DATE: June 17, 2002

In re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 01-05340

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Along with his meritorious education and professional experience, Applicant brings a history of not filing and paying his federal and state income taxes out of mistaken understanding that he did not have any legal obligation to file and pay either his federal income taxes or state taxes linked to the former provides insufficient proof of a good faith misunderstanding (considering both his education and experience) and IRS reliance to avert inferences of knowing, wilful failure to file his tax returns. Neither his subsequent filing of his federal returns (in December 2000) nor his more recent filing of his state returns (in March 2002) after the issuance of the SOR come with sufficient seasoning to satisfy mitigation guidelines of clear evidence of successful mitigation under current Appeal Board guidance.

While Applicant is able to mitigate his history of not paying his state taxes over an eight year period by paying substantial amounts of the computed back state taxes and offering to pay the balance, exclusive of interest and penalties, successful compromise of his accrued federal taxes for the covered delinquent years is too uncertain at this time to provide any safe predictions that he can resolve his federal tax debts with a workable payment plan with the IRS within the foreseeable future. More time is needed to ensure that Applicant's federal tax debts are resolved sufficiently to ensure he satisfies the requisite degree of reliability and trust sufficient for eligibility to hold a security clearance. Clearance is denied.

STATEMENT OF CASE

On December 26, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 22, 2002, and requested a hearing. The case was assigned to this Administrative Judge on February 8, 2002, and on February 11, 2002, was scheduled for hearing. A hearing was convened on March 7, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on five witnesses (including himself) and three exhibits. The transcript (R.T.) of the proceedings was received on March 14, 2002.

PROCEDURAL ISSUES

Prior to the close of the hearing, Applicant asked for leave to supplement the record with copies of his release of State tax lien for tax year 1995. There being no objection from the Government, and good cause being shown, Applicant was afforded a reasonable time to supplement the record with his release of tax lien from State A for tax year 1995. Within the time provided, Applicant provided no release of lien for the 1995 tax year; however, he did point out in a post-hearing April 2002 submission that the evidence presented reflects no tax lien in existence for either the 1993-1994 tax year or the 1995 tax year. In the same cover letter, Applicant requested additional time (to April 22, 2002) to supplement the record with an offer of compromise of his state tax debts (covering tax years 1993 through 1999). There being no objections from the Government, and good cause being shown, Applicant's submission was accepted as Applicant's exhibit J.

Applicant's request for additional time to supplement the record with an offer of compromise was also accepted. Within the time provided, Applicant supplemented the record with an offer of compromise of his state tax debts (covering tax years 1993 through 1999) and accompanying explanation of his waiver request. There being no objection from the Government, and good cause being shown, Applicant's faxed April 22, 2002 submission was accepted as exhibit K.

STATEMENT OF FACTS

Applicant is a 37-year old advisory systems engineer for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to be indebted to (1) the IRS in the approximate amount of $82,030.97 as a result of his failure to file and pay his federal income taxes for tax years 1994, 1995 and 1996 and (2) State A's Department of Taxation in the approximate amount of $7,429.96 under a tax lien filed against him because of his failure to file and pay his state income taxes for tax year 1996.

Additionally, Applicant is alleged to have (a) wilfully failed to file his federal income tax returns for tax years 1994 through 1998, in violation of 26 U.S.C. Sec. 7203 and (b) wilfully failed to file his State A income tax returns for tax years 1997 through 1999, in violation of Section 58.1-348 of Code of State A.

For his response, Applicant admitted to owing the IRS approximately $82,000.00 for tax years 1994 through 1996, but denied owing any taxes to State A on the basis of a tax lien for tax year 1996. He denied, too, any wilful failure to file federal and state returns for the tax years covered in the SOR: tax years 1994 through 1998 for the federal returns and tax years 1997 through 1999 for the State A returns. Applicant claimed misunderstanding over any legal obligation he had to file federal and correlative state tax returns based on his reading of the controlling statutes defining taxable activity, repeated inquiring of his legal filing obligations with the IRS and ensuing reliance on the IRS's failure to respond to his inquiries as confirmation of his position. Applicant claimed to have since filed his IRS returns for the back years, submitted an offer in compromise to the IRS (still awaiting), and arranged for tax withholding on his pay.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant is well educated and has held a variety of sophisticated analytical positions with federal contractors over the past fifteen years. But based on advice he received from a friend in 1993 and his own research of literature (including

old Supreme Court cases), Applicant concluded his employment activities were not of the type covered in the Internal Revenue Code that made him liable for income taxes and perforce obligated to file federal income tax returns (*see* ex. A; R.T., at 46-47). Reasoning that his liability for state income taxes and correlative filing of state returns were directly linked to his federal obligations, he determined in his own mind that he was not liable for State A income taxes, or for filing State A returns (*see* ex. 2; R.T., 47).

To test his non-taxpayer theories, Applicant initially wrote to the IRS Commissioner (copies to other high ranking federal officials) in November 1993 and asked the IRS to identify the revenue taxable activity which the Service considers to make Applicant liable for income taxes (*see* ex. 2). After waiting a month and getting no response, he re-sent the same letter to the Service, adding that he would construe no response after 30 days to mean IRS concurrence with his view that he was not a taxpayer. He posted his last letter to the IRS seeking a response to his claimed understanding in March 1994 and reaffirming his own conclusions that his absence of a response must mean he is not a taxpayer as claimed and therefore is not required to file a return or pay any income taxes. As with his first two letters, he posted this letter certified and received a return receipt.

After Applicant received no response to any of his letters to the IRS, he sought no professional advice from either an attorney or other tax professional and simply acted on the absence of any response from the IRS to mean he was not a taxpayer who was required to file federal and state returns and pay income taxes. In turn, he filed no federal or State A returns for the 1993 tax year and paid no income taxes to either jurisdiction. He filed no federal or State A income tax returns for the tax years of 1994 through 1998 either, and even after filing a federal return for tax year 1999, he failed to file a state return for the same year.

Whether Applicant can be faulted for relying on the IRS's failure to reply to his repeated inquiries requires an assessment of not only his own education and experience levels, but the extent of public recognition of individual income tax liability that Applicant could be expected to be aware of without the need for Service clarification. Since the Sixteenth Amendment's enactment almost a century ago, the certainty of death and taxes for every American income recipient has become virtually axiomatic. To credit Applicant with sincerity of understanding and purpose over his non-taxpayer claims, based solely on his researching of some very old case authorities and misplaced reading of the federal tax code, requires some very considerable stretching of accepted notions of common sense.

With Applicant's quite extensive background of Naval training and experience in the Government contracting world, his voiced expectation of reliance on the IRS's failure to confirm or deny his non-taxpayer claims is unrealistic. Applicant simply could not reasonably have expected the Service (who for almost a century has been charged with the enforcement of the Nation's federal income tax laws) to have accepted his claims (while not excusing the IRS for not responding). To be accorded any good faith mistaken reliance on his novel claims required at the very least a credible showing he consulted a reputable tax professional about the bona fides of his no-taxpayer theory. Applicant had simply too much education and training to risk default in his federal and state tax filing obligations without at the minimum checking with a knowledgeable tax professional. Considering all of the circumstances surrounding his multiple filing failures over an eight-year period, Applicant cannot avert drawn inferences of wilfulness associated with his failures to file either his federal or state tax returns for the covered tax years: 1993 through 1998 re: his federal returns and 1993 through 1999 as to his state returns.

Because Applicant had never filed a tax return with State A, he provided no advance notice of his understanding and intentions to their tax authorities. State A's tax authority inquired of Applicant by letter of March 1997 as to why he had not filed a state tax return for tax year 1994. A chain of correspondence ensued between Applicant and State A tax authorities. With no resolution, State A's taxing authority filed a memorandum of lien in May 1998 for the imputed tax amounts computed to cover tax years 1993 and 1994, in the aggregate sum of $5,132.00 (*see* exs. 5, 6, C and J). Disputing any tax obligations to State A based on his claimed lack of any federal tax liability, Applicant petitioned for a writ of mandamus in February 1999 (*see* ex. 2), but was unsuccessful. Without a stay obtained, State A's tax authorities continued to levy on Applicant's wages during the pendency of the mandamus petition and were successful in levying in excess of $5,000.00 on Applicant's assets before Applicant executed an authorization form with his employer to deduct $300.00 a week to pay down the remainder of the disputed state tax debt (*compare* exs. 2 and 4). Altogether, Applicant has paid down in excess of $12,000.00 in old state tax debts based on his October 2000 pay statement (*see* ex. B) and is currently indebted to State A in excess of $4,000.00

in back taxes, exclusive of interest and penalties.

Despite Applicant's denials, State A filed a tax lien against Applicant's property covering tax year 1995. State A's tax lien was released in November 2000 following Applicant's satisfaction of the lien to the extent of $5,032.50 (*see* exs. 4 and J). State A's tax records also reflect State A's filing a tax lien against Applicant's property for tax year 1996: this for $7,429.96. While Applicant denies any tax lien was filed covering 1996, State A's tax records do reflect a $7,429.96 State A tax lien being filed against Applicant's property in May 1999. Moreover, Applicant's most recent credit report carries an undischarged tax lien (*compare* exs. 4 and 6). Absent documented payment or discharge of this 1996 lien, it remains in force and unpaid, with only the amount still owing uncertain.

Like State A earlier, the IRS inquired of Applicant by mail (in August 1999) about his failure to file federal tax returns for the tax years of 1994 and 1995. Applicant responded with his same written explanations provided earlier about his assigned reasons for not filing for or paying federal income taxes. His response triggered a chain of back and forth correspondence between him and the Service, which resolved nothing and prompted Applicant to seek a writ of mandamus against the Government in August 2000. At the Government's urging, his mandamus petition was dismissed.

Still of the belief he was correct in his non-taxpayer theories, but financially exhausted, Applicant initiated a compromise effort with the IRS in December 2000. As a part of this compromise, he unilaterally agreed to and did file his federal tax returns for the back years of 1993 through 1998 in December 2000 (*see* ex. H and K: R.T., at 49). He filed his 1999 federal return in March 2001, and he has since filed his 2000 and 2001 federal and state tax returns in a timely way (*see* R.T., at 50). Aggregate federal taxes owed for the 1993 through 1999 tax years approximates $99,000.00, exclusive of any imposed interest and penalties. Of this amount, $55,842.00 represents Applicant's reported taxes due for 1999. With the addition of interest and penalties, owed federal taxes for the covered 1993-1998 tax years can be expected to approach or even exceed the aggregate $82,000.00 covered in the SOR for these years. This assumes, of course, the Service accepts Applicant's figures, which is no certainty.

Inexplicably, though, Applicant did not file his back State A returns contemporaneously with his federal returns. Even after receiving the Government's SOR in October 2001, he deferred any filing of his back State A returns. Not until March 2002, just a month before the scheduled hearing, did Applicant file his back State A tax returns for the inclusive years of 1993 through 1999 (s*ee* exs. A and I). Applicant's State A taxes accrued for the same 1993 through 1999 time period and exceeds $16,000.00, exclusive of any imposed interest and penalties (*see* exs. H and I).

While Applicant has not provided a copy of the compromise he submitted to the IRS for approval, he expresses the hope of working out a pay plan that will permit monthly installments he can safely handle with his current income sources. Based on what he has been told by others, he cannot estimate with any degree of accuracy as to when the IRS will get back in touch with him about his pending compromise offer. With over $162,000.00 in adjusted gross income attributable to Applicant and his spouse for tax year 1999 (*see* ex. I), the Service might not be inclined to be very accommodating with an Applicant payment proposal that stresses inability to pay. This adds still another level of uncertainty to Applicant's compromise hopes.

Since the hearing, Applicant submitted a compromise offer to State A's Department of Taxation in the amount of $4,792.00 to cover the balance he estimates to be due over and above the $12,000.00 previously deducted from his pay and remitted to State A in October 2000 (*see* ex. B). Applicant cannot be sure what interest and penalties have been imposed by State A for the back taxes owed, or whether or not State A's taxing authority will accept his compromise offer to pay the remaining computed balance, exclusive of interest and penalties. Whether and when State A can be expected to approve Applicant's compromise offer requires some conjecture, given both the uncertain amount of interest and penalties owing, and Applicant's own mis-impressions over the status of a 1996 state tax lien filed against his property interests. But any differences appear to be manageable.

Applicant is highly regarded by his supervisors and colleagues for his excellent engineering work, reliability and trustworthiness (*see* ex. G). He is known and appreciated by his parish administrator for his devoted efforts to his parish community (ex. G). In recognition of his many parish efforts and contributions, he has been appointed as one of his parish's Eucharistic Ministers.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Criminal Conduct

Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions

DC1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

DC 2. A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively

demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant presents with a meritorious record of education and professional experience, but also with a history of federal and state tax filing and debt delinquencies that raise security concerns about not only his vulnerability to pressures and influence to raise money to discharge his debts, but his overall reliability and trustworthiness in stabilizing his finances and tax filing obligations.

Applicant's back federal and state tax debts

Of considerable Government concern is Applicant's reliability and trustworthiness in light of his debt history, which to date he has not been able to seriously address. Security determinations have never confined risk considerations to the elimination of debts that result from isolated payment lapses linked to exigent circumstances, but rather it has looked to the applicant's overall financial history to shed light on his most recent conduct as an indicator of his future ability to successfully manage his finances. Applicant's still ongoing financial difficulties associated with his continued inability to address his old debts remain troublesome.

Appraising the security significance of Applicant's financial deficiencies, a number of Disqualifying Conditions (DC) of the Adjudicative Guidelines (for financial consideration) are applicable. With respect to his covered debts, DC 1 (history of not meeting financial obligations) and DC 2 (inability or unwillingness to satisfy debts) apply.

Applicant may justifiably claim some mitigation under the Adjudicative Guidelines. He has made considerable progress in resolving his delinquent state tax debts and has a pending compromise offer to resolve the balance of the debt. For these efforts he may take some benefit from MC 6 of the Financial Guidelines (initiated good faith effort to repay overdue creditors). Because of his expressed misunderstandings about the existence of a tax lien against his property for tax year 1996, Applicant's compromise offer with the state may well understate his tax liability (exclusive of interest and penalties) and lessen any real chance of acceptance. Still, he must be credited with considerable progress in resolving his State A tax liabilities. This is not the case, however, with his accrued federal tax liability. His delinquent federal tax obligations remain a work in progress and are still unresolved, even within the time permitted to supplement the record.

Assessment of Applicant's tax delinquencies is mitigating in part: His State A debts show enough repayment promise to merit safe predictions he can resolve them within the foreseeable future. Payment efforts addressed to his delinquent federal taxes remain too sketchy, however, to facilitate any kind of reasonable predictability over the core issue of whether he will be able to work out any viable repayment plan with the IRS any time soon. Safe assurances of any successful Applicant compromise with the IRS is further clouded by Applicant's current adjusted gross income level, which makes any work out plan based on limited or inability to pay problematic and perforce risky to predict any likelihood of success.

While Applicant is credited with addressing his State A tax delinquencies, much of which he has already discharged, too little is known about his pending compromise proposal with the IRS to justify any safe predictions that this very large federal tax accrual (over $99,000.00, exclusive of interest and penalties, through 1999) can be discharged in the foreseeable future, even with some form of agreed payment plan. Time, too is not an ally of Applicant when appraising his freshly claimed commitment to responsible tax filing/paying management. At the moment, there are too many uncertainties about his ability to reliably handle his tax affairs to ensure he is currently restored to the requisite levels of judgment compatible with accessing classified defense information. Protecting the Government's secrets is much too important to be left to peradventure. More seasoning is needed to test Applicant's use of judgment in the critical security linked area of federal tax payment compliance before reliable predictions can be made about Applicant's dependability in handling his federal tax payment responsibilities. Applicant fails to carry his mitigation burden relative to the poor

judgment allegations ascribed to his multiple federal tax payment failures.

Everything considered, Applicant's lack of any IRS acceptance of the compromise offer he submitted in March 2001 and very uncertain repayment status given both the number of tax years and high amounts involved make predictive judgments about his stabilizing his finances in the foreseeable future a very uncertain proposition. Because he has made such considerable progress to date in repaying his old State A tax debts, he in a much more favorable position here to enlist acceptance of his modest State A compromise offer and is credited with favorable assurances of success re: these debts. Unfavorable conclusions warrant, accordingly, with respect to the allegations covered by sub-paragraph 1.a of Guideline F. By contrast, favorable conclusions warrant with respect to sub-paragraph 1.b.

Applicant's federal and state tax filing failures

No one questions that a taxpayer's established wilful failure to file federal and state income tax returns (as here) constitutes criminal conduct of a misdemeanor nature under both the federal and State A statutory schemes, punishable by fine and imprisonment. *See* Sec. 7203 of Title 28 (U.S.C.A.) and Section 58.1-348 of the Code of State A,, respectively. The issue for resolution in this case is whether Applicant's serial failure to file his federal and state tax returns should be characterized as a wilful failure, or failure based on an erroneous, but, nonetheless, good faith misunderstanding that cannot be equated with wilfulness.

Relying on misinformed research he compiled, Applicant failed to file both his federal and state tax returns over a seven-year period (eight years including the tax year of 1999 for his State A return): this on the basis of some very misinformed research he conducted in 1993. His explanations, though based on some legislative and case research and unsuccessful efforts to obtain clarifications from the IRS, suffer from the lack of any plausible, coherent theory behind his persistent failures to file his federal and state tax returns. By all reasonable barometers his multiple filing omissions were misplaced. Whether his filing omissions meet the wilful requirement imposed by governing federal and State A legislation requires assessment of interpretations historically attached to the term "wilful" by the courts and consideration of Applicant's reasoning and actions under the circumstances extant.

Historically, the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution has been an entrenched part of American jurisprudence. *Cf. Liparota v. United States,* 471 U.S. 419, 441 (1985); *Shevlin-Carpenter Co. V. Minnesota,* 218 U.S. 57, 68 (1910); *United States v. Smith,* 5 Wheat 153, 182 (1820). *See, generally, O. Holmes, The Common Law* 47-48 (1881). Based on the premise that the law is definite and knowable, jurists and scholars steeped in the common law tradition drew upon the presumption that every person knew the law: Objective (not subjective) standards of reason governed the search for the law's dictates. This worked well when the law was relatively condensed and uncomplicated. With the emergence of complexity in the laws and their implementing regulations at both the federal and state level, Congress and the states began to chip away at this common law presumption by making specific intent to violate the law an element of certain criminal tax statutes. Special treatment of criminal tax offenses is a case in point of a carved out exception to the common law presumption: This forged exception comes by way of judicial interpretation, however, and not by any statutory clarification of the term "wilful." Beginning with the case of *United States v. Murdock* (290 U.S. 389, 396 (1933), our Supreme Court commenced the softening process by construing the term "wilful" in criminal tax statutes to exclude a bona fide misunderstanding as to a person's duty to file a return. *Murdock* construed the term wilfulness used in criminal tax statutes to mean "an act done with a bad purpose." *Id.,* at 394.

Later Supreme Court cases refined and reinforced the good faith misunderstanding exception to the general presumption when examining wilfulness issues in criminal tax cases. In *United States v. Bishop,* 412 U.S. 346, 360 (1973), the Court connoted wilfulness in criminal tax statutes with "a

voluntary, intentional violation of a known legal duty" with specific reference to the bad faith or evil intent language employed in *Murdock.* Similar specific intent construction of the wilfulness requirement in criminal tax cases was reaffirmed by the Court in *United States v. Pomponio,* 429 U.S. 10, 11-12 (1976). ore recently, in *Cheek v. United States,* 498 U.S. 200, 204 (1991), the Supreme Court reaffirmed anew the recognized good faith exception and engrafted a proof burden on the Government in criminal tax cases that requires a Government showing the defendant knew of his filing duty and intentionally violated that duty. *Id.,* at 204-06. This requires the Government to negate a defendant's

claim "of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws." *Id.,* at 204.[(1)] *See, generally,* ISCR Case No. 99-0205 (October 19, 2000).

Taking guidance from *Cheek* and its precedents, the inquiry over the good faith of Applicant's claimed misunderstanding of his filing requirements is a factual one that must take into account his education and training, the plausibility of his interpretations, and the quality of his claimed reliance on the IRS' failure to respond to his inquiries. While all of these considerations would need to be made in determining whether his actions were inherently unreasonable, the exercise is not one of trying to determine the objective reasonableness of his actions. Specific intent engrafted into the term "wilful" still requires probing for volitional action with a manifest purpose to criminally violate the filing requirements of the federal and State A tax laws.

Finding the necessary wilful element in connection with Applicant's failures to timely file his federal and state tax returns for the seven years covered by the SOR (1993-1998) does not depend on the existence of prior convictions. Even assuming he is ultimately never charged by either the US Government or State A's tax authorities for wilful evasion of his tax filing obligations, he could not be excused from his filing omissions by just the absence of a conviction. For cognizable criminal conduct under the Directive's Adjudication Guidelines does not depend for its sustenance upon an actual admission or conviction. Our Appeals Board has consistently affirmed that the fact that federal or state authorities have not pressed criminal charges against an applicant for failure to timely file tax returns is not dispositive of the conduct's security significance. *See* ISCR OSD No. 90-0049 (Sept. 26, 1991); ISCR OSD No. 90-0095 (January 14, 1991). In the course of establishing an applicant's security worthiness, criminal conduct may be considered *de novo* independent of any decision by federal or state prosecutors to press criminal charges against an applicant.

In defense of his actions, Applicant relies both on his own research of taxpayer status and the IRS's repeated failures to answer his inquiries. Neither his research nor his reliance on IRS inaction provide him with the kind of good faith reliance contemplated by either the courts or our DOHA jurisprudence. Applicant's research includes no consideration of the Sixteenth Amendment, of which students in virtually every secondary and college curriculum are schooled in. Not only do Applicant's non-taxpayer claims fail to take into account the Sixteenth Amendment and the wealth of case authority and literature validating the tax filing responsibilities of virtually every citizen, but they fail to include any consultative advice from a tax professional.

Without more, Applicant's claimed reliance on the absence of any responsive replies from the IRS to his inquiries is not enough avert drawn inferences his claimed reliance was reckless in the light of his education and training and insufficient to avert causal inferences his claims are unsupportable ones and not entitled to good faith treatment. Whatever estoppel Applicant might wish to draw from the Service's response failures (as inappropriate as they may be as a matter of course) is not available, no matter how reasonable Applicant might consider his inquiries and his own reliance. *See Office of Personnel Management v. Richmond,* 496 U.S. 414, 420-28 (1990).

Some mitigation is available to Applicant on the strength of his more recent federal and state tax filings, but not enough to satisfy Appeal Board mitigation guidelines for demonstrating clear evidence of successful rehabilitation under MC 6 of the Adjudicative Guidelines. *See* ISCR Case No. 99-0205 (October 19, 2000). While he can claim over sixteen months of seasoning with respect to his federal filings (filed in December 2000), none were accompanied by payment. Even less evidence of mitigation is available to Applicant with his late State A returns. Not only were his state returns not accompanied by full payment, but they were not filed until just recently: thus further impairing his mitigation efforts. For reasons still unclear, Applicant delayed the filing of his State A returns until March 2002, well after the issuance of the SOR, and even after the filing of his answer. More seasoning is needed to reconcile still active trust concerns over his failure to file both his federal and State A returns over such a prolonged period (eight years spanning 1993 and 1999). Accordingly, sub-paragraphs 2.a through 2.h are concluded unfavorable.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: FOR APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge

1. Government's reliance on *Cheek v. United States, supra,* for its argument that Applicant's "views about the validity of tax statute in the 16th Amendment are irrelevant to the issues of wilfulness and need not be heard by a jury" really does misstate the rule of *Cheek* and must be discounted, accordingly (*see* R.T., at 88). Applicant's views are certainly relevant.