Appendix H

Analysis of *U.S. v. Hicks*

Reader's Notes:

MEMO

TO: Interested Colleagues

FROM: Paul Andrew Mitchell, Founder
Account for Better Citizenship

DATE: October 25, 1991

SUBJECT: 9th Circuit Wrongly Decides
U.S. v. Hicks and U.S. v. Bentson

The Ninth Circuit Court of Appeals has based its two recent income tax rulings on blatantly wrong premises. In upholding convictions for willful failure to file income tax returns, the Court rejected appeals by both defendants to the clear and unambiguous provisions of the Paperwork Reduction Act (PRA) and the Administrative Procedure Act (APA). A simple yet careful analysis of these rulings is sufficient to expose the faulty premises upon which both rulings are based. As the Holy Bible says, "Only the fool builds his house upon sand" (or words to that effect).

U.S. v. Hicks

The case of U.S. v. Hicks is the more important of the two because it was decided first, it contains more "analysis", and sets a precedent to which the second case refers. Beginning with the PRA, the Court admits that the IRS must comply with the PRA and "... in particular, must display OMB control numbers on its tax return forms and on its regulations." Nevertheless, despite a clear and unambiguous public protection clause, the Court ruled that the IRS failure to comply with the PRA does not prevent the defendant from being penalized and that the PRA constitutes no defense to prosecution under 26 U.S.C. 7203:

> "But even assuming without deciding that the IRS failed to comply with the PRA here, its failure does not prevent Hicks from being penalized."

The Court's "analysis" justifies its ruling on the basis of a careful distinction it draws between agency regulations and Congressional statutes. Specifically, in the absence of an "express prior mandate" from Congress, a citizen may escape penalties for failing to comply with an agency information collection request that is issued *via regulation*, but without displaying an OMB control number. It is the existence of an "explicit statutory requirement" which makes all the difference, according to the 9th Circuit. The Court refers to its own precedents as follows:

> "The legislative history of the PRA and its structure as a whole lead us to conclude that it was aimed at reining in *agency* activity. ... Where an agency fails to follow the PRA in regard to an information collection request that the agency promulgates **via regulation**, at its own discretion, and **without express prior mandate from Congress**, a citizen may indeed escape penalties for failing to comply with the agency's request. *See e.g. United States v. Hatch*, 919 F.2d 1394 (9th Cir. 1990); *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1989). But where *Congress* sets forth an explicit statutory requirement that the citizen provide information, and provides statutory criminal penalties for failure to comply with the request, that is another matter. **This is a legislative command, not an administrative request.** The PRA was not meant to provide criminals with an all-purpose escape hatch.
>
> [emphasis added]

What exactly is this legislative command, this "explicit statutory requirement", this "express prior mandate" upon which the Court places so much emphasis? We search in vain amidst the Court's analysis of the PRA. Instead, we are told that the tax code predates the PRA by over 25 years and that Congress never intended the PRA to create a loophole in that tax code:

> Moreover, the provision of the tax code under which Hicks was convicted predates the PRA by over 25 years. If, in enacting the PRA, Congress had intended to repeal 26 U.S.C. 7203, it could have done so explicitly. Repeals by implication are not favored. ... **Congress enacted the PRA to keep agencies, including the IRS, from deluging the public with needless paperwork. It did not do so to create a loophole in the tax code.**
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> We hold that the public protection provision of the PRA, 44 U.S.C. 3512, constitutes no defense to prosecution under 26 U.S.C. 7203. To hold otherwise -- to interpret the PRA without reference to Congress' purpose -- would be to elevate form over substance.
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> [emphasis added]

Evidently, the Court is ready and willing to elevate legislative commands over administrative requests, "explicit statutory requirements" over agency regulations. However, it is not willing to be explicit itself about the exact statutory requirement that is so elevated, at least not in its analysis of the PRA. It is not until the Court analyzes the Administrative Procedure Act (APA) that we finally discover a pivotal reference to the exact statutory requirement which the Court considers so sacred. But this pivotal reference is a foundation of sand.

<u>Administrative Procedure Act</u>

Having made such an important distinction between statutes and regulations, the Court then proceeds to reiterate the same distinction in rejecting a defense based upon the APA. Even though the IRS has failed to publish Form 1040 in the Federal Register, and even though the IRS has failed to promulgate Form 1040 according to the APA notice and comment procedures, the Court maintains that <u>the defendant still had a legal duty to file a tax return</u>. According to the Court, it is entirely "meritless" to argue that the

IRS's failure to publish its form *eliminated* any legal duty that might have required the defendant to file income tax returns:

> Hicks's argument is meritless. It confuses law with regulations with respect to such law. **It is the tax code itself, without reference to regulations, that imposes the duty to file a tax return**. ... However, even if we suppose that the duty to file tax returns can be understood only with reference to regulations, the IRS has duly promulgated sufficient regulations, *e.g.* 26 CFR 1.6011-1, 1.6012-1, to make that duty clear. The meaning of "willful failure to make a tax return" is apparent without reference to the contents of Form 1040 or its instructions. Hicks cannot complain that he did not know what was expected of him. He had a duty to make a tax return, and chose to ignore that duty.

Notice, in particular, that the Court has *still* not mentioned the exact statutory requirement which it considers so decisive. Instead, we are told that the tax code imposes the duty to file a tax return, that the IRS has promulgated "sufficient regulations" to make that duty clear, and that Form 1040 and its instructions are not needed to know that duty. Evidently, the Court judges the statute to be crystal clear and the regulations to be duly promulgated and "sufficient", *even if* we suppose that the statute is not crystal clear. What exactly is the controlling statutory requirement, and is the "duty to file" as apparent in that statute as the Court would have us believe? In answer to the first question, the Court finally plays its hand:

> Hicks's reliance on *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986) is misplaced. As the Fourth Circuit noted in *Bowers, Reinis* involved unpublished rules (specifically, instructions for a Currency Transaction Report Form) that imposed "substantive obligations beyond those created by the statute itself." ... Only by publication could this obligation become known. The 1040 form, by contrast, did not add to Hicks's basic substantive obligation. That obligation is to comply with the applicable provisions of the Internal Revenue Code. **The code requires that persons such as Hicks make a return. 26 U.S.C. 6012.**
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> [emphasis added]

At long last, we finally discover the exact statutory requirement which the Court considers so decisive. But is the "duty to file" as "apparent", as obvious and as crystal clear in this exact citation as the Court would have us believe? Let us now quote the operant phrases from a subset of Title 26, Section 6012:

> (a) GENERAL RULE: Returns with respect to income taxes under subtitle A shall be made by the following:
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> (1)(A) Every individual having for the taxable year **gross income which equals or exceeds the exemption amount** .... except that ... nonresident alien individuals subject to the tax imposed by section 871 and foreign corporations subject to the tax imposed by section 881 **may be exempted from the requirement of making returns** under this section.
>
> [emphasis added]

Admittedly, Section 6012 contains a lot more verbiage which covers a lot more exceptions to the general rule, *e.g.*, those not married, heads of households, surviving spouses, joint returns, estates, trusts, political organizations and homeowners associations, and so on *ad nauseam*. Likewise, the meaning of "nonresident alien individuals" and "foreign corporations" is an entirely separate and complex subject which will divert us too far from the path at hand. The important point here is that the general rule specifies a **threshold**, namely, the duty to file is imposed *by law* on every individual having "gross income which **equals or exceeds** the exemption amount". Is this law sufficiently clear, explicit, and unambiguous? Apparently the Ninth Circuit thinks so. But is it really? Let's be honest and objective about this, because the issues here are important and even crucial to the future of our country.

What is a Widget?

In order to answer these questions, let us first reason by analogy. Because you are now reading a law which I have enacted for you, you are hereby informed that you have a duty to send me a birthday card, and a pair of free tickets to the World Series, if and when I reach the age of 50 widgets. Your immediate response is obvious: what's a widget? You would be happy to comply with the duty if I would only define what a "widget" is, in terms you understand. Absent such a definition, you cannot comply because my law is vague, and hence void. Once you know what a widget is, you are confident you will be able to determine when my age passes the threshold number of widgets, at which point you will be happy to satisfy your "known legal duty". Without a doubt, my definition of "widget" is crucial and decisive for you to satisfy your duty.

This same logic applies directly to the statutory threshold established for "gross income". At the risk of repeating a mountain of published analysis on this very same issue, we are forced once again to quote the statutory definition of "gross income" as follows:

> SEC. 61. GROSS INCOME DEFINED
>
> (a) GENERAL DEFINITION. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items ... [list follows].

Even though the statute has defined "gross income", it still has not defined "income". What the statute does say is comparable to saying, "Gross widgets means all widgets from whatever source derived." (Or, as Godfrey Lehman says, "Gross gobbledygook is gobbledygook from whatever source derived.") But we still have not defined "widgets" (or gobbledygook) and the definition of "gross widgets" is necessarily vague for this reason and for this reason alone. The statutory definition of "gross income" is a tautology, because it uses a term it is defining in the definition of the term defined. From a purely grammatical point of view, the only thing accomplished by this statutory definition of "gross income" is to qualify the meaning of "gross"; it accomplishes nothing else.

Furthermore, close examination of Title 26, the Internal Revenue Code (IRC), reveals that the meaning of "income" is simply not defined, period! There is an important reason in law why this is the case. At a time when the Supreme Court did not enjoy the benefit of 17,000 State-certified documents which prove it was never ratified, that Court assumed that the 16th Amendment was the supreme law of the land. In what is arguably one of the most important rulings on the definition of "income", the Supreme Court of the United States has clearly instructed Congress that it is essential to distinguish between what is and what is not "income", and to apply that distinction according to truth and substance, without regard to form. In that instruction, the high Court has told Congress that **it has absolutely no power** to define "income" because that term was considered by the Court to be a part of the U.S. Constitution:

> **Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution**, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised. [Eisner v. Macomber, 252 US 189]

[emphasis added]

Clearly, the Internal Revenue Code has not distinguished between what is and what is not income because to do so would be an exercise of power which Congress does not have. **This is a Catch-22 from which the Congress cannot escape. It either defines income by statute and thereby exercises a power which it does not have, or it fails to define income, thereby rendering whole chunks of the Internal Revenue Code null and void for vagueness.**

The well documented failure of the 16th Amendment to be ratified raises a host of other issues too complex to analyze here. One could argue, for example, that the term "income" is really **not** a part of the Constitution after all, because it is found only in the text of the failed amendment. Suffice it to say that Congress has never had the power to lien on the private property of sovereign Citizens of the 50 States, with or without the 16th Amendment, unless the lien results from a statute authorizing a direct tax which satisfies the apportionment rule in the Constitution (1:2:3 and 1:9:4).

Income is private property. Absent a direct tax, or some commercial agreement to the contrary, the federal government is not empowered to obtain a controlling interest in, or otherwise lien on private property so as to compel a private Citizen's performance to any third-party debt or obligation. Moreover, it is a well established principle in law that government cannot tax a sovereign Citizen for freely exercising a right guaranteed by the U.S. Constitution. The acquisition and exchange of private property is such a right.

Numerous *other* rulings of the Supreme Court have all defined "income" in the same exact terms, namely, income is a "profit" or a "gain". (See attached formal petition to Rep. Barbara Boxer for all relevant citations.) Remember, these are not the writings of some extremist or radical constitutional libertarian. We are relying here upon the words of the Supreme Court of the United States, in cases wherein the official definition of "income" was decisive. Try to find a principle that is better settled:

> Remember that our source is not some "tax protest" group. Just about everything we are telling you comes from the U.S. Supreme Court. **It would be difficult, and perhaps impossible, in our system of jurisprudence, to find a principle better settled** than the one we have been citing.
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> [from Tax Scam by Alan Stang, Mt. Sinai Press]
> [POB 1220, Alta Loma, CA 91701, 1988]

Whatever arguments one may choose to make from this point forward, those arguments would certainly benefit from a knowledge of the relevant case law in this area. I mean, if we're talking gasoline taxes, then we know the subject of the tax is gasoline; if we're talking tobacco taxes, then we know the subject is tobacco. Why should a tax on "income" be any different? Just because the Congressional Research Service chooses to differ with the Supreme Court? Just because the IRS uses police power to enforce a different definition? Just because the Federal Reserve needs a powerful agency to collect interest payments for its syndicated monopoly on private credit?

Is the Code Sufficient?

The Ninth Circuit tips its hand in another, albeit subtle way when it discusses so-called makeshift returns. Simply stated, you don't need a Form 1040 or its instructions to make and file a return; the statute and the regulations are enough:

> While it is true that the regulations state that filing a Form 1040 is the preferred manner of making a return, it is by no means the only manner of filing. 26 C.F.R. 1.6012-1(a)(6). **Knowing the code and the regulations, and no more, is enough to enable Hicks to attempt to comply with the obligation to file a return.** He did not need to consult a 1040 form or its instructions. *See also* 26 C.F.R. 1.6011-1(b) (taxpayer is not penalized for filing a makeshift return pending the filing of a proper return). It follows that Form 1040 is not a "rule" subject to the complicated publication, notice, and comment requirements of the APA.
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> [emphasis added]

Notice, in particular, that the Court has ruled that "knowing the code and the regulations, and no more, is enough ...." The Court has **not** ruled that "knowing the code is enough". This is an important, and telling admission on the part of the Ninth Circuit. By their own previous precedents in Hatch and Smith, this Court ruled that OMB control numbers and expiration dates are required to be displayed in the Code of Federal Regulations. We already know that the IRC does not define "income". If the regulations also fail to contain a satisfactory definition of "income", and if those same regulations fail to display currently valid OMB control numbers, the conscientious citizen is faced with a double whammy. The regulations are not only null and void for vagueness, they can also be ignored as "bootleg requests" because they do not display OMB approval. **If the Code cannot be understood without those regulations, the Code is not sufficient**. Last but not least, Congress' lack of power to legislate a statutory definition of "income" is also equally true of the regulations which promulgate statutes. Were the regulations which implement Section 6012 to contain a definition of

"income", the very existence of that definition in a regulation (which has the force of law) would evidence the exercise of a power which Congress has been told, in clear and certain terms, it simply does not have.

U.S. v. Bentson

Having established its precedents in U.S. v. Hicks, the Ninth Circuit proceeds to make summary hay of similar issues raised by defendant Stephen W. Bentson. The Court observed that Bentson's PRA argument was essentially the same as the argument it rejected in Hicks, and they found no merit in it:

> Bentson points to dicta in *United States v. Collins* ... that suggest that persons charged with criminal violations of the Internal Revenue Code might in some circumstances legitimately raise a PRA defense. For reasons given in *Hicks*, we believe that the PRA was not intended to provide such a defense, and therefore we disagree with the *Collins* court's dicta.

The Court's disposal of the APA argument is even less enlightening:

> The district court denied Bentson's motion for dismissal based on the APA as untimely. Whether or not it was untimely, the legal theory on which the motion was based has no merit. *Hicks, supra*.

So much for the APA. Since the Bentson case contains no additional analysis and relies upon the precedent(s) set by the Hicks case, it would be fair to fault the Bentson ruling for the same reasons that the Hicks ruling is faulty.

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