commissioner filed a motion for summary judgment and to impose sanctions under I.R.C. § 6673. (A. 9-14.) The Commissioner asserted in his motion that taxpayer had previously filed a petition in the Tax Court with respect to his 1985 tax liability in which he claimed a credit with respect to his opposition to military expenditures by the federal government, and that he was on notice from the Tax Court's disposition of that case that such arguments were without merit. (A. 13.)

The Tax Court granted summary judgment for the Commissioner. (A. 43-48.) The Court held that there was no issue of fact, and that

there was no merit to taxpayer's claim that the Constitution allowed him to retain his unpaid tax until such time as it could be directed to non-military expenditures. The Tax Court characterized taxpayer's claim as "representative of a class of arguments that have been universally rejected by this and other courts." (A. 46.) The Tax Court also imposed a penalty of $5,000 under I.R.C. § 6673, based on its holding that taxpayer's position was frivolous within the meaning of the statute. (A. 47-48.) The Tax Court observed that "[n]ot only did petitioner's prior proceedings before this court serve to warn him that his arguments were without merit, the settlement officer who conducted the hearing also reminded petitioner of the possible sanctions he might face by petitioning this court." (A. 47-48.)

Taxpayer now appeals.

SUMMARY OF ARGUMENT

Taxpayer brought suit to protest the IRS's attempt to levy to collect federal income tax he admits he owes, but which he refuses to pay because of his religious objection to funding the military. No court has ever ruled in favor of a taxpayer on this issue, and many courts have issued opinions rejecting the argument that taxpayers have a right to withhold taxes (or to claim tax deductions) on this basis under the United States Constitution or any other authority. This Court and others also have held that the Religious Freedom Restoration Act does not provide those who object to war on religious grounds the right to withhold their taxes.

The Tax Court correctly granted summary judgment for the Commissioner, and, pursuant to I.R.C. § 6673(a)(1), imposed a $5,000 sanction against taxpayer for instituting proceedings in which his position was frivolous or groundless. The imposition of sanctions was not an abuse of the court's discretion, inasmuch as taxpayer made no new arguments below, but merely reiterated arguments that have been

rejected by every court that has considered them, including the Tax Court in an earlier case brought by taxpayer. He was on notice from the court in that case that his arguments lacked merit, and, indeed, he acknowledged that new legislation would need to be enacted by Congress to provide the remedy he seeks. There are no special circumstances present here that should shield him from sanctions.

The Tax Court's decision is correct and should be affirmed.

ARGUMENT

I

THE TAX COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR THE COMMISSIONER UPHOLDING THE COMMISSIONER'S PROPOSED COLLECTION ACTION WHERE TAXPAYER'S ARGUMENTS WERE WITHOUT MERIT AND WHERE THERE WERE NO FACTS IN DISPUTE

Standard of Review

This Court reviews the Tax Court's grant of summary judgment *de novo*. *Eisenberg v. Commissioner*, 155 F.3d 50, 53 (2d Cir. 1998).

A. Introduction

Within 60 days of making a tax assessment, the Commissioner must notify the taxpayer of the assessment and demand payment. I.R.C. § 6303. When a taxpayer neglects or refuses to pay a tax liability after assessment, notice, and demand, the Commissioner may collect by levy under I.R.C. § 6331, after first giving the taxpayer 30 days notice of intent to do so. *See* I.R.C. § 6331(d)(1) and (2).

A taxpayer receiving a final notice of intent to levy has the right to request a "collection due process" (CDP) hearing. I.R.C. §§ 6320(b), 6330(b); Treas. Reg. § 301.6330-1(b) (26 C.F.R.). During the CDP proceeding, the IRS generally is prevented from going forward with any levy. I.R.C. § 6330(e).

CDP hearings are conducted by the IRS Office of Appeals. I.R.C. § 6330(b); Treas. Reg. § 301.6330-1(a). The scope of a CDP hearing is defined by § 6330(c). *See also* I.R.C. § 6320(c). The Appeals Office must obtain verification from the Secretary "that the requirements of any applicable law or administrative procedure have been met." I.R.C.

§ 6330(c)(1). A taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy," including spousal defenses (*i.e.*, "innocent spouse" relief from joint liability under I.R.C. § 6015), challenges to the appropriateness of collection activities, and offers of collection alternatives (*e.g.*, posting a bond, substitution of other assets, an installment agreement, or an offer in compromise). I.R.C. § 6330(c)(2)(A); Treas. Reg. § 301.6330-1(e)(3) (Q & A E6).

The taxpayer may also raise at the hearing "challenges to the existence or amount of the underlying tax liability" if he "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." I.R.C. § 6330(d)(2)(B). *See Roberts v. Commissioner*, 329 F.3d 1224, 1227-1228 (11th Cir. 2003). A taxpayer may not raise an issue that was raised and considered in any previous administrative or judicial proceeding in which he participated meaningfully. I.R.C. § 6330(c)(4). The Appeals Office must also consider whether "any proposed collection action balances the need for the efficient collection of taxes with the

legitimate concern of the person that any collection action be no more intrusive than necessary." I.R.C. § 6330(c)(3)(C); *see* Treas. Reg. §§ 301.6330-1(e)(3) (Q & A E8), 301.6330-1(f)(1).

After the CDP hearing, the Appeals Office issues a notice of determination setting forth its findings and decision. Treas. Reg. § 301.6330-1(e)(3)(Q & A E8). A taxpayer may seek judicial review of the determination. I.R.C. § 6330(d). Jurisdiction lies in the Tax Court if the underlying taxes are the type of taxes (such as income taxes) that the Tax Court generally has jurisdiction to review. I.R.C. § 6330(d)(1). Otherwise, the taxpayer may seek review in the appropriate federal district court. *Ibid*.

In this case, taxpayer requested a CDP hearing, but did not actually contest the correctness of the tax liability or the appropriateness of the proposed collection action. As we will show, the Tax Court correctly granted summary judgment for the Commissioner because the arguments raised by taxpayer were without merit.

B. Taxpayer raised only groundless arguments

There is no statutory provision or other authority that would allow taxpayer to withhold payment of any portion of his federal income tax liability because he disagrees with the manner in which it might be spent by the Federal Government, however sincere his convictions in that respect may be. There is a long and uniform line of cases in this and other courts disallowing deductions or reductions of tax claimed by taxpayers for the portion of their taxes that they estimate is likely to be spent for military purposes, based on their religious, moral, or ethical objections to war. *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999) (taxpayers cannot withhold the portion of their tax liability that they calculate would be allocated to the Department of Defense); *Adams v. Commissioner*, 170 F.3d 173 (3d Cir. 1999) (government not required to accommodate taxpayer's religious beliefs by ensuring that her tax payments do not fund the military); *United States v. Ramsey*, 992 F.2d 831, 833 (8th Cir. 1993) (there is no First Amendment right to avoid federal income taxes on religious grounds); *Jenney v. United States*, 755

F.2d 1384, 1387 (9th Cir. 1985) (taxpayers cannot withhold a portion of their tax liability based on their conscientious objection to war); *Kahn v. United States*, 753 F.2d 1208 (3d Cir. 1985) (same); *Barton v. Commissioner*, 737 F.2d 822 (9th Cir. 1984) (there is no constitutional right to refuse to pay taxes based on a conscientious opposition to war); *Lull v. Commissioner*, 602 F.2d 1166, 1169 (4th Cir. 1979)(taxpayers may not claim deductions based on their conscientious religious objection to war). To the same effect are *First v. Commissioner*, 547 F.2d 45 (7th Cir. 1976); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969); *Kalish v. United States*, 411 F.2d 606 (9th Cir. 1969); *Farmer v. Rountree*, 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958); *Greenberg v. Commissioner*, 73 T.C. 806, 812 (1980); *Anthony v. Commissioner*, 66 T.C. 367 (1976), *aff'd without pub. opinion*, 566 F.2d 1168 (3d Cir. 1977); *Egnal v. Commissioner*, 65 T.C. 255, 263 (1975); *Scheide v. Commissioner*, 65 T.C. 455 (1975); *Russell v. Commissioner*, 60 T.C. 942, 947 (1973); *Muste v. Commissioner*, 35 T.C. 913 (1961).

Any possible remaining basis for claiming that tax liability might properly be avoided because of a sincerely held, conscientious objection to the uses to which public funds are put, was laid to rest by the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252 (1982). There, a member of the Old Order Amish sect sought to avoid payment of social security taxes on the basis of his religiously based opposition to participating in the social security system, and to contributing to such a public welfare system. There, as here, there was no question raised as to the sincerity or depth of the taxpayer's convictions in this regard. Nevertheless, the court made it clear that neither the First Amendment nor any other Constitutional or statutory provision permitted him to avoid the taxes in question. Indeed, in reaching that conclusion, the court specifically noted (albeit in dicta) that a taxpayer could not avoid income taxes based on his conscientious opposition to war or defense spending. 455 U.S. at 260.

On appeal, taxpayer asserts for the first time (Br. 7-8, 10-11, 22-26) that his claims must be addressed under the Religious Freedom

Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb, *et seq*.), Addendum, *infra*. This Court has twice addressed a similar contention, however, and has rejected it. *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999); *Packard v. United States*, 7 F. Supp.2d 143 (D. Conn. 1998), *aff'd without pub. opinion*, 198 F.3d 234 (2d Cir. 1999). *See also Adams v. Commissioner*, 170 F.3d 173 (3d Cir. 1999).

Under RFRA, the government may not substantially burden a person's exercise of religion unless it shows that the burden is in furtherance of a compelling government interest, and that it is the least restrictive means of furthering that compelling government interest. 42 U.S.C. § 2000bb-1. In *Browne*, *Packard*, and *Adams*, the taxpayers asserted that RFRA required the government to accommodate their religious beliefs by ensuring that their tax payments did not fund the military. In *Adams*, the Third Circuit rejected this contention, relying on *Lee*, 455 U.S. 252, and *Hernandez v. Commissioner*, 490 U.S. 680 (1989), and a long line of cases "that have refused to recognize free

exercise challenges to the payment of taxes or penalties imposed due to a refusal to pay taxes as a protest against the military activities of the United States." 170 F.3d at 178. The court analyzed the government's compelling interest in collecting tax revenue and the least restrictive means of doing so, and concluded that the least restrictive means was to implement the tax collection system "in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to [be] built into the legislative scheme." 170 F.3d at 179. The court acknowledged that legislative changes can and do occur, but rejected the notion that exceptions on religious grounds should be carved out by the courts. 170 F.3d at 179-180.

In *Browne*, 176 F.3d at 26, this Court followed the Third Circuit's opinion in *Adams* in holding that the Brownes could be assessed penalties and interest where the IRS was forced to levy to collect the portion of their taxes that they withheld based on their religious objection to funding the Department of Defense. This Court rejected the claim that RFRA shielded the Brownes from penalties and interest,

"because voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in uniform, mandatory participation in the federal income tax system." 176 F.3d at 26.

While acknowledging (Br. 23) that the decisions in *Browne* and *Adams* "might appear to foreclose an accommodation" in this case, taxpayer nonetheless argues (Br. 23-26), that under the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, __ U.S. __, 126 S. Ct. 1211 (2006), the Commissioner must present specific evidence that the compelling interest test is satisfied through application of the challenged law to the particular claimant – here, Mr. Jenkins – whose sincere exercise of religion is substantially burdened. Taxpayer's reliance on *Gonzales* is misplaced.

In *Gonzales*, a religious sect known as UDV brought suit seeking a preliminary injunction to prevent enforcement of the Controlled Substances Act, which banned its use of Hoasca, a tea containing a hallucinogen (DMT), in its religious ceremonies. The district court

granted the preliminary injunction, and the court of appeals affirmed. In the Supreme Court, the government argued that it had a compelling interest in the uniform application of the Controlled Substances Act, which lists DMT under Schedule I because it is exceptionally dangerous, and that no exception should be made to accommodate the UDV. The Supreme Court held that RFRA requires the government "to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." 126 S. Ct. at 1220. The court held that DMT's listing under Schedule I was not sufficient to provide a categorical answer relieving the government of its burden under RFRA to make a more specific showing. 126 S. Ct. at 1221. And, because there is a long-standing exception to the Schedule I ban for religious use – peyote may be used by the Native American Church – the government could not preclude any consideration of a similar exception for the UDV. 126 S. Ct. at 1221-1222.

The Supreme Court also rejected the government's attempt to rely upon the *Lee* and *Hernandez* line of cases involving religion-based exceptions to application of federal tax laws, stating that "those cases strike us as quite different from the present one." 126 S. Ct. at 1223. The court held that the cases the government attempted to rely upon were distinguishable from the case before it because (126 S. Ct. at 1223):

> These cases [*Lee, Hernandez*, etc.] show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.
>
> Here, the Government's argument for uniformity is different; it rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law.

The court concluded that although there may be instances when the need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA, the case before it did not seem to present such an instance, particularly given the long-standing exception for

peyote. 126 S. Ct. at 1224. The court opined that " . . . in fact the Government has not offered evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee*, *Hernandez*, and *Braunfeld* [*v. Brown*, 366 U.S. 599 (1961)]." 126 S. Ct. at 1224.

The *Gonzales* opinion clearly does not aid taxpayer's cause here. The Supreme Court distinguished the *Lee* and *Hernandez* line of cases as instances in which the government *had* demonstrated that granting an exemption would cause unacceptable administrative harm to a compelling government interest. 126 S. Ct. at 1224. There accordingly is no need in this case for the government to demonstrate that it has a compelling interest in enforcing the tax laws against this particular taxpayer. This Court has held that all taxpayers are required to comply with the tax laws, despite religion-based disagreements with the allocation of certain funds, and that RFRA does not affect that obligation because "voluntary compliance is the least restrictive means by which the IRS furthers the compelling governmental interest in

uniform, mandatory participation in the federal income tax system." *Browne v. United States*, 176 F.3d at 26.

Indeed, taxpayer himself acknowledged (A. 21) that the federal tax collection system would need to be changed through the enactment of legislation in order to achieve his goal of directing his tax dollars to entirely non-military government expenditures. Taxpayer has chosen to use the courts as a forum for protest and civil disobedience, essentially conceding that he has no hope of prevailing. He did not utilize the CDP hearing procedure for its intended purpose. He neither challenged the existence or amount of his tax liability, nor did he raise "any relevant issue relating to the unpaid tax or the proposed levy," including spousal defenses (*i.e.*, "innocent spouse" relief from joint liability under I.R.C. § 6015), challenges to the appropriateness of collection activities, or an offer of a collection alternative (*e.g.*, posting a bond, substitution of other assets, an installment agreement, or an offer in compromise), as permitted in a CDP hearing under I.R.C. § 6330(c)(2)(A); Treas. Reg. § 301.6330-1(e)(3) (Q & A E6). In short,

taxpayer did not raise any relevant issues in the CDP context. Because there were no genuine issues of material fact, the Tax Court correctly granted summary judgment for the Commissioner, holding that the proposed collection activity could proceed.

II

THE TAX COURT CORRECTLY IMPOSED A $5,000 SANCTION UNDER I.R.C. § 6673 BECAUSE TAXPAYER'S POSITION WAS PATENTLY GROUNDLESS AND HE WAS AWARE OF THAT FACT

Standard of Review

This Court reviews the Tax Court's imposition of a penalty under I.R.C. § 6673 for abuse of discretion. *Burke v. Commissioner*, 929 F.2d 110, 116 (2d Cir. 1991).

I.R.C. § 6673(a)(1) provides as follows:

Whenever it appears to the Tax Court that –

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

> (B) the taxpayer's position in such proceeding is frivolous or groundless, or
>
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,
>
> the Tax Court, in its discretion, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.2/

Damages under I.R.C. § 6673 are appropriate where a taxpayer brings suit without any legal justification, and solely for the purpose of protesting Federal tax laws. *See, e.g., Burke v. Commissioner*, 929 F.2d 110 (2d Cir. 1991); *Wilkinson v. Commissioner*, 71 T.C. 633 (1979); *Sydnes v. Commissioner*, 74 T.C. 864 (1980), *aff'd,* 647 F.2d 813 (8th Cir. 1981). Damages or penalties under I.R.C. § 6673 also have been imposed when a taxpayer claims deductions or credits based on his objection to the use of his tax payments for military spending by the United States, particularly if the taxpayer does so with full knowledge

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2/ The maximum penalty under I.R.C. § 6673 was initially $500, but was raised to $5,000 in 1982 in an attempt to stem the huge increase in the Tax Court's docket of tax protest suits. *May v. Commissioner,* 752 F.2d 1301, 1306 (8th Cir. 1985). The limit was raised to its present level in 1989. Pub. L. 101-239, § 7731(a), 103 Stat. 2106.

that his claims are without legal merit. *See Greenberg v. Commissioner*, 73 T.C. 806 (1980); *Graves v. Commissioner*, T.C. Memo. 1981-154, *aff'd without pub. opinion,* 698 F.2d 1219 (6th Cir. 1982). This Court has also affirmed the imposition of penalties under other sections of the Internal Revenue Code where taxpayers brought groundless suits based on their religious objections to paying taxes that could be used to support the military. *See Browne*, 176 F.3d at 26; *Packard*, 7 F. Supp.2d 143 (D. Conn. 1998), *aff'd without pub. opinion*, 198 F.3d 234 (2d Cir. 1999).

Numerous courts have imposed sanctions under I.R.C. § 6702 (under which the maximum penalty is $500) for the filing of a frivolous return where taxpayers refused to pay their taxes or claimed deductions based on their objection to military spending or war. *See Bradley v. United States*, 817 F.2d 1400 (9th Cir. 1987)*; Dalton v. United States*, 800 F.2d 1316, 1319-1320 (4th Cir. 1986); *Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986); *Jenney v. Commissioner*, 755 F.2d at 1386-1387; *Kahn v. United States*, 753 F.2d at 1217; *Collett v. United States*, 781 F.2d 53 (6th Cir. 1985); *Wall v. United States*, 756 F.2d 52 (8th Cir. 1985);

Welch v. United States, 750 F.2d 1101 (1st Cir. 1985); *Clark v. United States*, 630 F. Supp. 101 (D. Md. 1986); *Carey v. United States*, 601 F. Supp. 150 (E.D. Va. 1985); *Franklet v. United States*, 578 F.Supp. 1552 (N.D. Cal. 1984), *aff'd* 761 F.2d 529 (9th Cir. 1985); *Woida v. United States*, 609 F. Supp. 1271 (E.D. Wis. 1985); *Drefchinski v. Regan*, 589 F. Supp. 1516 (W.D. La. 1984).

This Court has affirmed the imposition of sanctions under I.R.C. § 6673 in cases where the taxpayers asserted arguments that had been frequently and uniformly rejected. *Burke v. Commissioner*, 929 F.2d 110, 116 (2d Cir. 1991); *O'Connor v. Commissioner*, 770 F.2d 17, 20 (2d Cir. 1985) ("The argument that they [wages] are not [income] has been rejected so frequently that the very raising of it justifies the imposition of sanctions.") This Court has also held that the imposition of sanctions under I.R.C. § 6673 does not violate the constitutional rights of taxpayers. *O'Connor*, 770 F.2d at 19. Taxpayers do not have a constitutional right to bring groundless lawsuits. *See Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 743 (1983).

Taxpayer here was fully aware that his claims lack legal merit. He acknowledged to the settlement officer in his CDP hearing (A. 21) that the federal tax collection system would need to be changed through the enactment of legislation in order to achieve his goal of directing his tax dollars to entirely non-military government expenditures. Taxpayer nonetheless has chosen to use the CDP hearing process, the Tax Court, and now this Court, as a forum for protest against the country's military expenditures, a practice that the Tax Court has attempted to discourage through the imposition of sanctions, as it did in this case.3/ As this Court has held in a slightly different context, persons who disagree with

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3/ As far back as 1980, the Tax Court expressed a growing lack of patience with taxpayers who bring such suits (*Tingle v. Commissioner,* 73 T.C. 816, 822-823 (1980)):

> As we have stated time and again, this Court is not a "forum for protest" for a taxpayer's objections to this country's military appropriations. This Court has before it a large number of cases which deserve careful consideration as speedily as possible, and "protest" cases needlessly disrupt our consideration of those genuine controversies. General grievances against the policies of the Government, or against the tax system as a whole, are not the types of controversies to be resolved in the courts; Congress is the appropriate body to which such matters should be referred.

the current state of the law cannot simply disregard the law, or "resort to self-help," without expecting to incur a penalty. *Druker v. Commissioner*, 697 F.2d 46, 53 n.5 (2d Cir. 1982). In *Druker*, the taxpayers objected to the so-called "marriage penalty," and calculated their tax liability as if they were "unmarried individuals," although they knew that those rates did not apply to them. This Court reversed the Tax Court, and imposed a penalty for intentional disregard of rules and regulations, holding that even persons who sincerely disagree with the law must abide by it or suffer the consequences. *Druker*, 697 F.2d at 53 n.5. To refrain from imposing a penalty because the taxpayers raised constitutional objections to the law, this Court noted, would have the untenable result of carrying over to taxpayers "who sincerely dispute the legality of their being subjected to income taxation to support activities such as the Vietnam war or nuclear armament of which they strongly disapprove and who make fully disclosed deductions from their taxes on that account." *Ibid.*

Taxpayer knew that his position lacked merit, and moreover he had been explicitly so informed by the Tax Court when he previously made such assertions in an earlier case (*Jenkins v. Commissioner*, unofficially published at T.C. Memorandum 1987-322). In the Tax Court's opinion in that case, in which taxpayer claimed a credit with respect to his opposition to military expenditures by the federal government, the Tax Court held that taxpayer's contentions had no merit, because "[i]t is a fundamental principle of tax law that a taxpayer has no right to reduce his Federal tax liability on the ground that governmental policies or expenditures conflict with his religious or moral convictions, no matter how sincerely those convictions may be held." (A. 40.) The Tax Court declined to impose sanctions in that case, but taxpayer was on notice that sanctions could be imposed in the future. Nonetheless, taxpayer chose to request a CDP hearing in this case even though he did not intend to raise any issues that are permitted to be raised at CDP hearings. He did not dispute the existence or amount of his underlying tax liability, and he did not

propose any collection alternatives. *See* I.R.C. § 6330(c) and (d). The settlement officer who handled his CDP hearing in this case warned him that he could be subject to sanctions if he persisted in his claims. (A. 21.)

Taxpayer asserts on appeal (Br. 27-28) that he should not be subject to sanctions because his arguments in the Tax Court were "not simply a rehash" of arguments that had been universally rejected, but were "a reasoned method" of applying the Ninth Amendment to elaborate on the free exercise clause of the First Amendment, which "was not invoked in any of the prior cases." Taxpayer is mistaken. Although earlier taxpayers might not have used exactly the same language he employed below, it was more than sufficiently clear from the case law that neither the Ninth Amendment nor the First Amendment, separately or together, afford a basis for refusing to pay tax. *See Barton v. Commissioner*, 737 F.2d 822, 823-824 (9th Cir. 1984); *Autenrieth v. Cullen*, 418 F.2d 586, 588-589 (9th Cir. 1969); *Tingle v. Commissioner*, 73 T.C. 816, 817-821 (1980).

Taxpayer also contends (Br. 28) that his earlier Tax Court case raised different issues, but that even if there was "some overlap," "it is hard to imagine that raising a constitutional issue once every 20 years constitutes willfulness and lack of good faith that warrants the imposition of a $5,000 penalty." Taxpayer misses the point. Willfulness and lack of good faith are irrelevant to the imposition of penalties under I.R.C. § 6673. The bringing of a suit in which the taxpayer's position is legally groundless is all that is required for the imposition of penalties. I.R.C. § 6673(a)(1)(B). And taxpayer's earlier Tax Court case had more than a little overlap with the issues in this case. The Tax Court in that case characterized taxpayer's position as arguing "that he is conscientiously opposed to providing funds for military purposes and for this reason, as well as the dictates of his religious belief, he is unwilling to pay a tax which is used for military purposes." (A. 40.) The Tax Court also stated in no uncertain terms in that opinion that it was "a fundamental principle of tax law" that no taxpayer can reduce his Federal tax liability on the basis of his religious or moral objection to

governmental policies or expenditures. (A. 40.) The Tax Court considered whether to impose sanctions under I.R.C. § 6673, but declined to do so "under the particular circumstances of this case." (A. 41.) Taxpayer was thus on notice that he *could* be subject to sanctions for bringing such a suit, and the Tax Court was justified in imposing such sanctions the second time around.

Taxpayer also suggests (Br. 28) that the fact that he appeared *pro se* in the Tax Court is a "special circumstance" that would mitigate against the imposition of sanctions, relying upon this Court's opinion in *Maduakolam v. Columbia University*, 866 F.2d 53 (2d Cir. 1989). In *Maduakolam*, this Court reversed the lower court's imposition of Rule 11 sanctions, because it found that "[t]here is nothing in the record to indicate that Maduakolam knew or should have known that his 'motion to reopen the case' was time-barred." 866 F.2d at 56. By contrast, in this case, it is clear that taxpayer knew that his petition was legally groundless. He had been warned of this by the Tax Court in his earlier case, and he had been told by the IRS settlement officer who conducted

his CDP hearing. Taxpayer also should have known his petition was groundless because of the long line of cases in which the courts have uniformly rejected contentions substantially identical to the arguments he raised below. This Court has not been reluctant to affirm the imposition of sanctions on litigants, even those appearing *pro se*, who raise arguments that frequently and uniformly have been rejected. *See Burke*, 929 F.2d at 115-116; *O'Connor*, 770 F.2d at 19-20.

Finally, taxpayer asserts (Br. 28) that the amount of the penalty was "grossly disproportionate," because the tax liability in issue was only $2,276. This argument, too, misses the point. The sanction amount is not related to the amount of the tax; the sanction is imposed in an attempt to dissuade taxpayers from bringing groundless lawsuits that clog the courts and create unnecessarily heavy workloads for an already overburdened judiciary. *See May v. Commissioner,* 752 F.2d at 1306. The maximum sanction under I.R.C. § 6673 is now $25,000. The Tax Court's imposition of a $5,000 sanction was not an abuse of

discretion and was, in fact, a restrained response to a groundless protest case.

Many Americans, including respected leaders such as Henry David Thoreau and Martin Luther King, Jr., have engaged in civil disobedience as a form of protest against taxation for military spending or other issues of moral or religious significance. But, as the Third Circuit remarked in *Kahn*, 753 F.2d at 1215, a taxpayer cannot "rely on the privilege or the moral honor of civil disobedience without paying the price or penalty such disobedience necessarily incurs." Here, taxpayer's energy would be better spent lobbying Congress. *See Adams*, 170 F.3d at 179-180 (Congress and not the courts should determine any exceptions to the tax laws); *Babcock v. Commissioner*, 51 T.C.M. (CCH) 931, 934 (1986) (rejecting Quaker's free-exercise challenge to income tax, stating that "[i]t is Congress, and not this Court, that can give refuge to [taxpayer]. The relief which [taxpayer] seeks is contained in

the proposed United States Peace Tax Fund Act. [Religious Freedom Peace Tax Fund Act, H.R. 2660, 105th Cong., 1st Sess. (1996)]"4/)

4/ The New York Yearly Meeting of the Religious Society of Friends has filed a brief as *amicus curiae*, in which it recites past accommodations of religious beliefs by the federal government, such as the exemption of the Amish from paying social security taxes. All of the examples given, however, are the result of legislation passed by Congress, and were not judicially created. This only serves to reinforce our point that taxpayer here is barking up the wrong tree in seeking judicial rather than legislative relief.

CONCLUSION

For the foregoing reasons, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that, on this 28th day of July, 2006, this brief was mailed to the Clerk via First Class United States Mail and was served on counsel for the appellant and on counsel for the amicus curiae, New York Yearly Meeting of the Religious Society of Friends, via First Class United States Mail by mailing them two copies each thereof in envelopes properly addressed as follows:

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ADDENDUM

RELIGIOUS FREEDOM RESTORATION ACT (42 U.S.C. §§ 2000bb, *et seq*.)

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are–

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.
