



U.S. Department of Justice

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Please reply to: Appellate Section
P.O. Box 502
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KDUtiger
5-82-12068
2005100272

April 18, 2005

Cathy A. Catterson, Esquire
Clerk, U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94105

Re: Bill Walker v. Members of Congress, et al.
(9th Cir. - No. 05-35023)

Dear Ms. Catterson:

We are transmitting herewith for filing with your Court the original and 15 copies of the brief of the appellees in the above-entitled case. We are also enclosing an original and four copies of a motion to permit appearance of counsel, as required by the order of the Deputy Clerk issued on February 11, 2005. Also enclosed is an appearance form entering the appearance of Bruce Ellisen as co-counsel on behalf of the appellee.

As indicated in the certificates of service, copies of the brief and motion have been served upon the appellant, who is appearing pro se, together with a copy of this letter. This case is currently assigned to the undersigned attorney, who may be reached at (202) 514-2937.

Sincerely yours,

KAREN D. UTIGER
Attorney
Appellate Section

Enclosures

cc: Mr. Bill Walker
P.O. Box 698
Auburn, WA 98071-0698

John L. McKay, Jr., Esquire
United States Attorney
Western District of Washington
601 Union Street, Suite 5100
Seattle, WA 98101

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 05-35023

BILL WALKER,


Appellant

vs.

MEMBERS OF CONGRESS OF THE UNITED STATES, et al.

Appellees

The Clerk will enter my appearance for Appellees



BRUCE R. ELLISEN
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Department of Justice
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILL WALKER,)
)
 Plaintiff-Appellant)
) No. 05-35023
 v.)
)
 MEMBERS OF CONGRESS, et al.,)
)
 Defendants-Appellees)

MOTION TO PERMIT APPEARANCE OF COUNSEL

The appellees herein, by and through their counsel, submit this motion requesting leave to appear in this case, in accordance with this Court's order dated February 11, 2005. In support therefore, appellees state as follows.

STATEMENT

On September 20, 2004, Bill Walker (taxpayer) filed a complaint in the United States District Court for the Western District of Washington, naming as defendants the members of the United States Congress, in their individual and official capacities, as well as John W. Snow, the Secretary of Treasury, and Mark W. Everson, Commissioner of Internal Revenue, both in their official capacities. (ER 232-37.) Taxpayer certified that, on October 1, 2004, he served the members of Congress by mail. (CR 2.) Taxpayer also certified that, on October 5, 2004, he served Snow and Everson by mail, as well as John McKay, the United States Attorney for the Western District of Washington. (CR 3.)

The defendants had sixty days to respond to the complaint. Fed. R. Civ. P. 12(a)(3)(A). Shortly after taxpayer filed his complaint, however, the District Court issued an order to show cause why his case should not be dismissed for lack of jurisdiction. (ER 239-41.) On November 12, 2004, prior to the date that the defendants were required to answer, the Court dismissed the case for lack of jurisdiction. (ER 242.)

Later, taxpayer moved for default against the defendants for their alleged failure to appear. (ER 251.) The court entered an order, inter alia, striking the motion for default, noting that the case had been dismissed prior to the expiration of the time for the defendants to answer. (ER 245.)

Taxpayer appealed. (ER 231.) Karen D. Utiger, an attorney with the Tax Division of the Department of Justice, filed an appearance for the appellees. Taxpayer filed a motion in opposition to that appearance. On February 11, 2005, the Deputy Clerk issued an order, indicating that taxpayer's motion would be referred to the panel deciding the merits of this appeal. The order also states that "in view of the non-appearance in the district court, any brief submitted to this court must be accompanied by a motion requesting leave to participate at the appellate level."

ARGUMENT

Federal law provides that "the conduct of litigation in which the United States, an agency or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. It also provides that "any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517. Moreover, an attorney with the Department of Justice may appear in such a case "whether or not he is a resident of the district in which the proceeding is brought." 28 U.S.C. § 515(a).

Pursuant to this statutory authority, the Department of Justice, under the direction of the Attorney General, has promulgated regulations authorizing the Tax Division to represent the United States in various tax matters. See 28 C.F.R. § 0.70. Specifically the Tax Division, under the direction of the Assistant Attorney General, is authorized to handle "[p]rosecution and defense in all courts, other than the Tax Court, of civil suits, and the handling of other matters arising under the internal revenue laws," 28 C.F.R. § 0.70(a), as well as "general matters arising in connection with internal revenue matters." 28 C.F.R. § 0.70(c)(1). It is also authorized to

handle appellate proceedings in connection with those matters.
28 C.F.R. § 0.70(d).

Accordingly, it is well-recognized that the Tax Division of the Department of Justice represents the United States in civil tax cases in the district courts and the courts of appeals. See U.S. Dept. Of Justice v. Tax Analysts, 492 U.S. 136 (1989); Huff v. United States, 10 F.3d 1440, 1443-44 (9th Cir. 1993); United States v. Plesinski, 912 F.2d 1033, 1038 (9th Cir. 1993).

Taxpayer has named Secretary of Treasury John W. Snow, Commissioner of Internal Revenue Mark W. Everson, and the members of Congress in their official capacities. (ER 232-37.) A suit against Government officials in their official capacity is a suit against the United States. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Accordingly, the undersigned counsel of the Department of Justice are authorized to represent the defendants in their official capacities.¹

¹Although taxpayer purported to sue the members of Congress in their individual capacities, he failed to personally serve them as required by Fed. R. Civ. P. 4(i)(2)(B). Taxpayer has admitted that he did not receive waivers of service from the individual defendants, and that he was required to serve them in accordance with Fed. R. Civ. P. 4(e). (ER 195.) That section requires personal service (on the individual or at his residence), or service sufficient under state law. See Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987). Service also may be made under Rule 4(e) "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Taxpayer contended that because the U.S. Attorney was authorized by law to represent the defendants, he was "an agent authorized by law to
(continued...)

Nor did the Department of Justice somehow forfeit its right to appear in this appeal because of its "non-appearance" in the District Court. There was nothing improper in the Government waiting to file its appearance in the District Court until the time that it filed its answer. Indeed, Rule 5(g) of the Rules of the United States District Court for the Western District of Washington provides that an attorney may enter an appearance in a civil case by signing a pleading on behalf of the party he represents (or by filing a written praecipe noting the entry of his appearance). But the District Court dismissed the case prior to the time that the Government's answer was due. It was for that reason that the District Court denied taxpayer's motion for default against the Government. (ER 245.) In any event, we are unaware of any rule that would prohibit counsel from appearing for a party on appeal on account of its "non-appearance" in the court below.

¹(...continued)

receive service of process." (ER 195.) But the fact that the U.S. Attorney may be authorized to represent members of Congress, does not mean that he is authorized to accept service for members of Congress in their individual capacities. Cf. Jackson v. Hayakawa, 682 F.2d 1344, 1347-48 (9th Cir. 1982) (service upon public entity insufficient to subject government officials to suit in their individual capacities). Taxpayer's claims against the members of Congress in their individual capacities therefore are subject to dismissal for insufficiency of service of process.

WHEREFORE, the United States prays that the counsel for the appellees be permitted to appear for the appellees in this Court.

Respectfully submitted,

EILEEN J. O'CONNOR
Assistant Attorney General



BRUCE R. ELLISEN (202) 514-2929
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APRIL 2005

Of Counsel:

JOHN L. MCKAY, JR.

United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILL WALKER,)
)
Plaintiff-Appellant)
) No. 05-35023
v.)
)
MEMBERS OF CONGRESS, et al.,)
)
Defendants-Appellees)

DECLARATION

I, Karen D. Utiger, of the Department of Justice,
Washington, D.C., state as follows:

1. I am an attorney employed in the Appellate Section of
the Tax Division of the Department of Justice, and in that
capacity I have been assigned the primary responsibility for
handling the above-entitled cases on behalf of the appellees.

2. The facts set forth in the accompanying motion are true
to the best of my knowledge and belief.

I declare under penalty of perjury, pursuant to 28 U.S.C.
§ 1746, that the foregoing is true and correct. Executed on this
18th day of April, 2005, at Washington, D.C.



KAREN D. UTIGER
Attorney

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing motion to permit appearance of counsel has been made on the appellant, appearing pro se, on this 18th day of April, 2005, by sending a copy thereof in an envelope, properly addressed to him as follows:

Mr. Bill Walker
P.O. Box 698
Auburn, WA 98071-0698



KAREN D. UTIGER
Attorney