UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV09-01245-JVS(MLGx)	Date	July 26, 2010
Title	USA v. Thanh Viet Jeremy Cao, etc.		

Present: The Honorable	James V. Selna	
Julie Barrera		Sharon Seffens
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
John Monroe		Not Present

Proceedings: Plaintiff's Motion for Summary Judgment (Fld 5/27/10)

Cause called and plaintiff makes appearance. The Court's tentative ruling is issued. The plaintiff submits on the Court's tentative ruling. The Court GRANTS the plaintiff's motion and rules in accordance with the tentative ruling as follows:

Order re Motion for Summary Judgment

Plaintiff United States of America ("the Government") moves for summary judgment under Federal Rule of Civil Procedure 56 on its complaint against Defendant Thanh Viet Jeremy Cao ("Cao"). Cao has failed to file an opposition.[1]

The Court deems Cao's failure to oppose the motion as consent to the granting of the motion. L.R. 7-12. The Court also grants the motion on its merits, as discussed below.

[1] Cao submitted a document titled "Affidavit in Support of Response to Documents Received on May 30, 2010," but specifically directed that the document not be filed. (See Docket No. 34.) In any case, the document does not substantively rebut any factual assertions or legal arguments made in the Government's summary judgment motion and appears to be, at best, a conditional settlement offer. (See id. ¶¶ 19 ("Affiant [Cao] conditionally accepts and conditionally consents to the [Government's] NOTICE OF MOTION FOR SUMMARY JUDGMENT . . . ."), 33 ("[T]his Affidavit was not made to hamper, delay or deny due process, but to move forward in a positive manner, by due administrative procedure or process, in an effort to settle a claim, which has arisen or which may yet arise between the Parties.").)

I. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates that "there is no genuine issue as to any material fact and . . . the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine issue of material fact as to that portion of the claim. Fed. R. Civ. P. 56(a), (b); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322. A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (internal quotation marks and citations omitted). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See id. at 322-23. If the nonmoving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).

II. DISCUSSION

A. Background

The Government accuses Cao of filing numerous frivolous tax returns between 2008 and 2010 claiming inflated tax refunds. Cao filed these returns on behalf of others as a paid preparer. The Government seeks an order pursuant to 26 U.S.C. §§ 7407, 7408, and 7402 enjoining Cao from carrying out the following actions:

(1) Preparing or filing, or assisting in, or directing the preparation or filing of any federal tax return or amended return or other related documents or forms for any other person or entity;
(2) Engaging in activity subject to penalty under 26 U.S.C. §§ 6694 or 6695;
(3) Engaging in any other activity subject to penalty under the Internal Revenue Code;
(4) Engaging in other conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws;
(5) Organizing or selling plans or arrangements that advise or assist taxpayers to attempt to evade the assessment or collection of such taxpayers' correct federal tax;
(6) Engaging in any other activity subject to penalty under 26 U.S.C. § 6700, including organizing or selling a plan or arrangement and making a statement regarding the excludability of income or securing of any other tax benefit by participating in the plan that he knows or has reason to know is false or fraudulent as to any material matter;
(7) Engaging in any activity subject to penalty under 26 U.S.C. § 6701; and
(8) Directly or indirectly organizing, promoting, marketing, or selling any plan or arrangement that advises or encourages taxpayers to attempt to violate internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities, including promoting, selling, or advocating that taxpayers overstate federal income tax withholding and misuse Forms 1099-OID under false claims that:
    i. Taxpayers have a secret account with the Treasury Department which they can use to pay their debts or which they can draw on for refunds through a process that is often called "redemption" or "commercial

redemption";

ii. Taxpayers can name the Secretary of the Treasury as their fiduciary or can draw on the Treasury of the United States to pay their debts or tax using Forms 1099-OID, bonded promissory notes, sight drafts or other documents;

iii. Taxpayers can issue Forms 1099-OID on behalf of a creditor and report the amount on the Form 1099-OID as withheld income;

iv. Taxpayers can issue Forms 1096 listing the government officials as fiduciaries;

v. Taxpayers can issue Forms 1040-V (Payment Voucher) that list no payment;

vi. Taxpayers can issue any other IRS forms in such a way as to assert that U.S. Government officials are their fiduciaries or to overstate their withholding; and

(9) Preparing his own federal income tax returns and/or tax returns for entities that he owns or controls claiming false income tax withholding and overstated refunds;

(10) Filing, providing forms for, or otherwise aiding and abetting the filing of frivolous Forms 1040, Forms 1099 or other IRS forms for himself or others, including the notarization or signing of certificates of service or similar documents in connection with the frivolous tax returns.

The Government also seeks an order compelling Cao to:

(1) Contact by mail and e-mail all persons for whom Cao has prepared tax returns or who have purchased any products, services or advice associated with the false or fraudulent tax scheme described in this complaint within the last five years and inform those persons of the Court's findings concerning the falsity of Cao's prior representations and attach a copy of the permanent injunction against Cao.

(2) Provide a list of all persons who have purchased any products, services or advice from him in the past three years.

B. Undisputed Facts

The following facts are undisputed. Cao, doing business as Phoenix Financial

Management Group ("Phoenix"), has filed numerous IRS Forms 1040 and 1120 between 2008 and 2010 claiming a cumulative total of over $200 million in tax refunds. A number of these returns includes IRS Forms 1099-OID which report fabricated transactions and interest income. Cao then claims tax withholding for the full amount of the "original issue discount" on his customer's IRS Form 1040, generating an inflated refund claim.[2]

For example, Cao prepared a 2006 Form 1040 and 2007 Form 1040 for Raymond Yee ("Yee") and Wendy Huang ("Huang"). (Henline Decl., Exs. 3, 4.) Attached to Yee and Huang's 2006 Form 1040 are two Forms 1099-OID listing Huang as the recipient of OID income and Bank of America and HSBC USA, Inc., as the payers of OID with 100% of the OID purportedly withheld to pay federal income tax. (Id., Ex. 3.) IRS records do not show that Bank of America and HSBC USA, Inc., actually issued those Forms 1099 to Huang. (Id. ¶ 25.) IRS records for 2006 reflect only $14,427 in federal income tax withholding for Yee and Huang, which is $695,453 less than their claimed withholding of $709,880. (Id. ¶ 26.)

Attached to Yee and Huang's 2007 Form 1040 are 49 Forms 1099-OID that purport to show more than $1.2 million in OID income and withholding for Yee and Huang. (Id., Ex. 4.) IRS records, however, reflect only $2,940 in actual withholding, i.e., $1,295,934 less than the claimed withholding of $1,298,874. (Id. ¶ 28.) On behalf of Yee and Huang, Cao calculated a refund of $409,175 and $820,105 for the tax years 2006 and 2007, respectively, based on this overstated income and withholding. (Id. ¶ 30.)

On other returns, Cao claimed fraudulent business income and withholding in order to claim an inflated refund. For example, in October 2008, Cao prepared a 2007 Form 1040 for Taiming Ho ("Ho") and Chenda Hiep ("Hiep"). (Id., Ex. 2.) Ho and Hiep listed their occupation on their 2007 return as "authorized agent/rep" and reported $276,986 in business income and $59,665 in partnership income. (Id.) They also reported $350,833 in federal income tax withheld from Forms W-2 and 1099. (Id.) However, the Forms

[2] Cao apparently subscribes to "redemption" or "straw man" theories. The basis of these theories is that in the 1930's the United States created secret accounts in the Treasury Department for each citizen. The proponents of these theories assert that they can draw on the secret Treasury account by issuing a Form 1099-OID or other forms to a creditor of the citizen. Proponents assert that the issuance of the Form 1099-OID or some other form allows a creditor to make a claim with the Treasury Department and receive full payment of the debt.

W-2 attached to the Form 1040 documented only $14,179 in withholding (a difference of $336,654). (Id.) The difference between the documented withholding and the claimed withholding is nearly identical to the amount of business and partnership income ($336,651) that Ho and Hiep claimed on the Schedules C and E attached to their Form 1040. (Id.) The withholding from the Forms W-2 attached to their return matched IRS records of money actually withheld on behalf of Ho and Hiep. (Id. ¶ 19.) The IRS erroneously issued a tax refund check to Ho and Hiep for $211,183.86. (Id. ¶ 20.)

Cao filed similarly fraudulent IRS Forms 1040 for at least three other taxpayers, claiming either fraudulent business income and withholding or fraudulent interest income and withholding, as summarized in the following table:

Customer	Tax Year	Claimed Business or Interest Income	Claimed Withholding	Claimed Refund
Taiming Ho & Chenda J. Hiep	2007	$ 336,651	$ 350,833	$ 206,646
Raymond W. Yee & Wendy T. Huang	2006	$ 695,498	$ 709,880	$ 409,175
Raymond W. Yee & Wendy T. Huang	2007	$ 1,295,934	$ 1,298,874	$ 820,105
Roeun Thong & Vany Thong	2007	$ 161,446	$ 165,892	$ 99,282
Michele M. Ota	2007	$ 389,433	$ 392,115	$ 239,116
Jeremy P. Chhun & Lina H. Chhun	2007	$ 303,072	$ 310,666	$ 179,414

(Id. ¶ 51.)

In 2008, Cao also prepared several corporate tax returns (IRS Forms 1120) claiming refunds based on fabricated withholding. For example, Cao signed a 2006 IRS Form 1120 for Northpoint Ventures, Inc. ("Northpoint"), as president of Northpoint and

as paid preparer of the return. (Id., Ex. 10.) Cao reported $32,347,957 in income and the same amount as backup withholding, generating a requested refund in the amount of $21,026,172. (Id.) IRS records showed no such backup withholding. (Id. ¶ 55.) He filed nine other similar Forms 1120 in 2008, as summarized in the following table:

Company Name	Tax Year	Claimed Taxable Income	Claimed Backup Withholding	Claimed Refund / Overpayment
Raw Management Group, Inc.	2005	$ 361,364	$ 361,364	$ 238,500
Northpoint Ventures, Inc.	2005	$ 11,638,428	$ 11,638,427	$ 7,664,977
Northpoint Ventures, Inc.	2006	$ 32,347,957	$ 32,347,957	$ 21,026,172
Northpoint Ventures, Inc.	2007	$ 3,799,548	$ 3,799,548	$ 2,507,702
CIK, Inc.	2005	$ 114,988	$ 114,988	$ 86,893
CIK, Inc.	2006	$ 51,309	$ 51,309	$ 43,482
CIK, Inc.	2007	$ 31,972	$ 31,972	$ 27,176
BES Corp.	2005	$ 841,095	$ 841,095	$ 555,123
BES Corp.	2006	$ 421,213	$ 421,213	$ 278,001
BES Corp.	2007	$ 278,143	$ 278,143	$ 186,417

(Id. ¶ 54.) In each case, the IRS had no records of any such backup withholding. (Id. ¶ 55.)

In October 2008, Cao prepared and filed at least eight unsigned Forms 1065 (Return of Partnership Income) on behalf of EV Estates LLC, Titan Financiers LLC, and VC Estates LLC. (Id. ¶ 56 & Ex. 18.) Cao attached several frivolous documents with these returns, including: unsigned Forms 1040 for Cao; "Affidavit[s] of Truth," signed by

Cao, which set forth a series of "Maxims"; UCC Financing Statements; numerous "Private Discharging and Indemnity Bond[s]" signed by Cao; Forms 56 (Notice Concerning Fiduciary Relationship) (naming the U.S. Treasury Secretary as fiduciary); Forms 1040-V (Payment Voucher) (listing no payments); Forms 1099-OID; Forms 1096 signed by Cao; and a "[Commercial Oath and Verification]" signed by Cao. (See, e.g., Ex. 18.)

The IRS has continued to receive fraudulent tax returns prepared by Cao and Phoenix, including three returns prepared in March 2010 that request large refunds (including a refund claim on his 2009 personal tax return in the amount of $82 billion) based on fabricated tax withholding. (Id. ¶ 67 & Exs. 19-21.)

As of December 9, 2009, the IRS issued approximately $1,152,489 of erroneous refunds to Cao's customers as a result of his fraudulent return preparation. (Id. ¶ 60.) In total, the fraudulent refunds requested on Cao-prepared returns is at least $200 million. (Id. ¶ 61.)

C. Analysis

1. Permanent Injunction Under Internal Revenue Code § 7402

The Government seeks summary judgment and a permanent injunction under 26 U.S.C. § 7402, which grants district courts the authority "to make and issue . . . writs and orders of injunction, . . . and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." Id. § 7402(a). These remedies are "not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws." Id.

"In an action for a statutory injunction, once a violation has been demonstrated, the moving party need only show that there is a reasonable likelihood of future violations in order to obtain relief." SEC v. Holschuh, 694 F.2d 130, 144 (7th Cir. 1982) (footnote omitted). Thus, the Court need not consider the traditional factors for injunctive relief. United States v. Thompson, 395 F. Supp. 2d 941, 945-46 (E.D. Cal. 2005); United States v. Estate Preservation Servs., 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since [the statute] expressly authorizes the issuance of an injunction.").

"In predicting the likelihood of future violations, a court must assess the totality of the circumstances surrounding the defendant and his violations." SEC v. Murphy, 626 F.2d 633, 655 (9th Cir.1980). The Court may consider the following factors:

> (1) the gravity of harm caused by the offense; (2) the extent of the defendant's participation, and her degree of scienter; (3) the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve her in such transaction; (4) the defendant's recognition of her own culpability; and (5) the sincerity of her assurances against future violations.

United States v. Harkins, 355 F. Supp. 2d 1175, 1181 (D. Or. 2004) (citing United States v. Raymond, 228 F.3d 804, 813 (7th Cir.2000)).

Here, there is no genuine issue of material fact as to whether Cao has interfered with the administration and enforcement of the internal revenue laws by filing frivolous federal tax returns and other documents on behalf of himself and his customers. The Court finds that all five factors demonstrate a likelihood of future violations by Cao. First, Cao's actions have caused substantial harm to the Government, which has incurred administrative costs in investigating the fraudulent returns and has erroneously issued inflated refunds to Cao's customers. Cao's customers may incur penalties as a result of the frivolous returns. And Cao's filing of frivolous IRS Forms 56 and 1099-OID may result in erroneous liens, levies, or tax deficiencies on third parties.

Second, it clear that Cao was at the center of the scheme and had reason to know that his actions were fraudulent. Third, Cao has prepared numerous frivolous returns and continues to do so. Fourth, Cao's response to this suit — the filing of nonsensical "affidavits" and "maxims" — indicates a lack of any remorse or acceptance of his culpability. And finally, Cao has provided no assurances that he will not continue to file frivolous returns.

Accordingly, the Court finds a strong likelihood that Cao will continue his violations of the internal revenue laws absent an injunction, and therefore the Government's requested injunction should issue. See Thompson, 395 F. Supp. 2d at 946 ; Harkins, 355 F. Supp. 2d at 1181; United States v. Stephenson, 313 F. Supp. 2d 1054, 1061 (W.D. Wash. 2004) (ordering tax-return preparer to notify customers and produce

customer list to United States as part of preliminary injunction).

2. Permanent Injunction Under Internal Revenue Code § 7407

The Government also seeks summary judgment and a permanent injunction under 26 U.S.C. § 7407, which provides that, at the request of the Treasury Secretary, a civil action may be commenced "to enjoin any person who is a tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as a tax return preparer." Id. § 7407(a). A court may issue an injunction under § 7407(b) if it finds "(1) that a tax return preparer has – (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title, . . . or (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and (2) that injunctive relief is appropriate to prevent the recurrence of such conduct." Id. § 7407(b). "If the court finds that a tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of [§ 7407] and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as a tax return preparer." Id. § 7407(b).

Section 6694 of the Internal Revenue Code provides a penalty for tax preparers who understate a taxpayer's liability without substantial authority for doing so, when the tax preparer knew (or reasonably should have known) that there was no proper authority for doing so. Id. § 6694. Here, there is no genuine issue of material fact regarding whether Cao was an income tax preparer and engaged in conduct subject to penalty under § 6694 by preparing returns which he reasonably should have known that the returns were fraudulent. The undisputed evidence demonstrates that Cao has prepared returns claiming over $200 million in fraudulent refunds based on false representations of tax withholdings that never occurred. Therefore, the Court finds that the Government is entitled to summary judgment and a permanent injunction against Cao pursuant to 26 U.S.C. § 7407.

The Court further concludes that Cao has continually and repeatedly engaged in the conduct described above, that an injunction prohibiting only that conduct would not be sufficient to prevent Cao's future interference with the proper administration of the internal revenue laws, and that Cao should therefore be enjoined from acting as a tax

return preparer. As discussed above, the Court finds that there is a strong likelihood that Cao will continue to violate the internal revenue laws absent an injunction. Accordingly, the Government is entitled to summary judgment on its claim for an injunction permanently enjoining Cao from acting as a tax preparer pursuant to § 7407.

3. Permanent Injunction Under Internal Revenue Code § 7408

Finally, the Government seeks summary judgment and a permanent injunction under 26 U.S.C. § 7408, which provides the Court with authority to grant injunctive relief "if the court finds – (1) that the [defendant] has engaged in any specified conduct, and (2) that injunctive relief is appropriate to prevent recurrence of such conduct." Id. § 7408(b). "Specified conduct" is defined as "any action, or failure to take action, which is – (1) subject to penalty under section 6700, 6701, 6707, or 6708, or (2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code ." Id. § 7408(c).

Under § 6701, a penalty may be imposed upon any person "(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document, (2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and (3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person." Id. § 6701. Here, the undisputed facts demonstrate that Cao has violated § 6701 by knowingly preparing tax returns which understate the tax liability of his customers. As discussed above, the Court finds that Cao is likely to continue to file fraudulent returns absent an injunction. Accordingly, the Government is entitled to summary judgment on its claim for a permanent injunction against defendant pursuant to § 7408.

III. CONCLUSION

For the foregoing reasons, the motion for summary judgment is GRANTED.

IT IS SO ORDERED.

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Initials of Preparer jb