

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN W. POND,

Appellant,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Appellee.

Case No. 06-9002

On Appeal from a Final Order of the United States
TAX COURT

APPELLANT'S OPENING BRIEF

Steven W. Pond
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918-637-2320

1. Statement of the Case::

On April 8, 2003, the Commissioner of the Internal Revenue Service (“CIR”) caused to be issued pursuant to its authority under 26 U.S.C. § 6020(b) three Notice of Deficiencies to Appellant Pond (“Appellant”) for years 1995 through and including 2001. Appellant timely filed Petition with the United States Tax Court known as Pond v. CIR, # 10911-03 challenging the imposition of interest and penalties on the basis that any determination by the CIR that Appellant was required to make or file any specific information collection request form 1040, pursuant to 26 U.S.C. § 6020(b) was an erroneous determination by CIR.

On August 27, 2003, the CIR filed its answer to Appellant’s Petition.

On November 29, 2004, Appellant served upon CIR “Request for Admissions”.

On December 13, 2004, CIR was ordered by the Tax Court Judge to respond to Appellant’s Request for Admissions on or before December 27, 2004.

On December 22, 2004, CIR filed its “Response to Request for Admissions”.

On October 31, 2005, the Tax Court entered its decision and opinion regarding the issues between the parties and on March 3, 2006, incorporated this order with its final decision and computation.

On June 1, 2006, Appellant timely filed his notice of appeal of the Tax Court’s final decision and its order which incorporated its October 31, 2005 opinion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and this appeal follows.

2. Statement of the Facts Relevant to the Issues Presented for Review.

On April 8, 2003, the CIR issued three Notice of Deficiencies presumably pursuant to its authority under 26 U.S.C. §§ 6213 and 6020(b).

On December 22, 2004, CIR admitted and denied certain relevant facts while filing its response to the Court ordered Request for Admissions of Appellant.

In its “Response” which the CIR entitled “Respondent’s Answer” CIR **denied** the following

1. Since 1983 the OMB number 1545-0074 has appeared on every request for information form labeled as “1040 U.S. Individual Income Tax Return.”
2. The 1040 Form is a request for information by the United States.
3. Any information the Commissioner seeks from Petitioner is subject to OMB approval.
5. The Commissioner is aware that the 1040 Form for years 1995 through present contains requests for information and statements of law which do not derive from any specific provision of the Internal Revenue Code of 1986 as amended.
8. Without any “exemption amount” being given an assigned value by Congress section 6012 requires nothing from anyone.
9. The Notice of Deficiency was issued based upon the Commissioner’s interpretation and application of section 6012.

10. Without section 6012, no other provision of the Internal Revenue Code would support any claim by the Commissioner that Petitioner was required to file any information request form at any time based upon any reason for any year beginning in 1995 through present.

See dkt #s 8 and 11

In its “Response” which the CIR entitled “Respondent’s Answer” CIR **admitted** the following:

4. Petitioner has filed a Form 1040 with the OMB number 1545-0074.
7. At no time does any specific provision of the Internal Revenue Code set a value to the phrase “exemption amount” as appearing in section 6012.

See dkt #s 8 and 11

In its “Response” which the CIR entitled “Respondent’s Answer” CIR **denied part and admitted part of** the following

6. Denies that a Form 1040 is a “request for information” but admits that if an individual does not have gross taxable income in excess of the “exemption amount,” the filing of a return is not required.

See dkt # 11

Contrary to the CIR and Tax Court’s opinion, the Form 1040 is a request for admission by a Federal Agency and is subject to the public protection of 44 U.S.C §

3512(1995).

Contrary to the CIR and Tax Court's opinion, the Form 1040 is not a mandate from any specific provision of any law.

The Tax Court imposed penalties as "additions to tax due" for years 1995 through 2001 pursuant to 26 U.S.C. § 6651(a)(1) contrary to 44 U.S.C. § 3512(1995).

The Tax Court imposed penalties as "additions to tax due" for years 1996 through 2001 pursuant to 26 U.S.C. § 6654 contrary to 44 U.S.C. § 3512(1995).

3. Statement of the Issues.

- a. Whether admission by CIR that meaning given exempt "amount" at section 6012(a)(1)(D)(ii) is given same meaning as in section 151(d) and to which gives no amount for years at issue in this case as admitted by CIR renders any "requirement" under sections 6001, 6011 and 6012(a) and their regulations meaningless?**
- b. Whether the 1040 Form with OMB number 1545-0074 is a request for information involving statutes mixed with unauthorized agency action and is subject to the Paperwork Reduction Act's Public Protection Provision, 44 U.S.C. § 3512(1995)?**
- c. Whether Form 1040 complies with Paperwork Reduction Act of 1995?**
- d. Whether Appellant owes (can be subject to) "additions to tax" as "penalties" since it is beyond dispute that the information request form 1040 does not comply with the Paperwork Reduction Act of 1995.**
- e. Whether any determination made by CIR pursuant to 26 U.S.C. § 6020(b) to authorize its Notice of Deficiency for penalty years 1995 through 2001, is subject to the protection provided by Congress pursuant to 44 U.S.C. § 3512(1995)?**
- f. Whether 26 U.S.C. §§ 6651 and 6654 are penalties subject to the**

prohibitions announced under 44 U.S.C. § 3512(1995)?

a. First Issue:

CIR admitted that meaning given exempt “amount” at section 6012(a)(1)(D)(ii) is given same meaning as in section 151(d) and to which gives no amount for years at issue in this case as admitted by CIR rendering any “requirement” under sections 6001, 6011 and 6012(a) and their regulations meaningless.

At issue in this case is whether Appellant could be determined by CIR to be a individual required to make an information collection request form 1040 with OMB # 1545-0074 for tax and penalty years 1995 through 2001.

Section 6012(a)(1) states that every individual with gross income equaling or exceeding the “exemption amount” is required to file a federal income tax return. I.R.C. § 6012(a)(1)(D)(ii) states that the term “exemption amount” has the meaning set forth in I.R.C. § 151(d). CIR admitted that I.R.C. § 151(d)(1) does not contain any amount that section 6012's requirement could rely upon for any years at issue in this case. *See dkt. # 8 and 11* There is no specific amount “given” for any of these years.

Section 6020(b) states that “if any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor,the Secretary shall make such return from his own knowledge and from such information as he obtain through testimony or otherwise.”

Section 6011 says when required “ by regulations prescribed by the Secretary any person made liable for any tax imposed by this title,....shall make a return or statement

according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.”

44 U.S.C. § 3512(1995) provides that:

(a) Notwithstanding any other provision of law, **no person shall be subject to any penalty for failing to comply with a collection** of information that is subject to this subchapter if -

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.

Not only did the CIR make an erroneous determination that Appellant was required to provide information upon Form 1040 for years 1995 through 2001, the CIR also determined and the Tax Court approved penalties disguised as “additions to tax” solely upon the determination Appellant was to “make any return required by any internal revenue law or regulation made thereunder...”

Without any exempt amount to trigger section 6012 the determination by the CIR is erroneous. Without any form to provide the “information” on that complies with the

Paperwork Reduction Act of 1995 the determination by the CIR is erroneous.

This Court should reverse the Tax Court decision on grounds the CIR was without any authority under sections 6012, 6020 nor 6213, to issue any notice of deficiency for years 1995 through 2001 to Appellant because the determination Appellant was to “make any return required by any internal revenue law or regulation made thereunder” is an erroneous determination that failed to consider that the exempt amount triggering section 6012 does neither derive from law or regulation as well as the Form 1040 for the years 1995 through 2001 were not in compliance with the Paperwork Reduction Act of 1995.

b. Second Issue:

Form 1040 with OMB number 1545-0074 is a request for information involving statutes mixed with unauthorized agency action and is subject to the Paperwork Reduction Act’s Public Protection Provision, 44 U.S.C. § 3512(1995).

The CIR denies to the Tax Court that Form 1040 with displayed OMB # 1545-0074 is a “request for information”. *See dks # 8 and 11*

To settle this dispute, whether the Form 1040 is a “request for information” subject to the Public Protection Provision, 44 U.S.C. § 3512 (1995), Petitioner directs this Court to decisions by the 10th Circuit Court of Appeals as well as the Supreme Court. The Supreme Court stated in *Dole v. Steelworkers*, 494 U.S. 26 (1990) that:

“Typical information collection requests include ***tax forms***, Medicare forms, financial loan applications, job applications, questionnaires, compliance reports, and tax or business records. See S. Rep., at 3-4.”

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In *U.S. v. Dawes*, 951 F.2d 1189 (10th Cir. 1991) the Tenth Circuit stated:

“The 1040 form is the information collection request which arguably must comply with the PRA. It is through the 1040 form that the government obtains all of the tax information it requires”

“As long as the 1040 form complies with the Act, nothing more is required.”

Yet, the Commissioner denies the Form 1040 is a “request for information.” There can be no doubt that the Form 1040 U.S. Individual Income Tax Return is a “request for information” by the United States and as such is subject to the Paperwork Reduction Act of 1980 and 1995.

While addressing the reasons for the changes between the 1980 and 1995 Paperwork Reduction Acts, Congress said in its Legislative History of the 1995 PRA, the purpose for the 1980 PRA was to clarify it originally was enacted to among other things, “eliminate exemptions” for the “Internal Revenue Service”. *House Report, 104-13, [page 8] at 171 (1995)* This Report also directed that the difference between the language of the old section 3512 and the new section 3512 was to maintain the same purpose. The only reason it was modified to add certain terms was to maintain consistency and clarity and to “unequivocally cover all collections of information” *House R. [page 54] at 217*

The Tax Court’s decision that the Form 1040 is not a request for information inherently included within its decision to render a decision in favor of the CIR must be reversed on grounds the Form 1040 for 1995 through 2001, as well as any other year from 1981 through present, is a typical information collection request and is subject to the Paperwork Reduction Act of 1980 and 1995.

c. Third Issue:

Form 1040 does not comply with the Paperwork Reduction Act of 1995?

Appellant raised many issues with the non compliance of Form 1040 in regard to the Paperwork Reduction Act (PRA) of 1995. Since 1995, CIR has been required to give notice to the Public that “You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number.” Although this appears in the instruction booklet for Form 1040, it does not appear upon the form itself. This alone violates the PRA of 1995.

In the House Conference Report involving the 1995 PRA, No. 104-99 [page 36] at 248, the House and Senate agreed that:

“the Senate bill contains a provision which changes the Act’s current “public protection” provision by requiring a collection of information subject to the Act display a notice that a person is not required to respond to the collection of information unless it displays a control number which is valid.”

44 U.S.C. § 3512 provides:

- (a) Notwithstanding any other provision of law, **no person shall be subject to any penalty for failing to comply with a**

collection of information that is subject to this subchapter if -

(1) the collection of information does not display a valid control number assigned by the Director in accordance with this subchapter; or

(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

Furthermore, 44 U.S.C. § 3507(g) requires an approved number to expire after three years. Since IRS chooses not to display an expiration date, once the number is displayed for three years it has the appearance of being invalid. And for good reason.

44 U.S.C. § 3507(h)(3) provides no agency shall be authorized to make any changes to approved forms unless they have applied to OMB to make the changes and OMB approves those specific changes. If the Agency does not comply with the PRA of 1995 “The Act “allow[s] the public, by refusing to answer these [information collection requests], to help control `outlaw forms”).” *Dole v. Steelworkers*, 494 U.S. 26, 40 fn. 6 (1990)

The “standard deduction” changes on the second page each year and at no time upon the application to OMB does the IRS inform OMB of this change either in their 83-I or 83-C forms.

The exempt amount appears to change every year by way of the instruction booklet but that number is never informed to OMB or how it is calculated or intended to be used.

So, between the undisputed fact the 1040 Form for years 1995 through 2001 fails to contain the notice that Appellant is not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number, contains a number that has appeared since 1981 when the

numbers are only good for three years, as well as the Form 1040 contains changes never seen nor approved by OMB, the Form 1040 is out of compliance with the PRA of 1995. The purpose of the PRA is to build confidence between Government and the American Citizen. Thus far, the policy of the Commissioner is failing to accomplish this objective.

The CIR tells the public “you are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number”¹ and then tells the Tax Court that they claim the Form 1040 is neither a “request for information” nor is it required to comply and obtain approval from OMB. This is absurd double speak and this Court should impose sanctions on the CIR for even saying it.

To be clear, and for comparison, this Court should review Form W-4, 4852 and Form 941. Each of these forms have the notice “*you are not required to provide....*” on the forms themselves. Even Form 941 has an “instruction booklet” but this same policy followed with this form is not followed by the IRS with Form 1040.

For calendar year 2005, beginning 2006, IRS decided to remove each OMB number on several forms and place the Form 1040 # 1545-0074 on each form. This just further shows that the IRS has decided to ignore the PRA of 1995 which only shows why they claim in this case that Form 1040 is not a request for information when the Dole Supreme Court said it was a typical information collection request. This Court affirmed the Dole decision in both *U.S. v.*

¹ Erroneously in the 1040 instruction, a booklet this Court concluded is not subject to approval by OMB. See *U.S. v. Dawes*, 951 F.2d 1189, 1192-1193.

Collins, 920 F.2d 619, fn 12(10th Cir. 1990) and *Dawes*, generally.

Because there are several violations on Form 1040 that make it in violation of the PRA of 1995, to numerous to mention them all, this Court should enter an Order reversing the decision by the Tax Court and direct it that the Form 1040 for years 1995 through 2001 appears to contain several violations of the PRA of 1995 and as such is not “in accordance” with the PRA of 1995, and is an invalid, outlaw and bootleg request by the IRS.

d. Fourth Issue:

Appellant does not owe (cannot be subject to) “additions to tax” as “penalties” since it is beyond dispute that the information request form 1040 does not comply with the Paperwork Reduction Act of 1995

44 U.S.C. § 3512(b)(1995) provides “The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.” Section 3512(a) states “**no person shall be subject to any penalty for failing to comply with a collection** of information that is subject to this subchapter if...”

The Tax Court chose not to penalize Appellant under section 6651(f) because it decided Appellant held his belief in good faith. This must mean there is some merit to Appellant’s claims to the Tax Court. Without addressing them, the Tax Court decided to impose additions to tax upon Appellant as advanced by

CIR.

The Tax Court is a court of limited jurisdiction and is not empowered to decide general questions relating to interest. *Commissioner v. McCoy*, 484 U.S. 3, 7, 108 S.Ct. 217, 219, 98 L.Ed.2d 2 (1987). Yet, the CIR asked the Tax Court to decide issues relating to penalties and interest and the Tax Court, obviously ignoring the Supreme Court, decided to impose the additions in its final order.

Appellant does not owe and is not liable for any penalties and interest, color-ably identified as “additions to tax” as the IRS did not earn their privilege to ask for such additions. These penalties and interest section 3512 says Appellant cannot be subjected to and the Tax Court disagreed.

This Court should reverse the Tax Court’s decision Appellant owed “additions to tax” as these penalties are prohibited by law under 44 U.S.C. § 3512(1995).

e. Fifth Issue:

Any determination made by CIR pursuant to 26 U.S.C. § 6020(b) to authorize its Notice of Deficiency for penalty years 1995 through 2001, is subject to the protection provided by Congress pursuant to 44 U.S.C. § 3512(1995) in its final determination.

Section 6020(b) clearly places the power of the CIR to issue a Notice of Deficiency pursuant to whether or not Appellant was required by Internal Revenue Law or Regulations to make a Form 1040 for each of the years at issue in this case. 44 U.S.C. § 3512 clearly says that Appellant cannot be subject to

any penalty and section 6012 relies upon a phantom “exemption amount” the CIR admitted neither existed in law, regulation, or in how it decided to issue the Notice of Deficiencies in this case, when it responded to the Court ordered demand by Appellant for admissions on this subject.

It defies due process for such an erroneous determination to be made by the CIR and Appellant be prohibited from questioning its exercise. If the CIR makes a claim that Appellant was “required by law” to make a form 1040 then that determination must be subject to cross examination and particular scrutiny. The same CIR that made the erroneous determination told Appellant and the public in the instruction booklet “you are not required to provide the information requested on a form subject to the Paperwork Reduction Act unless the form displays a valid OMB number.”

This Court should enter an order that holds any determination by the CIR under section 6020(b) is subject to the protection provided by Congress pursuant to 44 U.S.C. § 3512.

f. Sixth Issue:

Whether 26 U.S.C. §§ 6651 and 6654 are penalties subject to the prohibitions announced under 44 U.S.C. § 3512(1995)?

It is very hard to even write this argument knowing how ridiculous it is that CIR somehow claimed the Form 1040 was not a request for information and thus it was not subject to the protection provided by section 3512. Since there is no

question that the Form 1040 for 1995 through 2001 is subject to the PRA of 1995, and because section 6651 and 6654 of 26 U.S.C. are both penalty provisions directed at punishment, and because penalty is defined at 44 U.S.C. § 3502(14) as to include property, fine, rights and the like, section 6651 and 6654 are penalties subject to the protection provided to the public by 44 U.S.C. § 3512.

This Court should enter an order deciding that penalties under section 6651 and 6654, imposed by the Tax Court, are prohibited by 44 U.S.C. § 3512 when the Federal Agency has not complied with the PRA of 1995 in any way whatsoever.

4. Do you think the tax court applied the wrong law? If so, what law do you want applied?

The Tax Court treated the PRA of 1995 as if it did not even exist. The Tax Court accepted the statements of Appellant to deny penalty under 26 U.S.C. § 6651(f) but then failed or refused to apply that finding any further. Appellant wishes this Court to apply the PRA of 1995, and its protections, to the claims made by CIR in their Notice of Deficiencies dated April 8, 2003. Appellant wishes this Court to apply the words of the CIR, compared to the words uttered in this case, and produce a unified position on whether the CIR can tell the public the form 1040 is subject to the PRA of 1995 and then also say it is not subject to the PRA of 1995 during the admission phase.

5. Did the tax court incorrectly decide the facts? If so, what facts?

Appellant never disputed the taxable income and only disputes the procedure in

which the decision by both the CIR and the Tax Court has been derived.

6. Did the tax court fail to consider important grounds for relief? If so, what grounds?

I am not certain how the Tax Court arrived at its decision to ignore the CIR's words or where the exempt amount magically appears. With the admissions by the CIR in this case, Appellant thinks the Tax Court refused to consider the words of the Supreme Court, Congress, this Court, and even the published public words of the CIR for over 25 years.

7. Do you feel that there are any other reasons by the tax court's judgment was wrong? If so, what?

Appellant believes with the CIR's inconsistent position on the undeniable application of the PRA of 1995, and the revelation of the phantom exempt amount and Form 1040 violations, the Tax Court simply made a decision which ignores certain laws.

8. What action do you want this court to take in your case?

Reverse the decision by the Tax Court with direction answering each issue herein in a manner that leaves ambiguity in the trash bin. Render a decision in Appellant's favor and against CIR.

9. Do you think the court should hear oral argument in this case? If so, why?

. It is up to you but I think the issues are purely legal and it is time the public becomes protected by the Paperwork Reduction Act of 1995.

Respectfully Submitted

Date

Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON August 28, 2006, I sent a copy of Appellant's
Opening Brief by first class mail to:

Robert L. Baker
Department of Justice
P.O. Box 502
Washington D.C. 20044

Server

August 28, 2006

