[​Original Image of 2014 WL 4373676 (PDF)](http://www.westlaw.com/Link/Document/Blob/I9ebef3f0342b11e483b49a2da5771d1e/2014_WL_4373676.pdf?targetType=TrialDocs&originationContext=pagepdflink&vr=3.0&rs=cblt1.0&transitionType=DocumentImage&contextData=(sc.Recommended))



2014 WL 4373676 (D.Alaska) (Trial Motion, Memorandum and Affidavit)

United States District Court, D. Alaska.

Donald Louis HYMES, in propria persona; and Rita MariNa Hymes, in propria persona. Plaintiffs,

v.

Jennifer D. AUCHTERLONIE, Individually and Official Capacity; and, Lynne Goldbach, Individually and Official Capacity; and, Jodi Vanderlei, Individually and Official Capacity; and, United States, and, Internal Revenue Service; and, Unknown U.S. Marshals; and, John Does 1-20 Defendants.

No. 4-14-cv-00016.

July 23, 2014.

**Motion to Vacate/Reconsider**

Donald Louis Hymes, Rita MariNa Hymes, 330 3rd Avenue #406, Fairbanks, Alaska 99701.

Come now Donald Louis Hymes, *in propria persona,* without Assistance of Counsel and Rita MariNa Hymes, *in propria persona* without Assistance of Counsel (“the Hymes”) with this Motion to Vacate/Reconsider. No one else will be given any Notice of this filing as Judge Gleason has trespassed into this Case that wasn’t even technically a Case with any Defendants and was able to speed read and dismiss all of the issues and facts and law in less that twenty (20) hours after the Hymes filed this Case. So why have other Motions languished before Judge Gleason with this type of superior abilities?

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The Hymes are shocked by the latest actions by Judge Gleason at Docket 7-ORDER of Dismissal that was filed in less that twenty (20) hours after the Hymes opened the case in the Fairbanks USDC.

Judge Gleason Dismisses the Hymes Complaint with this totally untrue and false statement, to wit:

Here, the Court will dismiss this action because at this juncture it is “frivolous,” as all of the issues have been fully litigated and conclusively determined in Case No. 3:05-cv-000123-SLG, then affirmed by the Ninth Circuit, and indeed then further raised in Case No. 4:13-cv-00015-SLG on appeal to this Court from the Bankruptcy Court.

Judge Gleason CAN’T identify the FACTS and Law with specificity in the Complaint; and further, that they were not ONLY NOT EVEN addressed by ANY COURT when the Hymes attempted to get the procedural documents and procedures that the IRS agents and Officers, the DoJ Attorneys with the co-oporation and silence of Judge Beistline and this Court to assist in keeping critical mandatory procedures and procedural documents from the Hymes.

And further, Judge Gleason can’t even identify the mandatory essential elements for a Notice of Deficiency ([§ 6212](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6212&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))) and Substitute for Return (§ 6020(b) and § 6651), which to DATE have NEVER been disclosed to the Hymes, to wit: (1) A Notice of Deficiency; and, (2) A Form 4549, Income Tax examination Changes or Equivalent: and, (3) A Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (4) *A by an IRS Agent/Officer signed certification (Form 13496)* is a *sine qua non* for a procedurally valid and legal determination of Notice of Determination and Substitute for Return against the Hymes before any Assessment, Notice and Demand, Garnishment and Levies, Seizure of Property and Foreclosure and Eviction can occur.

WHERE in the RECORD was this (1) disclosed, *supra;* and, (2) where was it adjudicated? NEVER is the answer. Therein Judge Gleason’s ORDER is impeached by refusing in the past and to file into this CASE with specificity the document(s) and resulting adjudication which have been disclosed and adjudicated according to Judge Gleason. Is the Chief Counsel WRONG of the IRS, *infra,* on the mandatory procedural requirements of Notice of Deficiency, Form 4549, Form 886-A and Form 13496 signed Certification?

FACT: With the recent new information isn’t it true that the IRS agents and officers, the DoJ Attorneys, Judge Beistline and this Court to date have been and continue Motion to Vacate/Reconsider Page 3 of 24 to use third party “informational returns” that are prohibited as stand alone sources to make determinations and assessment against the Hymes as foundational for the existing Foreclosure and Evictions!

***I. Frivolous***

A paper is frivolous if it is “both baseless and made without a reasonable and competent inquiry.... frivolousness and improper purpose inquiries overlap. A district court confronted with solid evidence of a pleading’s frivolousness may in circumstances that warrant it infer that it was filed for an *improper purpose.”* [*Townsend v. Holman Consulting Corp.,* 929 F.2d 1358, 1362 (9th Cir.1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991071992&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_1362&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_1362) (en banc ). Frivolous or unreasonable is an action that is *’ withoutfactual and legalfoundation.’* [*Zaldivar v. City of Los Angeles,* 780 F.2d 823, 827 (9th Cir. 1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986102494&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_827&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_827).

In [*Neitzke v. Williams,* 490 U.S. 319, 325 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989063358&pubNum=0000780&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_780_325&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_780_325), to wit:

[L]egal frivolousness which we articulated in the Sixth Amendment case of [*Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129500&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). There, we stated that an appeal on a matter of law is frivolous where “[none] of the legal points [are] arguable on their merits.”[Id., at 744, 87 S.Ct., at 1400](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129500&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_708_1400&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_708_1400). By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)’s term “frivolous,” when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation. See, *e.g.,* [*Payne v. Lynaugh,* 843 F.2d 177, 178 (CA5 1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988047271&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_178&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_178); [*Franklin,* 745 F.2d, at 1227-*1228*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984149538&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_1227&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_1227)*;*[*Johnson v. Silvers,* 742 F.2d 823, 824 (CA4 1984)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984141486&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_824&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_824); *Brandon, supra,* at 159, 734 F.2d, at 59; [*Wiggins v. New Mexico State Supreme Court Clerk,* 664 F.2d 812, 815 (CA10 1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981149093&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_815&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_815), cert. denied, [459 U.S. 840, 103 S.Ct. 90, 74 L.Ed.2d 83 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982235867&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))

“[A] court will not hesitate to award damages when the appeal is frivolous or taken merely for purposes of delay, involving an issue or issues already ‘clearly resolved.’ ” See [*Ueckert,* 721 F.2d at *251*](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983151631&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_251&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_251)*;* [*Lonsdale v. Commissioner,* 661 F.2d 71 (5th Cir. 1981)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981144983&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

This Court may impose sanctions pursuant to [Fed. R. App. P. 38](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000599&cite=USFRAPR38&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) if it determines that an appeal is frivolous. *Lewis v. Commissioner,* 523F.3d 1272, 1277 (10th Cir. 2008). “An appeal may be frivolous if it consists of ‘irrelevant and illogical arguments based on factual misrepresentations and false premises,’ or when ‘the result is obvious, or the appellant’s arguments of error are wholly without merit.’ ” *Id.* at1277-78 (quoting [*Lantec Inc. v. Novell, Inc.,* 306 F.3d 1003, 1031 n.14 (10th Cir. 2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002596880&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_1031&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_1031), and [*Taylor v. Sentry Life Ins. Co.,* 729 F.2d 652, 656 (9th Cir. 1984)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984115496&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_656&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_656)); see [*Ford v. Pryor,* 552 F.3d 1174, 1180 (10th Cir. 2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017689253&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_1180&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_1180). The IRS agents’ appeal clearly is not frivolous.

A pleading interposed for delay is frivolous, but a pleading is not frivolous because it is vague. See [*Farmers’ & Millers’ Bank v. Sawyer,* 7 Wis. 379, 384 (Sup.Ct. Wis. 1858)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1858009160&pubNum=0000822&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_822_384&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_822_384) “[if] it requires research and argument to determine the point \* \* \* If worthy of serious consideration, argument and research, it is of course not frivolous, but should be brought to hearing like all other matters in legal dispute. [*Yerkes v. Crum,* 49 N.W. 422, 425 (Sup.Ct.N.D. 1891)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891004331&pubNum=0000594&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_594_425&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_594_425) “In [citing] [*Kelly v. Barnett,* 10 How. Pr. 135, 137 (Sup.Ct.N.Y.C. 1857)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1854009949&pubNum=0000426&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_426_137&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_426_137) \* \* \* “Vagueness in pleading, it is well settled, is not frivolousness, it is to be corrected by amendment, and not visited by judgment.”

**II. Dismissal Without Service.**

In [*Guti v. U.S. I.N.S.,* 908 F.2d 495 (9th Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990105728&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), for an action to be subject to dismissal as frivolous prior to service of process upon defendants, a claim must lack any arguable basis in law or fact. This standard is not met when there is no controlling authority requiring a holding that facts as alleged fail to establish even arguable claim as a matter of law, to wit:

In order to satisfy that standard, the claim must lack any arguable basis in law or in fact. [*Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 1831, 104 L.Ed.2d 338 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989063358&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_708_1831&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_708_1831); [*Jackson,* 885 F.2d at 640](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132549&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_640&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_640). The standard is not met when there is no controlling authority requiring a holding that the facts as alleged fail to establish even an arguable claim as a matter of law. *See* [*Pratt v. Sumner,* 807 F.2d 817, 819 (9th Cir.1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987002003&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_819&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_819).

The district court’s *sua sponte* dismissal of a complaint as frivolous is proper if the complaint “lacks an arguable basis either in law or in fact.” [*Neitzke v. Williams,* 490 U.S. 319, 325 (1989)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989063358&pubNum=0000780&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_780_325&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_780_325); [*McKeever v. Block,* 932 F.2d 795, 798 (9th Cir.1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991084946&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_798&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_798)” *see also*[*Hernandez v. Denton,* 929 F.2d 1374, 1376 (9th Cir.)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991071994&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_1376&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_1376) (factually frivolous claims are those that rest upon facts the “court knows could not have occurred”), *cert. granted,* [112 S.Ct. 369](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991105295&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) (*1991);* [*Guti v. United States INS,* 908 F.2d 495, 496 (9th Cir.1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990105728&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_496&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_496) (claim not frivolous where no controlling authority bars claim as a matter of law). See also [*Iasu v. Smith,* 511 F.3d 881, 892 (9th Cir. 2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014387145&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_892&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_892); [*St. Hilaire v. State of Arizona,* 87 F.3d 1321, \*2 (9th Cir. Unpublished 1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996140114&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) “In any event, the argument is not frivolous. See also *Gutiv.* [*U.S. INS,* 908 F.2d. 495 (9th Cir. 1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990105728&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) (absence of controlling authority indicates nonfrivolous claim).;” In [*Newman v. Roland,* 66 F.3d 335, \*2 (9th Cir. Unpublished 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995151589&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), to wit:

A complaint is not frivolous unless there is controlling authority requiring a holding that the facts as alleged fail to establish even an arguable claim as a matter of law. *Gutiv.* [*I.N.S.,* 908 F.2d 495, 496 (9th Cir.1990)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990105728&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_496&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_496). A dismissal pursuant to [28 U.S.C. § 1915(d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1915&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5ba1000067d06) is reviewed for an abuse of discretion. [*Denton v. Hernandez,* 112 S.Ct. 1728, 1734 (1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992083196&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_708_1734&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_708_1734).

In civil rights cases where the plaintiff appears pro se, a court must construe pleadings liberally and afford the plaintiff the benefit of the doubt. [*Karim-Panahi v. Los Angeles Police Department,839* F.2d 621, 623 (9th Cir.1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988022619&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_623&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_623); [*King v. Atiyeh,* 814 F.2d 565, 567 (9th Cir.1987)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987044716&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_567&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_567). Even if “a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not.” [*Neitzke,* 490 U.S. at 328](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989063358&pubNum=0000780&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_780_328&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_780_328). Even “highly improbable or greatly exaggerated” allegations are not frivolous if they are legally arguable. [*Jackson,* 885 F.2d at 641](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132549&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_641&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_641).

See [*Aguayo-Gonzalez v. I.N.S.,* 60 F.3d 832](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995144907&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), ??2 (9th Cir. Unpublished 1995); [*Hill v. State of Arizona,* 48 F.3d 1228, \*1 (9th Cir. 1995)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995053839&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

Judge Gleason’s dismissal is clear error as the Hymes’ Complaint was NOT frivolous with no basis in fact and law; and, the Hymes have in the Complaint newly discovered errors in procedure that the IRS, agents and officers of the IRS, Department of Justice Attorneys and various Courts and Judges, that are deemed to know the law[1](#co_tablefootnoteblock_1_1), did not disclose to the Hymes such as essential elements for a Notice of Federal Tax Liens, for Assessments, for a Notice of Deficiencies, for Substitute for Returns. The prior actions by the IRS agents and officers and the DoJ Attorneys in the cases cited by Judge Gleason is intentional “spoliation of evidence.” Isn’t the IRS mandated to disclose the procedures and documents which they are required to follow to arrive at an Assessment? The Hymes have discovered that the IRS DID NOT follow the mandated procedures and the mandated procedures and documents have to date NEVER been seen by the Hymes.

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| [1](#co_tablefootnote_1_1) | [*Groh v. Ramirez,* 540 U.S. 551, 563, 564 (2004)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004152842&pubNum=0000780&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_780_563&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_780_563) “If the law was clearly established ... a reasonably competent public official should know the law governing his conduct.” Citing [*Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982128582&pubNum=0000780&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_780_818&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_780_818); [*State of Ohio v. Davis,* 584 N.E.2d 1192, 1196 (Sup.Ct. Ohio 1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992027958&pubNum=0000578&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_578_1196&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_578_1196) *“Judges,* unlike juries, *are presumed to know the law.”;* [*Leary v. Gledhill,* 84 A.2d 725, 728 (Sup.Ct. NJ 1951)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952110249&pubNum=0000162&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_162_728&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_162_728) “A court will in general take judicial notice of and apply the law of its own jurisdiction without pleading or proof thereof, the judges being deemed to know the law or at least where it is to be found.” |

***A. Spoliation of Evidence.***

In [*Equal Employment Opportunity Comm. V. Dillon Companies, Inc.,* 839 F.Supp.2d 1141, 144 (D.Colo. 2011)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026545363&pubNum=0004637&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) is an excellent examination lengthy of the issues of “spoliation of evidence,” to wit:

“’Spoliation is the destruction or significant alteration of evidence, or failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.’ ” [*Blangsted v. Snowmass-Wildcat Fire Prot. Dist.,* 642 F.Supp.2d 1250, 1259-60 (D.Colo.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019555251&pubNum=0004637&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_4637_1259&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_4637_1259) (quoting [*Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.,* 473 F.3d 450, 457 (2nd Cir.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011127591&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_457&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_457)). A court has both inherent power as well as authority under [Fed.R.Civ.P. 37(b)(2)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR37&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_c0ae00006c482) to sanction a litigant for the destruction or loss of evidence. *See* [*Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991102989&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)); [*Smith v. Nw. Fin. Acceptance, Inc.,* 129 F.3d 1408 (10th Cir.1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997237220&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

The Court must first determine whether the evidence “would be relevant to an issue at trial.” [*Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.,* 244 F.R.D. 614, 621 (D.Colo.2007)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011626247&pubNum=0000344&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_344_621&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_344_621). If so, sanctions are appropriate when (1) a party had a duty to preserve the evidence because it knew, or should have known, that litigation was imminent, and (2) the other party was prejudiced by the destruction of the evidence. [*Turner v. Pub. Serv. Co. of Colo.,* 563 F.3d 1136, 1149 (10th Cir.2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018702563&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_1149&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_1149). As a general rule, the “bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction.” [*Aramburu v. Boeing Co.,* 112 F.3d 1398, 1407 (10th Cir.1997)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997103466&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_1407&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_1407).

The duty to preserve is triggered by commencement of litigation or where a defendant reasonably anticipates litigation involving the evidence. [*Cache La Poudre,* 244 F.R.D. at 621](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011626247&pubNum=0000344&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_344_621&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_344_621). In this case, the defendant makes no argument regarding its duty to preserve the evidence. In fact, it could not make such an argument in light of the number of copies that were made and the creation of a master copy to prevent the videotape from being taped over. Instead, defendant focuses its argument on an alleged lack of prejudice to plaintiff.

With regard to prejudice, “[t]he burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination that access to the lost material would have produced evidence favorable to his cause.” [*Gates Rubber Co. v. Bando Chem. Indus., Ltd.,* 167 F.R.D. 90, 104 (D.Colo.1996)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996119135&pubNum=0000344&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_344_104&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_344_104).

e. In an unpublished case citing published decisions concerning “spoliation of evidence” in the Tax Court case in [*Garavaglia v. C.I.R.,* 521 Fed.Appx 476, 480-481 2013](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030337374&pubNum=0006538&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_6538_480&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_6538_480)), to wit:

This Court reviews a lower court’s decision to impose a sanction for spoliation of evidence for abuse of discretion. [*Beaven v. U.S. Dep ‘t of Justice,* 622 F.3d 540, 553 (6th Cir.2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023150016&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_553&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_553).3 “A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact.” [*Jones v. Ill. Cent.* \*481 *R.R. Co.,* 617 F.3d 843, 850 (6th Cir.2010)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022830374&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_850&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_850). A spoliation sanction is permitted where:

The ability of a court to sanction litigants for spoliation is part of the court’s inherent authority, [*Adkins v. Wolever,* 554 F.3d 650, 652 (6th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017997386&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_652&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_652) (en banc), and the decisions of tax courts are generally reviewed as if they were decisions of district courts. [*Greer v. Comm ‘r,* 557 F.3d 688, 690 (6th Cir. 2009)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018165303&pubNum=0000506&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_506_690&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_506_690).

[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed “with a culpable state of mind”; and (3) that the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

***B. Assessment is ONLY via Administrative Procedures.***

The Hymes have been continually lied to concerning the mandatory administrative procedures and they have been withheld from them before an Assessment under [26 U.S.C. § 6203](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6203&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Method of Assessment can be accomplished which proceeds the mandatory [26 U.S.C. § 6303](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6303&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Notice and Demand. Assessment is only accomplished administratively and not though a Court of Law judgment as pronounced in [*Cohen v. Gross,* 316 F.2d 521, 522-523 (3rd Cir. 1963)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963101038&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_522&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_522), to wit:

In the scheme which Congress has devised for the determination and collection of federal taxes, *assessment is a prescribed procedure* for officially recording the fact and the amount of a *taxpayer’s administratively determined tax liability,* with consequences somewhat similar to the reduction of a claim to judgment. 1954 Code [§ 6203](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6203&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). See [*Bull v. United States,* 1935, 295 U.S. 247, 259-260, 55 S.Ct. 695, 79 L.Ed. 1421](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1935123031&pubNum=0000708&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

***C. Tax Court is the Hymes ONLY Avenue to Challenge Notice of Deficiencies and Substitute for Returns.***

In [*Conforte v. United States,* 979 F.2d 1375, 1376 (9th Cir. 1992)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992198123&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_1376&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_1376) “[A]voiding the three standard routes prescribed by statute: suit in the tax court, suit for refund in the district court, or suit in the court of federal claims.” In [*Leves v. I.R.S. Com ‘r,* 796 F.2d 1433, 1435 (11th Cir. 1986)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986139325&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_1435&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_1435), to wit:

Their remedies for the allegedly wrongful assessment are to bring a timely suit in the tax court under [26 U.S.C. §§ 6212](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6212&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) and [6213](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6213&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) or to pay the tax and sue for a refund in district court or court of claims under [26 U.S.C. § 7422](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7422&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) and [28 U.S.C. §§ 1346(a)(1)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1346&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_7b9b000044381) and [1491](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1491&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

In [*Colangelo v. United States,* 575 F.2d 994, 998 (1st Cir. 1978)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978118562&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_998&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_998) “The only sensible reading of s 7421 is as a bar to suits that attempt to challenge a taxpayer’s liability or the amount of that liability except through the accepted channels of the deficiency suit in the Tax Court.” In [*Ehlers v. Vinal,* 382 F.2d 58, 65 (8th Cir. 1967)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967101748&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_65&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_65), to wit:

Assuming that the deficiencies were arbitrarily determined by improper allocation, and that this might be sufficient showing to sustain a taxpayer’s burden of proof before the tax court \* \* \* In a deficiency suit in the tax court, a judgment against the taxpayer would necessarily reflect the court’s acceptance of the government’s ‘spreading’ of a net worth increase over the individual years involved.

***D. To Date The IRS HAS NOT Provided the Hymes With the Procedural Notice of Deficienies and Substitute For Returns Documents as Mandated.***

The IRS agents and Officers, the DoJ Attorneys and the Court have hidden from the Hymes the mandatory Procedures and Documents so that the Hymes would challenge the determinations of Assessments under [26 U.S.C. § 6203](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6203&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Method of Assessment and the Notice and Demand under [26 U.S.C. § 6303](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6303&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Notice and Demand BEFORE the promulgation of Notice of Federal Notice of Tax Lien(s) ( “NFTL”) leading to then Foreclosure and Eviction.

In Attachment 1-CC-2007-0005-Chief Counsel Notice: Subject: Litigating Position For Returns Prepared Under Section 6020(b) (Al-Chief Counsel”)[2](#co_tablefootnoteblock_2_1), to wit:

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| [2](#co_tablefootnote_2_1) | Also Attachment 1 in Complaint. |

Under section 7491(c), the Service has the burden of production for contested penalties and additions to tax. To meet this burden with respect to the section 6651(a)(2) addition to tax, the Service *must offer as evidence the section 6020(b) return showing the unpaid tax as the basis on which the addition to tax is calculated. If the section 6020(b) return is not offered, respondent will not meet its burden of production,* and the *Tax Court will not sustain the addition to tax. See, Wheeler v. Commissioner,* 127 T.C. 14 (2006); [*Guthrie v. Commissioner,* T.C. Memo. 2006-81](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008954173&pubNum=0001051&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)); and [*Holmes v. Commissioner,* T.C. Memo. 2006-80](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008954633&pubNum=0001051&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

As described in [IRM 20.1.2.1.4(9)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0390946330&pubNum=0123085&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RM&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), to prepare the return under section 6020(b), the Service attaches a completed Form 13496 to other documents, which, when combined, *satisfy each of the elements of a valid section 6020(b) return.* Specifically, the package of documents consists of (1) *the Form 13496, signed and dated;* (2) *Form 4549, Income Tax Examination Changes;* and (3) *Form 886-A, Explanation of Items.* The latter two forms, which must be generated on or before the date the Form 13496 was signed, contain the information necessary to calculate the taxpayer’s liability for the period and the amount of the failure-to-pay addition to tax.

[T]his office will defend the section 6651(a)(2) addition to tax in cases in which the addition to tax is supported by a Form 13496 package conforming to the new procedures. The section 6651(a)(2) addition to tax should be defended in cases in which we can introduce into evidence a properly completed Form 13496 package as described in this Notice.

*If, however, the Service has not prepared a Form 13496* or ASFR Certification package, *the Office of Chief Counsel will not defend a document as* constituting a section 6020(b) return in cases with facts that do not closely parallel those described in [*Millsap v. Commissioner,* 91 T.C. 926 (1988)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988150748&pubNum=0000838&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), *acq. in result in part,* [1991-2 C.B. 1](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991377277&pubNum=0001041&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=CA&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). Accordingly, the section 6651(a)(2) addition to tax will be conceded when the Service has not prepared, as a return, a document that (1) identifies the taxpayer, (2) provides a basis for the taxpayer’s tax computation, and (3) is signed by a Service employee delegated the authority to sign section 6020(b) returns. As stated above, the section *6020(b) return must be placed into evidence* to satisfy the Service’s burden of production under section *7491(c).* The section 6020(b) return may be introduced in a number of ways. The simplest way is by stipulation of the parties, and, if necessary, through a motion to compel stipulation pursuant to [T. C. Rule 91(f)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000613&cite=USTAXCTR91&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_ae0d0000c5150). If a motion for summary judgment or other dispositive motion is filed, *the section 6020(b) return should accompany the motion as an exhibit to an affidavit or declaration authenticating the section 6020(b) return.* At trial, the section 6020(b) return may be offered into evidence through a witness who is qualified to testify that it was made and kept in the course of the Service’s regularly conducted business activities. In the alternative, the return may be introduced as a record of a regularly conducted activity under [Fed.R. Evid. 803(6)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER803&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_1e9a0000fd6a3) without a witness through an affidavit or declaration of the custodian or other qualified person (*e.g.,* a revenue agent who can explain how the record was made) prepared pursuant to the requirements of [Fed. R. Evid. 902(11)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000607&cite=USFRER902&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_9da60000c3824). Notice of intent to use this procedure and access to the affidavit or declaration and underlying record are required to give the opposing party an opportunity to test the adequacy of the foundation prior to trial. *See* [*Clough v. Commissioner,* 119 T.C. 183 (2002)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002664540&pubNum=0000838&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)); [*Spurlock v. Commissioner,* T.C. Memo. 2003-124](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003323426&pubNum=0001051&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)).

Under the [IRM 20.1.2.2.10.2](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0390946376&pubNum=0123085&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RM&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Processing when Deficiency Procedures Do not Apply, to wit:

1. When deficiency procedures do not apply, tax determined under [IRC 6020(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6020&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_a83b000018c76) can be assessed in two ways:

A. An authorized IRS employee may execute (fill out and sign) the actual tax form and send it through pipeline processing for assessment (following their specific IRM instructions). The employee’s signature on the return must be followed by the following statement: “This return was prepared and signed under authority of [IRC 6020(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6020&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_a83b000018c76).”.

B. Alternately, in lieu of signing the return with the accompanying statement, the agent may opt to complete and attach *Form 13496* to the source document for assessment of tax under [IRC 6020(b)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1012823&cite=26USCAS6020&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_a83b000018c76). In this case, *all of the items* described on Form 13496 under items 1 and 2 must be present as part of the source document.

FACT: The mandatory essential elements for a Notice of Deficiency and Substitute for Return, to wit: (1) A Notice of Deficiency; and, (2) A Form 4549, Income Tax examination Changes or Equivalent: and, (3) A Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (4) *A signed and Dated by an IRS Agent/Officer* certification (Form 13496) is a *sine qua non* for a procedurally valid and legal determination of Notice of Determination and Substitute for Return against the Hymes. FACT: (1) A Notice of Deficiency; and, (2) A Form 4549, Income Tax examination Changes or Equivalent: and, (3) A Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (4) *A signed and Dated by an IRS Agent/Officer certification (Form 13496)* HAVE NEVER been provided to the Hymes to DATE by the any IRS Agent or Officer, by any DoJ Attorney, been disclosed by any Court or Judge as being essential elements predating an Assessment, predating a Notice and Demand, predating a Garnishment, predating a Seizure of Property by the IRS, predating the filing of NFTLs and predating a Foreclosure.

FACT: Withholding from the Hymes the following (1) A Notice of Deficiency; and, (2) A Form 4549, Income Tax examination Changes or Equivalent: and, (3) A Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (4) *A signed and Dated by an IRS Agent/Officer certification (Form 13496)* are a *sine qua nons* required for the Hymes to challenge any IRS claim in the only statutory remedy available, being the Tax Court. This is a total denial of Due Process of Law to the Hymes leaving them with no remedy. In reality this is a combination of both administrative lynching[3](#co_tablefootnoteblock_3_1) and judicial lynching.[4](#co_tablefootnoteblock_4_1)

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| [3](#co_tablefootnote_3_1) | *Johnson v. Ferguson-Ramos,* [2005 WL 151324, \*11](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006115376&pubNum=0000999&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) (Ct.App.Ohio, 10th Dist. (2005) “[W]as punishing her though ‘administrative lynching.’ ”; *Smith v. District of Columbia Office of Human Rights,* 77A.3d 980, 988 (D.C.Ct.of Appeals 2013) “Terry characterized DYRS’s treatment of appellant as ‘an administrative lynching.’ ” |

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| [4](#co_tablefootnote_4_1) | [*McSwean v. State,* 57 So. 732, 738, 739 (Sup.Ct. Ala. 1912)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1912017609&pubNum=0000734&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_734_738&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_734_738): [*State v. Lattimar,* 111 S.E. 510, 511 (Sup.Ct.App.W.Va. 1922)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1922104001&pubNum=0000710&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_710_511&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_710_511) “ *A judicial lynching is a graver and more startling crime than a lynching by the irresponsible rabble. It undermines the foundation of orderly government, and weakens respect for law and order.* Much of the success of any form of government depends upon the opinion of those governed, of its power to protect them in the administration of the laws, and in the wisdom and integrity of those who govern. *When the courts do not uphold the laws, respect for law and for government ceases. There should be no compromise with the spirit of lynching for any crime.* The mob in Jerusalem was clamoring to Pilate to crucify the Saviour. He “washed his hands” of guilt, and released the Christ to the *“tender mercies” of his accusers, thereby perpetrating the greatest judicial crime of the ages.* The representative of imperial Rome *compromised with the congregated doers of evil.* It is little wonder that the empire declined and fell.” Motion to Vacate/Reconsider Page 13 of 24 |

***E. The IRS Agents and Officers, the DoJ Attorneys and Various Courts and Judges Have Been Using Informational Returns Against the Hymes to Determine Taxable Year Liability***

The Hymes have relied on the IRS Agents and Officers who have used prohibited documents to determine numerous “Taxable Year” liabilities against the Hymes; and, the Hymes have relied upon the integrity of the DoJ Attorneys to operate within the Statutes of the United States as codified in Title 26; and, the Hymes have relied upon the Judges and Courts who have remained silent when there was a duty to speak knowing that the procedural steps and procedural documents required were not provided to the Hymes and blocking the Hymes to have them disclosed to them in Discovery, Interrogatories and Admissions as evidenced by the Court Records. The Hymes have had to adjudicate in an attempt to understand what procedural documents and steps were not followed with absolutely no help from the IRS agents or officers, no help from the DoJ Attorneys and no help from the Courts and judges to date. Only with the assistance of others with their higher access to Westlaw have the Hymes discovered the unlawful and illegal procedural cabal that has been working against the Hymes.

In [*Daines v. Alcatel,* 105 F.Supp.2d 1153, 1155 (E.D.Wash. 2000)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000456948&pubNum=0004637&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_4637_1155&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_4637_1155), to wit:

Defendants contend they are entitled to summary judgment because the *1099s cannot on their own create tax liability* and the IRS has not independently taken any action against Daines as a result of the 1099s. *Defendants are correct that the 1099s, on their own, do not create tax liability. Form 1099 is an informational return,* filed by a third party to the relationship between the IRS and the taxpayer, which reports *income* as that third party believes it to be. The Internal Revenue Code makes it clear that a Form 1099 is not the final word on what a taxpayer’s taxable income is. As provided in [26 U.S.C. § 6201(d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6201&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5ba1000067d06):

In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item reported on an information return ... by a third party ... the [IRS] shall bear have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

The Tax Court has held that a *Form 1099 is insufficient,* on its own, to establish a taxpayer’s taxable income. *See* [*Estate of Gryder v. Commissioner,* T.C. Memo.1993-141, 1993 WL 97427, 65 T.C.M. (CCH) 2298, T.C.M. (RIA) 93,141 (1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993080332&pubNum=0000999&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), *citing* [*Portillo v. Commissioner,* 932 F.2d 1128 (5th Cir.1991)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991097604&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). *See also* [*Portillo v. Commissioner,* 988 F.2d 27, 29 (5th Cir.1993)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993076024&pubNum=0000350&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&fi=co_pp_sp_350_29&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_sp_350_29) (a Form 1099 is “insufficient to form a rational foundation for the tax assessment against the [taxpayers in this case].”). Thus, while a Form 1099 can serve as the basis for the inception of an IRS investigation, it cannot and does not, on its own, *create tax liability or establish how much income the taxpayer actually received.*

Therefore, if there were Substitute for Returns relied upon and that were sent to Social Security to make a determination of the Hymes’ “income,” which is only a starting point-Period. The Form 1099-Information Return is a HOLDING by the Tax Court and 5th Circuit! How do the IRS, the DoJ, the Courts and Judges not know this?

If the mandatory essential elements for a Notice of Deficiency and Substitute for Return has been disclosed to the Hymes, to wit: (1) A Notice of Deficiency; and, (2) A Form 4549, Income Tax examination Changes or Equivalent: and, (3) A Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (4) *A signed and Dated by an IRS Agent/Officer certification (Form 13496)* is a *sine qua non* for a procedurally valid and legal determination of Notice of Determination and Substitute for Return against the Hymes-then the Hymes would have discovered some of the following.

If the IRS had disclosed to the Hymes the Form 4549, Income Tax examination Changes or Equivalent, then based upon the Form 4549’s (not theirs to date yet) that Hymes have inspected, the IRS usually referenced both “6651(a)(1)”-Failure to File tax return and “6651(a)(2)”-Failure to File tax return.

In [26 U.S.C. § 6651](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6651&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Failure to file tax return or to pay tax “(a) Addition to the tax-in case of failure (1) to file any return required under authority of subchapter A of chapter 61 (*other than Part III* thereof) ...” This is unambiguous that “Part III” of “Chapter 61” is excluded for filing or determining any taxable year liability for substitute for returns. So what is “Part III” of “Chapter 61?” It is the *third party “informational returns.*” Title 26 Subtitle F-Procedure and Administration, Chapter *61-Information and Returns, Part Ill-Information Returns.* And Chapter 61, Part III is comprised of the following:

1. Subpart A-Information Concerning Persons Subject to Special Provisions-- Sections 6031-6040; and,

2. Subpart B-Information Concerning Transactions with Other Persons-Sections 6041-6050w; and,

3. Subpart C-Information Regarding Wages Paid Employees-Sections 6051-6053; and,

4. Subpart D-Information Regarding Health Insurance Coverage-Sections 6055-6056; and,

5. Subpart E-Registration of and Information Concerning Pension, Etc., Motion to Vacate/Reconsider Page 15 of 24 Plans-Sections 6057-6059; and,

6. Subpart F-Information Concerning Tax Return Preparers-Section-6060.

Clearly the W-2s W-3s, 1099s and 1096s are informational returns as identified in 26 C.F.R. § 31.5051-2-Information returns on Form W-3 and Internal Revenue Service copies of Forms W-2 “(a) [T]herein shall file the *Social Security Administration* copy of each Form W-2 required under *8 31.6051-1* to be furnished by the employer with respect to wages paid during the calendar year.”

The W-2 Form is an informational return only, by a third party just a Form 1099 and can’t be used to determine the “taxable income” for a “taxable year” of the Petitioner. See [*American Vending Group, Inc. v. United States,* 2008 WL 4605934, \*8 (D.Maryland 2008)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=2007378249&pubNum=0000999&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RP&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) “American Vending has raised genuine issues as to a material fact regarding whether its failure to file the informational returns (Forms W-2 and W-3) constitutes an “intentional disregard.”

If the Hymes had been furnished the mandatory Form 886-A, wherein in all of those Form 886-As that the Hymes have inspected, they have found within the second paragraph almost without exception “We used *informational Return Documents* filed by payers as reported under your Social Security Number to determine you income.”

Social Security is ONLY within Part 31, Subtitle C-Employment Taxes and Wages limited strictly to [26 U.S.C. §§ 3401](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-[3406](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3406&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). Wages by definition in [26 U.S.C. § 3401](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) is limited to strictly [26 U.S.C. §§ 3401](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-[3406](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3406&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), all being ONLY Part 31, Subtitle C-Employment taxes.

***E.*** [***26 U.S.C. S 6211***](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6211&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))***-Definition of a deficiency; and,*** [***26 U.S.C. § 6212***](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6212&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))***-Notice of Deficiency.***

As the IRS is mandated procedurally to provide the Hymes a “Notice of Deficiency” under [26 U.S.C. § 6211](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6211&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Definition of a Deficiency; and, [26 U.S.C. § 6212](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6212&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Notice of Deficiency, wherein we find the following for first [26 U.S.C. § 6211](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6211&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), to wit:

(a) In general.--For purposes of this title in the case of income, estate, and gift taxes imposed by *subtitles A and B* and excise taxes imposed by chapters 41, 42, 43, and 44 the term *“deficiency” means* the amount by which *the tax imposed by* subtitle A or B, or chapter 41, 42, 43, or 44 ...

Second, in [26 U.S.C. § 6212](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6212&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)), to wit:

(a) In general.--If the Secretary determines that there is a deficiency in respect of *any tax imposed by subtitles A* or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

First, Part 20, *Subtitle B-Gifts* and Estates; and, all of the excise taxes in *Chapter* 41-Public Charity, *Chapter* 42-Private Foundations; and Certain Other Tax-Exempt Organizations, *Chapter* 43-Qualified Pension, Etc., Plans and *Chapter* 44-Qualified Investment Entities are all ELIMINATED as having any application to the Hymes.

FACT: NO Part 31 Subtitle C-Employment Taxes can be included in a “Notice of Deficiency” being barred from Tax Court.

FACT: And a W-2 (It is a *Subtitle C* and an “informational return”), that it is prohibited as a third party informational Return can’t be used in a Notice of Deficiency flows *a fortiori* that any “social security” information on the W-2 is also prohibited for any source for a Notice of Deficiency for Subtitle A-Income Taxes and prohibited from Tax Court (only Subtitle A).

FACT: The IRS Agents and Officers, the DoJ Attorneys with the cooperation of the Courts and Judges to date have proffered as “evidence” third party “informational returns” to make Assessments, make Notice and Demand claims, file NFTLs, seize property and foreclose and evict the Hymes from their home and land.

***F. The Facts of*** [***26 U.S.C. § 7701(a)(23)***](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8e5e000045281)***-Taxable Year; and*** [***26 U.S.C. § 7701(a)(16)***](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5adc000001723)***-Withholding Agents; and,*** [***26 U.S.C. § 3***](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))***-Individual Tax Tables Have NEVER been Litigated.***

All parties involved want to only use “sources” of income (§ 1), gross income (§ 61) or taxable income (§ 63). No where, in Title 26 Subtitle A does Congress declare that all “income”, all “gross income” or all “taxable income” from all persons is required to pay Subtitle A-Income Taxes to the Federal Government. If that were correct, then almost of Title 26 would deleted, but that isn’t true. And the Tax Court, IRS and DoJ Attorneys are stuck in using subjective words that are not defined and have no specific meaning in Title 26, and especially none will not use the term “taxable year” is in almost ever code section. It is defined in [26 U.S.C. § 7701(a)(23)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8e5e000045281) and also in [26 U.S.C. § 441](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS441&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)). [§ 441](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS441&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) is in accord with [§ 7701(a)(23)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8e5e000045281). [§ 441](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS441&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)) concerns the “calendar year” consisting of twelve (12) months.

The *term defined in* [*26 U.S.C. § 7701(a)(23)*](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8e5e000045281) *“taxable year” means the calendar year .... of which the taxable income is computed under subtitle A.”.*

From [§ 7701(a)(23)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8e5e000045281) is the operative sentence structure of *“the taxable income is computed under subtitle A.” “Taxable income”* is the SUBJECT as is defined in [26 U.S.C. § 63](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS63&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Taxable Income “The term ‘taxable income’ means *gross income* minus the *deductions”,* which could be anyone at this point using just that term definition as a standalone definition.

The next part of the term “taxable year” sentence, *supra,* is the verb “is computed”, *i.e., the action to be taken* on the SUBJECT. The computation is found in [26 U.S.C. § 3](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Tax tables for individuals “(1) In general.--In lieu of the tax imposed by section 1, there is hereby imposed for each *taxable year* on the *taxable income* of *every individual.”* This is conclusive of “taxable year on the taxable income” shall be used for the computation of “is computed.”

The next part of the term “taxable year” sentence, *supra,* is the OBJECT of the SUBJECT and ACTION to be taken on the identified OBJECT. This action is limited to only “under subtitle A.” So who is in “under subtitle A.” This is disclosed in the term definition of “withholding agent” as millions of American’s have money forwarded to the IRS from their compensation. This is the ONLY definition of “withholding agent” in Title 26.

In unambiguous Statutes of the United States codified in [26 U.S.C. § 7701(a)(16)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7701&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5adc000001723)-“Withholding agent.--The *term ‘withholding agent’ means any person* required to deduct and *withhold any tax* under the provisions of *section 1441, 1442, 1443, or 1461.”*

The limiting term definition of “withholding agent” to “means *any person* required to deduct and *withhold any tax”* is conclusive including “ *any [all] persons* required to deduct and withhold and from *any* [*all] tax* with no exceptions. The ONLY parties “under Subtitle A” are listed in 7701(a)(16).

Then the only question is who or what parties are identified in “under Title A,” which are § 1441 (non-resident aliens), § 1442 (foreign corporations) and § 1443 (foreign organizations) with the hold harmless clause for Subtitle A, being § 1461, *only these Subtitle A parties can have money deducted and sent to the IRS.*

This is further reinforced with the instructions for a Form 1042-Annual Withholding Tax Return for U.S. Source Income of Foreign Persons must be filed by all “withholding agents” as found on Page 1 unless the IRS providing false and fraudulent information for the Form 1042, to wit:

**Who Must File**

*Every withholding agent* or intermediary (see definitions next) who receives, controls, has custody of, deposes of, or pays any fixed or determinable annual or periodical income must file an annual return for the preceding calendar year on Form 1042.

**Withholding Agent *Any person required to withhold tax is a withholding agent.***

Citing Subtitle C-Employment Taxes of § 3402(a)(1) “every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables and computational procedures prescribe by the Secretary” for “withholding agent” is not correct for Subtitle A-Income Taxes. First, The IRS, DoJ, the USDC and Tax Court use “employer” and refuse to acknowledge the unambiguous Statutes of the United States codified in [26 U.S.C. § 6331(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6331&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8b3b0000958a4) excerpt, to wit:

Levy may be made upon the *accrued salary or wages of any officer, employee, or elected official,* of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in [*section 3401(d)*](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5ba1000067d06)) of such officer, employee, or elected official.

And in the unambiguous Statutes of the United States codified in [26 U.S.C. § 3401(d)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_5ba1000067d06), *supra,* excerpt “(d) Employer.--For purposes of this chapter [Subtitle C, Chapter 24. Collection of Income Tax at Source on Wages (only within [§ 3401](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3401&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-[§ 3406](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS3406&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)))], the term *‘employer’* means the *person* for whom an individual performs or performed any service, of whatever nature, as the employee of such *person.”* Is there any doubt as to whom the Title 26 “employer” is and the parties that have said employer identified in [§ 6331 (a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6331&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8b3b0000958a4)?

Where are the “tax tables” for § 3402 Subtitle C. The Hymes do not argue that FICA and FUTA employment taxes for those identified in [§ 6331(a)](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS6331&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=RB&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended)#co_pp_8b3b0000958a4) that have an “statutory” employer defined in 3401(d). But remember that Part 31, Subtitle C-Employment taxes are prohibited from the only remedy being tax Court. equivalent; and, (2) a Form 886-A, Explanation of Items, appropriate issue lead sheet or similar form; and, (3) a Certification on Form 13496 signed and dated by an IRS Agent; and, (4) a Notice of Deficiency Letter.

***G. Theft of Property.***

FACT: As evidenced in A9-ORDER Beistline filed with the complaint paying especial notice to #13, “notwithstanding” the prior issues the ONLY means authority for evicting the Hymes was by a “Writ of Assistance.”

FACT: No “Writ of Assistance” was shown to the Hymes on August 29th, 2012 when they were, under force of arms, removed from their home as mandated by A9-ORDER Beistline if the Hymes were still present on their Property after the sale of said property.

FACT: The “subject property” of the Foreclosure in A9-ORDER Beistline was limited to only “Lot Fifty (50) of Section Fourteen (14), Township One South, Range Two West, Fairbanks Meridian Subject to reservations, restriction and easements of record.” No “Personal Property” was listed under the “subject property” of the ORDER.

FACT: The only “Personal Property” of the Hymes subject to seizure was after thirty (30) days as evidenced in A9-ORDER Beistline filed with the Complaint, wherein it would be considered “abandoned.”

FACT: The Hymes were not given thirty (30) days to remove their “personal property” but were limited to less than one hour and then after being forcibly removed were told by the Unknown U.S. Marshalls that they would be arrested if they came back to retrieve the rest of their “personal property.”

FACT: Personal Property Stolen by the Unknown U.S. Marshalls or others is as follows including but not limited to: Motion to Vacate/Reconsider Page 21 of 24

|  |  |
| --- | --- |
| 1. 1946 Taylor Craft Airplane(still in the Hymes name) | 25,000.00 |
| 2. GMC truck | 5,000.00 |
| 3. Yamaha Snow machine | 500.00 |
| 4. 4 Hives of live bees and equipment | 2,200.00 |
| 5. 12 Chickens | 180.00 |
| 6. 20 1 oz. gold coins | 30,000.00 |
| 7. Collector’s set of 50 1 oz sail ship silver coins | 2,500.00 |
| 8. Platinum and diamond ring | irreplaceable |
| 9. Gold nugget wedding band | 250.00 |
| 10. Gold Masonic ring | 450.00 |
| 11. Opal in gold setting ring | irreplaceable |
| 12. assorted antique jewelry inherited from both Mrs. Hymes and Mr. Hymes’ mothers | |
| 13. Alaska gold dog sled bracelet | 1,250.00 |
| 14. collector glasses | irreplaceable |
| 15. antique plate | irreplaceable |
| 16. 15 bottles of wine collection | 800.00 |
| 17. Frozen food | 1,000.00+ |
| 18. Dried food | 2.500.00+ |
| 19. 2 bicycles | 75.00 |
| 20. assorted tools | 500.00-1,500.00 |
| 21. A 5 gallon container filled to close to the top with 6 years savings of change ( | |

When Judge Gleason filed the ORDER in this Instant Case there DID NOT exist any ORDER concerning “notwithstanding.” Notwithstanding is used in 629 Code sections in Title 26. The Hymes would call Judge Gleason to its clear and unambiguous means when used in [26 U.S.C. § 7491](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=26USCAS7491&originatingDoc=I4d4fdf0034e611e4891c8f400132fd93&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Recommended))-Burden of Proof, to wit:

(c) Penalties.--Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

The newest 9th Edition of Blacks Dictionary (2nd Ed) “Notwithstanding, *prep.* (15c) Despite, *in spite of, notwithstanding the conditions listed above,* the landlord can terminate the lease if the tenant defaults..” This is in accord with the hundreds of uses in Title 26 and court cases. One would hope that the scarecrow in the Land of Oz isn’t consulted or used.

***III. Declarations of the Hymes.***

The Hymes have attached to this Motion to Vacate/Reconsider two Declarations, being Attachment 2-Declaration of Donald Louis Hymes; and Attachment 3-Declaration of Rita MariNa Hymes.

**III. Remedy**

Judge Gleason shall immediately reinstate this instant Case; and further Judge Gleason shall provide the findings of fact and conclusions of law to her carte blanche signed ORDER that all of the facts and conclusion of law have been adjudicated, which is untrue and false.

And further, the Lis Pendens expungement shall be vacated.

Donald Louis Hymes,

<<signature>>

Rita MariNa Hymes

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