

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 OPHELIA KELLEY, d/b/a)
 KELLEY TAX SERVICE and)
 CITY AND COUNTRY GIRL)
 TAX SERVICE,)
)
 Defendant.)
 _____)

Case No. _____

COMPLAINT FOR PERMANENT INJUNCTION AND OTHER RELIEF

Plaintiff United States of America alleges against defendant Ophelia Kelley, doing business as Kelley Tax Service and City and Country Girl Tax Service:

1. This action has been requested by the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury, and commenced at the direction of a delegate of the Attorney General, pursuant to the provisions of Internal Revenue Code (26 U.S.C.) ("IRC") §§ 7402, 7407, and 7408.

Jurisdiction and Venue

2. Jurisdiction is conferred on this Court by Sections 1340 and 1345 of Title 28, United States Code, and IRC §§ 7402(a), 7407, and 7408.

3. This is a civil action brought by the United States under IRC §§ 7402(a), 7407, and 7408 to enjoin Kelley and anyone in active concert or participation with her from:

- A. acting as a federal tax return preparer or requesting, assisting in, or directing the preparation or filing of federal tax returns for any person or entity other than themselves, or appearing as representatives on behalf of

any person or organization whose tax liabilities are under examination by the Internal Revenue Service;

- B. preparing or filing (or helping to prepare or file) federal tax returns, amended returns, or other related documents and forms for others;
- C. understating customers' liabilities as subject to penalty under IRC § 6694;
- D. engaging in any activity subject to penalty under IRC § 6695;
- E. engaging in any other activity subject to penalty under IRC §§ 6694, 6701, or any other penalty provision of the IRC; and
- F. engaging in other conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

4. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) because a substantial portion of the activities occurred within this district.

Ophelia Kelley

5. Ophelia Kelley is a federal income tax return preparer operating in the Vidalia, Georgia area. Kelley does business as Kelley Tax Service and City and Country Girl Tax Service, located at 204 N. Main St., Suite 4, in Vidalia, Georgia.

6. Kelley started preparing tax returns for others in 2002. She attended tax return preparation classes offered by Jackson Hewitt Tax Services and H&R Block.

7. Since 2002, Kelley has prepared approximately 1,100 federal income tax returns.

Fraudulent Fuel Tax Credit Deductions

8. Kelley has prepared at least 79 blatantly fraudulent tax returns for customers using IRS Form 4136, "Credit for Federal Tax Paid on Fuels," for tax years 2003 – 2006. In using and preparing these forms, Kelley fraudulently applied IRC §§ 6421(a), 6427(l)(1), and 4041(g)(3). The fuel tax credit under Section 6421(a) is available only to taxpayers who operate farm

equipment or other vehicles for off-highway business use. Moreover, the equipment or vehicles using the fuel must not be registered for highway uses. The fuel tax credit rooted in Sections 6427(l)(1) and 4041(g)(3) is only available to taxpayers who export fuels outside the United States.

Overview of IRC § 6421(a): Credit for Federal Tax Paid on Fuels

9. Fraudulently claiming entitlement to the fuel tax credit is a widespread tax scam, presenting a serious enforcement problem for the IRS. As part of this scheme, Kelley improperly claimed the fuel tax credit for her customers for purported business motor fuel purchases.

10. Code Section 6421(a) provides a tax credit for fuel used in an off-highway business use. Off-highway business use is any off-highway use of fuel in a trade or business or in an income-producing activity where the equipment or vehicle is not registered with the state government and not required to be registered for use on public highways. IRS Publication 225 provides the following examples of off-highway business fuel use: (1) in stationary machines such as generators, compressors, power saws, and similar equipment; (2) for cleaning purposes; and (3) in forklift trucks, bulldozers, and earthmovers. *See* IRS Publication 225 (2006), Farmer's Tax Guide, Chapter 14 (2006) (available online at: <http://www.irs.gov/publications/p225/ch14.html#d0e19048>).

11. IRS Publication 510 defines a highway vehicle as any "self-propelled vehicle designed to carry a load over public highways, whether or not it is also designed to perform other functions." A public highway includes any road in the United States that is not a private roadway. This includes federal, state, county, and city roads and streets. These highway vehicles are not eligible for the fuel tax credit. IRS Publication 510 provides the following as examples of

highway vehicles which are not eligible for the fuel tax credit: passenger automobiles, motorcycles, buses, and highway-type trucks and truck tractors. See IRS Publication 510 (2006), Excise Taxes for 2006, Chapter 2 (2006) (available online at: <http://www.irs.gov/publications/p510/ch02.html#d0e3533>)

12. IRS Publication 510 provides the following example of an appropriate application of the fuel tax credit:

Caroline owns a landscaping business. She uses power lawn mowers and chain saws in her business. The gasoline used in the power lawn mowers and chain saws qualifies as fuel used in an off-highway business use. The gasoline used in her personal lawn mower at home does not qualify.

13. In short, the fuel tax credit does not apply to passenger cars or other vehicles that are registered or required to be registered to drive on public highways.

Overview of IRC § 6427(l)(1): Credit for Exported Fuels

14. Section 6427(l)(1), IRC, provides a tax credit for certain taxpayers who use fuels for “nontaxable uses,” which is defined as anything exempt from the tax imposed by Section 4041(a)(1). Section 6427(l)(1). Fuels used for “export” are exempt from the tax imposed by Section 4041(a)(1). Section 4041(g)(3). IRS Publication 378 defines exported fuel as “fuel removed from the United States with the intention that the fuel remain in a foreign country or possession of the United States. Fuel is not exported if it is in the fuel supply tank of a vehicle or aircraft.”¹

15. Table 1-1 in IRS Publication 378 provides a list of different “nontaxable” fuel uses. Number 3 on Table 1-1 is fuel used for export.

¹ IRS Pub. 378, 2005 WL 880180 (I.R.S.).

16. The fuel tax credit for exported fuel is not available for taxpayers who purchase fuel for their personal or business vehicles that are used on highways in the United States.

Kelley’s Fraudulent Claims of the Fuel Tax Credit

17. Kelley prepared federal income tax returns for customers and improperly reduced their reported tax liabilities by claiming bogus fuel tax credits under both IRC §§ 6421 and 6427(l)(1). The IRS has determined that at least 79 federal tax returns Kelley prepared for customers claimed such false fuel tax credits.

18. Kelley prepared Forms 4136 for her customers falsely stating that the customer used gasoline for off-highway business purposes or exported the fuel outside the United States.

19. The following chart shows three examples of Kelley’s fraudulent preparation of federal income tax returns for the 2004 and 2005 year using the Fuel Tax Credit for fuel purportedly “exported”:

| Name, profession, city and state of customer | Amount of “exported” gasoline claimed on Form 4136 | Cost of claimed “exported” gasoline* | Estimated yearly/daily mileage** | Total Income | Amount of gasoline tax credit | Refund Requested |
|---|---|---|---|---------------------|--------------------------------------|-------------------------|
| Stewart; Over the Road Trucking; McRae, Georgia | 171,723 gallons | \$429,300 | 3,434,460 miles per year /9,410 per day | \$11,434 | \$41,830 | \$41,830 |
| Burney; Over the Road Trucking; Claxton, Georgia | 126,902 gallons | \$317,255 | 2,538,040 miles per year /6,954 per day | \$5,114 | \$30,954 | \$30,956 |

| | | | | | | |
|--|-------------------|-----------|---|----------|----------|----------|
| Butler; Over the Road Trucking; Vidalia, Georgia | 71,000 gallons | \$177,500 | 1,420,000 miles per year/3,890 per day | \$17,634 | \$17,324 | \$18,762 |
|--|-------------------|-----------|---|----------|----------|----------|

20. On the returns in the table above (and on other returns), Kelley fraudulently claimed that her customers purchased and exported overseas large quantities of fuel. For example, Kelley claims that customer Anthony Stewart, an over-the-road truck driver, purchased and exported 171,723 gallons of gasoline during 2005. Assuming that gas costs \$2.50 a gallon, this means Stewart spent \$177,500 on gas and then exported it during 2005. Stewart's adjusted gross income for the year, however, was only \$17,634. Stewart could not have afforded to purchase the gas Kelley claimed he purchased on this return. This example shows the blatantly fraudulent nature of Kelley's use of the fuel tax credit for exported fuel.

21. The follow chart shows two examples of Kelley's fraudulent preparation of federal income tax returns for the 2004 tax year using the Fuel Tax Credit for fuel purportedly used for "off highway" business uses.

| Name, profession, city and state of customer | Amount of gasoline claimed on Form 4136 | Cost of claimed gasoline claimed* | Estimated yearly/daily mileage** | Total Income | Amount of gasoline tax credit | Refund Requested |
|---|--|--|---|-------------------------|--|-----------------------------|
| George Burney; Long Distance Trucking; Claxton, Georgia | 43,336 gallons | \$108,340 | 866,720 miles per year /2,375 per day | \$42,459 | \$10,574 | \$11,741 |

| | | | | | | |
|--|----------------|-----------|---|----------|----------|----------|
| Violancia McMillian; Over the Road Trucking; McRae, Georgia | 60,400 gallons | \$151,000 | 1,208,000 miles per year /3,306 per day | \$25,977 | \$14,738 | \$16,340 |
|--|----------------|-----------|---|----------|----------|----------|

* Estimated total cost based on \$2.50 per gallon.

** Estimated milage based on 20 miles per gallon.

22. For example, Kelley claimed that Violanica McMillian, an over-the-road truck driver, purchased 60,400 gallons of gasoline in 2004, which would have cost \$151,000. However, McMillian's adjusted gross income for the year was only \$25,977. Thus, McMillian could not have afforded to purchase the gasoline Kelley claimed she purchased. What is more, to use that volume of gasoline, assuming milage of 20 miles per gallon, McMillian would have to have driven 1,208,000 business miles – off-highway – during the year. That's 3,306 miles per day, every day of the year. This example again shows the fraudulent nature of Kelley's preparation of federal income tax returns abusing the fuel tax credit.

23. On the returns depicted above (and on others), Kelley openly described her customers as "OTR" (over-the-road) truck drivers and "long distance" truckers. These descriptions further expose Kelley's fraud because only customers using fuel for certain *off-highway* and *export* uses are entitled to these tax credits, not "over the road" and "long distance" truck drivers.

Other False Returns Prepared by Kelley

24. Kelley has also claimed false or fraudulent deductions on IRS Schedules A and C of Form 1040 federal income tax returns.

25. During its investigation, the IRS interviewed 17 of Kelley's customers; all of these customers confirmed that Kelley had fabricated itemized or business deductions on their returns.

26. For example, Kelley claimed bogus itemized deductions on customer William Badie's 2005 Form 1040 federal income tax return, Form Schedule A, including fabricated deductions for medical and dental expenses, taxes paid, gifts to charity, and unreimbursed employee expenses. Badie told the IRS that he only gave Kelley information concerning his dependents. Kelley also claimed improper business deductions on customer Cherina Harrell's 2004 Form 1040 federal income tax return, Form Schedule C. Harrell told the IRS that she did not have a business during 2004 or 2005,² but Kelley prepared a false IRS Form Schedule C ("Profit or Loss From Business") for Harrell's 2004 Form 1040 federal income tax return. Kelley falsely stated on the Form Schedule C that Harrell owned a "direct seller" business, and she claimed over \$5,000 in fraudulent business expenses.

27. In 2007, Kelley prepared and filed at least 100 federal income tax returns without signing them as return preparer.

28. Kelly has failed to provide copies of federal income tax returns to customers for whom she prepared returns.

Harm to the Public

29. Kelley's preparation of false and fraudulent tax returns, to the extent that the IRS has not detected them, has resulted in customers receiving substantial federal income tax refunds to which they are not entitled. Kelley has filed returns for customers seeking more than \$350,000 in refunds based on fraudulent tax forms.

30. In addition to the direct harm caused by preparing tax returns that understate her customers' tax liabilities, Kelley's activities undermine public confidence in the

² Exhibit F to Henline Dec.

administration of the federal tax system and encourage noncompliance with the internal revenue laws.

31. Kelley further harms the United States because the IRS must devote its limited resources to identifying Kelley's customers, ascertaining their correct tax liability, recovering any refunds erroneously issued, and collecting any additional taxes and penalties.

Count I
Injunction under IRC § 7407

32. The United States incorporates by reference the allegations in paragraphs 1 through 31.

33. IRC § 7407 authorizes a district court to enjoin a tax preparer from:

- a. engaging in conduct subject to penalty under IRC § 6694;
- b. engaging in conduct subject to penalty under IRC § 6695;
- c. failing to comply with an IRS request under IRC § 6107(b);
- d. misrepresenting her experience or education as a tax return preparer; or
- e. engaging in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws,

if the court finds that the preparer has engaged in such conduct and that injunctive relief is appropriate to prevent the recurrence of the conduct. Additionally, if the court finds that a preparer has continually or repeatedly engaged in such conduct, and the court finds that a narrower injunction (*i.e.*, prohibiting only that specific enumerated conduct) would not be sufficient to prevent that person's interference with the proper administration of

the internal revenue laws, the court may enjoin the person from further acting as a federal tax return preparer.

34. Kelley has continually and repeatedly engaged in conduct subject to penalty under IRC § 6694 by preparing federal income tax returns that understate her customers' liabilities based on unrealistic, frivolous, and reckless positions.

35. Kelley's repeated violations of IRC § 6694 fall within IRC § 7407(b)(1)(A) and (D), and thus are subject to an injunction under IRC § 7407.

36. Kelley has continually and repeatedly engaged in conduct subject to penalty under IRC § 6695(a) by failing to provide copies of returns to her customers.

37. Kelley has continually and repeatedly engaged in conduct subject to penalty under IRC § 6695(b) by failing to sign tax returns she prepared and filed.

38. Kelley has continually and repeatedly engaged in conduct subject to penalty under IRC § 6695(c) by failing to provide her identifying number on returns she prepared and filed.

39. Kelley's repeated violations of IRC § 6695 fall within IRC § 7407(b)(1)(A) and (D), and thus are subject to an injunction under IRC § 7407.

40. If she is not enjoined, Kelley is likely to continue to file false and fraudulent tax returns and engage in the conduct described in paragraphs 35-37, above.

41. Kelley's continual and repeated conduct subject to an injunction under IRC § 7407, and flagrant misuse of fuel tax credits and a variety of other bogus claims, demonstrate that a narrow injunction prohibiting only specific conduct would not prevent

Kelley's interference with the proper administration of the internal revenue laws. Thus, she should be permanently barred from acting as a return preparer.

Count II
Injunction under IRC § 7408

42. The United States incorporates by reference the allegations in paragraphs 1 through 41.

43. Code Section 7408(a)-(c) authorizes a district court to enjoin any person from engaging in conduct subject to penalty under IRC § 6701 if injunctive relief is appropriate to prevent recurrence of such conduct.

44. Code Section 6701(a) penalizes any person who aids or assists in, procures, or advises with respect to the preparation or presentation of a federal tax return, refund claim, or other document knowing (or having a reason to believe) that it will be used in connection with any material matter arising under the internal revenue laws and knowing that if it is so used it will result in an understatement of another person's tax liability.

45. Kelley prepared federal tax returns for customers that she knows will understate their correct tax liabilities. Kelley's conduct is thus subject to penalty under IRC § 6701.

46. If the Court does not enjoin Kelley from preparing federal income tax returns for others, she is likely to continue to engage in conduct subject to penalty under IRC § 6701. Injunctive relief is therefore appropriate under IRC § 7408.

Count III
Injunction under IRC § 7402(a)
Necessary to Enforce the Internal Revenue Laws

47. The United States incorporates by reference the allegations of paragraphs 1 through 46.

48. Code Section 7402 authorizes a district court to issue orders of injunction as may be necessary or appropriate for the enforcement of the internal revenue laws.

49. Kelley, through the actions described above, has engaged in conduct that substantially interferes with the enforcement of the internal revenue laws.

50. Unless enjoined, Kelley is likely to continue engaging in such improper conduct. If Kelley is not enjoined from engaging in fraudulent and deceptive conduct, the United States will suffer irreparable injury because revenue losses caused by Kelley's conduct will continue.

51. Enjoining Kelley is in the public interest because an injunction, backed by the Court's contempt powers, if needed, will stop her illegal conduct and the harm it causes the United States.

52. The Court should impose injunctive relief under IRC § 7402(a).

WHEREFORE, the United States prays for the following:

1. That the Court find that Ophelia Kelley has continually and repeatedly engaged in conduct subject to penalty under IRC §§ 6694 and 6695, and has continually and repeatedly engaged in other fraudulent or deceptive conduct that substantially interferes with the administration of the tax laws, and that a narrower injunction prohibiting only this specific misconduct would be insufficient;

2. That the Court find that Ophelia Kelley has engaged in conduct subject to a penalty under IRC § 6701, and that injunctive relief under IRC § 7408 is appropriate to prevent a recurrence of that conduct;

3. That the Court find that Ophelia Kelley has engaged in conduct that interferes with the enforcement of the internal revenue laws, and that injunctive relief is appropriate to prevent the recurrence of that conduct pursuant to the Court's inherent equity powers and IRC § 7402(a);

4. That the Court, pursuant to I.R.C. §§ 7402(a), 7407, and 7408, enter a permanent injunction prohibiting Ophelia Kelley, and all those in active concert or participation with her from:

- A. acting as a federal tax return preparer or requesting, assisting in, or directing the preparation or filing of federal tax returns for any person or entity other than herself, or appearing as representative on behalf of any person or organization whose tax liabilities are under examination by the Internal Revenue Service;
- B. preparing or filing (or helping to prepare or file) federal tax returns, amended returns, or other related documents and forms for others;
- C. understating customers' liabilities as subject to penalty under IRC § 6694;
- D. engaging in any conduct subject to penalty under IRC § 6695;
- E. engaging in any other activity subject to penalty under IRC §§ 6694, 6701, or any other penalty provision of the IRC; and,
- F. engaging in other conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

5. That the Court, pursuant to I.R.C §§ 7402(a), 7407, and 7408, enter an injunction requiring Ophelia Kelley within 30 days to contact by United States mail and,

if an e-mail address is known, by e-mail, all persons for whom she prepared a federal tax return to inform them of the Court's findings concerning the falsity of Kelley's prior representations, and enclose a copy of the executed permanent injunction against her, and file with the Court a sworn certificate stating that she has complied with this requirement;

6. That the Court, pursuant to I.R.C. §§ 7402(a), 7407, and 7408, enter an injunction requiring Ophelia Kelley to produce to counsel for the United States within 30 days a list that identifies by name, social security number, address, e-mail address, and telephone number and tax period(s) all persons for whom she prepared federal tax returns or claims for a refund since January 1, 2005;

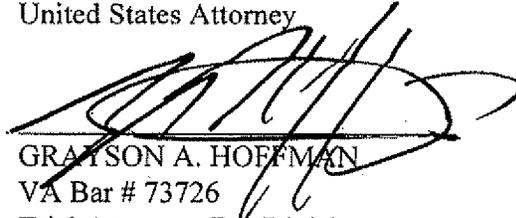
7. That the Court retain jurisdiction over Ophelia Kelley and over this action to enforce any permanent injunction entered against Kelley;

8. That the United States be entitled to conduct discovery to monitor Kelley's compliance with the terms of any permanent injunction entered against her; and

9. That this Court grant the United States such other and further relief, including costs, as is just and equitable.

Dated this 16th day of March, 2009.

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