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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA §
v. §
RICHARD MICHAEL SIMKANIN (01) §

Criminal No.: 4:03-CR-188-A

DEFENDANT SIMKANIN'S SUPPLEMENT
TO MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, Richard Michael Simkanin, in the above numbered and entitled cause and files this Supplement to his Motion for New Trial and for cause would show as follows:

1. Incorporation by reference - The Defendant hereby incorporates by reference for all purposes the Motion for New Trial filed earlier in this cause.

2. Affidavit of Victoria Osborne - Victoria Osborne, who was a potential witness who was excluded from the trial provides her affidavit with exhibits explaining what her testimony would have been had she been allowed to testify in the trial which amplifies in detail the summary and proffer of her testimony that was proffered by Counsel in order to have her testify.

WHEREFORE PREMISES CONSIDERED, the Defendant respectfully prays that this Supplement be taken into consideration with the Motion for New Trial and the Motion for

New Trial granted.

Respectfully submitted,

ARCH C. McCOLL, III
State Bar Card No.13431800
McColl & McColloch
2000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761
(214) 979-0999

By: 

CERTIFICATE OF CONFERENCE

I, ARCH C. McCOLL, III, do hereby certify that on the 21st day of January 2004, I was (able) (unable) to communicate with Mr. David Jarvis, the Asst. U.S. Attorney for the Northern District of Texas, Fort Worth Division, Fort Worth, Texas, who (agreed) (disagreed) (had no objection) (took no position) (was unavailable) regarding Defendant's Supplement to Motion for New Trial.



ARCH C. McCOLL, III

CERTIFICATE OF SERVICE

I, ARCH C. McCOLL, III do hereby certify that on the 21st day of January 2004, a true and correct copy of Defendant's Supplement to Motion for New Trial has been sent by Federal Express to Mr. David Jarvis, Asst. U.S. Attorney for the Northern District of Texas, Fort Worth Division, Fort Worth, Texas, at the latest address listed in the Texas "Blue Book" Legal Directory, or in the Martindale-Hubbell Attorney Directory, which address was verified with a telephone call from my office, and also sent by U.S. Mail to all other counsel for the additional parties, if any, as shown in the attachment or below.



ARCH C. McCOLL, III

FIAT

This matter is hereby set down for a hearing in this, the _____ Court for the _____ day of _____, 20____, at _____ m. o'clock.

Signed this _____ day of _____, 20____.

JUDGE PRESIDING

AFFIDAVIT OF VICTORIA OSBORN

STATE OF COLORADO

COUNTY OF EL PASO

1) My name is Victoria Osborn, and I live in Colorado Springs in El Paso County Colorado. I am over the age of 21 and I have never been convicted of a felony or crime of moral turpitude. If called to testify in the above referenced matter, I would testify as follows:

2) In September 2001 Mr. Simkanin contacted me because he had heard about the work I had accomplished since 1998 in reconciling taxpayers' accounts maintained by the Internal Revenue Service (IRS). Mr. Simkanin heard about my work sometime back in 1998 or 1999. He had been researching the tax laws for numerous questions. He was deeply concerned about the inability of the taxpayer to obtain answers to questions relating to their tax accounts maintained by the IRS.

3) Mr. Simkanin discussed with me the business he owned which was originally operated as Simkanin, Inc. and now operated as Arrow Custom Plastics. He said in or about 1994 or 1995 the business changed it's accounting method from cash to accrual. This change resulted in an increase in tax liability of approximately \$300,000.00. He had very complex tax transactions he felt had not been properly handled in the IRS' accounting of his tax accounts, both individually and for his business. He had been searching for someone with the capability to accurately reconcile the IRS' accounting.

4) In or about March 2002 Mr. Simkanin retained me for the purpose of reconciling his tax accounts maintained by the IRS for both his individual account and business account.

5) I was able to gain information through documents provided by Mr. Simkanin and the Disclosure Office.

6) After carefully reviewing the documents described below and thousands of

other taxpayer(s)' master file accounts and supporting documentation I have concluded the following:

7) Mr. Simkanin described concerns about his company having overpaid its taxes as a result of changes in the accounting methods sometime in 1994 or 1995. He was concerned he had overpaid the taxes and had been unsuccessful in obtaining the data needed or a professional who could reconcile his accounts with the IRS. In reviewing the transcripts he obtained from the Disclosure Office in 1999, I discovered inconsistencies in the application of payments and the transfer of payments from one period to another that resulted in penalties and interest being assessed and paid by Mr. Simkanin. These penalties and interest assessments were not owed. The inconsistencies I found in taxpayers' accounts were supported by the United States General Accounting Office Report to the Commission of Internal Revenue on Custodial Financial Management Weaknesses in August 1999. A copy of the referenced pages is attached to this affidavit as Attachment # 4. The timeliness in applying payments to taxpayers' accounts is absolutely critical. The computer system is programmed to comply with the Internal Revenue Codes and calculate penalties and interest when payments are not timely received. Mr. Simkanin's tax accounts reflected a large amount of activity related to payments not being posted to his accounts in a timely manner thus causing numerous assessments of penalties and interest, which Mr. Simkanin paid in full. See page 6 of Attachment # 4.

8) As a part of the normal course of business, in or around April 2002, I submitted numerous requests under the Freedom of Information and Privacy Act for transcripts of the tax accounts for both Mr. Simkanin and Simkanin, Inc. for tax periods 1980 through 2000. Records were requested under Simkanin, Inc. for taxpayer identification number 75-1763351. Simkanin, Inc. was dissolved in 2001 and Arrow Custom Plastics was operated as a Sole-Proprietorship. However, the Federal Identification number for Simkanin, Inc. did not change and has continued to be used for

Arrow Custom Plastics. The records produced indicate both names Simkanin, Inc. and Arrow Custom Plastics. Approximately 60% of the records requested have been received. I was able to determine from the records received to date that Mr. Simkanin has overpaid his tax accounts approximately \$300,000.00. To completely reconcile these accounts, full cooperation in producing the tax accounts and supporting documentation for the transactions made by the Internal Revenue Service are needed.

9) I reviewed a copy of Defendant's Exhibit 155, which is a letter dated March 7, 2000 referring to a package submitted on January 28, 2000 consisting of corrected statements including forms 940 and 941. The letter also refers to claims for refunds submitted for tax periods 1997, 1998 and 1999 relating to forms 940 and 941. Attached to the letter dated March 7, 2000 is a copy of the letter dated January 28, 2000, explaining the copies of corrected 1099 forms and corrected W-2 forms for the years 1997 and 1998.

10) After carefully reviewing the detail contained in Defendant's Exhibit 155, the Internal Revenue Manual and tax accounts for 1997, 1998 and 1999 related to forms 940 and 941 it is my expert opinion the claims for refund, in Exhibit # 155 are not fraudulent claims.

11) The reasons for my conclusion is based on the procedures outlined in the Internal Revenue Manual (IRM), Part 9 Criminal Investigation, Chapter 5 The Investigate Process, Section 4 Refund Fraud and Return Preparer Investigations. See Attachment # 6.

12) The IRM identifies two types of fraudulent refund investigations. "*Multiple claims for refunds and unscrupulous return preparers.*" See IRM Part 9.5.4.1.

13) The elements described in multiple claims for refund is the investigation that would apply to Exhibit # 155.

"Multiple claims for refund results from federal income tax return(s) that are supported by fabricated and false Forms W-2, Wage and Tax Statement(s).

The return(s) may be filed by one, two, or more subjects in collusion with intent to defraud the government.” See IRM 9.5.4.1.1.

14) The primary element necessary for a claim for refund to be questionable depends upon the validity of the return applicable to the claim. If the return is fraudulent then a claim for refund might be considered fraudulent. I examined the master file accounts for 1997, 1998 and 1999 and found that every period indicated a valid return was filed and a liability was self-assessed. The liability was paid in full with regular and timely deposits. *“In the multiple claims for refund investigations, the investigation is directed toward, the authenticity of return(s) and supporting document(s).”* See IRM 9.5.4.1.1.1. The records show the returns were authentic and did not meet questionable criteria.

15) I examined the claim submitted by Mr. Simkanin and found the claim gave a full and complete explanation of the basis for the claim, which provided full disclosure to the IRS indicating no intent to deceive.

16) The refund claims were submitted to the IRS on January 28, 2000 by certified mail no. Z 437 622 017. The refund claims were for tax periods 1997, 1998 and 1999 for forms 940 and 941. The master file accounts for 1997, 1998 and 1999 do not show the receipt or disallowance of the refund claims. However, on January 26, 2001, one year after the refund claims were submitted, these tax periods are referred to the Criminal Investigative Division.

17) The claim for refund gave full disclosure for the claim. Based upon this information it is my expert opinion the claims for refund are not fraudulent. The IRS was provided with the information necessary to make a determination regarding the claims and could accept or reject the claims.

18) In a Complaint for Permanent Injunction filed against Mr. Simkanin, the complaint requests, *“A permanent injunction requiring Simkanin to make and file his Forms W-2 for 2000, 2001, 2002, and 2003 (when due) and file with the Social Security*

Administration and issue to his employees complete and accurate Forms W-2 for the years 2000 through 2003 within 30 days of the entry of the injunction". (See Page 6, paragraph E of the complaint). The complaint further states, "since January 2000, he has failed to withhold from his employees' wages, to file federal employment and unemployment tax returns, to issue Forms W-2 with the SSA, to issue Forms W-2 to his employees, and to pay the federal employment and unemployment taxes that are lawfully owing". See page 1, paragraph 4 of the complaint.

19) The complaint is seeking an injunction against Mr. Simkanin to file the appropriate reporting forms and pay over the lawfully owed tax. The appropriate reporting form and lawful amount of tax depends on how the individual reported his employment status and if the individual on his/her form 1040 paid self-employment tax. If the individual filed a 1040 and declared to be self-employed and paid self-employment tax then the correct form to file would be a 1099 and no tax would be lawfully owed. The United States General Accounting Office has stated in a report on "Unpaid Payroll Taxes" these taxes can ONLY be collected once. The report states, *"One of the most serious issues we discussed related to the inability of IRS to link related taxpayer accounts to ensure that they all receive appropriate credit when a payment is made on one account. This is of particular concern with respect to unpaid payroll taxes and related TFRPs. The unpaid payroll tax of a business is maintained on IRS' business master files while the TFRP assessed against an individual, or individuals, is maintained on IRS' individual master files – a detailed record of individual taxpayer accounts. These two separate and distinct databases are not integrated. Consequently, if a payment is received from the business, there is no automated entry to record the reduction in the individual, or individuals', TFRP account or accounts. This has led to instances where IRS has pursued collection against officers of a corporation for amounts that had already been paid."* Before the lawful amount of tax owed, if any, can be determined, it must be known how each individual affected by the complaint filed his/her

individual employment status and if they paid self-employment tax.

20) I examined the Government's Exhibit # 176, which included Publication 501, Exemptions, Standard Deductions and Filing Information. The Internal Revenue Service publishes Publication 501 for use by the public to assist in understanding the Exemptions, Standard Deductions, and filing information. Exhibit # 176 makes a comparison of Mr. Simkanin's "Gross Income" to the "filing requirements using married filing jointly status as per Publication 501".

21) The "Gross Income" shown in Exhibit # 176 is misleading. In 2001 Simkanin, Inc. was dissolved and Arrow Custom Plastics began d/b/a a Sole-Proprietorship. Mr. Simkanin is the sole-proprietor of Arrow Custom Plastics. As a Proprietorship, Arrow Custom Plastics and Mr. Simkanin are the same. The proprietorship's losses are Mr. Simkanin's losses. The "Gross Income" shown in Exhibit # 176 flows from a number identified as "Payments to Richard Simkanin". The exhibit does not identify how this number was determined. The master file accounts for Mr. Simkanin for 1998, 1999, 2000 and 2001 indicate there was never an examination performed by the IRS. It is critical to have an itemized list of the payments made to Mr. Simkanin to determine the character of the payment. The character of the payment must be identified before a conclusion can be made that a payment is "Gross Income".

22) Publication 501 is published by the Internal Revenue Service for use by the public in obtaining answers to such questions as "Who Must File?" Publication 501, attached to the Government's Exhibit # 176 states, "*Self-employed persons. If you are self-employed in a business involving manufacturing, merchandising, or mining, gross income is total sales from that business minus the costs of goods sold. To this figure you add any income from investments and from incidental or outside operations or sources.*"

TIP You must file form 1040 if you owe any self-employment tax". Arrow Custom Plastics is a business involved in manufacturing. Relying only on the interpretation of Publication 501 as indicated by its attachment to the Government's Exhibit # 176, Mr.

Simkanin would determine his "Gross Income" from the total sales from the business minus the cost of goods sold and could easily come to the conclusion that he did not have an filing requirement due to the losses of Arrow Custom Plastics. After carefully examining the Government's Exhibit # 176 my conclusion is based on the following reasons.

23) The Government's Exhibit # 176 did not include any detail to support a genuine effort to determine the "Gross Income" from the business. Exhibit # 176 did not include any supporting information for the "Payments to Richard Simkanin" to determine the true characteristics of the payments. Exhibit # 176 does not acknowledge the dissolution of Simkanin, Inc. and the beginning of Arrow Custom Plastics operating as a Sole-Proprietorship in 2001. Exhibit # 176 does not acknowledge that Arrow Custom Plastics had losses rather than profits or that the losses could be carried back for two years then forward for twenty. Exhibit # 176 omits critical information that profits and losses from a proprietorship are equal to the "Gross Income" or lack of "Gross Income" to the proprietor, which is Mr. Simkanin. Exhibit # 176 does not identify in a proprietorship the owner is not permitted to take a salary or wages to report on a W-2 or 1099 but is required by the IRS to take draws. Draws are in lieu of a salary or wage and are necessary for the owner to survive personally. Cash drawn by the proprietor is NOT considered "Gross Income" and is NOT a taxable event. A taxable event does not occur in a proprietorship until there is a profit. This information is critical to understand and properly interpret the Government's Exhibit # 176.

24) I carefully reviewed a letter dated April 5, 2001 from Wayne A. Paul, C.P.A. to Mr. Thomas Marusin, Acting Director of the National Office of Disclosure. There are several significant issues addressed in this letter. One identifying the years in question as 1987 through the present, which is consistent with my conversations with Mr. Simkanin and his concerns about the accountability from the IRS for his tax accounts. Another significant issue Mr. Paul addresses is, *"in late 1997 and 1998 a number of law suits*

were filed against the Secretary of the Treasury seeking injunctive relief for failure of the IRS to produce records sought under the Privacy Act.”. This is consistent with the abuse documented in the transcripts of the Senate Finance Committee Hearings held in 1997 and 1998. The results of these hearings were the enactment of the IRS Restructuring and Reform Act of 1998.

25) Mr. Paul’s letter also requests a copy of the record of assessment. I have examined thousands of documents and correspondence to and from the taxpayer and the IRS requesting a copy of the record of assessment. This question is often misunderstood, however, is a question that must be answered by the Internal Revenue Service.

26) After carefully reviewing thousands of taxpayers’ correspondence requesting a copy of the record of assessment and the failure of the IRS to produce the documentation requested, taxpayers’ have been incorrectly labeled as “Tax Protestors”.

27) There are two methods by which an assessment of tax is made. One method is a self-assessment, which occurs when a taxpayer files a tax return and reports a tax liability. The tax assessment is made by recording the tax return. The second method of assessment occurs through the deficiency procedures found in IRC 6212, 6213 and 6503. The deficiency procedures only occur when the Commissioner has determined there is a deficiency in tax owed by a taxpayer. The deficiency procedures are not triggered when a taxpayer files a tax return, however, they are triggered when the taxpayer does not file a tax return. Once the deficiency procedures have been followed an assessment can be made, which is a statutorily required recording of the tax liability. The assessment must be made in accordance with 26 C.F.R. 301.6203-1, which is a multiple step process.

Howell v. U.S., [96-2] USTC provides a detail of the process:

Howell v. U.S., [96-2] USTC
U.S. District Court, Dist. Utah, Cent. Div.;; Civ 93-C-952J, 8/9/96

An assessment pursuant to 26 C.F.R. 301.6203-1, by which the IRS records and demands payment of tax obligations, is a several step process:

1. creation of a summary record of assessment,
2. maintenance of supporting documents,
3. notification of liable parties and,
4. upon request by a targeted taxpayer, the production of pertinent information to liable parties.

The first step of the assessment process is the creation of a summary record which summarizes all assessments made in a particular district on a particular date. The date on which an authorized official signs a summary record sheet becomes its "date of creation". The summary record sheet must be augmented by supporting records which relate to the summary record.

Supporting records must provide at least four pieces of information:

1. identification of the taxpayer;
2. the character of the liability assessed;
3. the taxable period, if applicable; and
4. the amount of the assessment. 26 C.F.R 301.6203-1.

26 C.F.R. 301.6203-1 states that if the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which sets forth five pieces of information:

1. The name of the taxpayer
2. The date of assessment
3. The character of the liability assessed
4. The taxable period
5. The amounts assessed

This differs from the supporting-records requirements in at least two ways: the pieces of information required and the purpose for the information.

The information sent to a requesting taxpayer must include all of the pertinent information in the supporting documents section discussed above, plus it must contain the date of assessment.

The additional datum required for distribution to the taxpayer—the assessment date—is often found on the supporting records, a copy of which the IRS typically sends to the taxpayer. There is no prescribed format in which the assessment date is to be sent, other than it is a copy of pertinent parts of the assessment.

Several cases have dealt with the failure of the IRS to send a copy of the actual signed and dated summary record to the taxpayer, all courts have considered this practice acceptable, if the supporting documentation records that a summary record was created.

A Form 4340, Certificate of Assessments and Payments, typically contains two

date columns titled "Date" and "23C Date". In some cases, the validity of Certificates of Assessments and Payments to establish that summary records have been created has been questioned if the "23C date" is missing. The "23C Date" is significant for it provides the sufficient evidence—in the absence of a copy of a Summary Record—that a summary record was indeed created.

The significance of the lack of a "23C Date" has typically been coupled with the failure of the IRS to provide any additional information which indicates that a valid assessment was made, such as a signed summary record.

The second difference between the supporting documentation and the documentation sent to the requesting taxpayer is the purpose for which the information is used. The purpose for the supporting documentation is to allow the IRS to identify the individual parties and calculate how their combined assessments total the aggregate assessment amount, which appears on the signed summary record.

The purpose for the pertinent information sent to requesting taxpayers is to allow taxpayers to understand for what purpose they have been assessed a tax, interest, or penalty. According to a General Counsel Memorandum prepared by the Interpretative Division of the IRS, GCM 39392 (August 1, 1985):

Treas. Reg. Section 301.6203-1 provides that the copy of the record of assessment furnished to a taxpayer, upon request, shall include the character of the liability assessed. We think the character of the liability assessed includes not only that the liability is tax, interest, or penalty but also the basis for the assessment.

The taxpayer needs to know the basis for an assessment as a necessary part of checking the correctness of the taxpayer's assessed tax liability.

As stated above, we think a copy of the record of assessment is furnished so that the taxpayer can make this check.

On Form 4340 and the Privacy Act Transcript the [IRS] does furnish the bases for assessments to taxpayer in certain situations. We believe the bases for assessments should also be furnished to taxpayer as a pertinent part of the record of assessment under section 6203.

The copy of the computer equivalent of a 23C Form, signed by an assessment officer—provides uncontroverted proof that an assessment occurred on a specific date. This, however, does not establish any of the additional required information. Stallard v. U.S. [92-2 USTC 50,596], (a signed and dated Form 23C does not identify the taxpayer, identify the character of the liability assessed, identify the tax period, or state that amount of the assessment).

The remaining information, then, must be found on the nine pages of the taxpayer's (Rogers) IMF, six of the nine pages display the taxpayers (Rogers) name, and all nine pages show his account number and name as "ROGE." This suffices.

The remainder of the information on the IMF is presented in cryptic form with hundreds of codes, acronyms, numbers, and sundry enigmatic entries. The IRS offered neither Rogers nor the Court any guide to assist in deciphering the confusing forms.

Indeed, the IRS did not attempt to refer to or rely on the encoded information in asserting its compliance with the statute and the regulations. Nonetheless, the Court has attempted to make sense of the IMF, relying on its own resources.

Characterization. The following two entries, by their resemblance to Defendant's Exhibit C, appear to be pertinent portions of the IMF

240 120588 58,560.00 8847 29254-715-52122-8
PEN CODE-618 PRC

290 120588 0.00 8847 29254-715-52122-8
HC ARC INTD PC
CORRESPONDDT- CREDIT DT-
RCVD DT-

The duty imposed upon the IRS by the regulation is to supply the requisite information upon request. This is done for a purpose. It seems to this Court that in return for allowing a summary sheet with entries affecting hundreds or thousands of different taxpayers to be used, the IRS by regulation is required to furnish particularized information concerning the assessment to an assessed party upon the party's request. This enables the party to evaluate the propriety of the assessment.

The information furnished to the taxpayer (Rogers) is deficient. Without further information, all that can be learned from the entry is that it is a numbered penalty. Code 240, nearly as ambiguous as the Penalty Code 618, means nothing more than "Miscellaneous Penalty." The Internal Revenue Manual lists that a "Miscellaneous Penalty" refers to numerous penalties. While as noted above, the significance of the PEN CODE 618 entry may be deciphered by a legal researcher possessing sufficient computer skills, it is practically meaningless to a taxpayer.

The information on the IMF did not allow the taxpayer (Rogers) to know the character of the liability assessed so that he could check its correctness. This Court concludes that the IMF that the IRS sent to the Taxpayer (Rogers) in response to his section 6203 request is deficient. It falls short of the standards articulated in GCM 39302 (August 1, 1985) and the Treasury regulations to which it refers.

Taxable Period. The taxable period only has to be provided to the taxpayer if applicable. In the present case the IRS contends it is not applicable. The IRS claims that the method of assessment of a 26 C.F.R. 301.6372-1 100% Penalty is as follows: a corporation fails to pay withholding taxes for certain taxable periods; upon not paying, the specific party within the corporation that was responsible for having failed to make the payments is assessed a penalty on a separate day for the taxable periods during which the corporation was delinquent. Therefore, the penalty is assessed at once, and not for a taxable period per se. Stallard v. United States [94-1 USTC 50,056], rejected such an argument—an argument the Fifth Circuit characterized as "patently specious."

As Stallard explains,

A taxpayer is liable for a penalty under 6672 if, and only if that person is a responsible party.” That taxpayer is a responsible party if he was both 1) under a duty to collect and; such liability is imposed only on those who were responsible parties for particular tax periods.

To determine whether a person is liability because he has the power to pay those taxes without also considering whether he held that power in the particular tax periods in which the deficiency accrued would be nonsensical.

Bureaucratic ineptitude and indifference coupled with judicial admissions made as part of a confused litigation strategy-have combined to produce an untenable argument by the Government; that the assessment of penalty tax under 6672 need not refer to particular tax periods to be valid. We reject this argument as unsound, contrary to precedent, and contrary to the strictures of the IRS's own regulations. Consequently, we conclude that the IRS's failure here to assess taxes under 6672 for the proper tax period renders that assessment invalid.

The opinion of the Fifth Circuit is persuasive.

In this case, the IRS was required to send taxable period information to the taxpayer (Rogers). The taxpayer had a right to know if the penalty stemmed from a period during which he was a responsible and willful person according to 26 C.F.R. 301.6672. As noted above, the copy of the computer equivalent of a 23C Form does not provide information on the taxable periods. The only other information which the taxpayer (Rogers) received which might contain this information is the IMF. The IRS has not demonstrated where the information can be found. The only apparently relevant information, the Court can identify in the IMF is the following entry found on page eight:

LAST RET-91 M/E COND-E FLC-29 9227

TAX PERIOD 55 8803 REASON CD- MOD EXT CYC-9318

FS-0 CRINV- LIEN-4 29254-715-52122-8 CAF- FZ>VT-

It appears that the “8803” entry in the starred-box may refer to the tax period March 1988. However, without any guidance from the IRS and without any adequate explanation for the “55” – or the other codes which surround the entry – the March, 1988 period is nothing more than a guess. Furnishing, such enigmatic information without any explanation denies the taxpayer’s rights under 26 C.F.R. 301.6203-1. See GCM 39392 (August 1, 1985). Accordingly, this Court concludes that the IRS has failed

to provide Mr. Rogers with pertinent parts of the record of the assessment, which set forth the taxable period in response to Rogers' section 6203 request.

CONCLUSION

The IRS failed to meet its burden of proof. The IRS was required to demonstrate that upon the taxpayers (Rogers) request, the taxpayer (Rogers) was sent pertinent parts of the assessment record containing the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, and the amounts assessed. While the record shows that the IRS did furnish the required name, date, and amount information to the taxpayer (Rogers), the record fails to show that IRS furnished the requisite information concerning the characterization and taxable period of the assessment. Consequently, the Court must conclude that a valid and enforceable assessment was not made. Stallard v. United States [94-1] USTC 50,056, 12F.3d 489 (5th Cir. 1994)

28) After careful review of the information contained in this affidavit it is my opinion that Mr. Simkanin's failure to file personal tax returns was due to multiple and complex changes in his business entity and his concern over his need to reconcile his tax accounts maintained by the IRS. The IRS owes Mr. Simkanin at least \$300,000.00 as a result of incorrect accounting transactions. In or around 1994 or 1995 his business changed it's accounting method from cash to accrual. This caused significant and complicated planning and structuring especially in the tax preparation. A few years later the corporation is dissolved and the business is operated as Sole Proprietorship. This causes a second major change in structure and accounting transactions that greatly influence the filing of the tax returns for both the business and Mr. Simkanin personally. In circumstances like this, it is consistent to wait to prepare the tax returns until all accounts can be reconciled to determine the correct amount of tax owed, if any.

29) In connection with my examination and conclusions, I reviewed the following documents provided by Mr. Simkanin, the Disclosure Office and exhibits presented at trial are evidentiary support for my conclusions.

- a. A copy of the response from the Disclosure Office for his request dated

August 12, 1999. The response contained IMF MCC "Specific" Transcripts for tax periods 1994 through 1998 for his individual account. A copy of the letter dated August 16, 1999 from the Disclosure Office to Mr. Simkanin is attached to this affidavit as Attachment # 1.

- b. A copy of the response from the Disclosure Office for his request dated September August 6, 1999. The response contained Business Master File (BMF) "specific transcripts" for tax periods 1994 through 1999 for Forms 940, 941, 945 and 1120. A copy of the letter dated November 24, 1999 from the Disclosure Office to Mr. Simkanin is attached to this affidavit as Attachment # 2.
- c. A copy of the transcripts described in number (a) and (b) above, which had been decoded by another individual.
- d. A copy of a letter dated November 8, 2000 from Mr. Simkanin to the Internal Revenue Service in response to correspondence received from the IRS relating to a \$15,000.00 payment made by Arrow Custom Plastics. A copy of this letter is attached to this affidavit as Attachment # 3.
- e. A copy of a letter dated April 5, 2001 from Wayne A. Paul, C.P.A. to Mr. Thomas Marusin, Acting Director of the National Office of Disclosure. The letter was in reference to tax periods 1987 through the present.
- f. A copy of a letter dated August 28, 2001 to David L. Jarvis, UASA from Mr. Simkanin with attachments including a copy of cashier's check number 51622 for \$3,000.00 and a STATEMENT consisting of 5 pages describing Mr. Simkanin's "request for records" and his instruction to post the \$3,000 cashier check as a "Cash Bond".

- g. A copy of the United States General Accounting Office Report to the Commission of Internal Revenue on Custodial Financial Management Weaknesses in August 1999 is attached to this affidavit as Attachment # 4.
 - h. A copy of Defendant's Exhibit 155, which is a letter, dated March 7, 2000 referring to a package submitted on January 28, 2000 consisting of corrected statements including forms 940 and 941. The letter also refers to claims for refunds submitted for tax periods 1997, 1998 and 1999. Attached to the letter dated March 7, 2000 was a copy of the letter dated January 28, 2000. A copy of this letter is attached to this affidavit as Attachment # 5.
 - i. A copy of the Internal Revenue Manual, Part 9 Criminal Investigation, Chapter 5 The Investigate Process, Section 4 Refund Fraud and Return Preparer Investigations. A copy is attached to this affidavit as Attachment # 6.
 - j. A copy of Exhibit 176, Summary Sheet Computation of Gross Income Paid by Arrow Custom Plastics to Richard Simkanin for tax periods 1998, 1999, 2000 and 2001.
 - k. A copy of the Complaint for Permanent Injunction, a civil action filed by the United States of America v. Richard Michael "dick" Simkanin, d/b/a Arrow Custom Plastics.
 - l. A copy of the United States General Accounting Office Report to the Subcommittee on government Management, Information and Technology, committee on government Reform, House of Representatives on UNPAID PAYROLL TAXES in August 1999 is attached to this affidavit as Attachment # 7.
- 30) I have a Bachelor of Science in Business, with majors in accounting and

finance, from the University of Colorado (1988). My practical experience as a Director of Finance and Controller, for approximately 20 years, has given me the foundation and the fundamental knowledge, in the field of accounting, to develop my expertise in investigating and analyzing the accounting system used by the Internal Revenue Service in the maintenance of taxpayers' accounts.

31) My expertise in accounting practices, of the Internal Revenue Service (IRS), have been developed over the past 4 years and are a result of my commitment and determination. Since the 1997 and 1998 Senate Finance Committee Hearings and the enactment of the 1998 Restructuring and Reform Act, I have studied extensively the internal revenue laws and the computer system used by the IRS, which compiles and accounts for financial data, as a way of finding solutions to extremely technical and complex tax issues.

32) During that time I have developed an in depth knowledge of the accounting and controls utilized by the IRS in maintaining taxpayers' accounts. The 1998 Restructuring and Reform Act, the IRS was required to publish on their website, made available, for the first time, the numerous manuals used to understand the accounting system and procedures used by the IRS in implementing the tax laws. Since that time, I have committed the time and resources to develop the skills to analyzing taxpayers' master file records, as a way to obtain solutions. I have become an expert in the accounting practices of the IRS and found how the system has been taken advantage of. The resources I have studied extensively and rely upon are:

A. THE CODES AND REGULATIONS

- a. Internal Revenue Codes
- b. Final and temporary regulations
- c. Treasury decisions

**B. COURT OPINIONS of the Tax Court, U.S. Court of Claims,
United District Courts, United States Circuit Courts of**

Appeals, U.S. Supreme Court

B. IRS DOCUMENTS

- a. Notices and Announcements
- b. IRS Publications
- c. Revenue Rulings and Procedures
- d. Internal Revenue Manual

C. TAX LEGISLATION

E. CHIEF COUNSEL ADVICE

- a. Letters and Technical Advice
- b. Actions on Decisions
- c. Settlement Guidelines
- d. Chief Counsel Notices
- e. Compliance Officer Memos
- f. Field Service Advice
- g. Information letters
- h. Legal Memorandums
- i. Litigation Guidelines and Memos
- j. Service Center Advice
- k. Technical Assistance
- l. General Counsel Memos

F. TAXPAYERS DOCUMENTATION

- a. Correspondence to and from the IRS
- b. Tax returns; individual, corporate, partnership
- c. Deposition and trial transcripts

G. GENERAL ACCOUNTING OFFICE (GAO)

33) I have worked along side professionals, in both the legal and accounting professions, to solve technical tax issues during both the administrative and judicial processes. I have been involved in both civil and criminal tax issues. I have worked directly with numerous departments of the IRS, such as the Collections Division, Appeals Division, Taxpayer Advocate Division and the Office of Chief Counsel. I have

participated in Collection Due Process Appeals and attended hearings. I have been involved in the judicial process in Tax Court, Federal District Courts and the Federal Circuit Courts.

34) Due to changes in the Federal law in about 1998, I along with other members of the public have been able to penetrate what were previously secretly held Internal Revenue Service documents and manuals. During this time, I have developed a particular expertise at being able to decode I.R.S. forms and accounting transactions that were previously undecipherable even to expert.

Under penalties of perjury, I declare that the above Affidavit is to the best of my knowledge and belief, true, correct, and complete.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 16th day of Jan 2004.


VICTORIA OSBORN

ACKNOWLEDGMENT

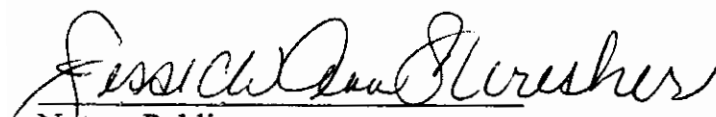
STATE OF COLORADO)

) SS:

COUNTY OF EL PASO)

On this 16th day of January 2004, before me, a notary public, personally appeared, Victoria Osborn personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the above instrument and acknowledged to me that she executed it.

WITNESS my hand and official seal.


Notary Public

My Commission Expires 12/11/2006

ATTACHMENT # 1

Internal Revenue Service

Department of the Treasury

Director
Austin Service Center

Midstates Region
Austin, Texas

P.O. Box 2986, Austin, Texas 78769
STOP 7000 AUSC

Richard Simkanin
3717 Commerce Place
Bedford, TX 76021

Person To Contact:
Brenda Ray
Telephone Number:
(512) 460-0333
Refer Reply to:
99-1852
Date: August 16, 1999

Dear Mr. Simkanin:

This letter is in response to the Freedom of Information Act (FOIA) request dated August 2, 1999 which was received in my office August 12, 1999.

Enclosed you will find the IMF MCC "Specific" Transcripts of Account for tax years 1994, 1995, 1997, and 1998 pursuant to your request. For your convenience, I have enclosed Document 10978, Transaction Pocket Guide, to assist you in interpreting the transcripts.

Some of the information appearing on the transcripts is exempt from disclosure pursuant to FOIA exemptions (b)(3) and (b)(7)(E). The statutory basis for the exemption is 26 U.S.C Section 6103. Consequently, this information has been redacted from the enclosed copies. Notice 393 is enclosed for your information.

This letter concludes my response to your request.

Sincerely,

for Brenda Ray
Estelle R. Tunley
Director

Enclosures

ATTACHMENT # 2

NOV 26 1999

Internal Revenue Service

Department of the Treasury

Director
Austin Service Center

Midstates Region
Austin, Texas

P.O. Box 2986, Austin, Texas 78769
STOP 7000AUSC

Simkanin Inc.
Arrow Custom Plastics
3717 Commerce Place Suite A
Bedford, TX 76021

Person To Contact:
Brenda Ray #18-02254
Telephone Number:
(512) 460-0333
Refer Reply to:
FOIA 99-1960
Date:
November 24, 1999

Dear Mr. Simkanin:

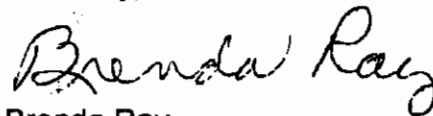
This letter is in response to the Freedom of Information Act (FOIA) request dated August 6, 1999 which was received in my office on September 8, 1999.

Please accept our apologies for the delay in responding to your request. We encountered some unexpected difficulties in securing the information you requested. We hope that our delay has not caused you any inconvenience.

Your request states to send you Business Master File (BMF) "specific transcripts" for tax years 1996, 1997, and 1998, but you do not state for what type of return, nor which quarter you are needing the transcripts. In an effort to be responsive to your request I am sending you a "Complete" Master File Transcript. I am also enclosing Document 5576, ADP Transaction Codes to assist you in reading the transcripts. Please keep in mind that a "Complete" transcript will only provide tax modules where activity is occurring. In the future when requesting BMF transcripts, please state the type of return and the quarter(s) you are needing the "specific" transcript for.

Again, I apologize for the delay in responding to your request. This letter concludes my response to your request.

Sincerely,



Brenda Ray
Disclosure Officer

Enclosure:

ATTACHMENT # 3

Arrow Custom Plastics, Inc.

3717 COMMERCE PLACE, SUITE A
BEDFORD, TX 76021

8 November, 2000

INTERNAL REVENUE SERVICE CENTER
AUSTIN, TX

Dear Sir/Madam,

Per the attached notification with regards to how we would like to handle the indicated credit.

Please send a check in the amount of \$15,000.00 TO:

Arrow Custom Plastics
3717 Commerce Place
Bedford, Texas 76021

Thank you for your assistance in this matter,



Richard Simkanin, President
Arrow Custom Plastics

817-283-1081

Fax 817-283-1081

Metro 817-540-1892

ATTACHMENT # 4

United States General Accounting Office

GAO

Report to the Commissioner of Internal Revenue

August 1999

INTERNAL REVENUE SERVICE

Custodial Financial Management Weaknesses



GAO/AIMD-99-193

B-282731

and related recommendations,⁴ (2) new issues identified during our fiscal year 1998 financial audit,⁵ along with new recommendations to address those issues, and (3) additional issues identified from our ongoing fiscal year 1999 financial audit.

Results in Brief

IRS continues to have a broad range of serious internal control weaknesses that have resulted in disbursements of fraudulent and other questionable tax refunds, unnecessary burden to taxpayers resulting from taxpayer receipts stolen by IRS employees, and errors or delays in posting payments to taxpayer accounts. These control weaknesses fall into five major areas: (1) unpaid assessments, (2) security over receipts and taxpayer information, (3) refunds and earned income tax credits, (4) revenue reporting and distribution, and (5) financial reporting. Some weaknesses are long-standing, having been reported since our first audit of IRS' financial statements in fiscal year 1992.⁶ In addition, we have found that some weaknesses are more pervasive than we previously reported. For example, we have now found weaknesses over the security of receipts and taxpayer information in varying degrees at all 10 IRS service centers, at other IRS offices, and at banks that process taxpayer receipts for IRS. Until IRS corrects these weaknesses—such as ensuring that taxpayer accounts are properly credited for payments made—these conditions will adversely impact IRS' ability to provide quality customer service. Weaknesses in the areas we identified include the following:

- **Unpaid tax assessments.** IRS does not have a detailed list, or subsidiary ledger, which tracks and accumulates unpaid assessments and their status on an ongoing basis. As a result, IRS is unable to properly manage its unpaid assessments. Deficiencies in IRS' systems that track

⁴See *Financial Audit: Examination of IRS' Fiscal Year 1997 Custodial Financial Statements* (GAO/AIMD-98-77, February 26, 1998); *Internal Revenue Service: Immediate and Long-Term Actions Needed to Improve Financial Management* (GAO/AIMD-99-16, October 30, 1998); *Excise Taxes: Internal Control Weaknesses Affect Accuracy of Distributions to the Trust Funds* (GAO/AIMD-99-17, November 9, 1998); and *Internal Revenue Service: Physical Security Over Taxpayer Receipts and Data Needs Improvement* (GAO/AIMD-99-15, November 30, 1998).

⁵See *Financial Audit: Examination of IRS' Fiscal Year 1998 Financial Statements* (GAO/AIMD-99-75, March 1, 1999).

⁶See *Financial Audit: Examination of IRS' Fiscal Year 1992 Financial Statements* (GAO/AIMD-93-2, June 30, 1993) and *Financial Management: Important IRS Revenue Information Is Unavailable or Unreliable* (GAO/AIMD-92-22, December 21, 1993).

B-282731

unpaid assessments have resulted in pursuit and collection of amounts from taxpayers that had already been paid.

- **Security over receipts and taxpayer information.** IRS' internal controls do not adequately safeguard assets such as cash, checks, and sensitive taxpayer information from loss or theft. For example, in at least six of the service centers, delays in background investigations resulted in employees being hired and handling receipts and taxpayer information before the results of background checks were available. According to IRS, at four of these service centers, background check results disclosed that 273 (5 percent) of approximately 5,400 employees hired to handle taxpayer data and/or receipts, had falsified key information on their applications. Of the 273 employees, 64 (23 percent) had significant unsuitable backgrounds, such as criminal convictions, which resulted in their termination or forced resignation. As late as March 1999, background investigations were still pending on some employees hired in fiscal year 1998 and still working for IRS—about 5 months after the end of the fiscal year.
- **Refunds and earned income tax credits.** IRS continues to lack adequate preventive controls to effectively reduce the risk of issuing inappropriate refunds. For example, in our fiscal year 1998 audit, we continued to find some refunds that should not have been issued. These weaknesses in preventive controls over refunds are further exacerbated by high amounts of invalid earned income tax credit claims.
- **Revenue reporting and distribution.** IRS cannot routinely track and report amounts collected for Social Security, Hospital Insurance, individual income taxes, and excise tax-related trust funds. Although IRS recently changed its method of distributing excise tax receipts to comply with the law, the new method is complex, cumbersome, and prone to significant error. For example, as a result of an IRS error in the certification process, all excise tax-related trust funds received understated amounts of distributions. For the Highway Trust Fund, this error was \$92 million. IRS corrected these errors once we brought them to its attention.
- **Financial reporting.** We continued to find that IRS' general ledger for custodial activities cannot routinely generate reliable and timely financial information for management decision-making. IRS' financial systems do not conform to the U.S. Government Standard General Ledger and material balances are not supported by subsidiary ledgers. Due to these weaknesses, IRS systems do not comply with the Federal Financial Management Improvement Act (FFMIA) of 1996, which requires that financial management systems comply with federal accounting and systems standards.

Page 3 GAO/AIMD-99-193 IRS Custodial Financial Management Weaknesses

B-282731

IRS has acknowledged the seriousness of its financial management problems and the Commissioner has committed to making necessary improvements. Although some needed improvements can be achieved in the short term, we recognize that for many weaknesses, systems modernization will need to be part of a long-term solution. IRS has begun—and in some cases, completed—actions to address some of these problems. For example, in the short term, IRS is developing and implementing various security procedures to better safeguard cash, checks, and taxpayer data. These procedures include purchasing and installing equipment that, if properly linked with the FBI, will provide fingerprint check results before new employees report to duty. However, we recognize that addressing other critical recommendations, such as the system deficiencies affecting IRS' ability to effectively manage and report on its unpaid assessments, will require system modifications that could take years to fully implement. Such long-term efforts will require sustained senior management commitment in order for IRS to have sound financial management. To help IRS accomplish these changes, we are making several recommendations on the newly reported issues.

IRS acknowledged the magnitude of its system deficiencies and internal control weaknesses in comments on this report. It noted that it was working on many of the matters that can be addressed in the short term, but recognized the long-term challenges posed by many of these issues and the need to factor them into its system modernization plans.

Background

IRS is responsible for collecting federal tax revenues, refunding tax overpayments, and pursuing collection of amounts owed. In fiscal year 1998, IRS collected nearly \$1.8 trillion in tax revenues, issued \$151 billion in tax refunds, and had net taxes receivable at fiscal year-end of \$26 billion. Although most of the \$1.8 trillion in revenue was collected by intermediaries such as financial depository institutions and transferred directly to the Treasury general fund, IRS offices and lockbox banks⁷ collected \$356 billion in fiscal year 1998. These IRS offices include 10 service centers nationwide that have collection, refund and enforcement responsibilities, as well as district and post-of-duty offices that IRS has

⁷A lockbox bank refers to a commercial bank with a designated post office box to which taxpayers are instructed to mail their payments and related tax documents. These lockbox banks process the documents, deposit the payments, then forward the documents and data to the service centers to update taxpayers' accounts.

B-282731

established to assist taxpayers and perform collection and enforcement activities. Ten commercial lockbox banks also receive and process taxpayer receipts, then forward the tax data to IRS for input and processing.⁸

Fiscal year 1997 marked the first time we were able to conclude that financial information, as presented in IRS' custodial financial statements, was reliable. For fiscal year 1998 we again concluded that IRS' tax revenues, refunds, and net taxes receivable were reliable.⁹ However, in both years, we were able to reach this conclusion only after IRS applied extensive ad hoc programming and analysis to its financial information, resulting in material adjustments to derive reliable amounts and balances for its tax administration activities reported in the financial statements. These extensive procedures are needed to compensate for chronic system deficiencies that prevent IRS from having custodial information readily available for routine use, reporting, and decision-making.

Objectives, Scope, and Methodology

The objectives of this report are to (1) discuss previously reported internal control and compliance issues and related recommendations, (2) present new issues identified during our fiscal year 1998 financial audit, along with new recommendations to address those issues, and (3) present additional issues identified from our ongoing fiscal year 1999 financial audit. Appendix I provides further details on our scope and methodology.

We conducted our work from April 1998 through April 1999 in accordance with generally accepted government auditing standards and Office of Management and Budget (OMB) Bulletin 98-08. We requested comments on a draft of this report from the Commissioner of Internal Revenue or his designee. The Commissioner's designee provided us with written comments, which are discussed in the "Agency Comments and Our Evaluation" section and reprinted in appendix III.

⁸Treasury's Financial Management Service contracts with such banks on IRS' behalf.

⁹During fiscal year 1998, IRS combined the financial reporting of its administrative and custodial activities, which had previously been reported and audited separately, into a single set of principal financial statements. This required IRS to include both administrative and custodial activities on its balance sheet. Our opinion on the statement of custodial activity was unqualified. However, our opinion on the balance sheet was qualified due to administrative issues, not custodial issues. These administrative issues will be covered in a separate report.

B-282731

Significant Weaknesses Continue to Hinder IRS' Ability to Manage Unpaid Assessments

IRS continues to lack controls to ensure effective management and accurate reporting of unpaid assessments.¹⁰ For example, IRS does not have a subsidiary ledger which tracks and accumulates unpaid assessments and their status on an ongoing basis, the absence of which adversely affects its ability to effectively manage and accurately report these assessments. As a result, it cannot readily prevent or detect errors in the accounts of taxpayers that owe such assessments. In some instances, this can result in taxpayers being pursued for amounts that have already been paid; in other instances, it can result in lost revenue to the government. Table 1 summarizes the weaknesses we identified related to unpaid assessments, both in the past and in our most recent work along with their effect and IRS' actions to address these issues.

Table 1: Internal Control and Compliance Issues Related to Unpaid Assessments

Internal control/compliance issues and effects	IRS actions to address issues
Issues previously reported	
<p>Issue: IRS lacks a subsidiary ledger to track and accumulate unpaid assessments. To compensate, it must use ad hoc programs to classify the categories of its unpaid assessments for the annual financial statements.</p> <p>Effect: IRS cannot routinely distinguish categories of taxes due and their status.</p>	<p>IRS action: IRS plans to implement a new subsidiary ledger system as part of its systems modernization effort. In the meantime, IRS must continue to use its ad hoc programs to prepare its financial statements.</p> <p>GAO response: Weaknesses will continue to exist in this area until an effective subsidiary ledger is established.</p>
<p>Issue: Key IRS systems are not linked to ensure that all parties liable for particular assessments receive proper credit for payments against those assessments.</p> <p>Effect: GAO has found taxpayers were erroneously pursued for nonpayment or had liens placed on their property even though the liability had already been paid.</p>	<p>IRS action: IRS issued directives to service center staff to reiterate that they must manually eliminate assessments that have already been paid from all taxpayer accounts.</p> <p>GAO response: Based on our fiscal year 1998 audit results, IRS' efforts to manually fix these problems were ineffective. Unless IRS is able to develop effective solutions, these problems will likely continue.</p>
<p>Issue: IRS had problems locating adequate supporting documents for individual unpaid balances.</p> <p>Effect: IRS may find it difficult to identify and focus collection efforts on cases most likely to be collectible. This condition also makes it difficult to assess the classification and collectibility of unpaid assessments.</p>	<p>IRS action: IRS does not plan to implement our previous recommendation to establish checklists for collection documents until January 2001.</p> <p>GAO response: While some improvements were noted, we found IRS still had trouble providing support for bankruptcy, nonstate installment agreement, and older cases. Weaknesses will likely continue in this area until further corrective action is taken.</p>

(continued)

¹⁰Unpaid assessments consist of amounts for which (1) IRS can support the existence of a receivable through taxpayer agreement or a favorable court ruling (federal taxes receivable), (2) neither the taxpayer nor the court has affirmed that the amounts are owed (compliance assessments), and (3) IRS does not expect further collections due to factors such as the taxpayer's death, bankruptcy, or insolvency (write-offs).

ATTACHMENT # 5

Nov-21-2003 07:08pm From: McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-219 P 001 F-227

Arrow Custom Plastics, Inc.

3717 COMMERCE PARK BLVD A
SEEDSVILLE, TX 78081

7 March, 2000

Certified Mail #Z 437 622 011
U.S. Department of the Treasury
Internal Revenue Service
300 East 8th Street
Stop 5000
Austin, Texas 78701

Re: Refund

Gentlemen:

On 28 January, 2000, a package was sent to you Certified Mail No. Z 437 622 017. The package consisted of corrected statements including forms 940 and 941.

The 1997 corrected forms were marked for REFUND as follows:

Form 941 Amount \$70,455.92

Form 940 Amount \$2,548.56

The 1998 corrected forms were marked for REFUND as follows:

Form 941 Amount \$72,368.81

Form 940 Amount \$2,291.50

The 1999 corrected forms were marked for REFUND as follows:

Form 941 Amount \$83,464.05

Form 940 Amount \$3,192.51

Your refund check has not been received.

If marking the corrected forms in the "refund" box is not the correct procedure, please identify each proper step the company must take to have "due process" under the law.

The fact that you have a "refund" box on the form indicates that the only known requirement would be to check the box, sign the form under penalty of perjury and file it with you.

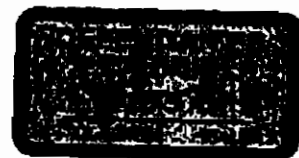
Each of those steps has been done.

Please advise. Your prompt attention is required.

Sincerely,



Richard Sirukanin, President
Arrow Custom Plastics, Inc.



817-283-1081

Fax 817-283-1081

Metro 817-540-1892

Nov-21-2003 07:08pm From-McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P.002 F-227

Arrow Custom Plastics, Inc.

3717 COMMERCE PLACE, SUITE A
BEDFORD, TX 76021

28 January 2000

Fed. ID# 75-1763351

Certified Mail # Z 437 622 017

U.S. Department of the Treasury
Internal Revenue Service
300 East 8th Street
Stop 5000
Austin, Texas 78701

Attn: District Director

REGARDING CORRECTION OF INFORMATION RETURNS FOR THE YEAR 1997 and 1998.

District Director and Staff

Enclosed in this package are Corrected 1099 forms as well as corrected W-2 forms for the year 1997, 1998.

These items are being provided by Arrow Custom Plastics Inc. in order to correct all records and claims made by Arrow Custom Plastics Inc. regarding third party individuals.

Please correct all subsequent IRS records accordingly.

CORRECTED 1099's

You will note that the corrected 1099 forms submitted here reveal that Arrow Custom Plastics Inc. is correcting its claim of any remuneration paid to the third parties was gross income as defined by law.

Arrow Custom Plastics Inc. has learned that these determinations constitute incorrect or misleading factual premises by misapplication of IRS Rules to the facts of the matter, and as thus would not withstand proper scrutiny of law if exposed to the due process right of cross-examination and confrontation as set forth in the landmark U.S. Supreme Court decision in Goldberg v. Kelly 397 U.S. 254 (1970):

"In the present context these principles require timely and adequate notice detailing reasons, and an effective opportunity to defend by confronting any adverse witnesses and by presenting arguments and evidence. These rights are important in cases...challenged as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."

Goldberg v. Kelly 397 U.S. 254 (1970).

Arrow Custom Plastics Inc. has been involved in in-depth research into the matter of its claims and has discovered that it was in error in making these claims and is providing the enclosed 1099's for the purpose of correcting these unfounded claims made without legal or statutory

817-283-1081

Fax 817-283-1081

Metro 817-540-1892

Nov-21-2003 07:08pm From: McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P.003 F-227

merit. This is its effort to help the individuals it has testified against mitigate damages, and aid the Company is avoiding cost of time and resources going through the process of being proved in error in the IRS' Administrative Process.

Pursuant to the duty and responsibility of the Company, these forms are corrected in good faith and with reasonable cause as shown below. This is a matter of Right, Law, and Duty to a Just society. The Company realizes its benefit received by a Just a Peaceful Society, and seeks to maintain and participate in its preservation and Trust.

Furthermore, since it is a matter of fact and course that the IRS makes determinations of taxable income, which is based upon the fact of gross income reported by third parties such as Arrow Custom Plastics Inc. on the form 1099, Arrow Custom Plastics Inc. no longer wishes to be party to these actions and witness for the government. Arrow Custom Plastics Inc. has determined that it does not wish to make erroneous claims to the detriment of others, causing them undue hardship, as presently the IRS does not allow individuals the opportunity to confront witnesses such as Arrow Custom Plastics Inc. for cross-examination and correction of records and information returns.

This is not at all fair under the law of the United States of America and the People's individual rights to Due Process of Law. Arrow Custom Plastics Inc. refuses to be an unwitting, or willfully mute, party to this any longer.

These 1099 information returns are now hereby corrected as the definition of gross income in the 16th Amendment and 26 USC § 61 both reveal that income must derive from a "source".

Section 61 clearly reveals that the term "source" and the term "item" are two separate words with two separate meanings.

The U.S. Supreme Court has ruled for over 100 years that the words in the laws indicate what the laws require, and that no word can be rendered superfluous. In light of this, the word "source" maintains its distinction and viability under the federal rules of statutory construction.

The U.S. Congress set forth a section of law at 26 USC § 861 to deal with the term "source" in relationship to the Internal Revenue Code, and thus the Internal Revenue laws.

According to 26 USC § 7806(b), the location of this law, nor its title heading has any legal significance. In keeping with the federal rules of statutory construction, the words in these laws indicate what they mean, what they require, what they prohibit, what they include, and what they exclude by absence of their entry within the law.

In two sections of the Regulations and rules (26 CFR §§ 1.861-1(a) and 1.863-1(c)) as promulgated by the Secretary, it is clearly stated that the regulations for § 861 apply for the determination of income that is taxable for the purposes of the income tax.

In the regulations of the Secretary, at 26 CFR § 1.861-8(a)(3), that fact of the differentiation between "sources" and "items" is proved by the language content of this law.

In the regulations of the Secretary, at 26 CFR § 1.861-8(f)(1), the sources that are taxable for the purposes of the income tax are laid out for all to see.

Despite the claims of one rouge federal Judge, this regulation is certainly not for foreigners as declared. This is revealed by subsection (i), which deals with the foreign tax credit, which is § 911 of the code regarding U.S. Citizens living abroad. In addition to this section of law revealing Citizens being subject to this regulation, to the consternation of the Federal Judiciary, subsection (vi)(E) specifically relates to Citizens by using the word specifically in its language. If this were not enough sub parts (E) and (H) regarding Puerto Rico and Guam apparently apply to U.S. Citizens also.

Nov-21-2003 07:08pm From: McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P 004/033 F-227

Should there be any emergency claims by the Judicial Branch or the IRS that these regulations only regard foreign earned income sources, as Puerto Rico and Guam are considered foreign, it is noted here that 26 CFR § 1.861-8(f)(1)(iv) relates to U.S. sources such as those listed in 861(a)(3), but it plainly places the taxability of such sources upon foreigners only.

In light of the fact that Arrow Custom Plastics Inc. has no evidence that any of those indicated on the enclosed 1099's were living abroad for the year 1997 and 1998 to thus be subject to § 911 determination of gross income for U.S. Citizens, and none of the remuneration was involved in any U.S. island possession, all 1099 Forms previously issued were in error and are hereby corrected to claim that no gross income was paid, as defined by the Rules of the Secretary of the Treasury.

CORRECTED W-2's

CORRECTED CLAIMS OF 3401(a) WAGES

You will note that the corrected W-2 forms submitted here reveal that Arrow Custom Plastics Inc. is correcting its claim of any remuneration paid to the third parties was "Wages" as defined by federal law to thus be deemed "gross income" as defined by law for the IRS to them make determinations of "taxable" income from the W-2 forms provided by Arrow Custom Plastics Inc. Arrow Custom Plastics Inc. has learned that these determinations of "wages" constitute incorrect or misleading factual premises by misapplication of IRS Rules to the facts of the matter, and as thus would not withstand proper scrutiny of law if exposed to the due process right of cross-examination and confrontation as set forth in the landmark U.S. Supreme Court decision in Goldberg v. Kelly 397 U.S. 254 (1970).

Arrow Custom Plastics Inc. has been involved in in-depth research into the matter of its claims and has discovered that it was in error in making these claims and is providing the enclosed W-2's for the purpose of correcting these unfounded claims made without legal or statutory merit. This is its effort to help the individuals it has testified against mitigate damages, and aid the Company is avoiding cost of time and resources going through the process of being proved in error in the IRS' Administrative Process.

Pursuant to the duty and responsibility of the Company, these forms are corrected in good faith and with reasonable cause as shown below. This is a matter of Right, Law, and Duty to a Just society. The Company realizes its benefit received by a Just a Peaceful Society, and seeks to maintain and participate in its preservation and Trust.

Furthermore, since it is a matter of fact and course that the IRS makes determinations of taxable income, which is based upon the fact of "Wages", an "item of gross income" (per § 61(a) and 1.861-8(a)(3)(A)), reported by third parties such as Arrow Custom Plastics Inc. on the form W-2, Arrow Custom Plastics Inc. no longer wishes to be party to these actions and witness for the government. Arrow Custom Plastics Inc. has determined that it does not wish to make erroneous claims to the detriment of others causing them undue hardship, as presently the IRS does not allow individuals the opportunity to confront witnesses such as Arrow Custom Plastics Inc. for cross-examination and correction of records and information returns.

This is not at all fair under the law of the United States of America and the People's individual rights to Due Process of Law. Arrow Custom Plastics Inc. refuses to be an unwitting or willfully mute party to this any longer.

Nov-21-2003 07:10pm From: McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P 005/033 F-227

These W-2 information returns are now hereby corrected as the definition of "Wages" in 26 USC § 3401(a) (an "item of gross income" that must come from a taxable source pursuant to the Rules of the Secretary of the Treasury (*supra*)), provides for an exception in subsection (8)(A)(i).

This exception has three criteria to determine remuneration paid to not be defined as "Wages" in 3401(a), they are as follows:

1. the remuneration must be paid by an employer;
2. the remuneration must be paid to a U.S. Citizen; and;
3. it must be reasonable to believe that the remuneration paid is excluded from gross income in § 911.

This exception of law is applicable to all of the payments made to the people on the corrected W-2's as:

- a. Arrow Custom Plastics Inc. is a private employer;
- b. Those named on the corrected W-2's are U.S. Citizens; and;
- c. None of those named on the corrected W-2's were living abroad to have any of their remuneration included in gross income as defined in § 911, and since they were not living abroad to be subject to § 911 their remuneration was not included in gross income in § 911. The definition in § 911 was not applicable and thus they were excluded by omission.

Point C is supported by the fact that under the general rule of statutory construction that the inclusion of one thing indicates and express exclusion of another unnamed thing. With these people's remuneration being paid to them while living in the U.S. not being included in § 911, it was excluded from the law.

Thus, if it is reasonable to believe that if the remuneration is included in gross income in § 911 it is the statutorily "wages", then there is no reason to believe it is "wages" unless it is included in gross income in § 911.

This exception is written in a double negative at point "c" as "except that excluded". The first 2 criteria clearly met by all involved here, and the third criteria requires reason to believe that the remuneration is included in gross income in order to cancel out any applicability of this exception clause.

With the fact being that:

- i. the determination of remuneration excepted from the definition of "wages" (§ 3401(a)(8)(A)(i)) being dependent upon the definition of that included in "gross income" in § 911 (the foundational source for citizens as revealed in §§1.861-8(f)(1)(i) and -8T(d)(2)(iii)(D));
 - ii. the fact that none of these citizens were living abroad excludes them from this law (§ 911);
 - iii. they are excluded from the definition of "gross income" in § 911; which is;
 - iv. also the definition of "wages" for U.S. Citizens per § 3401(a)(8)(A)(i);
- their remuneration is not "wages" subject to withholding, to be included in "gross income", to then taxable under the law.

Nov-21-2003 07:10pm From: McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P 006/033 F-227

In light of this, the claims of "Wages" paid and withheld on these W-2 forms for the years 1997 and 1998, pursuant to 6051(a)(3) and (4), have been corrected to be "0". Please correct all subsequent IRS records accordingly.

CORRECTED CLAIMS OF 3121(a) WAGES

In addition to the correction of the claim of "Wages" pursuant to § 3401(a), Arrow Custom Plastics Inc. is correcting the claims of "Wages" pursuant to Chapter 21, FICA/Social Security. Pursuant to the duty and responsibility of the Company, these claims are corrected in good faith and with reasonable cause as shown below.

The definition of "Wages" pursuant to 26 USC § 3121(a) and the withholding provisions in § 3102 are all subject to the Social Security Act. This Act is regarding government welfare provision, for which the Congress has no power by law to force any employer or U.S. Citizen to join, and by function set forth in the treaty calling for its creation does not apply to Arrow Custom Plastics Inc.'s activities.

The U.S. Supreme Court has held the following regarding the Congress' limitation of authority over activities within the Union, and made very final statements regarding government benefits programs and laws compelling corporations to participate:

"The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance, nursing, clothing, food, housing, and education of children, and a hundred other matters might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? It is not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of congressional power."

Railroad Retirement Board v. Alton Railroad Co.
295 U.S. 330, 55 S. Ct. 758 (1935)

Since the Social Security Act was enacted pursuant to the International Labor agreement, the intention of the Act was to provide for the welfare of foreigners working in the U.S. and U.S. Citizens living abroad. The Act did not create any new power to force the hand of the government into intra-state affairs, and even an attempt under the Commerce Clause as revealed by the Alton case above, shows that such power does not exist. This limitation exists to this day and has not been overturned.

Since all of those that we are providing corrected W-2 forms for are U.S. Citizens, and Arrow Custom Plastics Inc. has no reason to believe or understand that they are living abroad, the Company has determined that it was not involved in any circumstance subject to the ILA to be paying "Wages" as defined in the Social Security Act. This means that the amount previously reported and withheld as "wages" pursuant to § 6051(a)(5) & (6) were so reported and withheld in error.

Please correct all subsequent IRS and Social Security records accordingly.

CORRECTED 940 SERIES RETURNS

Nov-21-2003 07:11pm From-McCOLL & McCOLLOCH, ATTORNEYS AT LAW

T-213 P.007/033 F-227

Finally, enclosed you will find the corrected/amended 940 and 941 Returns for Arrow Custom Plastics Inc., reflecting the changes in these W-2 forms and correcting all of the amounts to now be "0" (zero) for the years 1997, 1998 and 1999. Please correct all subsequent IRS and Social Security records accordingly.

Arrow Custom Plastics Inc. is working on its 1120 forms at this time and will soon be providing it to the IRS to complete this correction process that it has initiated.

Thank you for your time and attention to this matter.

Sincerely,



Richard Simkanin, President
Arrow Custom Plastics Inc.

ATTACHMENT # 6

[Home](#) > [Internal Revenue Manual](#)

Internal Revenue Manual

Part 9. Criminal Investigation

Chapter 5. The Investigate Process

Section 4. Refund Fraud and Return Preparer Investigations

9.5.4 Refund Fraud and Return Preparer Investigations

- 9.5.4.1 [Overview](#)

9.5.4.1 (07-29-2002) Overview

1. Fraudulent refund investigations fall within two groups, Multiple Claims for Refunds and Unscrupulous Return Preparers.

9.5.4.1.1 (07-30-1998) Multiple Claims for Refund

1. Multiple claims for refund results from federal income tax return(s) that are supported by fabricated and false Forms W-2, Wage and Tax Statement(s). The return(s) may be filed by one, two, or more subjects in collusion with intent to defraud the government.

9.5.4.1.1.1 (07-29-2002) Investigative Techniques (Multiple Claims for Refund)

1. In the multiple claims for refund investigations, the investigation is directed toward:
 - A. the authenticity of return(s) and supporting document(s)
 - B. ascertaining the responsible return(s) preparer and filer

9.5.4.1.1.2 (07-29-2002) Investigation of Multiple Claims For Refund

1. Investigations in this group originate in a variety of ways such as:
 - A. The IRS Campus may forward information indicating that multiple returns have been filed by the same taxpayer.
 - B. The head of office of the operating division may forward to the Special Agent in Charge (SAC) returns indicating false claims for refunds, which were secured during collection activity.

<http://www.irs.gov/irm/part9/ch05s04.html>

1/12/2004

Internal Revenue Manual

Page 2 of 13

- C. A postman may report the delivery of numerous government checks to an address or person showing unusual interest in the mail.
 - D. The U.S. Postal Service or IRS may note an excessive number of mail-forwarding requests.
 - E. An audit may disclose a nonexistent address, taxpayer, employer, or excessive deductions.
 - F. A return preparer or filer may, in the presence of an informant, boast about how much he or she received in refunds.
 - G. Scrupulous return preparers, may report suspicious return preparers to the IRS.
2. Special agents should understand the provisions of 18 USC §287 and be prepared to coordinate their investigative activities with investigations conducted by the Secret Service, the U.S. Postal Service, or other government agency. It is not unusual for this type of return preparer or filer to be involved in violations of other federal statutes.
 3. The Secret Service is interested in knowing of an investigation of counterfeiting and forgery statutes (see text, Secret Service Records).
 4. The Postal Service is interested in the use of the mails to defraud the federal government.
 5. The assistance of the United States Attorney's office may be utilized to obtain an arrest or search warrant.
 6. A violation of 18 USC §287 occurs upon the filing of a fabricated federal income tax return wherein a false representation is made that the tax has been overpaid and there is a claim made for a refund of the overpayment.

9.5.4.1.1.3 (07-29-2002)**Fraudulent Claims Indicators**

1. The following are indicators special agents should look for in these investigations:
 - A. Multiple filing may be confined to a single IRS field office or may extend to many field offices.
 - B. The name used on a fraudulent return may be an alias, a fictitious name, or a variation of a preparer or filer's name.
 - C. The address is usually the address of a hotel, a motel, a rooming-house, a post office box number, or general delivery. However, residential street numbers have been used on occasion.
 - D. Attached to the returns are fabricated and false Form W-2 (sometimes handwritten) showing fictitious employer(s), salary, or tax withheld.
 - E. The name of the employer shown may or may not be an existent firm or person. If the name is that of an existent firm or person, an out-of-state address is frequently shown.
 - F. Usually the only income reported on the return is salary under \$5,000 from one employer.

<http://www.irs.gov/irm/part9/ch05s04.html>

1/12/2004

Under penalties of perjury, I declare that the above Affidavit is to the best of my knowledge and belief, true, correct, and complete.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 12th day of Jan 2004.


VICTORIA OSBORN

ACKNOWLEDGMENT

STATE OF COLORADO)

)SS:

COUNTY OF EL PASO)

On this 12th day of January 2004, before me, a notary public, personally appeared, Victoria Osborn personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the above instrument and acknowledged to me that she executed it.

WITNESS my hand and official seal.


Notary Public
My Commission Expires 04/05/2007

ATTACHMENT # 7

United States General Accounting Office

GAO

Report to the Subcommittee on
Government Management, Information
and Technology, Committee on
Government Reform, House of
Representatives

August 1999

UNPAID PAYROLL TAXES

Billions in Delinquent Taxes and Penalty Assessments Are Owed



GAO

Accountability * Integrity * Reliability

GAO/AIMD/GGD-99-211



United States General Accounting Office
Washington, D.C. 20548

Accounting and Information
Management Division

B-281574

August 2, 1999

The Honorable Stephen Horn
Chairman
The Honorable James Turner
Ranking Minority Member
Subcommittee on Government Management, Information
and Technology
Committee on Government Reform
House of Representatives

The Honorable Dennis Kucinich
House of Representatives

This report responds to your request for information on payroll taxes owed to the federal government and the associated trust fund recovery penalties¹ assessed individuals responsible for the nonpayment of these taxes. You asked that we determine (1) the extent to which payroll taxes are not remitted to the federal government, (2) the magnitude of the trust fund recovery penalties assessed against individuals of organizations that withheld federal payroll taxes from employees' salaries but did not forward them, (3) the extent to which individuals who have not remitted payroll taxes are responsible for not paying these taxes at multiple businesses, (4) the extent to which businesses and individuals who failed to pay payroll taxes are also receiving federal benefits or other federal payments, and (5) the factors that affect the Internal Revenue Service's (IRS) ability to enforce compliance or pursue collections in this area.

Results in Brief

According to IRS records, at September 30, 1998, nearly 2 million businesses owed about \$49 billion in payroll taxes, or about 22 percent of IRS' \$222 billion total outstanding balance of unpaid tax assessments. The businesses that failed to remit withheld payroll taxes were typically in wage-based industries and had few available assets from which IRS could recover these taxes. They were usually small, closely held businesses using

¹The IRS can assess a trust fund recovery penalty against an individual, such as a corporate officer, whom it determines was willful and responsible for not forwarding to the government federal payroll taxes withheld from employees' salaries.

B-281574

System Deficiencies Affect the Completeness and Accuracy of TFRP Information

In our October 1998 report⁹ on internal control weaknesses at IRS, which was based on the results of our audit of IRS' fiscal year 1997 custodial financial statements,¹⁰ we discussed serious financial management systems issues that affected IRS' ability to effectively manage and accurately report on its unpaid assessments. One of the most serious issues we discussed related to the inability of IRS to link related taxpayer accounts to ensure that they all receive appropriate credit when a payment is made on one account. This is of particular concern with respect to unpaid payroll taxes and related TFRPs. The unpaid payroll tax of a business is maintained on IRS' business master files while the TFRP assessed against an individual, or individuals, is maintained on IRS' individual master files - a detailed record of individual taxpayer accounts. These two separate and distinct databases are not integrated. Consequently, if a payment is received from the business, there is no automated entry to record the reduction in the individual, or individuals', TFRP account or accounts. This has led to instances where IRS has pursued collection against officers of a corporation for amounts that had already been paid.

IRS has attempted to correct this problem by manually entering a code on related taxpayer accounts to alert IRS personnel that related accounts exist and should be reviewed to ensure all transactions are appropriately reflected on each account. However, the use of these codes, referred to as "cross-references," has not been effective in providing the compensating link between related taxpayer accounts. As shown in table 3, both our fiscal years 1997 and 1998 financial audits identified a high incidence of unpaid payroll tax cases with TFRPs assessed against individuals in which payments were not accurately recorded in all related accounts to reflect each responsible party's tax liability reduction.

⁹See Internal Revenue Service: Immediate and Long-Term Actions Needed to Improve Financial Management (GAO/AIMD-99-16, October 30, 1998).

¹⁰See Financial Audit: Examination of IRS' Fiscal Year 1997 Custodial Financial Statements (GAO/AIMD-98-77, February 26, 1998).