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IN THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal No. 06 - 10019
	)	
ROBERT LAWRENCE,	)	
	)	
Defendant.	)	

UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION FOR ATTORNEY FEES AND COSTS

The United States of America through its counsel, Rodger A. Heaton, United States Attorney for the Central District of Illinois, and Gerard A. Brost, Assistant United States Attorney, hereby responds to and opposes the defendant's Motion for Attorney Fees and Costs.

A. Factual Background

1. The Indictment and Two Arraignment Hearings

On March 16, 2006, a federal grand jury indicted the defendant, Robert Lawrence, charging the defendant with three counts of tax evasion under 26 U.S.C. § 7201 relative to years 1999, 2000 and 2001 and three counts of willful failure to file income taxes under 26 U.S.C. § 7203 for the same years. (R.1) On

March 28, 2006, an arraignment hearing was held before Judge John Gorman. Defendant received a copy of the indictment, waived reading of the indictment and moved to continue the arraignment which was granted. (Docket Entry 3/28/06) At the second arraignment hearing on May 13, 2006, defendant through his counsel again waived the reading of the indictment. Defendant entered a plea of not guilty to all six counts of the indictment.[1] Trial in the matter was set for May 15, 2006. (Docket Entry 4/13/06)

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[1]In his Motion for Fees, the defendant claims that two trips from his home in Arkansas to Peoria for the arraignment hearings were justified because it was necessary to determine "the nature and cause of the accusation" of the charges in the indictment. (R.29, p.3) Defendant cryptically claims that a continuance of the first arraignment was necessary to prevent the government from "switching theories" in this case. (R.29, p.3) Defendant states that because he was able to continue the arraignment he learned "[t]he indictment charged a violation of **26 U.S.C. § 7203**. This is the sole statute, or the sole statute for a listed element of the count, with respect to every count of the complaint." (R.29, p.6, emphasis in original.) Similarly, defendant represents "[i]t is critically important to note that the statute of prosecution for all the years and all the counts was 26 U.S.C. § 7203." (R.29, p.2) As the Indictment in this case includes three counts charging the defendant with violations of 26 U.S.C. § 7201, government counsel is not sure by what logic the defendant claims that 26 U.S.C. § 7203 was the sole statute of prosecution. It is also unclear what was gained by continuing the arraignment since the defendant pled not guilty to all charges, including those under § 7201. (Docket Entry 4/13/06) Indeed, everything that transpired at the second arraignment hearing could have taken place at the first. Thus, it appears that having two arraignment hearings simply added unnecessary expense to the defense of this case.

2. Discovery Issues and Motion to Continue Trial

Late on the afternoon of May 10, 2006, counsel for the defendant informed government counsel for the first time that documents which had not yet been disclosed to the government pertained to the Paperwork Reduction Act ("PRA") and that the PRA would be part of his defense. (R.20, ¶ 6-7) In part, because the government had not yet received the referenced documents and needed time to research the facts and law on the PRA, the government moved on the morning of May 11, 2006, for a short continuance of the trial date. In that motion, the government stated that a continuance was also necessary because the defendant had failed to disclose the subject on which his three listed expert witnesses would testify and the defendant failed to provide contact information regarding some of his identified witnesses. (R.20)

On May 11, 2006, the Court held a hearing on the government's motion to continue and ordered the defendant to provide an expert witness list with written summaries and to provide affidavits regarding counsel's representation that he had no contact information regarding some his witnesses. (Docket Entry 5/11/06).

3. Discovery of a Tax Calculation Error

Following the court hearing on the afternoon of May 11, 2006, the IRS

revenue agent and special agent who were assigned to this case reviewed certain tax calculations in preparation for trial. At that time the agents discovered that calculations which formed the bases of the charges against the defendant and which were set forth in the indictment were incorrect.

The IRS agents had previously calculated that the defendant had taxable income for 1999, 2000 and 2001 in the amounts of $51,679, $52,780 and $71,340 respectively. As set forth in the indictment, these amounts of taxable income led to tax liabilities in the amount of $10,275, $11,927 and $9,453 for those years. The amount of taxable income the IRS agents attributed to the defendant consisted primarily of the income the defendant earned from his job at Mitsubishi. The agents' calculations of taxable income for years 1999 and 2001, however, also included amounts the defendant apparently gained from the sale of rental property in each of those years.

In calculating those gains, the case agent determined the sales price of each property and subtracted what she believed was the defendant's basis in each property. The figure the case agent used for the defendant's basis in each property was the amount the defendant listed in his 1998 tax return under "Basis for depreciation." This was a mistake.

As the agents discovered on the afternoon of May 11, the figures the

defendant listed in his 1998 tax return as "Basis for depreciation" was not the defendant's actual basis in the properties but was instead the amount the defendant claimed he had spent in 1998 for improvements to each property. Indeed, the agents further discovered on the afternoon of May 11 that the defendant had reported on his 1996 tax return that he had spent in 1996 the same amount of money he supposedly spent in 1998 also to improve one of the two properties. If the defendant's claims about the cost of improvements were accurate, then, contrary to the IRS's calculation of his gains, the defendant sold one of the two properties for a loss and he sold the other property for a substantially lower gain than the IRS had previously calculated.

Regardless of whether the defendant actually spent any money to improve either property, the IRS's previous calculation of the defendant's taxable income for two years was erroneous. Those calculations used a figure for the defendant's basis in sale property that was not accurate. For purposes of recalculating the defendant's taxable income for the two years in question, the agents accepted as true the amounts the defendant had previously claimed to have spent to improve the two properties. Adjusting for those claimed improvements led to a recalculation of the defendant's taxable income in the amount of $40,350 for 1999 and $41,340 for 2001. This resulted in a tax due and owing by the defendant of

$7,111 for 1999 and $702 for 2001. The calculations for 2000 were correct.

On the afternoon of May 11, 2006, the agents brought the calculation error to the attention of counsel for the government.

4. Dismissal of Charges

On the morning of May 12, 2006, the Court convened a telephone conference to determine whether the concerns raised by the government in its motion to continue had been addressed. The government noted that it received the outstanding information regarding the PRA and witnesses. Further, the defendant indicated that he would not rely on any expert witnesses. Because government counsel had sufficient time in a matter of hours to research the PRA and to conclude that the defendant's argument was without merit, he stated that the government would be filing a motion in limine. The United States withdrew its motion to continue. (Docket Entry 5/12/06)

During the May 12th conference with the Court, but not reflected in the Minute Entry, counsel for the government informed the court and the defendant that they had recently discovered an error in the dollar amounts set forth in certain counts the indictment. The government orally moved to amend the indictment by interlineation. The defendant objected, and the court denied the government's request.

After that conference, the government evaluated its options in light of the tax calculation errors contained in the indictment. Based upon the recommendation of the IRS to dismiss all counts and the government's belief that the errors were serious enough to undermine the jury's confidence in the government's case, the government determined to dismiss the case with prejudice. As soon as the decision was finalized, counsel for the government notified defendant's counsel and the Court of its intention to dismiss the charges against the defendant. The motion in limine regarding the PRA issue, though in the process of being finalized, was never filed.

5. Defendant's Motion for Fees

On June 11, 2006, the defendant filed a Motion for Attorneys Fees and Costs (R.29) in which he argues that under the Hyde Amendment he is entitled to fees because the prosecution of the defendant in light of the restrictions imposed by the PRA was vexatious, frivolous or in bad faith.

As discussed below, the defendant is not entitled to attorneys fees or costs under the Hyde Amendment and his motion should be denied.

B. Hyde Amendment

The Hyde Amendment was enacted by Congress as part of a 1998 appropriations bill and is located in a Statutory Note to 18 U.S.C. § 3006A; *United*

States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1998). It provides in pertinent part:

> . . . the court may in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous or in bad faith, unless the court finds that special circumstances make such an award unjust.

Statutory Note to 18 U.S.C. § 3006A.

A defendant has been held to be a prevailing party where the government voluntarily dismissed the charges against him. *United States v. Gardner*, 23 F. Supp.2d 1283, 1291 (N.D. Okla.1998). Merely prevailing, however, is insufficient to establish entitlement to attorneys fees under the Hyde Amendment. The Hyde Amendment "places a daunting obstacle before defendants who seek to obtain attorney fees and costs from the government following a successful defense of criminal charges." *United States v. Gilbert*, 198 F.3d 1293, 1302-03 (11th Cir. 1999).

The Hyde Amendment requires prevailing federal criminal defendants to recover expenses incurred in defending criminal charges to establish that the position of the United States was "vexatious, frivolous, or in bad faith, unless, the court finds that special circumstances make such an award unjust." Pub.L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997); *United States v. Braunstein*, 281 F.3d 982,

994 (9th Cir. 2002). In deciding a defendant's motion, the district court must analyze the case as a whole, not count by count. *United States v. Heavrin*, 330 F.3d 723, 730 (6th Cir. 2003). The defendant bears the burden of meeting any one of the three grounds under the statute, and acquittal by itself does not suffice. See *United States v. True*, 250 F.3d 410, 424 (6th Cir. 2001); *United States v. Adkinson*, 247 F.3d 1289, 1291 (11th Cir. 2001).

"Vexatious" means "without reasonable or probable cause or excuse" *Gilbert*, 198 F.3d at 1298. A "frivolous action" is one that is "groundless . . . with little prospect of success; often brought to embarrass or annoy the defendant." *Id.* at 1299. A case is frivolous when "the government's position was foreclosed by binding precedent or so obviously wrong as to be frivolous." *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002). "Bad faith" under the Hyde Amendment is "not simply bad judgment or negligence, but rather . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will." *True,* 250 F.3d at 423.

"To be eligible for fees as a result of having prevailed on a legal defense, the defendant must show that the government's legal position was either asserted in bad faith or without any legal foundation or basis for belief that it

might prevail." *Gilbert* 198 F.3d at 1303.

"[I]f the movant is unable even to establish that the prosecution was not substantially justified, he certainly cannot establish that it was vexatious, frivolous, or brought in bad faith." *United States v. Truesdale*, 211 F.3d 898, 909 (5th Cir. 2000).

In the instant case, the defendant cannot meet his burden to establish that the prosecution was vexatious, frivolous or brought in bad faith. In his motion for attorney's fees, the defendant argues that he is entitled to attorney fees because the Paperwork Reduction Act ("PRA") clearly bars the defendant from being prosecuted for failure to file federal income tax returns and tax evasion and the government knew it.

As discussed below, the defendant is wrong. First, he is wrong on the law. The PRA does not shield him from a prosecution for tax evasion and failure to file his tax returns. All the cases reviewing this issue find for the government. The defendant has cited no cases that support his position and there are none. Thus, the defendant has failed to show that he is entitled to legal fees under the Hyde Amendment based upon his legal theory.[2]

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[2] Even if the defendant in this case were entitled to his fees (and he is not), the defendant's attorney's billing statement shows fees charged in excess of the $125 per hour maximum allowed under 28 U.S.C. § 2412(a)(2)(A). Any amounts

Second, the basis for the dismissal of the case against the defendant had nothing to do with the PRA or any other legal theory advanced by the defendant. The case was dismissed because of facts unique to this case. The IRS made a significant error in determining the defendant's tax liabilities relative to two of the three years involved in this case. Once the government's counsel became aware of the error, the matter was brought to the attention of the IRS and with the US Attorney for the Central District of Illinois. After a thorough discussion of possible options, and based upon a belief that the errors may impair a successful prosecution of the defendant, a decision was made to dismiss the charges against the defendant.

B. Paperwork Reduction Act

The defendant assumes that the reason the government dismissed the case against him was based upon his defense that the Paperwork Reduction Act ("PRA") protected him from having to file his annual tax returns for 1999, 2000 and 2001.

This is not true. The United States did not dismiss this case based upon the PRA. The argument that the PRA somehow insulates a person from having

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in excess of the maximum should not be allowed under any circumstance.

to file an annual tax return is completely without merit.

The government acknowledges that the instructions to Form 1040 for the years in question, as noted by the defendant in his motion for fees, do contain a statement that a taxpayer is not required to submit information requested on a form that is subject to the PRA unless the form displays a valid OMB control number.[3] However, the defendant failed to a note a following paragraph in the instructions which reads:

> If you do not file a return, do not provide the information we ask for, or provide fraudulent information, you may be charged penalties and be subject to criminal prosecution.

(See, Exhibit B attached hereto) The long-established law provides that the PRA is not a bar to prosecution of a taxpayer who, like the defendant, fails to file his tax returns or attempts to evade his taxes.

The PRA, 44 U.S.C. § 3501 *et seq.*, requires all federal agencies to submit all "information requests" to the Office of Management and Budget ("OMB") for approval. Information requests include "tax forms, medicare forms, financial loan forms, job applications, questionaires, complaince reports and tax or business records." *Dole v. United Steelworkers*, 494 U.S. 26, 33 (1990).

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[3] In the instant case, the Federal Income Tax Forms 1040 for the years in question, 1999 through 2001, do display OMB numbers. (See, Exhibit B)

The PRA of 1995, 44 U.S.C. § 3512(a) provides that "[N]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information" that lacks a currently valid OMB control number. § 3512(b) provides: "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the . . . judicial action applicable thereto."[4]

The argument goes that the IRS Forms 1040 and related schedules and/or the publications and instructions relative to the Form and schedules either have no OMB number or do not have a valid OMB number. The conclusion is that because the IRS' tax forms do not contain a valid OMB number Section 3512 precludes prosecution for failing to file an income tax return.

These arguments have been uniformly rejected by all courts that have considered them, including the Seventh Circuit. In *Salberg v. United States*, 969 F.2d 379 (7th Cir. 1992), the defendant was convicted of two counts of failure to file income tax returns (26 U.S.C. § 7203) and one count of tax evasion (26 U.S.C.§

[4] Prior to its amendment in 1995, 44 U.S.C. § 3512 provided: "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

7201). In attacking his conviction the defendant argued, *inter alia,* that the relevant IRS regulations and the 1040 instruction books do not comport with the requirements of the PRA and, therefore, the PRA defense barred his prosecution for failure to file a tax return. *Id* at 384. The Seventh Circuit held that the PRA was intended to apply to agency regulations, it does not prevent a prosecution for violation of a statute. "It was a federal statute – 26 U.S.C. § 7203 – not a regulation or an instruction book that required Salberg to file an income tax return. Statutes are not subject to the PRA and, as the government points out in its brief, every court that has considered the argument that the regulations and the instruction books . . . are within the scope of the PRA has rejected it. . . . We do the same." *id.* at 384. *See also, United States v. Ryan*, 969 F.2d 238 (7th Cir. 1992) in which the defendant who was convicted of failing to file federal income tax returns, 26 U.S.C. § 7203, argued the PRA barred his conviction. The Seventh Circuit held that the PRA is not applicable to IRS instruction booklets as they do not independently seek information from the taxpayer.

As the Seventh Circuit noted in *Salberg*, every court to consider the PRA defense to failure to file tax returns has rejected it. In *United States v. Neff*, 954 F.2d 698, 699 (11th Cir. 1992) the Eleventh Circuit Court of Appeals found that the defendant's duty to file tax returns was a statutory requirement. Congress in

enacting the PRA did not intend to allow OMB to abrogate any duty imposed by Congress. "So the PRA provides Neff no refuge from his statutorily-imposed duty to file income tax returns." *id.* at 700. Similarly, the Eighth Circuit in *United States v. Holden*, 963 F.2d 1114 (8th Cir. 1992) rejected the defendant's contention that his conviction for willful failure to file tax returns should be overturned because the tax instruction booklets failed to comply with the PRA. In *United States v. Dawes*, 951 F.2d 1189 (10th Cir. 1991) the defendants appealed their conviction for their failure to file tax returns alleging that the IRS tax return forms did not have valid OMB numbers and, therefore, the PRA prohibited their prosecution. Affirming the convictions, the Tenth Circuit found "This [PRA] argument or some permutation thereof, has been raised recently in federal district courts around the country. The response from the courts has been diverse, but no court has excused the failure to file on these grounds. " *id.* at 1191. In *United States v. Hicks*, 947 F.2d 1356 (9th Cir. 1991) the Court rejected the defendant's PRA argument and affirmed his conviction for willful failure to file federal income tax returns. The Ninth Circuit held that even if "the IRS failed to comply with the PRA here, its failure does not prevent Hicks from being penalized." *id* at 1359. In *United States v. Kerwin*, 945 F.2d 92 (5th Cir. 1991) the defendant's conviction for willful failure to file his tax returns would not be

overturned as the Fifth Circuit found even if there were no OMB numbers on the income tax returns, the PRA did not bar prosecution of defendant who was required by statute to file a return. Likewise, in *United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990) the defendant's conviction for willful failure to file federal income tax returns was affirmed as the PRA does not apply to the statutory requirement to file those returns. *See also, United States v. Burdett*, 768 F. Supp. 409, 413 (E.D.N.Y. 1991)(court found "that the PRA does not stand as a defense to a *criminal* prosecution (emphasis in original)); *United States v. Foster*, 1997 WL 685371 (D. Minn. 1997) (court assumed without deciding that the pertinent 1040 forms bore an inaccurate OMB number; nevertheless, the court rejected the defendant's PRA argument on the basis that the PRA was not intended to be a defense to the defendant's statutory obligations.)

Thus, the courts are unanimous in holding the PRA does not create a valid defense to a prosecution for failure to file a federal income tax return. As the Ninth Circuit Court of Appeals reasoned in *Hicks:*

> 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.

> 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.

947 F.2d at 1359-60.

It is expected that the defendant will argue that these cases were all decided under the PRA of 1980, the PRA was amended in 1995 and, therefore, the above-cited cases are inapplicable here. However, since the amendment of the PRA in 1995, all courts to consider this argument have also rejected it. For example, in *Saxon v. Commissioner of Internal Revenue*, 2006 WL 741384, T.C. Memo 2006-52, United States Tax Court, March 23, 2006) the taxpayer claimed that he was not liable for federal taxes because the OMB control number 1545-0074 on the Form 1040 was invalid for failure to comply with the PRA. The Tax Court held "[c]laims that violation of the PRA excuses a taxpayer from filing returns and/or paying taxes have been considered and universally rejected as meritless by this and other courts." In *Faber v. United States*, 69 F.Supp. 965, 969 (W.D.Mich.1999) the taxpayer sought to quash administrative IRS summons on the ground that there was no valid OMB number on the summons. The court relied upon precedent finding that even if the lack of an OMB number actually constituted a statutory violation, this did not excuse the taxpayer from

complying with the summons. Most recently, in *Springer v. United States*, 06-0110 (N.D. Okla., decided June 21, 2006), the plaintiff sought to enjoin the IRS from penalizing him for failing to file federal income tax returns. The plaintiff relied on the public protection provision of the PRA. The district court dismissed the plaintiff's complaint finding that under "settled law" "the requirement to file a tax return is mandated by statute, not by regulation" and "such explicit statutory requirements are not subject to the PRA." *id.* at p. 4, citing *United States v. Dawes, supra.* (A copy of *Springer* is attached hereto as Exhibit C).

In the instant case, the defendant can point to no change in the law which could lead to a conclusion that the above cases are inapplicable here.

In fact, the regulations implementing the PRA of 1995 explicitly provide that the protections of the PRA do not bar a penalty action for failure to comply with the statutory requirements of the Internal Revenue Code. 5 C.F.R. § 1320.6(e) states the general rule that no person shall be subject to penalties for failure to comply with the information request where there is no valid OMB number; however, this section "does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed on the person by statute - e.g. 26 U.S.C. § 6011(a) (statutory requirement for a person to file a tax return) . . . ."

The discussion regarding the proposed rule changes under the PRA supports the government's position in this case. See, *Controlling Paperwork Burdens on the Public: Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act*, 60 Fed.Reg. 30438; 1995 WL 337826 (1995). The proposed rule changes relative to the PRA of 1995 discuss the new provision of 5 C.F.R. § 1320.6(e) discussed above in which it is stated:

> Proposed § 1320.6(e) is new. This paragraph points out that under existing law, the public protections provided under § 1320.6(a) do not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed by statute, e.g. 26 U.S.C. § 6011(a) (statutory requirement for a person to file a tax return) . . .
>
> This paragraph is based on the principle announced by the courts in several cases which addressed the issue of whether the public protection provided by 44 U.S.C. § 3512 could preclude the Federal government from prosecuting persons for their failure to perform paperwork duties imposed upon them by statute. See *Salberg v. United States*, 969 F.2d 379 (7th Cir. 1992); *United States v. Neff*, 954 F.2d 698 (11th Cir. 1992); *United States v. Dawes*, 951 F.2d 1189 (10th Cir. 1991); *United States v. Hicks*, 947 F.2d 1356 (9th Cir. 1991); *United States v. Wunder*, 919 F.2d 34 (6th Cir. 1990). In those cases, the courts concluded that Congress, in enacting the Paperwork Reduction Act, did not intend to require itself to comply with the requirements of that Act (and seek and obtain OMB approval) whenever Congress decides to impose a paperwork requirement on persons directly by statute.
>
> There is no legislative history pertinent to the [PRA] of 1995 that suggests that Congress intended to change this court

interpretation for 44 U.S.C. 3512.

60 FR 30438, 30441. (Footnote analyzing cases omitted)

Thus, the case law set forth above applies to the PRA of 1995 as it did to the original PRA of 1980.

The government did not and would not dismiss an indictment based upon defendant's proposed PRA defense as it has absolutely no support and, as discussed above, the law is clear that the PRA argument, no matter what its permutations, offers no defense to a criminal prosecution for willful failure to file federal tax returns or tax evasion.

Plaintiff's request for attorney's fees based upon his flawed legal theory should be denied.

C. Good Faith

The government brought this case in good faith having sufficient evidence to establish that the defendant had willfully attempted to evade his taxes for years 1999 through 2001. The government also had sufficient evidence to establish that he had willfully failed to file his tax returns for those years.

In order to establish the defendant's guilt on the charges of tax evasion under 26 U.S.C. § 7201, the government needs to prove willfulness, the existence of a tax deficiency and an affirmative act constituting an evasion or attempted

evasion of tax. *United States v. Sloan*, 939 F.2d 499, 501 (7th Cir. 1991). The filing of a false W-4 constitutes an affirmative act of evasion. *Id.* In order to establish the defendant's liability under 26 U.S.C. § 7203 for willful failure to file his tax returns, the government needs to show that the defendant was required to make a return and he willfully failed to do so. *United States v. Harris*, 942 F.2d 1125, 1128 (7th Cir. 1991). A tax deficiency is not an element of willful failure to file tax returns under § 7203. *Spies v. United States*, 317 U.S. 492, 496 (1943).

In the instant case, for all three years at issue, the United States had evidence to establish these elements. Government had evidence that the defendant had gross income in an amount that exceeded the minimum filing threshold. The Government had evidence that the defendant had gross income in the amounts of $40,350, $52,780, and $41,340 for 1999 through 2001, and thus was required to file returns for those years. The defendant filed false W-4's for all three years. He had previously filed his tax returns prior to the years at issue, so he knew of the obligation to do so, yet failed to do so for the years in question. Although the taxes were miscalculated, the defendant nevertheless did have a tax deficiency, albeit, it might not have been as large as originally contemplated.[5]

[5] In a prosecution under 26 U.S.C. § 7201, the government needs to prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. *U.S. v. Thompson*, 806 F.2d 1332, 1335 (7th Cir. 1986).

Counsel for the government had no notice of the errors in calculations until the afternoon of May 11, 2006. Counsel had to verify the calculations and discuss the available options which included dismissing some but not all of the counts and proceeding to trial. The indictment correctly set forth the defendant's tax liabilities for the year 2000 and discussion was had on what options were available to the government under the circumstances.

The government ultimately determined to dismiss all charges because two of the three years contained a miscalculation of the defendant's taxable income and the tax amount owed. Confronted with these miscalculations, the government had to weigh the risks of going forward with legally viable charges to prove to the jury that the defendant was guilty beyond a reasonable doubt, believing these miscalculations might loom large in the jury's deliberations. After much discussion between the United States Attorneys Office and the Internal Revenue Service, and based upon a consensus of opinions, it was decided to dismiss the charges in their entirety.

The sole basis for the defendant's request for attorneys fees is that the government dismissed the case based upon the PRA. This claim is not true and, based upon the well-established law, is a frivolous position. The dismissal was

based upon a miscalculation of the debtor's tax liabilities. There has been no vexatious, frivolous or bad faith prosecution in this case and attorneys fees are not warranted under the Hyde Amendment.

D. Conclusion

For the reasons set forth above, the defendant's Motion for Attorney Fees and Costs should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2006, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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