

DATE: June 8, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0810

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Milton H. Baxley II, Esq.

Administrative Judge John G. Metz, Jr. issued a decision, dated December 28, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether Administrative Judge erred by finding Applicant violated 26 U.S.C. 7203 and that tax liens were entered against Applicant in 1998 for unpaid federal income taxes for tax years 1994 and 1995; (2) whether the Administrative Judge erred by concluding Applicant demonstrated poor judgment by not filing income tax returns and not paying federal income taxes; and (3) whether the Administrative Judge erred by holding against Applicant the fact that he filed a petition for bankruptcy in 1998.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 11, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion F (Financial Considerations). A hearing was held on April 22, 1999.

The Administrative Judge issued a written decision, dated December 28, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's adverse security clearance decision.

Appeal Issues

1. Whether Administrative Judge erred by finding Applicant violated 26 U.S.C. 7203. The Administrative Judge found that Applicant willfully failed to file federal income tax returns for tax years 1993, 1994, 1995, 1996, and 1997, and that he did not intend to file federal income tax returns in the future. Applicant contends the Judge's findings are in error. In support of that contention, Applicant argues: (a) 26 U.S.C. 7203 (Section 7203) does not impose any duty to file a federal income tax return or to pay federal income taxes; (b) there is no provision of Title 26 of the U.S. Code (Title 26)

that imposed on Applicant liability for federal taxes for the years 1993, 1994, 1995, 1996, or 1997; (c) there is no provision of law that required Applicant to file federal income tax returns for the years 1993, 1994, 1995, 1996, or 1997; (d) there is no provision of Title 26 that imposes a direct income tax on the general public that conforms with the requirements of Article I, Section 2, Clause 3 of the U.S. Constitution; (e) the 16th Amendment to the U.S. Constitution did not repeal Article I, Section 2, Clause 3 of the U.S. Constitution, or specifically refer to a direct income tax; (f) 26 U.S.C. 1 (Section 1) does not comply with the requirements of Article I, Section 2, Clause 3 of the U.S. Constitution and, therefore, it does not impose on Applicant any tax liability or any duty to file a federal income tax return; (g) any provision of the Title 26 that does not have an implementing regulation incorporated in the Code of Federal Regulations does not have the force or effect of law, and there was no implementing regulation for Section 7203 for tax years 1993, 1994, 1995, 1996, or 1997; (h) Applicant cannot determine the proper income tax return which the Department of Defense contends he was required to file; and (i) it is violative of the due process clause of the Fifth Amendment to the U.S. Constitution for the IRS to take actions against him without litigation or an adjudication by a court of competent jurisdiction. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Applicant is correct in asserting that Section 7203 is a penalty provision that does not establish a duty to file an federal income tax return or to pay federal income taxes. However, Applicant's other arguments lack merit.

Applicant's arguments about the meaning and effect of the 16th Amendment have been rejected by the federal courts. *See, e.g., Quijano v. United States*, 93 F.3d 26, 30 (1st Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997); *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990), *cert. denied*, 500 U.S. 920 (1991); *In re Becraft*, 885 F.2d 547, 548-49 (9th Cir. 1989); *Parker v. Commissioner of Internal Revenue*, 724 F.2d 469, 471 (5th Cir. 1984); *United States v. Stillhammer*, 706 F.2d 1072, 1077-78 (10th Cir. 1983); *United States v. Rhodes*, 921 F.Supp. 261, 264-65 (M.D. Penn. 1996). Applicant's argument that no provision of Title 26 imposes a liability for federal income taxes has been rejected by the federal courts. *See, e.g., Charczuk v. Commissioner of Internal Revenue*, 771 F.2d 471, 473 (10th Cir. 1985); *United States v. Drefke*, 707 F.2d 978, 981 (8th Cir. 1983), *cert. denied*, 464 U.S. 942 (1983); *Plant v. Internal Revenue Service*, 943 F.Supp. 833, 836 (N.D. Ohio 1996); *United States v. Rhodes*, 921 F.Supp. 261, 266 (M.D. Penn. 1996). Applicant's argument that provisions of Title 26 cannot have the force or effect of law in the absence of implementing regulations has been rejected by the federal courts. *See, e.g., United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991); *United States v. Washington*, 947 F.Supp. 87, 91 (S.D.N.Y. 1996); *Watts v. Internal Revenue Service*, 925 F.Supp. 271, 277 (D.N.J. 1996). Applicant's argument that he has been denied due process of law because the IRS took actions against him without the benefit of a judicial determination of his rights has been rejected by the federal courts. *See, e.g., American Trust v. American Community Mutual Insurance Co.*, 142 F.3d 920, 923 (6th Cir. 1998); *Anderson v. United States*, 754 F.2d 1270, 1272 (5th Cir. 1985); *Christensen v. United States*, 733 F.Supp. 844, 850-851 (D.N.J. 1990), *aff'd mem.*, 925 F.2d 416 (3d Cir. 1991).

Applicant also contends, in the alternative, that even if there is a law that constitutionally imposes a federal income tax on him, he cannot determine the proper income tax return that he is required to file. In support of this contention, Applicant relies on an argument involving an analysis of Office of Management and Budget (OMB) Control Numbers on IRS forms. Applicant's argument lack merit. The requirements of the Paperwork Reduction Act with regard to OMB Control Numbers do not negate or diminish a person's culpability under Section 7203 for willfully failing to file a federal income tax return. *See, e.g., Salberg v. United States*, 969 F.2d 379, 383-84 (7th Cir. 1992); *United States v. Hicks*, 947 F.2d 1356, 1359-1360 (9th Cir. 1991). Applicant's argument is little more than a variation of the OMB Control Number arguments rejected by federal courts. Furthermore, it is frivolous for Applicant to argue he cannot determine the proper income tax return that he is required to file. The ability of millions of law-abiding citizens to make that determination each year stands as a simple, common sense refutation of Applicant's claim on this point. Also, if Applicant asked, he could receive assistance from the IRS in selecting the proper return.

Applicant's right to due process in these proceedings does not include the right to litigate the legality of the tax laws or the practices and procedures of the IRS. *See, e.g., ISCR Case No. 99-0433* (May 24, 2000) at p. 2. Applicant's disclaimer of any intent to contest the legality of the federal tax laws is untenable because the substance of most of his appeal arguments is aimed at attacking the legality and validity of the federal tax laws and the practices and procedures of the IRS. Applicant has the right to have his attorney zealously represent him in these proceedings. However, zealous representation is not unrestrained or unlimited; rather, a lawyer must provide his or her client with zealous representation *within the bounds of the law*. Making frivolous arguments does not fall within the bounds of the law.

Most of Applicant's arguments are patently frivolous in light of the clear weight of judicial authority rejecting them. Neither Applicant nor his lawyer has the right to abuse these proceedings (at hearing or on appeal) by raising or making frivolous arguments about the validity and legality of the tax laws and the practices and procedures of the IRS.

Applicant denied the SOR allegations. Department Counsel had the burden of presenting evidence to prove the controverted allegations. Directive, Additional Procedural Guidance, Item 14. When reviewing a challenge to an Administrative Judge's findings, the Board looks at the record as a whole to determine whether there is substantial evidence to support the challenged findings. *See, e.g.*, ISCR Case No. 99-0433 (May 24, 2000) at p. 2. In this case, there clearly is sufficient evidence to support the Judge's findings that Applicant had the legal obligation to file federal income tax returns, and that he willfully failed to file such tax returns for tax years 1993 through 1997. Applicant's arguments to the contrary are groundless and totally lacking in merit.

Applicant does not dispute that the IRS has filed notices of federal tax lien against him. However, Applicant argues: (a) a notice of federal tax lien is not a federal tax lien; (b) there is no evidence that a federal tax lien against him exists; and (c) there is no evidence that he owes taxes for years 1994 and 1995. Applicant's arguments fail to demonstrate the Administrative Judge erred. The record in this case shows that the IRS issued notices of levy indicating that it had determined Applicant owed taxes for years 1994 and 1995. A federal tax levy attaches at the time the tax assessment is made. *See, e.g., United States v. Librizzi*, 108 F.3d 136, 137 (7th Cir. 1997); *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995); *In re Walter*, 45 F.3d 1023, 1027 (6th Cir. 1995). An assessment of tax liability is presumed to be correct and a taxpayer has the burden of proving an assessment is in error. *See, e.g., Norfolk Southern Corp. v. Commissioner of Internal Revenue*, 140 F.3d 240, 244 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 509 (1998); *Palmer v. United States Internal Revenue Service*, 116 F.3d 1309, 1312 (9th Cir. 1997). Applicant could have sought relief in federal court if he wished to challenge the validity of the IRS levies. *See, e.g., American Trust v. American Community Mutual Insurance Co.*, 142 F.3d 920, 923 (6th Cir. 1998); *Baddour, Inc. v. United States*, 802 F.2d 801, 807 (5th Cir. 1986). These proceedings are not an appropriate forum for Applicant to challenge the validity of the federal tax liens against him.

2. Whether the Administrative Judge erred by concluding Applicant demonstrated poor judgment by not filing income tax returns and not paying federal income taxes. The Administrative Judge concluded that Applicant demonstrated poor judgment by not filing income tax returns and not paying federal income taxes. Applicant contends the Judge erred because there has been no showing that there is any law that requires Applicant to file federal income tax returns or to pay federal income taxes. As discussed earlier in this decision, Applicant's arguments against the legality and validity of the federal tax laws are groundless.

Given the evidence in this case, the Administrative Judge had a rational basis for concluding that Applicant's conduct demonstrated poor judgment. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and sense of his or her obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). A person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information. Considering the record as a whole, the Judge had a rational basis to conclude that Applicant's conduct suggests income tax evasion. It is untenable for an applicant to refuse to accept his or her legal obligation to comply with the federal tax laws and then insist that the federal government must grant him or her the privilege of handling classified information.

3. Whether the Administrative Judge erred by holding against Applicant the fact that he filed a petition for bankruptcy in 1998. The Administrative Judge found that: (a) Applicant filed a chapter 13 bankruptcy petition in 1998 because the IRS garnishments left him unable to pay his other bills; (b) a bankruptcy plan was never confirmed; and (c) the bankruptcy was dismissed with prejudice in February 1999. Applicant does not challenge these findings by the Judge. However, Applicant contends the Judge erred by holding against him the fact that he filed a petition for bankruptcy because: (i) there is no law against him filing for bankruptcy; (ii) he has the right to prevent the IRS from unlawfully levying on his income from his defense contractor; and (iii) it is improper for the federal government to punish a citizen for attempting to exercise the constitutional right of free access to the courts. Applicant's arguments fail to demonstrate the Judge erred.

There is nothing punitive about the Administrative Judge making findings about the facts and circumstances surrounding Applicant's conduct that are relevant to SOR allegations in this case. Furthermore, reading the Judge's decision in its entirety, it is clear that the Judge's adverse conclusions about Applicant's security eligibility were not based on the Judge's findings about Applicant's filing of a bankruptcy petition; rather, those adverse conclusions were based on the Judge's findings about Applicant's failure to file federal income tax returns. The right of Applicant to seek relief in a bankruptcy court does not mean that the federal government cannot consider the security significance of that conduct in the context of Applicant's intentional, repeated failure to comply with the federal tax laws.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's December 28, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board