

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case 2:08-cr-20585-GER-DAS

v.

D-1 PETER HENDRICKSON,

VIO: 26 U.S.C. § 7206(1)

Defendant.

**GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE AND DISMISS**

The United States Attorney for the Eastern District of Michigan, by and through the undersigned attorney, respectfully submits this memorandum in opposition to Defendant's Motion to Vacate and Dismiss (DK # 140). The motion should be denied as the defendant regurgitates arguments that the Court previously rejected and presents arguments that have no basis in law.

For his initial argument, the defendant posits that the indictment and proof at trial were defective as the government failed to allege or prove at trial that the defendant was a "person" for purposes of 26 U.S.C. § 7206(1). The defendant previously made this argument in a pretrial motion to dismiss (DK # 27) and in his reply (DK # 41). The Court soundly rejected this argument in its Order. (DK # 70); United States v. Hendrickson, 664 F.Supp.2d 793, 810-16 (E.D.Mich.2009). Further, he re-presented it in the Motion for Judgment of Acquittal or New Trial (DK # 78), the Supplemental Brief (DK # 87), and the Reply Brief (DK # 90). The Court denied that motion stating:

The Court addressed this contention at length in an October 7, 2009 opinion in this case, see United States v. Hendrickson, 664 F. Supp.2d 793, 813-16 (E.D. Mich. 2009), and Defendant's present motion merely rehashes the arguments addressed (and rejected) in this October 7 ruling. Accordingly, there is no need to revisit this question.

Order, p. 2 (DK # 97).

The defendant has argued that 26 U.S.C. § 6020(b)(1) obligates the Internal Revenue Service to prepare a tax return when either an individual does not file a return or to create its own contrary return when it suspects the filed return to be false. He contends that the IRS's failure to create a substitute return as a condition precedent to seeking an indictment was both a fraud upon the Court and rendered the Court devoid of jurisdiction.

Although the defendant's argument purports to be grounded in the plain language of the statute, he fails to acknowledge that every court that has addressed this issue, including this Court, has read the statute to be permissive and not to create an obligation for the IRS to create a substitute return. See, e.g., Deutsch v. Commissioner, 478 F.3d 450, 452 (2d Cir. 2007); United States v. Schiff, 919 F.2d 830, 832-33 (2d Cir. 1990) ("There is no requirement that the IRS complete a substitute return"); Selgas v. Commissioner, 475 F.3d 697, 700 (5th Cir. 2007); United States v. Stafford, 983 F.2d 25, 27 (5th Cir. 1993) ("[A]lthough [§ 6020(b)] authorizes the Secretary to file for a taxpayer, the statute does not require such a filing"); United States v. Cheek, 3 F.3d 1057, 1063 (7th Cir. 1993); Geiselman v. United States, 961 F.2d 1, 5 (1st Cir. 1992); United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992); In re Bergstrom, 949 F.2d 341, 343 (10th Cir. 1991); United States v. Barnett, 945 F.2d 1296, 1300 (5th Cir. 1991); United States v. Verkuilen, 690 F.2d 648, 657 (7th Cir. 1982); United States v. Tarrant, 798 F. Supp.

1292, 1302-03 (E.D. Mich. 1992) (Rosen, J.). As the IRS had no duty to create a substitute return, the defendant's argument are without merit.

For the reasons set forth above, the government respectfully requests that the Court deny Defendant's Motion to Vacate and Dismiss.

Respectfully submitted,

BARBARA MCQUADE
UNITED STATES ATTORNEY

Date: January 3, 2013

By: _____/s/_____

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