

CC-2006-022

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Subject: **The First Amendment as a Defense
to Summonses and Injunctions**

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I. Purpose

This Notice discusses the First Amendment as a defense (1) to compliance with summonses and (2) in investigations and requests for injunctive relief for violations of I.R.C. §§ 6700 and 6701. **This Notice explains what speech is protected by the First Amendment and what speech is unprotected. It focuses on two types of unprotected speech: false commercial speech and speech that aids or abets unlawful conduct.** It also describes in general terms the circumstances that should be present before the Service (1) issues a summons when the First Amendment is likely to be raised as a defense or (2) refers a case to the Tax Division of the Department of Justice for the filing of an injunction when the First Amendment is likely to be raised as a defense.

II. Background

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." The First Amendment protects the expression of ideas irrespective of what they are or the medium by which they are expressed, *United States v. Stewart*, 336 F. Supp. 299, 302 (E.D. Pa. 1971), **even if the speech is deemed to be false¹** or harmful. *Virginia v. Black*, 538 U.S. 343, 358 (2003). Protected speech includes the right to utter, print, distribute, receive, read, inquire about, contemplate, and teach ideas. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). It also includes the right to freely associate with others for expressive purposes. *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995). Protected speech includes conduct designed to express and convey ideas. *New Orleans S.S. Ass'n v. General Longshore Workers*, 626 F.2d 455, 462 (5th Cir. 1980), *aff'd*, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982).

When government action is challenged on First Amendment grounds, the permissibility of the action will depend on whether the communication or expressive conduct is protected speech and, if so, whether the government's action will have a chilling effect. If the communication is protected speech, the government's action must be narrowly tailored so as not to impair

¹ False *commercial speech*, however, is excluded, *infra*.

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protected speech. On the other hand, if the expression is unprotected speech, then the government is afforded a wider scope of action. Whether or not speech is protected depends upon the surrounding facts and circumstances, *i.e.*, both the content of the speech and the context in which it occurs.

a. Protected Speech

Protected speech includes statements and discussions about the tax laws whether or not they are true. *New Orleans S.S. Ass'n*, 626 F.2d at 462 (5th Cir. 1980). Thus, an individual is free to express virtually any manner of erroneous, frivolous arguments about the tax laws or their application or operation. *Abdo v. IRS*, 234 F. Supp. 2d 553, 567 (M.D.N.C. 2002) (holding that the First Amendment protects “many forms of expression, including the right to disagree with the law”), *aff'd*, 63 Fed. Appx. 163, 2003 WL 21154241 (4th Cir. 2003). The First Amendment right of association also protects group discussions (in person or over the Internet) about taxes, even if the discussions contain or perpetuate false ideas and information about the tax laws. Moreover, this type of protected speech is not, without more, a violation of any law. See *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) (“A First Amendment defense is warranted if there is evidence that the speaker’s purpose or words are mere abstract teaching of the moral propriety of opposition to the income tax law.”); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985) (“The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws . . .”); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (First Amendment protection will apply when the speaker has “directed his comments at the unfairness of the tax laws generally, without soliciting or counseling a violation of the law in an immediate sense”). Although statements about the tax laws are generally protected under the First Amendment, they are not protected in certain contexts, as described below.

b. Unprotected Speech (False Commercial Speech, Aiding Illegality, and Inciting It)

The First Amendment does not protect all speech and related behavior. Specifically, the First Amendment will not protect false commercial speech, speech that aids or abets unlawful conduct, and speech that incites imminent lawlessness.

When false speech that would otherwise be protected speech (such as expression of false opinions about the tax laws) occurs in a commercial context or in connection with a commercial interest, it becomes unprotected false commercial speech. *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528, 1530 (11th Cir. 1985). Commercial speech, whether truthful or false, is speech that proposes a commercial transaction and is “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980); *Bland v. Fessler*, 88 F.3d 729, 738 (9th Cir. 1996) (relying on *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Among the factors used to determine whether speech is commercial include “whether: (1) the speech is an advertisement; (2) the speech refers to a specific product or service; and (3) the speaker has an economic motivation for the speech.” *United States v. Bell*, 414 F.3d 474, 479 (3rd Cir. 2005). Commercial speech is outside of First Amendment protection when it is misleading, fraudulent, or related to illegal activity. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Posadas de Puerto Rico Ass’n v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986); *Central Hudson*, *supra*, at 563-64. In cases of false commercial speech, the First Amendment will not be a valid defense to a summons or a proposed injunction.

The First Amendment protects the expression of an opinion about the tax laws, but it does not

protect speech or conduct that violates the tax laws. *United States v. Citrowske*, 951 F.2d 899, 901 (8th Cir. 1991); *Collett v. United States*, 781 F.2d 53, 55 (6th Cir. 1985) (rejecting taxpayers' contention that the First Amendment protected them from the I.R.C. § 6702 penalty for filing a frivolous return that was intended as a protest of military spending); *Welch v. United States*, 750 F.2d 1101, 1108 (1st Cir. 1985) (stating that "noncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment"); *Abdo v. IRS*, 234 F. Supp. 553, 567 (M.D.N.C. 2002) ("[One] is free to advocate change or [to] talk about reforming the current tax law, [but] he [or she] is not free to break the law."). Similarly, the First Amendment does not protect speech that aids or abets illegal conduct, such as tax evasion. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982) (concerning "speech proposing an illegal transaction, . . . government may regulate or ban [it] entirely"); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997); *United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982).

The First Amendment defense will not apply if the speech aids in the commission of illegal activity. For example, a promoter may not legitimately claim First Amendment protection for speech that promotes abusive tax shelters and arrangements in a way that violates section 6700 or purposely helps taxpayers to violate section 7201 (tax evasion) or a similar provision. *United States v. Bell*, 414 F.3d 474, 483 (3d Cir. 2005) (promoter who engaged in conduct subject to the section 6700 penalty, as well as the section 6701 penalty, could be enjoined from further "aiding-and-abetting violations of the tax laws"); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (by explaining to taxpayers how to unlawfully avoid income tax withholding, resulting in the taxpayers filing false or fraudulent withholding forms, the defendants aided and abetted illegal conduct in violation of section 7206); *United States v. Hempfling*, 96 A.F.T.R.2d 2005-6578, 2005 WL 2334713, at *11 (E.D. Cal. 2005) ("Section 6700 does not implicate the First Amendment."). Speech made in a context that subjects it to penalty under section 6701 is speech that aids or abets illegal conduct. *Bell*, 414 F.3d at 483.

Another form of unprotected speech is that which incites others to imminently violate the law. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). "The First Amendment does not confer the right to persuade others to violate the law." *Bullock v. United States*, 265 F.2d 683, 694 (6th Cir. 1959). The imminence requirement may limit the government's ability to assert this exception in promoter injunction cases.² Nevertheless, a person can incite another to violate the internal revenue laws, and incitement as an exception to First Amendment protection may be available and should be considered in appropriate cases.

Recent opinions in which the courts have relied on false commercial speech, aiding or abetting illegal conduct, or incitement as bases to deny First Amendment protection to abusive tax promotions include *United States v. Schiff*, 379 F.3d 621, 626-30 (9th Cir. 2004) (false commercial speech), *United States v. Bell*, 414 F.3d 474, 479 (3d Cir. 2005) (false commercial speech and aiding and abetting tax violations), *United States v. Raymond*, 228 F.3d 804, 815-16 (7th Cir. 2000) (incitement), and *United States v. Fleschner*, 98 F.3d 155, 159 (4th Cir. 1996) (assisting unlawful acts).

² For example, advising a taxpayer personally, or at a seminar, on how to prepare fraudulent tax forms presents a stronger case for the exception than one in which the advice is not one-on-one and is not likely to be acted on imminently.

c. Protected and Unprotected Speech Together

Many utterances include both protected and unprotected speech. Cloaking unprotected speech in protected speech does not extend protection to the unprotected speech and will not prevent the government from regulating it, as either false commercial speech or speech contributing to illegal conduct or both, so long as the protected and unprotected speech are not “inextricably intertwined.” *United States v. Schiff*, 379 F.3d at 627-29; see also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring) (“[T]he noncommercial message does not obviate the need for appropriate commercial regulation”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 454 (1978) (noting that the government “does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity”).

d. Sections 6700 and 6701

Both sections 6700 and 6701 restrict only activities unprotected under the First Amendment. Because speech and conduct penalized by these sections is not First Amendment protected, the speech and conduct can be enjoined under sections 7402, 7407, or 7408.³ Section 6700 imposes a penalty on anyone who, in organizing or selling a “plan” or “arrangement,” makes a statement about the tax benefits from participating in the plan or arrangement knowing, or having reason to know, that the statement is materially false or fraudulent. When the statement is made in the course of “selling” the plan or arrangement, the statement is false speech made in a commercial context. The same is true for “organizing” a plan or arrangement with the intent to make money from that effort. Organizing or selling a knowingly false or fraudulent tax scheme in violation of section 6700 can also be speech that aids or abets unlawful actions. *United States v. Bell*, 414 F.3d 474, 483 (3d Cir. 2005). The exceptions to First Amendment protection apply as well to conduct covered by section 6701, which imposes a penalty for knowingly advising, aiding, or assisting a taxpayer with the preparation or filing of a return or other document with the Service that the preparer knows will result in an understatement of tax liability. In fact, because return preparation is most often a commercial enterprise, the First Amendment is unlikely to be a concern in a section 6701 investigation of a return preparer or a referral for injunctive relief under section 7407.

While speech penalized under sections 6700 and 6701 is unprotected speech, some individuals under investigation for violations of section 6700 or 6701 may, notwithstanding, raise the First Amendment as a defense to summons enforcement or to an injunction. This defense is more likely to be raised by promoters who deny the existence of a federal income tax or deny the validity of the internal revenue laws and disseminate false views about federal taxation of the sort described in “The Truth About Frivolous Tax Arguments,” http://www.irs.gov/pub/irs-utl/friv_tax.pdf and Notice 2006-31, 2006-15 I.R.B. 751, *Frivolous Arguments to Avoid When Filing a Return or Claim for Refund*. These false views have no merit and have been resoundingly rejected by the courts. These views may appear at first glance to be politically (as opposed to purely commercially) motivated, which increases the likelihood that a court will carefully consider a First Amendment claim. Some promoters try to cloak illegal conduct in the guise of what is purportedly or seemingly First Amendment-protected speech. *E.g.*, *National Commodity and Barter Ass’n/National Commodity Exchange v. United States*, 843 F. Supp. 655, 656, 660, 664-65 (D. Colo. 1993) (involving “a self-described ‘voluntary, non-commercial,

³ This Notice focuses on sections 6700 and 6701, but conduct in violation of other Code sections may also be a basis for an investigation and ultimately an injunction, such as a return preparer’s understatement of a taxpayer’s liability on a return or refund claim in violation of section 6694(a) or (b).

political and educational association” that engaged in supposedly “political and ostensibly protected First Amendment activities” but in fact “promoted and sold an abusive tax shelter” subject to the section 6700 penalty), *aff’d*, 74 A.F.T.R.2d 94-7385, 1994 WL 664970 (10th Cir. 1994). Thus, when promoters attempt to cloak illegal conduct in the guise of protected speech, the government will need to show a reviewing court that the purportedly protected speech is in fact a ruse.

III. The First Amendment as a Defense to Summonses

The Service has authority under section 7602 to issue summonses for testimony, documents, records, and other data to aid the Service in enforcing the internal revenue laws. To be valid and enforceable, a summons must be issued for a proper purpose and the information summoned must be relevant or potentially relevant to that purpose. The First Amendment can be a valid defense to summons enforcement. See *United States v. Fox*, 721 F.2d 32, 40 n.6 (2d Cir. 1983) (making clear that use of a summons for “effective enforcement of the tax laws should [not] take precedence over constitutional protections”). Indeed, summons enforcement is likely to be the point when a promoter first raises the First Amendment as a defense. More than one court has held that First Amendment factors must be considered in summons enforcement if credibly raised as a shield to the summons. See *United States v. Trader’s State Bank*, 695 F.2d 1132 (9th Cir. 1983); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980). The First Amendment, however, will be a valid defense only to a summons that requests information related to protected speech and, as a practical matter, will only be a serious consideration in an investigation that may restrict or penalize speech (e.g., a section 6700 investigation). The First Amendment will rarely be a concern in other investigations, such as an income tax examination, and it will not be a valid defense to a summons issued in any investigation unless it seeks information relating to protected speech.

The Service must anticipate and prepare for a First Amendment defense prior to issuing a summons. The summons should be narrowly tailored to exclude information regarding protected speech, or the government must develop evidence that the speech to which the summoned information relates is unprotected speech, such as false commercial speech. For instance, suppose that a promoter challenges, on First Amendment grounds, enforcement of a third-party summons issued to an Internet payment service for information about online sales of a book. The government must be able to demonstrate that the affected speech was made in the context of promoting an abusive tax scheme, thereby removing the speech from First Amendment protection.

The Service can demonstrate this through evidence that (1) there is a likely suspicion the promoter is engaged in conduct subject to penalty under section 6700 and (2) that the summons is limited to gathering information reasonably related to confirming that suspicion. Presented with this evidence, a court should enforce the summons. *Steinhardt v. United States*, 326 F. Supp. 2d 1113, 1117 (C.D. Cal. 2003) (denying a petition to quash on First Amendment grounds (among others) a summons for bank records that would help determine if petitioner and his associates were liable for the section 6700 and 6701 penalties in promoting a warehouse bank scheme for their customers to evade taxes). The suspicion of conduct subject to section 6700 will come from evidence of an actual plan, arrangement, or other similar services being promoted or sold that claim false tax benefits.

IV. The First Amendment as a Defense to Injunction Cases

Conduct that violates section 6700 or 6701 may be the basis for an injunction. In considering whether to impose an injunction, which is a prior restraint on speech, courts closely scrutinize the facts to determine if the speech or conduct to be enjoined is First Amendment protected. When the issue is raised, the government must establish that the First Amendment does not bar an injunction. If the facts show a person is engaging in activity that violates section 6700 or 6701, then the activity is not protected speech and may be enjoined. Toward that end, investigations must secure reliable evidence of the prohibited promotion, including the specifics of the promoter's speech and conduct and any commercial element.

Cases to enjoin promoters of frivolous tax arguments are likely to involve both protected and unprotected speech. In these cases, a promoter's fraudulent speech is not immune from appropriate sanction merely because it appears in a book that may also contain some protected speech, such as political commentary on the tax laws. *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004); *United States v. Savoie*, 594 F. Supp. 678, 682 (W.D. La. 1984) (noting that "while speech may be incidentally involved as a part of these prohibited [section 6700] activities," the First Amendment did not prevent the court from enjoining Savoie's promotion of abusive tax-avoidance plans). Giving a political or ideological spin to an abusive tax shelter promotion does not insulate the promotion from being penalized or enjoined, because the underlying conduct remains illegal. See *Abernathy v. Conroy*, 429 F.2d 1170, 1176 (4th Cir. 1970) (stating that illegal "acts are not accorded protection under the first amendment, even though they also constitute expressive or communicative conduct"). In *Schiff*, for example, the court held that, while *The Federal Mafia* contained some political speech that was protected by the First Amendment, the book was also "an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax," which was unprotected false commercial speech. 379 F.3d at 627-29. The court found that "[b]ecause the protected and unprotected parts of the book are not inextricably intertwined, Schiff cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection," and to the extent the book contained fraudulent speech it was subject to injunction. *Id.*

As the *Schiff* case demonstrates, books or other media asserting arguments about the supposed legality of not filing returns or not paying taxes (when otherwise due) sometimes contain false commercial speech. These writings may also be designed to further illegal activity. For instance, a book could include tax evasion plans or arrangements, sample forms or letters, or specific step-by-step advice to put the author's arguments into practice. A book's false commercial speech might also be in the form of advertisements for services or other products that facilitate tax evasion. A book can lose its First Amendment protection when used in a seminar or similar program to train individuals to implement frivolous arguments or to prepare returns based on those arguments. *E.g.*, *Abdo v. IRS*, 234 F. Supp. 2d 553 (M.D.N.C. 2002); *United States v. Allamby*, 96 A.F.T.R.2d 2005-5638, 2005 WL 2160107 (N.D. Ohio Jul. 29, 2005).

As with summonses, a proposed injunction must be carefully written to avoid unduly impacting protected speech when both types of speech are present. This may result in an injunction limited to the promotion of abusive tax schemes, while allowing the promoter to continue engaging in protected speech that stops short of promoting violations of the tax laws. The precise terms of the injunction will be important considerations for a court. See *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) (interpreting the district court's injunction narrowly to avoid contravening the First Amendment by limiting the broad language of the injunction to speech

