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ACTION ON DECISION

SUBJECT: McCormick v. Peterson<sup>1</sup>  
CV93-2157 (E.D.N.Y. 1993), 94-1 USTC ¶ 50,026

ISSUE:

Whether the taxpayer was subject to the frivolous return penalty under section 6702.

DISCUSSION:

The taxpayer submitted Form 1040 to the Internal Revenue Service. He signed the document under the jurat and wrote "under protest" beneath his signature. Because of this, the Service did not consider the document submitted by the taxpayer a return and assessed a penalty under section 6702 for filing a frivolous return.

The taxpayer filed suit in District Court seeking recovery of the penalty. The court held that the words "under protest" did not alter the meaning of the jurat and stated that Mr. McCormick properly exercised his First Amendment right to protest to the Internal Revenue Service while still complying with his statutory obligation to file a timely tax return.

The First Amendment applies to communications with the Government, including communications that are made with tax returns. Frivolous return arguments are inappropriate in cases in which a taxpayer has signed an otherwise valid return "under protest" or added commentary opposing the tax system. Noncompliance with the tax laws, however, is not protected by the First Amendment. Buck v. Commissioner, 967 F.2d 1060 (5th Cir. 1992); United States v. Lee, 455 U.S. 252, 260 (1982) (the maintenance of a functional federal tax system is a sufficiently important governmental interest to justify incidental regulation of First Amendment rights).

A tax return must be signed under penalties of perjury to comply with the filing requirement. Lucas v. Piliod Lumber Co., 281 U.S. 245 (1930). When a taxpayer strikes or obliterates the jurat, the Form 1040, even if otherwise complete, accurate, and signed, does not constitute a return. United States v. Moore, 627 F.2d 830 (7th Cir. 1980). Thus, a taxpayer who strikes out the entire jurat or who strikes out the phrase "under penalties

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<sup>1</sup> The Government asserted on brief that neither the Commissioner nor the Internal Revenue Service was a proper party to the suit.

of perjury" has not filed a valid return and is subject to the frivolous return penalty. Mosher v. Internal Revenue Service, 775 F.2d 1292 (5th Cir. 1985), cert. denied, 474 U.S. 1123 (1986); Hettig v. United States, 845 F.2d 794 (8th Cir. 1988).

The Tax Court in Sloan v. Commissioner, 102 T.C. 137 (1994), aff'd 53 F.3d 799 (7th Cir. 1995), addressed a situation where, rather than striking the jurat, a taxpayer added disclamatory language to the purported return. The court held that the taxpayer's addition rendered the document invalid as a return because the addition raised a "significant question as to whether [the] signatures under the jurat were declarations that the Forms 1040 contain[ed] information on which the substantial correctness of the self-assessment [could] be judged." 102 T.C. at 145. The Seventh Circuit agreed, stating that "the Internal Revenue Service should be entitled to construe alterations of the jurat against the taxpayer, at least when there is any doubt." 53 F.3d at 800.

In order to render a document frivolous for purposes of section 6702, the statements added must reasonably cast doubt on the validity of the jurat and be more than a mere expression of grievance. We now agree with the court that adding the words "under protest" without modifying the words of the jurat does not cast doubt on the validity of the jurat and, accordingly, does invalidate the document as a return.

Recommendation:

Acquiescence.

Reviewers:

\_\_\_\_\_  
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