UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Civil Action No. 06-11753
Hon. Nancy G. Edmunds

PETER ERIC HENDRICKSON and
DOREEN M. HENDRICKSON,

Defendants.
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BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION FOR RECONSIDERATION

Judgment was entered against the defendants, Peter Eric Hendrickson and Doreen M. Hendrickson, in this erroneous tax refund suit on January 26, 2007. Defendants' Motion for Reconsideration argues that (1) the United States failed to establish that defendants received taxable income in 2002 and 2003; and (2) that the Government was accordingly barred from bringing this action to recover the erroneous tax credits and refunds made to the defendants for the taxable years in question. Defendants also contend that the injunction sought in this case violates the "necessary and proper" clause of Art. I, § 8 of the Constitution and the First, Fifth, Seventh, Ninth and Tenth Amendments.

Construed as a Fed. R. Civ. P. 59(e) motion, defendants' motion fails because it does not bring newly discovered evidence or a manifest error of law or fact to the Court's attention. As a motion for relief from judgment, the motion should be denied because defendants have not established that the facts of the instant case are within one of the six reasons set forth in Fed. R. Civ. P. 60(b) that warrant relief from the judgment entered against them on January 26, 2007.

QUESTIONS PRESENTED

1. Defendant's Motion for Reconsideration (doc. #27) was served on the plaintiff, the United States of America, by first-class mail on February 12, 2007, and filed with the Court on February 13, 2006. All Fed. R. Civ. P. 59(e) motions to alter or amend the judgment must "be filed no later than 10 days after entry of the judgment." Furthermore, under E.D. Mich. L.R. 7.1(g)(1), "[a] motion for rehearing or reconsideration must be filed within 10 days after entry of the judgment or order." Because Defendant's Motion for Reconsideration was filed 11 days (not including weekends) after judgment was entered against them, should defendants' motion be construed as one brought under Fed. R. Civ. P. 60(b)?

2. Construing Defendants' Motion for Reconsideration as a motion for relief from judgment under Fed. R. Civ. P. 60(b), should defendants' motion be denied for the reasons set forth at length in Government's Brief in Opposition to Defendants' Motion for Relief from Judgment (doc. #28)?

3. Construing Defendants' Motion for Reconsideration as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), should defendants' motion be denied because it does not demonstrate (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustices?

ARGUMENT

I. DEFENDANTS' MOTION FOR RECONSIDERATION IS UNTIMELY

"Although motions for reconsideration are not specifically called for the Federal Rules of Civil Procedure, [the Sixth Circuit] has considered such motions before, holding that they are properly treated as motions to alter or amend a judgment under Rule 59(e)." *McDowell v.*

Dynamics Corp. of America, 931 F.2d 380, 382 (6th Cir. 1991). The purpose of a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment is to have the court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whitney,* 489 U.S. 169, 174 (1989). It is not an opportunity for unhappy litigants, such as the Hendricksons, to relitigate matters already decided. *See Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir. 1998) ("[a] motion under Rule 59(e) is not an opportunity to re-argue a case").

Defendants' Motion for Reconsideration (doc. # 26) was filed on March 13, 2007, more than ten days after judgment was entered in this action on February 26, 2007.[1] Because the motion for reconsideration was not filed within ten days after the entry of judgment, as required by Rule 59(e) and E.D. Mich. L.R. 7.1(g)(1), it is untimely. *Johnson v. Dellatifa,* 357 F.3d 539, 542 (6th Cir. 2004) ("All Rule 59(e) motions 'must be filed no later than 10 days after entry of the judgment.'") (quoting Fed. R. Civ. P. 59(e)); *contra Intera Corp. v. Henderson,* 428 F.3d 605, 611 n.2 (6th Cir. 2005).[2]

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[1] Fed. R. Civ. P. 59(e) motions must "be filed no later than 10 days after entry of judgment." As the period of time specified in Rule 59(e) is less than 11 days, Saturdays, Sundays and legal holidays are not included in the computation of time under Fed. R. Civ. P. 6(a). *See Miltmore Sales, Inc. v. Int'l Rectifier, Inc.,* 412 F.3d 685, 691 (6th Cir. 2005). Not counting the day on which judgment was entered (February 26, 2007), March 13, 2007, the date on which Defendants' Motion for Reconsideration was filed, is 11 business days after the entry of judgment.

[2] In *Intera Corp. v. Henderson,* 428 F.3d 605 (6th Cir. 2005), the Sixth Circuit ruled that "[i]n order for a Rule 59 motion to be deemed 'timely,' the motion must be served 'no later than 10 days after entry of the judgment.'" *Id.,* 428 F.3d at 611 (quoting the pre-1995 version of Fed. R. Civ. P. 59(e)). In footnote 2 of its opinion, the Court in *Intera Corp., supra,* went on to state that "[t]his Court has clarified that the 10-day time period for a Rule 59(e) motion corresponds to the date of service of the motion, and not the date that the motion is filed with the district court." *Id.* 428 F.3d at 611 n.2 (quoting *Peake v. First Nat'l Bank & Trust,* 717 F.2d 1016, 1019 (6th Cir. 1983)). The ruling in *Intera Corp., supra,* does not reflect the amendment to Rule 59(e), effective December 1, 1995, that changed the crucial date for the 10-day period from the date on

A motion for reconsideration, filed outside of the time permitted under Fed. R. Civ. P. 59(e), is properly construed as a motion for relief from judgment under Fed. R. Civ. P. 60(b). *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 268 (6th Cir. 1998). Defendants' Motion for Reconsideration (doc. #27) was filed outside of the time for filing a Rule 59(e) motion, and is therefore properly construed as a Rule 60(b) motion.

II. DEFENDANTS ARE NOT ENTITLED TO RELIEF FROM THE JUDGMENT UNDER RULE 60(b)

The judgment entered in this action on February 26, 2007, granting the United States' motion for summary judgment was undoubtedly a final judgment within the meaning of Fed. R. Civ. P. 58. *See Peake v. First Nat'l Bank & Trust*, 717 F.2d 1016, 1019-20 (6th Cir. 1983). Defendants argue, in their motion for reconsideration, that (1) the United States lacked standing and statutory authorization to bring the instant erroneous tax refund suit; (2) the Government failed to prove that the defendants had engaged in activities subject to the internal revenue laws or were liable for the payment of federal income taxes on the salaries earned by Peter Eric Hendrickson in 2002 and 2003; (3) the defendants' sworn income tax returns, which reported that Peter Hendrickson had "zero" or no wages for 2002 and 2003, could not be controverted by the United States in this action; and (4) that IRC § 7402(a), to the extent that it authorized this

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which the motion is served to the date on which the motion is filed with the district court. "Previously, there was an inconsistency in the wording of wording of Rules 50, 52, and 59 with respect to whether certain post-judgment motions had to be filed, or merely served, during the prescribed period . . . The Committee believes that each of these rules should be revised to require filing before the end of the 10-day period." Fed. R. Civ. P. 59(e) advisory committee's note to 1995 Amendments to Rule 59(e). Because of the language in *Intera Corp., supra,* regarding the timeliness of a Rule 59(e) motion that is served, but not filed, within the 10-day period following the entry of judgment, the Government's brief addresses "Defendants' Motion for Reconsideration" as both a Rule 60(b) and a Rule 59(e) motion.

Court to enjoin defendants from filing future false tax returns and required them to file corrected returns for 2002 and 2003, violated the "necessary and proper" clause of Article I, Section 8 of the Constitution, and the First, Fifth, Seventh, Ninth and Tenth Amendments. As all of these arguments were or could have been made by defendants in their prior filings in this case, defendants' motion for reconsideration (construed as a Rule 60(b) motion for relief from judgment) should be denied.

Rule 60(b) of the Federal Rules of Civil Procedure provides that "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of another party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). Defendants' attempts to reargue the standing of the United States to bring this erroneous refund suit, or the subject matter jurisdiction of this Court to entertain it, should be rejected because Rule 60(b) does not give defeated parties such as the Hendricksons a second chance to convince the Court to rule in their favor by presenting new explanations, legal theories or proof. *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001), citing *Couch v. Traveler's Ins. Co.*, 551 F.2d 958, 959 (5th Cir. 1977).

Relief under Rule 60(b) is "circumscribed by public policy favoring finality of judgments and termination of litigation." *Waifersong Ltd. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). As the moving parties, the Hendricksons must establish that the circumstances of this case warrant relief under Rule 60(b). *Jinks v. AlliedSignal, Inc.*, 250 F.3d at 385; *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993).[3] Defendants cannot carry their burden because their defense in this case is premised on the tax protestor-type theory that the salaries that Peter Hendrickson earned from Personnel Management in 2002 and 2003 were not taxable income to him, and that he was accordingly entitled to refunds of the federal income, social security, and Medicare taxes that had been withheld from his salary by his employer. The argument that such wages do not constitute taxable income, however, has been squarely rejected by every court that has considered the issue. *See Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986) ("Wages are income, and the tax on wages is constitutional"); *Perkins v. Commissioner*, 746 F.2d 1187, 1188 (6th Cir. 1984). Contrary to defendants' arguments, withholding federal taxes from Peter Hendrickson's salary in 2002 and 2003 did not violate the Constitution or give rise to a claim against the IRS. *See Robinson v. A & M Elec., Inc.*, 713 F.2d 608, 609 (10th Cir. 1983); *Stonecipher v. Bray*, 653 F.2d 398, 402 (9th Cir. 1981).

In order to be granted relief under Rule 60(b)(1), defendants must demonstrate: "(1) the existence of mistake, inadvertence, surprise, or excusable neglect, and (2) that [they] have a meritorious defense." *Marshall v. Monroe & Sons, Inc.*, 615 F.2d 1156, 1160 (6th Cir. 1980) (citations omitted). Defendants contend that Kim Halbrook, who averred that Peter Hendrickson

[3] The Government has previously addressed, in its Brief in Opposition to Defendants' Motion for Relief from Judgment (doc. # 28), the inapplicability of Fed. R. Civ. P. 60(b)(4) and (6) to the judgment entered in this action. We incorporate our opposing brief by reference here.

was employed by Personnel Management and paid a salary for his services in 2002 and 2003 in a Declaration submitted in support of the Government's motion for summary judgment, " could be wrong, for many different reasons and in many different ways." (doc. #27 at 5). This falls far short of establishing legal error of the sort that would justify relief under Rule 60(b)(1).[4] Equally unavailing is defendants' argument that the injunction sought by the United States in this case "is plainly violative of at least the 'necessary and proper' clause of the eighth section of Article One, and the First, Fifth, Seventh, Ninth, and Tenth Articles of Amendment to the U.S. Constitution." Doc. # 27 at 9. These arguments have been uniformly rejected. *See United States v. Smith*, 848 F.2d 8, 10-11 (10th Cir. 1973); *McCullough v. Secretary of the Treasury*, 621 F. Supp. 750, 752 (N.D. Miss. 1985); *Cameron v. IRS*, 593 F. Supp. 1540, 1551-52 (N.D. Ind. 1984); *Brennan v. Commissioner*, 581 F. Supp. 28, 30 (E.D. Mich.), *aff'd*, 752 F.2d 187 (6th Cir. 1984). Aside from their failure to set forth facts that would show mistake, inadvertence, surprise, or excusable neglect, defendants have also failed to show that they have a "meritorious defense" to the Government's claim that the tax refunds they received for 2002 and 2003 were "erroneous." Because defendants have not met either condition for relief under Rule 60(b)(1), their motion should be denied.

Defendants have not argued that there was any "newly discovered evidence" that might have shown that the judgment was erroneous under Fed. R. Civ. P. 60(b)(2). Likewise,

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[4] Significantly, defendants do not dispute that Peter Hendrickson was employed by Personnel Management during the tax years at issue, that he was paid a salary by his employer, or that a portion of his salary was withheld by his employer for federal income, social security and Medicare taxes. The reason for this is obvious; Hendrickson was employed by Personnel Management during 2002 and 2003, and federal taxes were properly withheld from his salary by his employer.

defendants did not argue that the judgment was obtained by fraud, misrepresentation, or misconduct on the part of the United States. *See* Fed. R. Civ. P. 60(b)(3). And, finally, defendants have not argued that the judgment entered in this action on February 26, 2007, has been satisfied, released, or discharged, or that a prior judgment upon which the decision was based was reversed or vacated, or was no longer equitable. Accordingly, defendants are not entitled to relief from the judgment under Rule 60(b)(1), (2), (3), or (5).

III. CONSTRUED AS A MOTION TO ALTER OR AMEND, DEFENDANT'S MOTION FOR RECONSIDERATION SHOULD ALSO BE DENIED

The Hendricksons' motion for reconsideration fares no better as a Rule 59(e) motion to alter or amend the judgment. In order to succeed on such a motion, the movant must establish a clear error of law; present newly discovered evidence; show that there has been an intervening changes in controlling law; or show that absent relief, a manifest injustice will occur. *Henderson v. Walled Lake Consol. Schools*, 469 F.3d 479, 496 (6th Cir. 2006); *Gencorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Any "newly discovered evidence," for Rule 59(e) purposes, must have been previously unavailable to the movant. *Javetz v. Board of Control, Grand Valley State Univ.*, 903 F. Supp. 1181, 1191 (W.D. Mich.). The movant must also show that correcting the defect in the judgment will result in a different disposition of the case. *Graham ex. rel. Estate of Graham v. County of Washtenaw*, 358 F.2d 377, 386 (6th Cir. 2004).

"In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." 11 Charles Alan Wright, *et al.*, Federal Practice and Procedure Civil 2d § 2810.1. Defendants' Motion for Reconsideration (doc. #27) does not present any

newly discovered evidence or show that there has been an intervening change in the controlling law regarding erroneous tax refunds. The motion for reconsideration does not identify a clear error of law or manifest injustice because none exists in the Magistrate's Report and Recommendation (doc. #17) which the Court accepted in part and rejected in part on February 26, 2007 (doc. #21).

Nowhere in their motion for reconsideration do the Hendricksons argue that summary judgment was improper because of a genuine issue of fact that remained for trial. The defendants argue instead that the Government has failed to prove that Peter Hendrickson received taxable income from his employment with Personnel Management, Inc., in 2002 and 2003. Defendants continue to erroneously assert that the compensation received by individuals in the private sector for services rendered is not taxable or subject to withholding. For the reasons set forth at length in the brief in support of the Government's motion for summary judgment, defendants' argument that Peter Hendrickson's salary was not subject to federal income tax or withholding is patently frivolous. As defendants have not established any of the grounds for relief under Rule 59(e), their motion for reconsideration should be denied.

Defendants' Motion for Reconsideration should also be denied because it merely reiterates the arguments made by the Hendricksons in their brief in opposition to the motion for summary judgment and their objections to the Magistrate Judge's Report and Recommendation. A motion for reconsideration which presents issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted. *See Hence v. Smith,* 49 F. Supp.2d 547, 550 (E.D. Mich. 1999); *Czajkowski v. Tindall & Assoc., P.C.,* 967 F. Supp. 951, 952 (E.D. Mich. 1997).

CONCLUSION

Throughout their motion for reconsideration, defendants persist in their erroneous and unreasonable belief that the wages of private sector workers are not subject to federal taxes. Defendants have failed to satisfy the requirements for relief from the judgment entered in this action on February 26, 2007, under Fed. R. Civ. P. 59(e) and/or 60(b). Accordingly, Defendants' Motion for Reconsideration should be denied.

Respectfully submitted this 28th day of March, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2007, I electronically filed the foregoing **BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION** with the Clerk of the Court using the CM/ECF system. I hereby certify that I have mailed by United States Postal Service the documents to the following non-CM/ECF participants:

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