DUE PROCESS VIOLATION

Which statutes control this duty to file income tax returns is subject to some dispute. **In Commissioner v. Lane-Wells Co., 321 U.S. 219, 222, 64 S.Ct. 511, 513 (1944), the Court noted that §54 of the 1939 Internal Revenue Code, the predecessor for §6001, related to the filing requirement;** see also Updike v. United States, 8 F.2d 913, 915 (8th Cir. 1925). In True v. United States, 354 F.2d 323, 324 (Ct.Cl. 1965), United States v. Carlson, 260 F.Supp. 423, 425 (E.D.N.Y. 1966), White v. Commissioner, 72 U.S.T.C. 1126, 1129 (1979), McCaskill v. Commissioner, 77 U.S.T.C. 689, 698 (1981), Counts v. Commissioner, 774 F.2d 426, 427 (11th Cir. 1985), Blount v. Commissioner, 86 U.S.T.C. 383, 386 (1986), and Beard v. Commissioner, 793 F.2d 139 (6th Cir. 1986), **these courts held that §6011 related to the filing requirement.** In United States v. Moore, 627 F.2d 830, 834 (7th Cir. 1980), United States v. Dawes, 951 F.2d 1189, 1192, n. 3 (10th Cir. 1991), and United States v. Hicks, 947 F.2d 1356, 1360 (9th Cir. 1991), **those courts held that §§ 6011 and 6012 governed this duty. In contrast**, Steinbrecher v. Commissioner, 712 F.2d 195, 198 (5th Cir. 1983), United States v. Bartrug, 777 F.Supp. 1290, 1293 (E.D.Va. 1991), United States v. Burdett, 768 F.Supp. 409 (E.D.N.Y. 1991), United States v. Pottorf, 769 F.Supp. 1176, 1183 (D.Kan. 1991), and United States v. Neff, 954 F.2d 698, 699 (11th Cir. 1992), **held that only §6012 governed this duty.** In United States v. Pilcher, 672 F.2d 875, 877 (11th Cir. 1982), **none of the above sections were mentioned and it was held that §7203 required returns to be filed.** While there may be a dispute about which statutes require the filing of returns as shown by these cases, some of them do show that §§ 6001 and 6011 do relate to this duty. It is perfectly clear that **which statute requires to filing of an income tax return is unclear.**

The evidence offered by **each of these defendants shows that they believed that the federal income tax is an excise tax which does not apply to them or the other witnesses in this case.** In summary, they studied and relied upon applicable state and federal decisional authorities to reach this conclusion, particularly authority within this Circuit. In White Packing Co. v. Robertson, 89 F.2d 775, 779 (4th Cir. 1937), the court declared:

"The tax is, of course, an excise tax, as are all taxes on income..."

This same conclusion was reached in Corn v. Fort, 95 S.W. 2d 620 (Tenn. 1936), and Jack Cole Co. v. MacFarland, 337 S.W.2d 453 (Tenn. 1960), **where that court held that the Tennessee income tax applies only to privileges and not to the exercise of the right to make a living.** Other courts have also so held; see Sims v. Ahrens, 167 Ark. 557, 271 S.W. 720 (1925); and Redfield v. Fisher, 135 Or. 180, 292 P. 813 (1930). Once these parties determined that the federal income tax was classified as an excise tax, **they relied upon the definition of this tax as appears within the leading case on this point, Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 349 (1911), which provided the following definition for this tax:**

"Excise taxes are those laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."

Based upon this definition of excise tax, they logically concluded, in conformity with the other cases upon which they relied, that they were not subject to it. Fleschner and Rubel have a right to rely upon these decisions; see United States v. Bishop, 412 U.S. 346, 361 (1973); and United States v. Albertini, 830 F.2d 985 (9th Cir. 1987).

The problem evident here is that the courts of this nation do not speak with unanimity about this point of whether the federal income tax is either an excise or direct tax. For example, in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 36 S.Ct. 236 (1915), the Court appears to have declared that the federal income tax is an excise tax, and at least one court has agreed that this case appears to so state; see United States v. Gaumer, 972 F.2d 723 (6th Cir. 1992). However, decisions of the Court following this one indicate that the tax is really a direct tax; see Stanton v. Baltic Mining Co., 240 U.S. 103, 112, 36 S.Ct. 278 (1916); William E. Peck and Co. v. Lowe, 247 U.S. 165, 172, 173, 38 S.Ct. 432 (1918); and Eisner v. Macomber, 252 U.S. 189, 206, 40 S.Ct. 189 (1920).

This split within decisional authorities over this issue is very apparent. In Ficalora v. Commissioner, 751 F.2d 85 (2nd Cir. 1984), that court indicated that the tax was an indirect tax. In

Jandorf's Estate v. Commissioner, 171 F.2d 464 (2nd Cir. 1948), that court declared "It should be noted that estate or inheritance taxes are excises ... while surtaxes, excess profits and war-profits taxes are direct property taxes." Yet in the adjoining First and Third Circuits, those courts appear to have labeled this tax as a direct one; see United States v. Turano, 802 F.2d 10 (1st Cir. 1986); and Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894 (3rd Cir. 1943). The Fifth Circuit falls within this same category; see Parker v. Commissioner, 724 F.2d 469, 471 (5th Cir. 1984)("the sixteenth amendment was enacted for the express purpose of providing for a direct income tax"); Jacobs v. Gromatsky, 494 F.2d 513 (5th Cir. 1974); Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981); and United States v. McCarty, 665 F.2d 596 (5th Cir. 1982). Other cases disclose this uncertainty; **see Commissioner v. Obear-Nester Glass Co., 217 F.2d 56, 58 (7th Cir. 1954)("The Amendment allows a tax on 'income' without apportionment, but an unapportioned direct tax on anything that is not income would still, under the rule of the Pollock case, be unconstitutional");** Prescott v. Commissioner, 561 F.2d 1287 (8th Cir. 1977); Funk v. Commissioner, 687 F.2d 264 (8th Cir. 1982); Broughton v. United States, 632 F.2d 707 (8th Cir. 1980); Fairbanks v. Commissioner, 191 F.2d 680 (9th Cir. 1951); United States v. Stillhammer, 706 F.2d 1072 (10th Cir. 1983); and United States v. Lawson, 670 F.2d 923 (10th Cir. 1982). The weight of federal authority is that the federal income tax is a direct tax, but there are exceptions to this rule, most noteably within this Circuit.

At the state level, an opposite situation is apparent. Most state courts hold that an income tax is an excise tax; see State v. Weil, 232 Ala. 578, 168 So. 679 (1936)(state constitutional amendment took income taxes out of the property class and placed them in the excise class); Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930); Diefendorf v. Gallet, 51 Idaho 619, 10 P.2d 307 (1932); **Miles v. Dept. of Treasury, 209 Ind. 172, 199 N.E. 372 (1935);** Reynolds Metal Co. v. Martin, 269 Ky. 378, 107 S.W.2d 251 (1937); Oursler v. Tawes, 178 Md. 471, 13 A.2d 763 (1940)(the federal tax is an excise); O'Keefe v. Somerville, 190 Mass. 110, 76 N.E. 457, 458 (1906); Opinion of Justices, 266 Mass. 590, 165 N.E. 904 (1929); Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102 (1934); Lawrence v. Miss. State Tax Comm., 162 Miss. 338, 137 So. 503 (1931); Glagow v. Rowse, 43 Mo. 479 (1869); Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, 205 S.W. 196 (1918); O'Connell v. State Board, 95 Mont. 91, 25 P.2d 114 (1933); Opinion of Justices, 77 N.H. 611,

93 A. 311 (1915); Maxwell v. Kent-Coffey Mfg. Co., 204 N.C. 365, 168 S.E. 397 (1933); Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873 (1936); and State v. Frear, 148 Wis. 456, 134 N.W. 673 (1912). Others hold the tax is a property tax; see Culliton v. Chase, 174 Wash. 363, 25 P.2d 81 (1933); Jensen v. Henneford, 185 Wash. 209, 53 P.2d 607 (1936); and Bryant v. Comm. of Corps. & Tax'n., 291 Mass. 498, 197 N.E. 509 (1935).

Here, the prosecution asserts that the duty to file federal income tax returns is "clearly known" and when the defendants advised others to not file returns, they committed a crime. But in reply, the defendants have shown that there is a conflict in the decisional authority which makes this claimed duty uncertain.

B. Consequence of uncertainty.

Several cases show that this uncertainty has a direct relationship to the guilt or innocence of these defendants, and the consequence is that this court must grant them judgment in their favor via their pending motion. For example, in United States v. Anzalone, 766 F.2d 676, 681, 682 (1st Cir. 1985), at issue were convictions for violating federal CTR laws and regulations. Here, the defendant demonstrated a serious uncertainty regarding application of those laws to his fact circumstances. In reversing Anzalone's conviction, the court held:

"We are required to conclude that the Reporting Act and its regulations, as they presently read, imposed no duty on appellant to inform the Bank of the 'structured' nature of the transactions here in question. The application of criminal sanctions to appellant for engaging in the activities heretofore described violates the fair warning requirements of the due process clause of the fifth amendment. The charges under Count V should have been dismissed."

A similar rationale was used to reverse a defendant's conviction in United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986).

In United States v. Varbel, 780 F.2d 758, 762 (9th Cir. 1986),

some defendants had broken up a large sum of cash and had converted it into cashier's checks by a series of transactions under $10,000. These acts resulted in charges against them for currency structuring. In reversing those convictions, that court stated:

"We conclude that the Reporting Act and its regulations did not impose a duty on appellants to inform the banks involved of the nature of their currency transaction. We believe that the application of criminal sanctions against appellants here would violate due process."

See also United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986), and United States v. Larson, 796 F.2d 244 (8th Cir. 1986).

In United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), at issue was the validity of the conviction of an Indian for tax evasion. Here, the Bureau of Indian Affairs had informed Critzer that the money she derived from real property located within a reservation was not taxable; Critzer relied upon this advice and failed to report such income. The IRS maintained a contrary position and indicted and convicted her for tax evasion. This conviction was reversed on the grounds that the unsettled nature of this field of law precluded any conviction:

"While the record amply supports the conclusion that the underreporting was intentional, the record also reflects that, concededly, **whether defendant's unreported income was taxable is problematical and the government is in dispute with itself** as to whether the omitted income was taxable," Id., at 1160.

"We hold that defendant must be exonerated from the charges lodged against her. As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that **even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions.** As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no

certainty as to what the law required.

"It is settled that when the law is vague or highly debatable, a defendant- actually or imputedly- lacks the requisite intent to violate it," Id., at 1162.

See also United States v. Mallas, 762 F.2d 361 (4th Cir. 1985)(prosecution for violating an unclear legal duty abridges due process).

Following Critzer was the case of United States v. Garber, 607 F.2d 92, 97-98 (5th Cir. 1979), a tax evasion case involving the question of the taxability of sales of rare blood. Here, Garber had an extremely rare blood type which she sold to various medical firms that paid large sums it. Garber filed returns without reporting these sales and she was prosecuted. At trial, both sides offered evidence regarding various legal theories as to taxability of blood sales, but this evidence was excluded. On appeal, it was held error to exclude that evidence offered by Garber:

"[The trial court] thus completely obscur[ed] from the jury the most important theory of Garber's defense- that she could not have willfully evaded a tax if there existed a reasonable doubt in the law that a tax was due- her trial was rendered fundamentally unfair.

"[T]he unresolved nature of the law is relevant to show that defendant may not have been aware of a tax liability or may have simply made an error in judgment."

Similarly, in United States v. Dahlstrom, 713 F.2d 1423, 1429 (9th Cir. 1983), a case involving foreign trusts, the unsettled nature of the law was admitted into evidence and that court concluded that convictions could not stand for that reason. That court relied upon both Critzer and Garber in holding:

"These appellants were prosecuted in spite of the fact that no statute, regulation or court decision gave fair warning that advocacy of the creation of lawful foreign trust corporations as

a tax shelter would result in a criminal prosecution if the challenged transaction might later be held to lack economic substance for purposes of a civil tax proceeding.

"Prosecution for advocacy of a tax shelter program in the absence of any evidence of a specific intent to violate the law is offensive to the first and fifth amendments of the United States Constitution."

See also United States v. Insco, 496 F.2d 204 (5th Cir. 1974), and People v. Dempster, 396 Mich. 700, 242 N.W.2d 381 (1976).

This line of authority became the basis for the decision in United States v. Harris, 942 F.2d 1125 (7th Cir. 1991), a case involving some "ladies of the evening" convicted of tax evasion. Here, a wealthy patron made gifts to these women which the IRS considered as income. But because the question of whether this money was income had never been clearly resolved, their convictions were found to be the product of due process violations and the same were reversed.

Criminal prosecutions are not the arena in which to test for the first time novel propositions of law. Due process mandates that criminal laws be certain, clear and comprehensible to the man on the street, and they cannot be vague, uncertain and unknown; see Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855 (1983). This is even more important when a criminal case is commenced where the critical issue is a premise that the defendant violated a known legal duty. Here, the legal duty to file federal income tax returns is uncertain, due to the split in relevant decisional authority regarding whether this tax is a direct tax or an excise. As a consequence, judgment must be granted in favor of the defendants.