July 26, 2012

Elmer Jon Buckardt
P.O. Box 1142
Stanwood, WA 98292

Molly Dwyer, Esquire
Clerk, U.S. Court of Appeals, 9th Circuit
The James R. Browning Courthouse
P.O. Box 193939
San Francisco, CA 94119-3939

Re: Elmer Jon Buckardt v. Commissioner of Internal Revenue
(9th Cir. - No. 10-72898)

Dear Ms. Dwyer:

Please accept for filing Appellant's Motion for Rehearing En Banc. You will find the original Motion enclosed. I can be reached at 206-714-2661.

Sincerely,

Elmer Jon Buckardt

Encls.

Cc: Melissa Briggs
Appellate Section
P.O. Box 502
Washington, D.C. 20044

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Elmer Jon Buckardt	)	No. 10-72898
	)	
	)	Tax Ct. No. 27949-07
Petitioner/Appellant	)	
	)	MOTION FOR REHEARING EN
v.	)	BANC
	)	
Commissioner of Internal Revenue	)	
	)	
Respondent/Appellee		

Elmer Jon Buckardt, hereinafter, "EJB," "Appellant" or "Petitioner," an unrepresented litigant, respectfully and timely moves this Court for rehearing en banc, pursuant to Federal Rules of Appellate Procedure (FRAP), Rule 35. This Motion is brought for two critically important and inextricably related reasons as follows: 1) to resolve conflict in the Court's decisions with respect to the validity of a zero return for the purposes of the income tax[1], and 2) it is of exceptional importance in the case sub judice that this Court acknowledge and ratify that 26 U.S.C. 861 and following and the regulations thereunder control the tax imposed on American individuals.

1.

[1] U.S. v. Long, 618 F.2d 74 (C.A.9 (Cal.), 1980), U.S. v. Kimball, 925 F.2d 356 (C.A.9 (Nev.), 1991) January 31, 1991, U.S. v. Kimball, 896 F.2d 1218 (C.A.9 (Nev.), 1990) February 26, 1990; **distinquished** from Cabirac v. Commissioner, 120 T.C. 163, 169 (2003), Coulton v. Commissioner, T.C. Memo. 2005-199 (citing Beard v. Commissioner, 82 T.C. 766, 777 (1984), affd. per curiam 793 F.2d 139 (6th Cir. 1986)); Halcott v. Commissioner, T.C. Memo. 2004-214, none of the Tax Court opinions are binding on Appellant. See IRM 4.10.7.2.9.8 (01-01-2006).

INTRODUCTION

2. Appellant reaffirms the appeal as though fully restated here.

3. Petitioner asserted in the U.S. Tax Court and still asserts that no deficiency existed for the years 2003, 2004 and 2005 and therefore no tax is due and owing the U.S. Treasury or are there any penalties due.

GOOD FAITH

4. Appellant from the beginning has, in all ways, acted in good faith. Appellant's arguments and papers were not and are not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

2. In *Scott v. Harold Barclay Logging Company,* 162 Or App 228, 987 P2d 17 (1999) (The court explained in *Mattiza* that "a claim, defense, or ground for appeal or review is meritless when it is entirely devoid of legal or factual support at the time it was made." See: *Mattiza v. Foster*, 311 Or 1, 803 P2d 723 (1990); Cf. *ABA Model Rules of Professional Conduct,* Rule 3.1 (1983) (*Meritorious Claims and Contentions*); *Restatement Third, The Law Governing Lawyers* § 110 (*Frivolous Advocacy*).

5. Appellant with great detail explained his argument in Appellant's Pre-trial Brief. If that explanation is frivolous, as Respondent and apparently this Court

contends, SO IS THE LITANY OF STATUTES AND REGULATIONS CITED IN THE BRIEF.

FRIVOLOUS

6. Of all the tools in Respondent's bag of tricks, none is as powerful and as misused as the concept of a declaring an argument as "frivolous!" 26 U.S.C. 6402 states [Emphasis added]:

> **(a) Civil penalty for frivolous tax returns**
> A person shall pay a penalty of $5,000 if—
> **(1)** such person files what purports to be a return of a tax imposed by this title but which—
> **(A)** does not contain information on which the substantial correctness of the self-assessment may be judged, or
> **(B)** contains information that on its face indicates that the self-assessment is substantially incorrect, **and**
> **(2)** the conduct referred to in paragraph (1)—
> **(A)** is based on a position which the Secretary has identified as frivolous under subsection (c), or
> **(B)** reflects a desire to delay or impede the administration of Federal tax laws.

3. As can be plainly seen above, subsections (1) and (2) are conjunctive; both must occur before an individual can be sanctioned for a frivolous argument. Never will Respondent identify with particularity their assertion that a given argument is frivolous. Instead Respondent makes a reflexively and conclusory statement without citing to any authority whatsoever; "your argument is frivolous!" Respondent subscribes to the Humpty-Dumptian philosophy of language found in Lewis Carroll's *Through the Looking Glass*: "'When I use a word,' Humpty

Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.'"

4. Petitioner has more than once requested Respondent identify the frivolous argument. The request has been summarily rejected. Respondent hides behind *Wnuck v. Commissioner*, 136 T.C. 498 (2011) (quoting Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984) claiming that Petitioner is not due an explanation, despite the axiomatic maxim that a party making a claim must prove up their claim. See 5 U.S.C. 556(d).

5. Appellant will show below his arguments concerning the validity of a zero return for federal income tax purposes and the validity of 26 U.S.C. § 861 and following and the regulations thereunder with respect to the determination of taxable income to not be frivolous.

ZERO RETURN

10. Respondent argues that zero returns are explicitly proscribed; no exceptions. Appellant vehemently disagrees. Zero returns are valid if supported by sufficient evidence that the receipts shown thereon are not taxable income. "Nothing can be calculated from a blank, but a zero, like other figures, has significance." See *U.S. v. Long*, 618 F.2d 74 (C.A.9 (Cal.), 1980). Consider the three hypothetical scenarios below to conclusively disprove the point all zero returns are invalid.

3. First, an American individual received gifts of $11,000 from each of ten Americans for a total of $111,000 per year. Second, an American individual invested $1,500,000 in tax-free municipal bonds in Washington State, maturing in 20 years earning 5% per year for a total of $75,000. Third, an American individual receives an inheritance of $100,000. No taxable event is triggered in any of the three scenarios.

4. EJB concedes that if he has taxable income, pursuant to 26 CFR § 1.1-1[2], he cannot legally avoid income tax by filing a zero return. If EJB has receipts that result in no taxable income, as in the three scenarios above, filing anything other than a zero return would be perjury; an inconvenient truth. Likewise, filing a return where the receipts from a pension and annuity are **excluded** for federal

[2] "The tax imposed is upon taxable income... In general, all citizens of the United States... are liable to the income tax imposed by the Code whether the income is received from sources within or without the United States." 26 CFR § 1.1-1.

income tax, the preparer of such return would be obligated to enter zeros with respect to taxable income or make a perjurious statement. 26 U.S.C. 861

5. 26 U.S.C. § 61[3] provides that "gross income[4] includes all income from whatever source derived.[5]" [Emphasis added] "Source" is a term of art and as such the term takes on the meaning found in the applicable law, in this case 26 U.S.C. § 861 and following and the regulations thereunder. Respondent will cry foul and say and assert one or more of the following:

6. *"Gross income means all income 'from whatever source derived,' so the source is irrelevant. You don't need to determine the source.*"

7. "*Compensation for services is listed in 26 USC § 61 as a source of income."*

8. "*Section 1.1-1 of the regulations shows that citizens are taxable on income no matter where it comes from.*"

9. *"Section 861 is only about foreign income, so you shouldn't be looking there.*"

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[3] The statute's regulation, 26 C.F.R. § 1.61-1 reads Gross income means all income from whatever source derived, unless excluded by law. [Emphasis added] Income can be exempted by fundamental law (U.S. Constitution) or by statute.

[4] "Rules are prescribed for determination of gross income and taxable income derived from sources within and without the United States, and for the allocation of income derived partly from sources within the United States and partly without the United States or within United States possessions. §§ 1.861-1 through 1.864. (Secs. 861-864; '54 Code.)" Treasury Decision 6258

[5] The statute includes a cross-reference to § 861 regarding "*income from sources within the United States*." And the first thing the regulations under §861 state is that "*section 861 and following... and the regulations thereunder determine the sources of income for purposes of the income tax*" (26 CFR § 1.861-1).

10. "*The rules in Section 861 and following only apply to those who have income from within the United States and income from outside. If you only have income from within the United States, you shouldn't be looking there.*"

11. "*The rules in 26 USC § 861 are only about income from certain specific activities, and if your income doesn't come from those activities, you should just be looking at 26 USC § 61.*"

12. All six assertions are provably wrong because the plain language of 26 U.S.C. 861 and following and the regulations thereunder categorically disprove each statement. Respondent cannot and has not cited to any statute or otherwise on which they rely to restrict Appellant's inquiry! As in the paragraphs that follow, Appellant and others MUST look beyond §§ 61 and 63.

13. Laws say what they mean, and mean what they say[6]. They are expertly written; the machinations of some jurists notwithstanding. Laws must be written in a fashion that can be easily understood by a person of average intelligence reading at a ninth grade level as accessed by a Flesch-Kincaid Grade Level evaluation. Laws that are ambiguous or incomprehensible are void for vagueness. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." See *Grayned v. City of Rockford*, 408

[6] *In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.*" [Gould v. Gould, 245 U.S. 151 (1917)]

US 104 - Supreme Court 1972. 26 U.S.C. 861 and following and the regulations thereunder are some of the most complex and convoluted laws known to man, causing the eyes of a ninth grader to glaze over!

14. "Federal Income Tax Regulations are the official Treasury Department interpretation of the Internal Revenue Code." Internal Revenue Manual, 4.10.7.2.3.1. "The Service is bound by the regulations." Internal Revenue Manual, 4.10.7.2.3.4.

15. Income is either taxable pursuant to 26 C.F.R. 1.861-8T(d)(2)(iii) or exempt, excluded or eliminated for federal income tax purposes. See 26 C.F.R. 1.861-8T(d)(2)(ii). [Emphasis added]

16. Over the overt shrieks of FRIVOLOUS and the endless threats of sanctions emanating from Respondent, Petitioner asserts in good faith and after exhaustive and diligent inquiry, pension receipts and annuity receipts are NOT taxable, i.e. they are EXCLUDED and such finding led to a zero federal income tax return. To arrive at that decision, Petitioner tirelessly searched the Code of Federal Regulations (C.F.R.) and found, *inter alia,* the following in support:

17. Two hits for the phrase "*how to determine taxable income."*[7] See 26 C.F.R. 1.861-8(a) and 26 C.F.R. 1.861-1(a).

[7] *This term only occurs in ONE Regulation, on ONE page, in ONE paragraph in the entirety of 26 CFR (millions of words). Not only does Sec. 861-8 specify "how to determine taxable income", it is titled "Computation of taxable income": (37 hits found), it lists the "specific sources" of income (1 hit found), it "provides specific guidance", and says that "The rules contained in this section apply in determining taxable income ... under other sections of the Code." These rules tell us to see paragraph (f)(1) for a list of taxable sources, and to follow paragraph (d)(2) to see the list of taxable items. Neither list imposes federal income tax on an American with only domestic income.*

18. One hit for the phrase "*determining taxable income of the taxpayer*" is found. See 26 C.F.R. § 1.861-8(a).

19. One hit for the phrase "*taxable income from sources within the United States shall consist of*" is found. See 26 C.F.R. § 1.861-1(b).

20. Three hits for the phrase "*specific sources*" are found. See 26 C.F.R. § 1.861-8(a), (f) and (ii).

21. Two hits for the phrase "*excluded income*" are found. See 26 C.F.R. § 1.861-8(4) for both.

22. Zero instances of "accession to wealth."

23. In addition, the following critically important text was found in 26 C.F.R.:

> 24. The regulations under 26 USC § 861 specifically state that the "items"[8] of income listed in §61 can include income which is NOT taxable, to wit: [P]aragraph (d)(2)[9] of this section... provides that "a class of gross income may include excluded income." See 26 CFR § 1.861-8(b)(1). For example, pension and annuity receipts can, and in the case of Appellant, are excluded.

25. "Determination of taxable income. The taxpayer's taxable income from sources within **or**[10] without the United States will be determined under the rules of

[8] Many incorrectly read the list in 26 USC § 61 to be a list of "sources," rather than a list of "items" of income, which is made clear at 26 CFR § 1.861-1.

[9] (26 CFR § 1.861-8(d)(2) redirects the reader to 26 CFR § 1.861-8T(d)(2).) *For purposes of this section, the term exempt income means any income that is, in whole or in part, exempt, excluded, or eliminated for federal income tax purposes*." [26 CFR § 1.861-8T(d)(2)(ii)]

[10] **There is no other choice…one or the other.**

§§ 1.861-8 through 1.861-14T, for determining taxable income from sources within the United States." (26 CFR § 1.863-1(c)). It cannot possibly be any clearer, 26 U.S.C. 861 and following the regulations thereunder, such as 26 CFR § 1.863-1(c), are essential to calculating the federal income tax and cannot in anyway be construed frivoulous!

26. Appellant's tax return contained evidence of an honest and reasonable attempt to satisfy the tax laws and contained sufficient data to calculate the tax liability, which are necessary elements of a valid tax return. See Beard v. Commissioner, 82 T.C. 766, 777-79, aff'd 793 F.2d 139 (6th Cir. 1986).

27. A DOJ brief makes the following snide comment concerning U.S. citizens: "In the words of IRC § 61, all of their income, from whatever source, is subject to tax. Proponents of the § 861 Argument do not like that, but it is the law." Nice sound bite, but it is provably false. Not only do the above citations explain how to determine one's "taxable income," which does not lead to the conclusion that all receipts of American's are taxable, but the regulations also specifically say that the "items" of income listed in § 61 make up "classes of gross income" (26 CFR § 1.861-8(a)(3)), and that such "classes of gross income" are **not** always taxable, but are sometimes excluded by law (26 CFR § 1.861-8(b)(1)). It is the law and cannot be ignored or obfuscated.

28. But before one can have taxable income from inside *or* outside the United States, he must be engaged in some "specific source or activity" described in the "operative sections" found throughout the *other* parts of Subchapter N. (Those "operative sections" are listed in 26 CFR § 1.861-8(f)(1).)

29. For example, one "operative section" is § 871(b), found in Part II of Subchapter N, which states that nonresident aliens "*shall be taxable*" under § 1 (the section which imposes the income tax on individuals) on income they receive from doing business in the United States. So in the case of a *nonresident alien* doing business in the states, § 861 shows that certain types of income (including compensation for services performed in the U.S.) are considered "*income from sources within the United States*," and such income, after subtracting allowing deductions, is to be included as *taxable* income. But that does not mean that *all* compensation for services performed by *anyone* in the U.S. is taxable.

30. One must be engaged in one of the "specific sources or activities" (described in the "operative sections") in order for the rules in §§ 861 through 863 to show that such income constitutes taxable income from within or without the United States. The regulations show that §§ 861, 862, and 863 apply in determining taxable income from "*specific sources*" (26 CFR § 1.861-8(f)(3)(ii)), and the section for determining "*taxable income from sources within the United States*" (§ 1.861-8) repeatedly shows that one must derive income from one of the "*specific*

sources" listed in § 1.861-8(f)(1) in order for the section to show that income to be taxable. Appellant's pension and annuity receipts DO NOT derive from any of the specific sources.

31. "[T]he term 'statutory grouping' means the gross income from a specific source or activity, which must first be determined in order to arrive at 'taxable income' from which specific source or activity under an operative section. (See paragraph (f)(1) of this section.)" (26 CFR § 1.861-8(a)(4))

32. More than *80 years* of legal history[11] leaves no room for doubt that Section 861 only shows domestic income to be taxable when received by nonresident aliens, foreign corporations, and others engaged in certain activities related to *international* commerce that "gross income" included all income except what was exempted by an Act of Congress, and except those types of income which were exempt because they were, "*under the Constitution, not taxable by the Federal Government*" (26 CFR § 39.22(b)-1). (The "full extent" of Congress' taxing power is not unlimited…and…all receipts are not taxable).

[11] In light of the plain text of 26 USC § 861(b), 26 CFR §§ 1.861-1(a), 1.861-1(b), 1.861-8(a), 1.863-1(c), 1.862-1(b), Treasury Decision 6258, Section 22(g) of the 1939 Code, and other citations, only the disingenuous would claim that it is entirely "baseless" or "friviolous" to believe that one should use 26 USC § 861(b) and 26 CFR § 1.861-8 to determine taxable domestic income

CONCLUSION

Appellant has carefully laid an administrative record. This Court must resolve the conflict in present law, where a zero return is putatively but wrongly unlawful and proscribed for all purposes. The Court must also acknowledge and validate that 26 U.S.C. 861 and following and the regulations thereunder control the tax imposed on American individuals.

The United States Court of Appeals for the Ninth Circuit filed, on July 13, 2012, a not-for-publication Memorandum stating: "The Tax Court properly upheld the Commissioner's deficiency determinations because Buckardt failed to establish that the funds he stipulated to receiving during each relevant year were not subject to taxation under the Tax Code. *See Hawkins v. United States,* 30 F .3d 1077, 1079 (9th Cir. 1994) ("An accession to wealth ... is presumed to be taxable income, unless the taxpayer can demonstrate that it fits into one of the Tax Code's specific exemptions.")." See Exhibit 1. The foregoing is provably false and judicial fiat for the reason that Appellant clearly articulated in Petitioner's Pre-Trial Brief, Page 13, the following: "The item (pension or annuity) must come from one of the listed SOURCES as defined at 26 C.F.R. § 1.861-8(f)(1). If the source is not listed, the item of income is not taxable. The regulation found at 26 C.F.R. 1.861-1 "determine[s] the

SOURCES of income for PURPOSES OF THE INCOME TAX." [Emphasis added] Neither Appellant's pension nor annuity receipts derive from the specific sources, therefore neither are taxable. Petitioner's assertion was summarily rejected, complete with the ubiquitous threats of sanctions when the law is clear and there for everyone to see. Such an attitude is tantamount to declaring the world is flat…not round, as all know it to be.

RELIEF SOUGHT

Appellant urges this Court to remand the case to the District Court to be heard on the merits.

Prepared and submitted on July 26, 2012 by:

Elmer Jon Buckardt
206-714-2661

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This Motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

__this Motion contains 15 pages or less, excluding the parts of the Motion exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

__this brief has been prepared in a proportionally spaced typeface using MS Word in Times New Roman 14 pt.

Prepared and submitted on July 26, 2012 by:

_____

Elmer Jon Buckardt

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am over 18 years of age and on the 25th day of July, 2012, I mailed a copy of Appellant's/Petitioner's Motion for Re-hearing En Banc to the recipient listed below by the method shown:

The documents were mailed to:

Mellissa Briggs Tax Division Department of Justice P.O. Box 502 Washington, D.C. 20044	Certified Mail 7011 0470 0002 7934 6811
The James R. Browning Courthouse U.S. Court of Appeals 95 7th Street (94103) P.O. Box 193939 San Francisco, CA 94119-3939	Express Mail EI 262844095 US

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

_____

Elmer Jon Buckardt